Parliamentary Joint Committee on Human Rights

Human rights scrutiny report

Report 15 of 2020

9 December 2020

ISSN 2204-6356 (Print)
ISSN 2204-6364 (Online)

PO Box 6100
Parliament House
Canberra ACT 2600

Phone: 02 6277 3823
Fax: 02 6277 5767

Email: human.rights@aph.gov.au
Website: http://www.aph.gov.au/joint_humanrights/

This report can be cited as: Parliamentary Joint Committee on Human Rights, *Report 15 of 2020*; [2020] AUPJCHR 180.

This document was prepared by the Parliamentary Joint Committee on Human Rights and printed by the Senate Printing Unit, Department of the Senate, Parliament House, Canberra.

Membership of the committee

Members

Senator the Hon Sarah Henderson, Chair	Victoria, LP
Mr Graham Perrett MP, Deputy Chair	Moreton, Queensland, ALP
Senator Patrick Dodson	Western Australia, ALP
Mr Steve Georganas MP	Adelaide, South Australia, ALP
Mr Ian Goodenough MP	Moore, Western Australia, LP
Senator Nita Green	Queensland, ALP
Ms Celia Hammond MP	Curtin, Western Australia, LP
Senator Andrew McLachlan CSC	South Australia, LP
Senator Lidia Thorpe	Victoria, AG
Dr Anne Webster MP	Mallee, Victoria, Nats

Secretariat

Anita Coles, Committee Secretary
Charlotte Fletcher, Principal Research Officer
Rebecca Preston, Principal Research Officer
Ingrid Zappe, Legislative Research Officer

External legal adviser

Associate Professor Jacqueline Mowbray

Table of contents

Committee information

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

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

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

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

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

---

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

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

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

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

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

Chapter 1[1]

New and continuing matters

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

- bills introduced into the Parliament between 30 November and 3 December 2020; and
- legislative instruments registered on the Federal Register of Legislation between 11 November and 1 December 2020.[2]

1 This section can be cited as Parliamentary Joint Committee on Human Rights, New and continuing matters, *Report 15 of 2020*; [2020] AUPJCHR 181.

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

Response required

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

Federal Court and Federal Circuit Court Amendment (Fees) Regulations 2020 [F2020L01416][3]

Purpose	This instrument increases the application fees charged by the Federal Circuit Court for migration litigants, and introduces a partial fee exemption enabling individuals to pay a reduced application fee where paying the full fee would cause financial hardship
Portfolio	Attorney-General
Authorising legislation	*Federal Circuit Court of Australia Act 1999* and *Federal Court of Australia Act 1976*
Last day to disallow	15 sitting days after tabling (tabled in the House of Representatives on 12 November 2020 and the Senate on 30 November 2020). Notice of motion to disallow must be given by 18 February 2021 in the House of Representatives and 22 February 2021 in the Senate[4]
Right	Fair hearing (access to justice)
Status	Seeking additional information

Increased application fees in the Federal Circuit Court

1.3 The instrument amends the Federal Court and Federal Circuit Court Regulation 2012 to increase the application fee for a migration matter in the Federal Circuit Court from $690 to $3,330.[5] The instrument further provides that where the Registrar or authorised court officer determines that payment of the full fee would cause financial hardship to a person, the person may instead pay a reduced fee of

3 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Federal Court and Federal Circuit Court Amendment (Fees) Regulations 2020 [F2020L01416], Report 182 of 2020; [2020] AUPJCHR 182.

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

5 Schedule 1, item 11, section 201A. The current application fee for filing in the Federal Circuit Court ($690) is set out in Federal Court and Federal Circuit Court Regulation 2012, Schedule 1, Part 2.

$1,665,[6] or if the reduced fee would also cause financial hardship, the person may be exempt from paying any fee.[7] In considering whether payment of a fee would cause financial hardship, the person's income, day-to-day living expenses, liabilities and assets must be considered.[8]

Preliminary international human rights legal advice

Right to a fair hearing

1.4 Increasing the application fee for migration matters filed in the Federal Circuit Court by $2,640 (or, by 483 per cent) may, in some cases, engage and limit the right to a fair hearing. The right to a fair hearing provides that in the determination of a person's rights and obligations in a 'suit at law', everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.[9] In migration matters relating to the determination of a person's existing rights under law (for example, an appeal of a decision to cancel a person's visa), the right to a fair hearing is engaged.[10]

1.5 One dimension of the right to a fair hearing is the right to access to justice.[11] The cost of engaging in legal processes in the determination of one's rights and obligations under law is, in turn, a component of the right to access to justice. The United Nations Human Rights Committee has stated that the imposition of fees on parties to legal proceedings which would de facto prevent their access to justice might give rise to issues under the right to a fair hearing.[12] The findings of

6 Schedule 1, item 11, section 201A.

7 Schedule 1, item 3, subsection 2.06A(2).

8 Schedule 1, item 3, subsection 2.06A(3).

9 International Covenant on Civil and Political Rights, article 14. The right to a fair hearing applies where domestic law grants an entitlement to the persons concerned (see, *Kibale v Canada* (1562/07) [6.5]). The term 'suit at law' relates to the determination of a right or obligation, and not to proceedings where a person is not contesting a negative decision (for example, a decision to refuse to give a worker a promotion would not necessitate a determination of a matter in which the person had an existing entitlement). See, *Kolanowski v Poland* (837/98) [6.4].

10 Schedule 1, item 11, new item 201A of Schedule 1 of the Federal Court and Federal Circuit Court Regulation 2012 provides that the Federal Circuit Court of Australia has jurisdiction pursuant to section 476 of the *Migration Act 1958*, and jurisdiction in relation to non-privative clause decisions under section 44AA of the *Administrative Appeals Tribunal Act 1975* and section 8 of the *Administrative Decisions (Judicial Review) Act 1977*.

11 See, United Nations Development Programme, *Programming for Justice: Access for All (a practitioner's guide to a human rights-based approach to access to justice)* (2005).

12 See, UN Human Rights Committee, *General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial*, U.N. Doc. CCPR/C/GC/32 (2007) [11]; and *Lindon v Australia*, Communication No. 646/1995 (25 November 1998) [6.4].

comparable jurisdictions are also relevant in this context. In this regard, the European Court of Human Rights has found that the amount of the fees assessed in light of the particular circumstances of a case (including the applicant's ability to pay them) and the phase of the proceedings at which that restriction has been imposed, are material in determining whether a person has enjoyed the right of access to justice and had a fair hearing.[13] As this instrument significantly increases the application fees for migration matters in the Federal Circuit Court, this may have the effect that, in cases where an individual is unable to file an application for their migration matter in the Federal Circuit Court because they cannot afford to pay the application fee, their right to a fair hearing may be limited.

1.6 The right of access to justice may be permissibly limited where such a limitation seeks to achieve a legitimate objective, is rationally connected to (that is, effective to achieve) that objective, and proportionate. The statement of compatibility does not recognise that this measure may engage the right to a fair hearing, and so no assessment of its engagement is provided.

1.7 With respect to the objective of the measure, the explanatory statement only states that this amendment will bring the Federal Circuit Court's application fees 'in line with the Federal Circuit Court's placement in Australia's court hierarchy'.[14] However, it is not clear that this would constitute a legitimate objective for the purposes of international human rights law. With respect to the proportionality of the measure, it is important to note that the instrument provides that the Registrar or court officer may reduce the fees by half, or to nil, if they consider that payment of the full or reduced fee would, at the time the fee is payable, cause 'financial hardship' to the person. As such, it would appear that there is capacity for the application fee to be reduced or waived in full in some cases. The instrument states that in considering whether payment of a fee would cause financial hardship to an individual, the Registrar or authorised officer must consider the individual's income,

13 European Court of Human Rights, *Kreuz v Poland* (Application No. 28249/95) (2001) [60]. In *Kijewska v Poland* (Application No. 73002/01) (2007) at [46], the court considered that the refusal by a court to reduce a fee for lodging a civil claim may constitute a disproportionate restriction on an applicant's right of access to a court, and be in breach of article 6 of the European Convention on Human Rights. Further, in *Ciorap v Moldova* (Application No. 12066/02) (2007) at [95], the court considered that the nature of the complaint or application in question was a significant consideration in determining whether refusing an application for waiver of court fees was a breach of article 6 (in this case, the applicant had sought to lodge a complaint about being force-fed by authorities while detained in prison).

14 Explanatory statement, p. 1. The application fee for filing a migration matter in the Administrative Appeals Tribunal is currently $1,826. Administrative Appeals Tribunal, 'Fees', https://www.aat.gov.au/apply-for-a-review/migration-and-refugee/migration/fees (accessed 25 November 2020). The cost for filing an appeal in the Federal Court of Australia from a decision of the Administrative Appeals Tribunal is $4,840. Federal Court of Australia, 'Fees Payable from 1 July 2020', https://www.fedcourt.gov.au/forms-and-fees/court-fees/fees (accessed 25 November 2020).

day-to-day living expenses, liabilities and assets.[15] However, no information is provided as to how assessments of a person's financial hardship would be conducted and what guidance is or would be provided to court officers in making such assessments of financial hardship. It is also not clear whether owning non-liquid assets such as a car, laptop, or a home would mean a person might not be eligible for a fee waiver, and what level of liquid assets would make a person eligible.

1.8 In order to assess the compatibility of this measure with the right to access to justice further information is required, in particular:

(a) the objective sought to be achieved by increasing the application fee for migration matters in the Federal Circuit Court, and how this seeks to address a pressing or substantial need;

(b) what would be regarded as 'financial hardship' in the context of an application for (i) a 50 per cent reduction in the application fee, and (ii) waiver of the full application fee;

(c) what guidance, if any, is or would the Registrar or authorised court officer be provided with in determining whether payment of a full (or partial) migration matter application fee would cause an applicant financial hardship;

(d) what other safeguards, if any, would operate to assist in the proportionality of this measure.

Committee comment

1.9 The committee notes that the instrument increases the application fees charged by the Federal Circuit Court for migration litigants and, significantly, introduces partial or full fee exemptions where paying the full fee would cause financial hardship. The committee notes that, in some cases, an increase in court application fees may engage and potentially limit the right to a fair hearing, which includes the right to access to justice. The committee notes that this aspect of the right may be subject to permissible limitations if they are shown to be reasonable, necessary and proportionate.

1.10 As the statement of compatibility does not recognise that this measure may engage and limit the right to a fair hearing, no information has been provided as to whether the fee increase would adversely impact on the right of some applicants to access proceedings in the Federal Circuit Court.

1.11 In order to form a concluded view on the human rights implications of this measure, the committee seeks the Attorney-General's advice as to the matters set out in paragraph [1.8].

15 Schedule 1, item 3, subsection 2.06A(3).

Bills and instruments with no committee comment[1]

1.12 The committee has no comment in relation to the following bills which were introduced into the Parliament between 30 November and 3 December 2020. This is on the basis that the bills do not engage, or only marginally engage, human rights; promote human rights; and/or permissibly limit human rights:[2]

- Aged Care Legislation Amendment (Serious Incident Response Scheme and Other Measures) Bill 2020;
- Customs Tariff Amendment (Incorporation of Proposals and Other Measures) Bill 2020;
- Designs Amendment (Advisory Council on Intellectual Property Response) Bill 2020
- Electoral Amendment (Territory Representation) Bill 2020;
- Industrial Chemicals Environmental Management (Register) Bill 2020
- Industrial Chemcials Environmental Management (Register) Charge (Customs) Bill 2020;
- Industrial Chemicals Environmental Management (Register) Charge (Excise) Bill 2020;
- Industrial Chemicals Environmental Management (Register) Charge (General) Bill 2020;
- Industrial Chemcial Legislation Amendment Bill 2020;
- Migration Amendment (Common Sense Partner Visa) Bill 2020;
- National Collecting Institutions Legislation Amendment Bill 2020;
- National Consumer Credit Protection Amendment (Small Amount Credit Contract and Consumer Lease Reforms) Bill 2020;
- National Emergency Declaration Bill 2020;
- National Emergency Declaration (Consequential Amendments) Bill 2020;
- Regulatory Powers (Standardisation Reform) Bill 2020;

1 This section can be cited as Parliamentary Joint Committee on Human Rights, Bills and instruments with no committee comment, *Report 15 of 2020*; [2020] AUPJCHR 183.

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

- Telecommunications Amendment IInfrastructure in New Developments) Bill 2020
- Treasury Laws Amendment (2020 Measures No. 6) Bill 2020.

1.13 The committee has examined the legislative instruments registered on the Federal Register of Legislation between 11 November and 1 December 2020.[3] The committee has reported on one legislative instrument from this period earlier in this chapter. The committee has determined not to comment on the remaining instruments from this period on the basis that the instruments do not engage, or only marginally engage, human rights; promote human rights; and/or permissibly limit human rights.

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

Chapter 2

Concluded matters

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

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

Native Title Amendment (Infrastructure and Public Facilities) Bill 2020[2]

Purpose	This bill seeks to amend the *Native Title Act 1993* to extend the operation of Subdivision JA, which permits the construction of public housing and other structures on Indigenous held land, for another 10 years
Portfolio	Attorney-General
Introduced	House of Representatives, 8 October 2020 *Received Royal Assent on 8 December 2020*
Rights	Equality and non-discrimination; self-determination; culture; effective remedy; adequate standard of living; education; health
Status	Concluded examination

2.3 The committee requested a response from the minister in relation to the bill in *Report 13 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, Native Title Amendment (Infrastructure and Public Facilities) Bill 2020, *Report 15 of 2020*; [2020] AUPJCHR 184.

3 Parliamentary Joint Committee on Human Rights, *Report 13 of 2020* (13 November 2020), pp. 2-11.

Extension of the future acts regime

2.4 This bill proposes to extend the operation of the future acts regime in the *Native Title Act 1993* for a further 10 years.[4] The future acts regime sets out how future acts that will affect native title rights and interests can be validly undertaken. Native title is not extinguished by the future acts regime, but if a future act is inconsistent with native title, the native title rights and interests have no effect in relation to the act (or to the extent of the inconsistency).[5]

2.5 A future act must facilitate or consist of the construction, operation, use, maintenance or repair of specific facilities, including public housing, staff housing and other public infrastructure, such as education, health, police and emergency facilities. These facilities must be established by or on behalf of the Crown or a local government body, or other statutory authority of the Crown (the action body), on land held by or for the benefit of Aboriginal or Torres Strait Islander people.[6]

2.6 The action body must give registered native title claimants, registered native title body corporates, or representatives of Aboriginal and Torres Strait Islander bodies notice of, and an opportunity to comment on, the act, and provide a report to the Commonwealth Minister.[7] If the action body does not do so, the future act will not be valid. The future act cannot be done before the consultation period ends.[8] Additionally, the future acts regime allows any registered native title claimant or body corporate to request consultation with the action body about the future act so far as it affects their registered native title rights and interests.[9] If such a request is made, the action body must consult with the claimant or body corporate about ways of minimising the impact of the future act on the native title rights and interests in relation to land or waters in the area.[10]

---

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

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

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

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

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

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

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

Summary of initial assessment

Preliminary international human rights legal advice

Rights to adequate standard of living, education and health

2.7 In extending the operation of the future acts regime by a further 10 years, to the extent that this facilitates the timely provision of adequate and safe public housing and other public infrastructure, such as education and health facilities, for Aboriginal and Torres Strait Islander people, the bill would promote the rights to an adequate standard of living, education and health. The right to an adequate standard of living requires States parties to take steps to ensure the availability, adequacy (including cultural adequacy) and accessibility of food, clothing, water and housing for all people in its jurisdiction.[11] The right to education includes the provision of functioning educational institutions and related facilities.[12] The right to health requires available, accessible, acceptable (including culturally appropriate) and quality health care. It includes the right to enjoy functioning public health facilities as well as those facilities, services and conditions necessary for the realisation of the highest attainable standard of health, such as adequate sanitation facilities, hospitals and health-related buildings.[13]

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

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

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

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

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

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

(who are exclusively Aboriginal and Torres Strait Islander people) differently from other land holders. The effect of the bill would be the continued limitation of the rights and interests of native title holders in exchange for the provision of public housing and public infrastructure on Indigenous held land—an exchange not imposed on other land owners.

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

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

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

---

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

16 Statement of compatibility, p. 9.

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

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

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

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

20 Statement of compatibility, p. 8.

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

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

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

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

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

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

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

2.13 It is possible that the bill may engage and limit the right to an effective remedy. The right to an effective remedy requires the availability of a remedy which is effective with respect to any violation of rights and freedoms recognised by the International Covenant on Civil and Political Rights.[29] While limitations may be placed in particular circumstances on the nature of the remedy provided (judicial or otherwise), state parties must comply with the fundamental obligation to provide a remedy that is effective.[30]

2.14 The rights to equality and non-discrimination, self-determination and culture may be subject to permissible limitations where the limitation pursues a legitimate

---

26 Committee on the Elimination of Racial Discrimination, *Concluding Observations on the eighteenth to twentieth periodic reports of Australia,* CERD/C/AUS/CO/18-20 (2017) [21]-[22]; Committee on Economic, Social and Cultural Rights, *Concluding observations on the fifth periodic report of Australia*, E/C.12/AUS/CO/5 (2017) [16(e)]. The committee has previously stated that principle of 'free, prior and informed consent' should therefore be considered in the context of developing and amending native title legislation. See Parliamentary Joint Committee on Human Rights, *Report 2 of 2019* (2 April 2019) pp.76–77.

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

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

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

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

objective, is rationally connected to that objective and is a proportionate means of achieving that objective.

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

(a) why is it necessary to limit native title without the consent of native title holders in order to achieve the objective of constructing necessary public infrastructure, and are there any other less rights-restrictive ways of achieving the same aim;

(b) why is there no legislative requirement that the future acts regime only be used as a measure of last resort, in particular once all avenues for agreeing to an Indigenous Land Use Agreement have been exhausted;

(c) if it is determined that an Indigenous Land Use Agreement is impracticable or unable to be agreed on, on what basis is the decision currently made to use the future acts regime rather an Indigenous Land Use Agreement;

(d) whether the use of the future acts regime will always give rise to an entitlement to compensation under the statutory scheme for compensation for the impairment of native title, and what type of compensation has been granted where the future acts regime has been relied on previously;

(e) what, if any, review mechanisms exist to challenge a decision to use the future acts regime; and

(f) why it is necessary to place the onus on native title holders and registered claimants to request consultation about minimising the impacts of the proposed future act on native title, rather than requiring consultation to be undertaken in all instances.

Committee's initial view

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

2.17 The committee considered that the bill seeks to address overcrowding, poor housing conditions and other infrastructure needs of Aboriginal and Torres Strait Islander people on Indigenous held land through the timely provision of public

infrastructure. This is a legitimate objective for the purpose of international human rights law, and the measure would appear to be rationally connected to that objective. The committee noted that some questions remain as to the proportionality of the measure.

2.18 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 [2.15].

2.19 The full initial analysis is set out in *Report 13 of 2020*.

Minister's response[31]

2.20 The minister advised:

> Subdivision JA is part of the 'future acts regime' of the *Native Title Act*, which specifies how acts that affect native title can be validly done. Subdivision JA identifies certain types of infrastructure to be provided either directly for the benefit of Indigenous Australians on Indigenous land or with a sufficient nexus to that purpose.
>
> The provision's intent is to strike an appropriate balance between the timely construction of critical public infrastructure and the rights and interests of native title holders. Subdivision JA has been used mainly for the provision of public housing, as well as emergency facilities such as women's shelters, fire brigades, police stations and child safety housing; public education and health facilities and staff housing for public school teachers and public health employees.
>
> Subdivision JA requires government bodies to notify native title holders and registered claimants about the proposed act and provides them with the opportunity to be consulted about the impact of the proposed act on their native title rights and interests. The notification and consultation process is an essential component of the provision, with the specific requirement under subsection 24JAA(14) for the government body to consult about ways to minimise the future act's impact on native title holders' rights and interests:
>
> > *(14) If a request to be consulted is made within the time specified in paragraph (11)(b), the action body must consult with the claimant or body corporate about ways of minimising the act's impact on registered native title rights and interests in relation to land or waters in the area, and, if relevant, any access to the land or waters or the way in which anything authorised by the act might be done.*

31 The minister's response to the committee's inquiries was received on 27 November 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.

Section 24JAA(16) also requires the Commonwealth Minister to be provided with a report on the things done in relation to the notification and consultation provisions regarding the future act. This oversight provides an additional layer of transparency with respect to the appropriate use of the provision.

Indigenous Land Use Agreements (ILUAs) are required to do acts of the kind to which subdivision JA applies. ILUAs are voluntary agreements made between native title groups and other parties (including governments) about the use of land and waters.

The Queensland and Western Australian governments, who have been the primary users of the provision, have advised that negotiating an ILUA for the kinds of infrastructure covered by subdivision JA can take between 18 months and three years to complete. For this reason, subdivision JA operates as an important mechanism between an ILUA and compulsory acquisition to enable a future act to be validly done when expediency is needed and alternative approval processes have stalled.

From consultations, I understand governments who have used subdivision JA, consider doing so on a case-by-case basis and have usually looked to negotiate an ILUA in the first instance. In some cases, once native title holders and claimants have been notified about the proposed use of subdivision JA, they have chosen not to opt-in to be consulted, given the intended use of the provision for public infrastructure, such as housing. I note the provision has only been used 127 times over the last 10 years.

In relation to compensation matters, section 24JAA(8) of the *Native Title Act* provides native title holders with an entitlement to compensation for an act to which subdivision JA applies in the following circumstances:

1. if the act could not have been validly done if the native title holders instead held ordinary title (generally meaning a freehold estate);
2. if the act is to some extent in relation to an offshore place; and
3. if the act is one for which compensation would be payable if the native title holders instead held ordinary title.

Under the *Native Title Act*, this entitlement to compensation is on just terms to compensate the native title holders for any loss, diminution, impairment or other effect of the act on their native title rights and interests.

To date, the only judicial determination of the principles governing this entitlement has been the Timber Creek compensation claim (*Northern Territory v Mr A. Griffiths (deceased) and Lorraine Jones on behalf of the Ngaliwurru and Nungali Peoples* [2019] HCA 7).

The High Court awarded the Ngaliwurru and Nungali native title holders compensation totalling $2.53 million, made up of:

- $320,250 for economic loss, based on the freehold value of the relevant land, with the non-exclusive native title rights and interests in question valued at fifty percent of the freehold value;
- $910,100 for interest on the economic loss, based on simple interest accruing from the date of the compensable act, although the Court did appear to leave open the possibility of compound interest being awarded in different factual circumstances; and
- $1.3 million for what the Court termed 'cultural loss', based on what the Court held was an intuitive process to determine what 'in the Australian community, at this time, is an appropriate award for what has been done; what is appropriate, fair or just'.

In relation to review mechanisms, none exist to challenge a decision to use Subdivision JA rather than negotiating an ILUA. However, Subdivision JA applies to limited categories of acts and in relation to limited areas. For an act to be valid under Subdivision JA procedural requirements relating to the provision of notice, an opportunity to comment and a report to the Commonwealth Minister must be met. An act is invalid if it is done or commenced before the end of the consultation period.

Concluding comments

International human rights legal advice

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

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

2.22 In assessing the proportionality of the measure, it is necessary to consider whether any less rights restrictive alternatives, such as consent via an Indigenous Land Use Agreement (ILUA) or other process, could achieve the stated objective. The minister has advised that ILUAs are voluntary agreements between native title groups and other parties (including governments) about the use of land and waters. The Queensland and Western Australian governments—the primary users of the future acts regime—have advised the minister that negotiating an ILUA to construct infrastructure to which the future acts regime applies can take between 18 months and three years to complete. The minister has stated that for this reason, the future acts regime operates as an important mechanism between an ILUA and compulsory acquisition to enable a future act to be validly done when expediency is necessary and alternative approval processes have stalled. The minister has advised that governments 'usually' seek to negotiate an ILUA before seeking to use the future acts regime.

2.23 ILUAs are informed by the principle of free, prior and informed consent—a fundamental human rights norm grounded in the rights to self-determination and freedom from racial discrimination.[32] As such, they are a less rights restrictive mechanism for pursuing development on Indigenous held land compared to the future acts regime, which permits construction on Indigenous held land without requiring the consent of the relevant native title holders and registered claimants. The minister's response suggests that a mechanism to enable the construction of infrastructure without the consent of native title holders and claimants is necessary in circumstances where negotiation of an ILUA is protracted and alternative approval processes have stalled. However, the minister's response does not provide any information regarding the reasons for these delays and whether consideration has been given to measures to alleviate such delays. While the minister noted that governments 'usually looked to negotiate an ILUA in the first instance', as currently drafted, Subdivision JA contains no legal requirement that agreement via an ILUA first be sought. Indeed, the minister has advised that the future acts regime has been used 127 times over the last 10 years, amounting to the use of this process more than once per month in the last decade.

2.24 It would appear that a less rights restrictive way of achieving the objective of expediting the construction of necessary public infrastructure on Indigenous held land would be to require that before consideration is given to using the future acts regime, there is a legislative requirement to seek consent from native title holders. This will not mean that public infrastructure can never be built without consent, rather, it would better ensure that there has first been an attempt at consensual decision-making.[33] Such an approach would ensure that the principle of free, prior and informed consent was fully implemented to the greatest extent possible, thereby facilitating the realisation of the rights to self-determination, culture and

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

33 See UN Human Rights Council, Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, A/HRC/12/34 (2009) [49] which noted 'In all cases in which indigenous peoples' particular interests are affected by a proposed measure, obtaining their consent should, in some degree, be an objective of the consultations…principles of consultation and consent do not bestow on indigenous peoples a right to unilaterally impose their will on States when the latter act legitimately and faithfully in the public interest. Rather, the principles of consultation and consent are aimed at avoiding the imposition of the will of one party over the other, and at instead striving for mutual understanding and consensual decision-making'.

equality and non-discrimination.[34] Indeed, the United Nations (UN) Human Rights Council, has stated that 'the role of free, prior and informed consent is to safeguard indigenous peoples' cultural identity, which is inextricably linked to their lands, resources and territories'.[35]

2.25 Another relevant consideration in assessing proportionality is whether the measure is accompanied by sufficient safeguards, including the possibility of oversight and the availability of review. The minister has advised that no review mechanisms exist to challenge a decision to use the future acts regime rather than negotiating an ILUA. The lack of any process by which the decision to use the future acts regime, which affects the rights of native title holders and claimants, may be reviewed raises concerns regarding the proportionality of the measure.[36]

2.26 The minister has noted that Subdivision JA does, however, provide procedural requirements that must be met for an act to be valid, including the provision of notice, an opportunity to comment and a report to be provided to the Commonwealth minister. A future act is invalid if it is commenced before the consultation period ends.[37] The strength of these procedural safeguards will be assessed in turn.

2.27 Regarding the provision of notice and the opportunity to comment, the minister has stated that the future acts regime requires government bodies to notify native title holders and registered claimants about the proposed act and provides

34 Noting the concerns and recommendations of the UN Committee on the Elimination of Racial Discrimination: 'The Committee is also concerned about information that extractive and development projects are carried out on lands owned or traditionally used by Indigenous Peoples without seeking their prior, free and informed consent…[The Committee] urges the States party to ensure that the principle of free, prior and informed consent is incorporated in the *Native Title Act 1993* and in other legislation as appropriate, and fully implemented in practice': Committee on the Elimination of Racial Discrimination, *Concluding Observations on the eighteenth to twentieth periodic reports of Australia,* CERD/C/AUS/CO/18-20 (2017) [21]-[22]. See also Committee on Economic, Social and Cultural Rights, *Concluding observations on the fifth periodic report of Australia*, E/C.12/AUS/CO/5 (2017) [16(e)].

35 United Nations Human Rights Council, *Free, prior and informed consent: a human rights-based approach - Study of the Expert Mechanism on the Rights of Indigenous Peoples,* A/HRC/39/62 (2018) [19].

36 The United Nations Human Rights Council has emphasised that the 'implementation of free, prior and informed consent should also include accessible recourse mechanisms for disputes and grievances, devised with effective participation of indigenous peoples, including judicial review': *Free, prior and informed consent: a human rights-based approach - Study of the Expert Mechanism on the Rights of Indigenous Peoples,* A/HRC/39/62 (2018) [45].

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

them with an opportunity to request to be consulted about the impact of the proposed act on their native title rights and interests.[38] To the extent that these provisions facilitate effective and meaningful consultation with Aboriginal and Torres Strait Islander peoples with respect to acts which affect Indigenous held land or territories, this notification and consultation process may operate as a safeguard to protect certain human rights, including the rights to self-determination and culture. However, questions remain as to whether the consultation process contained in the future acts regime is effective and meaningful in practice.

2.28 The right of indigenous peoples to be consulted is a critical component of free, prior and informed consent.[39] Genuine consultation in this context should be 'in the form of a dialogue and negotiation towards consent'.[40] Commenting on the scope of free, prior and informed consent, the UN Human Rights Council has stated:

> States' obligations to consult with indigenous peoples should consist of a qualitative process of dialogue and negotiation, with consent as the objective …Use in the Declaration [on the Rights of Indigenous Peoples] of the combined terms "consult and cooperate" denotes a right of indigenous peoples to influence the outcome of decision-making processes affecting them, not a mere right to be involved in such processes or merely to have their views heard ... It also suggests the possibility for indigenous peoples to make a different proposal or suggest a different model, as an alternative to the one proposed by the Government or other actor.[41]

2.29 Additionally, former Special Rapporteur on the rights of indigenous peoples, James Anaya, has emphasised that article 19 of the United Nations Declaration on the Rights of Indigenous Peoples establishes 'consent as the objective of consultations with indigenous peoples'.[42] He has noted that '[a] significant, direct impact on indigenous peoples' lives or territories establishes a strong presumption that the proposed measures should not go forward without indigenous peoples'

38 *Native Title Act 1993*, subsection 24JAA(14).

39 United Nations Human Rights Council, *Free, prior and informed consent: a human rights-based approach - Study of the Expert Mechanism on the Rights of Indigenous Peoples,* A/HRC/39/62 (2018) [14].

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

41 United Nations Human Rights Council, *Free, prior and informed consent: a human rights-based approach - Study of the Expert Mechanism on the Rights of Indigenous Peoples,* A/HRC/39/62 (2018) [15]. See United Nations Declaration on the Rights of Indigenous Peoples, article 19.

42 UN Human Rights Council, *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people*, A/HRC/12/34 (2009) [46].

consent'.[43] While the UN Declaration on the Rights of Indigenous Peoples is not included in the definition of 'human rights' that this committee considers under the *Human Rights (Parliamentary Scrutiny) Act 2011,* it provides clarification as to how human rights standards under international law, including under the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights apply to the particular situation of indigenous peoples.

2.30 The consultation process contained in the future acts regime would appear to lack several constituent elements of free, prior and informed consent for the purposes of international human rights law. Critically, under the relevant provisions of the *Native Title Act 1993*, consent of native title holders and claimants is not the objective of consultation and has no bearing on the validity of the future act. The consultation process is restricted to a maximum of four months and the onus is placed on native title holders and claimants to request to be consulted. The minister has noted that in some cases, native title holders and claimants have chosen not to opt-in to be consulted, given the intended use of the regime for provision of public infrastructure. However, the reasons for deciding not to opt-in to the consultation process in these cases are not clear and as such, the absence of a request to be consulted should not be taken to necessarily indicate implied consent. The minister's response does not provide information as to why the consultation provision is drafted as an opt-in process rather than requiring consultation to be undertaken for all proposed future acts. In the absence of a legislative requirement to consult native title holders and claimants in all instances, the measure would appear to only contain a process to consult those Aboriginal and Torres Strait Islander people who request to be involved in the consultation. In addition, it is unclear that involvement in such consultation would enable affected communities to influence the outcome of decision-making processes that affect them.[44] The ability to genuinely influence the decision-making process is a fundamental component of good faith consultation and important for realising article 19 of the United Nations Declaration on the Rights of

43 UN Human Rights Council, *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people*, A/HRC/12/34 (2009) [47]. See also *Saramaka People v Suriname*, Inter-American Court of Human Rights, Judgment (Preliminary Objections, Merits, Reparations, and Costs) (2007) [134]: the Inter-American Court of Human Rights held that 'regarding large-scale development or investment projects that would have a major impact within Saramaka territory, the State has a duty, not only to consult with the Saramaka, but also to obtain their free, prior, and informed consent, according to their customs and traditions'.

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

Indigenous Peoples,[45] which is linked to and elaborates on the rights to self-determination and culture.[46]

2.31 Regarding the requirement to provide the Commonwealth minister with a report about the consultation process, the minister has characterised this requirement as a form of oversight which provides an additional layer of transparency with respect to the appropriate use of the provision. While this may operate to provide a level of oversight, noting that the Commonwealth minister *may* publish this report, but is not legally required to do so, this requirement may not necessarily enhance the transparency of decisions regarding the use of the future acts regime.[47] Additionally, there appears to be limited possibility of monitoring of the use and effectiveness of the future acts regime, including the consultation provisions. The statement of compatibility acknowledges stakeholder concerns regarding the measure's diminishment of the procedural rights of native title holders and states that to balance these concerns, the bill limits the extension of the future acts regime to a further 10 years to provide the opportunity for reassessment of the need for the regime at a later time.[48] However, it is noted that the measure has already been in force for almost 10 years and no information has been provided as to whether the future acts regime has been independently evaluated and assessed, and in extending this for a further 10 years there is no requirement that such an evaluation or assessment occur. The minister's response does not provide any further information regarding the availability of monitoring mechanisms that could inform such a reassessment in the future. The possibility of monitoring can assist with the proportionality of a measure and is also an important component of free, prior and informed consent. The United Nations Human Rights Council has stated that 'the implementation of free, prior and informed consent should…be monitored and evaluated regularly' to ensure that consultation mechanisms are effective and continue to be improved.[49]

2.32 With respect to the right to an effective remedy, the minister has advised that subsection 24JAA(8) provides native title holders with an entitlement to compensation for an act to which subdivision JA applies in various circumstances,

45 UN Human Rights Council, *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people*, A/HRC/12/34 (2009) [46]; United Nations Human Rights Council, *Free, prior and informed consent: a human rights-based approach - Study of the Expert Mechanism on the Rights of Indigenous Peoples,* A/HRC/39/62 (2018) [15].

46 International Covenant on Civil and Political Rights, articles 1 and 27; and the International Covenant on Economic, Social and Cultural Rights, articles 1 and 15.

47 *Native Title Act 1993*, subsection 24JAA(16)(b).

48 Statement of compatibility, p. 8.

49 United Nations Human Rights Council, *Free, prior and informed consent: a human rights-based approach - Study of the Expert Mechanism on the Rights of Indigenous Peoples,* A/HRC/39/62 (2018) [45].

including if the act could not have been validly done if the native title holders instead held ordinary title (generally meaning a freehold estate).[50] The minister has stated that this entitlement to compensation is on just terms to compensate the native title holders for any loss, diminution, impairment or other effect of the act on their native title rights and interests. The minister has drawn attention to the Timber Creek compensation claim case, in which the High Court of Australia assessed compensation for the extinguishment of native title rights and interests under the *Native Title Act 1993*.[51]

2.33 The right to an effective remedy requires the availability of a remedy which is effective with respect to any violation of rights and freedoms recognised by the International Covenant on Civil and Political Rights.[52] While limitations may be placed in particular circumstances on the nature of the remedy provided (judicial or otherwise), states parties must comply with the fundamental obligation to provide a remedy that is effective.[53] The availability of compensation under the *Native Title Act 1993* and the right to have such a remedy determined by a competent judicial, administrative or legislative authority is likely to be an effective remedy for the purposes of international human rights law. It remains unclear, however, as to what, if any, compensation has been granted with respect to the approximately 127 times the future acts regime has been used in the past 10 years. It is noted that the Timber Creek compensation claim case cited by the minister dealt with 53 compensable acts between 1980 and 17 December 1996 in the Northern Territory rather than the future acts regime.[54]

2.34 In conclusion, the measure does not appear to be a proportionate limitation on the rights to equality and non-discrimination, self-determination and culture, noting in particular the existence of a less rights restrictive way of achieving the objective, the absence of formal review mechanisms, the limited possibility of oversight or monitoring, and insufficient safeguards to ensure that any consultation

50 *Native Title Act 1993*, subsection 17(2)(a).

51 *Northern Territory of Australia v. Mr A Griffiths (deceased) and Lorraine Jones on behalf of the Ngaliwurru and Nungali Peoples & Anor; Commonwealth of Australia v. Mr A Griffiths (deceased) and Lorraine Jones on behalf of the Ngaliwurru and Nungali Peoples & Anor; Mr A Griffiths (deceased) and Lorraine Jones on behalf of the Ngaliwurru and Nungali Peoples v. Northern Territory of Australia & Anor* [2019] HCA 7.

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

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

54 *Northern Territory of Australia v. Mr A Griffiths (deceased) and Lorraine Jones on behalf of the Ngaliwurru and Nungali Peoples & Anor; Commonwealth of Australia v. Mr A Griffiths (deceased) and Lorraine Jones on behalf of the Ngaliwurru and Nungali Peoples & Anor; Mr A Griffiths (deceased) and Lorraine Jones on behalf of the Ngaliwurru and Nungali Peoples v. Northern Territory of Australia & Anor* [2019] HCA 7 [6].

process is effective, meaningful and informed by the principle of free, prior and informed consent.

Committee view

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

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

2.37 The committee notes the minister's advice that governments usually seek to negotiate an Indigenous Land Use Agreement (ILUA) in the first instance, however, substantial delays in negotiating an ILUA necessitates a mechanism between an ILUA and compulsory acquisition to enable a future act to be validly done. The committee also notes the minister's advice that no review mechanisms exist to challenge a decision to use the future acts regime rather than negotiating an ILUA. The committee considers that there may be circumstances in which the future acts regime is required if consent is not able to be achieved after an effective and meaningful consultation process, informed by the principle of a free, prior and informed consent, has occurred.

2.38 The committee further notes the minister's advice that native title holders and registered claimants must be notified of the proposed future act and provided with an opportunity to request to be consulted. While the consultation process can operate as a safeguard to protect certain human rights, the committee considers that concerns remain as to whether this consultation process is effective and meaningful in practice, noting that the consultation process would appear to lack several constituent elements of free, prior and informed consent for the purposes of international human rights law.

2.39 Noting that the bill passed both Houses of Parliament on 3 December 2020, the committee considers that the proportionality of this measure would be assisted if the *Native Title Act 1993* were amended to provide that:

(a) Subdivision JA only applies to a future act if the minister has provided to affected parties and published (where to do so would not unduly limit the right to privacy), reasons as to why it has not been possible to obtain consent via an ILUA;

(b) any registered native title claimant or registered native title body corporate must be consulted about the doing of the act so far as it affects their registered native title rights and interests before the act is done or commenced. The consultation process should be guided by the principles in the United Nations Declaration on the Rights of Indigenous Peoples, with free, prior and informed consent being the principal objective of consultation;

(c) guidelines (in the form of a legislative instrument) are developed to inform decision-makers as to when the future acts regime should be used, including criteria to assess when an ILUA is impracticable or unable to be agreed on; and

(d) regular reports are tabled in both Houses of Parliament regarding the use and effectiveness of the future acts regime.

2.40 Alternatively, at a minimum, the committee considers the proportionality of the measure would be assisted if the *Native Title Act 1993* were amended to reduce the period of time during which the future acts regime operates (such as five years) with the requirement that during this time a review be undertaken of the use and effectiveness of the regime, noting that the regime is intended to be a temporary measure subject to reassessment.

2.41 With respect to the right to an effective remedy, the committee notes the minister's advice that the *Native Title Act 1993* provides native title holders with an entitlement to compensation for an act to which Subdivision JA applies in certain circumstances. The committee considers that the availability of compensation and the right to have such a remedy determined by a competent judicial, administrative or legislative authority is likely to be an effective remedy for the purposes of international human rights law.

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

Territories Legislation Amendment Bill 2020[1]

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

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

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

2.43 Schedule 1 of this bill seeks to amend the *Norfolk Island Act 1979* to permit the courts of a prescribed state or territory to have jurisdiction (including appellate jurisdiction) in relation to Norfolk Island as if it were part of that state or territory.[3] The proposed amendments would also effectively abolish the Supreme Court of Norfolk Island and confer jurisdiction on the courts of a prescribed state or territory.[4] The courts would be permitted to sit in either Norfolk Island or the prescribed state or territory.[5] The laws of the prescribed state or territory would be binding on all courts exercising jurisdiction in that state or territory, or in Norfolk Island, including laws relating to procedure, evidence and the competency of witnesses.[6]

2.44 When exercising its criminal jurisdiction, a prescribed state or territory court would only be permitted to sit in the prescribed state or territory (as opposed to

1 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Territories Legislation Amendment Bill 2020, *Report 14 of 2020*; [2020] AUPJCHR 185.

2 Parliamentary Joint Committee on Human Rights, Report 13 of 2020 (13 November 2020), pp. 12-17.

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

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

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

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

Norfolk Island) if to do so would not be contrary to the interests of justice.[7] The court would be able to make an order for a criminal trial of the accused to be held in the prescribed state or territory either before the trial has begun or after the trial has begun (in which case the trial would be discontinued, the jury discharged, and a new trial held in the prescribed state or territory).[8] Such an order could only be made if the court was satisfied that first, the interests of justice required it and second, if the accused was not present, that they were represented and understood the effect of the order.[9]

2.45 Additionally, if a trial was ordered to be held in the prescribed state or territory, the amendments would allow a court to make a further order that the accused be removed from custody in Norfolk Island and conveyed to, and held in, the prison specified in the order for so long as is necessary for the purposes of the trial and for any related proceedings.[10] The accused could also be conveyed back to and detained in Norfolk Island for particular purposes.[11]

Summary of initial assessment

Preliminary international human rights legal advice

Rights to a fair trial and liberty

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

2.47 The right to a fair trial and fair hearing is concerned with procedural fairness, and encompasses notions of equality in proceedings, the right to a public hearing and the requirement that hearings are conducted by an independent and impartial tribunal established by law.[12] The right to a fair trial provides that in the

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

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

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

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

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

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

determination of any criminal charge against a person, that person shall be entitled to certain minimum guarantees. These guarantees include the right to: have adequate time and facilities to prepare a defence; be tried without undue delay; be tried in person (not *in absentia*) or through legal representation; and examine witnesses both against the accused and on their behalf on equal terms with the prosecution.[13]

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

2.49 The rights to a fair trial and liberty may be subject to permissible limitations where the limitation pursues a legitimate objective, is rationally connected to that objective and is a proportionate means of achieving that objective.

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

(a) what is the objective of conferring jurisdiction on a prescribed state or territory court in relation to Norfolk Island and what evidence is there of a pressing or substantial concern to which the proposed amendments are directed;

(b) how will transferring the jurisdiction of the Norfolk Island courts to a prescribed state or territory court be effective to achieve the stated objective;

(c) whether the accused person would be liable to cover all or part of the costs associated with relocating the trial, for instance, the travel costs of their lawyer, witnesses or other support persons to the prescribed state or territory to prepare their defence;

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

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

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

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

(d) what, if any, financial support is available to an accused person from Norfolk Island to assist them in covering costs associated with the relocation of criminal proceedings;

(e) whether an accused person would be transferred from Norfolk Island before or after any bail application and whether there is a risk that an accused person from Norfolk Island would be less likely to be granted bail, having regard to any potential practical and logistical challenges for an accused person to attend court in a place outside Norfolk Island or meet bail conditions in a place that is not their usual place of residence; and

(f) whether the safeguards in place are sufficient to ensure that these measures constitute a proportionate limitation on the rights to a fair trial and liberty.

Committee's initial view

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

2.52 In order to form a concluded view of the human rights implications of this bill, the committee sought the assistant minister's advice as to the matters set out at paragraph [2.50].

2.53 The full initial analysis is set out in *Report 13 of 2020*.

Assistant Minister's response[17]

2.54 The assistant minister advised:

> ***What is the objective of conferring jurisdiction on a prescribed state or territory court in relation to Norfolk Island and what evidence is there of a pressing or substantial concern to which the proposed amendments are directed.***
>
> The primary objective is to allow the courts of the state or territory which provides state-type services in Norfolk Island to adjudicate matters arising under the laws of that state or territory.

17 The minister's response to the committee's inquiries was received on 24 November 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.

These amendments complement amendments to the *Norfolk Island Act 1979* in the Bill which allow state or territory laws to be applied in Norfolk Island. These measures are part of the Australian Government's ongoing work to build a strong and sustainable Norfolk Island community, with rights and responsibilities comparable to other Australians. In particular, these measures are intended to ensure that Norfolk Island has modern and comprehensive governance arrangements in place, including with respect to its justice system.

The previous governance arrangements in Norfolk Island required the former Norfolk Island Administration to be responsible for Commonwealth, state and local government functions. This wide range of services and the complexity involved in maintaining an effective and up-to-date body of state-type legislation meant the former Administration was unable to deliver an adequate level of services to the community. The application of a modern body of state or territory laws to Norfolk Island with access to a corresponding justice system are intended to address these governance concerns.

Provisions to permit the courts of a prescribed state or territory to have jurisdiction in relation to Norfolk Island would only be utilised if the Australian Government entered into a comprehensive agreement with a state or territory government for the delivery of state-type services and it was considered appropriate for that state or territory's courts to also operate in Norfolk Island.

This is the same as the arrangement which is currently in place in Christmas Island and the Cocos (Keeling) Islands where the Western Australian Government provides a range of state-type services in these Islands and the courts of Western Australia have jurisdiction as if these territories were part of Western Australia.

A secondary objective of the provisions is to provide for the courts of that state or territory to sit outside of Norfolk Island if to do so would not be contrary to the interests of justice.

These provisions are modelled on similar provisions in the *Norfolk Island Act 1979* which authorise the Supreme Court of Norfolk Island to hear criminal trials outside of Norfolk Island. In a small and remote community of approximately 1800 people, these provisions address the concern that it may not be possible to empanel an impartial local jury in some cases.

How will transferring the jurisdiction of the Norfolk Island courts to a prescribed state or territory court be effective to achieve the stated objective.

Article 14 of the International Covenant on Civil and Political Rights (ICCPR) recognises that every person is entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law in the determination of any criminal charge against them, as well as in the determination of their rights and obligations in a suit at law.

As is the case in Christmas Island and the Cocos (Keeling) Islands, transferring the jurisdiction of the Norfolk Island courts to the courts of the state or territory with responsibility for delivering state-type services would enhance the operation of the justice system on Norfolk Island and complement the application of an effective and up-to-date body of state-type legislation. This is because those courts would already have the necessary knowledge of the legislative framework under which the services are being delivered and extensive experience case managing and adjudicating those matters.

Similarly, criminal trials would only take place outside Norfolk Island in circumstances where the interests of justice require it. As a general rule, the venue of a trial is 'local' in the sense that it is located at the place where the alleged offence was committed, by a jury composed of residents of that place. However, it is conceivable that there may be cases where holding a trial on Norfolk Island, given its small size and remote location, is not consistent with the interests of justice. For instance, it may be difficult to find jurors who do not know the accused, the victim, or other witnesses.

As discussed in the Explanatory Memorandum, these provisions in the Bill dealing with the conduct of criminal trials outside Norfolk Island are modelled on 2018 amendments to the *Norfolk Island Act 1979*, contained in the *Investigation and Prosecution Measures Act 2018*, which similarly authorise the Supreme Court of Norfolk Island to hear criminal trials outside Norfolk Island in its criminal jurisdiction if the court is satisfied that the interests of justice require it.

Concerns about empanelling a jury on Christmas Island, which has a similar population to Norfolk Island, also led to similar provisions being made for trials to be conducted in Western Australia.

Whether the accused person would be liable to cover all or part of the costs associated with relocating the trial, for instance, the travel costs of their lawyer, witnesses or other support persons to the prescribed state or territory to prepare their defence.

Under the *Legal Aid Act 1995* (NI), accused persons have access to legal aid which may be used to cover the legal costs of the accused, including the travel expenses of lawyers. If an agreement were reached with a state or territory government for the delivery of state-type services in Norfolk Island and jurisdiction was conferred on that state or territory's courts, access to legal aid would continue to be available.

As is the present situation with the Supreme Court of Norfolk Island, if an accused was ordered by the court of a state or territory to be removed from Norfolk Island to stand trial in that state or territory (proposed section 60F as amended) the expense of this removal and any subsequent detention in a state or territory custodial facility would be at the expense of the Commonwealth. Such detention would only be authorised in

accordance with procedures that are established by law, consistent with the requirements of Article 9(1) of the ICCPR.

Similarly, under proposed section 60L as amended, if the accused is acquitted, or not required to serve a sentence of imprisonment, after their trial in a state or territory, the Commonwealth is, on application to the Secretary, obliged to provide the persons with the means to return to Norfolk Island.

As is the case with criminal matters arising in other remote communities, travel costs for lawyers, witnesses or other support persons may also be reduced through the use of modern communication technologies, such as telephone and video conferencing.

What, if any, financial support is available to an accused person from Norfolk Island to assist them in covering costs associated with the relocation of criminal proceedings.

Please refer to previous response.

Whether an accused person would be transferred from Norfolk Island before or after any bail application and whether there is a risk that an accused person from Norfolk Island would be less likely to be granted bail, having regard to any potential practical and logistical challenges for an accused person to attend court in a place outside Norfolk Island or meet bail conditions in a place that is not their usual place of residence.

The question of bail for an accused, including bail conditions, would be a matter for the relevant judicial authorities considering the evidence before them. Should the jurisdiction of the courts of Norfolk Island be conferred on the courts of a state or territory in the future, that court would consider applications for bail in accordance with the requirements of that state or territory's legislation relating to the granting of bail. The circumstances of the accused, including any practical or logistical challenges, are likely to be considered by the court when making its decision. Depending on the circumstances of the trial, arrangements could include the accused undertaking bail in Norfolk Island while awaiting trial in the state or territory.

However, under the proposed provisions, the state or territory court can only order that a trial take place outside Norfolk Island when satisfied that the interests of justice require a criminal trial outside Norfolk Island. While this decision would be made independently of any decision with respect to bail, case law indicates that the court will consider any potential hardship on the accused, including any possible implications for the remand of the accused.

Furthermore, consistent with present arrangements, an accused required to be remanded for significant periods would be transferred to the mainland. This is because Norfolk Island has very limited remand facilities and this would not change under any future criminal justice arrangements.

Whether the safeguards in place are sufficient to ensure that these measures constitute a proportionate limitation on the rights to a fair trial and liberty.

State and territory courts serving remote communities adopt a range of practices to ensure appropriate access to justice, including circuit visits and the use of technology such as telephone and video conferencing. Many of the existing services of the Norfolk Island courts are already delivered remotely by judicial officers sitting on the mainland and it is expected that these arrangements would continue. In practice, if these provisions were ever utilised, the experience of defendants and practitioners would be very similar to the present administration of the Norfolk Island courts.

As mentioned above, where the courts consider relocating a criminal trial from Norfolk Island to the mainland, the judiciary would take into account a number of factors when determining whether it would be in the interests of justice to do so. Case law indicates that these factors would include the court considering any potential hardship on the accused, including potential reduced access to witnesses or evidence. Under the provisions in the Bill, the accused could make submissions to the court on whether a trial should be heard in a prescribed state or territory, rather than Norfolk Island, including making submissions on access to legal representation, evidence and trial support in their specific circumstances.

The provisions in the Bill would therefore not significantly change the manner in which the courts presently exercise their jurisdiction in Norfolk Island and constitute a proportionate limit on an accused's rights to a fair trial and liberty. By authorising proceedings to be relocated and the empanelment of a jury in the alternative venue, the Bill also promotes the right to a fair trial in cases where there are concerns about empanelling an impartial local jury.

Concluding comments

International human rights legal advice

Rights to a fair trial and liberty

2.55 With respect to the objective of conferring jurisdiction on a prescribed state or territory court in relation to Norfolk Island, the assistant minister has advised that the primary objective is to allow the courts of the state or territory which provides state-type services in Norfolk Island to adjudicate matters arising under the laws of that state or territory. The assistant minister has noted that the measures are intended to ensure that Norfolk Island has modern and comprehensive governance arrangements in place, including with respect to its justice system. The assistant minister has stated that conferring jurisdiction on a prescribed state or territory court in relation to Norfolk Island would enhance the operation of Norfolk Island's justice system and complement the application of an effective and up-to-date body of state-type legislation. A secondary objective identified by the assistant minister is to allow for the courts of the prescribed state or territory to sit outside of Norfolk

Island if to do so would not be contrary to the interests of justice. The assistant minister has stated that these provisions are necessary to ensure that the accused is tried by an impartial jury, noting that Norfolk Island is a small and remote community of approximately 1800 people and it may not be possible to empanel an impartial local jury in some cases.

2.56 Enhancing the effective operation of the justice system in Norfolk Island and ensuring that prescribed state or territory courts exercising jurisdiction in relation to Norfolk Island are authorised to sit outside of Norfolk Island where it would not be contrary to the interests of justice to do so, are likely to constitute legitimate objectives for the purposes of international human rights law, and the measure appears to be rationally connected to those objectives. Indeed, ensuring that the court is authorised to change the venue of a trial where the interests of justice require it can play an important role in realising the right to a fair trial, particularly where the application for a change of venue is brought by the accused. The right to a fair trial includes the guarantee of a fair and public hearing as well as a competent, independent and impartial tribunal established by law.[18] A hearing may not be fair if it involves a jury that is not impartial.[19] However, noting that the Supreme Court of Norfolk Island is presently authorised to order that a criminal trial be held outside of Norfolk Island where the interests of justice require it[20] and 'it is likely to be a number of years before these provisions are utilised',[21] there are some questions as

18 UN Human Rights Committee, *General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial* (2007) [25]–[26].

19 Committee on the Elimination of Racial Discrimination, *Communication No. 3/1991, Narrainen v Norway,* A/49/18 (1994) [9.1]–[10].

20 Section 60C of the *Norfolk Island Act 1979* authorises the Supreme Court of Norfolk Island, in exercising its criminal jurisdiction, to sit in a host jurisdiction if to do so would not be contrary to the interests of justice. The Supreme Court of Norfolk Island is authorised to order that a criminal trial be held in a host jurisdiction if it is satisfied that the interests of justice require it. The effect of the proposed amendments to section 60C would be to confer jurisdiction on a prescribed state or territory court and authorise that state or territory court (as opposed to the Supreme Court of Norfolk Island) to order a criminal trial be held in a state or territory outside of Norfolk Island. It is noted that proposed section 60C is modelled on the existing law: explanatory memorandum, p. 17.

21 Explanatory memorandum, p. 7. The assistant minister's response stated that 'in practice, if these provisions were ever utilised, the experience of defendants and practitioners would be very similar to the present administration of the Norfolk Island courts'. The assistant minister noted that the 'Bill would therefore not significantly change the manner in which the courts presently exercise their jurisdiction in Norfolk Island'. The assistant minister has further stated that the possible future conferral of Norfolk Island jurisdiction on state or territory courts is intended to address governance concerns with respect to the former Administration, which according to the assistant minister, was unable to deliver an adequate level of services to the community (although, no evidence was provided in the assistant minister's response regarding the inadequacy of Norfolk Island's justice system).

to what is the current pressing and substantial concern to which the proposed amendments are directed.

2.57 Regarding the existence of safeguards to ensure that the measures constitute a proportionate limitation on the right to a fair trial, the assistant minister has advised that the courts can adopt various practices to ensure appropriate access to justice, including circuit visits and the use of technology such as telephone and video conferencing. Many of these practices are already utilised by Norfolk Island courts and the assistant minister expects that delivery of remote court services will continue. Additionally, the assistant minister has highlighted the legislative safeguard contained in proposed section 60C(4)—namely, that the court may only make an order to change the venue of a trial if it is satisfied that the interests of justice require it.[22] The assistant minister has noted that the court would take into account a number of factors when determining whether the interests of justice require the trial to be held in the state or territory, including any potential hardship on the accused, such as reduced access to witnesses or evidence. The assistant minister has further stated that the accused could make submissions to the court with respect to any change of venue application.

2.58 It is noted that in assessing the sufficiency of proposed section 60C(4) as a legislative safeguard, a relevant consideration is whether the minimum guarantees, as enumerated in article 14 of the International Covenant on Civil and Political Rights, would be afforded to accused persons from Norfolk Island when the court determines a change of venue application. The guiding principle in Australian case law is that each change of venue application must be:

> considered on its own merits and not with any preconceptions, save that a trial should ordinarily proceed in the district in which the offence charged was alleged to have been committed, removal being warranted where sufficient cause was shown.[23]

2.59 Relevant factors considered by a court in determining a change of venue application include:

- the cost, expense and inconvenience involved in a change of the venue including disruption to court schedules and use of court resources;
- the stage the proceedings were at when the application was made and what delays may be caused by a change of venue;

---

22 Schedule 1, Part 3, item 112, proposed subsection 60C(5) provides that the court may make an order under subsection (2) (that is, to order the trial be held in the prescribed state or territory) if it is satisfied that first, the interests of justice required it and second, if the accused was not present, that they were represented and understood the effect of the order.

23 *R v Yanner* [1998] 2 Qd R 208, 208. For a summary of the relevant case law see Judicial College Victoria, *Place of Trial*, 31 August 2020, https://www.judicialcollege.vic.edu.au/eManuals/VCPM/27486.htm (accessed 26 November 2020).

- ensuring that a fair trial was had and seen to be had;
- the general principle that trials should be held in the district where the offence was committed;
- the result of moving the trial from the locality in which the offence was allegedly committed; and
- the nature of the offence charged.[24]

2.60 It is a matter of judicial discretion as to what weight is attributed to each of the above factors, having regard to the facts and circumstances of each case.[25] The United Nations (UN) Human Rights Committee has recognised the value of judicial discretion in this context. In the case of *Chung v Jamaica*, in considering whether the trial judge's refusal to change the venue of the trial deprived the author of his right to a fair trial and to be presumed innocent, the UN Human Rights Committee held that:

> An element of discretion is necessary in decisions such as the judge's on the venue issue, and barring any evidence of arbitrariness or manifest inequity of the decision, the Committee is not in a position to substitute its findings for those of the trial judge.[26]

2.61 Australian case law indicates that, in satisfying itself that the interests of justice require an order to be made for a trial to be held in the prescribed state or territory as opposed to Norfolk Island, the court would have regard to the right to a fair trial, including factors that closely mirror the minimum guarantees contained in article 14 of the International Covenant on Civil and Political Rights. As such, the requirement that the venue of the criminal trial only be changed if the court is satisfied that the interests of justice require it, would appear to be a strong safeguard for ensuring that any limit on the right to a fair trial is proportionate.[27]

2.62 Another relevant consideration in assessing the proportionality of the measures is whether the accused person is liable to cover all or part of the costs associated with relocating the trial and has access to financial support to alleviate those costs. The assistant minister has advised that if jurisdiction was conferred on a state or territory in relation to Norfolk Island, accused persons would continue to have access to legal aid which may be used to cover their legal costs, including the

---

24 *R v Yanner* [1998] 2 Qd R 208, 208. See also *R v Cattell & Anor* (1967) 86 WN (Pt 1) (NSW) 391; *R v Knott* [1974] Qd R 58.

25 *R v Yanner* [1998] 2 Qd R 208, 208.

26 UN Human Rights Committee, *Chung v Jamaica*, A/53/40 (1998) [9.3]. The Committee held that there was no violation of article 14 as it did 'not consider, in these circumstances, that the judge's decision not to change the venue deprived the author of his right to a fair trial or to be presumed innocent until found guilty'.

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

travel expenses of their lawyers. If the state or territory court ordered that the accused be removed from Norfolk Island to the state or territory to be held in prison for the purposes of the trial, the assistant minister stated that the costs of removal and detention would be at the expense of the Commonwealth. Additionally, the assistant minister noted that if the accused was acquitted or not required to serve a prison sentence following the trial, the Commonwealth is, on application to the Secretary, obliged to provide the person with the means to return to Norfolk Island. The proportionality of this measure is assisted by the fact that accused persons from Norfolk Island would continue to have access to legal aid to assist with any costs associated with relocating criminal proceedings from Norfolk Island to a prescribed state or territory. Additionally, the availability of modern communication technologies, such as telephone and video conferencing, would alleviate possible costs and hardship on the accused, such as reduced access to witnesses.[28]

2.63 As to the adequacy of state or territory bail laws as a safeguard with respect to any limitation on the right to liberty, the assistant minister has advised that the question of bail for an accused, including bail conditions, would be a matter for the state or territory judge considering the evidence before them, applying the relevant bail laws of that state or territory. The assistant minister has advised that any practical or logistical challenges relating to bail are likely to be considered by the court when making its decision, including that arrangements could include the accused undertaking bail in Norfolk Island while awaiting trial in the state or territory. Where the accused is refused bail and remanded in custody, the assistant minister has advised that, consistent with present arrangements, an accused would be transferred to the mainland due to limited remand facilities in Norfolk Island. The assistant minister has suggested that possible implications for the remand of the accused may be considered by the court in determining a change of venue application. Furthermore, the practice of circuit visits and video conferencing could enable the question of bail to be determined remotely so as to allow the accused to remain in Norfolk Island if granted bail. These court practices may mitigate some of the potential practical or logistical challenges associated with bail and serve as a safeguard to ensure that any limitation on the right to liberty is proportionate.

2.64 In conclusion, these measures would appear to constitute a permissible limitation on the rights to a fair trial and liberty, noting in particular that the court may only make an order to change the venue of a trial if it is satisfied that the

28 Regarding witnesses' attendance and examination with respect to article 14(3)(e), the UN Human Rights Committee has stated that article 14(3)(e) 'does not, however, provide an unlimited right to obtain the attendance of any witness requested by the accused or their counsel, but only a right to have witnesses admitted that are relevant for the defence, and to be given a proper opportunity to question and challenge witnesses against them at some stage of the proceedings': *General Comment 32, Article 14: Right to equality before courts and tribunals and to a fair trial* (2007) [39].

interests of justice require it, and noting the continued availability of legal aid and remote court practices.

Committee view

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

2.66 The committee notes the assistant minister's advice that the objectives of the measures are to confer jurisdiction in relation to Norfolk Island to prescribed state or territory courts as well as authorise the state or territory courts to sit outside of Norfolk Island if it is not contrary to the interests of justice. The committee considers these to be legitimate objectives for the purposes of international human rights law. The committee notes the assistant minister's advice regarding the existence of safeguards to assist with the proportionality of the measures, including remote court practices, access to legal aid and the requirement that the court only orders a trial to be relocated from Norfolk Island to a state or territory if the interests of justice require it. Having regard to these matters, the committee considers the measures permissibly limit the rights to a fair trial and liberty.

2.67 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 assistant minister.

Senator the Hon Sarah Henderson

Chair

Appendix 1

Deferred legislation[1]

3.1 The committee has deferred its consideration of the following legislation for the reporting period:

- Australian Immunisation Register Amendment (Reporting) Bill 2020; and
- Surveillance Legislation Amendment (Identify and Disrupt) Bill 2020.

1 This appendix can be cited as: Parliamentary Joint Committee on Human Rights, Deferred legislation, *Report 15 of 2020*; [2020] AUPJCHR 186.