Chapter 1[1]

New and continuing matters

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

- bills introduced into the Parliament between 24 August and 3 September 2020;
- legislative instruments registered on the Federal Register of Legislation between 28 July and 11 August 2020.[2]

1 This section can be cited as Parliamentary Joint Committee on Human Rights, New and continuing matters, *Report 11 of 2020*; [2020] AUPJCHR 132.

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.

Response required

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

Counter-Terrorism Legislation Amendment (High Risk Terrorist Offenders) Bill 2020[1]

Purpose	This bill seeks to establish an extended supervision order scheme for high risk terrorist offenders, whereby a court could impose any conditions on a person that it is satisfied on the balance of probabilities are reasonably necessary, and reasonably appropriate and adapted, for the purpose of protecting the community from the unacceptable risk of the offender committing a serious offence under Part 5.3 of the Criminal Code.
Portfolio	Attorney-General
Introduced	House of Representatives, 3 September 2020
Rights	Liberty; freedom of movement; prohibition against retrospective criminal laws; fair trial; privacy; freedom of expression; freedom of association; right to work; right to education; life; security of the person
Status	Seeking additional information

Extended supervision order scheme

1.3 Schedule 1 of the bill seeks to amend the *Criminal Code Act 1995* (Criminal Code) to establish an extended supervision order scheme for 'high-risk terrorist offenders'. This scheme would operate in tandem with the existing continuing detention order scheme in Part 5.3 of the Criminal Code (which allows the court to make an order to allow for the continued imprisonment of certain terrorist offenders after completion of their sentence). The orders would be collectively referred to as 'post sentence orders'.

1.4 On application by the Australian Federal Police Minister (or their legal representative),[2] a State or Territory Supreme Court could make an extended

1 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Counter-Terrorism Legislation Amendment (High Risk Terrorist Offenders) Bill 2020, *Report 11 of 2020*; [2020] AUPJCHR 133.

2 Schedule 1, Part 1, item 62, proposed subsection 105A.5(1).

supervision order, including as an alternative to a continuing detention order.[3] The effect of an extended supervision order would be to impose conditions on the person, for a period of up to three years, contravention of which would be an offence punishable by imprisonment of up to five years.[4] In addition, a court could make an interim supervision order of up to 28 days, where an application had been made for an extended supervision order.[5] Another extended supervision order could be made after the original three year period expires. [6]

1.5 To make an extended supervision order, the court would have to be satisfied on the balance of probabilities that there is an unacceptable risk of the offender committing a serious terrorism offence.[7] The court may impose any condition it considers is reasonably necessary, and reasonably appropriate and adapted, for the purpose of protecting the community from that unacceptable risk.[8] The conditions that the court may impose are not limited in any further way, rather the bill sets out that such conditions may prohibit or restrict specified conduct, or impose obligations on the individual; or impose restrictions, obligations or prohibitions in relation to classes of conduct.[9] The bill also sets out an extensive and non-exhaustive list of the conditions which a court may impose, including conditions that the offender:

- not be present at specified areas or places or classes of areas or places;
- reside at specified premises, and remain there between specified times each day (which should be for no more than 12 hours within any 24 hours);
- not leave Australia or the State or Territory in which they reside;
- not communicate or associate with specified individuals or classes of individuals;
- not access or use specified forms of telecommunications or other technology (including the internet);
- not engage in specified activities or specified work;
- not engage in specified education or training without permission;

3 Schedule 1, Part 1, item 82, proposed section 105A.6A.

4 Schedule 1, Part 1, item 59, proposed subsections 105A.3(3); and sections 105A.18A-18B.

5 Schedule 1, Part 1, item 95, proposed section 105.9A. While a court could make a series of successive interim supervision orders, the total period of all such interim order could not be more than three months, unless the Court was satisfied that there were exceptional circumstances: proposed subsection 105A.9A(8).

6 Schedule 1, Part 1, item 87, proposed subsection 105A.7A(5).

7 Namely, an offence under Part 5.3 of the Criminal Code.

8 Schedule 1, Part 1, item 87, proposed subsections 105A.7A(1) and 105A.7B(1).

9 Schedule 1, Pat 1, item 87, proposed subsection 105A.7B(2).

- must undertake anything specified in the order or as directed by a specified authority relating to treatment, rehabilitation, intervention programs or activities, or psychological or psychiatric assessment or counselling.[10]

1.6 A person would be eligible for a post-sentence order where: they have been convicted of a specified terrorism related offence;[11] are at least 18 years old at the time their sentence ends; and a precondition for a post-sentence order is met. These pre-conditions include that the person:

- is currently detained in custody (either for the terrorism offence; for another offence but where they have previously been convicted of a terrorism offence;[12] pursuant to a continuing detention order; for breach of an extended supervision order;[13] or if they were subject to an extended or interim supervision order and they were imprisoned for another offence);
- has been released from prison, and is currently subject to an extended or interim supervision order; or
- has been released from prison, and is currently subject to an interim or confirmed control order.[14]

1.7 The AFP minister or their legal representative would be required to apply for review of an extended supervision order within twelve months of the order being in force, or since the most recent review of the order; or if the individual is detained in custody, and the relevant order has consequently been suspended, on or before the day that the person's detention ends.[15] In addition, the AFP minister or the subject of the order (or their respective legal representatives) could apply to a Supreme Court

10 Schedule 1, Pat 1, item 87, proposed subsection 105A.7B(3).

11 Schedule 1, Part 1, item 59, proposed subsection 105A.3(1) provides that a person would be eligible where they had been convicted of: an offence against Subdivision A of Division 72 of the *Criminal Code Act 1995* (Criminal Code) (international terrorist activities using explosive or lethal devices); a serious Part 5.3 offence (being terrorism offences carrying a maximum penalty of 7 or more years imprisonment); an offence against Part 5.5 (Foreign incursions and recruitment) (other than an offence against subsection 119.7(2) or (3)); or an offence against the now repealed *Crimes (Foreign Incursions and Recruitment) Act 1978*, other than an offence against paragraph 9(1)(b) or (c) of that Act.

12 Schedule 1, Part 1, proposed subsection 105A.3A(9) confirms that this would include sentences of imprisonment for an offence against a law of the Commonwealth, or a State or Territory, whether or not the sentence was imposed before, after, or at the same time as the sentence for an offence referred to in proposed subsection 105A.3(1) (being a terrorism-related offence).

13 Schedule 1, Part 1, item 59, proposed subsections 105A.3A(1)-(5).

14 Schedule 1, Part 1, item 59, proposed section 105A.3A.

15 Schedule 1, Part 1, item 102, proposed subsection 105A.10(1B).

for review of a post-sentence order at any time,[16] but the court must dismiss the application unless there are new facts or circumstances justifying the review, or it would be in the interests of justice to review the order.[17]

Preliminary international human rights legal advice

Multiple human rights

1.8 To the extent that an extended (or interim) supervision order may have the effect of protecting the public from harmful acts, this scheme may have the capacity to promote the right to life and security of the person.[18] The right to life imposes an obligation on the state to protect people from being killed by others or identified risks,[19] and the right to security of the person requires the state to take steps to protect people against interference with personal integrity by others.[20] The statement of compatibility notes that the bill promotes the right to life and security of the person by providing an additional tool to manage the risk posed by terrorist offenders post-sentence.[21] It states that the bill is aimed at a cohort of persons, post-sentence offenders, who in an overseas context have been proven to pose a risk to the security of persons by carrying out acts of violence.[22]

1.9 In addition, as a court could now choose to make a supervision order rather than a continuing detention order, which would deprive a person of their liberty by causing them to continue to be imprisoned, this scheme may also promote the right to liberty.[23]

1.10 However, the proposed introduction of an extended (and interim) supervision order scheme, which would be based on an assessment of a person's future risk of engaging in conduct, also appears to engage and limit a number of other human rights. At the outset it is noted that the imposition of a supervision order, that may significantly curtail individual rights and freedoms, which is said to be made not on the basis of criminal conviction but on the basis of future risk of offending, is a serious measure for the state to take. While the proceedings for a supervision order would appear be characterised by the usual procedures and rules

16 Schedule 1, Part 1, item 106, proposed subsection 105A.11(1).

17 See Criminal Code, existing subsections 105A.11(2) and (3).

18 International Covenant on Civil and Political Rights, articles 6 and 9. Statement of compatibility, p. 11.

19 International Covenant on Civil and Political Rights, article 6(1) and Second Optional Protocol to the International Covenant on Civil and Political Rights, article 1.

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

21 Statement of compatibility, p. 11.

22 Statement of compatibility, p. 11.

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

for civil proceedings,[24] the application of these indicia of judicial processes does not alter the fact that the proposed supervision order scheme fundamentally inverts basic assumptions of the criminal justice system: that persons may only be punished on the basis of offences, the existence of which has been proven beyond reasonable doubt. This bill proposes that persons who have committed offences and have completed their sentences for those offences may continue to be subject to coercive and invasive supervisory measures, because, on the balance of probabilities (that is, it being more likely than not), the offender poses an 'unacceptable risk' of committing a terrorism offence in the future. This inverts a fundamental assumption of democratic systems of criminal law: that a person should not be punished for a crime which they *may* commit in the future. The United Nations Human Rights Committee has strongly cautioned against punishing a person again after their initial punishment has concluded, based on an assessment of possible future risk:

> The concept of feared or predicted dangerousness to the community applicable in the case of past offenders is inherently problematic. It is essentially based on opinion as distinct from factual evidence, even if that evidence consists in the opinion of psychiatric experts… While Courts are free to accept or reject expert opinion and are required to consider all other available relevant evidence, the reality is that the Courts must make a finding of fact on the suspected future behaviour of a past offender which may or may not materialise.[25]

Prohibition against retrospective criminal laws

1.11 The imposition of an extended supervision order may engage the prohibition against retrospective criminal laws. An individual would only be eligible for an extended or interim supervision order where they had been convicted of a specified terrorism offence. This would apply to persons who are currently incarcerated for such offences, although the proposed scheme was not in existence at the point at which they were convicted.[26] Consequently, to the extent that this proposed scheme would apply to persons who have already been convicted and sentenced for a terrorism offence, imposing what could be considered an additional penalty, over and above the original sentence, this scheme could engage the absolute prohibition against retrospective criminal laws.

1.12 Article 15 of the International Covenant on Civil and Political Rights prohibits retrospective criminal laws. This requires that laws not impose criminal liability for acts that were not criminal offences at the time they were committed and that the

24 That is, an application for such an order would need to be made to a court, evidence adduced, and a member of the judiciary satisfied as to the level of potential risk posed by the individual.

25 *Fardon v Australia*, UN Human Rights Committee Communication No. 1629/2007 (2010), CCPR/C/98/D/1629/2007 [7.4(4)]. See also *Tillman v Australia,* UN Human Rights Committee Communication No. 1635/2007 (2010), CCPR/C/98/D/1635/2007.

26 See, statement of compatibility, p. 35.

law not impose greater penalties than those which would have been available at the time the acts were done. The prohibition against retrospective criminal laws is absolute and may never be subject to permissible limitations.

1.13 The statement of compatibility states that the imposition of an extended supervision order is not a penalty for criminal offending, and that it has a protective rather than a punitive or retributive purpose.[27] It states that the decision of a court to impose such an order is based on an assessment of future risk, not punishment for past conduct, and that this proposed scheme consequently does not breach the prohibition against retrospective criminal laws. However, the characterisation of an extended or interim supervision order as being non-punitive does not mean that such an order would not have a punitive effect, nor that it would not constitute a heavier penalty than the one that was applicable at the time the offence was committed. Therefore, further information is required in order to assess whether the measure engages the prohibition on retrospective criminal laws.

Multiple rights

1.14 In addition, the proposed introduction of an extended and interim supervision order scheme further engages and may limit a number of human rights. In determining an extended or interim supervision order, a court would be empowered to impose *any* condition on a person, which the court was satisfied was reasonably necessary, and reasonably appropriate and adapted, for the purpose of protecting the community from the unacceptable risk of an offender committing a serious terrorism offence.[28] Consequently, an extended or interim supervision order may engage and limit a wide range of human rights, including the:

- **right to privacy**, which prohibits arbitrary and unlawful interferences with an individual's privacy, family, correspondence or home; and protects the right to personal autonomy and physical and psychological integrity.[29] A supervision order would involve an individual being subject to monitoring, and possibly being restricted in the activities which they may undertake and the places which they may go. A court may also order that a person must participate in treatment or rehabilitation programs, or undertake psychological or psychiatric assessment or counselling.[30] Further, a court could order that an offender may apply for an exemption from some of the specified conditions, but to do so they would need to apply to a specified authority asking for such an exemption[31] (for example, an offender may need

27 Statement of compatibility, p. 35.

28 Schedule 1, Pat 1, item 87, proposed subsection 105A.7B(1).

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

30 Schedule 1, Part 1, item 87, proposed subsection 105A.7B(3).

31 Schedule 1, Part 1, item 87, proposed section 105A.7C.

to apply to a police officer to be allowed to go to a specified area to attend a doctor's appointment).[32] In addition, the imposition of a supervision order would trigger a range of other monitoring powers, which are outlined below from paragraphs [1.60] to [1.64].

- **right to freedom of movement**, which includes the right to move freely both within one's country, and to travel to other countries.[33] A supervision order could require that a person not be present at specified places or classes of place; that they reside at specified premises; that they remain at a specified premises for up to 12 hours per day; that they not leave Australia or their home state or territory; and that they surrender Australian or foreign travel documents.[34]
- **right to liberty**,[35] which prohibits the arbitrary deprivation of liberty, and potentially applies where a restriction on a person's movement is to such a degree and intensity that it would constitute a 'deprivation' of liberty, particularly where an element of coercion is present.[36] A supervision order may require a person to remain at specified premises for up to 12 hours a day, or on specified days, which may constitute a 'deprivation' of liberty.[37]
- **rights to freedom of expression, assembly and association**, which protect the right to all forms of expression and the means of their dissemination (including spoken, written and sign language and non-verbal expression), the right of all persons to group together voluntarily for a common goal and to form and join an association, including by gathering as a group.[38] A supervision order may limit the persons or classes of person with whom a

32 See example at p. 74 of the explanatory memorandum.

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

34 Schedule 1, Part 1, item 87, proposed subsection 105A.7B(3). See, statement of compatibility, p. 17.

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

36 United Nations Human Rights Committee, *General Comment No.27: Article 12 (Freedom of Movement)* (1999) [7]; see also United Nations Human Rights Council, *Report of the Working Group on Arbitrary Detention*, A/HRC/22.44 (2012) [55] and [57]; *Foka v Turkey*, European Court of Human Rights Application No.28940/95, Judgment (2008) [78]; *Gillan and Quinton v United Kingdom*, European Court of Human Rights Application No.4158/05, Judgment (2010) [54]-[57]; *Austin v United Kingdom*, European Court of Human Rights Application Nos. 39692/09, 40713/09 and 41008/09, Grand Chamber (2012) [57]; *Gahramanov v Azerbaijan*, European Court of Human Rights Application No.26291/06, Judgment (2013) [38]–[45].

37 Schedule 1, Part 1, item 87, proposed subsection 105A.7B(3). The statement of compatibility notes that the right to liberty may be engaged with respect to a continuing detention order, but not pursuant to a condition imposed under a supervision order. See, pp. 12–16.

38 International Covenant on Civil and Political Rights, articles 19–22.

person can communicate or associate (including by limiting or prohibiting the use of social media or certain forms of communication).[39]

- **right to work**, which provides that everyone must be able to freely accept or choose their work, and includes a right not to be unfairly deprived of work.[40] A supervision order may limit the type of work (including voluntary work) which a person is permitted to undertake.[41]
- **right to education**, which provides that education should be accessible to all.[42] A supervision order may prohibit a person from engaging in any training or education without the prior permission of a specified authority.[43]
- **right to protection of the family**, which requires the state not to arbitrarily or unlawfully interfere in family life and to adopt measures to protect the family.[44] As a supervision order may prohibit a person from associating with certain persons, and prohibit them from travelling, such conditions could have the effect of interfering with that person's family life, and their ability to associate with their family members.[45]
- **right to freedom of religion**,[46] which includes the right to demonstrate or manifest religious or other beliefs, by way of worship, observance, practice and teaching.[47] As a supervision order may prohibit a person from being present at specified areas or places (or classes of area or place), or from associating with specified individuals (or classes of persons), such conditions

39 See, statement of compatibility, pp. 33-34. The statement of compatibility does not identify that a condition imposed under a supervision order may limit the right to freedom of assembly.

40 International Covenant on Economic, Social and Cultural Rights, articles 6–7.

41 Schedule 1, Part 1, item 87, proposed subsections 105A.7B(3) and 105A.7B(8). See, statement of compatibility, p. 35.

42 International Covenant on Economic, Social and Cultural Rights, article 13.

43 Schedule 1, Part 1, item 87, proposed subsection 105A.7B(3). The statement of compatibility does not identify that such a condition may engage and limit the right to education.

44 International Covenant on Economic, Social and Cultural Rights, article 10(1).

45 Schedule 1, Part 1, item 87, proposed subsection 105A.7B(3). The statement of compatibility does not identify that such conditions may engage and limit the right to protection of the family.

46 International Covenant on Civil and Political Rights, article 18.

47 UN Human Rights Committee, *General Comment No. 22: Article 18 (Freedom of thought, conscience or religion)* (1993) [4].

may have the effect of restricting a person's capacity to manifest their religious beliefs (for example, by attending religious worship).[48]

- **right to an adequate standard of living**, which requires that the state take steps to ensure the availability, adequacy and accessibility of food, clothing, water and housing for all people in its jurisdiction.[49] As a supervision order may require a person to remain in their house subject to curfew-like conditions and either not work, or the conditions may be so stringent they are not capable of working, this may limit their right to an adequate standard of living.
- **rights of the child**, which provides that children have special rights under human rights law taking into account their particular vulnerabilities.[50] Where a child has been convicted of an offence and sentenced to imprisonment, the aim of the system in which they are incarcerated shall be to foster reformation and social rehabilitation.[51] With respect to persons who were children at the time of their alleged offending, the United Nations Committee on the Rights of the Child directs that child justice systems should extend protection to children who were below the age of 18 at the time of the commission of the offence but who turn 18 during the trial or sentencing process.[52] An individual may be eligible for an extended or interim supervision order where the relevant terrorism-related offence which renders them eligible was committed while they were aged under 18 years.[53] That is, a child who was convicted of a terrorism offence, and subject to a custodial sentence which they completed as an adult, could be subject to an extended or interim supervision order.

1.15 Most of these rights may be subject to permissible limitations. However, in order for a limitation to be permissible under international human rights law it must

48 Schedule 1, Part 1, item 87, proposed subsection 105A.7B(3). The statement of compatibility does not identify that such conditions may engage and limit the right to freedom of religion.

49 International Covenant on Economic, Social and Cultural Rights, article 11.

50 UN Human Rights Committee, *General Comment No. 17: Article 24* (1989) [1]. See also, Convention on the Rights of the Child. The statement of compatibility does not identify if the measures engage the rights of the child.

51 UN Human Rights Committee, *General Comment No. 17: Article 24* (1989) [2]. See also *General Comment 21: Article 10* (1992) [13] in which the committee notes that the *United Nations Standard Minimum Rules for the Administration of Juvenile Justice* (The Beijing Rules) are a relevant consideration for States. See also UN Human Rights Committee, *General Comment No. 32: right to equality before courts and tribunals and to a fair trial* (2007) [42]–[44].

52 UN Committee on the Rights of the Child, *General comment No. 24 (2019) on children's rights in the child justice system* (2019) [31].

53 Schedule 1, Part 1, item 59, proposed subsection 105A.3(1)(c), stating that the person will be at least 18 years old when the sentence for the relevant conviction ends.

be prescribed by law, pursue a legitimate objective, be rationally connected to (that is, effective to achieve) that objective and be a proportionate means of achieving that objective.[54]

Prescribed by law

1.16 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.[55]

1.17 In this respect, a court's assessment of whether there is an 'unacceptable risk' of a person committing a serious terrorism offence in the future raises some questions as to whether this would satisfy the quality of law test. It is not clear what would constitute the difference between an acceptable risk that a person may commit a serious terrorism offence in the future, and an unacceptable risk. The statement of compatibility does not address this issue. Therefore it is not clear that the question of whether a person poses an 'unacceptable' risk is sufficiently certain such that a person could understand the circumstances in which a supervision order may be imposed, such that this would satisfy the 'quality of law' test.

Legitimate objective

1.18 In addition, any limitation on a right must be shown to be aimed at achieving a legitimate objective. A legitimate objective is one that is necessary and addresses an issue of public or social concern that is pressing and substantial enough to warrant limiting the right.

1.19 The statement of compatibility states that the bill seeks to provide an additional tool to manage the risk posed by terrorist offenders post-sentence; to enhance the capabilities of law enforcement agencies to respond to a heightened terrorism threat;[56] and to protect Australia's national security.[57] The explanatory memorandum points to two incidents of terrorism in the United Kingdom in 2019 and 2020 as evidence that extremists continue to pose a threat, including after they have served sentences for terrorism offences.[58] The statement of compatibility

54 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.

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

56 Statement of compatibility, p. 11.

57 Statement of compatibility, p. 17.

58 Explanatory memorandum, p. 4.

further notes that politically motivated violent acts can threaten lives, and 'perpetuate a climate of fear which is socially divisive, threatening the cohesiveness of Australian society'.[59]

1.20 Addressing a risk of future harm to the community posed by persons convicted of terrorism offences would likely be capable of constituting a legitimate objective for the purposes of human rights law. However, it is noted that the explanatory materials do not set out any evidence of a pressing or substantial concern that requires addressing within Australia. In this respect, it is not clear how, or to what extent, two examples of violent incidents in the United Kingdom would evidence a risk of such incidents in Australia.

Rational connection

1.21 Under international human rights law, it must also be demonstrated that any limitation on a right has a rational connection to the objective sought to be achieved. The key question is whether the relevant measure is likely to be effective in achieving the objective being sought.

1.22 The statement of compatibility does not provide evidence of the accuracy of expert assessments in predicting a person's potential future risk of engaging in terrorism conduct. If such assessments are not reliably accurate, this raises questions as to whether the extended supervision order scheme would be effective to achieve the goal of protecting the public and national security. This is because, regardless of what conditions were imposed pursuant to an extended supervision order, such an order could only be effective to achieve the goal of protecting the public from terrorism related conduct if the individual in question did, in fact, pose a threat of engaging in such conduct in the future.

1.23 The explanatory memorandum states that, in determining whether to make an extended supervision order, the court could appoint one or more 'suitable qualified experts with medical, psychiatric, psychological or other expertise to assess and report on the risk posed by the offender'.[60] It states that an example of an expert who may be appointed by the court could be a person with expertise in forensic psychology or psychiatry (and, in particular, recidivism) coupled with specific expertise on terrorism, radicalisation to violent extremism and countering violent extremism.[61] The term 'relevant expert' means a registered medical practitioner, psychologist or any other expert who is competent to assess the risk of a terrorist offender committing a serious Part 5.3 terrorism offence if the offender is released into the community.[62]

59 Statement of compatibility, p. 23.

60 Explanatory memorandum, p. 6.

61 Explanatory memorandum, pp. 13-14.

62 Criminal Code, section 105A.2.

1.24 It would appear that such an expert would not be restricted in the methodologies which they may apply in making such an assessment. Australian courts have questioned the use of risk assessments, particularly as they can be incorrect,[63] and because they may be regarded as an informed guess.[64] Furthermore, there are questions as to whether the tools currently available to assess a future risk of terrorism—as opposed to the risk of future violent offending—may be insufficient.[65] It is unclear, therefore, whether an expert assessment as to the risk of a person engaging in future terrorism related conduct could be effective to accurately assess such a risk, and consequently whether the imposition of an extended supervision order would be rationally connected with the objective of protecting the public from terrorist acts.

Proportionality

1.25 In assessing the proportionality of a proposed limit on a human right, it is necessary to consider whether the proposed limitation is sufficiently curtailed. This requires consideration of any safeguards, the availability of independent oversight and external review, and the capacity for a proposed scheme to operate flexibly, and treat different cases differently. In this regard, there are questions as to whether the proposed extended supervision order scheme would be proportionate to the objectives sought to be achieved.

1.26 The bill proposes that, in determining whether to issue an extended (or interim) supervision order, the AFP minister would be required to satisfy a lower 'balance of probabilities' standard of proof,[66] in contrast to the 'high degree of

63 See, for example, Kirby J in *Fardon v Attorney-General* (Qld) [2004] HCA 46, [124].

64 *Fardon v Attorney-General* (Qld) [2003] QCA 416 at [91], applying the language of *Kable v Director of Public Prosecutions* (1996) 189 CLR 51 at 106 per Gaudron J, 123 per McHugh J. There is also evidence to suggest that psychiatric or clinical predictions of dangerousness have only a one-third to fifty per cent success rate, and that although actuarial predictions are better than clinical predictions, they can also be inaccurate because they are based on group data and do not necessarily allow for consideration of individual or situational factors. See, Professor Kate Warner, "Sentencing review 2002-2003", (2003) 27 Criminal Law Journal 325 at 338. See also Charisse Smith and Mark Nolan, 'Post-sentence continued detention of high-risk terrorist offenders in Australia', (2016) 40 Crim LJ 163 [168].

65 Noting that the factors that relate to and motivate acts of terrorism (for example, a commitment to an ideology that demands self-sacrifice and acts of violence) generally differ from the typical motivations behind violent offences (for example, personal gain, impulse control, or uncontrolled rage), and so violent offender tools may not accurately measure future risk. See Charisse Smith and Mark Nolan, 'Post-sentence continued detention of high-risk terrorist offenders in Australia' (2016) 40 Crim LJ 163 [169]. See also John Monahan, "The Individual Risk Assessment of Terrorism" (2012) 18 Psychology, Public Policy, and Law 167 [175]; and Mark R Kebbell and Louise Porter, "An Intelligence Assessment Framework for Identifying Individuals at Risk of Committing Acts of Violent Extremism against the West" (2012) 25 Security Journal 212 [215].

66 Schedule 1, Part 1, item 87, proposed section 105A.7A.

probability' standard required in the case of a continuing detention order.[67] The explanatory memorandum states that this reflects the less restrictive nature of an extended supervision order (as compared with a continuing detention order), and reflects the standard that applies in control order proceedings.[68] While it is recognised that an extended supervision order does not amount to a deprivation of liberty in the same way as remaining imprisoned under a continuing detention order does, as set out above, the impact on human rights could be quite considerable, depending on the conditions imposed. The fact that the conditions on which the court can impose must be those that the court is satisfied are appropriate and adapted for the purpose of protecting the community from the unacceptable risk of a terrorist attack, suggests that the conditions may be stringent, in order for them to fulfil the stated purpose. In addition, it would appear that there would be no limit as to the number of conditions which could be imposed under a single order (noting, however, that the court can only impose conditions which it is satisfied are appropriate and adapted for the purpose of protecting the community). As such, it is not clear why it is appropriate that the imposition of potentially extensive and stringent conditions should be able to be imposed only on the basis that it is more likely than not that an offender would pose an unacceptable risk, rather than that there is a high degree of probability that they would.

1.27 It is also not clear how long a person may be required to remain at specified premises under an extended supervision order. The bill provides that the conditions the court may impose include that an offender remain at specified premises between specified times of the day, but this must be no more than 12 hours within any 24 hours'. However, this general condition is stated to apply 'without limiting' the overall section which states that a court could impose 'any conditions' which the court is satisfied 'on the balance of probabilities, are reasonably necessary, and reasonably appropriate and adapted, for the purpose of protecting the community from the unacceptable risk of the offender committing a serious Part 5.3 offence'.[69] Therefore, it is not clear, as a matter of statutory interpretation, if a court could impose a condition that a person must remain within specified premises for more than 12 hours a day, if it were satisfied that such a condition was reasonably necessary, and reasonably appropriate and adapted in that particular case. In relation to safeguards, a court could specify that some conditions included in an extended or interim supervision order are ones from which the individual could apply for a temporary exemption from a specified authority.[70] This would enable the

67 Criminal Code, subsection 105A.7(1)(b).

68 Explanatory memorandum, p. 67.

69 Schedule 1, Part 1, item 87.

70 Schedule 1, Part 1, item 87, proposed section 105A.7C.

individual to then apply in writing to a specified authority for an exemption,[71] providing a reason for the request. The specified authority may grant or refuse the exemption, including granting the exemption subject to reasonable directions. The explanatory memorandum explains that this is intended to ensure that extended supervision orders are sufficiently flexible to manage a person in the community.[72] It provides the following example of where such an exemption may be made:

> [A]n [extended supervision order] may prohibit an offender from going to a particular location, such as the area around an airport. If the Court had made that an exemption condition, then the offender could apply to the person or persons specified in the order for an exemption to attend that location at a particular time for a particular reason, such as a medical appointment. The specified authority could approve the exemption subject to certain conditions, such as identifying a specific period of time in which the offender may be present in that location, or requiring the offender to make themselves known to a particular person at the relevant building before attending the appointment.[73]

1.28 This may provide the capacity to treat different cases differently, and assists with the proportionality of the measure. However, it is noted that having to apply to a specified authority (such as a police officer) to do specified things (such as attend medical appointments), itself limits a person's right to privacy, with the possibility of many day-to-day, and highly personal, decisions needing to be approved by another authority. The bill provides no guidance on when, and on what criteria, a specified authority may grant or refuse the exemption. As such, the specified authority is given an absolute discretion to refuse the exemption. There is also no timeframe by which a decision must be made and the bill does not require the specified authority to provide reasons for a decision.[74] Rather, as the explanatory memorandum notes, it would appear that the only remedy which a person could seek would be seeking a variation of the condition (through the courts) where an exemption is refused.[75] Consequently, questions remain as to whether this would operate effectively as a safeguard in practice.

1.29 In addition to the potentially significant number and types of conditions which could be imposed under an extended supervision order, it appears there is no

71 A 'specified authority' means a person or class of persons specified in an order for a requirement or condition in an order. These would include a police officer, or class of officers, a person or class of persons involved in electronically monitoring the person, or any other person or class of persons. See, Schedule 1, Part 1, item 2, proposed subsection 100.1(1).

72 Explanatory memorandum, p. 74.

73 Explanatory memorandum, p. 74.

74 See, Schedule 1, Part 1, item 87, proposed subsection 105A.7C(5).

75 Explanatory memorandum, p. 74.

limit to the number of successive extended supervision orders which may be made.[76] Rather, proposed subsection 105A.7A(5) confirms that a court may make an extended supervision order in relation to a person which begins to be in force immediately after a previous extended supervision order (or continuing detention order) ceases to be in force.[77] Consequently, it would appear that a person could feasibly be subject to successive extended supervision orders indefinitely, and the amount of time an offender may be subject to a supervision order could exceed the time spent incarcerated pursuant to the original sentence for the offence.

1.30 There are also concerns as to whether a person who may be made subject to a supervision order would have access to all of the evidence on which the decision to subject them to such an order would be based. An individual would be entitled to reasons for a decision made with respect to a supervision order,[78] and such a decision would be appealable.[79] In addition, the subject of a supervision order, or their legal representative, or the AFP minister (or their legal representative) could apply to the Supreme Court for variation of an order.[80] While the capacity to appeal an extended supervision order, or seek to vary a condition may have the capacity to serve as a safeguard, this could be significantly limited by restrictions on access to evidence associated with the order, as discussed in detail below at paragraphs [1.42] to [1.55].

1.31 Lastly, questions remain as to how the proposed supervision order scheme will interact with parole provisions. Currently, a person convicted of a terrorism offence may be eligible to be on parole for the last quarter of their sentence.[81] However, the Attorney-General (who makes the decision about parole for terrorism offenders) must not make a parole order unless satisfied exceptional circumstances exist to justify the making of the order.[82] As such, it appears unlikely that many terrorist offenders would be eligible for parole. It appears that in many ways the type of conditions that could be imposed on a person subject to a supervision order may be similar to those imposed on a person subject to parole. The primary difference between parole and the proposed extended supervision order appears to be that parole allows an offender to serve part of their already ordered sentence of imprisonment in the community, and its time span is fixed to that sentence, rather than being in addition to the sentence imposed, and of potentially unlimited time

76 See statement of compatibility, p. 6.

77 Schedule 1, Part 1, item 87.

78 Schedule 1, Part 1, item 123, proposed section 105A.16.

79 Schedule 1, Part 1, items 125-126. See also, Criminal Code, section 105A.17.

80 Schedule 1, Part 1, item 95, proposed sections 105A.9B–105A.9E.

81 *Crimes Act 1914*, section 19AG.

82 *Crimes Act 1914*, section 19ALB.

duration. This raises the question of why and how the power to release an offender on parole during the final quarter of their sentence subject to strict conditions (a less rights restrictive alternative to imposing a post-sentence extended supervision order) would not be effective to achieve the objective of protecting the public from the risk of terrorism conduct, and protecting Australia's national security, including by supporting a person to rehabilitate and reduce the risk of recidivism. Indeed, the Crimes Act states that the purposes of parole are to rehabilitate and reintegrate the offender, and to protect the community.[83] Parole provides offenders with a structured, supported and supervised transition so that they can adjust from prison back into the community, rather than returning straight to the community at the end of their sentence without supervision or support, and conditions can be imposed which are designed to minimise their risk of reoffending.[84]

1.32 Further, as an extended supervision order is proposed to be applied post-sentence, the prison environment in which terrorist offenders are held, and the services provided to offenders during that period of incarceration to help reduce the risk of recidivism, are also relevant considerations.[85] This is directly connected with the objective of protecting the community and Australia's national security, as well as with the capacity for strict parole conditions to be effective to achieve this. In this respect, no information has been provided as to whether, how, and to what extent the current prison services and parole conditions available to manage terrorist offenders are failing to reduce the risk of recidivism with respect to terrorism offences.

Concluding remarks

1.33 The introduction of extended and interim supervision orders would constitute a less rights-restrictive alternative to continuing detention, insofar as an individual subject to a supervision order would not be imprisoned. However, given the breadth of potential conditions which could be imposed under a supervision order, and the absence of any limits on the number of successive orders which could be made, extended supervision orders would raise a host of human rights concerns.

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83 *Crimes Act 1914*, section 194KA.

84 For example, in 2014, a study by the Australian Institute of Criminology found that offenders who received parole supervision on release from custody took longer to commit a new offence, were less likely to commit a new indictable offence and committed fewer offences than offenders who were released unconditionally into the community. See, Dr Wai-Yin Wan et al, 'Parole Supervision and reoffending', *Trends and issues in crime and justice* (No. 485) Australian Institute of Criminology (2014). See also, Adult Parole Board Victoria, What is parole? Purpose and benefits, https://www.adultparoleboard.vic.gov.au/purpose-and-benefits, accessed 15 September 2020; Office of the Inspector of Custodial Services of Western Australia, *Recidivism rates and the impact of treatment programs* (2014).

85 See, for example, United Nations Office on Drugs and Crime, *Handbook on the management of violent extremist prisoners and the prevention of radicalization to violence in prisons* (2016).

1.34 Foremost, imposing what may, in some circumstances, amount to a penalty (for the purposes of international human rights law) on a person because of a risk that they may engage in future criminal conduct is inherently problematic in that it inverts basic principles of the criminal justice system. Most significantly, where conditions imposed are so severe that they amount to a penalty, this inverts the principle that a person should be punished only for a crime which it has been proven that they have committed, not the risk that they *may*, in future, commit a crime.

1.35 In addition, the imposition of a supervision order on an individual who was convicted of a terrorism offence before the scheme became law may engage the absolute prohibition against retrospective criminal laws. The imposition of a supervision order could only be made where an individual had been convicted of, and imprisoned for, a terrorism offence (and the court considers the measures are reasonably necessary for the purpose of protecting the community from the unacceptable risk of the offender committing a serious terrorism offence). Consequently, the imposition of an extended supervision order on those offenders who have completed their sentence, may be regarded as an additional penalty for that past conduct, if the conditions to be imposed on an offender are so severe as to amount to a penalty.

1.36 In addition, the establishment of an extended and interim supervision order scheme engages a significant number of human rights, some of which are not identified in the statement of compatibility. While these rights may be permissibly limited, for a limitation to be permissible under international human rights law it must be prescribed by law, pursue a legitimate objective, be rationally connected to (that is, effective to achieve) that objective and be a proportionate means of achieving that objective. In this respect, further information is required in order to fully assess this.

1.37 Further information is required in order to assess the compatibility of the proposed measures with multiple human rights, and in particular:

(a) whether the type of conditions that may be imposed under an extended supervision order may be so severe as to amount to a penalty;

(b) why it is appropriate to apply the extended supervision order scheme to those who committed offences before this scheme (or the continued detention order scheme) was in operation;

(c) what factors would a court consider in determining whether a person poses an 'unacceptable risk' in the context of a court assessing a person's level of future risk under the proposed supervision order scheme, and what threshold would a court apply in determining whether a risk is an acceptable or unacceptable one;

(d) what evidence is there of a pressing and substantial concern to which the proposed extended and interim supervision order scheme is

directed (including evidence of terrorism offenders in Australia who have been released from a custody sentence and subsequently engaged in terrorism related conduct);

(e) how an expert assessment as to the risk of a person engaging in future terrorism related conduct would be effective to accurately assess such a risk, and consequently whether the imposition of an extended supervision order would be rationally connected with the objective of protecting the public from terrorist acts;

(f) why, and in what respects, the power to release an offender on parole during the final quarter of their sentence (subject to conditions) would not be effective to protect the public from any potential risk sought to be addressed by these measures, including by supporting a person to rehabilitate and reduce their risk of recidivism;

(g) whether a person could be released from prison and be subject to both parole conditions *and* conditions under an extended or interim supervision order, and if so, how would any conflict between the two be managed;

(h) what percentage of persons who have been imprisoned for a terrorism offence under Part 5.3 of the Criminal Code have received parole in the past 10 years;

(i) whether, how, and to what extent the current prison services available to manage terrorist offenders are not effective in reducing the risk of recidivism with respect to terrorism offences;

(j) why it is appropriate that the civil standard of proof (balance of probabilities) should be required for the issue of an extended or interim supervision order, noting the potential significant impact on human rights by the imposition of a supervision order; and

(k) whether, as a matter of statutory interpretation, a court could impose a condition that an offender remain at specified premises for more than 12 hours within any 24 hour period, nothing that the general conditions listed in proposed subsection 105A.7B(3) are expressly stated as being 'without limiting' a court's ability to impose *any* condition they were satisfied was necessary (under proposed subsection 105A.7B(1)).

Committee view

1.38 The committee notes that the bill seeks to establish a post-sentence extended supervision order scheme for high-risk terrorist offenders, which would enable a court to impose any conditions on a person that it is satisfied on the balance of probabilities are reasonably necessary, and reasonably appropriate and adapted, for the purpose of protecting the community from the unacceptable risk of the offender committing a serious terrorism offence.

1.39 To the extent that a supervision order may have the effect of protecting the public from harmful acts, the committee considers this scheme promotes the right to life and security of the person. The committee also notes that the introduction of extended supervision orders would constitute a less rights-restrictive alternative to the existing continuing detention order scheme, as an individual subject to a supervision order would not be subject to continued imprisonment. In this respect, the committee notes that these measures may promote the right to liberty.

1.40 However, the committee considers that given the breadth of potential conditions which could be imposed under a supervision order, extended supervision orders also engage a number of human rights. The committee notes that most human rights may be permissibly limited if it is shown to be reasonable, necessary and proportionate.

1.41 In order to form a concluded view of the human rights implications of this bill, the committee seeks the Attorney-General's advice as to the matters set out at paragraph [1.37].

Withholding of certain evidence from the offender

1.42 The bill sets out the requirements for providing offenders and their legal representatives with a copy of applications and materials where the AFP minister (or their legal representative) applies to the court in relation to a supervision order.[86] However, it also sets out mechanisms whereby sensitive information may be excluded from applications or materials where the information is national security information, subject to a claim of public interest immunity, or is terrorism material.[87]

1.43 In particular, proposed section 105A.14B provides that the AFP minister (or their legal representative) is not required to include in the application or material given to a terrorist offender, any information where the AFP minister is likely to seek to refuse disclosure of the information under the *National Security Information (Criminal and Civil Proceedings) Act 2004* (National Security Information Act).[88] Schedule 1[89] also seeks to amend the National Security Information Act to prevent the disclosure of information relating to interim or extended supervision order proceedings where such disclosure is likely to prejudice national security (except to

86 Schedule 1, Part 1, item 120, proposed sections 104A.14A.

87 Schedule 1, Part 1, item 120, proposed sections 104A.14B–104A.14D.

88 Schedule 1, Part 1, item 120, proposed sections 104A.14B.

89 Schedule 1, Part 2, items 189 –210.

the extent that preventing the disclosure would seriously interfere with the administration of justice).[90]

1.44 This would enable a court to make special orders allowing the court to consider information which is not disclosed to the offender or their legal representative,[91] including in proceedings relating to an application for a supervision order, or for variation or review of a supervision order, or an application for a continuing detention order where the court considers whether to make an extended supervision order instead. Where the Act has been invoked, the court may hold a closed hearing, which the offender and their legal representative could be excluded from,[92] to address whether disclosure of the information in question would be potentially prejudicial to national security, and whether to allow a witness to be called.[93] The court could then order that it may consider information which has not been disclosed to the offender or their legal representative as part of the substantive proceedings.[94]

1.45 In determining whether to make such an order, the court must be satisfied that the offender has been given sufficient information about the allegations to enable effective instructions to be given, taking into consideration: the risk of prejudice to national security if an order were not made; whether an order would have a substantial adverse effect on the substantive hearing in the proceeding; and any other matter the court considers relevant.[95] The individual and their legal representative could be excluded from both the initial closed hearing and the substantive extended supervision order hearing where information which the individual has been excluded from seeing is being considered by the court. In such instances, the court may appoint a 'special advocate' to represent the interests of the offender by making submissions, adducing evidence and cross-examining witnesses.[96] The explanatory memorandum explains that a special advocate is a security-cleared lawyer or former judge.[97]

90 *National Security Information (Criminal and Civil Proceedings) Act 2004*, section 3.

91 *National Security Information (Criminal and Civil Proceedings) Act 2004*, section 38J.

92 *National Security Information (Criminal and Civil Proceedings) Act 2004*, section 38I

93 *National Security Information (Criminal and Civil Proceedings) Act 2004*, section 38G.

94 *National Security Information (Criminal and Civil Proceedings) Act 2004*, section 38J.

95 *National Security Information (Criminal and Civil Proceedings) Act 2004*, subsection 38J(5).

96 *National Security Information (Criminal and Civil Proceedings) Act 2004*, section 38PB.

97 Explanatory memorandum, p. 115.

Preliminary international human rights legal advice

Right to a fair hearing

1.46 The capacity to restrict the subject of an application for an extended or interim supervision order from accessing evidence which may nevertheless be used against them, or from being able to appear at a hearing regarding the admissibility of such evidence, engages and may limit the right to a fair hearing.

1.47 The right to a fair hearing applies to both criminal and civil proceedings, to cases before both courts and tribunals, and extends to the pre-trial stages of substantive proceedings.[98] It is concerned with procedural fairness, and encompasses notions of equality in proceedings, the right to a public hearing and the requirement that hearings be conducted by an independent and impartial body. The ability to test evidence on which allegations are based is a fundamental component of the right to a fair hearing. Limitations on the right to a fair hearing are permissible where the measures pursue a legitimate objective and are rationally connected with and proportionate to that objective.

1.48 The statement of compatibility notes that these proposed measures would engage the right to a fair hearing.[99] It states that these measures seek to achieve the legitimate objective of protecting Australia's national security, as the inappropriate disclosure of national security information has the potential to prejudice Australia's national security and the security of all Australians.[100] It states that information relevant to supervision order proceedings may disclose sensitive sources, methodologies and capabilities employed by security agencies to obtain information about terrorist activities, and revealing this to the offender risks jeopardising ongoing investigations and has consequences for the safety of human sources.[101] Protecting national security and investigations is likely to constitute a legitimate objective for the purposes of international human rights law, and the measures may be rationally connected to that objective.

1.49 With respect to proportionality, the statement of compatibility states that the extent to which information may be excluded, or the individual's access to that information controlled, is limited to the extent necessary to protect national security, and is to be ultimately decided on by the court.[102] The statement of compatibility states that, where the National Security Information Act has been successfully invoked and the court has ordered a closed hearing, the appointment of a special advocate is one mechanism available to ensure a fair hearing where the individual is

98 International Covenant on Civil and Political Rights, articles 14-15.

99 Statement of compatibility, pp. 15-16.

100 Statement of compatibility, p. 15.

101 Statement of compatibility, p. 20.

102 Statement of compatibility, p. 19.

not able to receive certain highly sensitive information, and that the offender will be given sufficient information about the allegations to enable effective instructions to be given in relation to those allegations.[103]

1.50 With respect to the proportionality of the measure, the fact that the court makes the assessment as to whether to hold a closed hearing, and to admit certain evidence without providing it to both parties, may operate to safeguard the right to a fair hearing. However, it is noted that the National Security Intelligence Act provides that in deciding whether to disclose information to the offender, the court must give greatest weight to the Attorney-General's certificate stating that there would be a risk to national security if the information were disclosed, than to whether it would have a substantial adverse effect on the right to a fair trial.[104]

1.51 In addition, the ability of an offender to communicate with the special advocate would appear to be heavily restricted. The Act states that, although legal professional privilege would operate between a special advocate and the individual, the relationship between them is *not* that of legal representative and client.[105] The court could make orders prohibiting or restricting communication between the special advocate and the individual before the disclosure of information to the special advocate, if it were satisfied that it is in the interests of national security to do so.[106] In addition, once the relevant national security information had been disclosed to the special advocate, their ability to disclose the information to the offender would be restricted,[107] as would their ability to communicate with *any* person about *any* matter connected with the proceeding.[108] The person in relation to whom an extended supervision order was being sought could only communicate with a special advocate in writing through their legal representative,[109] and the special advocate could only correspond with them in writing and with the prior approval of the court.[110] It is unclear, therefore, how the individual could provide the special

103 Statement of compatibility, pp. 20–21.

104 *National Security Information (Criminal and Civil Proceedings) Act 2004*, subsection 31(8). Note also the comments by former Justice Michael McHugh AC QC in 'Terrorism legislation and the Constitution' (2006) 28 *Australian Bar Review* 117: '[The *National Security Information (Criminal and Civil Proceedings) Act 2004*] weights the exercise of the discretion in favour of the Attorney-General and in a practical sense directs the outcome of the closed hearing. How can a court make an order in favour of a fair trial when in exercising its discretion, it must give the issue of a fair trial less weight than the Attorney-General's certificate'.

105 *National Security Information (Criminal and Civil Proceedings) Act 2004*, section 38PC.

106 *National Security Information (Criminal and Civil Proceedings) Act 2004*, subsection 38PD(2).

107 *National Security Information (Criminal and Civil Proceedings) Act 2004*, subsection 38PE.

108 *National Security Information (Criminal and Civil Proceedings) Act 2004*, section 38PF.

109 *National Security Information (Criminal and Civil Proceedings) Act 2004*, subsection 38PF(8).

110 *National Security Information (Criminal and Civil Proceedings) Act 2004*, subsection 38PF(3).

advocate with adequate instructions with respect to the restricted information. This would appear, in such instances, to defeat the capacity of the special advocate scheme to protect the individual's right to a fair hearing. It is also noted that while a court may appoint a special advocate, there is no requirement that a court do so even where it is considering withholding sensitive information from the offender or their legal representative.[111]

1.52 The United Nations Human Rights Committee has explained that the right to a fair hearing requires that each side to a matter be given the opportunity to contest all the arguments and evidence adduced by the other party,[112] and that arguments must be open to challenge by the parties.[113] With respect to the use of special advocates, the European Court of Human Rights has recognised that in some limited circumstances (including those relating to national security), full disclosure of evidence may not always be possible.[114] However, the court has held that a hearing will not be fair 'unless any difficulties caused to the defendant by a limitation on his rights are sufficiently counterbalanced by the procedures followed by the judicial authorities'.[115] In this respect, the court considered that the use of a special advocate may have the capacity to serve as such a counterbalance, but not if the individual was not provided with sufficient information about the allegations against them such that they could give the special advocate effective instructions.[116] The United Nations Special Rapporteur on human rights while countering terrorism has similarly cautioned that a special advocate cannot always cure the disadvantages of a person not being made aware of the case against them.[117]

1.53 The statement of compatibility states that a special advocate may make arguments querying the need to withhold information from the offender, and challenge the relevance, reliability and weight of such information.[118] It further

111 *National Security Information (Criminal and Civil Proceedings) Act 2004*, section 38PA.

112 UN Human Rights Committee, *General Comment No. 32: The right to equality before courts and tribunals and to a fair trial* (2007) [13].

113 *Morael v France*, UN Human Rights Committee (1989) UN Doc CCPR/C/36/D/207/1986 [9.4].

114 *A v United Kingdom* (2009) 49 EHRR 29.

115 *A v United Kingdom* (2009) 49 EHRR 29 [205].

116 *A v United Kingdom* (2009) 49 EHRR 29 [220]. Affirmed by the United Kingdom House of Lords in *Secretary of State for the Home Department v AF* [2009] UKHL 28 [59].

117 Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin (A/63/223), [41]. See also, Report of the United Nations High Commissioner for Human Rights on the protection of human rights and fundamental freedoms while countering terrorism (A/HRC/22/26), [36]; and United Nations Counter-Terrorism Implementation Task Force, *Basic Human Rights Reference Guide: Right to a Fair Trial and Due Process in the Context of Countering Terrorism* (2014).

118 Statement of compatibility, p. 20.

states that the appointment of such an individual ensures that the offender has a reasonable opportunity to present their case 'under conditions which do not disadvantage them as against other parties in the proceedings'.[119] However, it appears that an individual who is unable to communicate freely and confidentially with a special advocate at all stages of the relevant proceedings may be at a disadvantage compared with the other party (being the AFP minister or their legal representative).

1.54 The statement of compatibility also states that, in contrast to a supervision order, when a court is considering making a continuing detention order, it cannot take into account evidence that has not also been given to the offender. It states that in these circumstances a court could instead consider the sensitive information and the potential harm from its disclosure and weigh that against the public interest in the offender receiving all relevant material. After making this assessment the court may order the redaction of sensitive information, summarising information to remove sensitivities or that the material be disclosed to the offender. This means that the AFP minister is not able to rely on evidence that is not put to the offender in relation to continuing detention orders. These safeguards do not apply to supervision orders because, the statement of compatibility says, these orders allow for supervision rather than detention.[120] However, as noted above at paragraph [1.26], while an extended supervision order does not amount to a deprivation of liberty, the impact on human rights could be quite considerable, depending on the conditions imposed, many of which could be very stringent. As such, it is not clear why it is appropriate to allow the court to rely on evidence that the offender may not have had a sufficient opportunity to challenge. It is noted that evidence is susceptible to being misleading if it is insulated from effective challenge, and this risk is magnified in circumstances where the standard of proof is lower than that applying in criminal proceedings (as is the case with extended supervision orders, see paragraph [1.26] above).

1.55 Consequently, further information is required in order to assess the compatibility of these proposed measures with the right to a fair hearing, and in particular:

(a) noting the potential significant impact on human rights by the imposition of a supervision order, why it is appropriate that a court considering a supervision order should have different powers to admit evidence, which the offender may not have had a sufficient opportunity to challenge, than those applicable in continuing detention order proceedings;

119 Statement of compatibility, p. 20.

120 Statement of compatibility, p. 20

(b) when will sufficient information be provided to an offender in order to allow them to give effective instructions to a special advocate, and will this information be given before restrictions are placed on communication with the special advocate; and

(c) will there be circumstances in which a special advocate will not be appointed where a court is considering whether to admit evidence which has not been provided to an offender or their legal representative.

Committee view

1.56 The committee notes that the bill sets out mechanisms whereby an offender and their legal representative may not be provided with national security information relating to a supervision order. This may result in information being used in evidence against the offender without them being able to directly challenge it.

1.57 The committee notes that these measures engage and may limit the right to a fair hearing. This right may be permissibly limited if it is shown to be reasonable, necessary and proportionate.

1.58 The committee considers these measures seek to achieve the legitimate objective of protecting Australia's national security, as the inappropriate disclosure of national security information has the potential to prejudice Australia's national security and the security of all Australians. The committee notes that where a court has ordered a closed hearing, there is a process whereby a special advocate may be appointed where the offender is not able to receive certain highly sensitive information, and that the offender will be given sufficient information about the allegations to enable instructions to be given in relation to those allegations. However, the committee notes that questions remain as to the adequacy of these safeguards.

1.59 In order to form a concluded view on these matters, the committee seeks the Attorney-General's advice as to the matters set out at paragraph [1.55].

Monitoring powers

1.60 The bill also seeks to amend the monitoring and surveillance powers under the *Crimes Act 1914* (Crimes Act), *Surveillance Devices Act 2004* (Surveillance Devices Act), and *Telecommunications (Interception and Access) Act 1979* (Interception and Access Act).[121] This would extend the following surveillance and monitoring powers to the proposed extended (and interim) supervision order powers, and to decisions concerning the making of a continuing detention order:

121 Schedule 1, Part 2.

- monitoring warrants under the Crimes Act, which may include powers to search premises; inspect, examine, measure or test things on the premises; inspect or copy documents; operate electronic equipment to put data into documentary form or to transfer data to a disk, tape or other storage device; and ask the occupier to answer questions and produce any document relevant to determining compliance with the conditions of a relevant order;[122]
- surveillance device warrants, surveillance device powers without a warrant and computer access warrants in the Surveillance Device Act (including allowing law enforcement agencies to obtain surveillance device or computer access warrants in determining whether to apply for either a continuing detention order *or* an extended supervision order).[123] These may authorise: the installation and use of a surveillance device; entry to premises; adding or altering data on a target computer, removing a computer or other thing from premises; or intercepting a communication passing over a telecommunications system);[124] and
- telecommunications service warrant and named person warrant framework under the Interception and Access Act.[125] These may authorise interception of communications (including stored communications); and entry on any premises for the purpose of installing, maintaining, using or recovering any equipment used.[126]

1.61 In addition, the bill would extend the operation of the proposed international production order regime (contingent on the passage of the Telecommunications Legislation Amendment (International Production Orders) Bill 2020). Such orders would allow Commonwealth, state and territory law enforcement and national security agencies to acquire data held in a foreign country by a designated communications provider, and to allow foreign governments to access private communications data.

Preliminary international human rights legal advice

Right to privacy

1.62 The extension of these existing surveillance and monitoring powers engage and limit a number of human rights, in particular the right to privacy. The right to

122 *Crimes Act 1914*, Part IAAB.

123 Schedule 1, Part 2, items 211-312.

124 *Surveillance Device Act 2004*, sections 18 and 27E. See also Part 4 regarding the use of optical and listening or recording surveillance devices without a warrant.

125 *Telecommunications (Interception and Access) Act 1979*.

126 *Telecommunications (Interception and Access) Act 1979*, sections 46-46A.

privacy includes respect for informational privacy, including the right to respect 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. The right to privacy may be permissibly limited. Any limitation must be prescribed by law, directed towards a legitimate objective, be rationally connected to (that is, effective to achieve) that objective, and be proportionate.

1.63 The statement of compatibility states that the proposed extension of these surveillance and monitoring powers would provide law enforcement agencies with sufficient powers to monitor compliance with supervision orders and detect breaches, and to ensure community safety by potentially preventing the person from engaging in terrorism-related activities or terrorism offences.[127] It further states that permitting surveillance of an individual who is incarcerated would inform the minister in determining whether it would be appropriate for the minister to apply for a post-sentence order.[128] As noted above, protecting the public from acts of terrorism is likely to constitute a legitimate objective for the purposes of international human rights law. However, it is not clear that the proposed expanded use of these monitoring and surveillance powers would be sufficiently constrained such that they would constitute a proportionate limitation on the right to privacy. For example, the committee recently considered that the establishment of the proposed International Production Order regime pursuant to the Telecommunications Legislation Amendment (International Production Orders) Bill 2020 was insufficiently circumscribed and lacked sufficient safeguards such that it risked arbitrarily limiting the right to privacy.[129]

1.64 As many of the monitoring and surveillance powers set to be applied to the supervision order scheme were legislated prior to the establishment of the committee, these powers have not been required to be subject to a foundational human rights compatibility assessment in accordance with the terms of the *Human Rights (Parliamentary Scrutiny) Act 2011*. It is therefore difficult to assess the human rights compatibility of extending these powers to this new scheme without the benefit of a foundational human rights assessment of those Acts. The expansion of these powers to the supervision order scheme would therefore appear to engage and significantly limit the right to privacy, but without a foundational review of the existing and extensive monitoring and surveillance powers it is not possible to determine the full extent of the privacy implications of this measure.

127 Statement of compatibility, p. 25-27.

128 Statement of compatibility, p. 25.

129 Parliamentary Joint Committee on Human Rights, *Report 7 of 2020*, committee view at pages 117 and 123. See also, in relation to computer access warrants: Parliamentary Joint Committee on Human Rights, *Report 13 of 2018* (4 December 2018), pp. 71–81.

Committee view

1.65 The committee notes that the bill would expand the application of existing monitoring and surveillance powers as part of the proposed expanded supervision order scheme. The committee notes that this would engage and limit the right to privacy. This right may be permissibly limited if it is shown to be reasonable, necessary and proportionate.

1.66 The committee considers the measure seeks to achieve the legitimate objective of providing law enforcement agencies with sufficient powers to monitor compliance with supervision orders and detect breaches or orders and thereby help protect community safety by potentially preventing terrorist acts.

1.67 As many of the monitoring and surveillance powers set to be applied to the supervision order process were legislated prior to the establishment of the committee, these powers have never been required to be subject to a foundational human rights compatibility assessment in accordance with the terms of the *Human Rights (Parliamentary Scrutiny) Act 2011*. It is therefore difficult for the committee to assess the human rights compatibility of extending these powers to this new scheme without the benefit of a foundational human rights assessment of those Acts.

Crimes Legislation Amendment (Economic Disruption) Bill 2020[1]

Purpose	This bill seeks to amend the *Crimes Act 1914* (the Crimes Act), the *Criminal Code Act 1995* (the Criminal Code), the *COAG Reform Fund Act 2008* and the *Proceeds of Crime Act 2002* (the POC Act) to: • update Commonwealth money laundering offences; • clarify that obligations imposed on investigating officials under Part IC of the Crimes Act do not apply to undercover operatives; • amend the POC Act to ensure that criminal entities are not afforded an opportunity to buy back forfeited property; • clarify the definition of the term 'benefit' under the POC Act; • clarify that orders made by a court with proceeds jurisdiction under the POC Act can be made in respect of property located overseas; • increase penalties for non-compliance and clarify the circumstances in which information can be disclosed and used; • expand the Official Trustee in Bankruptcy's powers to deal with property, gather information and recover costs under the POC Act
Portfolio	Home Affairs
Introduced	House of Representatives, 2 September 2020
Rights	Fair trial; rights of the child; life; torture or cruel, inhuman and degrading treatment or punishment
Status	Seeking additional information

Offence with no fault element and a reversal of the legal burden of proof

1.68 The bill seeks to amend the *Criminal Code Act 1995* (Criminal Code) to introduce two new offences where a person deals with money or other property and

1 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Crimes Legislation Amendment (Economic Disruption) Bill 2020, *Report 11 of 2020*; [2020] AUPJCHR 134.

'it is reasonable to suspect that the money or property is proceeds of indictable crime', and the value of the money or property is either $10 million or more, or $1 million or more.[2] The penalty for the offences would be imprisonment for up to five years or 300 penalty units, or imprisonment for up to four years or 240 penalty units.

1.69 Absolute liability would apply to whether it is reasonable to suspect that the money or property is proceeds of indictable crime and to the value of the money or property.[3] As such, this negates the requirement for the prosecution to prove fault in relation to these matters.[4] These offences are proposed to be inserted into existing section 400.9 of the Criminal Code, which includes a provision that states that the offences in the section do not apply if the defendant proves that he or she had no reasonable grounds for suspecting that the money or property was derived or realised, directly or indirectly, from some form of unlawful activity.[5] As such, this reverses the legal burden of proof, requiring the defendant to prove, on the balance of probabilities, they had no reasonable grounds to suspect these matters.[6]

Preliminary international human rights legal advice

Right to presumption of innocence

1.70 Removing the need for the prosecution to prove that the defendant suspected that the money or property is proceeds of indictable crime, and in providing a defence that reverses the legal burden of proof, this measure engages and limits the right to be a fair trial, in particular the right to be presumed innocent until proven guilty.[7] Generally, the presumption of innocence requires the prosecution to prove each element of a criminal offence beyond reasonable doubt. The effect of applying absolute liability to an element of an offence means that no fault element needs to be proved and the defence of mistake of fact is not available. In addition, an offence provision which requires the defendant to carry a legal burden of proof with regard to the existence of some fact will engage the presumption of innocence because a defendant's failure to discharge the burden of

2 Schedule 1, item 62 (proposed subsection 400.9(1AA) would impose a penalty of imprisonment for up to five years, or 300 penalty units (or both) where the value of the money of other property being dealt with is $10 million or more, and proposed subsection 400.9(1AB) would impose a penalty of imprisonment for up to four years, or 240 penalty units (or both) where the value of the money of other property being dealt with is $1 million or more).

3 Schedule 1, item 67 (which would amend subsection 400.9(4) of the *Criminal Code Act 1995* (Criminal Code) which applies absolute liability).

4 Section 6.2 of the Criminal Code.

5 Criminal Code, subsection 400.9(5).

6 Criminal Code, section 13.4.

7 International Covenant on Civil and Political Rights, article 14(2).

proof may permit their conviction despite reasonable doubt as to their guilt. The application of absolute liability and the reversal of the burden of proof will not necessarily be inconsistent with the presumption of innocence provided that they are within reasonable limits which take into account the importance of the objective being sought and maintain the defendant's right to a defence. In other words, such provisions must be reasonable, necessary and proportionate to that aim.

1.71 The explanatory memorandum to the bill states that the application of absolute liability to the circumstances that 'it is reasonable to suspect that money or other property is proceeds of crime', is necessary to target money laundering networks, which are structured to keep participants at 'arms-length' from relevant information to avoid criminal liability. It states that members of money laundering networks may only have a reasonable suspicion that money or other property was derived from crime, and may not be able to come to this conclusion with any greater certainty.[8] However, if it is likely that the defendant would have such a suspicion it is not clear why the prosecution could not prove that they did have that suspicion (noting that the offence provision only requires 'suspicion', and not 'knowledge' as an element of the offence).

1.72 In relation to the reversal of the legal burden of proof, the statement of compatibility states that this is justified on the basis that a person's purpose for dealing with money or other property, or causing a dealing to occur, and the extent of their subjective awareness as to its tainted nature or value, are matters peculiarly within the person's knowledge, and the person ought to lead evidence of these facts rather than the prosecution. It also states that requiring the prosecution to establish these subjective matters beyond reasonable doubt is often impossible to achieve in practice, and severely undermines law enforcement's ability to target organised crime networks. It states that it is appropriate to prove these matters to a legal standard of proof, given the knowledge and information the defendant has regarding the nature of their own dealing with money or other property, or the situation in which they caused this dealing to occur, and the difficulty that law enforcement has in obtaining or proving the existence of this information.[9]

1.73 The statement of compatibility concludes that any limit on the presumption of innocence is reasonable, necessary and proportionate to the legitimate aim of protecting public order and ensuring that the multiple layers of organised crime networks can be brought to justice. This would appear to be a legitimate objective for the purposes of international human rights law, and the measures would appear to be rationally connected to this objective. However, questions remain as to whether the measure is proportionate, in particular, if there are less rights restrictive ways to achieve the stated objective. As the provision is drafted, the prosecution

8 Explanatory memorandum, p. 31.

9 Statement of compatibility, p. 101.

would only need to prove that the person intentionally dealt with money or other property. They would not need to prove that the person reasonably suspected that it was the proceeds of indictable crime, only that it is objectively reasonable that a person would have suspected this. The burden would be on the defendant to prove, on the balance of probabilities, that they had no reasonable grounds for suspecting the money or property was derived or realised from some form of unlawful activity. Proving a negative (that they had no reasonable grounds) can be particularly difficult, and while the matters may be peculiarly in the defendant's knowledge, it is not clear why it would not be sufficient to reverse the *evidential* burden of proof (which would require the defendant to raise evidence about a matter, rather than positively prove it), rather than reverse the *legal* burden.

1.74 As such, further information is required in order to assess the compatibility of this measure with the right to the presumption of innocence, in particular:

(a) why is it necessary to completely remove the need for the prosecution to prove that the defendant suspected that the money or property was the proceeds of indictable crime (noting that the threshold is only suspicion rather than knowledge); and

(b) why is it necessary to reverse the legal burden of proof (requiring the defendant to positively prove that they had no reasonable grounds for suspecting unlawful activity), rather than reversing the evidential burden of proof (which would require the defendant to raise evidence about the matter).

Committee view

1.75 The committee notes that this measure would introduce two offences where a person deals with money or other property and 'it is reasonable to suspect that the money or property is proceeds of indictable crime', and the value of the money or property is either $10 million or more, or $1 million or more. The provisions would provide that the prosecution would not need to prove that the person reasonably suspected that the money or property was the proceeds of indictable crime, only that it is objectively reasonable that a person would have suspected this. In addition, the legal burden would be on the defendant to prove that they had no reasonable grounds for suspecting the money or property was derived or realised from some form of unlawful activity.

1.76 The committee notes that these measures engage and limit the right to be presumed innocent until proven guilty. This right may be permissibly limited if it is shown to be reasonable, necessary and proportionate. The committee notes that these measures seek to achieve the legitimate objective of protecting public order and ensuring that the multiple layers of organised crime networks can be brought to justice.

1.77 In order to form a concluded view of the human rights implications of this measure, the committee seeks the minister's advice as to the matters set out at paragraph [1.74].

Interviews of a child suspect by an undercover operative

1.78 The *Crimes Act 1914* (Crimes Act) currently provides that an investigating official must not question a person under arrest, a protected suspect,[10] or a suspect (whether under arrest or not) for a Commonwealth offence where they reasonably believe the person is under 18 years of age, unless they have allowed the person to communicate confidentially with a parent, guardian, lawyer, relative, friend or independent person.[11] The bill seeks to amend provisions in the Crimes Act relating to the investigation of Commonwealth offences and seeks to provide that undercover operatives are exempt from the obligations imposed on investigating officials under Part IC of the Crimes Act, including obligations in relation to child suspects.[12]

Preliminary international human rights legal advice

Rights of the child

1.79 Allowing an undercover operative to question a child suspected of having committed an offence, without first allowing the child to communicate with a parent, guardian or other support person, engages and may limit the rights of the child. Children have special rights under human rights law taking into account their particular vulnerabilities.[13] Children's rights are protected under a number of treaties, particularly the Convention on the Rights of the Child. All children under the age of 18 years are guaranteed these rights, without discrimination on any

10 *Crimes Act 1914*, subsection 23B(2) defines a person as a 'protected suspect', which includes if the person is in the company of the investigating official for the purposes of being questioned about a Commonwealth offence; they have not been arrested for the offence; and the official believes there is sufficient evidence to establish the person has committed the offence, or the official has indicated the person is not allowed to leave if they wished to do so,

11 *Crimes Act 1914*, section 23K. 'Interview friend' is defined in subsection 23K(3) to mean a parent or guardian or legal practitioner acting for the person; or if none of these are available, a relative or friend who is acceptable to the person being interviewed; or if the person is an Aboriginal person or a Torres Strait Islander and none of the previously mentioned persons is available, person who is a representative of an Aboriginal legal assistance organisation in the State or Territory in which the person is located; or if none of those persons are available, an independent person.

12 Schedule 2.

13 United Nations Human Rights Committee, *General Comment No. 17: Article 24* (1989) [1].

grounds.[14] Under article 3(1) of the Convention on the Rights of the Child, Australia is required to ensure that, in all actions concerning children, the best interests of the child are a primary consideration. It requires legislative, administrative and judicial bodies and institutions to systematically consider how children's rights and interests are or will be affected directly or indirectly by their decisions and actions.[15] Many of the rights of the child may be subject to permissible limitations where the limitation pursues a legitimate objective, is rationally connected to that objective and is a proportionate means of achieving that objective.

1.80 The statement of compatibility does not recognise that removing these obligations in relation to undercover investigations may engage the rights of the child, and so no assessment has been made in relation to this right. The statement of compatibility did recognise that the broader changes to Schedule 2 were to serve the legitimate objective of maintaining public order, by ensuring that any evidence gained by undercover operatives is not considered to be obtained unlawfully because they did not comply with the Part IC procedures, thereby improving the Commonwealth's capacity to prosecute serious criminal offences. It states that the amendments are necessary because requiring compliance with such obligations would directly undermine any undercover activity, and the court retains a discretion to consider whether or not to admit any evidence obtained in this way, on fairness or other grounds.[16] However, it is not clear in what circumstances undercover operations are used to question a child who may be a suspect in relation to the commission of a Commonwealth offence and whether the questioning of the child, including without allowing them to contact a family member or support person, is consistent with the rights of the child, including with the obligation to consider the best interests of the child.

1.81 Further information is required in order to assess the compatibility of this measure with the rights of the child, in particular:

(a) in what circumstances do undercover operatives question child suspects and what safeguards are in place to protect the rights of the child;

(b) in what circumstances is it appropriate that undercover operatives question a child in the absence of a family member or support person (noting that the removal of the obligation to allow a child to contact a family member or support person would apply to a child of any age of criminal responsibility, including those aged 10 years of age); and

14 United Nations Human Rights Committee, *General Comment No. 17: Article 24* (1989) [5]. See also International Covenant on Civil and Political Rights, articles 2 and 26.

15 United Nations 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).

16 Statement of compatibility, p. 103.

(c) whether there is reasoning or evidence to establish that removing the obligation on undercover operatives to allow a child suspect to contact a family member or other support person before being questioned is aimed at achieving a legitimate objective.

Committee view

1.82 The committee notes that this measure seeks to exempt undercover operatives from the requirement not to question a child under 18 years of age who is under arrest or a suspect for a Commonwealth offence unless they have allowed the person to communicate confidentially with a parent, guardian, lawyer, relative, friend or independent person.

1.83 The committee notes that this measure engages and may limit the rights of the child. Most of these rights may be permissibly limited if it is shown to be reasonable, necessary and proportionate.

1.84 In order to form a concluded view of the human rights implications of this measure, the committee seeks the minister's advice as to the matters set out at paragraph [1.81].

Expansion of *Proceeds of Crime Act 2002*

1.85 The bill seeks to amend various definitions in the *Proceeds of Crime Act 2002* (Proceeds of Crime Act), which would have the effect of expanding the application of the Act. In establishing a scheme to confiscate the proceeds of crime, the Proceeds of Crime Act sets out a number of processes relating to the confiscation of property, many of which relate to whether a person has, or is suspected of having, committed a 'serious offence'. If a person is reasonably suspected of committing a 'serious offence', a court is able to make a restraining order against property under a person's effective control and to forfeit this property unless the person can establish that, on the balance of probabilities, it was not derived from unlawful activity.[17] In addition, if a person is convicted of a serious offence, all property subject to a restraining order will automatically forfeit six months after the date of conviction unless the person can prove it was not the proceeds of unlawful activity or an instrument of a serious offence.[18]

1.86 What constitutes a 'serious offence' is defined to include offences subject to a certain period of imprisonment involving unlawful conduct that causes a 'benefit' to a person of a certain value.[19] What constitutes a 'benefit' includes a service or

17 *Proceeds of Crime Act 2002*, sections 18, 29, 47 and 73.

18 *Proceeds of Crime Act 2002*, sections 29, 92 and 94. See summary of this from explanatory memorandum, p. 74.

19 *Proceeds of Crime Act 2002*, section 338 (definition of 'serious offence').

advantage.[20] Schedule 4 of the bill seeks to amend the Act to provide that an 'advantage' includes a 'financial advantage', which includes 'the avoidance, deferral or reduction of a debt, loss or liability'.[21] The bill seeks to make these changes retrospectively, such that a benefit derived by a person at any time prior to the commencement of these provisions would be subject to this revised definition.[22]

1.87 In addition, the bill[23] seeks to amend the definition of 'serious offence' to include offences of failing to comply with coercive information-gathering powers under the Proceeds of Crime Act, such as failure to attend an examination, offences relating to appearance at an examination and offences of giving false or misleading answers or documents.[24] As such, a failure to comply with the information gathering powers could, itself, lead to a person being subject to the enhanced restraint and confiscation powers in the Proceeds of Crime Act.

Preliminary international human rights legal advice

Right to a fair trial and fair hearing (including prohibition on retrospective criminal law)

1.88 The expansion of the Proceeds of Crime Act to cover additional conduct and offences, may engage and limit the right to a fair trial and fair hearing.[25] These rights are concerned with procedural fairness, and encompass notions of equality in proceedings, the right to a public hearing and the requirement that hearings are conducted by an independent and impartial body. Specific guarantees of the right to a fair trial in relation to a criminal charge include the presumption of innocence,[26] the right not to incriminate oneself,[27] and the guarantee against retrospective criminal laws.[28]

1.89 In particular, the amendments to the definition of what constitutes a 'benefit' would apply retrospectively, such that matters that may not previously have constituted a benefit would now, regardless of when they occurred, be subject to the restraint and forfeiture processes. Article 15 of the International Covenant on Civil and Political Rights prohibits retrospective criminal laws, which requires that laws not impose criminal liability for acts that were not criminal offences at the time they

20 *Proceeds of Crime Act 2002*, section 338 (definition of 'benefit').

21 Schedule 4, items 1–3.

22 Schedule 4, item 4.

23 Schedule 3, item 13 and Schedule 6, item 19.

24 Offences set out at sections 195, 169 and 197A of the *Proceeds of Crime Act 2002.*

25 As protected by articles 14 and 15 of the International Covenant on Civil and Political Rights.

26 International Covenant on Civil and Political Rights, article 14(2).

27 International Covenant on Civil and Political Rights, article 14(3)(g).

28 International Covenant on Civil and Political Rights, article 15(1).

were committed and that the law not impose greater penalties than those which would have been available at the time the acts were done. The prohibition against retrospective criminal law is absolute and may never be subject to permissible limitations.

1.90 In relation to the expansion of a 'serious offence' to include offences relating to failures to comply with coercive information gathering powers under the Proceeds of Crime Act itself, the explanatory memorandum states that law enforcement's efforts to restrain and confiscate criminal assets are being delayed and frustrated by persons who refuse to comply with examinations.[29] It also states that even where criminal penalties for non-compliance can be enforced they may not sufficiently incentivise compliance with an information-gathering power, where the subject of that power is willing to incur a criminal penalty through non-compliance to maximise their chances of retaining illicitly derived property. It states that these proposed amendments will allow authorities to take enhanced restraint and confiscation action where non-compliance occurs.[30] The statement of compatibility does not specify whether expanding the restraint and confiscation powers in this way engages the right to a fair trial and fair hearing.

1.91 In relation to what constitutes a 'benefit' under the Proceeds of Crime Act, the explanatory memorandum states that the amendments are made to clarify 'for abundant caution' that 'benefit' includes the avoidance, deferral or reduction of a debt, loss or liability, by making this explicit in the Act. It notes that a 'financial advantage' could include, for example, the criminal evasion of import duties, excises or taxation. It also states:

> These amendments will reinforce the broad application of the POC Act in ensuring that criminals are not able to benefit in any way from their offending. For example, this would include where a person has incorrectly declared the import of goods (such as tobacco or alcohol) in order to pay lesser excise or import duty, which would allow them to gain a commercial advantage. Similarly, it would cover where a person provides false information to the Australian Taxation Office in order to reduce their tax liability.[31]

1.92 The statement of compatibility states that these amendments do not engage the prohibition on retrospective criminal law, as it states that this prohibition does not extend to civil proceedings, such as that under the Proceeds of Crime Act. It states that the amendments do not change any criminal offences or penalties imposed and do not make any act or omission retrospectively criminal or

29 Explanatory memorandum, pp. 56 and 73.

30 Explanatory memorandum, p. 66. See also p. 57.

31 Explanatory memorandum, p. 59.

retrospectively change penalties for criminal behaviour.[32] However, amending the definition of what constitutes a benefit under the Act may result in some behaviour, which was not previously subject to the Proceeds of Crime Act regime, now being subject to the confiscation and forfeiture regime. If the forfeiture of a person's property could properly be regarded as a penalty, it may be that, as a matter of international human rights law, these processes would constitute a criminal penalty, such that the criminal process rights under the International Covenant on Civil and Political Rights would apply, including the absolute prohibition on retrospective criminal laws.

1.93 The committee has previously raised concerns that the underlying regime established by the Proceeds of Crime Act for the freezing, restraint or forfeiture of property may be considered 'criminal' for the purposes of international human rights law.[33] For example, a forfeiture order may be made against property where (relevantly) a court is satisfied that the property is 'proceeds' of an indictable offence or an 'instrument' of one or more serious offences.[34] The fact a person has been acquitted of an offence with which the person has been charged does not affect the court's power to make such a forfeiture order.[35] Further, a finding need not be based on a finding that a particular person committed any offence.[36]

1.94 The test for whether a matter should be characterised as a 'criminal charge' relies on three criteria:

(a) the domestic classification of the offence;

(b) the nature of the offence; and

(c) the severity of the penalty.[37]

1.95 In relation to (a), it is clear that the forfeiture regime is defined under Australian domestic law as civil in nature. However, the term 'criminal' has an autonomous meaning in human rights law, such that a penalty or other sanction may be 'criminal' for the purposes of the International Covenant on Civil and Political Rights even though it is considered to be 'civil' under Australian domestic law.

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32 Statement of compatibility, p. 105.

33 Parliamentary Joint Committee on Human Rights, *Thirty-First Report of the 44th Parliament* (24 November 2015) pp. 43–44; *Twenty-Sixth Report of the 44th Parliament Report 1 of 2017* (16 February 2017); *Report 2 of 2017* (21 March 2017) p. 6; *Report 4 of 2017* (9 May 2017) pp. 92–93; *Report 1 of 2018* (6 February 2018) pp. 112–122.

34 *Proceeds of Crime Act 2002*, section 49.

35 *Proceeds of Crime Act 2002*, sections 51 and 80.

36 *Proceeds of Crime Act 2002*, section 49(2)(a).

37 For further detail, see the Parliamentary Joint Committee on Human Rights, *Guidance Note 2*: *Offence provisions, civil penalties and human rights* (December 2014).

1.96 In relation to (b), a penalty will likely be considered criminal under international human rights law if it is intended to punish and deter and the penalty applies to the public in general as opposed to being in a particular regulatory or disciplinary context. It is clear that the Proceeds of Crime Act has wide application and applies to general criminal conduct that may occur across the public at large. The Proceeds of Crime Act sets out the objectives of the Act which include 'to punish and deter persons from breaching laws of the Commonwealth or the non-governing Territories'.[38] Accordingly, a core purpose of the Act is to punish and deter.

1.97 Moreover, the Proceeds of Crime Act is structured such that a forfeiture order under the Act is conditional on a person having been convicted of a serious criminal offence, or a court being satisfied on the balance of probabilities that a person has engaged in conduct constituting a 'serious criminal offence'. Such a judgment would appear to entail a finding of 'blameworthiness' or 'culpability' on the part of the respondent, which, having regard to a number of English authorities would suggest that the provision may be criminal in character.[39] In addition, the Canadian courts have considered confiscation, or 'forfeiture proceedings' as being a form of punishment, and characterised them as a 'penal consequence' of conviction.[40]

1.98 In relation to (c), the severity of the penalty, forfeiture orders can involve significant sums of money, sometimes far in excess of any financial penalty that could be applied under the criminal law. For example the Australian Federal Police's 2012-13 Annual Report notes that one single operation resulted in $9 million worth of assets being forfeited.[41]

1.99 This short analysis of the Proceeds of Crime Act suggests that asset confiscation may be considered criminal for the purposes of international human rights law, because of the nature of the offence and the severity of the penalty. Assessing the forfeiture orders under the Proceeds of Crime Act as involving the determination of a criminal charge does not suggest that, in all instances, such measures will be incompatible with human rights – rather, it requires that such measures are demonstrated to be consistent with the criminal process rights under articles 14 and 15 of the International Covenant on Civil and Political Rights.

1.100 In order to assess whether these measures are compatible with the right to a fair trial and fair hearing, further information is required as to:

38 *Proceeds of Crime Act 2002*, section 5(2).

39 See *Goldsmith v Customs and Excise Commissioners* [2001] 1 WLR 16733; *R v Dover Magistrates Court* [2003] Q.B. 1238.

40 *R v Green* [1983] 9 C.R.R. 78; *Johnston v British Columbia* [1987] 27 C.R.R. 206.

41 Australian Federal Police, *Annual Report 2012-13*, 101.

(a) whether the restraint or forfeiture powers that are broadened by the amendments to the definitions of what constitutes a 'benefit' and what is a 'serious offence' may be characterised as 'criminal' for the purposes of international human rights law, having regard to the nature, purpose and severity of those powers; and

(b) the extent to which the provisions are compatible with the criminal process guarantees set out in Articles 14 and 15, including any justification for any limitations of these rights.

Committee view

1.101 The committee notes that these measures seeks to amend the definition of what constitutes a 'benefit' and a 'serious offence' under the Proceeds of Crime Act, which will have the effect of broadening the application of the restraint and forfeiture provisions under that Act.

1.102 The committee considers that the proceeds of crime legislation provides law enforcement agencies with important and necessary tools in the fight against crime. However, the amendments also raise concerns regarding the right to a fair hearing and the right to a fair trial, as although the regime established by the Proceeds of Crime Act for the restraint or forfeiture of property is classified as civil or administrative under domestic law, its content may nevertheless be considered 'criminal' under international human rights law.

1.103 In order to form a concluded view of the human rights implications of this measure, the committee seeks the minister's advice as to the matters set out at paragraph [1.100].

Privilege against self-incrimination

1.104 The Proceeds of Crime Act sets out an extensive coercive information gathering regime, and existing section 271 provides that a person is not excused from giving information or producing a document on the ground that to do so would tend to incriminate them or expose them to a penalty. This thereby abrogates the common law privilege against self-incrimination. Subsection 271(2) provides, however, that the information given; the giving of the document; or 'any information, document or thing obtained as a direct or indirect consequence of giving the information or document' is not admissible against the person in criminal proceedings except in limited circumstances. This provides for both a use and a derivative use immunity. The bill seeks to amend this provision to remove the derivative use immunity, so that anything obtained as a consequence of the

information or documents compulsorily provided by a person could be used against them in a criminal proceeding.[42]

Preliminary international human rights legal advice

Right to a fair trial

1.105 The removal of safeguards as to what evidence can be used against a person in a criminal proceeding engages and limits the right to a fair trial. The right to a fair trial includes the right not to be compelled to testify against oneself or confess guilt.[43] This right may be subject to permissible limitations where the limitation pursues a legitimate objective, is rationally connected to that objective and is a proportionate means of achieving that objective.

1.106 It is noted that the absence of a derivative use immunity could have significant and broad-reaching implications for a person's right not to be compelled to testify against themselves. A person subject to the information gathering powers may be required to answer questions about a specific matter and while that answer itself cannot be used in evidence against the person, the information could be used to find other evidence against the person which could be used against them in a prosecution.[44] This may have the practical effect that the subject had been compelled to testify against and incriminate themselves with respect to related criminal proceedings.

1.107 The statement of compatibility does not recognise that this measure engages and limits the right not to incriminate oneself, and so no assessment of this is provided. The explanatory memorandum explains that the derivative use immunity 'has been removed for operational reasons'.[45] It states that as a number of proceedings, such as criminal proceedings, proceeds of crime proceedings and management of assets by the Official Trustee, are often conducted simultaneously, a defendant could use derivative use immunity to frustrate a prosecution, and it would be a 'very onerous task' to prove the source of prosecution information. It states that the relevant agencies would be required to 'quarantine information and set up strict

42 Schedule 6, item 16.

43 International Covenant on Civil and Political Rights, article 14(3(g).

44 A person subject to an examination order under the Proceeds of Crime Act 2002 could be charged with a criminal offence for failure to attend or answer questions or produce documents, subject to up to two years imprisonment (see section 195 and196). The United Nations Human Rights Committee has relevantly directed that in considering any abrogation of the privilege against self-incrimination, regard should be had to any form of compulsion used to compel a person to testify against themselves. See, United Nations Human Rights Committee, *General Comment No. 13: Article 14 (Administration of justice)* (1984) [14].

45 Explanatory memorandum, p. 70.

information-sharing protocols' in anticipation of such an application, which is not desirable.[46]

1.108 However, 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. Administrative convenience, in and of itself, is unlikely to be sufficient to constitute a legitimate objective for the purposes of international human rights law.

1.109 Further information is required in order to assess the compatibility of this measure with the right to a fair trial, in particular:

(a) whether there is reasoning or evidence that establishes that the stated objective addresses a pressing or substantial concern or whether the proposed changes are otherwise aimed at achieving a legitimate objective; and

(b) whether the measure is a proportionate limitation on the right to a fair trial, including whether it is the least rights restrictive way of achieving the stated objective (noting the possibility of setting up quarantining of information and information-sharing protocols).

Committee view

1.110 The committee notes that this measure would remove an existing derivative use immunity, so that anything obtained as a consequence of information or documents compulsorily provided by a person in a proceeds of crime proceeding could be used against them in a criminal proceeding.

1.111 The committee notes that this engages and limits the right to a fair trial, specifically the right not to be compelled to testify against oneself or confess guilt. This right may be permissibly limited if it is shown to be reasonable, necessary and proportionate.

1.112 In order to form a concluded view of the human rights implications of this measure, the committee seeks the minister's advice as to the matters set out at paragraph [1.109].

Disclosure of information to foreign countries for investigating or prosecuting offences

1.113 The Proceeds of Crime Act sets out an extensive coercive information gathering regime, and section 266A sets out what information obtained under that process can be disclosed and to whom. The bill seeks to amend this provision to provide that this information can be disclosed to the Mutual Assistance

46 Explanatory memorandum, p. 70.

Department[47] for the purposes of it facilitating its functions under a number of Acts, relating to providing mutual assistance to foreign countries and extradition.[48] It also provides that the information could be disclosed to a foreign country with functions corresponding to the functions of the Mutual Assistance Department for the purposes of that country assisting in the prevention, investigation or prosecution of a relevant offence, or assisting in the identification, location, tracing, investigation or confiscation of proceeds or instruments of crime.[49]

Preliminary international human rights legal advice

Right to life and prohibition against torture and other cruel, inhuman and degrading treatment or punishment

1.114 By authorising the disclosure of identifying and personal information overseas to foreign governments in circumstances relating to the investigation and prosecution of offences, where the information might be shared with a country that has not abolished the death penalty, this measure may engage the right to life. The right to life imposes an obligation on state parties to protect people from being killed by others or from identified risks.[50] The United Nations (UN) Human Rights Committee has made clear that international law prohibits the provision of information to other countries that may be used to investigate and convict someone of an offence to which the death penalty applies.[51] In addition, the sharing of personal information overseas, in circumstances relating to the investigation of offences, could risk a person being exposed to torture or cruel, inhuman or

47 Schedule 6, item 18 would insert a new definition into the *Proceeds of Crime Act 2002* of 'Mutual Assistance Department' to mean the Department administered by the Minister who administers the *Mutual Assistance in Criminal Matters Act 1987* (currently the Attorney-General's Department).

48 Schedule 6, item 9, proposed item 2E in the table in subsection 266A(2).

49 Schedule 6, item 9, proposed item 2F in the table in subsection 266A(2).

50 International Covenant on Civil and Political Rights, article 6. While the ICCPR does not completely prohibit the imposition of the death penalty, international law prohibits states which have abolished the death penalty (such as Australia) from exposing a person to the death penalty in another state.

51 In this context, the United Nations Human Rights Committee stated in 2009 its concern that Australia lacks 'a comprehensive prohibition on the providing of international police assistance for the investigation of crimes that may lead to the imposition of the death penalty in another state', and concluded that Australia should take steps to ensure it 'does not provide assistance in the investigation of crimes that may result in the imposition of the death penalty in another State'. United Nations Human Rights Committee, *Concluding observations on the fifth periodic report of Australia*, CCPR/C/AUS/CO/5 (2009) [20].

degrading treatment or punishment. Under international law the prohibition on torture is absolute and can never be subject to permissible limitations.[52]

1.115 The statement of compatibility recognises that this measure may engage the right to life. However, it states that the risk of the right to life being engaged is mitigated by existing legislative requirements in the *Mutual Assistance in Criminal Matters Act 1987* (Mutual Assistance Act) which it states prevents the provision of assistance to a foreign country where the death penalty may be imposed.[53] However, while the Mutual Assistance Act provides that a request by a foreign country for assistance under the Act must be refused if the offence is one in respect of which the death penalty may be imposed, this prohibition will not apply if 'the Attorney-General is of the opinion, having regard to the 'special circumstances' of the case, that the assistance requested should be granted'.[54] The statement of compatibility notes that the explanatory memorandum to the Mutual Assistance Act when it was a bill, provided that the special circumstances may include 'where the information would assist the defence, or where the foreign country undertakes not to impose the death penalty'.[55] However, there is nothing in the legislation itself to restrict the Attorney-General's discretion in this way.

1.116 The statement of compatibility does not recognise that the measure may also engage the prohibition on torture or cruel, inhuman or degrading treatment or punishment, and so provides no assessment as to whether the measure may risk engaging this prohibition. It is noted that the Mutual Assistance Act provides that a request by a foreign country for assistance shall be refused if the Attorney-General is of the opinion that 'there are substantial grounds for believing that, if the request were granted, the person would be in danger of being subjected to torture'.[56] While this is consistent with Australia's obligations under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,[57] it may not be consistent with the prohibition in the International Covenant on Civil and Political Rights, which provides that no one shall be subject to torture or to cruel, inhuman or other degrading treatment or punishment.[58] This broader application means that measures that may not rise to the level of torture are also prohibited if it would

52 Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, article 4(2); United Nations Human Rights Committee, *General Comment 20: Article 7* (1992) [3].

53 Statement of compatibility, p. 98.

54 *Mutual Assistance in Criminal Matters Act 1987,* subsection 8(1A).

55 Statement of compatibility, p. 98.

56 *Mutual Assistance in Criminal Matters Act 1987,* paragraph (1)(ca).

57 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, article 3.

58 International Covenant on Civil and Political Rights, article 7.

constitute other cruel, inhuman or degrading treatment or punishment. As the Mutual Assistance Act does not reference this other type of treatment, it is not clear if assistance might be provided even if there were substantial grounds for considering that to do so might subject the person to cruel, inhuman or degrading treatment or punishment.

1.117 The committee has previously raised concerns regarding the human rights compatibility of powers allowing for information sharing overseas.[59] It has noted the importance of ensuring there are adequate and effective safeguards in place to protect the right to life and right not to be subjected to torture, or cruel, inhuman, or degrading treatment or punishment. Of particular relevance is whether there is legislation or guidelines in place requiring that information is not shared overseas in circumstances that could expose a person to the death penalty or to torture, or cruel, inhuman, or degrading treatment or punishment. The process for authorising disclosures and the scope of personal information that may be disclosed is also relevant to the compatibility of the measures with these rights.

1.118 Further information is required in order to assess the compatibility of these measures with the right to life and the prohibition on torture and cruel, inhuman and degrading treatment or punishment, in particular:

- the adequacy of the protections in the Mutual Assistance Act in ensuring that information is not disclosed to a foreign country in circumstances that could expose a person to the death penalty, and if there are any other relevant safeguards or guidelines; and
- what safeguards are in place to ensure that information would not be disclosed to a foreign country in circumstances that could expose a person to cruel, inhuman or degrading treatment or punishment.

Committee view

1.119 The committee notes that the bill provides that information obtained under the information gathering powers of the *Proceeds of Crime Act 2002* can be disclosed for the purposes of providing mutual assistance to a foreign country to investigate or prosecute a person.

1.120 The committee notes that where the relevant foreign country has not abolished the death penalty this may engage the right to life. In addition, the sharing of personal information overseas, in circumstances relating to the investigation of offences, could, in some circumstances, risk a person being exposed to torture or cruel, inhuman or degrading treatment or punishment.

59 See, for example, Parliamentary Joint Committee on Human Rights, *Report 10 of 2018* (18 September 2018) pp. 78-80; *Report 2 of 2019* (2 April 2019) pp 12-13; *Report 5 of 2017* (14 June 2017) pp. 39-41; *Report 8 of 2017* (18 August 2017) pp. 83-91.

1.121 In order to form a concluded view as to whether these rights are engaged and limited, the committee seeks the minister's advice as to the matters set out at paragraph [1.118].

Higher Education Support Amendment (Job-Ready Graduates and Supporting Regional and Remote Students) Bill 2020[1]

Purpose	This bill seeks to amend the *Higher Education Support Act 2003* to: • amend the Commonwealth Grants Scheme funding clusters and the Commonwealth contribution amounts; • amend the maximum student contribution amounts for a place in a unit of study; • provide transition arrangements to implement the Indigenous, Regional and Low Socio-Economic Status Attainment Fund; and • extend various quality and accountability requirements to all higher education providers and introduce new student protections.
Portfolio	Education, Skills and Employment
Introduced	House of Representatives, 26 August 2020
Right	Education; equality and non-discrimination
Status	Seeking additional information

Increasing the cost of student contribution amounts for certain disciplines

1.122 Schedule 1 of the bill seeks to amend the funding clusters into which higher education courses are arranged under the *Higher Education Support Act 2003* (Higher Education Support Act), and alter the Commonwealth contribution amount associated with those clusters.[2] It would also establish demand driven funding for Indigenous students from rural and remote areas studying at university.[3]

1.123 Schedule 2 of the bill seeks to provide for new, higher maximum student contribution amounts payable across various higher education courses, namely: Law;

1 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Higher Education Support Amendment (Job-Ready Graduates and Supporting Regional and Remote (Students) Bill 2020, *Report 11 of 2020*; [2020] AUPJCHR 135.

2 Schedule 1, item 14, proposed section 33-10.

3 Schedule 1, item 9, proposed section 30-27.

Accounting; Administration; Economics; Commerce; Communications; Society and Culture; and Visual and Performing Arts.[4] In other areas, the maximum student contribution amount would decrease (for example, Nursing; Education; Clinical Psychology; Engineering; and Agriculture).

Preliminary international human rights legal advice

Right to education

1.124 By altering the student contribution amounts for Commonwealth supported students in higher education studies, these measures engage the right to education. Article 13 of the International Covenant on Economic, Social and Cultural Rights protects the right to education. This requires that State parties provide education which is both available and accessible, including being economically accessible. With a view to achieving the full realisation of the right to education, article 13 requires that:

> Higher education shall be made equally accessible to all, on the basis of capacity, by every appropriate means, and in particular by the progressive introduction of free education.[5]

1.125 Reducing the cost of some studies would appear to promote the right to education. For example, under this bill the cost of a unit in Education would decrease from $6,804 to $3,950.[6]

1.126 However, the bill proposes that the cost of undertaking study in other fields would increase. For example, the yearly contribution required by a student studying a unit falling within the 'Society and Culture' cluster (such as a Bachelor of Arts) would increase from $6,804 to $14,500.[7] Australia has obligations to progressively introduce free higher education by every appropriate means. It has a specific and continuing obligation 'to move as expeditiously and effectively as possible' towards the full realisation of article 13, including progressive introduction of free higher education.[8] It also has a corresponding duty to refrain from taking retrogressive

4 Schedule 2, Part 1, Division 1, item 5, proposed section 93-10.

5 In relation to primary education, see UN Committee on Economic, Social and Cultural Rights, *General Comment 11: Plans of action for primary education (art.14)* (1998).

6 Schedule 2, Part 1, Division 1, item 5, proposed section 93-10.

7 See, explanatory memorandum p. 38. A unit of study correlates to an 'Equivalent Full-Time Student Load' (EFTSL). For example, if one law course constituted an EFTSFL of 0.125, the cost of the individual course would currently be calculated at $11,355 x 0.125. See, StudyAssist, *Student contribution amounts*, https://www.studyassist.gov.au/help-loans-commonwealth-supported-places-csps/student-contribution-amounts (accessed 15 September 2020).

8 See United Nations Committee on Economic, Social and Cultural Rights, *General Comment 13: the Right to education* (1999) [44].

measures, or backwards steps, in relation to the realisation to the right to education.[9] Increasing the cost of certain fields of higher education study would constitute a retrogressive step in relation to the realisation of the right to education, in that it would move backwards away from the realisation of free higher education for some students (noting the measures reduce the cost of education for other students). The United Nations Committee on Economic, Social and Cultural Rights has stated that the introduction of fees and increases in existing fees for education is a deliberate retrogressive step.[10] Retrogressive measures, a type of limitation, may be permissible under international human rights law providing that they address a legitimate objective, are rationally connected to that objective and are a proportionate way to achieve that objective.[11]

1.127 The United Nations Committee on Economic, Social and Cultural Rights has also stated that:

> If any deliberately retrogressive measures are taken, the State party has the burden of proving that they have been introduced after the most careful consideration of all alternatives and that they are duly justified by reference to the totality of the rights provided for in the Covenant, in the context of the full use of the maximum available resources of the State party. The Committee will look carefully at whether: (a) there was reasonable justification for the action; (b) alternatives were comprehensively examined; (c) there was genuine participation of affected groups in examining the proposed measures and alternatives; (d) the measures were directly or indirectly discriminatory; (e) the measures will

9 See, United Nations Committee on Economic, Social and Cultural Rights, *General Comment 13: the Right to education* (1999).

10 United Nations Committee on Economic, Social and Cultural Rights*, Concluding observations on Spain*, UN Doc E/C.12/ESP/CO/5 (6 June 2012) [6]; *Concluding observations on Germany*, UN Doc E/C.12/DEU/CO/5 (12 July 2011) [7]; *Concluding observations on Poland*, UN Doc E/C.12/POL/CO/5 (2 December 2009) [7]; *Concluding observations on Luxembourg*, UN Doc E/C.12/1/Add. 86 (26 June 2003) [5]; *Concluding Observations on Germany*, UN Doc E/2002/22 (2001) [671] and [689]; *Concluding Observations on Luxembourg*, UN DOC. E/2004/22 (2003) [103]; *Concluding Observations on Bulgaria*, UN DOC. E/C.12/1/Add.37 (1999) [3]; and *Concluding Observations on Canada*, UN DOC. E/C.12/1/Add.31 (10 December 1999) [7].

11 See, United Nations Committee on Economic, Social and Cultural Rights, *General Comment 13: the Right to education* (1999) [44]-[45].

> have a sustained impact on the realization of the right…and (f) whether there was an independent review of the measures at the national level.[12]

1.128 The statement of compatibility states that the measure does not directly restrict access to higher education as the students affected by these changes are able to defer their student contribution repayments through the High Education Loan Program (HELP) debt scheme.[13] The capacity to defer student debt repayments via the HELP debt scheme is relevant to the affordability of higher education, as it enables some students to undertake higher education without paying for it upfront. However, an increase to the *size* of that debt would appear to constitute a retrogressive measure, and is directly relevant in assessing the accessibility of such education. A HELP debt is required to be repaid in accordance with a person's earning level, and is indexed annually until it is entirely paid back.[14] In this respect, the explanatory materials do not set out any evidence demonstrating that these proposed amendments would *not* have the effect of deterring would-be students from undertaking higher education studies.[15]

1.129 With respect to whether the measure seeks to achieve a legitimate objective, the statement of compatibility states that this measure is intended to maximise efficiency in Commonwealth spending for higher education, and support a significant expansion in the number of Commonwealth supported places to improve access to university.[16] The explanatory memorandum further states that these amendments (coupled with the proposed amendments to the Commonwealth contribution amounts in Schedule 1) better align funding for Commonwealth supported places to the cost of delivering higher education, and ensure funding is directed towards areas of national priority and employment growth.[17] Supporting the expansion in the

12 United Nations Committee on Economic, Social and Cultural Rights, *General Comment 19: the right to social security* (2008) [42]. See also *General Comment 13: the Right to education* (1999) [45] which stated '[i]f any deliberately retrogressive measures are taken, the State party has the burden of proving that they have been introduced after the most careful consideration of all alternatives and that they are fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the State party's maximum available resources.'

13 Statement of compatibility, pp. 12-13.

14 Indexation of HELP debts commences 11 months after the debt has first accrued. Indexation maintains the real value of the loan by adjusting it in line with changes to the cost of living, as measured by the Consumer Price Index. In June 2020, HELP debts were indexed at a rate of 1.8 per cent. For example, a HELP debt of $30,000 was increased by $540 to $30, 540.

15 Noting that some studies indicate that an accumulation of debt may deter students, and particularly those from low socio-economic backgrounds. See, for example, Usher, Orr and Wespel, 'Do changes in cost-sharing have an impact on the behaviour of students and higher education institutions?', Report for European Union, United Kingdom, May 2014, 12.

16 Statement of compatibility, pp. 12-13.

17 Explanatory memorandum, p. 2.

number of Commonwealth supported places to improve access to university is likely to constitute a legitimate objective for the purposes of international human rights law. However, it is noted that this bill does not itself appear to provide for an expansion in the number of Commonwealth supported places. In addition, it is not clear that better aligning funding to the cost of delivering education, would address a pressing and substantial concern such that this would constitute a legitimate objective. There are also questions as to whether the measures are rationally connected to (that is, effective to achieve) that objective.[18] Similarly, ensuring that funding is directed towards areas of national priority and employment growth will only constitute a legitimate objective, for the purposes of international human rights law, if there is evidence that this addresses a pressing and substantial concern.

1.130 In respect of proportionality, it is noted that these changes will adversely impact students of some disciplines, while advantaging others. Noting the criteria set out by the United Nations Committee on Economic, Social and Cultural Rights if retrogressive measures are taken,[19] it is unclear whether, in deciding on this change to the funding, any alternatives were examined, and whether any persons who would be affected by these measures were consulted in regards to the proposal. It is also not clear if consideration was given as to whether these measures would indirectly discriminate against some students, such as those from lower socio-economic groups, and if the measure would have a sustained impact on the realisation of the right to education.

1.131 Further information is required in order to assess the compatibility of these proposed measures with the right to education, and in particular:

(a) evidence demonstrating a pressing and substantial concern which would justify an increase in the cost of some higher education studies;

(b) evidence indicating that the proposed increases in student contributions for certain courses would *not* have the effect of deterring future students from undertaking those studies, including students from lower socio-economic backgrounds, or students from regional and remote areas;

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18 For example, in 2016 it was reported that the reasonable cost of delivering a Society and Culture unit at an 'equivalent full-time student load' (equating to a year of full-time study) was broadly equivalent to that of delivering an Education unit (see Deloitte Access Economics, *Cost of Delivery of Higher Education: Final Report for the Department of Education and Training* (2016) p. iii). However, this bill proposes decreasing the student contribution for an Education unit by 42 per cent, but would increase the student contribution for a unit in Society and Culture by 213 per cent.

19 United Nations Committee on Economic, Social and Cultural Rights, *General Comment 19: the right to social security* (2008) [42]. See also *General Comment 13: the Right to education* (1999) [45].

(c) whether, and in what manner, persons who would be impacted by the proposed student contribution increases (in particular, current and future students, and universities) were consulted about the proposed amendments;

(d) what, if any, alternatives were considered to amending the student contribution amounts in this manner;

(e) whether the proposed student contribution increases may have the effect of being discriminatory (for example, against students from lower socio-economic backgrounds or women);

(f) whether an independent review of the proposed measures has been undertaken; and

(g) what, if any, other safeguards are in place to ensure that the proposed amendments to student contribution amounts, and particularly the proposed increases to some amounts, constitute a proportionate limitation on the right to education for prospective higher education students.

Committee view

1.132 The committee notes that the bill would amend the maximum student contribution amounts for a place in a unit of study. This would include decreasing the cost of several areas of study, and increasing the cost of other areas of study.

1.133 The committee notes that where these measures will lead to a decrease in the cost of undertaking studies, these measures will promote the right to education. The committee also notes that, where these measures would cause some studies to become more expensive, they engage and may constitute a retrogressive measure in relation to the right to education. The committee notes that retrogressive measures may be permissible if they are shown to be reasonable, necessary and proportionate.

1.134 The committee notes that these measures are intended to: maximise efficiency in Commonwealth spending for higher education; support a significant expansion in the number of Commonwealth supported places to improve access to university; better align funding for Commonwealth supported places to the cost of delivering higher education, and ensure funding is directed towards areas of national priority and employment growth. However, the committee notes some questions remain as to the proportionality of the measure.

1.135 In order to form a concluded view of the human rights implications of this bill, the committee seeks the minister's advice as to the matters set out at paragraph [1.131].

Minimum unit completion rate

1.136 In addition, Schedule 4 of the bill seeks to amend the Higher Education Support Act to require a student to maintain an overall pass rate of 50 per cent to remain eligible for Commonwealth assistance. In particular it would establish a 'minimum unit completion rate' for Commonwealth supported students, providing that a student may not receive Commonwealth support if they have failed more than half of the relevant units of a course of study.[20]

Preliminary international human rights legal advice

Right to education and equality and non-discrimination

1.137 Implementing a minimum unit completion rate which a student must meet in order to continue to be enrolled as a Commonwealth supported student may engage and limit the right to education, as discussed from paragraph [1.124] to [1.127]. While failing to meet a minimum unit completion rate would not necessarily result in a student's removal from the relevant course of study, it would appear that the student would no longer be eligible to receive a Commonwealth loan in order to undertake the study, and would have to pay for their studies upfront. This may have the effect, for a large number of students, of them not being able to afford to undertake the course of study and preventing them from accessing higher education.

1.138 In addition, it may be that these measures may have a disproportionate impact on some students for whom studying at university may present particular challenges (for example, students from regional areas), and may therefore engage the right to equality and non-discrimination.[21] 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).[22] 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.[23]

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20 Schedule 4, Part 2, Division 1, item 40, proposed section 36-13.

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

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

23 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].

1.139 The explanatory memorandum explains that where the course in question leads to an award of a bachelor degree or higher qualification, once a person has undertaken at least eight units in the course, they must successfully complete at least half of the units in the course (including previous ones) to continue to be a Commonwealth supported student in relation to any subsequent unit in the course.[24] A student undertaking a sub-bachelor qualification such as a Diploma, Advanced Diploma or Associate Degree,[25] would be required to meet a 4-unit minimum unit completion rate.

1.140 The statement of compatibility does not identify that this particular measure engages the right to education, or may engage the right to equality and non-discrimination.[26] The explanatory memorandum states that this measure will ensure that students are not burdened with a debt for studies from which they have derived little or no benefit, and ensure that students are enrolling in appropriate courses for their aptitude and interests.[27] A legitimate objective is one that is necessary and addresses an issue of public or social concern that is pressing and substantial enough to warrant limiting the right. If the objective of the measure is to ensure students are not burdened with debt for courses for which they derive limited benefit, this may be capable of constituting a legitimate objective. However, in order to establish whether this is indeed the case, further information is required as to whether there is a pressing and substantial concern which gives rise to the need for the specific measures.

1.141 Furthermore, it must also be demonstrated that any limitation on a right has a rational connection to the objective sought to be achieved. The key question is whether the relevant measure is likely to be effective in achieving the objective being sought. In this regard, no evidence has been provided to demonstrate that implementing a minimum unit completion rate would be effective to ensure students are not burdened with debt for courses for which they derive limited benefit, particularly noting that the rate would appear to take effect from the point at which a person first commences a higher education course. In particular, it is not clear that every student that fails this amount of units in their first year has no aptitude or interest in the course. It is conceivable that some students who may struggle in their

24 It would appear, therefore, that where the student failed to meet the minimum unit completion rate for one course they could then withdraw from that course of study, and go on to undertake a different course of study, enrolled as a Commonwealth supported student, and subject to a new 8-unit minimum unit completion rate.

25 See, *Higher Education Support Act 2003*, section 1; and *Tertiary Education Quality and Standards Agency Act 2011*, section 5 regarding the definitions of a 'higher education award'.

26 The statement of compatibility acknowledges other aspects of schedule 4 may both promote and limit the right to education, but does not address this particular measure (see pp. 11–14).

27 Explanatory memorandum, p. 57.

first year of a course may go on to succeed, and as such, it may not be rationally connected to the objective of ensuring such students are not burdened with a debt for a course for which they do not have the aptitude or interest, to cut off their Commonwealth funding.

1.142 Further, with respect to proportionality, it is noted that the Higher Education Support Act currently provides that where a higher education provider is satisfied that 'special circumstances' apply to a Commonwealth supported student who has not completed the requirements for a unit of study, that unit will not be counted towards the number of units which they have not successfully completed.[28] The Act provides that 'special circumstances' refer to circumstances which are beyond a person's control, do not make their full impact on the person until on or after the census date for a course, and make it impracticable for the person to complete the requirements for the unit.[29] The bill proposes that a unit would not be counted towards the number of units that a person has not successfully completed if the higher education provider has determined that special circumstances did apply to a particular student.

1.143 However, it would appear that this 'special circumstance' exemption is applied only in limited circumstances.[30] For example, in April 2019, the Administrative Appeals Tribunal (AAT) held that a student who had consumed illicit drugs which caused drug induced psychosis, was responsible for both the act of consuming the drugs, and the psychotic reaction.[31] The judgment also noted that the student: had previously attempted self-harm and been admitted to hospital; had experienced a recent relationship break-up; was dealing with her parents' recent separation and estrangement from one parent; and that she was working while studying. However, it held that special circumstances did not apply to this student, such that she could withdraw from her university courses after the census date without penalty. Further, in 2017, the AAT held that a student had failed to adduce sufficient evidence of his father's chronic medical conditions and the impact this had

28 *Higher Education Support Act 2003*, section 36-21 and subsection 36-13(2). See also Administration Guidelines 2012, Chapter 3.

29 Higher Education Support Act, section 36-21.

30 In *Killen and Secretary, Department of Education and Training* [2018] AATA 774 (8 February 2018) [22], the tribunal noted that, pursuant to the Higher Education Support Act Administration Guidelines 2012, circumstances beyond a student's control must be 'unusual, uncommon or abnormal'. This would not include, for example, illicit drug use (see *PVQQ and Secretary, Department of Education* [2019] AATA 659 (5 April 2019) [58]). Further, in *Zabaneh and Secretary, Department of Education and Training* [2016] AATA 569 [46] the tribunal held that an assessment of whether it would be 'impracticable' for a student to complete a unit of study means that it is 'not able to be done', not merely that it would be difficult to do.

31 *PVQQ and Secretary, Department of Education* [2019] AATA 659 (5 April 2019).

on his capacity to undertake studies to establish special circumstances.[32] The 'special circumstance' exemption would appear, therefore, to provide a limited exemption from the requirement to successfully pass half of a student's studies in their first year, and would not necessarily provide sufficient flexibility in relation to the challenges students may experience in undertaking their first year of studies. It is not clear whether any further flexibility would exist under the proposed minimum unit completion rate to treat individual cases differently, to exempt persons from this minimum unit completion rate, or otherwise make concessions for students, either on an individual basis or with respect to student cohorts.[33]

1.144 In addition, it is unclear whether consideration was given as to whether these measures would indirectly discriminate against some students, such as those from lower socio-economic groups. As the minimum unit completion rate would apply from a student's first year of higher education study, it may have a disproportionate impact on some more vulnerable students for whom undertaking higher education is associated with added challenges. This may include: rural students moving away from home for the first time; Indigenous students; students who are the first in their family to attend university; students from low socio-economic groups, including students who have to work to support themselves through study; students with disability, including mental health issues; students with caring responsibilities (in particular, women); and students whose first language is not English.[34] The statement of compatibility does not identify that this right may be engaged by these proposed measures, and so no information is provided.

1.145 Further information is required in order to assess the compatibility of this proposed measure with the right to education and the right to equality and non-discrimination, and in particular:

(a) whether there is reasoning or evidence that establishes that the stated objective addresses a pressing or substantial concern or whether the proposed changes are otherwise aimed at achieving a legitimate objective;

32 *Currie and Secretary, Department of Education and Training* [2017] AATA 1431 (1 September 2017).

33 For example, it is not clear whether students who will be significantly impacted by the effects of the COVID-19 pandemic in the future, in terms of undertaking their studies, would be subject to a minimum unit completion rate, or be exempt from it.

34 See, for example, University of Melbourne Centre for the Study of Higher Education, *The first year experience in Australian universities: findings from a decade of national studies* (Report for the Department of Education, Science and Training) (2005) pp. 67-78; and The National Centre of Excellence in Youth Mental Health, *Under the radar: the mental health of Australian university students* (2017).

(b) how the measure is rationally connected to (that is, effective to achieve) that objective;

(c) whether, beyond the existing 'special circumstance' provision in the Higher Education Support Act, any further flexibility would exist under the proposed minimum unit completion rate to treat individual cases differently, to exempt persons from this minimum unit completion rate, or otherwise make concessions for students, either on an individual basis or with respect to student cohorts;

(d) whether and in what manner, persons who would be impacted by the proposed introduction of a minimum unit completion rate (in particular, current and future students, and universities) were consulted about the proposed amendments;

(e) what, if any, alternatives were considered to introducing a minimum unit completion rate;

(f) whether a minimum unit completion rate may have the effect of being discriminatory (for example, against students from lower socio-economic backgrounds);

(g) whether an independent review of the proposed measures was undertaken; and

(h) what, if any, safeguards are in place to ensure that the proposed introduction of a minimum unit completion rate constitutes a proportionate limitation on the right to education (for example, is there a process to consider individual circumstances before financial assistance is removed).

Committee view

1.146 The committee notes that the bill would require a student to maintain an overall pass rate of 50 per cent to remain eligible for Commonwealth assistance in relation to higher education.

1.147 The committee notes that requiring some students to pay for their higher education degree up-front engages and may limit the right to education. The committee notes that limitations on this right may be permissible if they are shown to be reasonable, necessary and proportionate.

1.148 The committee notes that this measure is intended to ensure that students are not burdened with a debt for studies from which they have derived little or no benefit, and to ensure that students are enrolling in appropriate courses for their aptitude and interests.

1.149 In order to form a concluded view of the human rights implications of this bill, the committee seeks the minister's advice as to the matters set out at paragraph [1.145].

National Commissioner for Defence and Veteran Suicide Prevention Bill 2020[1]

Purpose	This bill seeks to establish the National Commissioner for Defence and Veteran Suicide Prevention as an independent statutory office holder within the Attorney-General's portfolio
Portfolio	Attorney-General
Introduced	House of Representatives, 27 August 2020
Rights	Life; health; just and favourable conditions at work, privacy; effective remedy and fair trial
Status	Seeking additional information

Information gathering powers

1.150 The bill would establish the National Commissioner for Defence and Veteran Suicide Prevention (the Commissioner) who would have the function of inquiring into the circumstances of defence and veteran deaths by suicide, making findings and recommendations following such inquiries and promoting understanding of suicide risks for defence members and veterans. In order to do this it would give the Commissioner a number of inquiry powers, which they would be empowered to use of their own initiative.[2] Part 3 of the bill would provide the Commissioner with broad information-gathering powers, including the power to compel the production of documents and written statements, and summon persons to attend public or private hearings and give evidence under oath or affirmation. This would include the capacity for the Commissioner to compel the disclosure of information protected by legal professional privilege.[3] Part 4 of the bill would establish a series of offences and penalties for failure to comply with these powers, and Part 5 provides that the Commissioner and eligible judges have, when performing or exercising functions or powers under this Act, the same protection and immunity as a Justice of the High Court.[4]

1 This entry can be cited as: Parliamentary Joint Committee on Human Rights, National Commissioner for Defence and Veteran Suicide Prevention Bill 2020*, Report 11 of 2020*; [2020] AUPJCHR 136.

2 Part 3, subclause 26(2).

3 Subclauses 30(5) and 32(5).

4 Clause 64.

Preliminary international human rights legal advice

Rights to life, health, just and favourable conditions at work, privacy, effective remedy and fair trial

1.151 The establishment of a Commissioner which is intended to support the prevention of defence members and veteran deaths by suicide, and to make recommendations and findings to improve the wellbeing of defence members and veterans into the future, promotes a number of human rights. This includes promoting the right to life,[5] health[6] and safe and healthy working conditions for defence members.[7]

1.152 However, by providing the Commissioner with coercive evidence-gathering powers, including the power to compel the production of documents and the provision of evidence, and to cause property to be searched, and allowing the Commissioner to use and disclose this information, these measures also engage and limit the right to privacy. The right to privacy prohibits arbitrary and unlawful interferences with an individual's privacy, family, correspondence or home.[8] This includes a requirement that the state does not arbitrarily interfere with a person's private and home life. A private life is linked to notions of personal autonomy and human dignity. It includes the idea that individuals should have an area of autonomous development; a 'private sphere' free from government intervention and excessive unsolicited intervention by others. The right may be permissibly limited, where it pursues a legitimate objective, is rationally connected to that objective, and proportionate.

1.153 Providing the Commissioner with the same protections and immunities as a Justice of the High Court also engages and may limit the right to an effective remedy. The right to an effective remedy requires states parties to ensure access to an effective remedy for violations of human rights.[9] This may take a variety of forms, such as prosecutions of suspected perpetrators or compensation to victims of abuse. While limitations may be placed in particular circumstances on the nature of the remedy provided (judicial or otherwise), states parties must comply with the fundamental obligation to provide a remedy that is effective.[10]

1.154 The bill would enable the Commissioner to:

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5 International Covenant on Civil and Political Rights, article 2.

6 International Covenant on Economic, Social and Cultural Rights, article 12.

7 International Covenant on Economic, Social and Cultural Rights, article 7.

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

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

10 See UN Human Rights Committee, *General Comment 29: States of Emergency (Article 4)* (2001) [14].

- compel any person to produce information in writing;[11]
- require any person to attend a hearing and give evidence under oath or affirmation;[12]
- authorise searches of property in order to obtain information;[13]
- compel the production of information which may be subject to legal professional privilege;[14]
- disclose information they had obtained to a range of bodies, including the Australian Federal Police, state and territory police, and the Director of Public Prosecutions.[15] They could do so where satisfied that the information would assist those entities to perform any of their functions or exercise any of their powers.

1.155 In addition, Commonwealth and state and territory bodies or office holders could, on request or of their own initiative, disclose information (including personal information) to the Commissioner for the purposes of assisting the Commissioner in the exercise of their powers or functions.[16]

1.156 The statement of compatibility identifies that these measures engage the right to privacy.[17] It notes that these broad information gathering powers will ensure the Commissioner 'can oversee full and genuine inquiries into the factors relevant to defence member and veteran deaths by suicide'.[18] Noting that the overall objective of implementing a framework for inquiring into, and in future preventing, defence member and veteran death by suicide promotes numerous human rights, having such powers to identify structural concerns would constitute a legitimate objective for the purposes of international human rights law, and the measures would appear to be rationally connected to this objective. With respect to proportionality, the statement of compatibility outlines several safeguards curtailing the manner in which personal information may be handled. These include:

- the principle that the Commissioner should take a 'trauma-informed and restorative approach' to their functions;[19]

11 Part 3, clause 32.

12 Part 3, clause 30.

13 Part 3, clause 36.

14 Part 4, Division 2, clause 48.

15 Part4, Division 4, clause 56.

16 Part 3, clauses 40-41.

17 Statement of compatibility, pp. 12-13.

18 Statement of compatibility, p. 6.

19 Part 2, Division 2, subclause 12(2).

- the Commissioner's power to direct that all or part of a hearing be held in private where personal and private information may be disclosed,[20] and to issue non-publication directions;[21]
- a specific and non-delegable power to further disclose to other entities to (for example) investigate causes of suicide, or possible criminal offences or civil penalties;[22] and
- the offence for unauthorised disclosure of information by the Commissioner or their staff.[23]

1.157 These may have the capacity to serve as valuable safeguards by limiting the circumstances in which personal information could be further disclosed. However, the breadth of personal matters in relation to which the Commissioner may compel disclosure by any person (including, potentially, family members of those who have died) is also a relevant consideration in assessing the proportionality of the limit on the right to privacy. The bill would provide that, where inquiring into the suicide of a defence member or veteran, the Commissioner may inquire into: the person's defence service (including their recruitment and transition out of the defence force); the availability of health and wellbeing support, and any complaints made in relation to the provision of such services; the extent to which the circumstances of the death reflect broader or systemic issues; and any other matter which the Commissioner considers to be 'relevant and reasonably incidental to defence and veteran deaths by suicide'.[24] While the majority of these matters would appear to be directly related to a deceased person's military service, the residual category of 'relevant and reasonably incidental to' could capture a far broader range of matters. The explanatory memorandum states that this is intended to provide the Commissioner with the flexibility to deal with each case, and states that the Commissioner could consider the social and family circumstances of a person, or their economic or employment circumstances.[25] This could feasibly necessitate the disclosure of personal matters by a family member such as personal debt, unemployment, or complex family relationships. Indeed, the range of matters which may be relevant and reasonably incidental to defence and veteran deaths by suicide are likely highly complex and deeply personal, and the bill would empower the Commissioner to require any person to give evidence. While the bill provides that, in general, the Commissioner should take a trauma-informed and restorative approach and

20 Part 3, clause 28.

21 Part 4, Division 4, clause 53.

22 Part 4, Division 4, clause 56.

23 Part 4, Division 4, clause 55.

24 Part 3, clause 26.

25 Explanatory memorandum, p. 27.

recognise that family members may wish to be consulted,[26] it is not entirely clear what the consequences would be if a person subject to a summons objected to being required to give evidence on the basis that it unreasonably interfered with their right to personal privacy. This is particularly the case as clause 64 provides the Commissioner with the same immunity as a Justice of the High Court, and so thus action can be brought against any decision of the Commissioner. It is also not clear if a summons issued by the Commissioner would be fully subject to judicial review.[27]

1.158 The bill also provides that the Commissioner may disclose information, including personal information, which was required to be provided to the Commissioner to a large range of entities. The only limit on what can be provided (except in relation to intelligence information) is that the Commissioner must be satisfied the information will assist the entity to perform any of its functions or exercise any of its powers.[28] The range of entities include police, prosecuting and enforcement authorities as well as 'any other' Commonwealth, state or territory body, and any other individual holding office or appointment under any Australian law.[29] The statement of compatibility states that this provision is intended to allow the Commissioner to disclose specific information to assist other entities, as part of working collaboratively on solutions to prevent future deaths by suicide or to enable the investigation of a possible criminal offence or civil penalty. It states that these powers 'could be exercised in a broad range of ways which did not involve disclosing personal information or could include seeking consent to do so'.[30] However, it is noted that while these powers *could* be exercised in such a way, the bill, as drafted, would not require this and would allow the disclosure of personal information even when there may be less rights restrictive ways to achieve the same aim.

1.159 In addition, the bill would appear to potentially abrogate legal professional privilege, by providing that a claim of legal professional privilege would not excuse a person from providing a document or thing unless a court had already determined that such a privilege attached to the relevant information, or the individual provided the document to the Commissioner for their assessment and they accept the claim.[31] This raises concerns with respect to the right to privacy of information which is protected by legal professional privilege. The statement of compatibility does not

26 Clause 12.

27 In *Douglas v Pindling* [1996] AC 890, at 904, in relation to the issuing of a summons by a royal commission, it was stated that 'the decision of the commission should not be set aside unless it is such as no reasonable commission, correctly directing itself in law, could properly arrive at'.

28 Subclause 56(1). Intelligence information can be disclosed under clause 57.

29 Subclause 56(2).

30 Statement of compatibility, p. 13.

31 Part 4, Division 2, clause 48.

identify that this engages the right to privacy, and so no information is provided. The potential abrogation of legal professional privilege also raises questions with respect to the right to a fair trial, as discussed below.

Right to a fair trial

1.160 In circumstances where these proposed powers abrogate the privilege against self-incrimination and legal professional privilege, and may also cause information to be further disclosed to police or prosecutors, these measures also engage and limit the right to a fair trial with respect to the right not to be compelled to testify against oneself and the right of a person to obtain confidential legal advice.

1.161 The right to a fair trial guarantees to all persons a fair and public hearing by a competent, independent and impartial tribunal established by law.[32] Specific guarantees of the right to a fair trial in the determination of a criminal charge include the presumption of innocence,[33] and minimum guarantees in criminal proceedings, including the right not to incriminate oneself.[34] It also provides that a person should be able to be represented by a lawyer of their choosing,[35] and that lawyers should be able to meet their clients in private and to communicate with the accused in conditions that fully respect the confidentiality of their communications.[36] These rights may be permissibly limited, but only where a limitation seeks to achieve a legitimate objective, is rationally connected to that objective, and is proportionate.

Legal professional privilege

1.162 As set out at paragraph [1.158], these measures may abrogate legal professional privilege, as a claim of legal professional privilege would not excuse a person from providing a document or thing except in limited circumstances. While clause 48 would protect communications which a court had already found was protected by legal professional privilege, this would not offer any protection with respect to communications between an individual and their lawyer where the court had not yet made such a determination. Clause 48 would also appear to protect communications in relation to which a claim of legal professional privilege was made by an individual, and which the Commissioner then accepted (potentially after first requiring that the relevant communications be provided for their consideration). This

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

33 International Covenant on Civil and Political Rights, article 14(2).

34 International Covenant on Civil and Political Rights, article 14(3)(g).

35 UN Human Rights Committee, *General Comment No. 32 (2007) Article 14: Right to equality before courts and tribunals and right to fair trial*, [37].

36 UN Human Rights Committee, *General Comment No. 32 (2007) Article 14: Right to equality before courts and tribunals and right to fair trial,* [34]. See also UN, *Basic Principles on the Role of Lawyers, Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990*.

could have the capacity to protect the privacy of communications between an individual and their lawyer, and the right of a person to obtain confidential legal advice as part of their right to a fair trial. However, no information is provided as to how, and based on what criteria and expertise, the Commissioner would make such a determination as to the application of legal professional privilege, and whether an individual could appeal such a decision. In this respect, it is relevant that assessing claims of legal professional privilege may be a complex exercise, and is one typically undertaken by a judicial officer.[37]

Privilege against self-incrimination

1.163 In addition, the bill raises questions as to the privilege against self-incrimination, another fundamental aspect of the right to a fair trial. Clause 50 of the bill provides that a witness would not be excused from providing information on the basis that it may incriminate them, thereby abrogating the privilege against self-incrimination. The statement of compatibility notes the engagement of the right to a fair hearing, and states that these information-gathering powers are necessary to ensure that the Commissioner can conduct full inquiries and obtain all the relevant information, giving weight to the public benefit of conducting such inquiries.[38] It would appear likely that having the power to inquire into the deaths of defence members and veterans, and identify contributing structural factors, would constitute a legitimate objective for the purposes of international human rights law.

1.164 As to whether the measure is proportionate to achieving this objective, the bill would also provide that evidence which a person had been compelled to disclose to the Commissioner may not be used in evidence against them in any criminal proceedings (thereby providing a 'use' immunity).[39] Further, subclause 50(2) provides that the abrogation of the privilege against self-incrimination in subclause 50(1) would not apply in relation to an offence with which a person had already been charged, and for which proceedings were underway. That is, if a person were already charged with a related offence, they could decline to provide information on the basis that it may incriminate them. This would serve as a safeguard with respect to persons who were already facing criminal charges, protecting them from being required to give evidence to the Commissioner on related matters. However, this would provide no protection to a person not yet charged with an offence, even if charges are pending.

1.165 However, the statement of compatibility does not explain why clause 50 would not provide individuals with a 'derivative use' immunity. Without a derivative use immunity, anything derived from information, evidence or statements that a

37 See, for example, *Esso Australia Resources v Commissioner of Taxation* [1999] 201 CLR 49.

38 Statement of compatibility, pp.8-11.

39 Part 4, subclause 50(3).

person was compelled to give could be used in evidence against them. In addition, clause 56 provides that the Commissioner could disclose any information which they had obtained pursuant to an inquiry to police or the Director of Public Prosecutions. While that information itself could not be admitted into evidence, police and prosecutors could use it to derive further information or evidence, which may then be admissible in evidence in a criminal proceeding. Consequently, a person may be required to answer questions about a specific matter and while that answer itself could not be used in evidence against that person, the information could be used to find other evidence against the person which could be used against them in court. This could facilitate further investigations against that individual by police (as noted in the statement of compatibility), which could have significant implications for a person's right not to be compelled to testify against themselves.

1.166 In order to assess whether these proposed measures constitute a permissible limitation on the rights to privacy and fair trial, further information is required as to:

(a) whether the Commissioner must have regard to the principles in clause 12 (of taking a trauma-informed and restorative approach) prior to exercising any of their powers, including the power to summon a person to give evidence, or to provide a document or thing;

(b) if the performance of any of the Commissioner's functions or powers would be subject to review, in particular, whether a person could seek merits review of a decision to issue a summons (and if not, how this is compatible with the right to an effective remedy);

(c) why the bill does not set out additional criteria as to what the Commissioner must consider in determining whether, pursuant to clause 56, to disclose information provided to them to other entities (such as, for example, the public interest in disclosing such information and the right to privacy of any affected person);

(d) according to what criteria the Commissioner may determine whether legal professional privilege attaches to a communication in relation to which the privilege has been claimed;

(e) whether a lawyer who had been summoned or notified to provide advice to the Commissioner would be exposed to risk of a penalty under Part 4 of the bill, where their client has claimed legal professional privilege with respect to the relevant communications (noting that only a client may waive legal professional privilege); and

(f) why the bill does not provide an individual with a derivative use immunity with respect to information which they are compelled to disclose to the Commissioner, including having regard to the proposed functions of the Commissioner.

Committee view

1.167 The committee notes that this bill seeks to establish the National Commissioner for Defence and Veteran Suicide Prevention as an independent statutory office holder within the Attorney-General's portfolio.

1.168 The committee considers that establishing a Commissioner to support the prevention of defence members and veteran deaths by suicide, and to improve the wellbeing of defence members and veterans into the future, promotes a number of human rights, including the rights to life, health and safe and healthy working conditions for defence members.[40]

1.169 The committee notes that the bill also seeks to provide the Commissioner with coercive information-gathering and disclosure powers, including with respect to personal information, which engages and limits the right to privacy and the right to an effective remedy. The committee notes abrogating the privilege against self-incrimination and legal professional privilege also engages and may limit the right to a fair trial. Most of these rights may be permissibly limited if they are shown to be reasonable, necessary and proportionate.

1.170 The committee notes that this bill seeks to establish a Commissioner to undertake the vitally important task of combatting suicides among defence member and veterans, and considers that this constitutes a legitimate objective for the purposes of international human rights law. However, the committee notes that some further information is required in order to assess the proportionality and compatibility of some of the proposed measures.

1.171 In order to form a concluded view of the human rights implications of this bill, the committee seeks the Attorney-General's advice as to the matters set out at paragraph [1.166].

40 International Covenant on Economic, Social and Cultural Rights, article 7.

Radiocommunications Legislation Amendment (Reform and Modernisation) Bill 2020[1]

Purpose	This bill seeks to amend the *Radiocommunications Act 1992* to: • clarify the roles of the Minister and the Australian Communications and Media Authority; • amend the spectrum allocation and re-allocation processes; • reduce regulatory barriers between licence types; • amend device supply schemes and equipment regulation; and • introduce a revised compliance and enforcement regime
Portfolio	Communications, Cyber Safety and the Arts
Introduced	House of Representatives, 27 August 2020
Rights	Criminal process rights
Status	Seeking additional information

Civil penalty provisions

1.172 This bill seeks to amend the *Radiocommunications Act 1992* (Radiocommunications Act) to modernise the legislative framework for managing radiofrequency spectrum. Schedule 4 seeks to confer on the Australian Communications and Media Authority (ACMA) the power to make rules prescribing standards of equipment, and imposing obligations and prohibition on equipment, including by establishing civil and criminal penalties for non-compliance. It also seeks to enable ACMA to regulate the operation, supply, importation or use of radiocommunications equipment.[2] Pursuant to proposed section 156, ACMA would have the power to make equipment rules by legislative instrument.[3] Such rules may impose obligations or prohibitions with respect to equipment.[4] To enable ACMA to

1 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Radiocommunications Legislation Amendment (Reform and Modernisation) Bill 2020, *Report 11 of 2020*; [2020] AUPJCHR 137.

2 'Equipment' would be defined to mean a radiocommunications transmitter or receiver; anything intended or designed for, or otherwise capable of, radio emission; or anything that has a use or function that is capable of being interfered with by radio emission. See, Schedule 4, Part 1, item 6, proposed section 5.

3 Schedule 4, Part 1, Division 2.

4 Schedule 4, Part 1, Division 2, proposed sections 156-164.

enforce such matters, the bill further seeks to establish a series of criminal offences and corresponding civil penalties including those relating to: breach of equipment rules and permit conditions;[5] failure to comply with an interim or permanent equipment ban;[6] and non-compliance with recall notices.[7] In addition, Schedule 6 seeks to establish corresponding offence and civil penalty provisions relating to: the unlicensed operation of radiocommunications devices,[8] and unlawful possession of radiocommunication devices.[9] It also seeks to replace existing offence provisions with civil penalties for matters including contravening conditions of an apparatus license;[10] the use of a transmitter from a foreign vessel, aircraft or space object;[11] and causing interference with radiocommunications.[12]

Preliminary international human rights legal advice

Criminal process rights

1.173 By providing for the creation of equipment rules, which would seek to protect persons from any adverse health and safety impacts attributable to radio emissions, the measures in this bill may promote the right to health.[13] However, with respect to the enforcement of measures in the bill, some of the proposed civil penalties in Schedule 6 would be up to 500 penalty units (currently $111,000),[14] and Schedule 4 would provide for civil penalties of up to 1000 penalty units ($222,000). 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, including the right to a fair trial and the prohibition on retrospective criminal laws. [15]

5 Schedule 4, Part 1, item 24, proposed section 160. Civil penalties of 30-500 penalty units.

6 Schedule 4, Part 1, item 24, proposed section 170 (200 civil penalty units) and section 176 (1000 civil penalty units).

7 Schedule 4, Part 1, item 24, proposed section 186. Civil penalty of 1000 penalty units.

8 Schedule 6, Part 1, item 9, proposed subsection 46(3). Civil penalties of 20-300 penalty units.

9 Schedule 6, Part 1, item 11, proposed subsection 47(3). Civil penalties of 20-300 penalty units.

10 Schedule 6, Part 1, item 14, proposed section 113. Civil penalty of 100 penalty units.

11 Schedule 6, Part 1, item 25, proposed section 195. Civil penalty of 300 penalty units.

12 Schedule 6, Part 1, item 28, proposed section 197. Civil penalty of 500 penalty units.

13 International Covenant on Economic, Social and Cultural Rights, article 12. See also, statement of compatibility, pp. 11-12.

14 The value of a penalty unit, currently $222, is set out in the *Crimes Act 1914,* subsection 4AA(1).

15 International Covenant on Civil and Political Rights, articles 14-15.

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

- the domestic classification of the penalty as civil or criminal (although the classification of a penalty as 'civil' is not determinative as the term 'criminal' has an autonomous meaning in human rights law);
- 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
- the severity of the penalty.

1.175 The statement of compatibility notes that the civil penalties proposed in Schedule 6, which provides for civil penalties of between 20 and 500 penalty units, are proposed as disciplinary alternatives to the punitive or deterrent criminal offences.[16] It also states that such alternatives will enable an effective disciplinary approach to dealing with non-compliance by corporations. It further states that the objectives of these civil penalties are regulatory or disciplinary in nature and apply to a class of persons, licence holders, who can reasonably be expected to be aware of their obligations under the legislation and who have voluntarily sought the approval of the Commonwealth to engage in an activity that is regulated under very clear conditions. Accordingly, it states that the civil penalty provisions in the bill should not be considered 'criminal' for the purposes of human rights law. It further highlights that there are other levels of regulatory actions that can be taken before escalating to civil penalties, including imposition of additional conditions or varying the activities that can be undertaken under the licence, the issuing of directions, giving of infringement notices, the accepting of enforceable undertakings and, if necessary, the revocation of a permit or the licence. These matters are all relevant to an assessment of whether civil penalties should be regarded as criminal for the purposes of human rights.

1.176 However, no information is provided as to whether or how the proposed civil penalties of up to 1000 penalty units in Schedule 4, relating to equipment, should be regarded as civil and not criminal penalties for the purposes of human rights law. It would appear that the proposed civil penalties, while designed as part of a specific regulatory context, could nevertheless apply to the public in general. For example, while non-compliance with the condition of a radiocommunications licence would appear only to apply to a licence-holder, any person could be penalised for unlawful possession of a radiocommunications device,[17] or failure to comply with an interim or permanent equipment ban (including by possession of, or supply of, particular

16 Statement of compatibility, p. 14.

17 Schedule 6, Part 1, item 11, proposed section 47. Civil penalties of 20-300 penalty units.

equipment).[18] In addition, it is unclear whether volunteers with community groups such as rural fire services, which appear to require a radiocommunications licence in order to use radios and other communications devices,[19] may be exposed to the risk of a civil penalty while undertaking voluntary work.

1.177 Noting that these penalties may apply to the public at large, and may constitute a significant penalty to apply to an individual, further information is required to consider whether some of these civil penalty provisions would be regarded as 'criminal' for the purposes of international human rights law. It is noted that if this were the case, this would not mean that the relevant conduct should be turned into a criminal offence under domestic law nor would it mean that the civil penalty is illegitimate. Rather, it would mean 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 International Covenant on Civil and Political Rights, 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.

1.178 Further information is required in order to conduct a full assessment of the potential limitation on criminal process rights, in particular

(a) whether the proposed civil penalties in Schedules 4 and 6 of the bill could apply to members of the public, including volunteers working under an organisation which holds a radiocommunications licence; and

(b) whether any of the civil penalties in Schedule 4 could be characterised as criminal for the purposes of international human rights law, and if so, how are they compatible with criminal process rights.

Committee view

1.179 The committee notes that the bill would confer on the Australian Communications and Media Authority the power to make rules prescribing standards of radiocommunications equipment, and imposing obligations and prohibitions on equipment, including by establishing penalties for non-compliance.

18 Schedule 4, Part 1, item 24, proposed sections 170 (civil penalties of 200 penalty units) and 176 (civil penalties of 1000 penalty units).

19 For example, the ACMA Register of Radiocommunications Licences appears to indicate that the NSW Rural Fire Service holds 1,971 licences. See, ACMA, *Register of Radiocommunications Licences*, https://web.acma.gov.au/rrl/register_search.main_page (accessed 7 September 2020).

1.180 The committee notes that these measures may promote the right to health, by addressing any potential adverse health or safety effects of radio emissions. In addition, the committee notes that some of the proposed civil penalties in this bill may engage criminal process rights, if those civil penalties are more properly to be regarded as criminal penalties for the purposes of human rights law. The committee notes that if this were the case, the civil penalty provisions in question must be shown to be consistent with the criminal process guarantees.

1.181 In order to form a concluded view of the human rights implications of this bill, the committee seeks the minister's advice as to the matters set out at paragraph [1.178].

Sport Integrity Australia Amendment (Enhancing Australia's Anti-Doping Capability) Regulations 2020 [F2020L00953][1]

Purpose	This instrument makes amendments consequent on the enactment of the *Australian Sports Anti-Doping Authority Amendment (Enhancing Australia's Anti-Doping Capability) Act 2020* (2020 Act) including: • removing references to the Anti-Doping Rule Violation Panel (which was abolished by the 2020 Act); • reflecting changes made by the 2020 Act which provided that the privilege against self-incrimination does not apply; • setting out the process to be followed regarding assertions about possible anti-doping rule violations; and • transitional arrangements regarding the Anti-Doping Rule Violation Panel.
Portfolio	Youth and Sport
Authorising legislation	*Sport Integrity Australia Act 2020*
Last day to disallow	15 sitting days after tabling (tabled in the Senate and the House of Representatives on 24 August 2020). Notice of motion to disallow must be given in the House of Representative by 27 October 2020 and in the Senate by 1 December 2020[2]
Rights	Privacy
Status	Seeking additional information

Publication of assertions regarding possible anti-doping violations

1.182 The *Sport Integrity Australia Act 2020* provides that the National Anti-Doping (NAD) Scheme must authorise the Chief Executive Officer (CEO) of Sport Integrity Australia to publish information relating to assertions of possible violations of the anti−doping rules, if:

1 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Sport Integrity Australia Amendment (Enhancing Australia's Anti-Doping Capability) Regulations 2020 [F2020L00953], *Report 11 of 2020*; [2020] AUPJCHR 138.

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

- the CEO considers the publication to be in the public interest; the publication is required or permitted by the World Anti-Doping Code; or the athlete or support person to whom the information relates has consented to the publication; and
- the other conditions specified in the NAD Scheme are satisfied.[3]

1.183 The Sport Integrity Australia Regulations 2020 sets out the requirements of the NAD Scheme. This instrument amends those regulations to provide that the CEO may only publish this information if, one or more of the following applies:

(a) a decision has been handed down by a sporting tribunal in relation to the assertion to which the information relates;

(b) the athlete or support person has waived their right to a hearing;

(c) the athlete or support person has refused to recognise the jurisdiction of a sporting tribunal to conduct a hearing process in relation to the assertion to which the information relates;

(d) no sporting tribunal has jurisdiction to conduct a hearing process in relation to the assertion to which the information relates.[4]

1.184 This instrument remakes what was in the Sport Integrity Regulations 2020, but in doing so removes reference to where the athlete or support person had applied to have the decision reviewed by the Administrative Appeals Tribunal (AAT), as review by the AAT was removed by the changes made to the primary legislation.[5]

Preliminary international human rights legal advice

Right to privacy

1.185 As the instrument provides that the CEO may publish personal information about an athlete or support person, this measure engages and limits the right to privacy. 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 information.[6] 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

3 *Sport Integrity Australia Act 2020*, paragraph 13(m).

4 Item 33 of the instrument.

5 *Australian Sports Anti-Doping Authority Amendment (Enhancing Australia's Anti-Doping Capability) Act 2020.*

6 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].

connected to that objective, and be a proportionate means of achieving that objective.[7]

1.186 The statement of compatibility does not acknowledge that the measure engages the right to privacy in this respect. The information that may be published by the CEO relates to assertions of possible violations of anti-doping rules, and it may be published in circumstances including where the athlete or support person refuses to recognise the jurisdiction of a sporting tribunal, or no tribunal has jurisdiction. Noting that the publication of assertions could be detrimental to an athlete or support person's privacy and reputation, particularly should these assertions prove to be false, it is not clear why it is necessary for the instrument to enable publication where no sporting tribunal has made a finding as to these assertions.

1.187 It is noted that this process for publishing such assertions is not new. Rather this instrument remakes the existing provisions while removing reference to the AAT. However, the role of this committee is to assess all legislation for compatibility with human rights.[8] Since this instrument sets out the process for publishing such assertions, it is necessary for the committee to consider if this process is compatible with the right to privacy.

1.188 In order to assess the compatibility of this measure with the right to privacy, further information is required as to:

(a) what is the objective behind enabling the Commissioner to publish assertions of possible violations of anti-doping rules, and whether this is aimed at achieving a legitimate objective for the purposes of human rights law;

(b) how is this measure rationally connected to (that is, effective to achieve) that objective;

(c) if an athlete or support person does not recognise the jurisdiction of a sporting tribunal, or if there is no sporting tribunal with jurisdiction to determine the assertion, how would that athlete or support person challenge the assertion; and

(d) whether the measure is a proportionate limitation on the right to privacy. In particular, is there any less rights restrictive ways to achieve

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.

8 *Human Rights (Parliamentary Scrutiny) Act 2011*, section 7.

the stated objective and are there any safeguards in place to protect the right to privacy.

Committee view

1.189 The committee notes that this instrument provides for the Chief Executive Officer of Sport Integrity Australia to publish information relating to assertions that have been made against an athlete or support person, including where the jurisdiction of a sporting tribunal is not recognised or no tribunal has jurisdiction.

1.190 The committee notes that this measure engages and may limit the right to privacy. The committee notes that this right may be subject to permissible limitations if they are shown to be reasonable, necessary and proportionate.

1.191 In order to form a concluded view of the human rights implications of this bill, the committee seeks the minister's advice as to the matters set out at paragraph [1.188].

Sport Integrity Australia Amendment (World Anti-Doping Code Review) Bill 2020[1]

Purpose	This bill seeks to amend the *Sport Integrity Australia Act 2020* and the *National Sports Tribunal Act 2019* to: • introduce a new category of person, 'non-participant', who may be subject to the National Anti-Doping Scheme; • provide greater discretion for the Chief Executive Officer (CEO) of Sports Integrity Australia (SIA) to choose not to publish the details of a violation; • broaden when the CEO of SIA may respond to public comments on matters that are not finalised; and • extends when a person is considered to be an athlete.
Portfolio	Youth and Sport
Introduced	Senate, 26 August 2020
Rights	Privacy
Status	Seeking additional information

Public disclosure of personal information by Sport Integrity Australia

1.192 Currently the *Sport Integrity Australia Act 2020* (SIA Act) makes it an offence for an entrusted person to make an unauthorised disclosure of 'protected information'.[2] However, the SIA Act also currently provides that the Chief Executive Officer (CEO) of Sport Integrity Australia may disclose protected information relating to an athlete or support person if public comments have been 'attributed' to the athlete or support person or their representative, and the disclosure is for the purposes of Sport Integrity Australia responding to the comments.[3] Protected information is defined as information that was obtained under relevant legislation, which 'relates to the affairs of a person', and is able to identify that person.[4]

1 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Sport Integrity Australia Amendment (World Anti-Doping Code Review) Bill 2020, *Report 11 of 2020*; [2020] AUPJCHR 139.

2 *Sports Integrity Australia Act 2020*, section 67.

3 *Sports Integrity Australia Act 2020*, section 68E.

4 *Sports Integrity Australia Act 2020*, section 4.

1.193 The bill seeks to amend the SIA Act to extend this provision to allow the CEO to also disclose protected information if comments have been 'based on information provided by' the athlete, support person or their representative, and also by a relevant 'non-participant'.[5]

Preliminary international human rights legal advice

Right to privacy

1.194 Expanding the circumstances in which the CEO of Sport Integrity Australia can publicly disclose protected information, which may potentially reveal highly personal information about a person (such as their use of medication, or intersex status if relevant to a sports doping allegation), 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.[6]

1.195 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.

1.196 The statement of compatibility does not acknowledge that this measure limits the right to privacy, and so provides no assessment of whether the measure permissibly limits this right. The explanatory memorandum states that the ability of the CEO to disclose this information reflects the World Anti-Doping Code, and is intended to enable the CEO to respond to public comments to address misinformation. It gives the example that the amendments in the bill would allow the CEO to disclose protected information 'where the athlete or support person discloses protected information to another person, who then discloses that information more publicly'.[7] It is noted that these amendments would mean that the CEO could disclose potentially highly personal information about an individual if public comments have been 'based on information provided by' that person. It is irrelevant if the information was provided by the person in confidence to the third party who publicly disclosed it, and the CEO would not be restricted in the amount of information disclosed, so long as it is for the purposes of responding to the comments and it 'relates to the affairs of the person'.

1.197 In order to assess the compatibility of this measure with the right to privacy, further information is required as to:

5 Schedule 1, items 23–25.

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

7 Explanatory memorandum, p. 9.

(a) whether the measure is aimed at achieving a legitimate objective for the purposes of human rights law, and how it is rationally connected to (that is, effective to achieve) that objective;

(b) whether the measure is a proportionate limitation on the right to privacy, in particular whether this is the least rights restrictive way to achieve the stated objective, and whether there are any safeguards in place to help protect the right to privacy; and

(c) what type of information is likely to be disclosed in order to respond to comments based on information provided by an athlete or other relevant persons.

Committee view

1.198 The committee notes the bill would expand the circumstances in which the Chief Executive Officer of Sport Integrity Australia could publicly disclose protected information about an athlete, support person or relevant non-participant in order to respond to public comments based on information provided by that person.

1.199 The committee notes that this measure appears to engage and limit the right to privacy. The committee notes that this right may be permissibly limited if it is shown to be reasonable, necessary and proportionate.

1.200 In order to form a concluded view of the human rights implications of this bill, the committee seeks the minister's advice as to the matters set out at paragraph [1.197].

Bills and instruments with no committee comment[1]

1.201 The committee has no comment in relation to the following bills which were introduced into the Parliament, or restored to the notice paper, between 24 August and 3 September 2020. 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]

- Australia's Foreign Relations (State and Territory Arrangements) Bill 2020;
- Australia's Foreign Relations (State and Territory Arrangements) (Consequential Amendments) Bill 2020;
- Civil Aviation (Unmanned Aircraft Levy) Bill 2020;
- Civil Aviation Amendment (Unmanned Aircraft Levy Collection and Payment) Bill 2020;
- Clean Energy Finance Corporation Amendment (Grid Reliability Fund) Bill 2020;
- Competition and Consumer Amendment (Exploitation of Indigenous Culture) Bill 2020;
- Coronavirus Economic Response Package (Jobkeeper Payments) Amendment Bill 2020;
- Defence Amendment (Sovereign Naval Shipbuilding) Bill 2018;
- Defence Legislation Amendment (Enhancement of Defence Force Response to Emergencies) Bill 2020;
- Education Legislation Amendment (Up-front Payments Tuition Protection) Bill 2020;
- Environment Protection and Biodiversity Conservation Amendment (Streamlining Environmental Approvals) Bill 2020;
- Fair Work Amendment (Improving Unpaid Parental Leave for Parents of Stillborn Babies and Other Measures) Bill 2020
- Family Law Amendment (Risk Screening Protections) Bill 2020;
- Franchising Laws Amendment (Fairness in Franchising) Bill 2020;

1 This section can be cited as Parliamentary Joint Committee on Human Rights, Bills and instruments with no committee comment, *Report 11 of 2020*; [2020] AUPJCHR 140.

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.

- Health Insurance Amendment (Administration) Bill 2020;
- Higher Education (Up-front Payments Tuition Protection Levy) Bill 2020;
- Higher Education Legislation Amendment (Provider Category Standards and Other Measures) Bill 2020;
- National Commissioner for Defence and Veteran Suicide Prevention (Consequential Amendments) Bill 2020;
- Radiocommunications (Receiver Licence Tax) Amendment Bill 2020;
- Radiocommunications (Transmitter Licence Tax) Amendment Bill 2020;
- Recycling and Waste Reduction Bill 2020;
- Recycling and Waste Reduction (Consequential and Transitional Provisions) Bill 2020;
- Recycling and Waste Reduction Charges (Customs) Bill 2020;
- Recycling and Waste Reduction Charges (Excise) Bill 2020;
- Recycling and Waste Reduction Charges (General) Bill 2020; and
- Treasury Laws Amendment (Self Managed Superannuation Funds) Bill 2020.

1.202 The committee has examined the legislative instruments registered on the Federal Register of Legislation between 28 July and 11 August 2020.[3] The committee has reported on one legislative instrument 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.

Senator the Hon Sarah Henderson

Chair

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.