Chapter 2

Concluded matters

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

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

Counter-Terrorism Legislation Amendment (High Risk Terrorist Offenders) Bill 2020[2]

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	Concluded examination

2.3 The committee requested a response from the minister in relation to the bill in *Report 11 of 2020*.[3]

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

2 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Counter-Terrorism Legislation Amendment (High Risk Terrorist Offenders) Bill 2020, *Report 13 of 2020*; [2020] AUPJCHR 157.

Extended supervision order scheme

2.4 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'.

2.5 On application by the Australian Federal Police Minister (or their legal representative),[4] a State or Territory Supreme Court could make an extended supervision order, including as an alternative to a continuing detention order.[5] 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.[6] 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.[7] Another extended supervision order could be made after the original three year period expires.[8]

2.6 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.[9] 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.[10] 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

3 Parliamentary Joint Committee on Human Rights, *Report 11 of 2020* (24 September 2020), pp. 2-29.

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

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

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

7 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 orders could not be more than three months, unless the Court was satisfied that there were exceptional circumstances: proposed subsection 105A.9A(8).

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

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

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

classes of conduct.[11] 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;
- 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.[12]

2.7 A person would be eligible for a post-sentence order where: they have been convicted of a specified terrorism related offence;[13] 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;[14] pursuant to a continuing detention order; for breach of an

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

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

13 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.

14 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).

extended supervision order;[15] 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.[16]

2.8 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.[17] In addition, the AFP minister or the subject of the order (or their respective legal representatives) could apply to a Supreme Court for review of a post-sentence order at any time,[18] 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.[19]

Summary of initial assessment

Preliminary international human rights legal advice

Multiple human rights

2.9 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.[20] The right to life imposes an obligation on the state to protect people from being killed by others or identified risks,[21] and the right to security of the person requires the state to take steps to protect people against interference with personal integrity by others.[22] The statement of compatibility notes that the bill promotes the rights to life and security of the person by providing an additional tool to manage the risk posed by terrorist offenders post-sentence.[23] It states that the bill is aimed at a cohort of persons, post-

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

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

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

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

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

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

21 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.

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

23 Statement of compatibility, p. 11.

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.[24]

2.10 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.[25]

2.11 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 to be characterised by the usual procedures and rules for civil proceedings,[26] the application of these indicia of judicial processes does not alter the fact that the proposed supervision order scheme fundamentally inverts a basic assumption 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

24 Statement of compatibility, p. 11.

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

26 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.

a finding of fact on the suspected future behaviour of a past offender which may or may not materialise.[27]

Prohibition against retrospective criminal laws

2.12 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 could apply to persons currently incarcerated for such offences, even though the proposed scheme was not in existence at the point at which they were convicted.[28] 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.

2.13 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 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.

Multiple rights

2.14 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.[29] 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.[30] A supervision order would involve an individual being subject to monitoring, and possibly being restricted in the activities which they may undertake and

27 *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.

28 See, statement of compatibility, p. 35.

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

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

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.[31] 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[32] (for example, an offender may need to apply to a police officer to be allowed to go to a specified area to attend a doctor's appointment).[33] In addition, the imposition of a supervision order would trigger a range of other monitoring powers[34].

- **right to freedom of movement**, which includes the right to move freely both within one's country, and to travel to other countries.[35] 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.[36]
- **right to liberty**,[37] 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.[38] A supervision order

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

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

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

34 As set out in the initial analysis, see Parliamentary Joint Committee on Human Rights, *Report 11 of 2020* (24 September 2020), pp. 26–28.

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

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

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

38 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].

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.[39]

- **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.[40] A supervision order may limit the persons or classes of person with whom a person can communicate or associate (including by limiting or prohibiting the use of social media or certain forms of communication).[41]
- **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.[42] A supervision order may limit the type of work (including voluntary work) which a person is permitted to undertake.[43]
- **right to education**, which provides that education should be accessible to all.[44] A supervision order may prohibit a person from engaging in any training or education without the prior permission of a specified authority.[45]
- **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.[46] As a supervision order may prohibit a person from associating with certain persons, and prohibit them from travelling, such conditions could

39 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.

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

41 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.

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

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

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

45 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.

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

have the effect of interfering with that person's family life, and their ability to associate with their family members.[47]

- **right to freedom of religion**,[48] which includes the right to demonstrate or manifest religious or other beliefs, by way of worship, observance, practice and teaching.[49] 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 may have the effect of restricting a person's capacity to manifest their religious beliefs (for example, by attending religious worship).[50]
- **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.[51] 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.[52] 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.[53] 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

47 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.

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

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

50 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.

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

52 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.

53 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].

the commission of the offence but who turn 18 during the trial or sentencing process.[54] 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.[55] 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.

2.15 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;

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

55 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.

(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, noting 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)).

2.16 The full initial analysis is set out in *Report 11 of 2020*.

Committee's initial view

2.17 To the extent that a supervision order may have the effect of protecting the public from harmful acts, the committee considered that this scheme would promote the right to life and security of the person. The committee also noted 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 noted that these measures may promote the right to liberty.

2.18 However, the committee considered 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 noted that most human rights may be permissibly limited if it is shown to be reasonable, necessary and proportionate.

2.19 In order to form a concluded view of the human rights implications of this bill, the committee sought the Attorney-General's advice as to the matters set out at paragraph [2.15].

Attorney-General's response[56]

2.20 The Attorney-General advised:

Extended supervision order scheme

(a) Conditions

The Committee requested further information regarding whether the type of conditions that may be imposed under an extended supervision order (ESO) may be so severe as to amount to a penalty.

ESOs are designed to ensure the protection of the community from the unacceptable risk posed by convicted high risk terrorist offenders. They do not serve a retributive or punitive purpose, and the orders therefore do not have the character of a penalty. While the conditions which may be imposed by a Supreme Court under an order are restrictive, the court may only impose conditions if satisfied that each condition is 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.

In determining whether a condition is reasonably necessary, and reasonably appropriate and adapted, the court is required to take into account, as a paramount consideration in all cases, the object of Division 105A, namely the protection of the community from serious Part 5.3 offences.

The legislation is designed to ensure that orders are appropriately tailored to protect the community from the specific risk posed by an offender, and that any limitation of the offender's rights is only to the extent necessary to protect the community from the risk posed of committing a further serious terrorism offence.

The process involved in identifying conditions for an ESO would be similar to the approach taken by the Australian Federal Police (AFP) in relation to control orders. When applying for a control order in relation to an individual, the AFP seeks controls which balance the need to ensure that the risk to the community can be mitigated, with the need to ensure that the individual can reintegrate into the community. These factors are considered in drafting the controls in control orders for released offenders and will continue to be important considerations in the drafting of ESO conditions. Operational experience in applying for control orders has also shown that courts have considered proposed control order conditions in close detail in determining whether the conditions are necessary and proportionate to achieve the protective purpose of the order.

56 The minister's response to the committee's inquiries was received on 14 October 2020. This is an extract of the response. The response is available in full on the committee's website at: https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Scrutiny_reports.

The proposed ESO scheme includes safeguards which seek to ensure that any limitations on human rights are proportionate to the legitimate objective of protecting the community from the risk of terrorism. For example, it is open to an offender to apply to the court to vary a condition imposed under the order or to appeal the making of an order.

An offender may also apply to a specified authority for a temporary exemption to a condition, where the court specifies an exemption condition. This seeks to ensure that orders are not unduly onerous and allow for a level of flexibility, while maintaining their protective purpose.

(b) Application of the CDO and ESO scheme

The Committee requested further information regarding why it is appropriate to apply the ESO scheme to those who committed offences before the ESO scheme (or the continuing detention order (CDO) scheme) was in operation.

It is appropriate that the ESO scheme would apply to those who committed offences before the ESO scheme was in operation to achieve the purpose of the scheme, which is to protect the community from terrorist acts. The ESO scheme has been specifically designed and tailored to address the risk posed by high risk terrorist offenders who have committed, and been convicted of, a serious terrorism offence(s).

As noted in the Explanatory Memorandum to the Bill, the imposition of an ESO is not a penalty for criminal offending, as the purpose of an ESO is protective rather than punitive or retributive. While eligibility for a post-sentence order (ESO or CDO) depends on the person having been convicted of a specified terrorism offence, the decision of the court as to whether to impose an ESO is based on an assessment of future risk, rather than as punishment for past conduct. An order could only be made where the court is satisfied that the offender poses an unacceptable risk of committing a serious Part 5.3 offence once released in the community following their custodial sentence. Post-sentence orders are thus based on the risk posed by the offender as they are approaching completion of their custodial sentence, rather than at the time of conviction, consistent with their protective rather than punitive purpose. This is in line with similar state schemes which serve to protect the community from high risk violent and sexual offenders.

(c) Court's determination of 'unacceptable risk'

The Committee requested further information about the factors a court would 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 ESO scheme), and the threshold that a court would apply in determining whether a risk is an acceptable or unacceptable one.

In considering whether a person poses an unacceptable risk, the Bill provides that the court must have regard to a range of matters, which are listed in proposed section 105A.6B. These matters include:

- the object of Division 105A (being the protection of the community from serious Part 5.3 offences);
- any report of an assessment received from a relevant expert, and the level of the offender's participation in the assessment, under section 105A.6 or section 105A.18D;
- the results of any other assessment conducted by a relevant expert of the risk of the offender committing a serious Part 5.3 offence, and the level of the offender's participation in any such assessment;
- any report, relating to the extent to which the offender can reasonably and practicably be managed in the community, that has been prepared by State or Territory corrective services, or any other person or body who is competent to assess that extent;
- any treatment or rehabilitation programs in which the offender has had an opportunity to participate, and the level of the offender's participation in any such programs;
- the level of the offender's compliance with any obligations to which the offender is or has been subject while on parole or while subject to post-sentence order, interim post-sentence order or control order;
- the offender's history of any prior convictions for, and findings of guilt made in relation to, any offence referred to in paragraph 105A.3(1)(a);
- the views of the sentencing court at the time any sentence for any offence referred to in paragraph 105A.3(1)(a) was imposed on the offender; and
- any other information as to the risk of the offender committing a serious Part 5.3 offence.

The Bill provides that the court is not prevented from considering any other factor which it considers relevant. The court would determine what weight it gives to the matters listed in section 105A.6B.

Ultimately, it would be a matter for the court to make an assessment on a case-by-case basis, on the basis of admissible evidence, as to whether the risk an offender poses is unacceptable to meet the threshold for a post-sentence order. This would likely be informed by information which demonstrates the likelihood of the offender being at risk of committing a terrorism offence and the gravity of that potential offending. A court's assessment of whether a person poses an unacceptable risk may also be informed by their experience with similar supervisory schemes. For example, in determining what would constitute an unacceptable risk for the purposes of the Terrorist High Risk Offenders scheme, the courts in

New South Wales consider both the degree of likelihood of the risk being realised and the extent of harm which might result from that realisation.

Consistent with the current approach to CDOs, the court would also have the ability to appoint an independent expert to help inform its decision about the risk posed by an offender, if the court considers that doing so is likely to materially assist the court in deciding whether to make a post-sentence order.

(d) Terrorism threat in Australia

The Committee requested further information about what evidence there is of a pressing and substantial concern to which the proposed ESO 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).

The current threat level for terrorist acts remains at PROBABLE, which means that credible intelligence, assessed by Australia's security agencies, indicates that individuals or groups continue to possess the intent and capability to conduct a terrorist attack in Australia.

As noted in the Explanatory Memorandum to the Bill, the 2019 London Bridge and 2020 Streatham attacks in the United Kingdom were carried out by convicted terrorist offenders who had been released into the community. While Australia has not experienced a similar attack by convicted terrorist offenders to date, the evolving nature of the terrorism threat now includes a specific risk posed by released offenders, who can be highly radicalised, motivated and capable of engaging in further offending (or inspiring others to do so).

There is now a growing cohort of convicted terrorist offenders who have been released into the community following the end of their custodial sentences. Between January 2020 and October 2020, nine convicted terrorist offenders were released into the community, with a further 12 offenders due to be released between November 2020 and 2025.

It is essential that Australia's counter-terrorism framework effectively manages the risk posed by this cohort. The ESO scheme is designed to ensure that appropriate controls are available where a court is satisfied that a particular offender poses an unacceptable risk of committing a serious terrorism offence. This is necessary to ensure the safety and protection of the community from potentially catastrophic terrorist attacks.

(e) Expert assessments

The Committee requested further information about how expert assessments as to the risk of a person engaging in future terrorism related conduct would be effective to accurately assess such a risk, and whether the imposition of an ESO would be rationally connected with the objective of protecting the public from terrorist acts.

Expert assessors provide the court with their assessment of the person's risk of engaging in future terrorism acts, based on their professional judgement. The expert assessor considers the nature and extent of any risks presented by an offender by reviewing:

- the offender's offending history and past conduct;
- the offender's behaviour whilst serving their custodial sentence, including behaviours that indicate maintenance of or disengagement from violent extremist beliefs;
- the offender's participation in rehabilitation programs;
- the offender's plans on release from custody, including in relation to their family and social networks; and
- a structured psychosocial assessment of the offender using the Violent Extremism Risk Assessment 2 Revised (VERA-2R) tool and other appropriate assessment instruments.

When conducting the psychosocial assessment, the expert undertakes a risk assessment by combining their clinical expertise with the support of professional assessment tools such as the VERA-2R. The expert's assessment is based on factual information provided to the expert and information gained from interviewing the person. Instruments such as the VERA-2R support the assessor to identify and analyse risks presented by the person that are associated with terrorism related conduct. The VERA-2R is a structured professional judgement tool that supports a clinician to formulate a subject's risk of committing a violent extremism offence. The risk formulation is therefore ultimately a product of the expert's professional judgment. Unlike actuarial risk assessment tools, the VERA-2R does not claim predictive validity, but assists the assessor to identify and explore risk and protective factors that should be addressed to reduce the subject's risk of reoffending. It has been designed such that the offender's participation in an assessment is not required in order for an assessment to be made, and also permits the measurement of longitudinal change in offender risk over time.

The VERA-2R also supports the expert to explore scenarios in which the offender's risk might be increased or reduced, and identify case management and treatment strategies to reduce the risk. This includes informing the Government of the need for an ESO and the particular conditions that may reduce risk.

The VERA-2R has been subject to peer reviews and is widely used within Australia and internationally. It has also been used by the New South Wales Supreme Court in relation to applications under their Terrorist High Risk Offender scheme.

Instruments such as the VERA-2R do not produce a standalone risk assessment or risk prediction. The assessment is that of the expert, not the instrument itself. Instruments that give a statistical prediction of violent

extremist reoffending are not available. The small numbers of convicted violent extremists who have been released and have subsequently offended does not provide a large enough sample for statistical analysis.

As noted in the Explanatory Memorandum to the Bill, the court must consider amongst other factors the report of an assessment conducted by a relevant expert of the risk of the offender committing a serious Part 5.3 offence (proposed section 105A.6B). It is then a matter for the court as to how much weight it chooses to afford to the assessment when deciding whether it is necessary to make an order to protect the public from terrorist acts. As such, the court's decision as to whether to impose an ESO is appropriately informed by an expert's assessment of the risk the offender poses of committing a further terrorism offence, and is rationally connected to the objective of protecting the public from terrorist acts.

(f) Parole for terrorist offenders

The Committee requested further information as to 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.

Parole allows for the conditional release of offenders to serve the remainder of their prison sentence in the community. It does not provide an effective means to protect the public from the threat posed by high risk terrorist offenders at the end of their sentences. ESOs would provide an appropriately tailored option to manage the enduring risk that an offender poses to the community following their release. Orders would be available for up to three years. There is also the possibility of successive orders, providing that the court is satisfied that the offender continues to pose an unacceptable risk of committing a serious Part 5.3 offence. In contrast, conditions imposed on offenders released on parole can only apply for the duration of the offender's sentence.

Under section 19ALB of the *Crimes Act 1914*, the Attorney-General must only grant parole to a specified individual (including an individual convicted of a terrorist offence) where satisfied that exceptional circumstances exist to justify making a parole order. Exceptional circumstances are not defined. Section 19ALB does not operate as a blanket ban against parole for terrorists and terrorism-related offenders, and offenders still have the opportunity to be released into the community under supervision and parole conditions where there are exceptional circumstances. However, due to the seriousness of the offending it is appropriate that terrorist offenders are subject to a higher threshold when considered for release from prison.

Matters that are generally taken into consideration include (but are not limited to) the offender's engagement in rehabilitation, their behaviour in prison, their progression through prison classification systems, the views

of operational agencies regarding the threat the offender poses to the community if released, and whether the offender's release on parole is supported by those agencies.

While each case is assessed on its merits, in circumstances where operational agencies have information which indicates that an offender poses a threat to community safety, it is unlikely that exceptional circumstances can be established and they will not be able to be released on parole.

(g) Parole conditions and ESO conditions

The Committee requested further information around 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.

A person will be eligible for an ESO if they are detained in custody serving a sentence of imprisonment for an eligible offence (proposed new section 105A.3A(1)). As such, if an offender is released on parole, they would no longer be eligible for an ESO as they would no longer be detained in custody.

There are some limited circumstances where it is theoretically possible that a person could be subject to an ESO and bail or parole conditions at the same time. For example, an offender could be released after serving a sentence for an eligible terrorism offence and made the subject of an ESO for a three year period. In the first year of their release, the offender is convicted of a further offence and sentenced to 12 months imprisonment. During this period of imprisonment, the Bill would provide that the order is suspended, which means that the conditions do not apply. This suspension does not affect the expiry date of the order. If the offender was then released on parole, then they would be subject to both parole and the ESO conditions.

Such cases are likely to be infrequent, and will be managed by ensuring that the conditions of parole take into account the fact that the ESO conditions would resume once the person is released from custody. This is similar to the current arrangements where an individual can be subject to state and Commonwealth parole conditions simultaneously. Where this occurs, the Commonwealth Parole Office works with state agencies to manage the offender under both orders.

(h) Terrorist offenders who have received parole

The Committee requested further information about the percentage of persons who have been imprisoned for a terrorism offence under Part 5.3 of the Criminal Code, and who have received parole in the past 10 years.

One terrorist prisoner has been granted parole since October 2012. At the time of his release, he had been in a normal prison environment for many

years and was undertaking supervised work outside of the prison. His release on parole was supported by the APP and Corrective Services NSW.

Before October 2012, the *Crimes Act 1914* did not provide discretion to refuse to grant parole to any federal prisoners whose head sentences were under 10 years. For example, some of the offenders convicted as a result of Operation Pendennis received sentences that were under 10 years imprisonment and as a result, these offenders were automatically released on parole at the expiry of the non-parole periods set by the sentencing courts.

(i) Current prison services available to manage terrorist offenders

The Committee requested further information regarding 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.

The management and rehabilitation of federal terrorist offenders is a state and territory responsibility. The Australian Government has supported the states and territories to implement and develop rehabilitation programs. However, the relatively small number of convicted terrorists who have been released in Australia makes it difficult to obtain statistically valid evaluations of the effectiveness of prison terrorist rehabilitation programs in reducing the risk of terrorism recidivism. Prisoners who are eligible under the HRTO scheme may also have declined to participate in rehabilitation programs, attended but not engaged meaningfully, or may need to undertake further participation in programs beyond their sentence to reduce their risk.

Success in these programs relies on the person's motivation to change and their willingness to re-evaluate their ideology. An offender's successful rehabilitation may also depend on whether they have appropriate family, social and professional supports in the community.

(j) Civil standard of proof for ESOs

The Committee requested further information as to why it is appropriate that the civil standard of proof (balance of probabilities) should be required for the issue of an ESO or ISO, noting the potential significant impact on human rights by the imposition of a supervision order.

The civil standard of proof required for making of an ESO or ISO is appropriately set to the 'balance of probabilities' (which is the same standard of proof for making a control order) to reflect the fact that these orders impose restrictions on an individual's personal liberties that fall short of custody. As such, this standard of proof is lower than the current standard of proof required for making a CDO, which is a high degree of probability. It is also consistent with the standard of proof that ordinarily applies in other civil proceedings.

This standard is appropriate to ensure that the scheme achieves its intended objective of protecting the community from terrorist acts. Any imposition on the offender's rights will be considered by the court as it assesses whether the proposed conditions are reasonably necessary, and reasonably appropriate and adapted for the purpose of protecting the community.

(k) Condition to remain at specified premises for more than 12 hours within any 24 hour period

The Committee requested further information as to 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, noting 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(l)).

It would be open to a court to impose any condition under an ESO, provided it is satisfied that the condition is reasonably necessary, and reasonably appropriate and adapted.

The possible conditions listed in subsections 105A.7B(3) and 105A.7B(5) do not limit the court's ultimate discretion to impose whatever conditions the court is satisfied are proportionate to the risk posed by the offender. However the specific listing of those conditions are intended to provide some guidelines on the Parliament's views on what may constitute reasonable conditions. The proposed provisions have been framed this way to ensure there is sufficient flexibility to tailor the conditions to the specific risk posed by the offender in the community.

It is relevant to note the safeguards proposed which seek to ensure that any limitations on human rights are proportionate to the legitimate objective of protecting the community from the risk of terrorism. For example, it is open to an offender to apply to the court to vary a condition imposed under the order or to appeal the making of an order.

An offender may also apply to a specified authority for a temporary exemption to a condition, where the court specifies an exemption condition. Requests for exemptions would be considered on a case by case basis, and will depend on a range of factors including the range of conditions currently in place, the individual 's past behaviour, though protection of the community will ultimately be the primary factor. This is similar to the approach taken by the AFP in relation to control orders where exemptions from certain conditions may be issued from time to time to afford sufficient flexibility for the offender in circumstances where the risk to the community would not be increased (for example, compliance with curfew conditions where a person may be working a late night shift). It is envisaged that the consideration of exemptions under the ESO scheme will be similar.

As noted in the Explanatory Memorandum to the Bill, the court may set out the process for seeking an exemption in the terms of the order. For example, the condition may be drafted so the subject is required to provide a certain period of notice. To request an exemption, the offender will need to submit a written request to the specified authority for an exemption to a particular condition, outlining the exemption sought and reasons for seeking an exemption.

Noting that the Supreme Court would have already made a finding that the condition the offender is seeking an exemption from is necessary for the protective purpose of the order, it would not be appropriate to have a requirement to provide reasons for refusing an exemption to the subject as police may have come to this decision based on sensitive or intelligence information.

Exemptions that constitute a substantial variation of the condition would follow the variation process.

Concluding comments

International human rights legal advice

Absolution prohibition on retrospective criminal laws

2.21 Further information was sought as to whether the type of conditions that may be imposed under an extended supervision order may be so severe as to amount to a penalty for the purposes of international human rights law. The Attorney-General advised that extended supervision orders are designed to protect the community and do not serve a retributive or punitive purpose, and so do not have the character of a penalty. The Attorney-General stated that the conditions which may be imposed by a court may be restrictive, but may only be imposed if the court is satisfied that each condition is 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. The Attorney-General further stated that the legislation is designed to ensure that orders are appropriately tailored to protect the community from the specific risk posed by an offender, and that any limitation of the offender's rights is only to the extent necessary to protect the community from the risk of the offender committing a further serious terrorism offence.

2.22 The Attorney-General further explained that it would be open to a court to impose any condition under an extended supervision order, provided it was satisfied that the condition is reasonably necessary, and reasonably appropriate and adapted. The Attorney-General explained that the possible conditions listed in proposed subsections 105A.7B(3)-(5) do not limit the court's ultimate discretion to impose whatever conditions the court is satisfied are proportionate to the risk posed by the offender, although they are intended to provide some guidance on the Parliament's views as to what may constitute reasonable conditions, and to provide sufficient

flexibility to tailor the conditions to the specific risk posed by the offender in the community.

2.23 Article 15 of the International Covenant on Civil and Political Rights relevantly provides that no one shall be subject to a heavier penalty than one that applied at the time an offence was committed. As the extended supervision order scheme only applies to persons who have already been convicted and sentenced for a specified criminal offence, it is necessary to consider if an additional penalty is being imposed on those persons by this measure. Under international human rights law, in assessing whether a measure constitutes a 'penalty', it is necessary to consider:

(a) whether the measure in question is imposed following conviction for a criminal offence;

(b) the domestic classification of the measure;

(c) the nature and purpose of the measure;

(d) the severity of the penalty; and

(e) the procedures involved in the making and implementation of the measure.[57]

2.24 In relation to (a), the extended supervision order is imposed only in relation to those who have been convicted of specified offences. In relation to the domestic classification of the measure, the scheme is treated as protective, as opposed to punitive, and is thus non-criminal under Australian domestic law. However, the notion of a 'penalty' has an autonomous meaning in international human rights law, and it is necessary to go beyond appearances and assess whether a particular measure amounts in substance to a 'penalty' within the context of a retrospective criminal penalty.[58] Consequently, the domestic classification of the measures, while relevant, is not determinative.

2.25 In relation to the nature and purpose of the measure, a measure will likely be considered criminal under international human rights law if it is intended to punish and deter. In this respect, the extended supervision order scheme is clearly intended to deter people who have been convicted of a terrorism offence from engaging in similar future conduct.

57 See *Welch v United Kingdom*, European Court of Human Rights, Applicant No. 17440/90; *Scoppola v Italy (No. 2)*, European Court of Human Rights (Grand Chamber), Application No. 10249/03 (2009); and Trine Baumbach, 'The Notion of Criminal Penalty and the Lex Mitior Principle in the Scoppola v. Italy Case,' *Nordic Journal of International Law*, Volume 80, no. 2 (2011), pp.125-142, particularly pp. 131- 132.

58 *Scoppola v Italy (No. 2)*, European Court of Human Rights (Grand Chamber), Application No. 10249/03 (2009) [96].

2.26 As to the severity of the measure, the Attorney-General has advised that, on being satisfied that an unacceptable risk of the individual committing a terrorism offence exists, a court could impose *any* condition which it is satisfied is reasonably necessary, and reasonably appropriate and adapted to protect the community from that unacceptable risk. It would appear that some potential conditions which could be imposed under an extended supervision order (for example, that the person may not contact a particular friend) may not rise to the level of severity such that they would be considered a criminal penalty under international human rights law. However, it would also appear that a court could impose conditions that may be so severe as to be regarded as a criminal penalty under international human rights law. In particular, while the bill proposes that a reasonable condition may involve a requirement that a person remain at specified premises for up to 12 hours a day, the Attorney-General explained that this would not constrain the court from requiring that a person remain at specified premises for longer than this. Consequently, as a matter of statutory interpretation, there is a risk a court could require that, in order to address the unacceptable risk of a person engaging in terrorist conduct, they must remain at specified premises for 24 hours a day. Such a condition would amount to a deprivation of liberty under international human rights law,[59] and the United Nations Human Rights Committee has explained that this would constitute a criminal penalty under international human rights law.[60] This means that there is a risk that some particular conditions which could, as a matter of statutory interpretation, be imposed under an extended supervision order, may be so severe as to be considered to amount to a criminal penalty under international human rights law.

2.27 In relation to the procedures involved in the making and implementation of the measure, an extended supervision order may only be sought by application to a court. A judge must be satisfied on the balance of probabilities that the person poses an unacceptable risk of engaging in a future terrorist offence. They must then be satisfied, with respect to every proposed condition, that each condition is reasonably appropriate and reasonably necessary and adapted to address that risk. Given that the measures would only be imposed based on an assessment of the facts of each individual case (as opposed to a standardised sanction) this tends to indicate that the measures may be regarded as penal.[61]

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59 *Fardon v. Australia*, UN Human Rights Committee, CCPR/C/98/D/1629/2007, 10 May 2010, [7.4].

60 *Fardon v. Australia*, UN Human Rights Committee, CCPR/C/98/D/1629/2007, 10 May 2010, [7.4]; *Tillman v. Australia*, UN Human Rights Committee, CCPR/C/98/D/1635/2007, 10 May 2010, [7.4].

61 See, Trine Baumbach, 'The Notion of Criminal Penalty and the Lex Mitior Principle in the Scoppola v. Italy Case,' *Nordic Journal of International Law*, Volume 80, no. 2 (2011), pp.125-142, particularly pp. 131- 132. Baumbach states, ' If, instead, the measure is a standardised sanction and not imposed on the basis of the concrete circumstances in the case at hand, it points in the direction of a non-penal measure'.

2.28 In relation to the retrospective application of this measure, the Attorney-General advised that there is a growing cohort of convicted terrorist offenders who have been released into the community following the end of their custodial sentences, with 12 offenders due to be released between November 2020 and 2025. The Attorney-General further stated that it is essential that Australia's counter-terrorism framework effectively manages the risk posed by this cohort. As to 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, the Attorney-General stated that the scheme has been specifically designed and tailored to address the risk posed by high risk terrorist offenders who have committed, and been convicted of, a serious terrorism offence. The Attorney-General stated that, due to the protective as opposed to the punitive character of an extended supervision order, it is appropriate to apply the scheme retrospectively.

2.29 The Attorney-General has explained that the extended supervision order would operate with respect to terrorist offenders who are currently in prison. That is, people who have already engaged in criminal conduct, and been sentenced for that conduct. In such cases, the extended supervision order would be operating in a retrospective way, because it would be exercised in response to conduct which took place before the law existed.

2.30 On this basis there is a risk that an extended supervision order could be made in relation to a person who had engaged in terrorist conduct before the scheme existed where the conditions of the order were so severe (particularly if it involved home detention for long periods) that this may be regarded as a criminal penalty under international human rights law. As such, the measure risks being incompatible with the absolute prohibition on retrospective criminal laws.

Multiple rights

Prescribed by law

2.31 In addition, the proposed introduction of an extended and interim supervision order scheme further engages and may limit a number of human rights, the rights to liberty, freedom of movement, a private life, protection of the family, freedom of expression, assembly and association, and the right to work. These rights may be subject to permissible limitations where the limitation is prescribed by law, pursues a legitimate objective, is rationally connected to that objective and is a proportionate means of achieving that objective.

2.32 In determining whether the extended supervision order would satisfy the requirement that a limitation on rights must be prescribed by law, it must be determined whether the law is sufficiently certain such that people understand the legal consequences of their actions or the circumstances under which authorities

may restrict the exercise of their rights.[62] In this regard, further information was sought as to what factors a court would 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 a court would apply in determining whether a risk is an acceptable or unacceptable one.

2.33 The Attorney-General noted that in determining that the offender poses an unacceptable risk, the court must have regard to a range of matters as set out in section 105A.6B, and any other matter the court considers relevant. This includes considering any assessment report from a relevant expert; reports regarding the extent to which the offender can reasonably and practicably be managed in the community; any rehabilitation or treatment programs; the level of the offender's compliance with any obligations while on parole, or subject to a post-sentence or control order; the offender's history of prior convictions; and the views of the sentencing court at the time any sentence was imposed.

2.34 The Attorney-General advised that it would be a matter for the court to assess, on a case-by-case basis, whether the risk an offender poses is unacceptable. This would likely be informed by: information which demonstrates the likelihood of the offender being at risk of committing a terrorism offence; the gravity of that potential offending; and potentially a court's experience with similar supervisory schemes. The Attorney-General also noted that the court could appoint an independent expert to help inform its decision about the risk posed by an offender. The Attorney-General further noted that, in determining what would constitute an unacceptable risk, the courts in New South Wales consider both the degree of likelihood of the risk being realised and the extent of harm which might result from that realisation.

2.35 The 'unacceptable risk' test currently operates in other areas of law. For example, the *Bail Act 2013* (NSW) provides that a bail authority may refuse to grant bail if satisfied that there is an unacceptable risk that the person will engage in specified conduct if released, including committing a serious offence.[63] In this context, courts appear to have interpreted the unacceptable risk test to require an assessment of whether the risks associated with the release of a person can be mitigated by the imposition of strict conditions.[64] The term has also been used by courts in assessing a risk of child abuse by parents, and corresponding decisions around parental access to children, although the High Court in particular has not

62 *Pinkney v Canada,* UN Human Rights Communication No.27/1977 (1981) [34]. The UN Human Rights Committee noted that a legislative provision framed in very general terms may not itself provide satisfactory legal safeguards against arbitrary application, at [34].

63 *Bail Act 2013* (NSW), section 19.

64 See*, Rakielbakhour v DPP* [2020] NSWSC 323 (31 March 2020) [21] per Hamill J.

offered a precise definition of the term, instead cautioning against 'striving for a greater degree of definition than the subject is capable of yielding'.[65] These have some use in terms of understanding how a court may interpret the phrase in this context, as do the matters the court must have regard to when determining whether to make such an order. However, it is noted that for the purposes of international human rights law, the quality of law test requires that any measures which interfere with human rights must be sufficiently certain and accessible, such that people can understand the circumstances under which authorities may restrict the exercise of their rights. In this regard, some questions remain as to whether the distinction between an 'acceptable' risk, as opposed to an 'unacceptable risk' of engaging in future terrorist conduct, is sufficiently clear such that an individual could adduce evidence to a court demonstrating that they do not pose an unacceptable risk, and understand where that threshold lies.

Legitimate objective

2.36 Further information was sought as to what evidence there is of a pressing and substantial concern to which the proposed extended and interim supervision order scheme is directed (including numbers of terrorism offenders in Australia who have been released from prison and re-offended).

2.37 The Attorney-General stated that the current threat level for terrorist acts is at 'probable', meaning that credible intelligence indicates that individuals or groups possess an intention and capability to conduct a terrorist attack in Australia. He stated that although Australia has not experienced an attack such as those carried out in the United Kingdom in 2019 and 2020 (by convicted terrorist offenders who had been released), there is nevertheless a specific risk posed by released offenders in Australia who can be highly radicalised and motivated. The Attorney-General noted that between January and October 2020, nine convicted terrorist offenders were released in the community, and 12 offenders are due to be released between November 2020 and 2025, and that as a cohort, these offenders pose a risk. The Attorney-General also stated that the small numbers of convicted violent extremists who have been released and have subsequently offended does not provide a large enough sample for statistical analysis.

2.38 As previously noted, 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 international human rights law. However, some questions remain as to whether there is currently a pressing or substantial concern that requires addressing in Australia, noting that the information provided only states that the risk exists, and that those convicted of terrorism offences have recently been, or are soon due to be, released from prison, and does

65 See, *M v M* [1988] HCA 68 [25].

not point to specific evidence establishing the extent of the risk posed by such individuals.

Rational connection

2.39 Further information was sought as to whether expert assessments of the risk of a person engaging in future terrorism related conduct can accurately assess such risks, and consequently whether the imposition of an extended supervision order would be rationally connected with the objective of protecting the public from terrorist acts.

2.40 The Attorney-General explained that expert assessors provide the court with an assessment of the person's risk of engaging in future terrorist acts based on: the person's offending history and past conduct; their behaviour in custody, including behaviours indicating maintenance of, or disengagement from, violent extremist beliefs; their participation in rehabilitation programs; their plans on release from custody, including relating to family and social networks; and a structural psychological assessment of the person using the Violent Extremism Risk Assessment Tool 2 Revised (VERA-2R) and other appropriate assessment instruments. The Attorney-General explained that the expert's assessment is based on factual information provided to the expert and information gained from interviewing the person. The Attorney-General advised that the VERA-2R does not claim predictive validity, but assists the assessor to identify and explore risk and protective factors that should be addressed to reduce the subject's risk of reoffending. The Attorney-General further noted that the VERA-2R has been designed such that the offender's participation in an assessment is not required in order for an assessment to be made, and also: permits the measurement of longitudinal change in offender risk over time, and supports experts to explore scenarios which might increase or reduce a risk of reoffending. The Attorney-General stated that the VERA-2R mechanism could, therefore, inform the court as to whether an extended supervision order may address a risk, and what conditions may reduce any such risk.

2.41 The Attorney-General further advised that instruments such as VERA-2R are used to inform an expert's assessment, and do not themselves produce a standalone risk assessment or prediction, and further noted that a court must consider other matters beyond the report of an assessment, and that it is a matter for the court as to how much weight it chooses to afford an assessment.

2.42 This information is useful in assessing whether expert assessments may be accurate in predicting a person's potential future risk of engaging in terrorist conduct, and in informing the court when deciding whether to make an extended supervision order. It is noted that in comparing different tools for assessing the risks of recidivism among terrorist offenders in 2019, the International Centre for Counter-Terrorism in the Hague noted that Structured Professional Judgment tools such as the VERA-2R may be effective as an aid or basis for decision-making, but it

'does not mean much more than structuring the common sense and intuition of professionals to support their judgments'.[66] It would appear that an assessment by an expert, which may include an evaluation in accordance with the VERA-2R tool, may be capable of assisting in identifying instances in which there is a real risk of recidivism by a convicted terrorist offender. However, there may be significant challenges in retrospectively assessing the accuracy of expert assessments, noting that it may not be possible to distinguish between persons who left prison subject to an extended supervision order and never intended to undertake a further terrorist act, and those persons who would have engaged in future terrorist conduct but for the imposition of conditions under an extended supervision order.

Proportionality

2.43 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 relation to the extent of the conditions that may be imposed under an extended supervision order, and therefore the proportionality of the measure, information was sought as to whether, as a matter of statutory interpretation, proposed section 105A.7B places any limitation on the court's discretion to impose conditions under an extended supervision order. As discussed above at paragraph [2.24], the Attorney-General advised that the suggested extended supervision order conditions provide guidance as to the Parliament's views as to what may constitute reasonable conditions, but do not constrain the court's power to impose any condition which it is satisfied is reasonably necessary, and reasonably appropriate and adapted for the purpose of protecting the community from the unacceptable risk of a terrorist act being committed. As such, it would appear that the only constraints on a court's ability to make orders of any kind with respect to an individual would be the assessment of whether those orders are necessary, appropriate and adapted to protect the community from the

66 Liesbeth van der Heide, Marieke van der Zwan, and Maarten van Leyenhorst, 'The Practitioner's Guide to the Galaxy: A Comparison of Risk Assessment Tools for Violent Extremism', *International Centre for Counter-Terrorism Research Paper* (September 2019) p. 22. RTI International further cautions that for assessment tools for violent extremism to have any authority they must be empirically evaluated, but none of the existing tools have been comprehensively validated, in part because extremist violence is a relatively rare occurrence and its perpetrators are often either killed in the act or arrested and unavailable for interview by researchers. See, RTI International, ' Countering Violent Extremism: The Application of Risk Assessment Tools in the Criminal Justice and Rehabilitation Process', *Literature Review prepared for the Department of Homeland Security* (February 2018), p. 23.

unacceptable risk of a person engaging in a terrorist act.[67] Proposed subsection 105A.7B(3) provides that the conditions a court may impose include that the offender remain at specified premises between specified times or days, and also states 'but for no more than 12 hours within any 24 hours'.[68] However, noting that proposed subsection 105A.7B(3) also provides that this qualification is 'without limiting' the overall section which allows for *any* reasonable conditions to be imposed, and noting the Attorney-General's advice that this does not limit the court's ultimate discretion, it would appear that it would be open to a court to order the home detention of a person for up to 24 hours a day, if it were considered reasonably necessary, and reasonably appropriate and adapted in that particular case. It is not clear that such conditions would be proportionate to the objective sought to be achieved, particularly noting that the scheme is based on the risk of future offending, and not punishment for past conduct.

2.44 In relation to the safeguards available in the bill, the Attorney-General noted that an individual may apply to the court for variation of a condition, as well as seeking a temporary exemption from a condition from a specified authority. In terms of assessing requests for a temporary exemption, the Attorney-General stated that the outcome will depend on a range of factors including the range of conditions currently in place and the individual's past behaviour, although protection of the community will ultimately be the primary factor. The Attorney-General stated that no written reasons would be provided for a decision to refuse an exemption, because the reasons may be based on sensitive or intelligence information. The capacity to seek a variation of a condition, or a temporary exemption, may assist with the proportionality of the measure. However, it is noted that variations are unlikely to be granted for personal reasons if the court determines that the condition is still reasonably appropriate and adapted for the purposes of protecting the community. In addition, having to apply to a specified authority (such as a police officer) for a temporary exemption in order 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. Further, there may be circumstances in which the individual faces difficulties adducing evidence that they no longer pose a risk, or pose less of a risk, of engaging in further terrorist conduct. In addition, 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

67 In making such an assessment, a court would not be required to, for example, take into consideration the individual's privacy, their capacity to support themselves financially and meet their basic needs (through work or further education), or their health (including mental health) and personal relationships.

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

does not require the specified authority to provide reasons for a decision.[69] The only remedy which a person could seek would be seeking a variation of the condition (through the courts) where an exemption is refused.[70] In addition, 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 accessing evidence associated with the order, as discussed in detail below at paragraphs [2.72] to [2.76]. Noting these limitations, the ability of a person to apply for exemptions and variations to the order does not appear to offer an effective safeguard to protect the person's human rights.

2.45 Further information was sought as to 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. This is in contrast to the 'high degree of probability' standard required in the case of a continuing detention order.[71] The Attorney-General stated that this reflects the fact that the extended supervision orders impose restrictions on an individual's personal liberties which fall short of custody. The response also noted that any imposition on the offender's rights will be considered by the court as it assesses whether the proposed conditions are reasonably necessary, and reasonably appropriate and adapted for the purpose of protecting the community. The Attorney-General further stated that the lower standard is appropriate to ensure that the scheme achieves its intended objective of protecting the community from terrorist acts.

2.46 However, 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. To make an extended supervision order a court must first be satisfied that there is an unacceptable risk of the person engaging in a terrorist offence, and that any conditions are to protect the community from that unacceptable risk. This suggests that the conditions imposed may need to be stringent in order to protect the public, and could necessitate monitoring and supervision, or otherwise limit a person's liberty, in order for them to fulfil the stated purpose. As set out above, a court could impose an extended supervision order that resulted in the home detention of a person for many hours a day, which may amount to a deprivation of liberty. 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. Given the potential impact on human rights that could be imposed under an extended supervision order, it would not appear that the civil

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

70 Explanatory memorandum, p. 74.

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

standard of proof (that it is more likely than not that an offender would pose an unacceptable risk) constitutes a sufficient safeguard to protect the rights limited by this scheme.

2.47 Further information was also sought regarding parole, and 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. The Attorney-General advised that an extended supervision order would not generally be able to be made in relation to a person released on parole,[72] and that parole is rarely used in relation to those convicted of terrorism offences.[73] The Attorney-General also advised that, while parole allows for the conditional release of offenders to serve the remainder of their prison sentence in the community, it does not provide an effective means to protect the public from the threat posed by high risk terrorist offenders at the end of their sentences. He noted that parole conditions may only apply for the duration of the offender's sentence, whereas an extended supervision order could apply after their sentence had ended, and continue to be available successively to manage 'the enduring risk' that an offender may pose following their release. It is noted that a less rights restrictive approach may be to not have a presumption against parole, to allow stringent conditions to be imposed while a person serves their original sentence, and then if it is still considered necessary to impose an extended supervision order, to allow an application for such an order at that point. It is also noted that the Attorney-General's response, in referring to managing the 'enduring' risk that an offender poses, appears to indicate that it is intended that extended supervision orders may continually be made, which may effectively subject a person to this scheme indefinitely, which calls into question the proportionality of this measure.

2.48 Finally, further information was also sought as to 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. The Attorney-General advised that, with the support of the federal government, states

72 Although there may be some limited and infrequent circumstances where it is theoretically possible that a person could be subject to an extended supervision order *and* bail or parole conditions at the same time, such as if after an extended supervision order was made the person was convicted of another offence, and was then given bail or parole for that offence. In such circumstances, the Attorney-General stated that such cases would be similar to the current arrangements where an individual can be subject to state or territory and Commonwealth parole conditions simultaneously, and that where this occurs, the Commonwealth Parole Office works with state or territory agencies to manage the offender under both orders.

73 Noting that parole may only be granted to terrorist offenders, where 'exceptional circumstances' exist to justify making such an order: *Crimes Act 1914*, section 19ALB.

and territories have responsibility for the management and rehabilitation of federal terrorist offenders.[74] The Attorney-General stated that individual success in these programs relies on the person's motivation to change and their willingness to re-evaluate their ideology, and that an offender's successful rehabilitation may also depend on whether they have appropriate family, social and professional supports in the community. The response stated that prisoners who are eligible under the High Risk Terrorism Offenders scheme may also have declined to participate in rehabilitation programs, attended but not engaged meaningfully, or may need to undertake further participation in programs beyond their sentence to reduce their risk. The Attorney-General further advised that the small number of convicted terrorists who have been released in Australia makes it difficult to obtain statistically valid evaluations of the effectiveness of prison terrorist rehabilitation programs in reducing the risk of terrorist recidivism. In the absence of comprehensive information as to whether prison services, including those developed specifically to reduce the risk of recidivism among terrorist offenders, are available and effective to de-radicalise or otherwise rehabilitate terrorist offenders, it is difficult to make a conclusive finding as to the extent to which such services provide an effective less rights restrictive alternative to a post-sentence extended supervision order.

Concluding observations

2.49 As was noted in the initial analysis, 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, stating:

> 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

74 It appears that only Victoria and New South Wales have prison programs directed specifically towards radicalised inmates: the Victorian Community Integrated Support Program; and the NSW proactive integrated support model (PRISM) intervention. See, Professor Adrian Cherney, 'Prison radicalisation and deradicalisation in Australia', *Australian Strategic Policy Institute* (4 April 2020); and NSW Inspector of Custodial Services, 'The management of radicalised inmates in NSW' (May 2018).

> 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.[75]

2.50 The Attorney-General has indicated that this scheme would operate with respect to terrorist offenders who are currently in prison, and noted that 12 such persons are due to be released between now and 2025. Where the extended supervision order would operate with respect to terrorist offenders who are currently in prison, it would be operating in a retrospective way (that is, it would be exercised in response to conduct which took place before the law existed). In such cases, if a condition imposed under an extended supervision order (or a series of conditions) was so severe such that it would be regarded as a criminal penalty under international human rights law, this would violate the prohibition on retrospective criminal laws. This is an absolute right and may not be permissibly limited. As the bill provides no limit on the type of conditions that a court may impose, other than that they must be reasonably necessary and appropriate and adapted for the purpose of protecting the community from the unacceptable risk of the offender committing a future terrorist offence, there is a risk that the conditions may be so severe as to amount to a penalty. This is particularly the case if the court were to order long periods of home detention. As such, as currently drafted, there is a risk that this measure may not be compatible with the absolute prohibition against retrospective criminal laws.

2.51 In addition, the proposed extended supervision order scheme would establish a broad discretion for a court to impose any conditions which it considered, on being satisfied that the person posed an unacceptable risk of engaging in terrorist conduct, were reasonably necessary and reasonably appropriate and adapted to protect the community from that risk. Consequently, the scheme may engage and limit a number of other human rights. These rights may be permissibly limited where such a limitation is: prescribed by law; seeks to achieve a legitimate objective; is rationally connected to (that is, effective to achieve) that objective; and is a proportionate means of doing so.

2.52 As set out above, while it may generally have been established that the measure is prescribed by law, seeks to achieve a legitimate objective and is rationally connected to that objective, some questions remain: whether the threshold that a person poses an 'unacceptable risk' of engaging in future terrorist conduct is sufficiently certain; whether there is an issue of public or social concern that is

75 *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.

pressing and substantial enough to warrant limiting the rights; and how the accuracy of any assessments of future risk may, in practice, be determined.

2.53 In relation to whether, taken as a whole, the extended supervision order scheme would be a proportionate means of addressing its stated objectives, it does not appear that applying the civil standard of proof (on the balance of probabilities) would be proportionate, noting the Attorney-General's advice that a court could impose *any* conditions which it was satisfied (also on the balance of probabilities) were reasonably necessary, and reasonably appropriate and adapted to protect the community from the unacceptable risk of a person engaging in terrorist conduct. The civil standard of proof is a substantially lower threshold to be met than the comparable 'satisfied to a high degree of probability' that applies in relation to continuing detention orders. In addition, it appears that the existing capacity to release an offender on parole, including subject to strict conditions, is rarely utilised with respect to terrorist offenders, and it remains unclear as to whether prison services designed specifically to de-radicalise terrorist inmates and reduce the risk of recidivism are effective, or not (such that the introduction of a post-sentence scheme such as this is necessary). Other matters which raise concerns from the perspective of proportionality include the fact that extended supervision orders, while limited to a maximum of three years in duration, could be sought consecutively without limit. Further, it is not clear that the capacity to apply for a variation of an order, and to seek a temporary exemption from a condition, would provide practical flexibility such that these could operate as safeguards in practice, and assist in the proportionality of the measure.

2.54 As such, it would appear that there is a significant risk that the extended supervision order scheme could impermissibly limit multiple human rights, including the rights to liberty, freedom of movement, a private life, protection of the family, freedom of expression, assembly and association, and the right to work.

Committee view

2.55 The committee thanks the Attorney-General for this response. 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. The committee recognises that this constitutes an important safeguard against the imposition of unreasonable or inappropriate conditions on a person.

2.56 To the extent that a supervision order may have the effect of protecting the public from harmful acts, the committee considers that this scheme promotes the right to life and security of the person. In the context of high-risk terrorist offenders, the committee recognises that the government has a critically important role in protecting the community from the catastrophic harm which could be

caused by a large scale terrorist attack in Australia. 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.

2.57 The committee notes 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.

2.58 In relation to the absolute prohibition on retrospective criminal law, the committee notes the Attorney-General's advice that extended supervision orders are designed to protect the community and do not serve a retributive or punitive purpose, and so do not have the character of a penalty. However, the committee also notes the legal advice that the notion of a 'penalty' has an autonomous meaning in international human rights law, and it is necessary to look beyond the description of a measure to its substantive character, and assess whether a particular measure amounts in substance to a 'penalty'. In this regard, the committee considers that the imposition by the court of many conditions under an extended supervision order would not be so severe as to amount to a penalty. However, the committee notes that should a court order the home detention of a person for long periods of time, this deprivation of liberty may risk amounting to a penalty, which in such circumstances risks being incompatible with the absolute prohibition on retrospective criminal laws.

2.59 In relation to other human rights that may be limited by this bill, the committee considers it has generally been established that the measure is prescribed by law, seeks to achieve the legitimate objective of addressing a risk of future harm to the community posed by persons convicted of terrorism offences, and is rationally connected to that objective. In relation to the proportionality of the measure, the committee notes the Attorney General's advice as to why it is appropriate to apply the civil standard of proof; the safeguards available to seek to vary an extended supervision order or to be exempted from specified conditions; and the matters a court must consider before making an extended supervision order. The committee also notes the legal advice as to the concerns about the civil standard of proof in relation to the court imposing any number of conditions which it was satisfied is reasonably necessary, and reasonably appropriate and adapted to protect the community from the unacceptable risk of the person engaging in terrorist conduct (which could include home detention).

2.60 However, it is the committee's view that if the court was required to adopt a higher burden of proof such as being 'satisfied to a high degree of probability' which currently applies in relation to continuing detention orders, this could

constrain the court from making appropriate supervision orders which adequately protect the community, a key concern of the Attorney-General.

2.61 The committee draws these human rights concerns to the attention of the minister and the Parliament.

Withholding of certain evidence from the offender

2.62 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.[76] 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.[77]

2.63 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).[78] Schedule 1[79] 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 the extent that preventing the disclosure would seriously interfere with the administration of justice).[80]

2.64 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,[81] 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 National Security Information Act has been invoked, the court may hold a closed hearing, which the offender and their legal representative could be excluded from,[82] to address whether disclosure of the

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

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

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

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

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

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

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

information in question would be potentially prejudicial to national security, and whether to allow a witness to be called.[83] 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.[84]

2.65 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 in relation to those allegations, 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.[85] 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.[86] The explanatory memorandum explains that a special advocate is a security-cleared lawyer or former judge.[87]

Preliminary international human rights legal advice

Right to a fair hearing

2.66 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.

2.67 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.[88] 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.

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

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

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

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

87 Explanatory memorandum, p. 115.

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

2.68 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;

(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.

2.69 The full initial analysis is set out in *Report 11 of 2020*.

Committee's initial view

2.70 The committee noted 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.

2.71 The committee considered 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 noted 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 noted that questions remain as to the adequacy of these safeguards.

2.72 In order to form a concluded view on these matters, the committee sought the Attorney-General's advice as to the matters set out at paragraph [2.68].

Attorney-General's response

2.73 The Attorney-General advised:

Court-only evidence and the special advocates scheme

(a) Court-only evidence in CDO and ESO proceedings

The Committee requested further information regarding why it is appropriate that a court considering an ESO should have different

powers to admit evidence, which the offender may not have had a sufficient opportunity to challenge, than those applicable in CDO proceedings.

The Bill would amend the *National Security Information (Criminal and Civil Proceedings) Act 2004* (NSI Act) to extend the court-only evidence provisions which currently apply in control order proceedings to ESO proceedings. Court-only evidence is only available for control orders and ESOs, as these orders allow for supervision rather than detention. These are exceptional provisions and would only be used in exceptional circumstances, where it is absolutely necessary to present highly sensitive information to a court to support an application. It is not appropriate for court-only evidence to be available for CDOs, given the result of such an order is the continued detention of an offender for a period of time following the end of their custodial sentence.

The Bill also amends the NSI Act to ensure that special advocates, which are available where court-only evidence is considered in control order proceedings, will also be available where court-only evidence is considered in ESO proceedings. As noted in the Explanatory Memorandum to the Bill, a special advocate represents the offender's interests during the parts of a hearing from which the offender and their ordinary legal representative are excluded when the court agrees to consider highly sensitive court-only evidence. The special advocate is able to make arguments to the court querying the need to withhold information from the offender, and can challenge the relevance, reliability and weight accorded to that information. The appointment of a special advocate ensures that the offender will have a reasonable opportunity to present their case and challenge the arguments adduced by the other party.

(b) Instructing a special advocate

The Committee requested further information about when sufficient information could 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.

Before making an order to allow for court-only evidence, the court must be satisfied that the offender has been given sufficient information about the allegations on which the request for an order was based to enable effective instructions to be given in relation to those allegations.

Whether the offender is provided the 'sufficient information' prior to the special advocate seeing the sensitive national security information will depend on the circumstances of the case. The offender will be given sufficient information about the allegations such that they can instruct their ordinary legal representative, and special advocate in relation to those allegations, prior to the special advocate having seen the sensitive national security information.

However, there may be some circumstances in which further information is disclosed to the offender after the special advocate has seen the sensitive national security information. Under these circumstances, the communication restrictions under the NSI Act would apply, requiring the special advocate to seek the approval of the court for any proposed communications to the offender. The offender can continue to communicate with the special advocate about any matter connected with the proceeding in writing through their ordinary legal representative without restriction. This allows the offender to provide information to the special advocate that the offender considers relevant in relation to the allegations on which the request for an order was based.

(c) Court's appointment of a special advocate

The Committee requested further information regarding whether there 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.

The appointment of a special advocate is at the discretion of the court, which is best placed to assess whether a special advocate is necessary to assist the court process and safeguard the rights of the offender in proceedings. In some instances, the court may consider itself sufficiently equipped to safeguard the rights of the offender without the appointment of a special advocate. It is appropriate that that decision be made on a case by case basis.

Concluding comments

International human rights legal advice

Right to a fair trial

2.74 As noted in the initial analysis, withholding certain evidence from an offender in an application for an extended supervision order seeks to achieve the legitimate objective of protecting national security and investigations, and the measures may be rationally connected to that objective. The Attorney-General has provided further information relevant to the assessment of the proportionality of the provisions. With respect to the capacity to withhold certain evidence from an offender, the Attorney-General advised that the extension of court-only evidence provisions to extended supervision order proceedings are exceptional provisions and would only be used in exceptional circumstances, where it is absolutely necessary to present highly sensitive information to a court to support an application. The Attorney-General advised that court-only evidence is available for extended supervision orders as these orders allow for supervision rather than detention, whereas they are not available in the case of continuing detention orders, as these orders enable the continued detention of an offender for a period of time following the end of their custodial sentence. However, as set out above at paragraph [2.41], there is no limit on the conditions that a court may impose under an extended supervision order, other than that the court considers the measure reasonably

necessary, and appropriate and adapted for the purpose of protecting the community from the unacceptable risk of the person committing a terrorist offence. As such, it would appear that it would be open to a court to order the home detention of a person for many hours a day, if it were considered reasonably necessary, and reasonably appropriate and adapted in the particular case. As such, it is not clear that it would be appropriate to allow for court-only evidence in cases that could lead to the effective detention of a person subject to the order.

2.75 The Attorney-General noted that before making an order to allow for court-only evidence, the court must be satisfied that the offender has been given sufficient information about the allegations on which the request for an order was based to enable effective instructions to be given in relation to those allegations.[89] Once a court makes a closed-hearing order this would have the effect of excluding the terrorist offender, and their legal representative, from part of the hearing relating to whether an extended supervision order is made against them. In such circumstances, it is open to the court to appoint a person as a special advocate to represent the offender's interests at the hearing.[90] As to whether there may be cases in which no special advocate is appointed, the Attorney-General advised that the court may, in some instances, consider itself sufficiently equipped to safeguard the rights of the offender without the appointment of a special advocate, and that it is appropriate that that decision be made on a case by case basis. As such, there may be circumstances in which evidence is relied on by a court in making an extended supervision order that has not been able to be subjected to challenge by the offender or their representative.

2.76 In addition, where a special advocate has been appointed, the ability of an offender to communicate with the special advocate would appear to be restricted. The National Security Information Act provides that before a special advocate is given national security information there is no general restriction on the communication between the advocate and the offender. However, it also provides that the court may restrict such communication if satisfied it is in the interests of national security to do so and it is not inconsistent with the Act.[91] The Attorney-General has advised that whether the offender is provided with 'sufficient information' *prior* to the special advocate seeing the sensitive national security information will depend on the circumstances of the case. The Attorney-General has advised that the offender will be given sufficient information about the allegations such that they can instruct their special advocate in relation to those allegations, prior to the special advocate having seen the sensitive national security information,

89 *National Security Information (Criminal and Civil Proceedings) Act 2004*, paragraph 38J(1)(c).

90 *National Security Information (Criminal and Civil Proceedings) Act 2004*, sections 38PA and 38PB.

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

but that there may be some circumstances in which further information is disclosed to the offender after the special advocate has seen the sensitive national security information. Under these circumstances, the special advocate would be required to seek the approval of the court for any proposed communications to the offender,[92] although the offender could continue to communicate with the special advocate about any matter connected with the proceeding in writing through their ordinary legal representative without restriction. The Attorney-General stated that this would allow the offender to provide information to the special advocate that the offender considers relevant in relation to the allegations on which the request for an order was based. However, in circumstances where the restricted information is central to the basis of the order, the offender is only able to communicate with the special advocate in writing via their legal representative,[93] and the special advocate can only correspond with them in writing and with the prior approval of the court,[94] it would appear that providing adequate instructions with respect to the restricted information could be very difficult.

2.77 As noted in the initial analysis, 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,[95] and that arguments must be open to challenge by the parties.[96] With respect to the use of special advocates, the European Court of Human Rights has found 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'.[97] 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.[98] The involvement of the court in making such an order may operate to safeguard the right to a fair hearing. However, the National Security Intelligence Act provides that in deciding whether to make an order to restrict the disclosure of information, the court must consider both whether there would be a risk of prejudice to national security and to whether it would have a substantial adverse effect on the substantive

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

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

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

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

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

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

98 *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].

hearing in the proceeding.[99] It is noted that the courts routinely accept that they are not well placed to evaluate intelligence, and that the public interest in national security will rarely yield to the public interest in the administration of justice.[100] As such, this may mean in practice that the court is not fully able to effectively ensure the right to a fair trial where the Attorney-General has issued a certificate stating that the disclosure of such evidence risks prejudicing national security.

2.78 While the special advocate scheme may work in practice to ensure an offender is able to obtain a fair hearing when restricted evidence is relied on in the making of an extended supervision order, there is a risk that the offender may not be able to adequately contest the arguments or evidence against them as they may be excluded from part of the hearing and from adequately instructing the special advocate so that they are able to effectively challenge it. As such, questions remain as to whether the detriment caused to an individual in seeking to defend themselves in an extended supervision order application proceeding involving the use of evidence which is withheld from them would be sufficiently counterbalanced by having access to a special advocate, and whether the capacity of a court to seek to ensure a fair trial, while needing to balance the right to a fair trial with the risk of prejudice to national security, would be sufficient, such that an individual could still have a fair trial in such circumstances.

Committee view

2.79 The committee thanks the Attorney-General for this response. 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 an extended supervision order (although they would be provided with sufficient information about the allegations). This may result in information being used in evidence against the offender without them being able to directly challenge such evidence.

2.80 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.

2.81 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.

2.82 The committee notes that where a court has ordered a closed hearing, there is an important process whereby a special advocate may be appointed where

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

100 See Brennan J in *Church of Scientology v Woodward* (1982) 154 CLR 25 at 76; *Leghaei v Director-General of Security* [2007] FCAFC 37 at [48] to [54].

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. The committee recognises there are some restrictions on communications between special advocates and the offender but that such restrictions are warranted in all of the circumstances given the important role they play in protecting Australia's national security.

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

2.83 The committee requested a response from the minister in relation to the bill in *Report 11 of 2020*.[2]

1 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Crimes Legislation Amendment (Economic Disruption) Bill 2020, *Report 13 of 2020*; [2020] AUPJCHR 158.

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

2.84 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 '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.[3] The penalty for the offences would be imprisonment for up to five years or 300 penalty units (where the value is $10 million or more), or imprisonment for up to four years or 240 penalty units (where the value is $1 million or more).

2.85 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.[4] As such, this negates the requirement for the prosecution to prove fault in relation to these matters.[5] 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.[6] As such, this reverses the legal burden of proof, requiring the defendant to prove, on the balance of probabilities, that they had no reasonable grounds to suspect these matters.[7]

Summary of initial assessment

Preliminary international human rights legal advice

Right to presumption of innocence

2.86 By removing the need for the prosecution to prove that the defendant suspected that the money or property was proceeds of indictable crime, and in providing a defence that reverses the legal burden of proof, this measure engages and limits the right to a fair trial, in particular the right to be presumed innocent until

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2 Parliamentary Joint Committee on Human Rights, *Report 11 of 2020* (24 September 2020), pp. 30-47.

3 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).

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

5 Criminal Code, section 6.2.

6 Criminal Code, subsection 400.9(5).

7 Criminal Code, section 13.4.

proven guilty.[8] 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 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 the aim being pursued.

2.87 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's initial view

2.88 The committee noted 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 noted 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.

2.89 In order to form a concluded view of the human rights implications of this measure, the committee sought the minister's advice as to the matters set out at paragraph [2.87].

2.90 The full initial analysis is set out in *Report 11 of 2020*.

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

Minister's response[9]

2.91 The minister advised:

> The proposed offences under section 400.9 of the *Criminal Code* follow the same structure as existing offences under this section, and only relate to higher values of property (valued at $1,000,000 or more and $10,000,000 or more respectively).
>
> ***No need to prove that the defendant actually held a reasonable suspicion***
>
> The new offences place a burden on the prosecution to prove beyond reasonable doubt that the defendant dealt with money or other property and that it was reasonable to suspect that the property (including money) was proceeds of indictable crime. This may be satisfied where circumstances exist that would create a reasonable suspicion in the trier of fact that the property was derived from a particular indictable offence or a kind of indictable offence (for example, tax evasion).
>
> The prosecution is not required to also prove that the defendant knew or subjectively suspected that the property was proceeds of an indictable crime. If the defendant had no knowledge of circumstances that would give rise to a reasonable suspicion that the property was derived or realised from some form of unlawful activity, they may rely on the defence at subsection 400.9(5) to avoid criminal liability.
>
> Framing the offences with reference to an objective test that it was 'reasonable to suspect' that property was proceeds of indictable crime, rather than requiring proof of the defendant's subjective knowledge or suspicion, is necessary and appropriate to deal with the activities of money laundering networks.
>
> These networks operate in ways which seek to insulate operatives from information as to the true origins of the property to be laundered. Through engaging in this information compartmentalisation, networks can ensure that participants do not subjectively suspect that property was derived from a particular kind of offence, even if they suspect that it was derived from offending generally.
>
> For example, a person may be asked to deliver $1 million in cash to a third party in an abandoned car park whilst using encrypted communications to contact his instructor and also using tokens to identify himself to the third party. In these circumstances, the defendant may have reasonable grounds to suspect that the property was derived from some form of unlawful activity but is not given enough information by his instructor to suspect that it came from a specific kind of indictable offence.

9 The minister's response to the committee's inquiries was received on 21 October 2020. This is an extract of the response. The response is available in full on the committee's website at: https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Scrutiny_reports.

Unknown to the defendant, the money came from a drug cartel and was likely derived from drug trafficking offences. Criminal liability could be established under the proposed offence provisions as the trier of fact could find that it was objectively reasonable to suspect that the money came from drug trafficking. The defendant would be unable to rely on the defence under subsection 400.9(5) as, on the information known to him, he had reasonable grounds to suspect that the cash was derived from some form of unlawful activity.

Reversing the legal (not evidential) burden of proof

The defence at subsection 400.9(5) imposes a legal burden of proof on the defendant, requiring them to establish, on the balance of probabilities, that they had no reasonable grounds for suspecting that money or property was derived or realised , directly or indirectly, from some form of unlawful activity. A legal burden of proof is higher than an evidential burden, which requires a defendant to merely adduce or point to evidence that suggests a reasonable possibility that a particular matter exists or does not exist.

It is necessary to impose a legal rather than evidential burden on the defendant here to ensure that the offences can pierce the 'veil of legitimacy' that money laundering networks frequently use to disguise their activities.

These networks often exploit seemingly legitimate front companies; complex financial, legal and administrative arrangements; real estate and other high-value assets; gambling activities; and a range of formal and informal nominee arrangements to conceal proceeds of crime and obscure beneficial ownership. This layering activity generates a paper trail that can be used to establish a 'reasonable possibility' of legitimacy that, in many cases, would be sufficient to meet an evidential burden under subsection 400.9(5) and thereby allow these networks to avoid criminal liability.

An evidential burden may be met by pointing to evidence, even *slender* evidence, adduced as part of the prosecution case. Hence a defendant could discharge an evidential burden by pointing to an answer provided in a police record of interview which suggested that the money or other property was derived from a legitimate business activity. By imposing a legal burden of proof on the defendant, the offences will ensure that courts look beyond this 'reasonable possibility' to properly examine the genesis and operation of structures used to legitimise transactions, reducing the effectiveness of layering activity.

Concluding comments

International human rights legal advice

Right to presumption of innocence

2.92 The minister has advised that framing these offences with reference to an objective test, rather than requiring proof of the defendant's knowledge or suspicion,

is necessary and appropriate to deal with the activities of money laundering networks, which operate in a way which seeks to insulate operatives from information as to the true origins of the property to be laundered. Thus, operatives may suspect the property was derived from offending generally, but not that it was derived from a particular kind of indictable offence. The minister has also advised that it is necessary that the defence carry a legal rather than an evidential burden because money laundering networks frequently establish a paper trail that could be used to establish a 'reasonable possibility' of legitimacy, which in many cases would be sufficient to meet an evidential burden. By imposing a legal burden of proof on the defendant this will ensure the courts can look beyond this 'reasonable possibility' to properly examine the genesis and operation of structures used to legitimise transactions.

2.93 Dealing with the activities of money laundering networks would appear to constitute a legitimate objective for the purposes of international human rights law, and the application of absolute liability and the reversal of the legal burden of proof would appear to be rationally connected to that objective. In terms of proportionality, the minister's response appears to have demonstrated that there may be no less rights restrictive option available (in the form of an evidential, rather than a legal, burden of proof), and the availability of the defence, albeit with the imposition of a legal burden of proof, would assist with the proportionality of the measure. It is also noted that the defence of mental impairment in relation to the carrying out of the conduct that constituted the offence would also appear to be available.[10] As such, while the measure limits the right to be presumed innocent, on the basis of the information provided, it would appear that this may constitute a permissible limit on this right.

Committee view

2.94 The committee thanks the minister for this response. 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.

2.95 The committee notes the minister's advice that these measures seek to deal with the activities of money laundering networks, which often create layers of

10 *Criminal Code Act 1995*, Schedule – The Criminal Code, section 7.3.

activities, making it difficult to demonstrate that all operatives had knowledge of the specific offence. The committee considers that dealing with the activities of money laundering networks constitutes a legitimate objective for the purposes of international human rights law, and the application of absolute liability and the reversal of the legal burden of proof are rationally connected to that objective. The committee notes the minister's advice that it is necessary to impose a legal rather than an evidential burden because money laundering networks frequently establish a paper trail that could be used to establish a 'reasonable possibility' of legitimacy, which in many cases would be sufficient to meet an evidential burden. On the basis of this information, it would appear that there is no less rights restrictive way to achieve the objective of the measure, and the measure constitutes a permissible limitation on the right to be presumed innocent.

2.96 The committee considers it would be useful if the explanation provided by the minister were included in the statement of compatibility accompanying the bill.

2.97 The committee has concluded its examination of this matter.

Interviews of a child suspect by an undercover operative

2.98 The *Crimes Act 1914* (Crimes Act) currently provides that an investigating official must not question a person under arrest, a protected suspect,[11] 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.[12] 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.[13]

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11 *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.

12 *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 are available, a 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.

13 Schedule 2.

Summary of initial assessment

Preliminary international human rights legal advice

Rights of the child

2.99 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.[14] 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 grounds.[15] 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.[16] 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.

2.100 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

(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.

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

15 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.

16 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).

Committee's initial view

2.101 The committee noted 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.

2.102 In order to form a concluded view of the human rights implications of this measure, the committee sought the minister's advice as to the matters set out at paragraph [2.100].

2.103 The full initial analysis is set out in *Report 11 of 2020*.

Minister's response

2.104 The minister advised:

> ***The necessity of questioning children (without supervision) in undercover operations***
>
> Requiring an undercover operative to only question a child suspect after allowing them to communicate confidentially with an independent person would significantly increase the chance that criminal groups would identify an operative. This would also severely jeopardise operations targeting serious criminal behaviour of individuals under the age of 18 years, including in counter-terrorism operations where suspects have been children in the past. This would effectively mean that undercover operatives could not undertake undercover engagement in some circumstances (regardless of the severity of any suspected criminal conduct). The consequences of this could be severe given undercover operatives can be used in investigations for the most serious Commonwealth offences (for example, terrorism).
>
> Clarifying that this obligation does not apply to undercover operatives is necessary to achieve the legitimate objective of protecting national security and public safety, and ensuring the ability of law enforcement to undertake essential investigative activity, while maintaining the safety of officers.
>
> ***Safeguards to protect the rights of the child***
>
> At all times during the course of covert undercover operations, law enforcement agencies are mindful to conduct themselves to the highest standard, and to comply with their legal obligations.
>
> The inability to afford a child suspect, or person of interest, with an interview friend (for example) is a reflection of the nature of undercover work.
>
> Any interaction an undercover officer has with a child (or any person) in terms of evidence collection will be scrutinised by a Court and determined as to whether such evidence should be admissible or not under well-established rules of evidence. This will take account of factors such as propriety and fairness. This significant external scrutiny also ensures law

enforcement agency processes and procedures are robust and fit for purpose.

This measure is a reasonable and proportionate limitation on the rights of the child as:

- law enforcement agencies will continue to conduct themselves to the highest standard when engaging with a child suspect or person of interest in undercover operations;
- the Commonwealth Ombudsman provides independent oversight of the use of powers by law enforcement agencies in investigations into serious Commonwealth offences, including in relation to covert undercover operations which may involve engagement with individuals under the age of 18 years; and
- courts will continue to have discretion to consider whether or not to admit evidence obtained by an undercover officer in these circumstances.

Concluding comments

International human rights legal advice

Rights of the child

2.105 The minister advised that requiring an undercover operative to only question a child suspect after allowing them to communicate confidentially with an independent person would severely jeopardise operations targeting serious criminal behaviour of individuals under the age of 18 years. The minister has advised that as such this measure seeks to achieve the legitimate objective of protecting national security and public safety, and ensuring the ability of law enforcement to undertake essential investigative activity, while maintaining the safety of officers. These are likely to constitute legitimate objectives for the purposes of international human rights law, and the measure would appear to be rationally connected to these objectives.

2.106 In relation to the proportionality of the measure, and in particular, whether there are safeguards in place to protect the rights of the child, the minister has advised that law enforcement agencies are mindful to conduct themselves to the highest standard, a court would determine if any evidence obtained in this manner is admissible, and the Commonwealth Ombudsman provides independent oversight of the use of powers by law enforcement agencies. While these could potentially operate to safeguard a child's rights, the response has not addressed whether the undercover operatives would have in mind the best interests of the child in determining whether to question a child suspect in the absence of a family member or other support person.

2.107 As noted above, children have special rights under human rights law taking into account their particular vulnerabilities. In relation to children suspected of being involved in criminal offences, both international human rights law and Australian

criminal law recognise that children have different levels of emotional, mental and intellectual maturity than adults, and so are less culpable for their actions.[17] No information has been provided as to when it is considered appropriate that undercover operatives question a child in the absence of a family member or support person, rather than determining only to undertake undercover operations involving adults. In addition, no information has been provided as to whether there is any guidance in place that provides that undercover operatives should only question child suspects having regard to the best interests of the child as a primary consideration. In the absence of such safeguards there is a risk that removing the obligation for undercover operatives to allow a child suspect to contact a family member or support person may impermissibly limit the rights of the child.

Committee view

2.108 The committee thanks the minister for this response. 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.

2.109 The committee notes that this measure engages and limits the rights of the child. This right may be permissibly limited if it is shown to be reasonable, necessary and proportionate. The committee considers that this measure seeks to achieve the legitimate objective of protecting national security and public safety, and ensuring the ability of law enforcement to undertake essential investigative activity, while maintaining the safety of officers, noting that requiring an undercover operative to question a child suspect only after allowing them to communicate with an independent person would severely jeopardise operations targeting serious criminal behaviour of children.

2.110 In relation to the proportionality of the measure the committee notes the minister's advice that law enforcement agencies are mindful to conduct themselves to the highest standard; that a court determines if evidence obtained in this manner is admissible; and the Commonwealth Ombudsman provides independent oversight of the use of these powers. The committee considers these may operate as important safeguards. However, as there is no requirement that undercover operatives consider the best interests of the child when conducting undercover operations, there is some risk that this may impermissibly limit the rights of the child.

2.111 The committee considers that the proportionality of this measure would be assisted were the bill amended to provide that the minister should consider, by

17 *United Nations Standard Minimum Rules for the Administration of Juvenile Justice* (The Beijing Rules) at: http://www.un.org/documents/ga/res/40/a40r033.htm.

legislative instrument, issuing guidelines setting out when it is appropriate for a child suspect to be interviewed by undercover operatives, taking into account the rights of the child, in particular the obligation to consider the best interests of the child as a primary consideration.

2.112 The committee draws these human rights concerns to the attention of the minister and the Parliament.

Expansion of *Proceeds of Crime Act 2002*

2.113 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.[18] 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.[19]

2.114 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.[20] What constitutes a 'benefit' includes a service or advantage.[21] 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'.[22] 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.[23]

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

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

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

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

22 Schedule 4, items 1–3.

23 Schedule 4, item 4.

2.115 In addition, the bill[24] 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.[25] 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.

Summary of initial assessment

Preliminary international human rights legal advice

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

2.116 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.[26] 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. 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.[27] Specific guarantees of the right to a fair trial in relation to a criminal charge include the presumption of innocence,[28] the right not to incriminate oneself,[29] and the guarantee against retrospective criminal laws.[30]

2.117 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 were committed and that the law not impose greater penalties than those which

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

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

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

27 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.

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

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

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

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.

2.118 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:

(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's initial view

2.119 The committee considered 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.

2.120 In order to form a concluded view of the human rights implications of this measure, the committee sought the minister's advice as to the matters set out at paragraph [2.118].

2.121 The full initial analysis is set out in *Report 11 of 2020*.

Minister's response

2.122 The minister advised:

> Relevant restraint and forfeiture powers (as expanded by the Bill) are properly characterised as civil for the purposes of international human rights law. These powers do not engage the criminal process guarantees as set out in Articles 14 and 15 of the International Covenant on Civil and Political Rights.
>
> The Committee's Guidance Note 2 states that the test for whether a penalty can be classified as 'criminal' for the purposes of international human rights law relies on three criteria:
>
> (a) The domestic classification of the penalty;
>
> (b) The nature and purpose of the penalty; and
>
> (c) The severity of the penalty.

On the domestic classification of the penalty, section 315 of the POC Act expressly provides that relevant restraint and forfeiture powers are characterised as civil in nature under Commonwealth law.

On the nature and purpose of the penalty, the POC Act is not solely focused on deterring or punishing persons for breaching laws, but under paragraphs 5(a)-(ba) is primarily focused on remedying the unjust enrichment of criminals who profit at society's expense, while paragraphs (d)-(da) are focussed on the removal of illicit funds from the licit economy. In addition, actions taken under the POC Act also make no determination of a person's guilt or innocence and can be taken against assets without finding any form of culpability against a particular individual (see sections 19 and 49 of the POC Act).

On the severity of the penalty, Guidance Note 2 provides that a penalty is likely to be considered criminal for the purposes of human rights law if the penalty is imprisonment or a substantial pecuniary sanction. Proceedings under the POC Act cannot in themselves create any criminal liability and do not expose individuals to criminal sanction (or a subsequent criminal record). Further, penalties under the POC Act cannot be commuted into a period of imprisonment.

On whether the penalty is substantial, it also remains open to a court to decrease the quantum to be forfeited under the POC Act to accurately reflect the quantum that has been derived or realised from crime, ensuring that orders are aimed primarily at preventing the retention of ill-gotten gains, rather than the imposition of a punishment or sanction (see, for example, compensation orders at sections 77 and 94A of the POC Act).

For these reasons, amending the definitions of what constitutes a 'benefit' and what is a 'serious offence' does not make the restraint and forfeiture powers criminal for the purposes of international human rights law.

Concluding comments

International human rights legal advice

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

2.123 In relation to whether the restraint and forfeiture powers, as expanded by the bill, are properly characterised as civil, the minister has advised that they are civil in nature for the purposes of international human rights law. In relation to the domestic classification of the penalty, the minister notes that the Proceeds of Crime Act expressly provides that they are civil in nature under Commonwealth law.

2.124 In relation to the nature of the offence, 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 also 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'.[31] However, the minister advised that the Proceeds of Crime Act is not solely focused on deterrence and punishment, but is also focused on remedying the unjust enrichment of criminals, and removing illicit funds from the licit economy. In addition, the minister advised that the Proceeds of Crime Act makes no determination of a person's guilt or innocence and can be taken against assets without any finding of culpability against a particular individual. It should be noted, however, that under the Proceeds of Crime Act property can only be forfeited without a finding of culpability against a particular person when the person does not contest the order;[32] if the person contests the order the forfeiture can only be made if the person has been convicted of an indictable offence or on the basis that the court is satisfied they engaged in the specified conduct.[33] While deterrence and punishment may not be the only objective of the proceeds of crime regime, it is clearly one of the objectives,[34] and as such would appear to meet the test that it is intended to punish and deter.

2.125 In relation to the severity of the penalty, the minister has advised that proceedings under the Proceeds of Crime Act do not expose individuals to criminal sanction, and it is open to the court to decrease the quantum to be forfeited to reflect the quantum that has been derived or realised from crime. However, 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.[35] As such, in certain instances the proceeds of crime orders may be so severe as to be considered to constitute a penalty.

2.126 As such, it may be 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. However, it is difficult to reach a concluded view on this without undertaking a full review of the provisions of the Proceeds of Crime Act. 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. There

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

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

33 *Proceeds of Crime Act 2002*, sections 47 and 48.

34 *Proceeds of Crime Act 2002*, paragraph 5(c).

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

are particular concerns in relation to the standard of proof used in proceeds of crimes proceedings, the potential for double punishment, and that applying the changes to the definition of 'benefit' retrospectively could constitute retrospective criminal punishment. The minister's response did not address the question of the extent to which the provisions are compatible with the criminal process guarantees set out in articles 14 and 15. As such, it is not possible to fully assess the compatibility of the expansion of the restraint and forfeiture powers with criminal process rights.

Committee view

2.127 The committee thanks the minister for this response. The committee notes that these measures seek 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.

2.128 The committee reiterates its earlier comments 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 freezing, restraint or forfeiture of property is classified as civil or administrative under domestic law, its content may be considered 'criminal' under international human rights law.

Privilege against self-incrimination

2.129 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.[36]

36 Schedule 6, item 16.

Summary of initial assessment

Preliminary international human rights legal advice

Right to a fair trial

2.130 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.[37] 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.

2.131 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's initial view

2.132 The committee noted that this measure 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.

2.133 In order to form a concluded view of the human rights implications of this measure, the committee sought the minister's advice as to the matters set out at paragraph [2.131].

2.134 The full initial analysis is set out in *Report 11 of 2020*.

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

Minister's response

2.135 The minister advised:

Measure is aimed at achieving a legitimate objective

The removal of the derivative use immunity at paragraph 271 (2)(c) is necessary to achieve the legitimate objectives of preserving public order and public safety by ensuring that the POC Act can be effectively used to trace, restrain and confiscate illicitly obtained funds.

The derivative use immunity applies in relation to information gained under the Official Trustee's powers at Part 4-1 of the POC Act including their powers to access books, seek assistance from suspects and obtain information and evidence. These information-gathering powers can only be used to support the Official Trustee's powers and functions, which relate to managing property seized under the POC Act and the Confiscated Assets Account into which the sale proceeds from confiscated property is credited.

The derivative use immunity creates operational issues of substantial concern, which are capable of severely undermining the confiscation mechanisms underpinning the POC Act and later unrelated criminal investigations. As it is not always possible to identify whether information may later become relevant to a criminal investigation, the information barriers required to mitigate the risk must be extremely restrictive, creating impediments that go far beyond mere administrative inconvenience.

For example, books may be provided by the Official Trustee to show that a person had provided false or misleading information and documents. Two years later these books could be seized separately as part of investigations into a separate criminal matter (such as breach of corporations offences, or money laundering). Under the current use and derivative use provisions, the Australian Federal Police could be required to go into great depth to show that information originally provided by the Official Trustee has been appropriately quarantined. This could include not only locking down the information in relevant systems, but also showing that no officer had worked on both cases and that there was no potential that investigators had access to the Official Trustee's material.

Sufficient quarantine procedures are not only administratively burdensome but can be impossible to achieve in some cases, given how closely staff supporting the Official Trustee are required work with law enforcement to ensure that restrained property is preserved pending the resolution of a matter. As the POC Act relies on the Official Trustee and law enforcement maintaining a high level of cooperation to remain effective, the necessary quarantining practices can severely undermine the effectiveness of the scheme, raising substantial concerns in asset confiscation cases.

Measure is a proportionate limitation on the right to a fair trial

The measure is also a proportionate limitation on the right to a fair trial, being the least rights restrictive means of achieving its objective.

The derivative use immunity only relates to information obtained by the Official Trustee under Part 4-1 of the POC Act, and the Official Trustee's information-gathering powers under this Part can only be used for a narrow range of purposes relating to the administration of seized property and the Confiscated Assets Account.

Under subsection 271(2) of the POC Act (as amended by items 15-17 of Schedule 6 to the Bill), information and documents obtained using these information-gathering powers will only be admissible in the following criminal proceedings:

- proceedings under, or arising out of, section 137.1 or 137.2 of the *Criminal Code* (false and misleading information and documents) in relation to giving the information or document; or
- proceedings for an offence against Division 2 of Part 4-2 of the POC Act.

In effect, this ensures that evidence gathered under the Official Trustee's information-gathering powers will only be admissible in criminal proceedings to prove non-compliance with these powers. The removal of the derivative use immunity at paragraph 271 (2)(c) will not allow the evidence to be used against the person in unrelated criminal proceedings (such as criminal proceedings for fraud).

Concluding comments

International human rights legal advice

Right to a fair trial

2.136 In relation to whether the removal of safeguards as to what evidence can be used against a person in a criminal proceeding seeks to achieve a legitimate objective, the minister advised that this seeks to achieve the objective of preserving public order and public safety by ensuring that the Proceeds of Crime Act can be effectively used to trace, restrain and confiscate illicitly obtained funds. In particular, the minister advised that the derivative use immunity creates operational issues, requiring the creation of quarantine procedures that are so administratively burdensome that they are capable of severely undermining the confiscation mechanisms underpinning the Proceeds of Crime Act. On the basis of this information, it would appear that the removal of the derivative use immunity seeks to achieve the legitimate objective of being able to trace, restrain and confiscate illicitly obtained funds, and does not merely seek to achieve an outcome that is desirable or convenient. Removal of this derivative immunity would also appear to be rationally connected to this objective.

2.137 In terms of proportionality, the minister advised that the amendments will mean that information and documents obtained using these information gathering powers will only be admissible in criminal proceedings to prove non-compliance with these powers, and the removal of the derivative use immunity will not allow the evidence to be used against the person in unrelated criminal proceedings. However, while it is clear that a use immunity remains in place, prohibiting the directly provided information and documents to be used in other criminal proceedings, the repeal of the derivative use immunity would allow any information, document or thing obtained as a consequence of the forced production of the information or document to be used against the person. 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.[38] This may have the practical effect that the subject had been compelled to testify against and incriminate themselves with respect to related criminal proceedings. It is also necessary to consider whether there are any less rights restrictive ways to achieve the same aim, and the ability for information to be quarantined, while administratively burdensome, may be appropriate in some cases. Yet, this amendment would remove the derivative use immunity in its entirety.

2.138 As such, it would appear that removing the 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, appears to impermissibly limit the right of a person not to be compelled to testify against themselves.

Committee view

2.139 The committee thanks the minister for this response. 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.

38 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 and 196). 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].

2.140 The committee considers that the removal of the derivative use immunity seeks to achieve the legitimate objective of being able to trace, restrain and confiscate illicitly obtained funds. However, the committee also notes the countervailing consideration that the absence of a derivative use immunity could have significant implications for a person's right not to be compelled to testify against themselves.

2.141 The committee draws these human rights concerns to the attention of the minister and the Parliament.

Disclosure of information to foreign countries for investigating or prosecuting offences

2.142 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 Department[39] for the purposes of it facilitating its functions under a number of Acts, relating to providing mutual assistance to foreign countries and extradition.[40] 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.[41]

Summary of initial assessment

Preliminary international human rights legal advice

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

2.143 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

39 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).

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

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

by others or from identified risks.[42] 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.[43] 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 degrading treatment or punishment. Under international law the prohibition on torture is absolute and can never be subject to permissible limitations.[44]

2.144 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's initial view

2.145 The committee noted 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.

2.146 In order to form a concluded view as to whether these rights are engaged and limited, the committee sought the minister's advice as to the matters set out at paragraph [2.144].

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42 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.

43 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].

44 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].

2.147 The full initial analysis is set out in *Report 11 of 2020*.

Minister's response

2.148 The minister advised:

> The note inserted at item 11 of Schedule 6 to the Bill makes it clear that the proposed amendments are not intended to alter or override the procedures applicable to the disclosure of information to foreign countries (for example, procedures under the *Mutual Assistance in Criminal Matters Act 1987* (the MACMA)). As the section applies to information, it only gives authorisation for the disclosure of this information pursuant to these procedures.
>
> The particular amendments in Schedule 6 reinforce, and make no substantial changes, to the way in which information obtained under the POC Act is shared with foreign authorities. On that basis, these amendments do not further engage the right to life or prohibition against torture and other cruel, inhuman and degrading treatment or punishment.
>
> If it was considered that these amendments in Schedule 6 do engage this right or prohibition, there are sufficient safeguards to ensure that the subject of a particular information-gathering request is not subject to the death penalty or cruel, inhuman or degrading treatment or punishment.
>
> ***Death penalty safeguards***
>
> Subsection 8(1A) of the MACMA provides that a request by a foreign country for mutual assistance must be refused if it relates to the investigation, prosecution or punishment of a person arrested or detained on suspicion of, or charged with, or convicted of, an offence in respect of which the death penalty may be imposed in the foreign country, unless the Attorney-General is of the opinion, having regard to the special circumstances of the case, that the assistance requested should be granted.
>
> 'Special circumstances' is not defined in the MACMA. However, the Explanatory Memorandum to the Mutual Assistance in Criminal Matters Legislation Amendment Bill 1996 (at paragraphs 60-61) provides that 'special circumstances' exist if the evidence sought is exculpatory or if the foreign country has given an assurance concerning the death penalty, for instance that it will not be sought, or if sought will not be imposed, or if imposed will not be carried out. The Federal Court in *McCrea v Minister for Customs and Justice* [2005] FCAFC 180 sets out the test for an acceptable death penalty undertaking. The test requires that the Attorney-General be satisfied that 'the undertaking is one that, in the context of the system of law and government of the country seeking surrender, has the character of an undertaking by virtue of which the death penalty would not be carried out'.
>
> Where a mutual assistance request is received in circumstances where no person has yet been charged, arrested, detained or convicted of an

offence that could result in the death penalty (generally in the early investigatory stages), subsection 8(1 B) of the MACMA covers cases where the Attorney-General believes that the provision of the assistance may result in the death penalty being imposed on a person. It gives the Attorney-General a discretion to refuse a request if the Attorney-General:

- believes that the provision of the assistance may result in the death penalty being imposed on a person; and
- after taking into consideration the interests of international criminal co-operation, is of the opinion that in the circumstances of the case the request should not be granted.

In addition, under paragraph 8(2)(g) of the MACMA, the Attorney-General has a discretion in all cases to refuse a request if 'it is appropriate, in all the circumstances of the case, that the assistance requested should not be granted'. The MACMA also enables conditions to be placed on the provision of the assistance. This could include restricting the use of the material to investigation purposes, or requiring the country to seek the Minister's authorisation to use the material for the purposes of prosecuting a person.

Safeguards against cruel, inhuman or degrading treatment or punishment

Concerns about cruel, inhuman or degrading treatment or punishment are addressed through the Attorney-General's general discretion under paragraph 8(2)(g) of the MACMA to refuse mutual assistance where 'it is appropriate, in all the circumstances of the case'.

Serious forms of cruel, inhuman or degrading treatment or punishment are addressed through the requirement under paragraph 8(1)(ca) of the MAGMA for the Attorney-General to consider torture as a mandatory ground of refusal. There is no definition of 'torture' in the MAGMA. This ensures that in making a decision on whether to provide assistance, the Attorney-General is able to take a broad approach and take into account a number of considerations in deciding whether there is a risk of torture.

Concluding comments

International human rights legal advice

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

2.149 The minister has advised that the amendments make no substantive changes to the way in which information obtained under the Proceeds of Crime Act is shared with foreign authorities, giving authorisation only for information to be disclosed pursuant to existing procedures. However, the explanatory memorandum states that the amendments will 'enhance the ability of law enforcement to enforce compliance with information-gathering powers' and they are made, for an abundance of caution, 'to ensure that information can be disclosed for the purpose of international crime

cooperation'.[45] Given it was considered legislatively necessary to include this power in the Proceeds of Crime Act to help facilitate the disclosure of information for the purposes of international crime cooperation, it would appear that these amendments do engage the right to life and the prohibition against torture and other cruel, inhuman and degrading treatment or punishment.

2.150 In relation to the right to life, the minister has advised that there are sufficient safeguards to ensure that the subject of a particular information-gathering request is not subjected to the death penalty. In particular, the minister notes that 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, unless the Attorney-General is of the opinion, having regard to the 'special circumstances' of the case, that the assistance requested should be granted'.[46] The minister notes that 'special circumstances' are not defined but may include where the information would assist the defence, or where the foreign country undertakes not to impose the death penalty. In addition, where a mutual assistance request is received in the early investigatory stages, the Mutual Assistance Act provides the Attorney-General with a discretion to refuse the request if they believe it may result in the death penalty being imposed 'after taking into consideration the interests of international criminal cooperation'. The Attorney-General has also advised that there is a general discretion to refuse a request if appropriate in all the circumstances of the case.

2.151 The requirement that the Attorney-General must refuse the request for assistance if the death penalty may be imposed acts as a safeguard to protect the right to life. However, this is qualified by the fact that the Attorney-General may still grant the assistance if they are of the opinion that it should be granted having regard to the special circumstances of the case. While noting the advice that 'special circumstances' would likely include matters such as where the evidence sought is exculpatory or an undertaking has been sought, there is nothing in the legislation restricting the interpretation in this way. In addition, while the Attorney-General's general discretion may operate to safeguard the right, this remains discretionary and the possibility remains that the discretion may not be exercised in this way. The explanatory memorandum also states that while the existing procedures under the Mutual Assistance Act would continue to apply, there will also be circumstances where disclosure under this provision 'is not governed by other procedures (for example, in certain cases of informal cooperation with other foreign authorities)'.[47] In such cases it is not clear if there would be any restriction on the sharing of such information because of concerns as to the imposition of the death penalty. As such,

45 Explanatory memorandum, p. 71.

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

47 Explanatory memorandum, p. 72.

in the absence of a strict prohibition on the provision of mutual assistance where the death penalty may be imposed, these amendments may result in a risk that information obtained under the Proceeds of Crime Act may be shared with foreign governments in circumstances that may not be compatible with the right to life.

2.152 In relation to the prohibition against torture and other cruel, inhuman or degrading treatment or punishment, the minister advised that serious forms of cruel, inhuman or degrading treatment or punishment are addressed by the requirement that the Attorney-General must refuse to provide assistance if there are substantial grounds for believing that, if the request were granted, the person would be in danger of being subjected to torture.[48] The minister notes that there is no definition of torture in the Mutual Assistance Act, which ensures that the Attorney-General is able to take a broad approach and take into account a number of considerations in deciding if there is a risk of torture. However, while the Attorney-General could choose to take this broader interpretation of the definition of torture, it would also appear open as a matter of statutory interpretation to take a narrower approach. The value of this as a safeguard would be strengthened if the legislation specifically provided that the definition of 'torture' included other cruel, inhuman or other degrading treatment or punishment.[49] In the absence of this there may be some risk that information obtained under the Proceeds of Crime Act may be shared with foreign governments in circumstances that may limit the absolute prohibition against cruel, inhuman or degrading treatment or punishment.

Committee view

2.153 The committee thanks the minister for this response. 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.

2.154 The committee notes the minister's advice that the amendments make no substantive changes to the way in which information obtained under the Proceeds of Crime Act is shared with foreign authorities, and that information will be disclosed pursuant to existing procedures. The committee also notes the significant safeguards that already exist in the *Mutual Assistance in Criminal Matters Act 1987* which seeks to ensure that mutual assistance is likely to be refused if to do so would result in the application of the death penalty or would expose a person to torture or serious forms of cruel, inhuman or degrading treatment or punishment. The committee considers these could operate in practice to safeguard these rights. However, noting the exceptions to allow information sharing where there are 'special circumstances', and that there is no definition of 'torture' (so it is not clear

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

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

that this would include cruel, inhuman or degrading treatment or punishment), the committee considers there is some risk that information obtained under the Proceeds of Crime Act may be disclosed to foreign countries in circumstances that may not be compatible with the right to life or the prohibition against torture, or cruel, inhuman or degrading treatment or punishment.

2.155 The committee draws these human rights concerns to the attention of the minister and the Parliament.

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

Purpose	This bill sought 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 *Received Royal Assent on 27 October 2020*
Right	Education; equality and non-discrimination
Status	Concluded examination

2.156 The committee requested a response from the minister in relation to the bill in *Report 11 of 2020*.[2]

Increasing the cost of student contribution amounts for certain disciplines

2.157 Schedule 1 amends the funding clusters into which higher education courses are arranged under the *Higher Education Support Act 2003* (Higher Education Support Act), and alters the Commonwealth contribution amount associated with

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 13 of 2020*; [2020] AUPJCHR 159.

2 Parliamentary Joint Committee on Human Rights, *Report 11 of 2020* (24 September 2020), pp. 48-59.

those clusters.[3] It would also establish demand driven funding for Indigenous students from rural and remote areas studying at university.[4]

2.158 Schedule 2 provides for new, higher maximum student contribution amounts payable across various higher education courses, namely: Law; Accounting; Administration; Economics; Commerce; Communications; Society and Culture; and Visual and Performing Arts.[5] In other areas, the maximum student contribution amount would decrease (for example, Nursing; Education; Clinical Psychology; Engineering; and Agriculture).

Summary of initial assessment

Preliminary international human rights legal advice

Right to education

2.159 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 States 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.[6]

2.160 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;

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

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

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

6 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).

(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's initial view

2.161 The committee noted 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 noted 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 noted that retrogressive measures may be permissible if they are shown to be reasonable, necessary and proportionate.

2.162 The committee noted 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 noted some questions remain as to the proportionality of the measure.

2.163 In order to form a concluded view of the human rights implications of this bill, the committee sought the minister's advice as to the matters set out at paragraph [2.160].

2.164 The full initial analysis is set out in *Report 11 of 2020*.

Minister's response[7]

2.165 The minister advised:

> These reforms do not change the ability of Australian students to access a tertiary education. Specifically, no Australian student is denied access to a tertiary education based on their ability to pay. In fact, the reforms will allow more students to access higher education from 2021. For this reason, the Australian Government does not consider that the Bill introduces retrogressive measures.
>
> The Australian Higher Education Loan Program (HELP) is one of the most generous student loan schemes in the world. Access is not determined by age, income or background, and eligible students can participate in higher education without the barrier of upfront fees. Australian students also have access to a fair, accessible and transparent Australian income support system which ensures that the opportunity to study is not dependent on wealth.
>
> The Job-ready Graduates package of reforms to higher education does not change this. No eligible student will be required to pay tuition fees up front and Australia's generous welfare system remains in place.
>
> Student HELP loans will only be repaid, through the tax system, when the student is earning over $46,620 (in 2020-21). A person on the lowest repayment threshold (which starts at 80 per cent of the median earnings for Australian employees) will pay only $8.80 to $10.20 per week.
>
> By global comparison, students in the United States of America do not generally have access to income contingent loans to defer fees. And while students in the United Kingdom can access income contingent loans, they incur a real interest rate once earning a reasonable wage, whereas HELP debts are only indexed by Consumer Price Index.
>
> The Bill includes amendments to strengthen and extend student protection and provider integrity measures, as well as other compliance measures, to all higher education providers. Student protections measures, including quality and accountability requirements, were first introduced for non-university higher education providers in 2017 building on similar student protections in place in the vocational education and training sector following lessons learned from VET FEE-HELP. These measures are not about limiting access to education, but protecting students from debts they will likely never see the benefit of.

7 The minister's response to the committee's inquiries was received on 14 October 2020. This is an extract of the response. The response is available in full on the committee's website at: https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Scrutiny_reports.

Concluding comments

International human rights legal advice

Right to education

2.166 The minister has advised that these reforms do not change the ability of Australian students to access a tertiary education, and that no Australian student is denied access to a tertiary education based on their ability to pay, because of the availability of the Australian Higher Education Loan Program (HELP). The minister has advised that student HELP loans are only required to be repaid when the student is earning over $46,620 (in 2020-21). As such, the minister has advised that it is the Australian Government's view that the bill does not introduce a retrogressive measure in relation to the right to education.

2.167 As stated in the initial analysis, 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, in light of the requirement of article 13 of the International Covenant on Economic, Social and Cultural Rights for states to ensure 'the progressive introduction of free education'. The amount of debt incurred by students for their education is also 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.[8] There is a concern that, while the debt must only be repaid once students are earning an income, the size of the debt to be repaid may deter some would-be students from undertaking higher education studies.[9] Indeed, the minister's response notes that the cost of studies does have an effect on individuals' choices in relation to higher education: the minister later states that decreasing the cost of some studies will help to attract more people into those fields – on this reasoning, increasing the cost of some studies would appear more likely to deter people going into such fields. Further, it must be reiterated that the obligation is for Australia to progressively realise the right to free higher education. As such, with respect to those students for whom the cost of their higher education studies will now be increased, this measure would appear to

8 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.

9 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.

constitute a retrogressive (or backward) step in relation to progressively realising the right to free education.

2.168 In assessing if this is a justifiable retrogressive measure, it is necessary to consider if the measure seeks to address a legitimate objective, is rationally connected to that objective and is a proportionate way to achieve that objective. As noted in the initial analysis, supporting the expansion in the 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.[10] 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. However, no information was provided as to whether this seeks to address a pressing and substantial concern.

2.169 In respect of proportionality, as noted in the initial analysis, these changes will adversely impact students of some disciplines, while advantaging others. As was set out in the initial analysis, the United Nations Committee on Economic, Social and Cultural Rights has advised that if any deliberately retrogressive measures are taken with respect to a right, 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'.[11] In determining this, the United Nations Committee on Economic,

10 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.

11 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'.

Social and Cultural Rights has advised that it will carefully consider whether: there was reasonable justification for the action; alternatives were comprehensively examined; there was genuine participation of affected groups in examining the proposed measures and alternatives; the measures were directly or indirectly discriminatory; the measures will have a sustained impact on the realisation of the right; and whether there was an independent review of the measures at the national level.[12] It cautions that there is a strong presumption of impermissibility of any retrogressive measures taken in relation to the right to education.[13] If these matters are not demonstrated, a backward step in relation to realising a right (a retrogressive measure) will be regarded as unjustifiable under international human rights law.

2.170 In this regard, the information provided by the minister sets out no evidence or information:

- demonstrating a pressing and substantial concern which would justify an increase in the cost of some higher education studies;
- 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;
- as to whether, and in what manner, persons who would be impacted by the proposed student contribution increases were consulted about the proposed amendments;
- as to what, if any, alternatives were considered to amending the student contribution amounts in this manner;
- as to whether the proposed student contribution increases may have the effect of being discriminatory (for example, against students from lower socio-economic backgrounds or women);
- as to whether an independent review of the proposed measures has been undertaken; and
- as to 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.

2.171 As a result, it has not been established that, in deciding on this change to the funding, any alternatives were examined, nor whether any persons who would be

12 United Nations Committee on Economic, Social and Cultural Rights, *General Comment 19: the right to social security* (2008) [42].

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

affected by these measures were consulted regarding the proposal. It has also not been established that consideration was given as to whether these measures would indirectly discriminate against some students, such as those from lower socio-economic groups, or if the measure would have a sustained impact on the realisation of the right to education.

2.172 Consequently, it would appear that these amendments constitute an unjustifiable retrogressive measure in relation to the realisation of the right to education for those students in relation to whom their course of study will, overall, increase in cost.

Committee view

2.173 The committee thanks the minister for this response. The committee notes 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.

2.174 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 minister's advice that as these reforms do not change the ability of Australian students to access a tertiary education because of the availability of the Australian Higher Education Loan Program (HELP), the bill does not introduce a retrogressive measure in relation to the right to education. The committee also notes the legal advice that article 13 of the International Covenant on Economic, Social and Cultural Rights provides that states must ensure 'the progressive introduction of free education', and in relation to those students for whom the size of the debt they incur for undertaking higher education studies will now be increased, this measure would appear to constitute a retrogressive (or backward) step in relation to progressively realising the right to free education. The committee notes that retrogressive measures may be permissible if they are shown to be reasonable, necessary and proportionate.

2.175 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, including in light of the COVID-19 pandemic. The committee considers it does not have sufficient information to fully assess if the measure constitutes an unjustifiable retrogressive measure in relation to the right to education.

2.176 The committee notes that the bill has now passed, and makes no further comment.

Minimum unit completion rate

2.177 In addition, Schedule 4 amends 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 establishes 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.[14]

Summary of initial assessment

Preliminary international human rights legal advice

Right to education and equality and non-discrimination

2.178 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. 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.

2.179 In addition, 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.[15] 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).[16] Differential treatment will not constitute unlawful discrimination if the

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

15 International Covenant on Civil and Political Rights, articles 2 and 26. The prohibited grounds of discrimination are race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Under 'other status' the following have been held to qualify as prohibited grounds: age, nationality, marital status, disability, place of residence within a country and sexual orientation. The prohibited grounds of discrimination are often described as 'personal attributes'.

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

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.[17]

2.180 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;

(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).

2.181 The full initial analysis is set out in *Report 11 of 2020*.

17 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].

Committee's initial view

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

2.183 The committee noted 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.

2.184 In order to form a concluded view of the human rights implications of this bill, the committee sought the minister's advice as to the matters set out at paragraph [2.180].

Minister's response

2.185 The minister advised:

> As universities are autonomous entities, established under state and territory legislation, they are required to ensure that all students are academically suitable for their course and that students are engaged with the course and maintaining a reasonable completion rate. This will ensure universities are supporting students to succeed in their degree. The low-completion measure will ensure students do not accumulate large debts without having a degree to show for it. Universities will have the ability to respond to individual circumstances if a student's studies have been impacted by factors outside their control, like ill health, or a bereavement. If a student transfers to another course the low completion rate will not be carried with them. This measure will only apply to students commencing courses that start after 1 January 2022.
>
> A 2018 analysis of university enrolments indicated strengthening accountability requirements for universities would formalise best practices, while extending student protections measures. The Bill responds to evidence and the cases where students have been continuously enrolled at multiple providers at the same time, resulting in excessive HELP debts (at the most extreme, these debts ranged from $220,000 to more than $600,000 per individual) with very low pass rates (on average, passing one in five units attempted). This Bill will protect these students from building such substantial debts in the future.
>
> These measures will be critical in maintaining the high quality of Australia's higher education sector, particularly at a time when the number of online students has increased as a result of COVID-19. Strengthening student protections in public universities will bring universities into alignment with non-university higher education providers, and strengthen quality and accountability in Australia's tertiary sector.

The new provisions requiring students who have attempted eight or more units to successfully complete more than 50 per cent of those units would affect 9,654 students, around two per cent of Commonwealth supported students. For most full-time students, this gives universities at least two study periods to identify struggling students and link them with existing support services, including potentially transitioning them to a course they are better suited to complete.

The Bill will ensure every student in Australia can be confident that wherever they choose to study, they will be assessed as being academically suited to that study, their academic progress and engagement will be monitored throughout the course, and they will be prevented from incurring debt for study for which they are not suited. With the increase in online delivery of education as a result of the COVID-19 pandemic, it is more important than ever that we ensure student progress is actively managed.

The employment challenge presented by the COVID-19 pandemic demands changes in our education systems. This package incentivises students to pursue careers where the employment outcomes are better.

Students will always have the freedom to choose what they want to study and because the Government continues to offer one of the world's best student loan schemes, no student will be denied a place because of their capacity to pay.

Graduates enjoy an income premium of around 60 per cent higher than those without tertiary qualifications. Nearly all gains in employment over the last 40 years (96 per cent) have been made by people with tertiary qualifications (Certificate Ill or higher). This trend is expected to continue. Furthermore, demand for higher education increases during economic slowdowns, and students are seeking job-relevant skills to help them enter or re-enter the workforce. The Government is responding to economic circumstances by ensuring students are ready for the labour market that lies beyond the pandemic.

The regionally focused measures announced in the package address the disparity between metropolitan and regional and remote students, whether they choose to relocate to study or stay in their local community. These measures are targeted to provide opportunities for regional and remote students to attend university, and to support additional investment in regional universities to boost regional development.

New growth funding will see funding allocated where the nation needs it most. It provides a 3.5 per cent boost to funding for regional campuses to address the gap in attainment. It provides 2.5 per cent additional funding per annum for campuses located in high-growth metropolitan areas, to allow those to grow in line with the population, especially in outer-metropolitan growth corridors. It provides 1 per cent growth funding per

annum for other campuses to allow them to keep up with population growth in cities.

Providing a boost to funding for regional campuses responds to Recommendation 1 of the Napthine Review to 'improve access to study options for students in rural, regional and remote areas.' The Napthine Review found regional and remote students had less access to tertiary education options in their local communities, and to increase university participation rates, revision of funding caps for university places would be necessary. Additional places will support the capacity of regional education institutions and, the communities they serve, in line with Recommendation 6 to 'strengthen the role of tertiary education providers in regional development and grow Australia's regions.'

The Bill lowers the cost of education in current female dominated careers like teaching and nursing. This lowers the cost of these important careers. The Bill also lowers the costs of science, technology, engineering, and mathematics (STEM) subjects, which will help to attract more women (and men) into these fields, particularly given the demand for STEM skills is high and will continue to grow as society tackles the challenges of a digital and technologically-enabled world. Contemporary data suggests women who elect to enrol in units relevant to the jobs of the future - STEM, health, and education - will be more employable and more likely to achieve higher lifetime earnings.

The choice to study STEM and health is increasing. Since 2014, growth in enrolments in STEM and health has been higher than the humanities for females and Indigenous Australians. This Bill further incentivises this choice.

The Napthine Review highlighted the increased challenges and very low higher education participation rates for Indigenous students in regional and remote areas.

In 2016, the participation rate for Indigenous students from regional and remote areas was 2.6 per cent, less than half the rate for all regional and remote students (5.3 per cent) and just over a third of the rate for people from metropolitan areas (7.3 per cent).

The Bill introduces demand driven funding for Aboriginal and Torres Strait Islander students from regional areas, when they are admitted to a bachelor-level place in their university of choice. In 2021, an additional 160 Aboriginal and Torres Strait Islander students from regional and remote areas are expected to benefit from this policy. This number is expected to rise to over 1,700 students by 2024.

This will enable universities to provide better support for Indigenous students by providing funding capacity that aligns with enrolment levels. It will also have flow-on benefits for Indigenous communities, including in

remote locations, by providing professional services and other enterprises requiring a university educated workforce.

In addition to demand driven funding for regional and remote Indigenous students, from 2021, the Higher Education Participation and Partnerships Program (HEPPP) will be reformed to ensure Indigenous students receive greater support in accessing and succeeding in higher education.

For the first time, Indigenous students and students from regional and remote areas will be recognised as a target group in the distribution of access and equity funding through the HEPPP. The formula for distributing funding, which rewards university performance in meeting the needs of groups of students, will balance the barriers to education faced by low socio-economic status, Indigenous, and regional and remote students.

The Higher Education Support Amendment (Job-Ready Graduates and Supporting Regional and Remote Students) Bill 2020 Inquiry recommended that a review be conducted two years after implementation, the Government has accepted this recommendation. The same inquiry by the Senate Education and Employment Legislation Committee found: 'The bill is compatible with the human rights and freedoms recognised or declared in the international instruments listed in Section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*'.

The measures in this Bill do not constitute retrogressive measures to the right to education. The Bill retains the most important education safety-net, the HELP system. The Bill lowers the cost of education where the need for those skills will be intensified in the future and it does this at the unit level, meaning the cost of a degree can be lowered by choosing key STEM-skills to enhance your future employability. The Bill supports student decision making, who, since 2014 have been enrolling in STEM and health degrees at a rate higher than humanities.

Concluding comments

International human rights legal advice

Right to education and equality and non-discrimination

2.186 The minster stated that the minimum unit completion rate will ensure that universities are supporting students to succeed in their degrees, and ensure that students do not accumulate large debts without having a degree to show for it. The minister noted that universities will have the ability to respond to individual circumstances if a student's studies have been impacted by factors outside their control, like ill health, or bereavement.

2.187 Failing to meet a minimum unit completion rate would not necessarily result in a student's removal from the relevant course of study. However, the student would no longer be eligible to receive a Commonwealth loan in order to undertake that study, and would have to either: pay for their studies upfront; or switch to a

different course of study (in which case they would accrue a further HELP debt in addition to their existing debt). 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. Consequently, the minimum unit completion rate may operate as a retrogressive measure in practice. In assessing if this is a justifiable retrogressive measure, it is necessary to consider if the measure seeks to address a legitimate objective, is rationally connected to that objective and is a proportionate way to achieve that objective.

2.188 The minister explained that these measures seek to maintain the high quality of Australia's higher education sector. The minister stated that strengthening student protections in public universities will also bring universities into alignment with non-university higher education providers, and strengthen quality and accountability in Australia's tertiary sector. The minister further stated that the bill will ensure that students can be confident that: they will be assessed as being academically suited to their studies, wherever they choose to study; that their academic progress and engagement will be monitored throughout the course; and they will be prevented from incurring debt for study for which they are not suited. The minister stated that with the increase in online delivery of education as a result of the COVID-19 pandemic, it is more important than ever that student progress is actively managed, and that the pandemic generally has created an employment challenge which demands incentives for students to pursue careers where the employment outcomes are better. It would appear, therefore, that the minimum unit completion rate seeks to achieve a number of objectives. Maintaining the high quality of Australia's higher education sector and ensuring that students are not burdened with debt for courses for which they derive limited benefit, may constitute a legitimate objective for the purposes of international human rights law. However, a legitimate objective must also seek to address a pressing and substantial concern which gives rise to the need for the specific measure.

2.189 As to whether there is reasoning or evidence of a pressing or substantial concern, the minister advised that the bill responds to evidence and the cases where students have been continuously enrolled at multiple higher education providers at the same time, accumulating excessive HELP debts (at the most extreme, ranging from $220,000 to more than $600,000 per individual) with very low pass rates. However, it is noted that as at 30 June 2020, only 50 people had a HELP debt of over $220,000, and only one of those people had a debt exceeding $470,000.[18] In addition, in 2020, HELP loans were capped at $106,319 for most students and $152,700 for students studying eligible medicine, dentistry, veterinary science and

18 Department of Education, Skills and Employment, response to question on notice by Senator Farqui, 11 August 2020, Senate Select Committee on COVID-19 (Response number 388).

aviation courses.[19] This would appear to suggest that the large HELP debts identified by the minister are exceptional and rare. The minister further advised that the new provisions requiring students who have attempted eight or more units to successfully complete more than 50 per cent of those units 'would affect only 9,654 students, being approximately two per cent of Commonwealth supported students'. As this measure would currently only apply to 2 per cent of Commonwealth supported students it is not clear that there is a pressing and substantial concern which warrants the introduction of the minimum unit completion rate with respect to all Commonwealth supported students.

2.190 As to whether the minimum unit completion rate would be rationally connected to (that is, effective to achieve) its objective, the minister has advised that where a student does not meet the minimum unit completion rate with respect to one course of study, and then transfers to a different course of study, the low completion rate will not be carried with them. That is, they can undertake that new course of study without penalty for failing to meet the previous minimum unit completion rate. However, it is not clear 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 as the rate would take effect from the point at which a person first commences a higher education course, and they would be accruing a debt from that time. Rather, it would appear that a student who had failed to meet the minimum unit completion rate with respect to one course of study could withdraw, enrol in an alternative course of study as a Commonwealth supported student, and would accrue a further HELP debt with respect to that second course. The student would have accrued a HELP debt with respect to all those units of study, including their first incomplete course of study. In addition, it is not clear that every student who fails this number 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 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.

2.191 With respect to the proportionality of the minimum unit completion rate, the minister stated that universities will have the ability to respond to individual circumstances if a student's studies have been impacted by factors outside their control, like ill health, or a death. This appears to refer to the existing 'special circumstances' provisions contained in the Higher Education Support Act. 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

19 See, Study Assist, 'HELP Loans', https://www.studyassist.gov.au/help-loans [Accessed 26 October 2020].

census date for a course, and make it impracticable for the person to complete the requirements for the unit.[20] However, it would appear that this 'special circumstance' exemption is applied only in limited circumstances.[21] The minister's response did not provide any further information as to 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.[22]

2.192 The minister also noted that the bill includes a range of measures designed to support particular students, including: regionally focused measures to address the disparity between metropolitan and regional and remote students; additional funding for and student places in regional campuses; decreased HELP contributions for female-dominated careers; and demand driven funding for Indigenous students from regional areas. These appear to be relevant and positive measures with respect to the capacity of regional, female and Indigenous students to overcome barriers to undertake higher education. However, without information as to whether a minimum unit completion rate may itself have the effect of being discriminatory, it is difficult to assess any safeguard value of these measures. There remains a risk that the minimum unit completion rate, which would apply from a student's first year of

20 *Higher Education Support Act 2003*, section 36-21.

21 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. See also *PVQQ and Secretary, Department of Education* [2019] AATA 659 (5 April 2019) and *Currie and Secretary, Department of Education and Training* [2017] AATA 1431 (1 September 2017).

22 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.

study, may have a disproportionate impact on some more vulnerable students for whom undertaking higher education is associated with added challenges.[23]

2.193 As noted at paragraph [2.169], the state bears the burden of proving that retrogressive measures have been introduced only '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'.[24] In this respect, it has not been established that any alternatives to the minimum unit completion rate were examined, and whether any persons who would be affected by these measures were consulted in regards to the proposal. It has also not been established that 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.

2.194 Consequently, there is a risk that the minimum unit completion rate would constitute an unjustifiable retrogressive measure in relation to the realisation of the right to education for those students in relation to whom their access to Commonwealth funding may be cut off. There also appears to be a risk that the measures may have a discriminatory impact on students for whom undertaking university studies is accompanied by additional challenges.

Committee view

2.195 The committee thanks the minister for this response. 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.

23 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. 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).

24 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.'

2.196 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.

2.197 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. The committee notes the minister's advice that the minimum unit completion rate would affect only an estimated two per cent of Higher Education Supported students, and that students who may require additional support to undertake higher education studies will be supported by additional targeted measures. The committee also notes the legal advice that there is a risk that the minimum unit completion rate would constitute an unjustifiable retrogressive measure in relation to the realisation of the right to education for those students in relation to whom their access to Commonwealth funding may be cut off, and that the measures may have a discriminatory impact on students for whom undertaking university studies is accompanied by additional challenges. The committee considers it does not have sufficient information to fully assess if the measure constitutes an unjustifiable retrogressive measure in relation to the right to education or an impermissible limitation on the right to equality and non-discrimination.

2.198 The committee notes that this bill has now passed, and makes no further comment.

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	Concluded examination

2.199 The committee requested a response from the minister in relation to the bill in *Report 11 of 2020*.[2]

Information gathering powers

2.200 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.[3] 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.[4] 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

1 This entry can be cited as: Parliamentary Joint Committee on Human Rights, National Commissioner for Defence and Veteran Suicide Prevention Bill 2020*, Report 13 of 2020*; [2020] AUPJCHR 160.

2 Parliamentary Joint Committee on Human Rights, *Report 11 of 2020* (24 September 2020), pp. 60-68.

3 Part 3, subclause 26(2).

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

powers under this Act, the same protection and immunity as a Justice of the High Court.[5]

Summary of initial assessment

Preliminary international human rights legal advice

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

2.201 The establishment of a Commissioner which is intended to support the prevention of defence member 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. These include the rights to life,[6] health[7] and safe and healthy working conditions for defence members.[8]

2.202 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.[9] 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.

2.203 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.[10] 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

5 Clause 64.

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

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

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

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

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

remedy provided (judicial or otherwise), States Parties must comply with the fundamental obligation to provide a remedy that is effective.[11]

2.204 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.

2.205 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.[12] Specific guarantees of the right to a fair trial in the determination of a criminal charge include the presumption of innocence,[13] and minimum guarantees in criminal proceedings, including the right not to incriminate oneself.[14] The right requires that a person should be able to be represented by a lawyer of their choosing,[15] 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.[16] 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.

2.206 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);

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

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

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

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

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

16 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*.

(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.

2.207 The full initial analysis is set out in *Report 11 of 2020*.

Committee's initial view

2.208 The committee considered 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.

2.209 The committee noted 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 noted 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.

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

2.211 In order to form a concluded view of the human rights implications of this bill, the committee sought the Attorney-General's advice as to the matters set out at paragraph [2.8].

Attorney-General's response[17]

2.212 The Attorney-General advised:

The application of the principles in clause 12

The Committee has requested further information as to 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

Clause 12 of the Bill provides the general principles that the National Commissioner for Defence and Veteran Suicide Prevention (the Commissioner) should take into account in the performance or exercise of their functions or powers. The general principles include taking a trauma-informed and restorative approach. The Explanatory Memorandum outlines that 'this means the principles of safety, confidentiality, consultation and informed participation, for example, will underpin the way the Commissioner undertakes its role'. Clause 12 also recognises that families and others affected by a suicide death have a unique contribution to make to the Commissioner's work, and may wish to be consulted.

Applying a restorative and trauma-informed approach will involve the Commissioner ensuring that families and other people are appropriately assisted and supported when providing information and giving evidence, including when exercising their compulsory powers to summon a person to give evidence, or to provide a document or thing. This may include, for example, considering the use of non-compulsory information-gathering mechanisms, where appropriate.

In practice, families and others affected by a death by suicide will have the opportunity to engage with the Commissioner in a variety of informal ways. This could be, for example, through making a submission on a matter relevant to the Commissioner's work. It could also include engaging with families and other interested persons through meetings and discussions. While formal 'evidence' would not be taken during these meetings, they will be an important way for families and others to share their experiences, and for the Commissioner to develop an understanding of the circumstances surrounding a death by suicide, and/or systemic issues. A formal hearing might then be a further way for the Commissioner to formally inquire into particular relevant issues, and take evidence, if the Commissioner thinks this is required.

17 The minister's response to the committee's inquiries was received on 14 October 2020. This is an extract of the response. The response is available in full on the committee's website at: https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Scrutiny_reports.

Merits Review

The Committee has requested further information as to whether 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)

The Bill implements the Australian Government's commitment that the Commissioner will have inquiry powers broadly equivalent to a Royal Commission. Generally aligning the Commissioner's inquiry powers with those of a Royal Commission includes providing appropriately broad discretion to the Commissioner in the exercise of those powers.

The Bill does not exclude the performance of any of the Commissioner's functions or powers from being subject to judicial review, such as under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) or section 39B of the *Judiciary Act 1903* (Cth). This will enable a party that may hold a concern about the legality of a decision of the Commissioner to seek judicial review.

The Bill does not provide for merits review of the performance or exercise of the Commissioner's functions or powers. Doing so would constitute a significant departure from the processes in the *Royal Commissions Act 1902* (Cth) (Royal Commissions Act), which does not provide for merits review of the performance of functions and exercise of powers by a member of a Royal Commission. Like a Commissioner appointed to a Royal Commission, the Commissioner has the same protection and immunity as a Justice of the High Court of Australia in the performance or exercise of their functions (clause 64 of the Bill, section 7 of the Royal Commissions Act).

Providing a pathway for merits review of the Commissioner's decisions would undermine the Commissioner's standing as an independent statutory office holder, as this would involve placing another person or body in the position of reconsidering whether the Commissioner made the correct or preferable decision in the course of their inquiries or other work. The framework in the Bill provides appropriate autonomy and flexibility to the Commissioner in exercising their role, which extends to ensuring the Commissioner is not subject to direction in the way they undertake their inquiries (whether through a merits review process, or otherwise).

The Committee has commented that the Bill engages and may limit the right to an effective remedy. The right to an effective remedy is contained in article 2(3) of the International Covenant on Civil and Political Rights (ICCPR) and requires state parties to provide an effective remedy for violations of human rights protected under the ICCPR. Therefore, article 2(3) does not in itself confer substantive rights, such as a right to merits review.

The right to an effective remedy is preserved in the Bill through the availability of judicial review, which provides recourse for a person who may be concerned about the legality of a compulsory request issued by the Commissioner. The opportunity for a relevant party to claim public interest immunity, and the following defences in the Bill, also enable a person to resist a compulsory request and to have their basis for doing so upheld by a court, if required:

- the defence of relevance (subclause 45(4)) – which is available to protect a person from being compelled to provide information that is not relevant or connected to the matters into which the Commissioner is inquiring; and
- the defence of reasonable excuse (subclause 45(3)) - which ensures a person is not penalised where they may be unable legitimately to produce a document or attend a hearing due to circumstances beyond their control, or where there is some other good and acceptable reason.

As outlined in the Explanatory Memorandum, the general defences under Part 2.3 of the Criminal Code (such as mistake of fact, duress, lawful authority, and sudden or extraordinary emergency), would also be available to a person subject to a compulsory request.

Clause 56 - Authorisation to disclose information

The Committee has requested further information as to 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)

Clause 56 authorises the Commissioner to disclose information they have received to other entities in certain circumstances. It supports the objectives of:

- Enabling the Commissioner to refer material evidencing a potential civil, criminal or similar probity issue to law enforcement or integrity bodies, similar to the arrangements for Royal Commissions under section 6P of the Royal Commissions Act. Given the Commissioner is not permitted to make findings of civil or criminal wrongdoing, it is necessary and appropriate that the Commissioner has broad discretion to refer material raising potential wrongdoing of this kind to an appropriate authority.
- Enabling the Commissioner to work collaboratively with other bodies engaged in suicide prevention efforts, such as the Australian Institute of Health and Welfare, Coroners, and any other relevant bodies. It is a priority that the Commissioner, as an enduring body, can work in partnership with others on suicide prevention, and be empowered to share information flexibly within this remit.

A range of safeguards are provided in the Bill to ensure the information sharing power in clause 56 is appropriately exercised, and any risk to privacy issues is mitigated:

- Only the Commissioner is authorised to disclose information under clause 56 – the power cannot be delegated.
- Clause 55 prevents the unauthorised use or disclosure of protected information (including by the Commissioner themselves), except in certain limited circumstances. Clause 56 operates as a limited exception to the unauthorised disclosure offence in clause 55.
- Paragraph 56(1)(a) limits the information the Commissioner may disclose to that received through an authorised voluntary disclosure (clauses 40 and 41 refer), or to information received in response to a notice or summons (clauses 30 and 32 refer).
- Paragraph 56(1)(b) requires the Commissioner to be satisfied that the information proposed to be disclosed will assist the receiving entity to perform any of its functions or powers - this requires an assessment of the relevance of the information to be disclosed, against the functions and powers of the potential receiving entity. It is anticipated that such disclosure would generally occur for the purposes of law enforcement and integrity action, or the performance of functions or exercise of powers by other government bodies and officers where there is a clear nexus with defence and veteran suicide prevention.
- The power to disclose information under clause 56 is discretionary, and the Commissioner would have due regard to all relevant considerations, including the particular circumstances in deciding whether to disclose information. For example, as outlined above, clause 12 provides that the Commissioner should take a trauma-informed and restorative approach to the performance or exercise of their functions or powers, and to recognise that the families and other persons affected by a relevant death may wish to be consulted. In keeping with a trauma-informed approach, the wishes and interests of families (including appropriate consultation about the sharing of their sensitive information) will inform the way the Commissioner exercises their functions and powers in relation to the disclosure of information under clause 56.
- The Commissioner can determine the form of any information to be disclosed under clause 56, enabling (for example) de-identification, redaction of material that is not relevant, and/or relaying material with requests as to its future use (for example, requesting the receiving entity preserve confidentiality).

Legal Professional Privilege

The Committee has requested further information as to 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

The approach to legal professional privilege (LPP) in the Bill is closely modelled on section 6AA of the Royal Commissions Act and is intended to ensure the Commissioner can conduct full inquiries, with access to all relevant information, like a Royal Commission. As acknowledged in the Explanatory Memorandum, the approach taken in the Bill gives weight to the public benefit in equipping the Commissioner with appropriate powers of inquiry which are broadly equivalent to the powers of inquiry of a Royal Commission.

In deciding a claim of LPP under subclause 48(2), it is intended that the Commissioner would apply the established common law principles relevant to determining a claim of LPP. This subclause effectively replicates subsection 6AA(2) of the Royal Commissions Act, which does not expressly set out the test to be applied. Applying the common law principles would require the Commissioner to have regard to the information presented by the party making the claim (noting that the Commissioner would need to afford procedural fairness to the affected parties in deciding that claim). The Commissioner could also seek additional information, as required.

Further, it is intended that a decision to reject a claim of LPP would be an administrative decision subject to judicial review under the *Administrative Decisions (Judicial Review) Act 1977* (Cth), as well as under section 39B of the *Judiciary Act 1903* (Cth). As such, even leaving aside the ability of an affected party to seek a declaration from a court that the relevant information is subject to LPP, there will be appropriate judicial oversight where there are concerns as to whether the Commissioner has applied the relevant common law principles correctly.

The person appointed as the Commissioner must, in the Governor-General's opinion, be suitable for appointment because of their qualifications, training or experience (see subclause 16(2)). This will provide scope for the Governor-General to consider, among a range of other relevant factors, whether the person's qualifications, training or experience would enable them to effectively assess claims of LPP.

The Commissioner will also be supported by legal and other specialist staff in the Office of the National Commissioner as required, enabling them to draw on expert assistance and advice when assessing claims of LPP.

The Committee has requested further information as to 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)

If a lawyer was summonsed or notified to provide communications to the Commissioner in respect of which their client has claimed LPP,

paragraph 48(1)(b) would allow for a claim to be made to the Commissioner that the communications in question were subject to LPP. The Commissioner would then decide the claim. As outlined above, this would be done through the application of established common law principles regarding LPP.

This provides a mechanism for LPP to be relied upon as a reasonable excuse for not complying with a summons or notice to produce, even in circumstances where a court had not found the relevant material to be subject to LPP. If the LPP claim was accepted by the Commissioner, the lawyer would be able to rely on LPP as a reasonable excuse for the purposes of clause 45. This means that where there is a legitimate LPP claim and the process for making such a claim to the Commissioner is followed, a lawyer would not be exposed to penalties under Part 4 of the Bill in respect of a failure to comply with the summons or notice.

Additionally, subclause 64(4) of the Bill, which affords witnesses or persons responding to a summons or notice the same protection as a witness in the High Court, means that such protections would be available for a lawyer in such circumstances (for example, in relation to any subsequent proceedings they might face).

As discussed above, the approach to LPP in the Bill is very closely modelled on section 6AA of the Royal Commissions Act, consistent with the Australian Government's commitment that the Commissioner will have inquiry powers broadly equivalent to a Royal Commission.

The exclusion of 'derivative use immunity'

The Committee has requested further information as to 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.

The *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement powers* (the Guide) provides that 'the privilege against self-incrimination may be overridden by legislation where there is clear justification for doing so' and 'if the privilege against self-incrimination is overridden; the use of incriminating evidence should be constrained' (9.5.3-4 of the Guide refers).

As noted in the Explanatory Memorandum, the justification for a partial abrogation of the privilege against self-incrimination is to support the Commissioner's function to inquire into, and report on, a matter of public importance – namely the prevention of defence member and veteran deaths by suicide. In doing so, the approach gives weight to the public benefit and expectation that the Commissioner will have appropriate inquiry powers. As is the case with a Royal Commission, the abrogation of the privilege against self-incrimination is not absolute and there are limits and safeguards on the abrogation.

The partial abrogation of the privilege against self-incrimination operates alongside the protection that a person appearing as a witness, or giving or producing evidence or a statement in response to a notice, has the same protection as a witness in the High Court (clause 64). This will enable relevant persons to claim the defence of absolute privilege in respect of information disclosed, when appearing as a witness or in response to a compulsory notice, for example, in separate criminal or civil proceedings. The Commissioner also has powers under clause 53 to issue a non-publication direction to limit the further disclosure or publication of evidence which may be self-incriminating.

It is acknowledged that the Commissioner may disclose information to listed entities, including the police or the Director of Public Prosecutions, where the Commissioner considers the information will assist the entity to perform its functions or exercise its powers (clause 56). During the course of their work, the Commissioner may uncover information indicating a crime may have been committed. Introducing a ' derivative use' immunity to prevent any incriminating evidence being used to gather other evidence against the person may unreasonably hinder the ability of law enforcement agencies to investigate and prosecute matters the Commissioner identifies.

This consideration has been central in the design of the approach taken in the Bill, noting that the approach in the Bill to partially abrogate the privilege against self-incrimination, and not to provide a ' derivative use' immunity, is consistent with the approach taken in other inquiry legislation, such as the Royal Commissions Act and subsection 9(4) of the *Ombudsman Act 1976* (Cth).

Concluding comments

International human rights legal advice

Rights to life, health, and just and favourable conditions at work

2.213 The establishment of a Commissioner which is intended to support the prevention of defence member 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. These include the rights to life,[18] health[19] and safe and healthy working conditions for defence members.[20]

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

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

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

Rights to privacy and an effective remedy

2.214 In relation to the limit on the right to privacy in the context of the Commissioner's coercive evidence-gathering powers, the Attorney-General has advised that applying a restorative and trauma-informed approach will involve the Commissioner ensuring that families and other people are appropriately assisted and supported when providing information and giving evidence. This approach will be applied when the Commissioner is exercising their compulsory powers to summon a person to give evidence, or to provide a document or thing. The Attorney-General has advised that applying a restorative and trauma-informed approach may include, for example, the Commissioner considering the use of non-compulsory information-gathering mechanisms, where appropriate. The Attorney-General has advised that in practice, families and others affected by a veteran death by suicide will have an opportunity to engage with the Commissioner in a variety of informal ways, for example, through making a submission or participating in meetings and discussions. If required, a formal hearing might take place, in which the Commissioner could formally inquire into relevant issues.

2.215 This advice indicates that it is intended that the Commissioner will take a restorative and trauma-informed approach both prior to, and while, exercising their information-gathering powers. If the Commissioner were to exercise their powers in the manner outlined in the Attorney-General's response, the principles in clause 12 may sufficiently safeguard the right to privacy in relation to the exercise of the compulsory information-gathering powers. However, while the Commissioner should be guided by this restorative and trauma-informed approach, the strength of this safeguard may depend to some extent on the practice of the individual Commissioner. The proportionality of this measure may be assisted if guidelines were developed to assist the Commissioner in exercising these powers, such as specifying that the Commissioner exhaust non-compulsory information-gathering mechanisms, such as assisting and supporting families and other people to provide information through informal discussions or submissions, prior to exercising their compulsory powers. Exercising their compulsory information-gathering powers as a last resort would ensure that the Commissioner adopts the least rights restrictive approach.

2.216 Regarding the limit on the right to privacy in the context of the onwards disclosure of personal information, the Attorney-General has advised that it is necessary to authorise the Commissioner to refer material evidencing a potential civil, criminal or similar probity issue to law enforcement or other integrity bodies because the Commissioner is not permitted to make findings of civil or criminal wrongdoing. The Attorney-General has set out various safeguards to ensure that this power is exercised appropriately and any limits on the right to privacy are mitigated. However, questions remain as to the sufficiency of these safeguards. The Attorney-General has identified clause 55 (which prevents the unauthorised disclosure of protected information) as a safeguard. However, as the

Attorney-General notes, clause 56 (which authorises the disclosure of information to other entities) is a specific exception to clause 55. The limits on the information that may be disclosed (which includes information provided voluntarily or information received by notice or summons) is also identified as a safeguard.[21] Notwithstanding these limits, however, the breadth of information that could be disclosed is wide and could include highly complex and deeply personal matters.

2.217 Another safeguard identified by the Attorney-General is the requirement that the Commissioner be satisfied that the information will assist the entity to perform any of its functions or powers.[22] The Attorney-General has advised that this would require the Commissioner to assess the relevance of the information to be disclosed against the functions and powers of the entity receiving the information. It is anticipated that such disclosure would generally occur for the purposes of law enforcement and integrity action, or the performance of functions by other entities where there is a clear nexus with defence and veteran suicide prevention. The Attorney-General has advised that this power to disclose information is discretionary, although the Commissioner would have due regard to all relevant considerations, including the principles in clause 12. Applying a trauma-informed approach, for instance, could involve appropriate consultation with the families about the sharing of their sensitive information. The Commissioner can also determine the form of information shared, for example, sharing de-identified or redacted material.

2.218 While the power to disclose information to other entities could be exercised in the manner suggested in the Attorney-General's response, the bill, as drafted, would not require this and would appear to allow the disclosure of personal information even when there may be less rights restrictive ways to achieve the same aim. Where a measure limits a human right, discretionary safeguards alone may not be sufficient for the purpose of a permissible limitation under international human rights law.[23] This is because discretionary safeguards are less stringent than the protection of statutory processes and may vary depending on who is exercising that discretion. As such, questions remain as to whether the safeguards identified by the Attorney-General would be sufficient to protect the right to privacy in the context of the Commissioner's power to disclose personal information to other entities. As noted above, the proportionality of this measure would be assisted by the development of guidelines to ensure that the Commissioner adopts the least rights restrictive approach in exercising their powers. In the context of determining

21 Part 4, Division 4, clause 56(1)(a).

22 Part 4, Division 4, clause 56(1)(b).

1 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Radiocommunications Legislation Amendment (Reform and Modernisation) Bill 2020, *Report 13 of 2020*; [2020] AUPJCHR 161.

whether to disclose information to other entities (particularly information compulsorily acquired), the guidelines could require that the Commissioner consider additional criteria, such as the public interest in disclosing such information and the right to privacy of any affected person or persons, including the extent to which the right to privacy would be limited by the disclosure of this information.

2.219 In relation to the right to an effective remedy (being a remedy in relation to any breach of privacy), the Attorney-General has advised that while the performance of any of the Commissioner's functions or powers is not subject to merits review, it is subject to judicial review and as such the right to an effective remedy is preserved. The Attorney-General also noted that a person can resist a compulsory request by claiming public interest immunity or other defences, such as the defence of relevance or reasonable excuse.

2.220 The Attorney-General has noted that the right to an effective remedy does not confer substantive rights, such as the right to judicial or merits review. However, in assessing if the Commissioner's powers might violate a person's right to privacy, it is necessary to consider if there is an effective remedy available for any possible breach of this right. While the Attorney-General has confirmed that judicial review of the Commissioner's decisions is available, external merits review is not. Judicial review represents a limited form of review in that it allows a court to consider only whether the decision was lawful (that is, within the power of the relevant decision maker). The court cannot undertake a full review of the facts (that is, the merits), as well as the law and policy aspects of the original decision to determine whether the decision is the correct or preferable decision. If the Commissioner was required to consider the right to privacy in exercising their functions, as noted above, then judicial review alone may be considered an effective remedy for any violation of the right to privacy. This is because the failure to properly consider the right to privacy and the extent to which it might be limited in exercising a particular power or function could then be subject to judicial review. In the absence of a requirement that the Commissioner consider the privacy impact of the exercise of their power, it is difficult to see how judicial review would effectively be able to remedy any violation of the right to privacy.

Right to a fair trial

2.221 In relation to the right to a fair trial and the application of legal professional privilege, the Attorney-General has advised that in deciding a claim of legal professional privilege it is intended that the Commissioner would apply the established common law principles relevant to determining a legal professional privilege claim. The Attorney-General has noted that in determining such claims, the Commissioner will be supported by legal and other specialist staff in the Office of the National Commissioner as required, and a decision by the Commissioner to reject a legal professional privilege claim would be subject to judicial review. The Attorney-General has further noted that where a claim of legal professional privilege was accepted, a lawyer would not be exposed to penalties under Part 4 of the bill in

respect of a failure to comply with the summons or notice. Existing common law principles and access to judicial review in this instance would appear to be an effective safeguard to ensure that any abrogation of legal professional privilege may be proportionate.

2.222 In relation to the right to a fair trial and the privilege against self-incrimination, the Attorney-General has advised that the justification for a partial abrogation of the privilege against self-incrimination is to support the Commissioner's function to inquire into, and report on, the prevention of defence and veteran deaths by suicide. Regarding the proportionality of this limit to the right to a fair trial, the Attorney-General has noted that there are safeguards on the partial abrogation of the privilege against self-incrimination. In particular, a person appearing as a witness or producing evidence in response to a notice has the same protection as a witness in the High Court, meaning that they can claim the defence of absolute privilege in respect of information disclosed when appearing as a witness in separate proceedings.

2.223 However, regarding the safeguard of a derivative use immunity, the Attorney-General has advised that introducing a derivative use immunity may unreasonably hinder the ability of law enforcement agencies to investigate and prosecute matters identified by the Commissioner. The decision to not provide a derivative use immunity allows any information, document or thing obtained as a consequence of the forced production of the information or document to be used against the person. The effect of clause 56 (the authorisation to disclose information to other entities) is that information compulsorily obtained pursuant to an inquiry could be used by police or prosecutors to derive further information or evidence, which may then be admissible in evidence in a criminal proceeding against the person who was compelled to provide the original information. 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. While this could facilitate further investigations and prosecutions, the absence of a derivative use immunity could also have significant and broad-reaching implications for a person's right not to be compelled to testify against themselves. As such, it would appear that the absence of a derivative use immunity, so that anything obtained as a consequence of information or documents compulsorily provided by a person to the Commissioner could be used against them in a criminal proceeding, may impermissibly limit the right of a person not to incriminate oneself.

Committee view

2.224 The committee thanks the Attorney-General for this response. 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.

2.225 The committee reiterates 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.

2.226 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 reiterates that as this bill seeks to establish a Commissioner to undertake the vitally important task of combatting suicide among defence members and veterans, this constitutes a legitimate objective for the purposes of international human rights law and the measure would appear to be rationally connected to this objective.

2.227 Regarding the proportionality of the measure, the committee considers the principles in clause 12 (including to take a trauma-informed and restorative approach) may, in practice, operate to sufficiently safeguard the right to privacy in the context of the Commissioner's coercive evidence-gathering powers. In relation to the Commissioner's powers to disclose information it has compulsorily obtained to other entities, the committee considers this power is necessary to enable the Commissioner to work collaboratively with other bodies engaged in suicide prevention efforts. However, some questions remain as to whether the safeguards provided in the bill would be sufficient to protect the right to privacy (and the right to an effective remedy), noting that much relies on the exercise of the Commissioner's discretion.

2.228 The committee considers that the proportionality of this measure would be assisted were the bill amended to provide that the Commissioner must:

- **have regard to guidelines as to the exercise of the Commissioner's compulsory information-gathering powers under clauses 30 to 32, which should provide that in considering whether to exercise these powers the Commissioner must have regard to whether the information may be obtained non-compulsorily, and after having considered an individual's right to privacy and the public interest; and**
- **when considering whether to disclose protected information under clauses 56 and 57, consider how much the privacy of any person or persons would be likely to be interfered with by the disclosure of this information, as balanced with the public interest in such disclosure.**

2.229 The committee notes abrogating the privilege against self-incrimination and legal professional privilege also engages and may limit the right to a fair trial. The committee considers that there are sufficient safeguards to protect the right to legal professional privilege. However, while the absence of a derivative use immunity may facilitate the ability of law enforcement agencies to investigate and

prosecute matters identified by the Commissioner, which we recognise is a critically important part of the Commissioner's role, we note the legal advice that not providing a derivative use immunity could also have significant implications for a person's right not to be compelled to testify against themselves, but consider that this measure is nonetheless a proportionate means of achieving the stated objective.

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	Concluded examination

2.230 The committee requested a response from the minister in relation to the bill in *Report 11 of 2020*.[2]

Civil penalty provisions

2.231 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.[3] Pursuant to proposed section 156, ACMA would

1 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Radiocommunications Legislation Amendment (Reform and Modernisation) Bill 2020, *Report 13 of 2020*; [2020] AUPJCHR 161.

2 Parliamentary Joint Committee on Human Rights, *Report 11 of 2020* (24 September 2020), pp. 69-73.

3 '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.

have the power to make equipment rules by legislative instrument.[4] Such rules may impose obligations or prohibitions with respect to equipment.[5] To enable ACMA to 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;[6] failure to comply with an interim or permanent equipment ban;[7] and non-compliance with recall notices.[8] In addition, Schedule 6 seeks to establish corresponding offence and civil penalty provisions relating to: the unlicensed operation of radiocommunications devices,[9] and unlawful possession of radiocommunication devices.[10] It also seeks to replace existing offence provisions with civil penalties for matters including contravening conditions of an apparatus licence;[11] the use of a transmitter from a foreign vessel, aircraft or space object;[12] and causing interference with radiocommunications.[13]

Summary of initial assessment

Preliminary international human rights legal advice

Criminal process rights

2.232 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.[14] 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),[15] 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

4 Schedule 4, Part 1, Division 2.

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

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

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

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

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

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

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

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

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

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

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

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. [16]

2.233 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's initial view

2.234 The committee noted 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 noted 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 noted that if this were the case, the civil penalty provisions in question must be shown to be consistent with the criminal process guarantees.

2.235 In order to form a concluded view of the human rights implications of this bill, the committee sought the minister's advice as to the matters set out at paragraph [2.233].

2.236 The full initial analysis is set out in *Report 11 of 2020*.

Minister's response[17]

2.237 The minister advised:

> **Civil penalty provisions in Schedules 4 and 6 of the Bill that apply to individuals**
>
> Schedule 4 of the Bill repeals and substitutes Part 4.1 of the Act which deals with the regulation of radiocommunications equipment and prohibitions regarding possession and use. The effective regulation of equipment is necessary to contain interference to radiocommunications,

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

17 The minister's response to the committee's inquiries was received on 8 October 2020. This is an extract of the response. The response is available in full on the committee's website at: https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Scrutiny_reports.

provide for the electromagnetic compatibility of equipment, and to protect the health and safety of individuals from adverse effects attributable to radio emissions.

Schedule 4 of the Bill contains a number of civil penalty provisions that could apply to an individual in some circumstances. These provisions include:

- non-compliance with an interim ban on equipment related to the operation of such equipment in proposed section 170, and
- non-compliance with a permanent ban on equipment related to the possession or operation of such equipment in proposed section 176.

While these provisions can apply to individuals, the high levels of civil penalty available under section 176 would not apply until processes specified in the Bill had been undertaken. These include the Australian Communications and Media Authority (ACMA) issuing a permanent ban by legislative instrument, following public consultation, and the expiry of any amnesty period determined by ACMA, during which the individual would have the opportunity to forfeit the equipment without penalty. It is also expected that alternative enforcement options will generally be more appropriate in the case of non-compliance by individuals (discussed more below).

Schedule 6 of the Bill introduces a graduated set of enforcement tools to enable ACMA to take proportionate action in response to non-compliance with the provisions of the Act. As part of this, Schedule 6 introduces several civil penalty provisions and also repeals a number of the current criminal penalties and replaces these with civil penalty provisions where this provides a more appropriate response than a criminal sanction.

Schedule 6 also contains a number of civil penalties that could, in some circumstances, apply to an individual. These provisions include amendments to:

- section 46, which concerns the operation of a radiocommunications device without a licence;
- section 47, which concerns the unauthorised possession of a radiocommunications device; and
- section 197, which concerns reckless conduct that may result in substantial interference, disruption or disturbance to radiocommunications.

Sections 46 and 47 would not apply to individuals who were working for an organisation that holds an appropriate licence under the Act. Section 197 concerns conduct that can cause significant harm to radiocommunications and risks to health and safety.

The remaining civil penalty provisions in Schedules 4 and 6 to the Bill apply to either licensees or businesses that deal with radiocommunications equipment and, consistent with related advice in the Statement of

Compatibility with Human Rights contained in the Explanatory Memorandum to the Bill, this class of persons can reasonably be expected to be aware of their obligations under the legislation.

Characterisation of the civil penalty provisions

Having regard to the aims, quantum, exemptions and broader regulatory context, I consider it is appropriate to conclude that these civil penalty provisions should not be regarded as criminal penalties for the purposes of human rights law.

The civil penalties in the Bill are intended to regulate conduct in a manner proportionate with reference to the regulatory context, and the nature of the regulated industry.

The civil penalty provisions, including the instances where a comparatively high civil penalty may be applied (for example, the proposed section 176), are designed to be commensurate with the potential harm caused in the form of disruption to radiocommunications and risks to health and safety from non-compliant radio emissions. The amount of the penalties is in line with similar penalties in regulatory regimes relating to product bans under the Australian Consumer Law (ACL) and the transportation of dangerous goods. Under the ACL, non-compliance with a product ban attracts the same amount of penalty for both the civil penalty and the offence.

The amount of the civil penalties was also determined based on the considerations set out in *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers,* published by the Attorney-General's Department.

The Act will also provide suitable exemptions from these civil penalty provisions that are relevant to their characterisation as civil penalties for the purposes of human rights law.

Section 27 of the Act allows ACMA to determine that acts or omissions by a person performing their duties or functions in a specified organisation or in relation to defence, law enforcement or the response to an emergency are exempt from all or part of Parts 3.1, 4.1 or 4.2. This includes a person performing their duties as part of a firefighting, civil defence or rescue organisation. The proposed subsection 269(6) in Schedule 4 to the Bill also provides that a person is not liable to a civil penalty for conduct that is reasonable in response to an emergency.

In relation to members of the public, the Act provides for the exemption of persons from licensing provisions in the Act in circumstances where it is considered appropriate. For example, section 49 of the Act provides that a person operating a radiocommunications device in an emergency does not contravene the prohibitions in sections 46 and 47 requiring a person operating or possessing a device to have a licence.

In addition, the civil penalties are part of a graduated set of enforcement tools that also include infringement notices (which extinguish future

liability and have a maximum penalty of 12 penalty units for individuals) and forfeiture notices (which extinguish future liability on the condition that non-compliant equipment is forfeited to ACMA). These additional tools are designed to assist ACMA to deal proportionately with lower level non-compliance with the Act, such as inadvertent contraventions by individuals.

In this context, I consider that the civil penalty provisions should not be characterised as criminal penalties for the purposes of human rights law.

Protection of criminal process rights

It is also important to note that the criminal process guarantees contained in the ICCPR are not limited by the provisions of the Bill. This includes the right to the presumption of innocence, the right to a fair trial and the right not to be tried twice for the same offence.

The right to a fair hearing is not limited by the Bill. The proposed section 269 in Schedule 6 to the Bill requires that the hearing must be by the Federal Court or the Federal Circuit Court of Australia, thus meeting the requirement for the hearing to be by a competent, independent and impartial tribunal established by law. Under section 82 of the Regulatory Powers Act, civil penalty orders can only be granted by a relevant court, which must consider all relevant matters before determining the amount of the penalty.

The right not to be tried twice for the same offence is also not limited. While a small number of provisions (for example, the proposed section 176) contain a penalty for an offence as well as a civil penalty, protections are in place through sections 88 and 89 of the *Regulatory Powers (Standard Provisions) Act 2014.* These sections apply to all civil penalty provisions in the Bill and mean that a civil penalty cannot be imposed by a court if a criminal penalty has already been imposed.

Concluding comments

International human rights legal advice

Criminal process rights

2.238 The minister provided further information as to whether and in what circumstances the civil penalties contained in the bill may apply to members of the public, or to individuals working on behalf of organisations. The minister noted that the Act allows ACMA to determine that acts or omissions by a person performing their duties or functions in a specified organisation or in relation to defence, law enforcement or the response to an emergency are exempt from all or part of the Act as it relates to unlicensed radiocommunications; standards and other technical regulation; and offences relating to radio emission. The minister stated that this includes a person performing their duties as part of a firefighting, civil defence or rescue organisation. The minister further noted that the bill provides that a person is not liable to a civil penalty for conduct that is reasonable in response to an

emergency,[18] stating that this would also apply to members of the public. In addition, the minister advised that the civil penalties for unauthorised possession of a radiocommunications device (or operation with a licence),[19] would not apply to individuals working for an organisation which holds a licence under the Act. These provisions would appear to limit the potential application of these civil penalties, including by protecting persons volunteering with community organisations, as well as members of the public acting in an emergency, from the imposition of a civil penalty.

2.239 The minister also advised that, in addition to the civil penalties (and offence provisions), additional less serious enforcement tools are available under the Act. The minister stated that the Act contains a graduated set of enforcement tools including infringement and forfeiture notices, both of which extinguish future liability. The minister advised that these additional tools are designed to assist ACMA to deal proportionately with lower level non-compliance with the Act, such as inadvertent contraventions by individuals. The minister stated that, in the case of any non-compliance by individuals, it is expected that alternative enforcement options will generally be more appropriate. This flexibility would assist in the proportionality of the more significant civil penalties proposed in the bill.

2.240 With respect to the magnitude of the proposed civil penalties, the minister noted the broader regulatory context in which the penalties would operate. The minister advised that many of the civil penalty provisions in Schedules 4 and 6 to the bill would apply to either licensees or businesses dealing with radiocommunications equipment, and that this class of persons can reasonably be expected to be aware of their obligations under the legislation. The minister stated that the civil penalties are designed to be commensurate with the potential harm caused in the form of disruption to radiocommunications and risks to health and safety from non-compliant radio emissions. Furthermore, with respect to the 1000 penalty unit ($222,000) for non-compliance with a permanent equipment ban,[20] the minister noted that several steps would precede the imposition of such a penalty, which would place relevant persons on notice as to any permanent ban on equipment.

2.241 Based on the information provided by the minister with respect to the series of enforcement tools within the Act, of which the significant civil penalty provisions would be the more serious element; the flexibility to exempt members of the public and persons volunteering with community organisations from the application of a penalty; and the consequent restriction of these penalties to a regulatory context, it would appear that these civil penalties may be described as being civil for the

18 Schedule 6, Part 1, item 31, proposed subsection 269(6).

19 Schedule 6, Part 1, items 9–11, proposed sections 46–47.

20 Schedule 4, Part 1, item 24, proposed section 176 (1000 civil penalty units).

purposes of international human rights law. This would have the effect that the penalties would not engage criminal process rights under human rights law.

Committee view

2.242 The committee thanks the minister for this response. 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.

2.243 The committee notes the minister's detailed advice that the civil penalty provisions in the bill operate in a regulatory context, as part of a graduated set of enforcement tools, and are designed to be commensurate with the potential harm caused in the form of disruption to radiocommunications and risks to health and safety from non-compliant radio emissions. The committee also notes the minister's advice that there are existing legislative provisions which protect persons working with emergency organisations, and a further more general proposed exemption from liability for persons acting in an emergency. The committee considers that these are significant safeguards which assist in the proportionality of the civil penalty provisions, and their constrained application within this regulatory context.

2.244 The committee considers that, based on the information provided by the minister, it would appear that these civil penalties may rightly be regarded as being civil for the purposes of international human rights law, meaning that they do not engage criminal process rights.

2.245 The committee recommends that consideration be given to updating the statement of compatibility to include this additional useful information which has been provided by the minister.

2.246 The committee makes no further comment, and has concluded its consideration of the bill.

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 provide 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	Concluded examination

2.247 The committee requested a response from the minister in relation to the instrument in *Report 11 of 2020*.[3]

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 13 of 2020*; [2020] AUPJCHR 162.

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

3 Parliamentary Joint Committee on Human Rights, *Report 11 of 2020* (24 September 2020), pp. 74-77.

Publication of assertions regarding possible anti-doping violations

2.248 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:

- 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.[4]

2.249 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.[5]

2.250 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.[6]

Summary of initial assessment

Preliminary international human rights legal advice

Right to privacy

2.251 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

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

5 Item 33 of the instrument.

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

the right to respect for private information and private life, particularly in relation to the storing, use, and sharing of personal information.[7] The right may be subject to permissible limitations which are prescribed by law and are not arbitrary. In order for a limitation not to be arbitrary, it must pursue a legitimate objective, be rationally connected to that objective, and be a proportionate means of achieving that objective.[8]

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

Committee's initial view

2.253 The committee noted that this measure engages and may limit the right to privacy. The committee noted that this right may be subject to permissible limitations if they are shown to be reasonable, necessary and proportionate. In order to form a concluded view of the human rights implications of this bill, the committee sought the minister's advice as to the matters set out at paragraph [2.252].

2.254 The full initial analysis is set out in *Report 11 of 2020*.

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

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

Minister's response[9]

2.255 The minister advised:

Objective and rational connection of the measure

The objective of publication is to ensure the integrity of sporting competitions by enabling the global sporting community, and in particular sporting organisations, to accurately ascertain individuals who are ineligible to compete or perform any other official function (such as coach, or work in an administrative capacity) within sport.

The measure ensures Australia meets publication requirements under 14.3.1 of the Code, with the additional publication requirements to accommodate scenarios where athletes or support persons fail to recognise the jurisdiction of the sporting tribunal, or no sporting tribunal has jurisdiction.

Sanctioned athletes who continue to compete in sport despite their ineligibility (generally because organisers may not be aware they are sanctioned) can prevent legitimate competitors from winning awards, accolades or prize money, creates an uneven playing field, and encroaches on the rights of clean athletes to compete in sport free from doping. In most cases, athletes have little recourse to retrieve lost earnings or accolades when such rewards are improperly awarded to sanctioned athletes who should not have competed. In addition, if athlete support persons who have committed an anti-doping rule violation are not publicised, they may continue to improperly influence athletes and others within the sporting community.

Publication of an assertion where the person does not recognise the jurisdiction, or there is no jurisdiction, is primarily a matter of public safety. For example, there may be a situation where a person meets the definition of 'support person' under the SIA Act, but has not signed a membership agreement with a sporting organisation to fall within a sporting tribunal's jurisdiction. If a criminal court were to convict that support person of trafficking an illegal substance, for example steroids, the CEO of Sport Integrity Australia should have the ability to alert sporting organisations that this particular support person has an assertion of an anti-doping rule violation for trafficking.

Likewise it is imperative to publish an assertion of an anti-doping rule violation where a person who has contractually agreed to anti-doping rules, including arbitration through appropriate hearing bodies, tries to

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

avoid sanction or publication by refusing to engage in an arbitration hearing process. In both examples, the ability to publish the assertion is directly linked and proportional to protect the safety of other participants and the integrity of sporting events in Australia and potentially internationally.

The clauses currently included within the Principal Regulations allow the CEO of Sport Integrity Australia to meet the objective to protect sport and its participants through the publication of timely, clear and accurate information which is published and easy for relevant members of the sporting community to access.

How can an athlete or support person challenge an assertion?

In either situation identified by the Committee (non-recognition of the jurisdiction of a sporting tribunal, or no sporting tribunal with jurisdiction), an individual against whom a violation is asserted may challenge the assertion through judicial review under the *Administrative Decisions (Judicial Review) Act 1977* (Cth). In addition to judicial review, a person may make a complaint to the Commonwealth Ombudsman.

In the case where an athlete or support person does not recognise the jurisdiction of a sporting tribunal it is important to understand that international anti-doping arrangements are structured to ensure athletes and support personnel agree to the jurisdiction of the relevant tribunal when they enter into a contractual arrangement with the sport (usually a membership agreement) and agree to abide by the anti-doping rules of the sport. The ability for the CEO of Sport Integrity Australia to publicly disclose details of the assertions if an athlete or athlete support person simply refuses to cooperate with the established process they have contractually agreed to is required to ensure Australia remains compliant with its obligations to the Code.

Whether the measure is a proportionate response

The measure is a proportionate response when seeking to ensure other members of the sporting community are not adversely affected by the actions of a person who is asserted to have committed an anti-doping rule violation, but has avoided the proper hearing process. To ensure the proportionality of the measure, the long-standing practice of Sport Integrity Australia, and the former Australian Sports Anti-Doping Authority, is to remove the publication once the athlete or athlete support person's period of ineligibility has, or would have, expired. This ensures the publication does not last beyond the intended objective.

Concluding comments

International human rights legal advice

2.256 The minister has advised that the objective of publishing information relating to assertions of possible violations of the anti-doping rules is to ensure the integrity

of sporting competitions by enabling sporting organisations to accurately ascertain individuals who are ineligible to compete or perform any other official function within sport. Sanctioned athletes who continue to compete in sport despite their ineligibility, because no one is aware of the sanction, can prevent legitimate competitors from winning, creates an uneven playing field, and encroaches on the rights of clean athletes to compete in sport free from doping. In addition, the minister has advised that athlete support persons who have committed an anti-doping rule violation may continue to improperly influence athletes and others within the sporting community. Protecting the rights of others to be able to fairly compete in their chosen sport appears to be a legitimate objective for the purposes of international human rights law, and publishing relevant information would likely be rationally connected to that objective.

2.257 In terms of proportionality, the minister advised that publication of an assertion where the person does not recognise the jurisdiction, or there is no jurisdiction, of a sporting tribunal is primarily a matter of public safety. The minister has noted that a person may not recognise the jurisdiction of a sporting body because they refuse to engage in an arbitration hearing process in order to avoid sanction, or they may not formally fall within a sporting tribunal's jurisdiction because they have failed to sign a membership agreement. Yet in both instances matters that are relevant to assertions of an anti-doping rule violation need to be made public in order to protect the safety of other participants and the integrity of sporting events. The minister also noted that in entering into a contractual arrangement with a sport, individuals have agreed to abide by the anti-doping rules of the sport.

2.258 The minister has also advised that an individual against whom a violation is asserted may challenge the assertion through judicial review under the *Administrative Decisions (Judicial Review) Act 1977*, and may make a complaint to the Commonwealth Ombudsman. Finally, the minister has advised that the long-standing practice of Sport Integrity Australia, and the former Australian Sports Anti-Doping Authority, is to remove the publication once the athlete or athlete support person's period of ineligibility has, or would have, expired to ensure the publication does not last beyond the intended objective.

2.259 Noting the legitimate objective of protecting the rights of others to be able to fairly compete in their chosen sport; the necessity for publishing assertions of anti-doping violations where the person does not recognise the jurisdiction, or there is no jurisdiction, of a sporting tribunal; the availability of a complaints mechanism; and the time limit on when the information remains publicly available, this measure would appear to constitute a permissible limitation on the right to privacy.

Committee view

2.260 The committee thanks the minister for this response and notes that this instrument provides for the Chief Executive Officer of Sport Integrity Australia to

publish information relating to assertions of anti-doping rule violations 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.

2.261 The committee notes the minister's detailed advice that the objective of publishing such information is to ensure the integrity of sporting competitions, and considers that protecting the rights of others to be able to fairly compete in their chosen sport is a legitimate objective, and publishing relevant information is rationally connected to that objective. The committee also notes the minister's advice as to the need to publish assertions of anti-doping violations where the person does not recognise the jurisdiction, or there is no jurisdiction, of a sporting tribunal. Noting all of these matters, and the availability of a complaints mechanism and the time limit on when the information remains publicly available, the committee considers the measure permissibly limits the right to privacy.

2.262 The committee recommends that consideration be given to updating the statement of compatibility to include this additional useful information which has been provided by the minister.

2.263 The committee makes no further comment, and has concluded its consideration of this legislative instrument.

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 • extend when a person is considered to be an athlete.
Portfolio	Youth and Sport
Introduced	Senate, 26 August 2020
Rights	Privacy
Status	Concluded examination

2.264 The committee requested a response from the minister in relation to the bill in *Report 13 of 2020*.[2]

Public disclosure of personal information by Sport Integrity Australia

2.265 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'.[3] 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.[4] Protected

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 13 of 2020*; [2020] AUPJCHR 163.

2 Parliamentary Joint Committee on Human Rights, *Report 13 of 2020* (24 September 2020), pp. 78-80.

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

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

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.[5]

2.266 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'.[6]

Summary of initial assessment

Preliminary international human rights legal advice

Right to privacy

2.267 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.[7]

2.268 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.

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

(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.

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

6 Schedule 1, items 23–25.

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

Committee's initial view

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

2.271 In order to form a concluded view of the human rights implications of this bill, the committee sought the minister's advice as to the matters set out at paragraph [2.269].

2.272 The full initial analysis is set out in *Report 11 of 2020*.

Minister's response[8]

2.273 The minister advised:

> As noted in the explanatory memorandum, the Code Review Bill implements the approved revisions to the Code set to commence on 1 January 2021. It applies the relevant legislative changes to ensure Australia remains compliant with its international anti-doping obligations under the Convention. The proposed amendments, specifically in Schedule 1, Item 24, directly reflect the wording of the revisions to Article 14.3.6 of the Code, which allow an anti-doping organisation to respond:
>
> *"...to public comments attributed to, or based on information provided by the Athlete, other Person or their entourage or other representatives."*
>
> All provisions of the Code are mandatory in substance and must be followed as applicable. The issue of publication and the ability to respond to public comments (either attributable to a person, or based on information by that person) reflect a mandatory guiding principle of the Code. If the mandatory guiding principle on this issue is not reflected in Australia's anti-doping framework there is a risk that the World Anti-Doping Agency may take compliance action against Sport Integrity Australia, where possible consequences include Australia's exclusion from hosting or bidding for major sporting events, and exclusion of Australian athletes from international sporting competitions.
>
> *Objective of the measure*
>
> A key objective of the Code is to ensure the anti-doping system (designed to protect athletes' right to fair competition) is respected and protected. This is reflected in the proposed measure relating to public comment in the Code Review Bill. Where information, and particularly misinformation, is released by the athlete or their representative, or in the case of the amendment, based on information *provided* by that person, the CEO of

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

Sport Integrity Australia must have the ability to respond to ensure that accurate and truthful information is available to the public. This is crucial to preserve the integrity of the anti-doping system. While there is no obligation to comment, the opportunity to provides the CEO of Sport Integrity Australia with an avenue to provide factual corrections where incorrect information, particularly in the media, threatens to undermine the process, the perception of fairness, or the rights of athletes.

Proportionality of the measure

Section 68E, as amended by the measure, remains proportionate and safeguards the privacy of the participant or non-participant as any public response by the CEO of Sport Integrity Australia is restricted to the subject matter of the information released by the athlete, their representative or someone associated with them. Importantly, it does not give the CEO of Sport Integrity Australia scope to comment on any or all aspects of the case, and the CEO of Sport Integrity Australia may not initiate the comment - only respond. Other than not responding at all, which could result in public circulation of information which is misleading and potentially harmful, there is no less restrictive way to achieve the objective and comply with the mandatory guiding principle of the Code.

What type of information is likely to be disclosed?

At paragraph 1.194 the Committee raises concern at several hypothetical examples or types of information which the CEO of Sport Integrity Australia may disclose, including the use of medication or intersex status of the athlete to a sports doping allegation. In direct response to the example provided, it is important to note that the intersex status of an athlete has no part to play in the anti-doping process. Whilst it is a topic currently challenging sport and sporting organisations, the issue of intersex and transgender athletes is not within scope of anti-doping organisations and therefore is not a matter the CEO of Sport Integrity Australia is permitted to disclose (if it was even known at all) under this measure. Rather, concerns around intersex athletes relate to participation issues that are for sporting organisations to determine.

Noting the measure only extends the situations in which the CEO of Sport Integrity Australia can comment, and does not expand the parameters of the public comment as it presently stands, the most likely information disclosed would include the name of the athlete or athlete support person, and the factual status of the process to determine an alleged anti-doping rule violation. For example, this may include claims regarding the sample collection process, or status of the B sample testing and the disciplinary process. Where a matter involves an adverse analytical finding, it is possible the type of information confirmed by the CEO of Sport Integrity Australia (in response to public comment) will include the prohibited substance the athlete is alleged to have used (as opposed to details relating to personal medications or medical treatment).

Thank you for the opportunity to provide clarification on the matters the Committee has raised and to highlight that both are legitimate objectives representing proportionate limitations on the right to privacy.

Concluding comments

International human rights legal advice

Right to privacy

2.274 The minister provided further advice as to the types of protected information about an athlete, support person or relevant non-participant which the CEO of Sport Integrity Australia could publicly disclose in order to respond to public comments based on information provided by, or attributed to, that person. The minister stated that section 68E, as amended, would likely permit the disclosure of the name of an athlete (or athlete support person), and the factual status of the process to determine an alleged anti-doping rule violation (including, for example, claims regarding the sample collection process, or the disciplinary process). The minister further stated that where a matter involved an adverse analytical finding, the CEO could, in response to public comment, confirm the prohibited substance an athlete was alleged to have used.

2.275 The minister advised that the objective of this measure is to ensure that the anti-doping system is respected, protect fair competition, enable the CEO of Sport Integrity Australia to provide factual corrections where incorrect information, particularly in the media, threatens to undermine the process of the anti-doping system, the perception of fairness, or the rights of athletes. Preserving the integrity of athletic competition and the rights of other athletes is likely to constitute a legitimate objective for the purposes of international human rights law. Providing the CEO of Sport Integrity Australia with a right of reply to correct misinformation or maintain confidence in the integrity of the anti-doping system would appear to be capable of helping to achieve this objective.

2.276 With respect to proportionality, the minister advised that any public response by the CEO would be restricted to the subject matter of the information released by the athlete, their representative or someone associated with them. That is, the CEO could only respond to a public statement, and not initiate the comment themselves. This would appear to limit the circumstances in which the CEO may publicly disclose information related to an athlete. However, the CEO would also be empowered to publicly respond to comments which have been based on information provided by the athlete or their support person to any person (including in confidence), and about which the athlete themselves (or their support person) may have made no public statement. This would appear to empower the CEO to respond publicly to a comment made by *any* other person, where such comments have been based on information provided by the athlete, their support person or representative. Consequently, this may limit the proportionality of this power, depending on the manner in which it is exercised in practice.

2.277 With respect to the kinds of public comments in relation to which the CEO could respond, the minister advised that the intersex status of an athlete would not, for example, fall within the scope of anti-doping organisations. However, it is noted that the World Anti-Doping Agency (WADA), which recently undertook the World Anti-Doping Code Review, does provide medical information to define the criteria for granting a Therapeutic Use Exemption relating to a prohibited substance, which may be permissibly administered to an athlete who is transgender.[9] Consequently, it would appear that there may be circumstances in which an athlete's transgender or potentially intersex status may be relevant to the administration of an anti-doping scheme.[10] However, in this respect it is significant that section 68E merely provides the CEO with an opportunity to make a public response, and does not compel them to do so. This could serve as a significant safeguard in practice. Further, if, as the minister has advised, an athlete's intersex status is not regarded by Sport Integrity Australia to be relevant to Australia's anti-doping rules, such a scenario may not eventuate in practice. However, it is noted that as this legislative provision would override any prohibition on the use or disclosure of information in the *Privacy Act 1988*,[11] there is nothing requiring the CEO to consider the athlete or support person's right to privacy in exercising this discretion. As such, there is some risk that this power may be exercised in a way that may arbitrarily limit the right to privacy.

Committee view

2.278 The committee thanks the minister for this response. The committee notes that the bill seeks to amend the *Sport Integrity Australia Act 2020 to* allow the Chief Executive Officer of Sport Integrity Australia to disclose protected information publicly, in response to public comments that are based on information provided by the athlete, support person or their representative, or a relevant non-participant.

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9 See, World Anti-Doping Agency, 'Medical Information to Support the Decisions of (Therapeutic Use Exemptions) Committees, Transgender Athletes', https://www.wada-ama.org/en/resources/therapeutic-use-exemption-tue/medical-information-to-support-the-decisions-of-tuecs-7 [Accessed 12 October 2020].

10 For example, the amendments made by the bill would appear to enable the CEO of Sport Integrity Australia to confirm an athlete is taking a prohibited hormone, but doing so pursuant to a therapeutic use exemption, where the athlete had privately advised a friend of this and these comments were repeated publicly. In some cases, if this information was disclosed against the wishes of the athlete, this could, for example, have the effect of disclosing an athlete's status as a transgender or intersex person. Where such a matter had not already been publicly disclosed, this could have significant implications with respect to the athlete's right to privacy.

11 Noting that the Australian Privacy Principles provide that the prohibition on use or disclosure of personal information does note apply where its use or disclosure is authorised under an Australian Law, see Australian Privacy Principle 6.2(b).

2.279 The committee notes the minister's advice that these amendments would ensure that Australia meets its obligations under the World Anti-Doping Code and relevant International Standards. The committee also notes the minister's advice that ensuring that the CEO of Sport Integrity Australian can respond to a public statement which is based on information provided by an athlete or related person, seeks to ensure the integrity of the anti-doping system, and protect the right of athletes to fair competition.

2.280 The committee considers that preserving the integrity of athletic competition by addressing cases of suspected doping constitutes a legitimate objective for the purposes of international human rights law, and providing the CEO of Sport Integrity Australia with a right of reply, including where misinformation about anti-doping measures has been publicised, would be capable of helping to achieve this objective.

2.281 With respect to proportionality, the committee notes that this amendment would provide the CEO with only a right of reply, and not the discretion to make public statements of their own initiative. The committee considers that this may serve as an important safeguard in practice. However, the committee notes that there is no legislative requirement that the CEO consider the athlete or support person's right to privacy in exercising this discretion. As such, there is some risk that this power may be exercised in a way that may arbitrarily limit the right to privacy. The committee considers that the proportionality of this measure would be assisted were the *Sport Integrity Australia Act 2020* also amended to provide that the CEO of Sport Integrity Australia must, when considering whether to disclose protected information under section 68E, consider how much the privacy of any person or persons would be likely to be interfered with by the disclosure of this information.

2.282 The committee recommends that consideration be given to updating the statement of compatibility with human rights to reflect the information which has been provided by the minister with respect to the right to privacy.

2.283 The committee draws these human rights concerns to the attention of the minister and the Parliament.

Senator the Hon Sarah Henderson

Chair