

Chapter 1¹

New and continuing matters

- 1.1 This chapter provides assessments of the human rights compatibility of:
- one bill² introduced on 17 June 2020 and bills introduced into the Parliament between 19 to 22 October 2019;
 - legislative instruments registered on the Federal Register of Legislation between 21 September and 13 October 2020;³ and
 - two bills previously deferred.⁴

1 This section can be cited as Parliamentary Joint Committee on Human Rights, New and continuing matters, *Report 13 of 2020*; [2020] AUPJCHR 153.

2 Competition and Consumer Amendment (Australian Consumer Law—Country of Origin Representations) Bill 2020.

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>.

4 Native Title Amendment (Infrastructure and Public Facilities) Bill 2020 and the Territories Legislation Amendment Bill 2020 were previously deferred in *Report 12 of 2020*.

Response required

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

Native Title Amendment (Infrastructure and Public Facilities) Bill 2020¹

Purpose	This bill seeks to amend the <i>Native Title Act 1993</i> to extend the operation of Subdivision JA, which permits the construction of public housing and other structures on Indigenous held land, for another 10 years.
Portfolio	Attorney-General
Introduced	House of Representatives, 8 October 2020
Rights	Equality and non-discrimination; self-determination; culture; effective remedy; adequate standard of living; education; health
Status	Seeking additional information

Extension of the future acts regime

1.3 This bill proposes to extend the operation of the future acts regime in the *Native Title Act 1993* for a further 10 years.² The future acts regime sets out how future acts that will affect native title rights and interests can be validly undertaken. Native title is not extinguished by the future acts regime, but if a future act is inconsistent with native title, the native title rights and interests have no effect in relation to the act (or to the extent of the inconsistency).³

1.4 A future act must facilitate or consist of the construction, operation, use, maintenance or repair of specific facilities, including public housing, staff housing and other public infrastructure, such as education, health, police and emergency

1 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Native Title Amendment (Infrastructure and Public Facilities) Bill 2020, *Report 13 of 2020*; [2020] AUPJCHR 154.

2 The bill proposes to amend subparagraphs 24JAA(1)(d)(i) and (ii) of the *Native Title Act 1993* to omit '10 years' and substitute '20 years'. Under the future acts regime, a future act must be done within 10 years of the commencement of subdivision JA. The bill extends the operation of subdivision JA for another 10 years.

3 *Native Title Act 1993*, subsection 24JAA(7). See subsections 238(2)–(4) regarding the meaning and operation of the non-extinguishment principle.

facilities. These facilities must be established by or on behalf of the Crown or a local government body, or other statutory authority of the Crown (the action body), on land held by or for the benefit of Aboriginal or Torres Strait Islander people.⁴

1.5 The action body must give registered native title claimants, registered native title body corporates, or representatives of Aboriginal and Torres Strait Islander bodies notice of, and an opportunity to comment on, the act, and provide a report to the Commonwealth Minister.⁵ If the action body does not do so, the future act will not be valid. The future act cannot be done before the consultation period ends.⁶ Additionally, the future acts regime allows any registered native title claimant or body corporate to request consultation with the action body about the future act so far as it affects their registered native title rights and interests.⁷ If such a request is made, the action body must consult with the claimant or body corporate about ways of minimising the impact of the future act on the native title rights and interests in relation to land or waters in the area.⁸

Preliminary international human rights legal advice

Rights to adequate standard of living, education and health

1.6 In extending the operation of the future acts regime by a further 10 years, to the extent that this facilitates the timely provision of adequate and safe public housing and other public infrastructure, such as education and health facilities, for Aboriginal and Torres Strait Islander people, the bill may promote the rights to an adequate standard of living, education and health. The right to an adequate standard of living requires States parties to take steps to ensure the availability, adequacy (including cultural adequacy) and accessibility of food, clothing, water and housing for all people in its jurisdiction.⁹ The right to education includes the provision of

4 *Native Title Act 1993*, section 24JAA.

5 *Native Title Act 1993*, subsections 24JAA(4)–(6) and (10).

6 *Native Title Act 1993*, subsections 24JAA(4)–(6). Subsection 24JAA(19) defines the consultation period as beginning on the notification day and ending 2 months later (if no claimant or body corporate requests consultation under subsection 24JAA(13)) or 4 months later (if a claimant or body corporate requests consultation).

7 *Native Title Act 1993*, subsection 24JAA(13).

8 *Native Title Act 1993*, subsection 24JAA(14). Subsection 24JAA(16) provides that the action body must provide a report to the Commonwealth Minister with respect to the consultation process and this report may be published.

9 International Covenant on Economic, Social and Cultural Rights, article 11. See also, United Nations Human Rights Committee, *General Comment No. 3: Article 2 (Implementation at a national level)* and United Nations Committee on Economic, Social and Cultural Rights, *General Comment No. 4: The right to adequate housing (art. 11 (1) of the Covenant)* (1990) [8(g)].

functioning educational institutions and related facilities.¹⁰ The right to health requires available, accessible, acceptable (including culturally appropriate) and quality health care. It includes the right to enjoy functioning public health facilities as well as those facilities, services and conditions necessary for the realisation of the highest attainable standard of health, such as adequate sanitation facilities, hospitals and health-related buildings.¹¹

1.7 The statement of compatibility states that the bill promotes these rights by ensuring that Aboriginal and Torres Strait Islander people can access adequate and safe public housing, public health facilities and associated infrastructure, such as sewerage treatment facilities and water supply facilities, as well as public education facilities and associated infrastructure, such as housing for teachers.¹² It notes that the timely construction of public infrastructure will address overcrowding in houses and the current and emerging health needs of remote Indigenous communities.¹³

Rights to equality and non-discrimination, self-determination, culture and an effective remedy

1.8 The bill also engages and limits several other human rights, including the rights to equality and non-discrimination, self-determination, culture and an effective remedy. The right to equality and non-discrimination provides that everyone is entitled to enjoy their rights without discrimination of any kind, including on the grounds of race, and that all people are equal before the law and entitled without discrimination to equal and non-discriminatory protection of the law.¹⁴ The bill appears to limit the right to non-discrimination by treating native title holders (who are exclusively Aboriginal and Torres Strait Islander people) differently from

10 International Covenant on Economic, Social and Cultural Rights, article 13; United Nations Committee on Economic, Social and Cultural Rights, *General Comment No. 13: The right to education (article 13 of the Covenant)* (1999) [6].

11 International Covenant on Economic, Social and Cultural Rights, article 12; United Nations Committee on Economic, Social and Cultural Rights, *General Comment No. 14: The right to the highest attainable standard of health (Art. 12)* (2000) [9], [12].

12 Statement of compatibility, pp. 9–11.

13 Statement of compatibility, p. 10. However, it is noted that the statement of compatibility does not contain information regarding the extent to which public housing and other infrastructure constructed or planned under the future acts regime is culturally appropriate and responsive to the needs of Aboriginal and Torres Strait Islander people as articulated by the communities themselves. Cultural adequacy is an important consideration in realising the rights to an adequate standard of living, health and education: United Nations Committee on Economic, Social and Cultural Rights, *General Comment No. 4: The right to adequate housing (art. 11 (1) of the Covenant)* (1990) [8(g)].

14 International Covenant on Civil and Political Rights, articles 2 and 26; International Covenant on Economic, Social and Cultural Rights, article 2(2); International Convention on the Elimination of All Forms of Racial Discrimination, articles 1, 2 and 5.

other land holders. The effect of the bill would be the continued limitation of the rights and interests of native title holders in exchange for the provision of public housing and public infrastructure on Indigenous held land—an exchange not imposed on other land owners.

1.9 Differential treatment on the grounds of a protected attribute, such as race, may not constitute discrimination if it is considered to be a special measure. Special measures are those that are 'taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms'.¹⁵ The statement of compatibility states that the bill can be characterised as components of a broader special measure, being the *Native Title Act 1993* in its entirety.¹⁶ However, the UN Special Rapporteur on the situation of human rights and fundamental freedoms of Indigenous people has emphasised that while special measures are:

required to address the disadvantages faced by indigenous peoples in Australia...it would be quite extraordinary to find consistent with the objectives of the Convention, that special measures may consist of differential treatment that limits or infringes the rights of a disadvantaged group in order to assist the group or certain members of it.¹⁷

1.10 Special measures are ordinarily achieved through preferential treatment of disadvantaged groups and 'not the impairment of the enjoyment of their human rights'.¹⁸ The UN Committee on the Elimination of Racial Discrimination has similarly stated that special measures should be 'designed and implemented on the basis of prior consultation with affected communities and the active participation of such communities'.¹⁹ The extension of the future acts regime by a further 10 years is unlikely to be considered a special measure under international law noting that it seeks to advance certain human rights for Aboriginal and Torres Strait Islander people through measures implemented without the free, prior and informed consent of the affected communities, and appears to have the effect of limiting other human rights for some or all members of that community.

15 International Convention on the Elimination of All Forms of Racial Discrimination, article 1(4).

16 Statement of compatibility, p. 9.

17 United Nations Human Rights Council, *Report by the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people: The situation of indigenous peoples in Australia*, A/HRC/15/37/Add.4 (2010) [21].

18 United Nations Human Rights Council, *Report by the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people: The situation of indigenous peoples in Australia*, A/HRC/15/37/Add.4 (2010) [21].

19 United Nations Committee on the Elimination of Racial Discrimination, *General Recommendation No. 32* (2009) [16]–[18].

1.11 The bill would also limit the rights to self-determination and culture as the future acts regime affects native title rights and interests by permitting the construction of infrastructure on Indigenous held land without requiring the consent of the relevant native title holders and registered claimants.²⁰ The right to self-determination includes 'the rights of all peoples to pursue freely their economic, social and cultural development without outside interference'.²¹ As part of its obligations in relation to respecting the right to self-determination, Australia has an obligation under customary international law to consult with Indigenous peoples in relation to actions which may affect them.²² A related requirement is that of Indigenous peoples' 'free, prior and informed consent' in relation to decisions that may affect them.²³ The United Nations Declaration on the Rights of Indigenous Peoples provides that States shall consult and cooperate in good faith with Indigenous persons and their representative organisations to obtain free and informed consent prior to the approval of projects affecting Indigenous held land or territories.²⁴ The UN Human Rights Committee Expert Mechanism on the Rights of Indigenous Peoples has stated that 'free, prior and informed consent is a human rights norm grounded in the fundamental rights to self-determination and to be free from racial discrimination'.²⁵ In the context of amendments to native title legislation,

20 Statement of compatibility, p. 8.

21 International Covenant on Civil and Political Rights, article 1; and the International Covenant on Economic, Social and Cultural Rights, article 1. See United Nations Committee on the Elimination of Racial Discrimination, *General Recommendation 21 on the right to self-determination* (1996).

22 See Parliamentary Joint Committee on Human Rights, *Report 4 of 2017* (9 May 2017) pp.122–123. The United Nations Human Rights Council has recently provided guidance on the right to be consulted, as part of its Expert Mechanism on the Rights of Indigenous Peoples, stating that 'states' obligations to consult with indigenous peoples should consist of a qualitative process of dialogue and negotiation, with consent as the objective' and that consultation does not entail 'a single moment or action but a process of dialogue and negotiation over the course of a project, from planning to implementation and follow-up': United Nations Human Rights Council, *Free, prior and informed consent: a human rights-based approach - Study of the Expert Mechanism on the Rights of Indigenous Peoples*, A/HRC/39/62 (2018) [15]–[16].

23 See, in particular, United Nations Declaration on the Rights of Indigenous Peoples, article 19. While the Declaration is not included in the definition of 'human rights' under the *Human Rights (Parliamentary Scrutiny) Act 2011*, it provides clarification as to how human rights standards under international law, including under the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights apply to the particular situation of Indigenous peoples. See Parliamentary Joint Committee on Human Rights, *Report 4 of 2017* (9 May 2017) pp. 122–123.

24 United Nations Declaration on the Rights of Indigenous Peoples, article 32.

25 United Nations Human Rights Council, *Free, prior and informed consent: a human rights-based approach - Study of the Expert Mechanism on the Rights of Indigenous Peoples*, A/HRC/39/62 (2018) [3].

the UN Committee on the Elimination of Racial Discrimination and the UN Committee on Economic, Social and Cultural Rights have recommended that Australia ensure the principle of free, prior and informed consent is incorporated into the *Native Title Act 1993* and fully implemented in practice.²⁶

1.12 The right to culture provides that all people have the right to benefit from and take part in cultural life.²⁷ In the context of Indigenous peoples, the right to culture includes the right for Indigenous people to use land resources, including through traditional activities such as hunting and fishing, and to live on their traditional lands.²⁸

1.13 The statement of compatibility notes that the bill limits the procedural rights of native title holders to the extent that they only have the right to be consulted for a maximum of four months about ways of minimising impacts of future acts on native title rights and interests, and do not have to consent to the proposed future act.²⁹ To the extent that the bill permits the construction of infrastructure without the consent of the relevant community, the right of Indigenous peoples to freely pursue their economic, social and cultural development and live on, use and protect their traditional lands would be limited.³⁰

1.14 It is possible that the bill may engage and limit the right to an effective remedy. The right to an effective remedy requires the availability of a remedy which is effective with respect to any violation of rights and freedoms recognised by the

26 Committee on the Elimination of Racial Discrimination, *Concluding Observations on the eighteenth to twentieth periodic reports of Australia*, CERD/C/AUS/CO/18-20 (2017) [21]-[22]; Committee on Economic, Social and Cultural Rights, *Concluding observations on the fifth periodic report of Australia*, E/C.12/AUS/CO/5 (2017) [15(e)]. The committee has previously stated that principle of 'free, prior and informed consent' should therefore be considered in the context of developing and amending native title legislation. See Parliamentary Joint Committee on Human Rights, *Report 2 of 2019* (2 April 2019) pp.76–77.

27 International Covenant on Economic, Social and Cultural Rights, article 15; and International Covenant on Civil and Political Rights, article 27. See also, UN Committee on Economic, Social and Cultural Rights, *General Comment No. 21: article 15 (right of everyone to take part in cultural life)* (2009). The committee explains, at [6], that the right requires from a State party both abstention (including non-interference with the exercise of cultural practices) and positive action (including ensuring preconditions for participation, facilitation and promotion of cultural life).

28 See, *Käkkäläjärvi et al. v Finland*, UN Human Rights Committee Communication No.2950/2017 (2 November 2018) [9.8]–[9.10].

29 Statement of compatibility, p. 8.

30 The United Nations Committee on the Elimination of Racial Discrimination has called upon States parties to ensure that no decisions directly relating to the rights and interests of Indigenous peoples are taken without their informed consent: *General Recommendation No. 23: Indigenous Peoples* (1997) [4].

International Covenant on Civil and Political Rights.³¹ While limitations may be placed in particular circumstances on the nature of the remedy provided (judicial or otherwise), state parties must comply with the fundamental obligation to provide a remedy that is effective.³² The statement of compatibility states that the bill will promote the right to an effective remedy by providing native title holders with an entitlement to compensation on just terms for the effect of any future act on their native title rights and interests. However, it is unclear how this compensation scheme operates in practice and whether all future acts constitute an impairment of native title rights and interests, thereby engaging the right to compensation.

1.15 The rights to equality and non-discrimination, self-determination and culture 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.

1.16 Through the timely provision of public infrastructure, the bill seeks to address overcrowding, poor housing conditions and other infrastructure needs of Aboriginal and Torres Strait Islander people on Indigenous held land. This is likely to be a legitimate objective for the purpose of international human rights law, and the measure would appear to be rationally connected to that objective insofar as this measure may ensure such infrastructure is constructed quickly.

1.17 Regarding the proportionality of the measure, it is necessary to consider whether any less rights restrictive alternatives could achieve the stated objective. The statement of compatibility states that permitting development without consent and the consequent limitation on human rights is necessary and proportionate to achieving the rights of Indigenous community members to an adequate standard of living, health and education. It notes that Indigenous Land Use Agreements (ILUAs) are the standard and preferred mechanism for undertaking future acts and the future act regime would be used in limited circumstances where an ILUA cannot be agreed or is facing extended negotiations. ILUAs, or another process informed by the principle of free, prior and informed consent, would appear to be a less rights restrictive avenue for pursuing development on Indigenous held land compared to

31 International Covenant on Civil and Political Rights, article 2(3). See, *Kazantzis v Cyprus*, United Nations Human Rights Committee Communication No. 972/01 (2003) and *Faure v Australia*, United Nations Human Rights Committee Communication No. 1036/01 (2005): State parties must not only provide remedies for violations of the Covenant, but must also provide forums in which a person can persuasively argue if unsuccessful claims of violations of the Covenant.

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

the future acts regime.³³ However, while the statement of compatibility states that ILUAs are the preferred mechanism for undertaking future acts, there is no legal requirement that agreement via an ILUA first be sought. Thus, further information as to why this is not included in the legislation, and information regarding the adequacy of the ILUA process would be helpful to assess the proportionality of the measure. In particular, it is unclear to what extent consideration was given to less rights restrictive measures to alleviate delays in the negotiation process of ILUAs.

1.18 Another relevant factor in assessing whether a measure is proportionate is whether it is accompanied by sufficient safeguards and there is the possibility of oversight and the availability of review. The statement of compatibility states that native title holders and registered claimants are afforded the right to participate in a consultation process and the bill retains a mechanism for raising concerns about land use.³⁴ While consultation with Indigenous peoples can operate as a safeguard to protect certain human rights, notably the right to self-determination, questions remain as to whether the consultation process contained in the bill is effective and meaningful.³⁵ The UN Human Rights Council has emphasised that a consultation process should be intended to protect the right of indigenous peoples to 'influence the outcome of decision-making processes affecting them, not a mere right to be involved in such processes or merely to have their views heard'.³⁶ It would appear that native title holders may not be able to substantially influence the outcome of decisions relating to proposed future acts on their land. This is because their consent is neither the objective of consultation nor a requirement for the validity of the act; the onus is placed on the native title holders to request consultation about ways to minimise the impact of the future act on native title; the consultation period is restricted to a maximum of four months; and the outcomes of any consultation are

33 When the future acts regime was first introduced, some commentators noted a lack of evidence to support the shift away from Indigenous Land Use Agreements (although there were some concerns raised regarding the effectiveness of Indigenous Land Use Agreements): see Claire Stacey and Joe Fardin, 'Housing on Native Title Lands: Responses to the Housing Amendments of the Native Title Act', *Land, Rights, Laws: Issues of Native Title*, vol. 4, no. 6, 2011, pp. 5–6.

34 Statement of compatibility, p. 8.

35 Elements of genuine consultation with Indigenous peoples include 'adequate/formal notification; early involvement of the community; provision of information; adequate timeframes for native title parties to obtain advice, consult with other members and translate information into culturally accessible forms; and an opportunity to reach and record an agreement': see Claire Stacey and Joe Fardin, 'Housing on Native Title Lands: Responses to the Housing Amendments of the Native Title Act', *Land, Rights, Laws: Issues of Native Title*, vol. 4, no. 6, 2011, p. 8.

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

not required to be publicly reported (although the action body must provide a report to the Commonwealth Minister). Further, the bill does not appear to provide any possibility of oversight or availability of review for decisions made under the future acts regime or contain any safeguards to ensure that the future acts regime is used as a measure of last resort where an ILUA cannot be reached. While the statement of compatibility notes that the measure is temporary and will be reassessed in a further 10 years, it provides no information about available monitoring mechanisms to inform that reassessment.

1.19 In order to assess the compatibility of this bill with human rights, further information is required as to:

- (a) why is it necessary to limit native title without the consent of native title holders in order to achieve the objective of constructing necessary public infrastructure, and are there any other less rights-restrictive ways of achieving the same aim;
- (b) why is there no legislative requirement that the future acts regime only be used as a measure of last resort, in particular once all avenues for agreeing to an Indigenous Land Use Agreement have been exhausted;
- (c) if it is determined that an Indigenous Land Use Agreement is impracticable or unable to be agreed on, on what basis is the decision currently made to use the future acts regime rather than an Indigenous Land Use Agreement;
- (d) whether the use of the future acts regime will always give rise to an entitlement to compensation under the statutory scheme for compensation for the impairment of native title, and what type of compensation has been granted where the future acts regime has been relied on previously;
- (e) what, if any, review mechanisms exist to challenge a decision to use the future acts regime; and
- (f) why it is necessary to place the onus on native title holders and registered claimants to request consultation about minimising the impacts of the proposed future act on native title, rather than requiring consultation to be undertaken in all instances.

Committee view

1.20 The committee notes that this bill seeks to amend the *Native Title Act 1993* to extend the operation of the future acts regime, which permits the construction of public housing and other infrastructure on Indigenous held land, for another 10 years. This would have the effect that any native title rights and interests would have no effect in relation to that act.

1.21 The committee considers that the bill could promote the rights to an adequate standard of living, education and health for Aboriginal and Torres Strait

Islander peoples on Indigenous held land through facilitating the timely provision of public housing and other public infrastructure such as education and health facilities. However, the committee notes that the bill engages and may limit a number of other human rights, including the rights to self-determination, culture and equality and non-discrimination by permitting the development of infrastructure on native title land without requiring the consent of native title holders and registered claimants. These rights may be subject to permissible limitations if they are shown to be reasonable, necessary and proportionate.

1.22 The committee considers that the bill seeks to address overcrowding, poor housing conditions and other infrastructure needs of Aboriginal and Torres Strait Islander people on Indigenous held land through the timely provision of public infrastructure. This is a legitimate objective for the purpose of international human rights law, and the measure would appear to be rationally connected to that objective. The committee notes that some questions remain as to the proportionality of the measure.

1.23 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 [1.19].

Territories Legislation Amendment Bill 2020¹

Purpose	This bill seeks to amend various Acts in relation to the territories of Norfolk Island, Christmas Island, the Cocos (Keeling) Islands and the Jervis Bay Territory to allow for the laws of other Australian jurisdictions to be applied to these territories
Portfolio	Infrastructure, Transport, Regional Development and Communications
Introduced	House of Representatives, 7 October 2020
Rights	Fair trial; liberty
Status	Seeking additional information

Relocating criminal matters from Norfolk Island to a prescribed State or Territory

1.24 Schedule 1 of this bill seeks to amend the *Norfolk Island Act 1979* to permit the courts of a prescribed state or territory to have jurisdiction (including appellate jurisdiction) in relation to Norfolk Island as if it were part of that state or territory.² The proposed amendments would also effectively abolish the Supreme Court of Norfolk Island and confer jurisdiction on the courts of a prescribed state or territory.³ The courts would be permitted to sit in either Norfolk Island or the prescribed state or territory.⁴ The laws of the prescribed state or territory would be binding on all courts exercising jurisdiction in that state or territory, or in Norfolk Island, including laws relating to procedure, evidence and the competency of witnesses.⁵

1.25 When exercising its criminal jurisdiction, a prescribed state or territory court would only be permitted to sit in the prescribed state or territory (as opposed to Norfolk Island) if to do so would not be contrary to the interests of justice.⁶ The court would be able to make an order for a criminal trial of the accused to be held in the prescribed state or territory either before the trial has begun or after the trial has begun (in which case the trial would be discontinued, the jury discharged, and a new

1 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Territories Legislation Amendment Bill 2020, *Report 13 of 2020*; [2020] AUPJCHR 155.

2 Schedule 1, Part 2, item 81, proposed subsections 60AA(1)–(2).

3 Schedule 1, Part 3, item 108; explanatory memorandum, pp. 6–7, 64.

4 Schedule 1, Part 2, item 81, proposed subsection 60AA(3).

5 Schedule 1, Part 2, item 81, proposed subsection 60AA(5).

6 Schedule 1, Part 3, item 112, proposed section 60C.

trial held in the prescribed state or territory).⁷ Such an order could only be made if the court was satisfied that first, the interests of justice required it and second, if the accused was not present, that they were represented and understood the effect of the order.⁸

1.26 Additionally, if a trial was ordered to be held in the prescribed state or territory, the amendments would allow a court to make a further order that the accused be removed from custody in Norfolk Island and conveyed to, and held in, the prison specified in the order for so long as is necessary for the purposes of the trial and for any related proceedings.⁹ The accused could also be conveyed back to and detained in Norfolk Island for particular purposes.¹⁰

Preliminary international human rights legal advice

Rights to fair trial and liberty

1.27 By permitting the relocation of criminal proceedings from the place in which the alleged conduct occurred (namely Norfolk Island) to a prescribed state or territory, and allowing an accused to be removed from Norfolk Island and detained in prison in the prescribed state or territory for so long as necessary for the purposes of that trial, these measures engage and may limit the rights to a fair trial and liberty.

1.28 The right to a fair trial and fair hearing is concerned with procedural fairness, and encompasses notions of equality in proceedings, the right to a public hearing and the requirement that hearings are conducted by an independent and impartial tribunal established by law.¹¹ The right to a fair trial provides that in the determination of any criminal charge against a person, that person shall be entitled to certain minimum guarantees. These guarantees include the right to: have adequate time and facilities to prepare a defence; be tried without undue delay; be tried in person (not *in absentia*) or through legal representation; and examine witnesses both against the accused and on their behalf on equal terms with the

7 Schedule 1, Part 3, item 112, proposed subsections 60C(2)–(3).

8 Schedule 1, Part 3, item 112, proposed subsection 60C(4).

9 Schedule 1, Part 3, item 112, proposed subsections 60C(5) and item 115, proposed subsection 60F(1)–(3).

10 Schedule 1, Part 3, Item 120, proposed section 60H. If satisfied that the interests of justice required it, the court could order that a trial held in a prescribed state or territory be adjourned and continued in Norfolk Island for a particular purpose, including viewing a place or taking evidence from a person in Norfolk Island, for so long as is necessary for that purpose. If an order is made under this subsection, the accused would be returned to Norfolk Island for the continuation of the trial and any related proceedings, and empanelled jurors would also be conveyed to Norfolk Island for the trial.

11 International Covenant on Civil and Political Rights, article 14; UN Human Rights Committee, *General Comment No. 13: Article 14, administration of justice* (1984).

prosecution.¹² The statement of compatibility notes that the relocation of proceedings may impose hardship on the accused person by reason of reduced access to witnesses and other evidence on which they may seek to rely in their defence of the proceedings.¹³ There may also be a risk that relocating proceedings, particularly where the trial of the accused has begun in Norfolk Island, would cause undue delay in proceedings. The bill seems to limit the right to a fair trial, particularly the right to minimum guarantees in criminal proceedings, to the extent that it may have the effect of reducing an accused's access to a local court to be tried before a local jury; causing delays to proceedings in the event the trial was relocated; and impairing the accused's ability to prepare a defence and present and examine witnesses in the same manner as the prosecution.

1.29 The right to liberty prohibits the arbitrary and unlawful deprivation of liberty.¹⁴ The notion of 'arbitrariness' includes elements of inappropriateness, injustice and lack of predictability. Accordingly, any detention must be lawful as well as reasonable, necessary and proportionate in all the circumstances. In circumstances where a person is detained on a criminal charge, the right to liberty includes the right to a trial within a reasonable time and the right to be released pending trial, noting that as a general rule, people should not be detained in custody while awaiting trial, although release may be subject to guarantees to appear for trial.¹⁵ The bill would authorise the detention of an accused person for the purposes of a trial held outside Norfolk Island for as long as is necessary for that trial and any related proceedings.¹⁶

1.30 The statement of compatibility notes that the detention is subject to the power of the prescribed state or territory court to grant bail.¹⁷ It states that the effect of the bill would be that the accused person is dealt with and detained in the same manner, and subject to the same laws, as if the detention had been authorised under the law of the relevant state or territory.¹⁸ The statement of compatibility notes that the bill does not deal with the conditions of detention for accused persons from Norfolk Island, as this is a matter dealt with under the relevant state or territory law.¹⁹ While an accused person would be subject to the bail laws of the relevant

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

13 Statement of compatibility, p. 17.

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

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

16 Schedule 1, Part 3, item 112, proposed subsection 60C(5) and item 115, proposed subsection 60F(1)–(3).

17 Statement of compatibility, p. 18.

18 Statement of compatibility, p. 18.

19 Statement of compatibility, p. 18.

state or territory, it is unclear how these laws would operate in practice. It is not clear if the accused would be removed to the specified place before any bail application or after, and what the potential practical and logistical challenges for an accused person may be in applying for bail and in meeting any potential bail conditions if outside their usual place of residence. It is not clear if these challenges may adversely affect the likelihood of being granted bail.²⁰ The bill limits the right to liberty in that it allows a court to order the accused to be removed to the place specified in the order and to be detained, and to the extent that it may have the effect of reducing the likelihood of an accused person from Norfolk Island being granted bail, thus departing from the general rule that persons should not be detained while awaiting trial. It is unclear whether other human rights would be limited by the provision allowing the detention of an accused person from Norfolk Island in a prison in the prescribed state or territory, with potentially reduced access to family, local legal representation and/or other support persons.

1.31 The rights to a fair trial and liberty 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.

1.32 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. It is not sufficient, therefore, that a measure simply seeks an outcome regarded as desirable or convenient. The explanatory memorandum states that the proposed amendments to the jurisdiction of the Norfolk Island courts would allow the possible future conferral of jurisdiction to state or territory courts in relation to Norfolk Island, at which point the Supreme Court of Norfolk Island would cease to operate.²¹ The statement of compatibility notes that it is likely to be a number of years before these provisions are utilised.²² This appears to be a description of what the bill does rather than articulating the pressing or substantial concern the proposed amendments address as required to constitute a legitimate objective for the purposes of international human rights law. It would appear that the proposed amendments may be being made primarily for administrative convenience. Administrative convenience, in and of itself, is unlikely to be sufficient to constitute a legitimate objective for the purposes of international human rights

20 For example, in New South Wales, in assessing bail concerns, the court will consider the concern that an accused person, if released from custody, will fail to appear at any proceedings for the offence: *Bail Act 2013 (NSW)* subsection 17(2)(a). An accused person's ability to appear at proceedings may be compromised by logistical challenges in travelling from Norfolk Island to the prescribed state or territory, potentially giving rise to concerns that the accused will fail to appear for proceedings.

21 Statement of compatibility, p. 13; Schedule 1, Part 2, Item 97, Division 3.

22 Statement of compatibility, p. 13.

law. Further information is required in order to identify the objective being pursued by these measures, assess whether this objective is legitimate and how the measures are rationally connected to (that is effective to achieve) that objective.

1.33 In addition, a key aspect of whether a limitation on a right can be justified is whether the limitation is proportionate to the objective being sought. In this respect, it is necessary to consider whether a proposed limitation is accompanied by sufficient safeguards. Regarding the limit on the right to a fair trial, the statement of compatibility states that factors that may impose hardship on the accused, such as reduced access to witnesses and evidence, would be taken into account by the relevant state or territory court in determining whether the relocation of the proceedings from Norfolk Island would be contrary to the interests of justice. The requirement that criminal proceedings only be relocated if it is not contrary to the interests of justice appears to be an important safeguard.²³ However, further information is required to assess whether this safeguard is sufficient to ensure that minimum guarantees are afforded to accused persons from Norfolk Island: for example, whether the accused person from Norfolk Island would be required to cover the costs of relocating defence witnesses; lawyers and other support persons to prepare their defence; or whether the accused person has access to legal aid schemes and other support services in the relevant state or territory. Regarding the limit on the right to liberty, the statement of compatibility notes that accused persons would be subject to the relevant state or territory bail laws. While bail laws serve as a safeguard to ensure that a person is not unlawfully and arbitrarily deprived of their liberty and is not detained while awaiting trial, as noted above, some questions remain as to the adequacy of this safeguard, having regard to potential practical and logistical challenges of obtaining bail.

1.34 In order to assess the compatibility of this bill with the rights to a fair trial and liberty, further information is required as to:

- (a) what is the objective of conferring jurisdiction on a prescribed state or territory court in relation to Norfolk Island and what evidence is there of a pressing or substantial concern to which the proposed amendments are directed;
- (b) how will transferring the jurisdiction of the Norfolk Island courts to a prescribed state or territory court be effective to achieve the stated objective;
- (c) whether the accused person would be liable to cover all or part of the costs associated with relocating the trial, for instance, the travel costs of their lawyer, witnesses or other support persons to the prescribed state or territory to prepare their defence;

23 Statement of compatibility, p. 17.

- (d) what, if any, financial support is available to an accused person from Norfolk Island to assist them in covering costs associated with the relocation of criminal proceedings;
- (e) whether an accused person would be transferred from Norfolk Island before or after any bail application and whether there is a risk that an accused person from Norfolk Island would be less likely to be granted bail, having regard to any potential practical and logistical challenges for an accused person to attend court in a place outside Norfolk Island or meet bail conditions in a place that is not their usual place of residence; and
- (f) whether the safeguards in place are sufficient to ensure that these measures constitute a proportionate limitation on the rights to a fair trial and liberty.

Committee view

1.35 The committee notes that this bill seeks to amend the *Norfolk Island Act 1979* to allow criminal proceedings to be relocated from Norfolk Island to a prescribed state or territory if it is not contrary to the interests of justice. This would have the effect of relocating a criminal trial to a place other than where the alleged conduct occurred and authorising the detention of an accused person from Norfolk Island in a prison in the prescribed state or territory.

1.36 The committee notes that the bill engages and may limit the rights to a fair trial and liberty to the extent that relocating criminal proceedings may impose hardship on the accused person, such as reduced access to evidence and witnesses to prepare a defence. The committee notes that these rights may be subject to permissible limitations if they are shown to be reasonable, necessary and proportionate.

1.37 In order to form a concluded view of the human rights implications of this bill, the committee seeks the assistant minister's advice as to the matters set out at paragraph [1.34].

Bills and instruments with no committee comment¹

1.38 The committee has no comment in relation to the following bills which were introduced into the Parliament on 17 June 2020 and between 19 to 22 October 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

- Aged Care Amendment (Aged Care Recipient Classification) Bill 2020;
- Aged Care Legislation Amendment (Financial Transparency) Bill 2020 [No. 2];
- Aged Care Legislation Amendment (Improved Home Care Payment Administration No. 2) Bill 2020;
- Competition and Consumer Amendment (Australian Consumer Law—Country of Origin Representations) Bill 2020; and
- Social Services and Other Legislation Amendment (Coronavirus and Other Measures) Bill 2020.

1.39 The committee has examined the legislative instruments registered on the Federal Register of Legislation between 21 September and 13 October 2020.³ The committee has deferred its consideration of two legislative instruments from this period (see Appendix 1). 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.

1 This section can be cited as Parliamentary Joint Committee on Human Rights, Bills and instruments with no committee comment, *Report 13 of 2020*; [2020] AUPJCHR 156.

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.

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>.