Chapter 2

Concluded matters

2.1 This chapter considers responses 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]

Bills

Foreign Investment Reform (Protecting Australia's National Security) Bill 2020[2]

Purpose	The bill seeks to amend various Acts relating to foreign acquisitions and takeovers to: • introduce a new national security test requiring mandatory notification for investments in a sensitive national security business or land, and allowing investments not otherwise notified to be 'called in' for review if they raise any national security concerns; • strengthen the Treasurer and Commissioner of Taxation's enforcement powers by increasing penalties, directions powers and new monitoring and investigative powers; • close potential gaps in the screening regime; • expand information sharing arrangements; and • establish a new Register of foreign owned assets to record all foreign interests acquired in Australian land, water entitlements and contractual water rights, and business acquisitions that require foreign investment approval
Portfolio	Treasury

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, Foreign Investment Reform (Protecting Australia's National Security) Bill 2020, *Report 1 of 2021*; [2021] AUPJCHR 8.

Introduced	House of Representatives, 28 October 2020 *Passed both Houses on 9 December 2020*
Rights	Privacy; work; equality and non-discrimination; life; torture, cruel, inhuman or degrading treatment or punishment; fair hearing

2.3 The committee requested a response from the Treasurer in relation to the bill in *Report 14 of 2020*.[3]

Expanded information sharing with foreign governments

2.4 The bill seeks to authorise the disclosure of protected information to a foreign government, or a separate government entity in relation to a foreign country, if the information is disclosed in the course of the person performing their functions or duties, or exercising their powers under the Act, or the person is satisfied that disclosing the information will assist or enable the foreign government or entity to perform a function or duty, or exercise a power of that government or entity.[4] 'Protected information' is information obtained under, in accordance with or for the purposes of the Act and could include personal information, meaning information or an opinion about an identified individual or an individual who is reasonably identifiable.[5] Protected information could be disclosed to a foreign government or entity if:

- the Treasurer is satisfied that information relates to a matter for which a national security risk may exist for Australia or the foreign country;
- the Treasurer is satisfied that disclosure would not be contrary to the national interest;
- the person disclosing the information is satisfied it would only be used in accordance with an agreement between the Commonwealth or a Department of State, authority or agency of the Commonwealth and a foreign government or entity; and
- the foreign government or entity has undertaken not to use or further disclose the information except in accordance with the agreement or otherwise as required or authorised by law.[6]

3 Parliamentary Joint Committee on Human Rights, *Report 14 of 2020* (25 November 2020), pp. 2-17.

4 Schedule 1, Part 1, item 205, proposed subsection 123B(1)(a).

5 *Foreign Acquisitions and Takeovers Act 1975*, section 120; *Privacy Act 1988*, section 6; explanatory memorandum p. 58.

6 Schedule 1, Part 1, item 205, proposed paragraphs 123B(1)(b)–(e) and subsection 123B(2).

2.5 The Treasurer may impose conditions to be complied with by the foreign government or entity in relation to the disclosed protected information.[7]

Summary of initial assessment

Preliminary international human rights legal advice

Rights to privacy, life, and prohibition against torture or cruel, inhuman or degrading treatment or punishment

2.6 By authorising the disclosure of protected information, including personal information, to foreign governments or entities for the purpose of assisting them to perform a function or duty, or exercise a power, the measure engages and limits the right to privacy. The right to privacy includes respect for informational privacy, including respect for private and confidential information, particularly the storing, use and sharing of such information.[8] It also includes the right to control the dissemination of information about one's private life.

2.7 The right to privacy 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.

2.8 In addition, to the extent that the measure would authorise the disclosure of protected information relating to national security risks posed by an individual to a foreign government which might then use it to investigate and convict a person of an offence to which the death penalty applies, the right to life may be engaged and limited. The right to life imposes an obligation on Australia to protect people from being killed by others or identified risks.[9] While the International Covenant on Civil and Political Rights does not completely prohibit the imposition of the death penalty, international law prohibits states which have abolished the death penalty (such as Australia) from exposing a person to the death penalty in another state. This includes prohibiting the provision of information to other countries that may use that information to investigate and convict someone of an offence to which the death

7 Schedule 1, Part 1, item 205, proposed subsection 123B(3).

8 International Covenant on Civil and Political Rights, article 17. Every person should be able to ascertain which public authorities or private individuals or bodies control or may control their files and, if such files contain incorrect personal data or have been collected or processed contrary to legal provisions, every person should be able to request rectification or elimination: UN Human Rights Committee, *General Comment No. 16: Article 17* (1988) [10]. See also, *General Comment No. 34 (Freedom of opinion and expression)* (2011) [18].

9 International Covenant on Civil and Political Rights, article 6. The right should not be understood in a restrictive manner: UN Human Rights Committee, *General Comment No. 6: article 6 (right to life)* (1982) [5].

penalty applies.[10] Additionally, it is not clear if sharing protected information with foreign governments, in circumstances relating to the investigation of national security matters, could risk exposing a person to torture or cruel, inhuman or degrading treatment or punishment. Australia has an obligation not to subject any person to torture or to cruel, inhuman or degrading treatment or punishment.[11] Under international law the prohibition on torture is absolute and can never be subject to permissible limitations.[12]

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

(a) what is the nature and scope of personal information that is authorised to be disclosed to a foreign government or entity;

(b) whether the proposed limitation on the right to privacy is only as extensive as is strictly necessary, noting that the purpose for which protected information can be disclosed to a foreign government or entity is very broad;

(c) what are the consequences, if any, of a foreign government failing to use protected information in accordance with an agreement, particularly where an individual's right to privacy is not protected;

(d) how the specific safeguards in the Australian Privacy Principles and the *Privacy Act 1988* operate with respect to this measure;

(e) why there is no requirement in the bill requiring that the agreement with the foreign government or entity must seek to include privacy protections around the handling of personal information, and protection of personal information from unauthorised disclosure;

(f) what is the level of risk that the disclosure of protected information relating to national security could result in: the investigation and

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

11 International Covenant on Civil and Political Rights, article 7; and Convention against Torture and other Cruel, Inhuman, Degrading Treatment or Punishment, articles 3–5. See also the prohibitions against torture under Australian domestic law, for example the *Criminal Code Act 1995*, Schedule 1, Division 274.

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

conviction of a person for an offence to which the death penalty applies in a foreign country; and/or a person being exposed to torture or cruel, inhuman or degrading treatment or punishment in a foreign country; and

(g) what, if any, safeguards are in place to ensure that information is not shared with a foreign government or entity in circumstances that could expose a person to the death penalty or to torture or cruel, inhuman or degrading treatment or punishment, including:

(i) the approval process for authorising disclosure; and

(ii) whether there will be a requirement to decline to disclose information where there is a risk that it may expose a person to the death penalty or to torture or cruel, inhuman or degrading treatment or punishment.

Committee's initial view

2.10 The committee noted that this measure engages and limits the right to privacy. To the extent that there may be a risk that disclosure of protected information to a foreign government or entity could expose a person to the death penalty or to torture or cruel, inhuman or degrading treatment or punishment, the measure may engage and limit the right to life and the prohibition against torture or cruel, inhuman or degrading treatment or punishment.

2.11 The committee noted that the right to privacy may be subject to permissible limitations if they are shown to be reasonable, necessary and proportionate. The committee considered that the measure seeks to enhance compliance with the *Foreign Acquisitions and Takeovers Act 1975* and address national security risks. This appears 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. The committee noted that some questions remained as to the proportionality of the measure.

2.12 In order to form a concluded view of the human rights implications of these measures, the committee sought the Treasurer's advice as to the matters set out at paragraph [2.9].

2.13 The full initial analysis is set out in *Report 14 of 2020*.

Treasurer's response[13]

2.14 The Treasurer advised:

> Protected information is defined in subsection 120(1) of the *Foreign Acquisitions and Takeovers Act 1975* (FATA) to mean information obtained under and in accordance with the FATA (with certain exceptions). Protected information obtained under the FATA is used by the Treasurer to make decisions on whether certain foreign acquisitions or mergers are contrary to the national interest. Protected information can include personal information as defined under the *Privacy Act 1988*. Personal information may include a person's name, address, email address and phone number.
>
> The amendments provide that protected information under the FATA may be shared with foreign governments in limited circumstances. These circumstances are where national security risks may exist, where it is not contrary to the national interest to do so, and where there is an agreement in place between Australia and the foreign government. The permitted scope of sharing information with foreign governments needs to be sufficiently broad to provide the Treasurer with sufficient flexibility in assessing and addressing national security risks. However, there are protections to put appropriate limits on disclosure.
>
> The exchange of information with foreign governments may be necessary for the Treasurer to obtain a 'full picture' of the applicant, as the applicant may be making similar investments in other countries. This would allow the Treasurer to leverage the knowledge and experience of other countries. Being able to draw on the knowledge and experience of other countries would allow the Treasurer to better assess any potential national security risks and make an assessment on cases related to national security. Additionally, sharing may be necessary where a national security risk for another country is identified and that risk poses an indirect national security risk for Australia.
>
> Information would only be used in accordance with the agreement between Australia and the foreign government and that information would not be further disclosed unless in accordance with that agreement. Information cannot be shared unless such an agreement is in place. Australia would need to negotiate individual agreements with foreign governments setting out mutually agreed standards for handling personal and commercial-in-confidence information. These individual agreements would need to provide that the information can only be used for the

13 The Treasurer's response to the committee's inquiries was received on 22 December 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.

purpose for which it is shared. The agreement would provide for adequate protections for the use of information and could have mechanisms in place to resolve differences with the foreign government. Proposed paragraph 123B(1)(e) stipulates the sharing of information would not occur unless the foreign government undertakes not to use or further disclose the information in accordance with the agreement or otherwise as required or authorised by law. Additionally, if further constraints or protections are required when the information is shared, proposed subsection 123B(3) allows the Treasurer to impose conditions in relation to the information to be disclosed.

In line with its obligations under the *Privacy Act 1988*, the Government would seek to include privacy related protections in the agreements, as appropriate, to prevent any unnecessary release of information. However, as any information proposed for sharing will relate to national security risks, and therefore possible law enforcement actions, the receiving agencies should be able to receive sufficient information to identify persons or entities of interest for further inquiries. This approach is consistent with exceptions under the *Privacy Act 1988*, which exempts the applications of the Australian Privacy Principles for appropriate action relating to suspected unlawful activity or serious misconduct. It is difficult to predict whether the sharing of protected information may result in persons being at risk of the death penalty, or a person being exposed to torture or cruel, inhuman or degrading treatment or punishment in a foreign country because such risk is highly dependent on the particular circumstances of each case. Such risk can be considered in any decision to share information, where relevant.

In negotiating the relevant agreements, the Government intends to act consistently with the Australian Government's official policy to oppose the death penalty in all circumstances for all people. Further, negotiators intend to be guided by the Australian Government's broader approach to seek assurances of protection against exposing a person to the death penalty or to torture or cruel, inhuman or degrading treatment or punishment in relation to extradition treaties and mutual assistance arrangements, to the extent relevant. For example, an agreement may limit the use of the information for the investigation and enforcement of foreign investment related legislation only, and require that the other country does not impose the death penalty. In such instances, seeking explicit assurances would appear unnecessary.

In negotiating and finalising these agreements, the Government will seek advice from all relevant agencies on appropriate measures and assurances to ensure effective outcomes, whilst ensuring appropriate human rights protections.

The Government has not yet commenced negotiating any international agreements under proposed section 123B. Where the negotiations result in a treaty level agreement, then in accordance with established practice,

any agreement proposed to be entered into by the Government will be tabled in Parliament and subject to scrutiny by the Joint Standing Committee on Treaties.

The Joint Standing Committee on Treaties would be able to review the appropriateness of the international agreement and provide adequate oversight and scrutiny on any proposed agreements between Australia and foreign governments.

Concluding comments

International human rights legal advice

Right to privacy

2.15 In assessing the proportionality of the measure, it is relevant to consider whether the proposed limitation on the right to privacy is sufficiently circumscribed and only as extensive as is strictly necessary. The nature and scope of personal information that is authorised to be disclosed and the purpose for which protected information can be disclosed to a foreign government or entity are relevant considerations. The Treasurer has advised that protected information means information obtained under and in accordance with the *Foreign Acquisitions and Takeovers Act 1975* (FATA). It includes personal information such as a person's name, address, email address and phone number. The Treasurer has stated that protected information obtained under FATA is used to make decisions on whether certain foreign acquisitions or mergers are contrary to the national interest. The Treasurer has noted that information can only be shared where an agreement is in place between the Commonwealth and a foreign government, and the agreement would need to provide that information can only be used for the purpose for which it is shared. The Treasurer has advised that the permitted scope of sharing protected information with foreign governments needs to be sufficiently broad to provide the Treasurer with flexibility to assess and address national security risks. The Treasurer has stated that such information sharing arrangements would enable the Treasurer to draw on the knowledge and experience of other countries to assess potential national security risks, including indirect national security risks posed by a security risk in another country, and cases related to national security.

2.16 As noted in the initial analysis, the legislative purpose for which protected information could be disclosed to a foreign government appears to be very broad insofar as the measure would appear to allow protected information to be disclosed to, and used by, a foreign government to perform a wide variety of functions or duties, or exercise a broad scope of powers.[14] If an agreement specified the precise circumstances in which protected information could be disclosed and the specific purpose for which that information could be used and further disclosed, it may operate to ensure that any limitation on the right to privacy is only as extensive as is

14 Schedule 1, item 205, proposed subsection 123B(1)(a).

strictly necessary. However, it is not clear that agreements would be this precise in practice, noting the Treasurer's advice that the permitted scope of information to be shared with foreign governments needs to be sufficiently broad to respond to direct and indirect national security risks. Concerns therefore remain as to whether the measure is sufficiently circumscribed and the proposed limit on the right to privacy would be only as extensive as is strictly necessary in all cases.

2.17 Another relevant factor in assessing the proportionality of the measure is whether the measure is accompanied by sufficient safeguards. The Treasurer has stated that protections exist to place appropriate limits on the disclosure of protected information, specifically, the requirement that information only be used in accordance with an agreement between the Commonwealth and a foreign government, and the government's obligations under the *Privacy Act 1988* (Privacy Act). With respect to agreements, the Treasurer has advised that individual agreements would need to be negotiated between the Commonwealth and a foreign government, setting out mutually agreed standards for handling personal and commercial-in-confidence information. The Treasurer has stated that agreements would need to provide that information can only be used for the purpose for which it is shared and not further disclosed unless in accordance with the agreement. Proposed subsection 123B(3) allows the Treasurer, where appropriate, to impose conditions to be complied with by a foreign government in relation to the information to be disclosed. The Treasurer has noted that agreements could include mechanisms to resolve differences with the foreign government. Regarding protection of the right to privacy, the Treasurer has advised that the government would seek to include privacy related protections in the agreements, as appropriate, to prevent any unnecessary release of information.

2.18 Where an agreement includes adequate privacy protections, such as protections around the handling of personal information both before and after it is disclosed, and protection of personal information from unauthorised disclosure, it may operate to adequately safeguard the right to privacy. However, while the government states that it intends to include privacy protections, as currently drafted, the bill does not require privacy protections to be included in such agreements. As such, the strength of an agreement as a safeguard will depend on the contents of each individual agreement. If privacy protections were unable to be mutually agreed and thus not included in an agreement, the requirement that foreign governments only use information or not further disclose information except in accordance with the agreement will unlikely operate to protect the right to privacy. It also remains unclear what the consequences are, if any, of a foreign government failing to use protected information in accordance with an agreement, particularly where an individual's right to privacy is not protected.

2.19 With respect to the government's obligations under the Privacy Act, the Treasurer has noted that the Privacy Act exempts the application of the Australian Privacy Principles (APPs) for appropriate action relating to suspected unlawful

activity or serious misconduct. The Treasurer has stated that the information sharing arrangements are consistent with these exceptions, and while the government would seek to include privacy protections in agreements, it is necessary that foreign governments receive sufficient information to identify persons or entities of interests for further investigation. As noted in the initial analysis, the Privacy Act and the APPs may not mitigate concerns about interference with the right to privacy for the purposes of international human rights law because they contain broad exceptions to the prohibition on use or disclosure of personal information for a secondary purpose. Noting the Treasurer's advice that the measure would fall within the exceptions under the Privacy Act, the APPs do not appear to be an adequate safeguard to protect the right to privacy in this instance.

2.20 In conclusion, concerns remain as to whether the proposed limitation on the right to privacy is proportionate. While an international agreement may operate as a safeguard insofar as it could elucidate the precise circumstances in which interferences with privacy may be permitted and include adequate privacy protections, the effectiveness of this safeguard will depend on the specific contents and enforceability of each agreement. In negotiating agreements, there remains a risk that adequate privacy protections may not be mutually agreed to and complied with by a foreign government. Additionally, the Privacy Act and the APPs are unlikely to operate as an effective safeguard as the information sharing arrangement would appear to fall within the exceptions under the Privacy Act.

2.21 Regarding the possibility that the measure engages and limits the right to life or engages the prohibition against torture or cruel, inhuman or degrading treatment or punishment, the Treasurer has stated that it is difficult to predict whether the sharing of protected information may result in persons being at risk of the death penalty or being exposed to torture or cruel, inhuman or degrading treatment or punishment in a foreign country. This is because such a risk is highly dependent on the particular circumstances of each case. The Treasurer has advised that such a risk can be considered in any decision to share information. In negotiating agreements, the Treasurer has stated that the government intends to act consistently with its official policy to oppose the death penalty, and to the extent relevant, be guided by its broader approach to seek assurances of protection against exposing a person to the death penalty or to torture or cruel, inhuman or degrading treatment or punishment in relation to extradition treaties and mutual assistance arrangements. Additionally, the Treasurer has noted that an agreement may be negotiated to limit the use of the information for investigation and enforcement of foreign investment related legislation only and require that the death penalty not be imposed. In such cases, the Treasurer has stated that seeking explicit assurances would appear to be unnecessary.

2.22 As regards the government's intention to seek assurances of protection, it should be noted that assurances may be able to serve as a safeguard to protect persons against exposure to the death penalty. The UN Human Rights Committee has

stated that, for this to be the case, diplomatic assurances must be 'credible and effective…against the imposition of the death penalty'.[15] However, it has also noted that diplomatic assurances alone may not be sufficient to eliminate the risk in circumstances where there is no mechanism for monitoring of their enforcement or no means through which the assurances could be effectively implemented.[16] There are also significant questions around whether diplomatic assurances not to subject a person to torture or cruel, inhuman or degrading treatment or punishment can ever be sufficient, noting the unenforceability of such assurances and the difficulties in monitoring compliance.[17] As regards the effectiveness of including a condition in an agreement that the death penalty not be imposed, this will depend on the form of the agreement and its enforceability.

2.23 The Treasurer has noted that the government has not yet commenced negotiating any agreement under section 123B, but where such negotiations result in a treaty level agreement, it will be subject to scrutiny by the Joint Standing Committee on Treaties. Review by the Joint Standing Committee on Treaties could provide an important level of oversight and scrutiny but would only apply to treaty level agreements. It is also noted that such a review would not necessarily consider the human rights implications of any such agreement. While the government may intend to act consistently with its policy to oppose the death penalty and seek assurances or the inclusion of conditions in agreements regarding the limited use of information for a specified purpose, it is not a legal requirement to do so. The measure does not prohibit the sharing of information with a foreign government or entity in circumstances that could expose a person to the death penalty or to torture or cruel, inhuman or degrading treatment or punishment. The UN Human Rights Committee has previously raised concerns that Australia lacks 'a comprehensive prohibition on the providing of international police assistance for the investigation of crimes that may lead to the imposition of the death penalty in another state', and concluded that Australia should take steps to ensure it 'does not provide assistance in the investigation of crimes that may result in the imposition of the death penalty

15 UN Human Rights Committee, *General Comment No.36 on Article 6, on the right to life* (2018) [34].

16 *Alzery v Sweden,* UN Human Rights Committee Communication No.1416/2005 (2006) [11.5].

17 See Manfred Nowak, Report of the Special Rapporteur on the question of torture, 1st report to the Commission on Human Rights, E/CN.4/2006/6, 23 December 2005, [32]: 'diplomatic assurances with regard to torture are nothing but attempts to circumvent the absolute prohibition of torture and refoulement, and that rather than elaborating a legal instrument on minimum standards for the use of diplomatic assurances … States [should be called on] to refrain from seeking and adopting such assurances with States with a proven record of torture'. See also *Agiza v Sweden* 2005, Committee Against Torture, CAT/C/34/D/233/2003, 20 May 2005, [13.4]; *Saadi v Italy*, European Court of Human Rights, Application no. 37201/06 (28 February 2008), [147]–[148].

in another State'.[18] Without a comprehensive prohibition, the Treasurer's discretion to consider the risk of exposing a person to the death penalty or to torture or cruel, inhuman or degrading treatment or punishment with respect to decisions to share information with a foreign government, and seek assurances where appropriate, appears to be insufficient for the purpose of meeting Australia's obligations with respect to the right to life and the prohibition on torture or cruel, inhuman or degrading treatment or punishment.

Committee view

2.24 The committee thanks the Treasurer for this response. The committee notes that the measure serves a very important purpose in safeguarding Australia's national security, by authorising the disclosure of protected information relating to national security, including personal information, to a foreign government or entity for the purpose of assisting the foreign government or entity to perform a function or duty, or exercise a power.

2.25 The committee notes the Treasurer's advice that the scope of sharing information with foreign governments needs to be sufficiently broad to provide the Treasurer with flexibility in assessing and addressing national security risks. It also notes the Treasurer's advice that there are protections in place to limit disclosure, notably, that information cannot be used or further disclosed unless in accordance with an agreement, and the government's obligations under the *Privacy Act 1988*.

2.26 Where an agreement with a foreign country includes adequate privacy protections and sufficiently circumscribes the circumstances in which interferences with a person's privacy may be permitted, this could operate to safeguard the right to privacy. However, the committee notes that the strength of this safeguard may vary depending on the mutually agreed standards and enforceability mechanisms contained in each agreement. The committee further notes the Treasurer's advice that the information sharing arrangements fall within the exceptions under the *Privacy Act 1988*. Accordingly, the Australian Privacy Principles may not necessarily operate to safeguard the right to privacy with respect to this measure. As such, the committee considers that some questions remain as to whether the proposed limitation on the right to privacy would be proportionate in all circumstances.

2.27 To assist with the proportionality of this measure with respect to the right to privacy, the committee recommends that the Act be amended to provide that:

(a) when considering disclosure of protected information to a foreign government or entity, an individual's right to privacy is considered, including the likely extent of interference with the privacy of any

18 UN Human Rights Committee, *Concluding observations on the fifth periodic report of Australia*, CCPR/C/AUS/CO/5 (2009) [20].

person or persons so as to ensure that any limitation on the right to privacy is only as extensive as is strictly necessary; and

(b) adequate privacy protections around the handling of personal information and protection of personal information from unauthorised disclosure are included as enforceable standards in all negotiated agreements with a foreign government.

2.28 With respect to the right to life and prohibition against torture or cruel, inhuman or degrading treatment or punishment, the committee notes the Treasurer's advice that it is difficult to predict whether the sharing of protected information may result in a risk of exposing a person to the death penalty or to torture or cruel, inhuman or degrading treatment or punishment in a foreign country because such a risk is highly dependent on the particular circumstances of each case. The committee notes the Treasurer's advice that the government intends to act consistently with its official policy to oppose the death penalty and its broader approach to seek assurances. The committee considers that where there is a risk of the death penalty being applied, this may be mitigated by including conditions in an agreement that protected information only be used in matters that would not lead to the application of the death penalty. However, noting that there is no legislative requirement to prohibit the sharing of personal information in circumstances that may expose a person to a real risk of the death penalty being applied or to ill treatment, the committee considers that discretionary considerations and assurances may be insufficient for the purpose of meeting Australia's obligations with respect to the right to life and the prohibition on torture or cruel, inhuman or degrading treatment or punishment.

2.29 To assist with the compatibility of the measure, the committee recommends that the Act be amended to provide that where there are substantial grounds for believing there is a real risk that disclosure of information to a foreign government may expose a person to the death penalty or to torture or cruel, inhuman or degrading treatment or punishment, protected information must not be shared with that government.

2.30 The committee draws these human rights concerns to the attention of the Parliament.

Treasurer's powers to give directions

2.31 The bill seeks to allow the Treasurer to make a direction if they have 'reason to believe' that a person has engaged, is engaging, or will engage in conduct that would constitute a contravention of the Act.[19] The Treasurer may direct the person to engage in conduct that addresses or prevents the contravention or a similar or

19 Schedule 1, Part 1, item 132, proposed subsection 79R(1).

related contravention.[20] Proposed subsection 79R(7) states that this includes the power to direct specified persons or specified kinds of persons, such as 'persons who are not Australian citizens, or who are foreign persons', to cease being or not become senior officers of a corporation.[21] The Treasurer may also direct that a specified proportion of the senior officers of the corporation are not specified kinds of people.[22] A direction made by the Treasurer must be published on a website maintained by the Department as soon as practicable after it is made.[23] Failing to comply with a direction made by the Treasurer is a criminal offence subject to up to 10 years imprisonment or 15,000 penalty units, or subject to a civil penalty of up to 5,000 penalty units.[24]

Summary of initial assessment

Preliminary international human rights legal advice

Rights to work, equality and non-discrimination, and privacy

2.32 By authorising the Treasurer to make directions requiring specified persons or kinds of persons to cease being, or not become, senior officers of a corporation, the right to work is engaged and limited. The right to work provides that everyone must be able to freely accept or choose their work, and includes a right not to be unfairly deprived of work.[25] This right must be made available in a non-discriminatory way.[26]

2.33 While the directions power may apply to any person who has contravened, or may contravene, the Act, insofar as the directions power may apply to persons on the basis that they are foreign persons (being those not ordinarily resident in

20 Schedule 1, Part 1, item 132, proposed subsection 79R(3). Directions that can be made under proposed section 79R can be extended by regulations: explanatory memorandum, p. 108.

21 Schedule 1, Part 1, item 132, proposed subsections 79R(7)(a)–(d). Proposed subsection 79R(7) sets out a non-exhaustive list of conduct to be engaged in as specified in the direction.

22 Schedule 1, Part 1, item 132, proposed subsection 79R(7)(e).

23 Schedule 1, Part 1, item 132, proposed section 79S. The Treasurer may decide to not publish a direction on a website maintained by the Department if it would be contrary to the national interest: proposed subsection 79S(2).

24 Schedule 1, Part 1, item 158, proposed section 88A. Contravention of a direction or interim direction is a civil penalty provision where the provision to which the relevant contravention relates is a civil penalty provision: Schedule 2, item 16, proposed section 98A. See also explanatory memorandum, p. 112. The civil penalty provisions in the bill are discussed in further detail below at paragraph [2.53]-[2.55].

25 International Covenant on Economic, Social and Cultural Rights, articles 6–7. See also, UN Committee on Economic, Social and Cultural Rights, *General Comment No. 18: the right to work (article 6)* (2005) [4].

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

Australia) and persons who are not Australian citizens[27] and may have the effect of depriving them of certain types of work, the measure also engages and limits the right to equality and non-discrimination. This right provides that everyone is entitled to enjoy their rights without discrimination of any kind and that all people are equal before the law and entitled without discrimination to equal and non-discriminatory protection of the law.[28] The right to equality encompasses both 'direct' discrimination (where measures have a discriminatory *intent*) and 'indirect' discrimination (where measures have a discriminatory *effect* on the enjoyment of rights).[29] Where the direction may treat non-Australian citizens differently to Australian citizens, this would have the effect of constituting direct discrimination. Where the direction may treat foreign persons (being those not ordinarily resident in Australia) differently to Australian residents, this may impact on non-nationals disproportionately and may constitute indirect discrimination.[30]

2.34 Additionally, as the measure would authorise interference with a person's private life and workplace, and require that directions, which may contain personal information, be published on a public website, the right to privacy is engaged and limited. The right to privacy prohibits arbitrary and unlawful interferences with an individual's privacy, family, correspondence or home.[31] This includes a requirement that the state does not arbitrarily interfere with a person's private and home life, which includes a person's workplace.[32] The right to privacy also includes respect for informational privacy, including the right to respect for private and confidential information, particularly the storing, use and sharing of such information.[33]

2.35 The rights to work, equality and non-discrimination and privacy 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.

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27 See for example Schedule 1, Part 1, item 132, proposed paragraphs79R(7)(c)–(e).

28 International Covenant on Civil and Political Rights, articles 2 and 26. Article 2(2) of the International Covenant on Economic, Social and Cultural Rights also prohibits discrimination specifically in relation to the human rights contained in the International Covenant on Economic, Social and Cultural Rights.

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

30 *D.H. and Others v the Czech Republic,* European Court of Human Rights (Grand Chamber), Application no. 57325/00 (2007) [49]; *Hoogendijk v the Netherlands*, European Court of Human Rights, Application no. 58641/00 (2005).

31 International Covenant on Civil and Political Rights, article 17 and UN Human Rights Committee, *General Comment No. 16: Article 17* (1988) [3]–[4].

32 UN Human Rights Committee, *General Comment No. 16: Article 17* (1988) [5].

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

2.36 In order to assess the compatibility of this measure with the rights to work, equality and non-discrimination and privacy, further information is required as to:

(a) what is the substantial and pressing concern that the measure seeks to address and how is the measure rationally connected to the objective;

(b) what, if any, safeguards are in place to ensure that the measure does not unlawfully discriminate against persons with protected attributes, particularly national origin;

(c) why is it appropriate that the standard of 'reason to believe' should be required for the Treasurer to make directions, noting the potential interference with human rights by making a direction, and whether 'reason to believe' imports a requirement that the belief must be one that is reasonable;

(d) why the bill does not set out that the Treasurer is required to afford a person an opportunity to make submissions on the matter before the Treasurer makes or varies a direction;

(e) whether consideration has been given to other less rights restrictive ways to achieve the objective; and

(f) whether there is the possibility of oversight and the availability of review of the Treasurer's decision to make a direction.

Committee's initial view

2.37 The committee noted that this measure engages and may limit the rights to work, equality and non-discrimination and privacy. These rights may be subject to permissible limitations if they are shown to be reasonable, necessary and proportionate.

2.38 The committee noted that the measure pursues the legitimate objective of ensuring compliance with the Act and supporting early regulatory intervention in order to protect further or ongoing harm to the national interest. However, further information was required as to whether the measure addresses a substantial and pressing concern and is rationally connected to the objective, and is proportionate.

2.39 In order to form a concluded view of the human rights implications of these measures, the committee sought the Treasurer's advice as to the matters set out at paragraph [2.36].

2.40 The full initial analysis is set out in *Report 14 of 2020*.

Treasurer's response[34]

2.41 The Treasurer advised:

> Treasury's approach to managing compliance has evolved over recent years as the nature and type of acquisitions has changed. It has become increasingly clear that community expectations have risen, and Members of Parliament expect Treasury to be able to assure the Australian community that effective monitoring and compliance arrangements are in place.
>
> The amendments meet these expectations by enhancing and expanding the Treasury's enforcement and compliance toolkit. The Bill brings the compliance and enforcement tools available to Treasury in line with other regulators, including those in the Treasury portfolio.
>
> The Bill introduces new powers to provide the Treasurer with the ability to give directions to investors to prevent or address suspected breaches of conditions or of foreign investment laws, providing the Treasurer the ability to respond to actual or likely non-compliance. This is similar to the Australian Prudential Regulation Authority's power under the *Superannuation Industry (Supervision) Act 1993* to issue a direction to a person who is in control of the RSE licensee to relinquish that control, where APRA has reason to believe that the person has been, or is unlikely to be, able to satisfy one or more of the trustee's obligations, does not have the relevant approvals, or provided false or misleading information.
>
> The Treasurer's directions are designed to provide a quick and efficient response to the conduct of a person and to require the person to promptly remedy a breach of the FATA. The power supports early regulatory intervention in order to protect further or ongoing harm to the national interest.
>
> The measure will ensure that the Treasurer will have sufficient powers to intervene early to ensure compliance with the FATA. Directions given by the Treasurer are aimed at protecting Australia's national interest and preventing or addressing suspected breaches of the law.
>
> The term 'reason to believe' is not intended to create a lower or different bar to the term 'reasonably believes'. It is an appropriate standard to apply here as the directions and interim directions are intended to be flexible and responsive mechanisms to enable prompt regulatory action and remedies, as stated above.

34 The Treasurer's response to the committee's inquiries was received on 22 December 2020. This is an extract of the response. The response is available in full on the committee's website at: https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Scrutiny_reports.

The issue of a directions order by the Treasurer is aimed at correcting or preventing non-compliance. Therefore the provisions do not apply to the general public, but to persons and entities who should be reasonably aware of their obligations under the FATA.

Procedural fairness and the opportunity for a person to engage with the Treasury prior to enforcement action being taken is inherent in the approach taken to administering Australia's foreign investment screening regime. It has been longstanding practice of the Treasury to work with a foreign investor to achieve compliance where non-compliance is identified. Procedural fairness obligations already apply to the Government's ongoing administration of the FATA, and a requirement to meet its procedural fairness obligations being placed on the face of the Bill would create doubt elsewhere in the FATA where procedural fairness obligations already apply. In accordance with existing procedural fairness obligations, Treasury gives persons an opportunity to make submissions on a matter before Treasury provides advice or the Treasurer makes or varies a direction.

Finally, in terms of review, administrative decisions made under the FATA are subject to judicial review under section 39B of the *Judiciary Act 1903*.

Concluding comments

International human rights legal advice

Rights to work, equality and non-discrimination, and privacy

2.42 With respect to the objective being pursued by the measure, the Treasurer has advised that the Treasurer's directions powers meet community expectations by enhancing and expanding the Treasury's enforcement and compliance toolkit. The Treasurer has stated that the community and members of Parliament now expect the Treasury to be able to assure the Australian community that effective monitoring and compliance arrangements are in place with respect to breaches of foreign investment laws. The directions powers are intended to provide the Treasurer with the power to quickly and efficiently respond to actual or likely non-compliance with FATA and to require a person to promptly remedy a breach. The Treasurer explains that this power supports early regulatory intervention in order to protect further or ongoing harm to the national interest.

2.43 The initial analysis noted that while the objective of ensuring compliance with FATA in order to protect the national interest may be capable of constituting a legitimate objective, it was unclear whether the measure addressed a pressing and substantial concern for the purposes of international human rights law. A legitimate objective is one that is necessary and addresses an issue of public or social concern that is pressing and substantial enough to warrant limiting the right. Community expectations or seeking an outcome that is regarded as desirable or convenient is not generally a sufficient justification for limiting human rights. The Treasurer's response does not explain why it is necessary to introduce pre-emptive compliance

powers rather than responding to contraventions if they occur. While pursuing the objective of ensuring compliance with the FATA would appear to be desirable, without further information regarding the extent of actual or likely non-compliance and the substantial or pressing need to expand pre-emptive enforcement powers, it is difficult to conclude that the measure pursues a legitimate objective for the purposes of international human rights law.

2.44 In assessing the proportionality of the measure, the scope of the directions power and the basis on which a direction can be made are relevant considerations in determining whether the proposed limitation is sufficiently circumscribed. The Treasurer has stated that the directions to be given by the Treasurer are aimed at protecting Australia's national interest and preventing or addressing suspected or actual breaches of the FATA. The Treasurer has noted that the measure applies to persons or entities who are subject to the FATA and should be reasonably aware of their obligations under the FATA. Regarding the basis on which a direction can be made, the Treasurer has advised that the standard 'reason to believe' that a person has engaged, is engaging, or will engage in conduct that would constitute a contravention of the Act, is not intended to be a lower or different bar to the standard 'reasonably believes'. The Treasurer has stated that the standard 'reason to believe' is appropriate in the circumstances as the directions are intended to be flexible and responsive mechanisms to enable prompt regulatory action and remedies.

2.45 As noted in the initial analysis, laws conferring discretionary powers on the executive, which limit human rights, must indicate with sufficient clarity the scope of any such power or discretion conferred on competent authorities and the manner of its exercise.[35] This is because, without sufficient precision and the existence of safeguards, broad powers may be exercised in such a way as to be incompatible with human rights. The Treasurer's response indicates that the measure is intended to apply in a regulatory context and those to whom it is addressed are reasonably likely to be aware of their obligations under the FATA. The Treasurer has clarified that the standard on which a direction can be made is not lower than the standard 'reasonably believes' and would appear to import a requirement that the belief must be one that is reasonable. However, while some degree of flexibility is required in order to address actual or likely non-compliance and accepting that the measure cannot provide for every eventuality, concerns remain that the scope of the directions powers is very broad. The measure empowers the Treasurer to direct a person to engage in conduct as specified in the direction, in order to address or prevent a contravention or related contravention. The legislation does not limit the

35 *Hasan and Chaush v Bulgaria,* European Court of Human Rights App No.30985/96 (2000) [84].

type of conduct that can be specified in the direction.[36] On this basis, there remain concerns as to whether the proposed limitation is sufficiently circumscribed.

2.46 The existence of safeguards is also relevant in considering proportionality. The Treasurer has advised that procedural fairness and providing a person with the opportunity to engage with the Treasury prior to enforcement action being taken is inherent in the approach taken by the government in administering the FATA. The Treasurer has explained that including in the Act a requirement to meet procedural fairness obligations would create doubt elsewhere in the FATA where procedural fairness obligations already apply. The Treasurer has noted that it is the practice of the Treasury to afford a person an opportunity to make a submission on the matter before the Treasurer makes or varies a direction. If the directions power is exercised in the manner set out by the Treasurer, whereby all persons are afforded an opportunity to make a submission on the matter before a direction is made or varied, the Treasurer's procedural fairness obligations may serve as an important safeguard against the arbitrary exercise of executive discretion.

2.47 Another relevant factor in assessing the proportionality of the measure is whether there is the possibility of oversight and the availability of review. The Treasurer has stated that administrative decisions made under the FATA are subject to judicial review under section 39B of the *Judiciary Act 1903.* While judicial review of the Treasurer's decision to make or vary a direction is available, external merits review is not. Judicial review in Australia represents a limited form of review in that it allows a court to consider only whether the decision was lawful (that is, within the power of the relevant decision maker). The court cannot undertake a full review of the facts (that is, the merits), as well as the law and policy aspects of the original decision to determine whether the decision is the correct or preferable decision. While access to review is an important safeguard, its effectiveness may be weakened by the lack of access to merits review.

2.48 In conclusion, questions remain as to whether the measure addresses a substantial and pressing concern for the purposes of establishing a legitimate objective and is a proportionate means of achieving that objective. In particular, noting that the extent of interference with human rights could be quite substantial, such as depriving a person of certain types of work, concerns remain that the scope of the directions power is very broad and there is no access to merits review. As such, it is not clear that the measure includes sufficient safeguards to adequately protect the rights to work, equality and non-discrimination, and privacy.

36 In exercising the power, the Treasurer may be guided by a non-exhaustive list of directions in subsection 79R(7) as well as any directions prescribed in regulations: Schedule 1, Part 1, item 132, Division 5, proposed subsections 79R(3) and (7).

Committee view

2.49 The committee thanks the minister for this response. The committee notes that the measure would allow the Treasurer to make a direction if they have reason to believe that a person has engaged, is engaging or will engage in conduct which would constitute a contravention of the *Foreign Acquisitions and Takeovers Act 1975* (FATA). This could include directions that ensure specified persons (such as non-Australian citizens) not be senior officers of specified corporations.

2.50 The committee notes that the measure pursues the important objective of expanding the Treasurer's compliance and enforcement powers to support early regulatory intervention in order to protect further or ongoing harm to the national interest. The committee notes the Treasurer's advice that enhancing and expanding the Treasury's enforcement and compliance powers will also meet community expectations. The committee accepts that these objectives may be legitimate but notes that questions remain as to whether the measure addresses a social concern that is pressing and substantial enough to warrant limiting human rights.

2.51 As regards proportionality, the committee accepts the Treasurer's advice that it is the longstanding practice of the Treasury to apply procedural fairness obligations in administering the FATA and persons who may be subject to a direction will have an opportunity to make a submission on the matter to the Treasurer before a direction is made or varied. The committee notes the legal advice that these safeguards may not be adequate in light of the broad scope of the directions power and the lack of access to merits review. As such, the committee considers it is not clear that the measure includes sufficient safeguards to adequately protect the rights to work, equality and non-discrimination, and privacy.

2.52 The committee draws these human rights concerns to the attention of the Parliament.

Civil penalty provisions

2.53 Schedule 2 of the bill seeks to introduce and significantly increase the penalties for contraventions of civil penalty provisions. With respect to the proposed directions power, for example, a person who fails to comply with a Treasurer's direction or interim direction would be liable to a civil penalty of 5,000 penalty units ($1.11 million).[37] Schedule 2 would also introduce a civil penalty of up to 2,500,000 penalty units (up to $555 million) for persons who provide false or misleading

37 Schedule 2, Part 1, item 16, proposed section 98A. A penalty unit is $222: *Crimes Act 1914*, subsection 4AA(1A) and Notice of Indexation of the Penalty Unit Amount 2020.

information to the Treasurer in relation to a no objection notification.[38] Information could be false or misleading because of the omission of a matter or thing.[39] Likewise a person who contravenes a condition specified in a no objection notification or a notice imposing conditions would be liable to a civil penalty of up to 2,500,000 penalty units ($555 million).[40]

Summary of initial assessment

Preliminary international human rights legal advice

Right to a fair hearing

2.54 The significant increase in civil penalties, including up to 2,500,000 penalty units ($555 million) for individuals, raises the risk that these penalties may be considered criminal in nature under international human rights law. Under Australian law, civil penalty provisions are dealt with in accordance with the rules and procedures that apply in relation to civil matters (the burden of proof is on the balance of probabilities). However, if the new civil penalty provisions are regarded as 'criminal' for the purposes of international human rights law, they will engage the criminal process rights under articles 14 and 15 of the International Covenant on Civil and Political Rights, including the right to be presumed innocent until proven guilty according to law,[41] which requires that the case against the person be demonstrated on the criminal standard of proof of beyond reasonable doubt. In assessing whether a civil penalty may be considered criminal, it is necessary to consider the domestic classification of the penalty as civil or criminal; the nature of the penalty; and the severity of the penalty.

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

(a) noting the potential severity of the civil penalties, why any of the civil penalties would not be characterised as criminal for the purposes of international human rights law; and

(b) if such penalties are 'criminal' for the purposes of international human rights law, how are these compatible with criminal process rights under international human rights law

38 Schedule 2, Part 1, item 16, proposed section 98B. Subsection 3 provides that the maximum penalty for contravention of section 98B is the lesser of the following: 2,500,000 penalty units or the greater of the following: 5,000 penalty units or the sum of the amounts worked out under section 98F.

39 Schedule 2, Part 1, item 16, proposed subsection 98B(7).

40 Schedule 2, Part 1, item 14, proposed section 93.

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

Committee's initial view

2.56 The committee considered that increasing civil penalties may be appropriate given the potential financial benefits that may be derived from illegal behaviour and the potential harm to the national interest. However, noting the substantial pecuniary sanctions that would apply to individuals, including up to 2,500,000 penalty units ($555 million), there is a risk that the penalties may be so severe as to constitute a criminal sanction under international human rights law. If the penalties were to be considered 'criminal' under international human rights law, the proposed provisions must be shown to be consistent with the criminal process guarantees set out in articles 14 and 15 of the International Covenant on Civil and Political Rights.

2.57 In order to form a concluded view of the human rights implications of these measures, the committee sought the Treasurer's advice as to the matters set out at paragraph [2.55].

2.58 The full initial analysis is set out in *Report 14 of 2020*.

Treasurer's response[42]

2.59 The Treasurer advised:

> Consideration has been given to the guidance set out in the Parliamentary Joint Committee on Human Rights' *Guidance Note 2: Offence provisions, civil penalties and human rights* and to the Attorney General's Department's *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*.
>
> The Guidance Note observes that civil penalty provisions may engage criminal process rights under articles 14 and 15 of the International Covenant on Civil and Political Rights (ICCPR), regardless of the distinction between criminal and civil penalties in domestic law. This is because the word 'criminal' has an autonomous meaning in international human rights law. When a provision imposes a civil penalty, an assessment is therefore required as to whether it amounts to a 'criminal' penalty for the purposes of articles 14 and 15 of the ICCPR.
>
> While the civil penalties under the Bill are not classified as criminal under Australian law, consideration is nonetheless given to the nature, purpose and severity of the penalties.
>
> The purpose of the increase to the maximum civil penalty is to act as a sufficient deterrent for misconduct. Treasury considers that the increased penalties do not amount to criminal penalties because the penalties do not

42 The Treasurer's response to the committee's inquiries was received on 22 December 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.

apply to the public at large and are limited to persons and entities whose investments are screened under the FATA. These persons and entities should be aware of their obligations under the FATA. For example, a foreign person who has been given a no objection notification under section 74 or 75 or an exemption certificate given under Division 5 of Part 2 must not contravene a condition specified in the notification or in the certificate.

The maximum penalty for contravening a civil penalty provision for an individual is either 5,000 penalty units or 75 per cent of the value to which the alleged contravention relates, determined according to the introduced valuation rules. While this penalty is substantial, it is also comparable to recent penalty increases in the *Australian Securities and Investments Commission Act 2001*. The maximum penalty enables the imposition of an effective and commensurate penalty, noting that certain investments are not screened under the FATA unless the value of the investment exceeds $1.192 billion. The increased penalty reflects the size and nature of the investments being screened under the FATA. The increased penalty also ensures civil penalties for individuals proportionately align with the increase in civil penalties for bodies corporate, and act as a sufficient deterrent for misconduct.

In practice, it is intended that courts would use their discretion to impose an appropriate penalty. The penalties in the Bill are the maximums that a court can impose, taking into account the facts and circumstances of each case.

The method for calculating the applicable civil penalty provides flexibility which ensures that the penalty reflects the seriousness of the contravention and community expectations. It will ensure that incurring a civil penalty is not merely considered a cost of doing business, and that the penalty amount is appropriate to deter and address misconduct.

While the civil penalty amounts are intended to deter misconduct, none of the civil penalty provisions carry a penalty of imprisonment. The civil penalty provisions should not be considered 'criminal' for the purpose of human rights law due to their application in ensuring compliance with the FATA. Therefore, the civil penalty provisions do not create criminal offences for the purposes of articles 14 and 15 of the ICCPR.

Furthermore, the increased penalties for civil penalty provisions will apply to offences that are committed after the Bill commences and will apply prospectively, therefore upholding article 15 of the ICCPR.

Concluding comments

International human rights legal advice

Right to a fair trial

2.60 As to whether the civil penalty provisions should be considered 'criminal' for the purposes of international human rights law, the Treasurer has advised that the

purpose of increasing the maximum civil penalty amount is to act as a sufficient deterrent for misconduct. The Treasurer has noted that the penalties do not apply to the general public and are limited to persons or entities whose investments are screened under the FATA, noting that certain investments are not screened under the FATA unless the value of the investment exceeds $1.192 billion. The Treasurer has stated that such persons or entities should be aware of their obligations under the FATA. The Treasurer has explained that the increased penalty reflects the size and nature of the investment and is an appropriate amount to deter and address misconduct. Further, the Treasurer has noted that the penalties apply prospectively, and the courts would use their discretion to impose an appropriate penalty.

2.61 In assessing whether a civil penalty should be regarded as criminal, it is necessary to consider the domestic classification of the penalty; the nature of the penalty; and the severity of the penalty. The civil penalty provisions are classified as 'civil' not 'criminal', although this is not determinative. The penalties apply to persons or entities whose investments are screened under the FATA and would therefore appear to be restricted to a specific regulatory context rather than applying to the public at large. The penalties do not carry a term of imprisonment, although may impose a substantial pecuniary sanction. While these factors may support classifying the civil penalties as 'civil', there are also factors which indicate that the penalties could be regarded as 'criminal' for the purposes of international human rights law. In particular, the penalties are intended to deter misconduct and carry a substantial pecuniary sanction, including up to 2,500,000 penalty units ($555 million) for individuals. The severity of the pecuniary sanction raises concerns that the penalty may constitute a criminal sanction for the purposes of international human rights law.

2.62 As noted in the initial analysis, if the civil penalty provisions were considered to be 'criminal' for the purposes of international human rights law, this neither means that the relevant conduct must be turned into a criminal offence in domestic law nor that the civil penalty is illegitimate. Instead, it means that the civil penalty provisions in Schedule 2 must be shown to be consistent with the criminal process guarantees set out in articles 14 and 15 of the International Covenant on Civil and Political Rights, including the right to be presumed innocent until proven guilty according to law.[43] This right requires that the case against the person be demonstrated on the criminal standard of proof, that is, it must be proven beyond reasonable doubt. The standard of proof applicable in civil penalty proceedings is the civil standard of proof, requiring proof on the balance of probabilities. If the civil penalties in Schedule 2 were considered to be 'criminal', the lower standard of civil proof would appear to limit article 14. The Treasurer's response did not explain whether any such limit would be permissible under international human rights law.

43 It is noted that the civil penalties apply prospectively and thus do not engage article 15 of the International Covenant on Civil and Political Rights.

As such, it is not possible to conclude that these substantial civil penalties are compatible with the criminal process rights under the International Covenant on Civil and Political Rights.

Committee view

2.63 The committee thanks the Treasurer for this response. The committee notes that Schedule 2 of the bill seeks to significantly increase penalties for contraventions of civil penalty provisions.

2.64 The committee considers that increasing the maximum penalty for contravening civil penalty provisions is an important measure to deter serious misconduct. The committee notes the Treasurer's advice that the penalty amount is appropriate to ensure that incurring a civil penalty is not merely considered a cost of doing business. The committee considers that there are factors which suggest the civil penalty provisions would be considered 'civil' for the purposes of international human rights law, including their domestic classification, their application in a regulatory context and their imposition of a pecuniary sanction rather than a term of imprisonment. However, noting the purpose of the increased civil penalty is to deter misconduct and the potential pecuniary sanction is substantial, including up to 2,500,000 penalty units ($555 million) for individuals, there remains a risk that the penalties may be so severe as to amount to a criminal sanction under international human rights law. If the penalties were considered to be 'criminal', the committee notes that this does not mean the relevant conduct must be classified as a criminal offence or that the civil penalty is illegitimate. Rather, it must be shown that the provisions are consistent with the criminal process guarantees set out in article 14 the International Covenant on Civil and Political Rights. Without information in relation to this, it is not possible to conclude that these civil penalties are compatible with the criminal process rights under international human rights law.

2.65 The committee draws these human rights concerns to the attention of the Parliament.

Higher Education Support Amendment (Freedom of Speech) Bill 2020[1]

Purpose	This bill seeks to amend the *Higher Education Support Act 2003* to: • insert a new definition of 'academic freedom'; and • replace the existing term 'free intellectual inquiry' with 'freedom of speech' and 'academic freedom'
Portfolio	Education
Introduced	House of Representatives, 28 October 2020
Rights	Multiple rights

2.66 The committee requested a response from the minister in relation to the bill in *Report 14 of 2020*.[2]

Academic freedom and freedom of expression

2.67 This bill seeks to amend the *Higher Education Support Act 2003* (the Act) to provide that one of the objectives of the Act is to support a higher education system that promotes and protects freedom of speech and academic freedom.[3] The bill would also require higher education providers to have a policy upholding freedom of speech and academic freedom.[4]

2.68 The term 'freedom of speech' is not defined by the bill or in the Act. The bill would define the term 'academic freedom' to mean:

(a) the freedom of academic staff to teach, discuss, and research and to disseminate and publish the results of their research;

(b) the freedom of academic staff and students to engage in intellectual inquiry, to express their opinions and beliefs, and to contribute to public debate, in relation to their subjects of study and research;

1 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Higher Education Support Amendment (Freedom of Speech) Bill 2020, *Report 1 of 2021*; [2021] AUPJCHR 9.

2 Parliamentary Joint Committee on Human Rights, *Report 14 of 2020* (25 November 2020), pp. 26-33.

3 Schedule 1, item 1, proposed subparagraph 2-1(a)(iv).

4 Schedule 1, item 3, proposed section 19-115.

(c) the freedom of academic staff and students to express their opinions in relation to the higher education provider in which they work or are enrolled;

(d) the freedom of academic staff to participate in professional or representative academic bodies;

(e) the freedom of students to participate in student societies and associations;

(f) the autonomy of the higher education provider in relation to the choice of academic courses and offerings, the ways in which they are taught and the choices of research activities and the ways in which they are conducted.[5]

Summary of initial assessment

Preliminary international human rights legal advice

Multiple rights

2.69 This bill seeks to enhance protections around freedom of expression, as well as provide for the protection of academic freedom, in higher education institutions. In this respect, these measures may promote a number of human rights, including the rights to freedom of expression, education, and to benefit from cultural and scientific progress. The right to freedom of expression includes the freedom to seek, receive and impart information and ideas of all kinds, either orally, in writing or print, in the form of art, or through any other media of an individual's choice.[6] The right to education provides that education should be accessible to all, and requires that States Parties recognise the right of everyone to education, and agree that education shall be directed to the full development of the human personality and sense of dignity, and shall strengthen the respect for human rights and fundamental freedoms.[7] The United Nations (UN) Committee on Economic, Social and Cultural Rights has stated that academic freedom includes the liberty of individuals to express freely opinions about the institution or system in which they work, to fulfil their functions without discrimination or fear of repression by the State, and to enjoy all

5 Schedule 1, item 4.

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

7 International Covenant on Economic, Social and Cultural Rights, article 13. Article 15 further provides that every person has a right to take part in cultural life, to enjoy the benefits of scientific progress and its applications, and to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which they are the author.

the internationally recognised human rights applicable to other individuals in the same jurisdiction.[8]

2.70 It is also necessary, however, to consider the human rights which operate synchronously with the right to freedom of expression, and in relation to which its exercise must be balanced. While the right to *hold* an opinion is absolute, and may never be permissibly limited under law,[9] the right to freedom of expression (that is, the freedom to *manifest* one's beliefs or opinions) is limited.[10] In particular, the International Covenant on Civil and Political Rights expressly provides that the advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.[11] The International Covenant on the Elimination of Racial Discrimination also requires States to make it an offence to disseminate 'ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin'.[12] These provisions are understood as constituting compulsory limitations on the right to freedom of expression.[13]

2.71 In addition, other human rights operate alongside (and must be balanced with) the right to freedom of expression, including:

- the right to privacy and reputation (which provides that no person shall be subjected to arbitrary or unlawful interference with their privacy, family,

8 UN Committee on Economic, Social and Cultural Rights, *General Comment No. 13: The Right to Education (Art. 13)* (1999) [39].

9 International Covenant on Civil and Political Rights, article 19(1).

10 Article 19(3) of the International Covenant on Civil and Political Rights states that the exercise of the right to freedom of expression carries with it special duties and responsibilities, and may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary: for respect of the rights or reputations of others; for the protection of national security or of public order; or of public health or morals.

11 International Covenant on Civil and Political Rights, article 20(2).

12 International Covenant on the Elimination of Racial Discrimination, article 4(a). Where each of the treaty provisions above refer to prohibition by law, and offence punishable by law, they refer to criminal prohibition. Although Australia has ratified these treaties, Australia has made reservations in relation to both the International Covenant on Civil and Political Rights and International Covenant on the Elimination of Racial Discrimination in relation to its inability to legislate for criminal prohibitions on race hate speech.

13 See, also, UN Special Rapporteur, F La Rue, *Annual Report of the Special Rapporteur on the promotion and protection of the right to freedom of expression and opinion*, Human Rights Council, UN Doc A/HRC/14/23 (20 April 2010) [79(h)] available at http://www.un.org/en/ga/search/view_doc.asp?symbol=A/HRC/14/23 (accessed 4 November 2020).

home or correspondence, or to unlawful attacks on their honour and reputation);[14]

- freedom of thought, conscience and religion (which is the right of all persons to think freely, and to entertain ideas and hold positions based on conscientious or religious or other beliefs, and to manifest those beliefs subject to certain limitations);[15] and
- the right to equality and non-discrimination (which provides that everyone is entitled to enjoy their rights without discrimination of any kind, and which protects persons from serious forms of racially discriminatory speech).[16]

2.72 The process of balancing the realisation of these rights may necessitate a limit on the right to freedom of expression. Such a limitation will be permissible where it is reasonable, necessary and proportionate.

2.73 Further information is required to establish how these proposed amendments would operate, and consequently to assess the compatibility of the bill, which would promote the right to freedom of expression, with other human rights. In particular:

(a) whether these proposed provisions may engage and limit other human rights, including the right to equality and non-discrimination, freedom of religion, privacy and reputation, and the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence;[17]

how these legislative provisions would operate in relation to existing Commonwealth, state and territory legislative prohibitions against discrimination; and

(b) whether these legislative provisions could restrict higher education providers' ability to take employment-related action against academic staff who engage in conduct that has been found to constitute incitement to discrimination.

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

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

16 International Covenant on Civil and Political Rights, articles 2 and 26. Article 2(2) of the International Covenant on Economic, Social and Cultural Rights also prohibits discrimination specifically in relation to the human rights contained in the International Covenant on Economic, Social and Cultural Rights.

17 The committee's guidance note 1 provides information as to when human rights may be limited.

Committee's initial view

2.74 The committee noted that these amendments are in response to the 2019 Report of the Independent Review of Freedom of Speech in Australian Higher Education Providers, undertaken by the Honourable Robert French AC, and are designed to strengthen protections for academic freedom and freedom of speech in Australian universities. The committee considered that these amendments will promote the right to freedom of expression, and the right to education, in higher education institutions in Australia. The committee noted the foundational importance of the right to freedom of expression in relation to the realisation of other human rights, and the importance of academic freedom.

2.75 The committee further noted that the promotion of freedom of expression must also be balanced with the realisation of other related human rights, and that the right to freedom of expression may be subject to permissible limitations if they are shown to be reasonable, necessary and proportionate.

2.76 In order to form a concluded view as to whether this bill, in addition to promoting the right to freedom of expression, limits any other rights, the committee sought the minister's advice as to the matters set out at paragraph [2.73].

2.77 The full initial analysis is set out in *Report 14 of 2020*.

Minister's response[18]

2.78 The minister advised:

> The effect of the Bill will be to require a higher education provider under HESA to have a policy that upholds freedom of speech and academic freedom, instead of the current requirement to have a policy that upholds free intellectual inquiry. In practice, this is not a major change and is intended to align the language of the legislation with that of the Model Code.
>
> The Explanatory Memorandum notes that, 'freedom of speech' does not mean that speech cannot be subject to reasonable limitations. The proposed provisions do not prevent speech being subject to reasonable and proportionate limits. As the Model Code itself, outlines, such limitations may be imposed by:
>
> - law;
> - the reasonable and proportionate regulation of conduct necessary to the discharge of the university's teaching and research activities

18 The minister's response to the committee's inquiries was received on 11 December 2020. This is an extract of the response. The response is available in full on the committee's website at: https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Scrutiny_reports.

- the right and freedom of others to express themselves and to hear and receive information and opinions
- the reasonable and proportionate regulation of conduct to enable the university to fulfil its duty to foster the wellbeing of students and staff
- the reasonable and proportionate regulation of conduct necessary to enable the university to give effect to its legal duties including its duties to visitors to the university.

While the Bill defines academic freedom for the purposes of HESA, it does not displace the operation of other relevant legislation such as Commonwealth, state or territory antidiscrimination law, or the *Fair Work Act 2009* and any enterprise agreements that operate under it (which may include anti-discrimination provisions).

The policies developed by providers to comply with HESA will also need to comply with other relevant legislated prohibitions against discrimination.

Concluding comments

International human rights legal advice

Multiple rights

2.79 The minister advised that the proposed provisions do not prevent speech from being subject to reasonable and proportionate limits. He advised that the amendments would not displace the operation of other relevant legislation, including existing anti-discrimination legislation or the *Fair Work Act 2009*, and stated that higher education providers would be required to comply with legislated prohibitions against discrimination. He further highlighted that the proposed Model Code itself (the language of which these amendments are intended to mirror) outlines the various bases on which freedom of speech may be permissibly limited, including where it is reasonable and proportionate to foster the wellbeing of students and staff.

2.80 Based on this advice, it would appear that these provisions would operate in tandem with existing laws. Australia has a number of existing laws that protect the right to reputation[19] and prohibit discrimination on a number of grounds,[20] including anti-vilification laws.[21] As the provisions of this bill are not intended to override those other laws, this may have the effect that a proportionate balance between protecting freedom of expression and other rights (including the right to reputation

19 See for example state and territory based defamation laws.

20 See, for example, at the Commonwealth level, the *Age Discrimination Act 2004, Disability Discrimination Act 1992, Racial Discrimination Act 1975,* and *Sex Discrimination Act 1984*. There is also anti-discrimination legislation at the state and territory level.

21 See Part IIA of the *Racial Discrimination Act 1975*.

and freedom from prohibited forms of discrimination) would be achieved. However, it is noted that it is not clear whether compliance with these proposed provisions would have the practical effect of providing greater protection for speech which may amount to hate speech under international law,[22] but which may not be fully prohibited under Australian law. For example, the UN Committee on the Elimination of Racial Discrimination has raised concerns about the operation of Australia's legislative anti-discrimination provisions with respect to combatting racist hate speech in the context of rising levels of racist hate speech.[23]

2.81 Australia has made reservations to the relevant international treaties in relation to hate speech,[24] which are relevant in assessing the bill's compatibility with the human rights recognised or declared by Australia.[25] Noting these reservations, it

22 As set out in the preliminary international human rights legal advice, article 4(a) of the International Covenant on the Elimination of Racial Discrimination requires States to make it an offence to disseminate 'ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin'.

23 See UN 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) [7]–[8] and [13]–[16]. Further, several inquiries have been conducted considering the status of freedom of speech in Australia to date. For example: Parliamentary Joint Committee on Human Rights, *Freedom of Speech in Australia, Inquiry into the operation of Part IIA of the Racial Discrimination Act 1975 (Cth) and related procedures under the Australian Human Rights Commission Act 1986 (Cth)* (28 February 2017); and Australian Law Reform Commission, *Traditional Rights and Freedoms – Encroachment by Commonwealth Laws* (ALRC Report 129, 2 March 2016).

24 Australia's reservation to article 4 of the International Convention on the Elimination of All Forms of Racial Discrimination (made on 30 September 1975) states: 'The Government of Australia...declares that Australia is not at present in a position specifically to treat as offences all the matters covered by article 4 (a) of the Convention. Acts of the kind there mentioned are punishable only to the extent provided by the existing criminal law dealing with such matters as the maintenance of public order, public mischief, assault, riot, criminal libel, conspiracy and attempts. It is the intention of the Australian Government, at the first suitable moment, to seek from Parliament legislation specifically implementing the terms of article 4 (a).' Australia's reservation to article 20 of the International Covenant on Civil and Political Rights (made on 13 August 1980) states: 'Australia interprets the rights provided for by articles 19, 21 and 22 as consistent with article 20; accordingly, the Commonwealth and the constituent States, having legislated with respect to the subject matter of the article in matters of practical concern in the interest of public order (*ordre public*), the right is reserved not to introduce any further legislative provision on these matters.' See United Nations Treaty Collection Depository, *Status of Treaties, Chapter IV. Human Rights*, https://treaties.un.org/pages/treaties.aspx?id=4&subid=A&lang=en in relation to the International Convention on the Elimination of All Forms of Racial Discrimination and the International Covenant on Civil and Political Rights.

25 See the definition of 'human rights' in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

would appear that the bill would promote the right to freedom of expression and education and, because existing legislation continues to operate, may not impermissibly limit those other rights that operate alongside (and must be balanced with) the right to freedom of expression.

Committee view

2.82 The committee thanks the minister for this response. The committee notes that the bill seeks to amend the *Higher Education Support Act 2003* to provide that one of the objectives of the Act is to support a higher education system that promotes and protects freedom of speech and academic freedom, and to require higher education providers to have a policy upholding freedom of speech and academic freedom.

2.83 The committee considers that these amendments will promote the right to freedom of expression, and the right to education, in higher education institutions in Australia. The committee notes the foundational importance of the right to freedom of expression in relation to the realisation of other human rights, and the importance of academic freedom.

2.84 The committee notes that the promotion of freedom of expression must also be balanced with the realisation of other related human rights, and that the right to freedom of expression may be subject to permissible limitations if they are shown to be reasonable, necessary and proportionate. The committee notes the minister's advice that these provisions are not intended to override existing legislative protections against discrimination. The committee considers that as existing legislation continues to operate, the bill promotes the right to freedom of expression and education and does not appear to limit those other rights that operate alongside (and must be balanced with) the right to freedom of expression.

Social Security (Administration) Amendment (Continuation of Cashless Welfare) Bill 2020 and related instruments[1]

Purpose	This bill seeks to transition Income Management participants in the Northern Territory and Cape York region in Queensland onto the Cashless Debit Card and provide for the cashless welfare arrangements to continue as an ongoing measure The related instruments[2] determine that the Northern Territory is a 'declared child protection State or Territory'; and set out the decision-making principles that the Secretary must comply with, in deciding whether they are satisfied that there are no indications of financial vulnerability in relation to a person in the preceding 12 months
Portfolio	Social Services
Introduced	House of Representatives, 8 October 2020 *Received Royal Assent 17 December 2020*
Rights	Privacy; social security; equality and non-discrimination; adequate standard of living; rights of the child

2.85 The committee requested a response from the minister in relation to the bill and related instruments in *Report 14 of 2020*.[3]

Establishing cashless welfare as an ongoing measure

2.86 The bill seeks to amend the *Social Security (Administration) Act 1999* (the Act) to establish the Cashless Debit Card scheme as a permanent measure in locations which are currently 'trial sites',[4] as well as to transition the Northern Territory and Cape York areas from income management to cashless welfare.

1 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Social Security (Administration) Amendment (Continuation of Cashless Welfare) Bill 2020 and related instruments, *Report 14 of 2020*; [2021] AUPJCHR 10.

2 The related instruments are the Social Security (Administration) (Declared child protection State or Territory – Northern Territory) Determination 2020 [F2020L01224] and the Social Security (Administration) (Exempt Welfare Payment Recipients – Principal Carers of a Child) (Indications of Financial Vulnerability) Principles 2020 [F2020L01225].

3 Parliamentary Joint Committee on Human Rights, *Report 14 of 2020* (26 November 2020), pp. 38-54.

4 Note that the bill was amended prior to its passage so that the cashless welfare card trials were extended for a further two years, rather than made permanent.

Currently, the cashless welfare trials and the Cape York income management scheme are due to cease operation on 31 December 2020.[5] The bill would also amend the stated objectives of the cashless debit card, providing that instead of the objective of determining whether the reduction in the amount of certain restrictable payments decreases violence or harm in trial areas, and whether such arrangements are more effective when community bodies are involved, it would instead be to support participants 'with their budgeting strategies'.[6]

2.87 The bill would create, or continue, different eligibility criteria for cashless welfare program participants in the different geographical areas:

- following the transition from income management, individuals in the Cape York area would be subject to cashless welfare arrangements where they or their partner receive a category P welfare payment (which includes most welfare payments such as the age pension, parenting payments and unemployment benefits)[7] and a written notice is given by the Queensland Commission requiring that the person be a trial participant;[8]
- following the transition from income management, individuals in the Northern Territory would be subject to cashless welfare arrangements[9] where:
    - they receive a category E welfare payment (which includes unemployment benefits and certain parenting payments);[10] or

5 Coronavirus Economic Response Package (Deferral of Sunsetting—Income Management and Cashless Welfare Arrangements) Determination 2020 [F2020L00572].

6 Schedule 1, Part 1, item 9, proposed subsection 124PC(b). Section 124PC of the Act currently provides that the objects of the cashless welfare arrangements are to: reduce the amount of certain restrictable payments available to be spent on alcoholic beverages, gambling and illegal drugs; determine whether such a reduction decreases violence or harm in trial areas; determine whether such arrangements are more effective when community bodies are involved; and encourage socially responsible behaviour.

7 A 'category P' welfare payment means a social security benefit, or social security pension, or payment under the ABSTUDY scheme that includes an amount identified as living allowance (per *Social Security (Administration) Act 1990,* section 123TC). A 'social security benefit' means a widow allowance; youth allowance; Austudy payment; Newstart allowance; sickness allowance; special benefit; partner allowance; a mature age allowance under Part 2.12B; or benefit PP (partnered); or parenting allowance (other than non-benefit allowance). A 'social security pension' means an age pension; disability support pension; wife pension; carer payment; pension PP (single); sole parent pension; bereavement allowance; widow B pension; mature age partner allowance; or a special needs pension: see section 23 of the *Social Security Act 1991*.

8 Schedule 1, Part 2, item 74, proposed section 124PGD.

9 Schedule 1, Part 2, item 74, proposed section 124PGE.

- they or their partner receive a category P welfare payment and a Northern Territory child protection officer has given the Secretary written notice requiring them to be a participant;[11] or
- they receive a category P welfare payment and are characterised by the secretary as a 'vulnerable welfare payment recipient';[12] and

- individuals in Ceduna, East Kimberley and the Goldfields, would continue to be subject to cashless welfare arrangements if they receive a 'trigger payment'[13] (most unemployment benefits and some pensions, including the disability support pension, but excluding the age pension);[14] and
- individuals in the Bundaberg and Hervey Bay area would continue to be subject to cashless welfare arrangements if they receive a 'trigger payment' and are aged under 36.[15]

2.88 The bill would retain the existing cashless welfare and income management restriction rates. That is, persons subject to the cashless debit card would have 80 per cent of their welfare payments restricted,[16] or between 50 and 70 per cent in the case of persons in Cape York or the Northern Territory.[17] However, the Act provides that the Secretary may vary the restricted portion of a welfare payment amount up

10 A category E welfare payment means youth allowance, Newstart allowance, special benefit, pension PP (single) or benefit PP (partnered): *Social Security (Administration) Act 1990,* section 123TC.

11 The Social Security (Administration) (Declared child protection State or Territory – Northern Territory) Determination 2020 [F2020L01224] determines the Northern Territory as a 'declared child protection State or Territory' for the purposes of Part 3B of the *Social Security (Administration) Act 1990*. It repeals and re-makes the existing instrument, which is due to sunset.

12 Under section 123UGA of the *Social Security (Administration) Act 1990*, the Secretary may determine that a person is a 'vulnerable welfare payment recipient' for the purposes of Part 3B of the Act. The term is not defined in the Act.

13 A 'trigger payment' means a social security benefit (other than a mature age allowance); an ABSTUDY payment; or a social security pension of the following kind: a carer payment; a bereavement allowance; a disability support pension; a pension PP (single); a widow B pension; or a wife pension: see section 124PD of the *Social Security (Administration) Act 1999*.

14 *Social Security (Administration) Act 1990*, sections 124PG, 124PGA and 124PGB, subject to the amendments proposed in Schedule 1, Part 2, items 66–71.

15 *Social Security (Administration) Act 1990*, section 124PGC, subject to the proposed amendment contained in Schedule 1, Part 2, items 72–73.

16 *S*chedule 1, Part 2, item 82, proposed subsections 124PJ(1)(a)–(b).

17 *S*chedule 1, Part 2, item 84, proposed subsections 124PJ(1)(1A)–(1D).

to 100 per cent for individuals.[18] The bill also seeks to enable the minister to, by notifiable instrument, vary the percentage of restricted welfare payments for a group of persons in the Northern Territory to a rate of up to 80 per cent.[19]

2.89 The bill also seeks to amend the process by which reviews of the cashless welfare measure are subsequently evaluated, removing the requirement that the evaluation be completed within six months, and be conducted by an independent evaluation expert with significant expertise in the social and economic aspects of welfare policy, who must consult participants and make recommendations.[20]

2.90 A person subject to cashless welfare could seek an exemption from the scheme, and would bear the onus of producing evidence to demonstrate that they are either suitable to be exempted, or that continued participation would cause serious risk to their physical or mental health.[21] The Social Security (Administration) (Exempt Welfare Payment Recipients – Principal Carers of a Child) (Indications of Financial Vulnerability) Principles 2020 similarly sets out the decision-making principles which the Secretary must comply with when considering whether a person should be exempt from income management under the disengaged youth and long-term welfare payment recipient income management measures. It likewise causes the individual to bear the burden of producing evidence to satisfy the Secretary pursuant to the instrument.

Summary of initial assessment

Preliminary international human rights legal advice

Multiple rights

2.91 The cashless welfare arrangements outlined in this bill engage and may promote a number of human rights.[22] For example, as noted in the statement of compatibility,[23] restricting a substantial portion of a person's welfare payments may promote the right to an adequate standard of living in some instances, to the extent that quarantining those funds means that the individual is not able to spend the

18 *Social Security (Administration) Act 1990*, subsection 124PJ(3). The bill proposes to extend this power such that it could be exercised in relation to individuals in the Cape York and Northern Territory areas. See, Schedule 1, Part 2, items 90–92.

19 Schedule 1, Part 2, item 87, proposed section 124PJ(2A). Proposed subsection 124PJ(2C) clarifies that where the Secretary has made an individual determination that one person's restricted rate of payment will be varied, a broader determination by this Minister varying rates of restriction for cohorts of participants would not impact that individual.

20 Schedule 1, Part 3, item 114.

21 *Social Security (Administration) Act 1990*, sections 124PHA-124PHB.

22 As noted in the Parliamentary Joint Committee on Human Rights, *Report 1 of 2020* (5 February 2020) pp. 132–142.

23 Statement of compatibility, p. 35.

money on items other than essential goods such as groceries and bills. The right to an adequate standard of living requires that the State party take steps to ensure the availability, adequacy and accessibility of food, clothing, water and housing for all people in its jurisdiction.[24] In particular the right to housing (which is part of the right to an adequate standard of living) may be advanced if the measures help to ensure that a portion of a person's income support payments is spent on rent. Further, as noted in the statement of compatibility, by ensuring that a portion of welfare payments is available to cover essential goods and services, this measure may have the capacity to improve the living conditions of children of welfare recipients.[25] This may have the effect of promoting the rights of the child. Children have special rights under human rights law taking into account their particular vulnerabilities.[26] Children's rights are protected under a number of treaties, particularly the Convention on the Rights of the Child. All children under the age of 18 years are guaranteed these rights, without discrimination on any grounds.[27] In particular, the right of a child to benefit from social security, and the rights of the child to the highest attainable standard of health and to an adequate standard of living[28] may be advanced by these measures as they could help to ensure income support payments are used to cover minimum basic essential goods and services necessary for the full development of these rights.

2.92 The cashless welfare arrangements outlined in this bill also engage and limit a number of other human rights, including the right to privacy,[29] right to social security,[30] and right to equality and non-discrimination.[31]

2.93 The bill engages and limits the rights to privacy and social security as it significantly intrudes into the freedom and autonomy of individuals to organise their private and family lives by making their own decisions about the way in which they use their social security payments. The right to privacy is linked to notions of personal autonomy and human dignity. It includes the idea that individuals should

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

25 Statement of compatibility, p. 35.

26 Convention on the Rights of the Child. See also, UN Human Rights Committee, *General Comment No. 17: Article 24* (1989) [1].

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

28 Convention on the Rights of the Child, articles 24, 26 and 27.

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

30 International Covenant on Economic, Social and Cultural Rights, article 9.

31 International Covenant on Civil and Political Rights, articles 2, 16 and 26 and International Covenant on Economic, Social and Cultural Rights, article 2. It is further protected with respect to people with disability by the Convention on the Rights of Persons with Disabilities, article 2.

have an area of autonomous development; a 'private sphere' free from government intervention and excessive unsolicited intervention by others. The right to social security recognises the importance of adequate social benefits in reducing the effects of poverty and in preventing social exclusion and promoting social inclusion,[32] and enjoyment of the right requires that social support schemes must be accessible, providing universal coverage without discrimination.

2.94 The statement of compatibility provided with respect to the proposed amendments largely mirrors the information provided with respect to earlier proposed extensions of the cashless welfare trial. The statement of compatibility recognises that the bill engages the right to a private life and the right to social security but states that the measures in the bill do not detract from the eligibility of a person to receive welfare, or reduce the amount of their social security entitlement. They merely limit how payments can be spent and provide 'a mechanism to ensure that certain recipients of social security entitlements are restricted from spending money on alcohol, gambling and drugs'.[33]

2.95 The measure also engages the right to equality and non-discrimination. This right provides that everyone is entitled to enjoy their rights without discrimination of any kind, which encompasses both 'direct' discrimination (where measures have a discriminatory *intent*) and 'indirect' discrimination (where measures have a discriminatory *effect* on the enjoyment of rights). Indirect discrimination occurs where 'a rule or measure that is neutral at face value or without intent to discriminate', exclusively or disproportionately affects people with a particular protected attribute.[34]

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32 UN Committee on Economic, Social and Cultural Rights*, General Comment No. 19: The Right to Social Security* (2008) [3]. The core components of the right to social security are that social security, whether provided in cash or in kind, must be available, adequate, and accessible. Provision of the majority of a social security payment via a debit card, which limits the goods and services in relation to which those funds may be used, and prevents the payments being withdrawn and converted to cash, raises some questions as to whether cashless welfare fulfils the fundamental components of the right, in particular noting the geographical isolation of the relevant areas and the likely limited choices of shops and service providers; the potential poor mobile phone reception in these areas; and potentially also an absence of mobile phone or internet access on an individual level.

33 Statement of compatibility, p. 30.

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

2.96 Limits on the above rights may be permissible where a measure seeks to achieve a legitimate objective, is rationally connected to (that is, effective to achieve) that objective, and is proportionate to that objective.

2.97 The initial analysis found that it is likely that combatting social harms caused by the use of harmful products including alcohol and illicit drugs would constitute a legitimate objective for the purposes of international human rights law.[35] However, questions remained as to whether the measures are, or will be effective, to achieve their stated objective and are proportionate to that objective.

2.98 Further information is required in order to assess the proposed measures for compatibility with human rights, and in particular:

(a) why these measures propose to establish the cashless debit card scheme as an ongoing measure, before the completion of the trial reviews;

(b) what evidence demonstrates that the cashless debit card scheme is effective in achieving the stated objectives, considering the evaluation reports in their totality;

(c) what consultation was undertaken with affected communities, seeking their views as to whether they wanted the trials to be made into an ongoing measure, or if no consultation was undertaken, why it was not undertaken;

(d) whether the evaluation of the cashless debit card scheme, which is designed to assess its ongoing effectiveness, can operate as a safeguard to protect human rights when this bill seeks to establish the scheme on an ongoing basis, regardless of the results of those evaluations;

(e) what percentage of persons who would be required to participate in the cashless welfare scheme (including those transitioning from income management) as a result of this bill identify as being Aboriginal or Torres Strait Islander;

(f) why the onus is on the person who is already subject to the cashless debit card scheme to demonstrate that they can manage their own affairs in order to be exempt from the scheme, rather than applying the scheme on the basis of individual circumstances or on a voluntary basis;

(g) why is the wellbeing exemption restricted to circumstances when there is 'a serious risk', rather than 'a risk', to a person's mental, physical or emotional wellbeing, and is it appropriate, when all participants are automatically included in the program, that the Secretary is not

35 As previously set out in the Parliamentary Joint Committee on Human Rights, *Report 1 of 2020* (5 February 2020), pp. 132–142.

required to inquire into whether a person being in the program would pose a risk to the person's mental, physical or emotional well-being; and

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

Committee's initial view

2.99 The committee considered that the cashless debit card scheme engages and may promote a number of human rights, including the right to an adequate standard of living and the rights of the child. Restricting a substantial portion of a person's welfare payments may promote the right to an adequate standard of living as these funds may only be spent on essential goods such as groceries and bills, and in particular, may advance the right to housing if the measures help to ensure that a portion of a person's income support payments is spent on rent. Further, by ensuring that a portion of welfare payments is available to cover essential goods and services, this measure may improve the living conditions of children of welfare recipients, which may have the effect of promoting the rights of the child. In particular, the right of a child to benefit from social security, the right of the child to the highest attainable standard of health and to an adequate standard of living may be advanced by these measures as they could help to ensure income support payments are used to cover minimum basic essential goods and services necessary for the full development of these rights. In this regard, the committee reiterated its previous comments on the manner in which cashless welfare measures engage positive human rights.[36]

2.100 The committee further noted that these measures may limit some human rights, including the right to privacy, social security, and equality and non-discrimination. These rights may be subject to permissible limitations if they are shown to be reasonable, necessary and proportionate. The committee considered the bill seeks to achieve a number of legitimate objectives, including reducing immediate hardship and deprivation, and encouraging socially responsible behaviour. However, some questions remained in relation to rational connection and proportionality.

2.101 The committee considered that further information was required to assess the human rights implications of this bill, and as such the committee sought the minister's advice as to the matters set out at paragraph [2.98].

2.102 The full initial analysis is set out in *Report 14 of 2020*.

36 See, Parliamentary Joint Committee on Human Rights, Social Security (Administration) Amendment (Income Management to Cashless Debit Card Transition) Bill 2019, *Report 6 of 2019* (5 December 2019), pp. 39–53; and *Report 1 of 2020* (5 February 2020), pp. 132–142.

Minister's response[37]

2.103 The minister advised:

Evaluation

The Cashless Debit Card (CDC) is a tool operating alongside other reforms and initiatives to address the impacts of alcohol and drug misuse, and problem gambling. Evaluations show that the CDC is working, with a range of evidence showing the program has had a positive impact for participants and communities.

Consistent findings across CDC evaluations are:

- That alcohol consumption has reduced since the introduction of the CDC.
- Levels of substance abuse appear to have reduced.
- The CDC is helping to reduce gambling, with positive impacts for families and broader social life.
- In relation to financial planning and money management, the CDC is reported to make things better for those who are most vulnerable and who need it most.
- Participants were better able to budget for rent and bills, as well as improvements in their ability to save money.

The purpose of CDC evaluations is to further develop the evidence base, to better understand what works, for whom, and in what context so that continued improvements can be made to the CDC program.

Various reviews of the CDC have been commissioned, including a first impact evaluation, a second impact evaluation and baseline data collections in the Goldfields region and the Bundaberg and Hervey Bay region.

Evaluation and data monitoring activities will strengthen the evidence base and ensure that participants, their families and the wider community continue to receive ongoing support.

CDC as an ongoing program and transition in the Northern Territory and Cape York region

The continuation of the CDC is a direct response to calls from community leaders requesting that the Government deliver certainty to participants, stakeholders and communities by making the trial an ongoing measure. This provides certainty for participants, leaders and stakeholders in CDC

37 The minister's response to the committee's inquiries was received on 17 December 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.

communities, and will sustain the positive impacts and effectiveness of the CDC.

The Department of Social Services has continued its regular engagement with community leaders in the CDC existing sites. This includes regional meetings with government, community leaders and service providers to discuss the impact and operations of the cashless debit card and its supporting programs. Feedback from community leaders has included that it would be beneficial if certainty on the future of the CDC was provided as opposed to its current nature as a trial.

The department has also delivered 84 information sessions to over 70 communities, engaged with around 3,500 community members and met with over 120 stakeholders and local organisations in the Northern Territory and Cape York region.

Stakeholders include service providers, community leaders, community reference groups, program participants, support service representatives, advocacy bodies (both Indigenous and non-Indigenous), the general community, government officials, and all levels of government. The department has also consulted with the National Indigenous Australians Agency.

A common theme from these sessions is that participants are pleased with the increased functionality of the card and the flexibility it provides in comparison with the BasicsCard.

The continuation of the CDC program as an ongoing measure in exiting sites and the transition of participants from Income Management to the CDC program in the Northern Territory and Cape York region will advance the protection of human rights by ensuring that welfare payments are spent in the best interests of welfare recipients and their dependents by restricting spending on alcohol, drugs and gambling. Engagement with participants, stakeholders and communities will continue to ensure the objectives of the CDC continue to be delivered. The measures are reasonable, necessary and proportionate to achieving their objectives.

Exits and wellbeing exemptions

The primary purpose of the CDC is to reduce harm at a community level from the use of harmful products such as alcohol, illicit drugs and gambling. The CDC applies to eligible people on working-age welfare payments in current sites, and not according to other factors such as gender or ethnicity. As a result, each exit and wellbeing exemption application is considered on a case-by-case basis to ensure the individual circumstances of each person are taken into account before a decision is made.

If a participant's wellbeing is at risk, the participant may be referred to a Services Australia social worker who undertakes an assessment of the participant's circumstances, considers any supporting information that may be relevant and has a discussion with the participant as required.

Data

As at 6 November 2020, the percentage of CDC participants who identify as an Indigenous Australian is 40 per cent. The percentage of current Income Management participants in the Northern Territory and participants captured under Cape York Income Management who identify as Indigenous Australian is 81 per cent.

Concluding comments

International human rights legal advice

Multiple rights

2.104 Further information was sought as to whether the measures would be effective to achieve their stated objectives and whether they would constitute a proportionate limitation on human rights.

Rational connection

2.105 The minister stated that the evaluations of the cashless debit card show that the card is achieving its objectives and having a positive impact on participants and communities, including leading to: reduced alcohol consumption, gambling and substance abuse; making things better for vulnerable people in relation to financial planning and money management; and enabling participants to better budget for rent and bills, as well as improving their ability to save money. If the measures have been demonstrated to have substantially led to reduced alcohol consumption, gambling and substance abuse, the measures would appear to be rationally connected to (that is, effective to achieve) the legitimate objective of combatting social harms caused by the use of harmful products, including alcohol and illicit drugs. However, it is noted that the minister's response provides no specific evidence demonstrating the percentage changes in the trial sites, and as set out in the initial analysis, the publicly available evaluations have elicited a range of mixed findings as to the efficacy of cashless welfare to achieve its stated objectives.[38] While they, and other studies, provide some positive results as to the effectiveness of the trials, they also raise some significant questions as to the efficacy of the cashless debit card scheme in achieving the stated objectives (including reducing the amount of payments available to be spent on alcohol, gambling and illegal drugs, and

38 See Parliamentary Joint Committee on Human Rights, *Report 14 of 2020* (26 November 2020), pp. 38–54.

encouraging socially responsible behaviour).[39] They also raise questions as to whether the cashless debit card scheme would, in practice, promote the rights set out in paragraph [2.91]. In addition, it is noted that the Australian National Audit Office has recently found that the cashless debit card trial had been inadequately monitored and evaluated, such that it is difficult to conclude whether quarantining of social welfare has led to a reduction in social harm.[40]

2.106 The results of these trial evaluations are a critical component of demonstrating a rational connection between cashless welfare and its intended objectives. With respect to the proposal to make cashless welfare an ongoing measure, the minister stated that the evaluations of the program are intended to further develop the evidence base for the program, and to understand what works for participants, and to enable improvements to be made. However, considering this, it remains unclear why the most recent evaluation of the trial, which was due to be published in late 2019,[41] has not been published, and no information has been provided as to the status of the evaluation.[42]

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39 In addition, more contemporaneous studies have been conducted examining other specific elements of the cashless welfare trial, including its effects on: Indigenous mobility; homelessness; and perceptions of shame attached with use of the card. See, *Australian Journal of Social Issues*, vol. 55, no. 1, 2020. In particular: Eve Vincent et al, '"Moved on"? An exploratory study of the Cashless Debit Card and Indigenous mobility', pp. 27–39; Shelley Bielefeld et al, 'Compulsory income management: Combatting or compounding the underlying causes of homelessness?', pp. 61–72; Cameo Dalley, 'The "White Card" is grey: Surveillance, endurance and the Cashless Debit Card', pp. 51–60; and Elizabeth Watt, 'Is the BasicsCard "shaming" Aboriginal people? Exploring the differing responses to welfare quarantining in Cape York', pp. 40–50. See also Luke Greenacre et al, 'Income Management of Government payments on Welfare: The Australian Cashless Debit Card', *Australian Social Work* (2020) pp. 1–14.

40 Australian National Audit Office (ANAO), 'The Implementation and Performance of the Cashless Debit Card Trial', *Auditor-General Report No.1 2018–19 Performance Audit*, pp. 7–8. The audit also found that while arrangements to monitor and evaluate the trial were in place, key activities were not undertaken or fully effective, and the level of unrestricted cash available in the community was not effectively monitored. The audit further found that there was a lack of robustness in data collection and the department's evaluation did not make use of all available administrative data to measure the impact of the trial including any change in social harm. The ANAO also found that the trial was not designed to test the scalability of the cashless debit card and there was no plan in place to undertake further evaluation.

41 Statement of compatibility, p. 29.

42 In March 2020, the department advised the Senate Standing Committee on Community Affairs that the publication of this most recent trial evaluation had been delayed because people in the field had advised the University of Adelaide that more qualitative interviews with cashless welfare scheme participants needed to be conducted, and this was being undertaken. See, Ms Liz Hefren-Webb, Deputy Secretary, Families and Communities, Department of Social Services, *Community Affairs Additional Estimates*, 5 March 2020, p. 148.

2.107 Consequently, it remains unclear whether the proposed extension of the cashless welfare scheme is rationally connected to, that is, effective to achieve, the stated objectives of the trial.

Proportionality

2.108 Further information was also sought to assist the assessment of whether the cashless welfare measures provide sufficient flexibility to treat different cases differently,[43] having regard to the safeguard measures set out in the statement of compatibility.[44]

2.109 In relation to the right to equality and non-discrimination, the minister advised that at 6 November 2020, 40 per cent of cashless debit card participants identified as being Indigenous, as do 81 per cent of current income management participants in the Northern Territory and Cape York. As such, noting that Aboriginal and Torres Strait Islander people make up around 3.3 per cent of the Australian population as a whole,[45] it is clear that the cashless welfare and income management schemes disproportionately impacts on Indigenous Australians. Where a measure impacts on a particular group disproportionately it may give rise to indirect discrimination.[46] However, differential treatment (including the differential effect of a measure that is neutral on its face) will not constitute unlawful discrimination if the differential treatment is based on reasonable and objective criteria.[47] In this regard, information was sought as to the nature of any consultation with Indigenous participants in the cashless welfare scheme, noting that the cashless welfare scheme has a disproportionate impact on Indigenous Australians, and that, as a matter of international law, consultation has particular significance where it relates to a measure which impacts indigenous people. The minister advised that the department has regularly engaged with community leaders at existing cashless debit card sites to discuss the impact and operation of the card and its supporting programs, stating that feedback from community leaders included a desire for certainty as to the future of cashless welfare. The minister stated that the continuation of cashless welfare is a direct response to those calls for certainty. The minister also stated that 84 information sessions were delivered about the scheme,

43 See, Dinah Shelton (ed), 'Proportionality', *The Oxford Handbook of International Human Rights Law*, pp. 450–468.

44 Statement of compatibility, p. 20.

45 Australian Bureau of Statistics, *Estimates of Aboriginal and Torres Strait Islander Australians*, June 2016.

46 *D.H. and Others v the Czech Republic,* European Court of Human Rights (Grand Chamber), Application no. 57325/00 (2007) [49]; *Hoogendijk v the Netherlands*, European Court of Human Rights, Application no. 58641/00 (2005).

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

involving approximately 3,500 community members and 120 stakeholders (which included program participants), and that a common theme from these sessions was that participants were pleased with the enhanced functionality of the cashless debit card (when compared with the BasicsCard).

2.110 It is helpful that information sessions have been held informing key community leaders and organisations about the intention to roll out the scheme, and advising those communities about how the cashless welfare card will operate in practice. However, the value of this as a safeguard is limited given that it does not appear to be a two-way deliberative process of dialogue in advance of a decision to progress the scheme, allowing for a discussion with community leaders about whether the community wants to participate in the scheme. In particular, it is unclear whether a desire for 'certainty' about the future of cashless welfare necessarily reflects a desire by affected participants for the cashless welfare measure to be made ongoing (as opposed to reflecting a desire for the measure to be discontinued). Further, it remains unclear that such consultation meaningfully informed the decision to seek to impose the cashless welfare card as an ongoing measure, noting also that the consultation conducted with affected persons in relation to the transfer of Income Management participants in the Northern Territory and Cape York to the cashless welfare card was undertaken 'post-decision'.[48]

2.111 Article 19 of the United Nations (UN) Declaration on the Rights of Indigenous Peoples provides that States should consult and cooperate in good faith with indigenous peoples in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them. 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, and as such is relevant to this analysis. The right of indigenous peoples to be consulted about measures which impact on them is a critical component of free, prior and informed consent.[49] Genuine consultation in this context should be 'in the form of a dialogue and negotiation towards consent'.[50] Commenting on the scope of free, prior and informed consent, the UN Human Rights Council has stated:

48 Regulation impact statement, p. 35.

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

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

> 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.[51]

2.112 Former Special Rapporteur on the rights of indigenous peoples, Mr James Anaya, has emphasised that article 19 of the UN Declaration on the Rights of Indigenous Peoples establishes 'consent as the objective of consultations with indigenous peoples'.[52] He has further directed that the strength or importance of the objective of achieving consent will vary according to the circumstances and the indigenous interests involved, stating that measures which have 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' consent'.[53]

2.113 The consultation process outlined in relation to the proposal to establish the cashless welfare scheme as an ongoing measure in specified geographical areas would appear to lack several constituent elements of free, prior and informed consent for the purposes of international human rights law. In particular, it is unclear that involvement in the consultation which did take place provided affected communities with the opportunity to genuinely influence the outcome of the decision-making processes affecting them.[54] 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 UN Declaration on the Rights of Indigenous Peoples.[55] Consequently, the conduct of consultation in relation to this proposal as a

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

52 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].

53 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].

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

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

mechanism by which free, prior and informed consent could be established appears to have limited safeguard value.

2.114 Further information was also sought in relation to the conduct of evaluations of the cashless welfare trial, and their value as a safeguard. Trial evaluations have the capacity to serve as a safeguard with respect to proportionality, if they are used to ensure that the scheme continues to operate only where its benefits in achieving its legitimate objectives outweigh any corresponding negative impacts on human rights. As set out at paragraph [2.105], it appears that those evaluations have elicited a range of mixed findings as to the efficacy of cashless welfare to achieve its stated objectives. It is not clear that the evaluation findings were considered when the decision was made to expand the existing cashless welfare measures.[56] In addition, the most recent evaluation of the trial is not publicly available, and no information has been provided as to why the bill proposes expanding the cashless welfare scheme before the contemporaneous evaluation has been completed and reviewed. Finally, it is not clear how that trial evaluation, and any future evaluations, would operate to safeguard human rights given that the measure was proposed to be made ongoing, regardless of their results. This would appear to indicate that the results of the trials would not be used to inform a future decision as to the efficacy of the measure on a trial basis. Consequently, the conduct of evaluations of the cashless welfare trial would appear to have limited safeguard value.

2.115 Lastly, information was sought as to the capacity for flexibility in exiting the cashless welfare scheme, that is, the ability for an individual to exit the scheme where they have automatically been required to participate because they reside in a specified geographic location and receive a specified social security payment. The minister stated that the primary purpose of the cashless debit card is to reduce harm at a community level from the use of harmful products such as alcohol or illicit drugs, and that each exit and wellbeing exemption application is considered on a case-by-case basis. With respect to wellbeing exemptions, the minister stated that if a participant's wellbeing is at risk from being subject to the cashless debit card trial, they may be referred to a Services Australia social worker for an assessment of their circumstances. However, no information is provided as to what the outcome of any such assessment may be (for example, whether a social worker may recommend that the individual be exited from the cashless welfare program, and cause the secretary to be notified of a serious risk to the person's health). Further, this does not address the question of why is the wellbeing exemption restricted to circumstances when there is 'a serious risk', rather than 'a risk', to a person's mental, physical or emotional wellbeing, and whether it is appropriate, when all participants are automatically included in the program without any assessment of the individual's

56 It is noted that the bill originally sought to make the cashless welfare card measure permanent in the existing locations, however, the bill was amended so that in its final version, the cashless welfare card trials were instead extended for a further two years.

circumstances, that the secretary is not required to inquire into whether a person being in the program would pose a risk to the person's mental, physical or emotional well-being. Given the small number of participants who appear to have been able to exit the cashless welfare program pursuant to a wellbeing exemption (and particularly the low number of Indigenous participants who have exited),[57] it appears there are limited prospects of a participant being able to exit the program on this basis in practice. Consequently, it appears that the wellbeing exemption exit process has limited safeguard value.

2.116 In addition, it remains unclear why a person who is subject to the cashless debit card scheme bears the onus of demonstrating their ability to manage their own affairs in order to be exempt from the scheme, rather than the scheme being applied to them on the basis of their individual circumstances, or on a voluntary basis. In particular, it is unclear how a person who is subject to the cashless debit card (and therefore prevented to some extent from deciding how to budget the majority of their income) could be capable of demonstrating their ability to reasonably and responsibly manage their affairs (including their financial affairs).[58] Having some flexibility to ensure a person can exit the cashless debit card scheme does assist with the proportionality of the measure. However, shifting the burden of proving such matters, and making the application, onto the affected person greatly lessens the effectiveness of this as a safeguard. This is particularly problematic given that once a person has exited the cashless welfare scheme they can still be required to re-enter it, and the processes through which this occurs are not contained in the bill.[59] It also appears that in practice only a very small number of participants who have applied to exit the cashless welfare program under section 124PHB have been successful (less than 4 per cent of applicants).[60] Considering all these factors, it is not apparent that there are reasonable prospects of a participant being able to exit the program by demonstrating their ability to manage their own affairs in practice. Consequently, the value of these exit provisions as a safeguard appear to be limited.

Concluding remarks

2.117 The cashless welfare measures contained in this bill, which would cause the cashless welfare trial to become an ongoing measure in certain geographical areas,

57 The department advised that, at 31 January 2020, 173 participants had been approved for a wellbeing exemption, 46 of whom identified as being Indigenous. Department of Social Services, answer to question on notice DSS SQ20-000214, *Senate Community Affairs Additional Estimates*, 5 March 2020.

58 *Social Security (Administration) Act 1990*, section 124PHB.

59 *Social Security (Administration) Act 1990*, section 124PHA.

60 At 5 March 2020, the department advised that of 859 applications to exit, 28 applications were approved. See, Ms Liz Hefren-Webb, Deputy Secretary, Families and Communities, Department of Social Services, *Community Affairs Additional Estimates*, 5 March 2020, p. 148.

could potentially promote a number of human rights, but would also engage and limit a number of other rights, including the rights to social security, privacy, and equality and non-discrimination. Those rights may be permissibly limited where a measure seeks to achieve a legitimate objective, is rationally connected to (that is, effective to achieve) that objective, and is proportionate to that objective.

2.118 As previously noted, it is likely that combatting social harms caused by the use of harmful products, including alcohol and illicit drugs, would constitute a legitimate objective for the purposes of international human rights law. However, it is not clear that the cashless welfare measures are effective to achieve these objectives, noting in particular, that the evaluations of the cashless debit card have raised questions as to its effectiveness, and whether it has caused or contributed to other harms. In addition, it is not clear that the cashless welfare scheme constitutes a proportionate limitation on these rights, having regard to the absence of adequate and effective safeguards to ensure that limitations on human rights are the least rights restrictive way of achieving the legitimate objective, and the absence of sufficient flexibility within the scheme to treat different cases differently.

2.119 As such, it has not been clearly demonstrated that the continuation of the cashless debit card scheme would constitute a justifiable limit on the rights to social security and privacy or, noting that the scheme has a disproportionate impact on Indigenous Australians, that it is a reasonable and proportionate measure and therefore not discriminatory.

Committee view

2.120 The committee thanks the minister for this response. The committee notes that the bill sought to establish the cashless debit card scheme as a permanent measure in locations which are currently 'trial sites', and to transition the Northern Territory and Cape York areas from income management to the cashless debit card scheme. However, the committee further notes that the bill has now passed and, as amended, the *Social Security (Administration) Amendment (Continuation of Cashless Welfare) Act 2020* instead extends the operation of the cashless debit card trial by two years to 31 December 2022. The committee notes that this will provide for further parliamentary scrutiny of this scheme.

2.121 The committee considers that the cashless debit card scheme engages and promotes a number of human rights, including the right to an adequate standard of living and the rights of the child. Restricting a substantial portion of a person's welfare payments may promote the right to an adequate standard of living as these funds may only be spent on essential goods such as groceries and bills, and in particular, may advance the right to housing if the measures help to ensure that a portion of a person's income support payments is spent on rent. Further, by ensuring that a portion of welfare payments is available to cover essential goods and services, this measure may improve the living conditions of children of welfare recipients, which may have the effect of promoting the rights of the child. In particular, the right of a child to benefit from social security, the right of the child

to the highest attainable standard of health and to an adequate standard of living may be advanced by these measures as they could help to ensure income support payments are used to cover the minimum basic essential goods and services necessary for the full development of these rights.

2.122 The committee further notes that these measures engage and limit other human rights, including the right to privacy, social security, and equality and non-discrimination. These rights may be subject to permissible limitations if those limitations are shown to be reasonable, necessary and proportionate.

2.123 The committee considers the bill seeks to achieve a number of legitimate objectives, including reducing immediate hardship and deprivation, and encouraging socially responsible behaviour. However, some questions remain in relation to rational connection and proportionality. The committee considers that the results of the cashless welfare trial evaluations are an important component of demonstrating a rational connection between cashless welfare and its intended objectives, and notes the minister's advice that the evaluations show that the cashless debit card is having a positive impact, including reducing the use of alcohol and illicit drugs, and helping to reduce gambling. However, the committee notes that these trial evaluations have also elicited a range of more nuanced findings as to whether cashless welfare is effectively achieving its objectives, and whether it is contributing to other harms.

2.124 The committee considers that questions also remain as to whether the continuation of the cashless welfare card (in trial or ongoing form) constitutes a proportionate means by which to achieve the objectives of the cashless welfare scheme. Noting that 40 per cent of cashless debit card participants and 81 per cent of income management participants in the Northern Territory and Cape York identify as being Indigenous, despite making up less than 4 per cent of the Australian population as a whole, it is clear that these measures disproportionately impact on Indigenous Australians. The right of indigenous peoples to be consulted about measures which impact on them is a critical component of free, prior and informed consent. As such, while the committee notes the minister's explanation of the consultation which has been undertaken with affected participants, the committee considers that some questions remain as to whether that consultation could be said to meet the requirements necessary to demonstrate that affected Indigenous participants were given the opportunity to provide their free, prior and informed consent to this measure for the purposes of international human rights law.

2.125 In addition, the committee notes that questions remain as to whether the provisions enabling participants to seek to exit the program (for their own wellbeing, or because they can demonstrate reasonable management of their own affairs) are sufficient to provide participants with a reasonable prospect of exiting the program where appropriate. In particular, the committee notes that it remains unclear how a person who is subject to the cashless debit card and has the majority

of their funds restricted, could effectively demonstrate that they possess the skills to manage their own funds and to budget responsibly.

2.126 Noting that the bill has now passed, the committee makes no further comment in relation to this bill.

Legislative instruments

Federal Court and Federal Circuit Court Amendment (Fees) Regulations 2020 [F2020L01416][1]

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[2]
Right	Fair hearing (access to justice)

2.127 The committee requested a response from the Attorney-General in relation to the instrument in *Report 15 of 2020*.[3]

Increased application fees in the Federal Circuit Court

2.128 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.[4] 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

1 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Federal Court and Federal Circuit Court Amendment (Fees) Regulations 2020 [F2020L01416], Report 1 of 2021; [2020] AUPJCHR 11.

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

3 Parliamentary Joint Committee on Human Rights, *Report 15 of 2020* (9 December 2020), pp. 2-5.

4 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,[5] or if the reduced fee would also cause financial hardship, the person may be exempt from paying any fee.[6] 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.[7]

Summary of initial assessment

Preliminary international human rights legal advice

Right to a fair hearing

2.129 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.[8] 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.[9]

2.130 One dimension of the right to a fair hearing is the right of access to justice.[10] 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 of 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

5 Schedule 1, item 11, section 201A.

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

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

8 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].

9 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*.

10 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).

might give rise to issues under the right to a fair hearing.[11] The findings of 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.[12] 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.

2.131 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 is 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.

2.132 In order to assess the compatibility of this measure with the right of 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; and

11 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].

12 *Kreuz v Poland*, European Court of Human Rights, Application No. 28249/95 (2001) [60]. In *Kijewska v Poland*, European Court of Human Rights, 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*, European Court of Human Rights, 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).

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

Committee's initial comment

2.133 The committee noted 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 of access to justice. The committee noted that this aspect of the right may be subject to permissible limitations if they are shown to be reasonable, necessary and proportionate.

2.134 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.

2.135 In order to form a concluded view on the human rights implications of this measure, the committee sought the Attorney-General's advice as to the matters set out in paragraph [2.132].

2.136 The full initial analysis is set out in *Report 15 of 2020*.

Attorney-General's response[13]

2.137 The Attorney-General advised:

(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

The increased application fee for migration matters will raise $36.4 million over the forward estimates to offset costs associated with increasing judicial and registrar resourcing for the Federal Circuit Court of Australia, in its general federal law and family law jurisdictions.

This additional resourcing will support the Federal Circuit Court in managing the growing pressure of migration cases on the Court and assist with the timely resolution of both migration and family law matters. This additional resourcing will provide the Federal Circuit Court with:

- three additional general federal law judges, accompanied by two additional registrars, and other support staff, to support the migration workload of the court;

13 The minister's response to the committee's inquiries was received on 14 January 2021. 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.

- one additional family law judge, accompanied by five additional registrars, and other support staff, to support the family law workload of the court; and
- increased base funding to support the court's current and ongoing operations.

The number of migration matters filed in the Federal Circuit Court has grown from 3,544 in 2014-15 to 6,555 in 2019-20. While the Federal Circuit Court continues to increase the number of migration matters that it finalises each year, it has been unable to finalise as many matters as there are filings. The Federal Circuit Court noted, in its 2019-20 annual report, that the level of migration applications filed was a particular challenge for the court. The annual report went on to note that the court considers the provision of judicial resources to be essential to the timely resolution of the migration caseload, as well as noting that migration work presents added demands on the court and its administration, such as for interpreters, that do not arise in other areas of the court's jurisdiction.

The additional resourcing provided as part of this measure is estimated to allow the Federal Circuit Court to finalise approximately 1,000 additional migration matters each year.

The increase to the Federal Circuit Court migration fee will bring the Federal Circuit Court fee into line with the Federal Circuit Court's placement in Australia's court hierarchy. Currently, the Federal Circuit Court fee for migration litigant is 2.5 times lower than the fee for migration applicants to the Administrative Appeals Tribunal ($1,826). The Federal Circuit Court fee set by the regulation will adjust this fee so that it is appropriately set at the midpoint between the Administrative Appeals Tribunal and the Federal Court.

It is notable that of the 25,809 migration lodgements in the Migration and Refugee Division of the Administrative Appeals Tribunal in 2018-19, there were only 930 applications for a fee reduction, and of which, 490 fee reductions were granted. Of the migration matters that proceeded from the Administrative Appeals Tribunal to the Federal Circuit Court in 2018-19, 17 per cent of matters finalised were dismissed for non-appearance. It is also the case that around 84 per cent of bridging visa holders in Australia have work rights.

Moreover, the Productivity Commission's 2014 Access to Justice Arrangements report recommended increased cost recovery in civil courts (recommendation 16.2). The Commission noted that court fees generally bear little relationship to the resources used by the courts in settling disputes and that court fees are relatively low.

It is also useful to note the benefits that will be realised for family law matters from the increased resourcing to the Federal Circuit Court. The additional judge and five additional judicial registrars will help those using the family law courts to resolve their matters faster following a separation.

The Federal Circuit Court, in its 2019-20 annual report, noted that one of its priorities was allowing registrars in the Federal Circuit Court to provide greater support to judges by assisting with case management work and free up judicial time so that judges can focus on determining the most complex matters and hearing trials. The additional five judicial registrars provided by this measure will further increase the amount of judicial time that can be freed up, and assist the court to build on recent initiatives that have relied on registrar involvement.

As you know, the Federal Circuit Court hears the vast majority of family law matters – around 87 per cent of all final order applications in 2019-20 – and resolved almost 17,000 final orders last financial year. This additional support will assist the Federal Circuit Court to resolve more matters each year to the benefit of separating families and their children.

It is important to recognise that the Government has put in place measures to ensure that this change will not prevent access to justice for migration litigants. The current full fee exemption will apply to applicants who would otherwise be in financial hardship, and this will also be accompanied by the creation of a new reduced fee, set at half the full fee. The creation of a half fee reduced rate is consistent with the half fee reduction already in place for the Administrative Appeals Tribunal. Introducing a proposed partial exemption, which will enable eligible migration litigants to pay a reduced fee set at $1,665 in the Federal Circuit Court, and retaining the current full fee exemption provisions, ensures the Court has the discretion to reduce or waive the fee requirement if appropriate in individual cases.

(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

Registrars or Authorised Officers (trained Court staff who have been authorised) determine an application for financial hardship. They have regard to the liquid assets and income of a party, as well as any other relevant factors including financial dependents.

There are general waivers and discretionary hardship fee reductions/exemptions. General waivers apply throughout the jurisdictions of the Court, including in migration matters. Applicants are entitled to a complete waiver of the filing fees if they hold a Centrelink Health Care Card, are receiving Legal Aid, are in detention or a correctional facility or are minors. This general waiver is not discretionary.

(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?

A hardship waiver or reduction is discretionary and the decision to approve one is made by a Registrar or Authorised Officer. In addition to

general training, internal guidelines will assist with guidance on these matters. Those internal guidelines are based on the guidelines used in the Family Court of Australia and Federal Circuit Court's family law jurisdiction.

The existing guidelines focus on liquid assets and income tests, rather than capital assets. If the applicant does not meet any or all parts of the test, the applicant may still qualify for a reduction or exemption if the Applicant can show there are circumstances which would cause them to face hardship if they were required to pay the full fee. Registrars and Authorised Officers will consider not only the internal guidelines, but also factors unique to migration applicants such as the types of visa an applicant holds and what, if any, work rights they might have.

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

The availability of fee exemptions, both full and partial, are a longstanding and important feature of Australia's court and tribunal system to ensure access to justice. However, for completeness, as well as these features, it is worth noting that the Administrative Appeals Tribunal has jurisdiction under regulation 2.21 of the Federal Court and Federal Circuit Regulation 2012 to hear reviews of decisions which are made in respect to fee reductions or exemptions.

Concluding comments

International human rights legal advice

2.138 As to the objective of this measure, the Attorney-General advised that the increase in application fees for migration matters is expected to raise $36.4 million, which will be used to offset the cost of providing additional resourcing to the Federal Circuit Court. The Attorney-General noted that the number of migration matters filed in the court has recently increased, and stated that the additional funding will enable the court to finalise an estimated additional 1,000 migration matters per year, as well as enhancing the court's capacity to resolve family law matters. The Attorney-General also noted that this increase in fees sets the application for migration matters in the Federal Circuit Court so that they are at the mid-point between the filing fees in the Administrative Appeals Tribunal (AAT) and the Federal Court. While increasing the capacity of the Federal Circuit Court to hear and resolve matters is an important and necessary aim, if the ultimate effect of the measure were to deny access to the courts for those who could not afford the application fees, this would limit the right to a fair hearing, and in assessing such a limitation it is not clear that revenue raising would, in itself, constitute a legitimate objective for the purposes of international human rights law.

2.139 However, the Attorney-General stated that by giving the court the discretion to either reduce or waive the application fee in individual cases of financial hardship, this change will not prevent access to justice. The Attorney-General advised that applicants are entitled to a complete waiver of the filing fees if they hold a Centrelink

Health Care Card, are receiving Legal Aid, are in detention or a correctional facility or are minors.[14] This general waiver is not discretionary. Further, in relation to other applicants the Attorney-General advised that the current full fee exemption will apply to applicants who would otherwise be in financial hardship, and this will also be accompanied by the creation of a new reduced fee, set at half the full fee. He noted that Registrars or Authorised Officers of the court would, in assessing whether an applicant was in 'financial hardship', have regard to the liquid assets and income of the person, and any other relevant factors such as their financial dependants. The Attorney-General noted that these personnel would be provided with general training, as well as drawing on internal guidelines (which will be based on similar guidelines in the court's family law jurisdiction). The Attorney-General additionally noted that Registrars and Authorised Officers will consider factors unique to migration applicants, such as their visa status and whether they have work rights. In addition, the Attorney-General noted that the AAT can hear reviews of decisions made with respect to fee reductions or exemptions.

2.140 It would appear, therefore, that the increased application fees for migration matters in the Federal Circuit Court may be accompanied by sufficient safeguards such that the increase may not limit the right of access to justice. In particular, the discretion provided to Registrars and Authorised Officers to consider an applicant's unique circumstances when determining whether payment of a full (or reduced) application fee will cause financial hardship would appear to have important safeguard value. Further, the existing fee exemption provisions, particularly those relating to people who hold concessionary benefits or are in detention, may have significant safeguard value in ensuring that migration applicants are not prevented from applying to the court for a hearing because of associated application costs. However, it is noted that much will depend on how the fee waiver is applied in practice and whether sufficient information is made available to applicants (in languages they understand) as to the availability of the waiver.[15]

Committee view

2.141 The committee thanks the Attorney-General for this response. The committee notes that this instrument increases the application fees charged by the Federal Circuit Court for migration litigants, and introduces partial or full fee exemptions where paying the full fee would cause financial hardship.

14 See, Federal Court and Federal Circuit Court Regulation 2012, section 2.05.

15 It is noted that if persons who may seek a review of their migration decision in the Federal Circuit Court are not made aware of their ability to apply for a waiver of the court application fee (in a language which they understand), the magnitude of the application fee may itself have the effect of deterring them from seeking such a review, in particular for those applicants who are self-represented.

2.142 The committee notes the Attorney-General's advice that the funds generated by the increased application fee for migration matters will be used to offset the cost of increasing the capacity of the Federal Circuit Court in both migration *and* family law matters, including enabling the court to finalise an estimated additional 1,000 migration matters each year. In addition, the committee notes that court personnel will have the discretion to consider an applicant's full unique personal circumstances (including their liquid assets, income, and any other relevant factors) in determining whether they will be in financial hardship if required to pay the application fee. The committee also notes that some classes of applicants (such as minors and people in detention) are exempt from payment of the application fee based on their status. The committee considers, therefore, that there are sufficient safeguards such that these amendments may not result in a limitation on the right of access to justice in practice.

2.143 The committee recommends that the statement of compatibility with human rights be updated to reflect this substantial additional information provided by the Attorney-General with respect to the access to justice dimension of the right to a fair hearing.

Health Insurance Legislation Amendment (Extend Cessation Date of Temporary COVID-19 Items) Determination 2020 [F2020L01190]
Health Insurance Legislation Amendment (Bulk-billing Incentive (No. 2)) Regulations 2020 [F2020L01203][1]

Purpose	The first instrument amends the *Health Insurance Act 1973* to: • extend the availability of Medicare benefits for temporary remote service options from 30 September 2020 to 21 March 2021; • expand SARS-CoV-2 testing to include people who travel interstate as a rail crew member; and • remove the requirement to bulk-bill attendances in relation to telehealth and phone consultation for certain patients from 1 October 2020. The second instrument removes the temporary increase that was applied to the schedule fees for the bulk-billing incentive items and returns the schedule fees to their normal rate from 1 October 2020.
Portfolio	Health
Authorising legislation	*Health Insurance Act 1973*
Last day to disallow	15 sitting days after tabling (tabled in the House of Representatives and the Senate on 6 October 2020).
Rights	Health; social security; equality and non-discrimination

2.144 The committee requested a response from the minister in relation to the bill in *Report 14 of 2020*.[2]

1 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Health Insurance Legislation Amendment (Extend Cessation Date of Temporary COVID-19 Items) Determination 2020 [F2020L01190] and Health Insurance Legislation Amendment (Bulk-billing Incentive (No. 2)) Regulations 2020 [F2020L01203], *Report 1 of 2021*; [2021] AUPJCHR 12.

2 Parliamentary Joint Committee on Human Rights, *Report 14 of 2020* (26 November 2020), pp. 18-25.

Extension of Medicare benefits and changes to bulk-billing

2.145 The Health Insurance Legislation Amendment (Extend Cessation Date of Temporary COVID-19 Items) Determination 2020 (Telehealth instrument) extends by six months the availability of Medicare benefits for temporary remote service options to enable patients to access telehealth and phone consultation services. The provision of access to Medicare benefits for certain medical services, including remote service options, was originally introduced as a temporary measure in response to the COVID-19 pandemic,[3] and this instrument extends this until 31 March 2021. It also removes the requirement for General Practitioners (GPs) and other doctors in general practice to bulk-bill telehealth and phone attendances for certain patients, including persons at risk of COVID-19, concessional beneficiaries and persons under the age of 16 years,[4] leaving it to the discretion of the doctor to bulk-bill or patient bill such services.

2.146 The Health Insurance Legislation Amendment (Bulk-billing Incentive (No. 2)) Regulations 2020 (Incentive instrument) removes the increase that was applied to the schedule fees for the bulk-billing incentive items and returns the schedule fees to their normal rate from 1 October 2020. In effect, the regulations reduce the schedule fees for bulk-billing incentive items by 50 per cent. Bulk-billing incentive items are available for certain medical services, diagnostic imaging services and pathology services for patients who are either under 16 years old, or who are Commonwealth concessional beneficiaries.[5] The temporary increase in the bulk-billing incentive items was introduced in response to the COVID-19 pandemic.[6]

3 See Health Insurance (Section 3C General Medical Services - COVID-19 Telehealth and Telephone Attendances) Determination 2020 [F2020L00342].

4 Schedule 2 repeals the definition of bulk-billed in section 5 and subsection 8(4) of the Health Insurance (Section 3C General Medical Services – COVID-19 Telehealth and Telephone Attendances) Determination 2020. Subsection 8(4) prescribed that bulk-billing services were to be provided to a person who is a: patient at risk of COVID-19 virus; concessional beneficiary; or under the age of 16. A patient at risk of COVID-19 virus is defined as a person who is: required to self-isolate or self-quarantine in relation to COVID-19; at least 70 years old or 50 years old if Aboriginal or Torres Strait Islander; pregnant; a parent of a child under 12 months; being treated for a chronic health condition; immune compromised; or meets the current national triage protocol criteria for suspected COVID-19 infections.

5 Health Insurance Legislation Amendment (Bulk-billing Incentive (No. 2)) Regulations 2020, statement of compatibility, p. 4.

6 Health Insurance Legislation Amendment (Bulk-billing Incentive) Regulations 2020 [F2020L00341].

Summary of initial assessment

Preliminary international human rights legal advice

Rights to health, equality and non-discrimination and social security

2.147 The temporary provision of access to Medicare benefits for telehealth and phone consultation services, the requirement to bulk-bill certain patients, and the temporary doubling of the schedule fees for the bulk-billing incentive items, promoted the right to health by increasing access to certain health-care services, ensuring that no person was constrained from seeking health care. These measures were intended to be temporary in nature, being part of the government's health care package to protect all Australians from COVID-19.[7] The Telehealth instrument, in extending Medicare benefits for telehealth and phone consultation services for a further six months, also promotes the right to health. The right to health is understood as the right to enjoy the highest attainable standard of physical and mental health, and requires available, accessible, acceptable and quality health care.[8] Regarding accessibility of health services, the United Nations (UN) Committee on Economic, Social and Cultural Rights has noted that payment for health-care services should be 'based on the principle of equity, ensuring that these services, whether privately or publicly provided, are affordable for all, including socially disadvantaged groups'.[9]

2.148 In respect of economic, social and cultural rights, including the right to health, there is a duty to realise these rights progressively. Under international human rights law, there is also a corresponding duty to refrain from taking retrogressive measures, which means the state cannot unjustifiably take deliberate steps backwards which negatively affect the enjoyment of economic, social and cultural rights. Although the bulk-billing requirement and the 50 per cent increase in the schedule fees for bulk-billing incentive items was always intended to be temporary, the removal of these rights-enhancing measures might nonetheless, as a technical matter, constitute a retrogressive step, if the effect is to reduce access to affordable health-care services for certain patients. To the extent that these instruments may result in some health professionals now choosing to bill their patients, where previously they bulk-billed these patients, the measures may appear to be retrogressive in the sense of reducing access to existing more affordable health

7 See explanatory statement to Health Insurance (Section 3C General Medical Services - COVID-19 Telehealth and Telephone Attendances) Determination 2020 [F2020L00342] and Health Insurance Legislation Amendment (Bulk-billing Incentive) Regulations 2020 [F2020L00341].

8 International Covenant on Economic, Social and Cultural Rights, article 12(1).

9 United Nations Economic, Social and Cultural Rights Committee, *General Comment No. 14: The Right to the Highest Attainable Standard of Health* (2000) [12].

care options. This was not fully addressed in the statements of compatibility accompanying the instruments.

2.149 Further, Australia has an obligation to ensure that the right to health is made available in a non-discriminatory way.[10] Immediately prior to the introduction of the Telehealth instrument, the following patients were required to be bulk-billed for all telehealth appointments:

- patients at risk of COVID-19 (including pregnant women, older persons and those with chronic health conditions);
- patients who are concessional beneficiaries (being health care card holders – such as those receiving unemployment benefits and parenting payments – and pensioners); and
- patients under the age of 16.[11]

2.150 As a result of the Telehealth instrument, from 1 October 2020 doctors were 'able to choose to bulk-bill or patient bill any temporary COVID-19 telehealth and phone attendance service'.[12] Further, the Incentive instrument reduced by half the incentive for health professionals to bulk-bill concessional beneficiaries (such as pensioners and the unemployed) and persons under 16 years of age. As such, there is a risk that such persons may be patient charged rather than bulk-billed. The payment of an out-of-pocket expense may be financially burdensome for certain patients, noting that concession card holders may be more likely to be older persons, persons with disability, and persons experiencing socio-economic disadvantage. Although noting that the requirement to bulk bill was only a temporary measure, if these changes result in a disproportionate adverse impact on people with particular protected attributes, this could amount to indirect discrimination against persons with these protected attributes, such as age and disability.[13]

10 Article 2(2) of the International Covenant on Economic, Social and Cultural Rights prohibits discrimination specifically in relation to the human rights contained in the International Covenant on Economic, Social and Cultural Rights. See also International Covenant on Civil and Political Rights, articles 2 and 26.

11 Health Insurance (Section 3C General Medical Services - COVID-19 Telehealth and Telephone Attendances) Determination 2020, subsection 8(4) (as in force prior to 1 October 2020).

12 Explanatory statement, p. 1, to the Health Insurance Legislation Amendment (Extend Cessation Date of Temporary COVID-19 Items) Determination 2020 [F2020L01190].

13 Indirect discrimination occurs where 'a rule or measure that is neutral at face value or without intent to discriminate', exclusively or disproportionately affects people with a particular protected attribute: *Althammer v Austria*, UN Human Rights Committee Communication no. 998/01 (2003) [10.2].

2.151 In addition, while the increase in the bulk-billing incentive was intended to be temporary, the reduction of the bulk-billing incentive by the Incentive instrument may, as a technical matter, engage and limit the right to social security. The right to social security includes the right to access benefits to prevent access to health care from being unaffordable.[14] In this regard, Medicare benefits could be considered to constitute a form of social security benefit that is provided to secure protection from unaffordable access to health care. It is not clear if the removal of the temporary increase to the schedule fees for the bulk-billing incentive items could amount to a reduction in a social security benefit available to certain patients and thus be a retrogressive measure with respect to the right to social security.

2.152 The rights to health, equality and non-discrimination and social security may be subject to permissible limitations (noting that retrogressive measures are a type of limitation), where the limitation pursues a legitimate objective, is rationally connected to that objective and is a proportionate means of achieving that objective.[15]

2.153 In order to assess the compatibility of these instruments with the rights to health, social security and equality and non-discrimination, further information is required as to:

(a) whether the removal of the temporary increase to the schedule fees for the bulk-billing incentive items would have the effect of reducing the benefit available to certain patients;

(b) what is the objective of removing the temporary increase to the schedule fees for the bulk-billing incentive items;

(c) how does the reduction of the schedule fees for the bulk-billing incentive items achieve the stated objective;

(d) the extent to which GPs and other doctors exercise the discretion to bulk-bill instead of patient bill, particularly for patients at risk of COVID-19, concessional beneficiaries, or patients under the age of 16;

(e) what, if any, alternatives were considered to reducing the schedule fees for the bulk-billing incentive items and removing the bulk-billing requirement for certain patients;

14 United Nations Economic, Social and Cultural Rights Committee, *General Comment No. 19: The Right to Social Security* (2008) [13].

15 The United Nations Economic, Social and Cultural Rights Committee has noted that any measures taken in response to the COVID-19 pandemic that limits rights 'must be necessary to combat the public health crisis posed by COVID-19, and be reasonable and proportionate': United Nations Economic, Social and Cultural Rights Committee, *Statement on the coronavirus disease (COVID-19) pandemic and economic, social and cultural rights* (2020) [11].

(f) what, if any, safeguards are in place to ensure that the measures constitute a proportionate limitation on the rights to health, social security and equality and non-discrimination; and

(g) what, if any, safeguards are in place to ensure that the measures do not indirectly discriminate against certain patients with protected attributes.

Committee's initial view

2.154 The committee noted that at the beginning of the COVID-19 pandemic, a number of vital steps were taken to protect Australians from the risk posed by COVID-19. Part of this health care package included introducing Medicare benefits for telehealth consultation services to provide services remotely to patients, and temporarily increasing the incentive for doctors to bulk-bill certain patients. The committee considered that these measures were extremely important emergency measures in the management of the pandemic. The committee recognised that Australia's universal health care system is one of the best in the world and that the government invested very significantly in these additional measures to support Australians to access health care at this very difficult time for our nation, particularly given the additional health risk that would have arisen if a patient with COVID-19 was to attend a medical clinic in person. The committee also noted that the government was able to implement nation-wide telehealth services in an incredibly short time frame which the committee assumed played a critically important role in protecting and saving lives during this pandemic. The committee considered the Telehealth instrument, in extending Medicare benefits for telehealth appointments by six months, promoted the right to health.

2.155 The committee noted the legal advice that as the initial measures promoted the right to health, pending receipt of further information, it is not clear if removing these temporary measures may be seen under international human rights law to constitute a backwards step in the realisation of the right to health and social security and may have a disproportionate impact on certain persons.

2.156 The committee had not formed a concluded view in relation to this matter. It considered that further information was required to assess the human rights implications of these measures, and as such, the committee sought the minister's advice as to the matters set out at paragraph [2.153].

2.157 The full initial analysis is set out in *Report 14 of 2020*.

Minister's response[16]

2.158 The minister advised:

> On 11 March 2020, the Prime Minister, the Hon. Scott Morrison MP, announced a comprehensive health package to protect all Australians, including vulnerable groups such as the elderly, those with chronic conditions and Aboriginal and Torres Strait Islander communities, from COVID-19.
>
> An expansion of Medicare Benefits Scheme (MBS) telehealth services during the COVID-19 health emergency was announced on 24 March 2020, which commenced in a staged approach from 30 March 2020. As part of this staged approach, the Australian Government provided extra bulk-billing incentives to support the health professional sector during this period.
>
> Between March and September 2020, the Government required GPs and other medical practitioners to bulk-bill certain patient groups for the telehealth services. The Government also temporarily increased the bulk-billing incentive and established an incentive payment to ensure practices could stay open to provide face-to-face services where they were essential for patients that could not be treated through telehealth.
>
> The fee increases were introduced temporarily and were scheduled to cease on 30 September 2020. The standard schedule fee for these items returned from 1 October 2020 and included the application of the 2020 indexation parameter of 1.5 per cent.
>
> On 1 October 2020, the Government also removed the mandatory requirement to bulk-bill certain telehealth and phone consultation services provided by GPs and other medical practitioners in general practice. This meant that from 1 October 2020, GPs and other medical practitioners returned to normal MBS billing arrangements, including the discretion for them to bulk-bill their services or charge co-payments. This change was considered necessary to support the continued viability of the sector and is consistent with the billing arrangements for the equivalent face-to-face services.
>
> Under the MBS, medical practitioners are free to set their own value on the services they provide. While the Government is responsible for setting the Schedule fee on which Medicare rebates are based, there is nothing to prevent medical practitioners setting fees that exceed those in the

16 The minister's response to the committee's inquiries was received on 8 December 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.

Schedule. The Government encourages bulk-billing, but it is at the provider's discretion whether or not to do so.

As part of its health care package to protect all Australians from COVID-19, the Government has been continually consulting with the medical sector. The Australian Medical Association, the Royal Australian College of General Practitioners, the Australian College of Rural and Remote Medicine and the Rural Doctors Association of Australia were consulted on the temporary changes to the bulk-billing incentives.

The return of the scheduled fees for the bulk-billing incentives maintain rights to health and social security by ensuring access to publicly subsidised health services which are clinically effective and cost-effective. The return of the scheduled fees retains the incentives for medical practitioners to provide bulk-billed services to financially disadvantaged patient groups.

Concluding comments

International human rights legal advice

Rights to health, equality and non-discrimination and social security

2.159 Regarding the objective of the Telehealth instrument, the minister has reiterated that the removal of the mandatory requirement to bulk-bill certain telehealth and phone consultation services provided by GPs and other medical practitioners was necessary to support the continued viability of the sector and is consistent with billing arrangements for the equivalent face-to-face services. As noted in the preliminary analysis, the continued viability of the health care sectors during the COVID-19 pandemic is likely to constitute a legitimate objective for the purposes of international human rights law, and the measure would appear to be rationally connected to that objective.

2.160 With respect to the Incentive instrument, the minister has advised that the temporary increase to the bulk-billing incentive was introduced to ensure practices could stay open to provide face-to-face services where they were essential for patients that could not be treated through telehealth. While the minister has explained the purpose behind *increasing* the bulk-billing incentive, he has not provided any further information regarding the objective underlying the removal of the temporary increase to the schedule fees for the bulk-billing incentive items (noting that while the instrument retains the incentive it reduces it by 50 per cent). Without this information it is difficult to conclude as to whether the Incentive instrument pursues a legitimate objective for the purposes of international human rights law.

2.161 As regards proportionality, a relevant consideration is the extent to which the discretion to bulk-bill is exercised by GPs and other doctors in practice, particularly for patients at risk of COVID-19, concessional beneficiaries, or patients

under the age of 16 years. The minister has emphasised that the effect of the Telehealth instrument is that from 1 October 2020, GPs and other doctors have returned to normal MBS billing arrangements, including the discretion for doctors to bulk-bill their services or charge co-payments. The minister has advised that while the government sets the schedule fees and encourages bulk-billing, medical practitioners are free to set their own value on the services they provide, and it is at the provider's discretion whether or not to bulk-bill. The minister has not provided information about how this discretion is exercised in practice. Without this information, it is difficult to assess the extent to which this measure has the effect of reducing access to affordable health care options for patients who previously benefited from the bulk-billing requirement, notably patients at risk of COVID-19, concessional beneficiaries, and patients under the age of 16 years.

2.162 Noting the jurisprudence of the UN Committee on Economic, Social and Cultural Rights that any deliberately retrogressive measures should only be introduced after the most careful consideration of all alternatives and should be fully justified, questions remain as to whether this high standard has been met in relation to these measures. In particular, it is not clear that there was careful consideration of less rights restrictive alternatives and of the effect of the measure on certain patients, particularly those experiencing socio-economic disadvantage.[17] As these measures were introduced on a temporary basis in response to the COVID-19 pandemic, it may be easier, under international human rights law, to justify them, as the apparently retrogressive measures are in fact the removal of temporary rights-enhancing measures. However, it should be noted that the UN Committee on Economic, Social and Cultural Rights, in its statement on the pandemic and economic, social and cultural rights, has called on States to ensure that urgent measures taken in response to the pandemic provide the impetus for long-term

17 United Nations Economic, Social and Cultural Rights Committee, *General Comment No. 14: The Right to the Highest Attainable Standard of Health* (2000) [32]. Noting the adverse impact of the COVID-19 pandemic on States parties' resources and economies, the UN Office of the High Commissioner for Human Rights' *Report on Austerity Measures and Economic and Social Rights* is helpful in assessing the lawfulness of austerity measures in the context of the States' duty to progressively realise social, economic and cultural rights. The report states – 'Where austerity measures result in retrogressive steps affecting the realization or implementation of human rights, the burden of proof shifts to the implementing State to provide justification for such retrogressive measures. In ensuring compliance with their human rights obligations when adopting austerity measures, States should demonstrate: (1) the existence of a compelling State interest; (2) the necessity, reasonableness, temporariness and proportionality of the austerity measures; (3) the exhaustion of alternative and less restrictive measures; (4) the non-discriminatory nature of the proposed measures; (5) protection of a minimum core content of the rights; and (6) genuine participation of affected groups and individuals in decision-making processes': UN Office of the High Commissioner for Human Rights, *Report on Austerity Measures and Economic and Social Rights* (2013) [15].

resource mobilisation towards the full realisation of economic, social and cultural rights, including the right to health.[18] The Committee has also urged States parties to 'mobilize the necessary resources to combat COVID-19 in the most equitable manner, in order to avoid imposing a further economic burden' on marginalised groups.[19]

2.163 Without further information as to how, in practice, GPs exercise their discretion to bulk-bill, it is not possible to assess whether these measures have the effect of reducing access to affordable health care options for patients who previously benefited from the bulk-billing requirement and increased incentive. Further, the minister has not provided any information as to whether consideration was given to less rights restrictive alternatives or to the extent to which these measures may indirectly discriminate against certain patients, particularly those experiencing socio-economic disadvantage. As such, it is not possible to conclude as to the compatibility of these measures with the rights to health, social security, and equality and non-discrimination.

Committee view

2.164 The committee thanks the minister for this response. The committee notes that these instruments remove the temporary requirement that doctors undertaking tele-health and phone appointments bulk-bill certain patients and removes the temporary increase to the schedule fees for bulk-billing. The committee notes the minister's advice that these measures were introduced temporarily, as part of a health care package to protect all Australians from COVID-19. The committee also notes the minister's advice that returning these measures to their normal Medicare Benefits Scheme billing arrangements is necessary to support the continued viability of general medical practices.

2.165 The committee recognises that the temporary measures to increase bulk-billing were vitally important in responding to the COVID-19 pandemic and promoting the right to health. The committee notes the legal advice that as the initial temporary measures promoted the right to health, the removal of these rights-enhancing measures may, as a technical matter, constitute a retrogressive step under international human rights law, if the effect is to reduce access to affordable health-care services for certain patients.

18 United Nations Economic, Social and Cultural Rights Committee, *Statement on the coronavirus disease (COVID-19) pandemic and economic, social and cultural rights* (2020) [10], [25].

19 United Nations Economic, Social and Cultural Rights Committee, *Statement on the coronavirus disease (COVID-19) pandemic and economic, social and cultural rights* (2020) [14].

2.166 Notwithstanding, the committee notes that these measures align tele-health appointments with the same bulk-billing arrangements as face-to-face appointments, and the return of the scheduled fees continue to retain the incentive for medical practitioners to provide bulk-billed services to financially disadvantaged patient groups.

Migration (LIN 20/166: Australian Values Statement for Public Interest Criterion 4019) Instrument 2020 [F2020L01305][1]

Purpose	This instrument amends the language of the values statement for all visa subclasses
Portfolio	Population, Cities, and Urban Infrastructure
Authorising legislation	Migration Regulations 1994
Last day to disallow	Exempt from disallowance pursuant to paragraph (b) of item 20 of the table in section 10 of the Legislation (Exemptions and Other Matters) Regulation 2015
Rights	Equality and non-discrimination; rights of people with disabilities

2.167 The committee requested a response from the minister in relation to the instrument in *Report 14 of 2020*.[2]

Australian Values Statement

2.168 This instrument approves the Australian Values Statement for specified subclasses of visas. This replaces the existing statement and adds a new statement for specified permanent visa subclasses, whereby applicants for these visas are required to sign a values statement which includes an undertaking to make reasonable efforts to learn English, if it is not the applicant's native language.[3] If an applicant does not sign the Australian Values Statement when they apply for a visa, their application may be delayed or refused.[4]

1 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Migration (LIN 20/166: Australian Values Statement for Public Interest Criterion 4019) Instrument 2020 [F2020L01305], *Report 1 of 2021*; [2021] AUPJCHR 13.

2 Parliamentary Joint Committee on Human Rights, *Report 14 of 2020* (25 November 2020), pp. 34-37.

3 Schedule 2, Part 2. See also, Migration Regulations 1994, Schedule 4, Part 1, 4019 (public interest criteria).

4 Department of Home Affairs, 'Australian values' https://immi.homeaffairs.gov.au/help-support/meeting-our-requirements/australian-values [Accessed 4 November 2020].

Summary of initial assessment

Preliminary international human rights legal advice

Right to equality and non-discrimination; rights of people with disabilities

2.169 Requiring that specified permanent visa subclass applicants undertake to make reasonable efforts to learn English, if it is not their native language, may assist new migrants in integrating into the Australian community and in helping them to access a broader range of employment opportunities. It is also noted that there is legislation currently before the Parliament which would allow more migrants to access more free English language classes. This would assist migrants in meeting the requirement that they learn English.[5]

2.170 However, the requirement to make reasonable efforts to learn English may also have a disproportionate impact on people of certain nationalities, notably those from non-English speaking countries and countries where English is not routinely taught. In this respect, the instrument engages and may limit the right to equality and non-discrimination.[6] This right provides that everyone is entitled to enjoy their rights without discrimination of any kind and that all people are equal before the law and entitled without discrimination to equal and non-discriminatory protection of the law.[7] The right to equality encompasses both 'direct' discrimination (where measures have a discriminatory *intent*) and 'indirect' discrimination (where measures have a discriminatory *effect* on the enjoyment of rights).[8] Indirect discrimination occurs where 'a rule or measure that is neutral at face value or without intent to discriminate', exclusively or disproportionately affects people with a particular protected attribute.[9]

2.171 In addition, requiring a permanent visa applicant to undertake to take efforts to learn English may impact on persons living with a cognitive, intellectual or other developmental disability, and those with health challenges for whom learning an

5 See Immigration (Education) Amendment (Expanding Access to English Tuition) Bill 2020.

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

7 International Covenant on Civil and Political Rights, articles 2 and 26. Article 2(2) of the International Covenant on Economic, Social and Cultural Rights also prohibits discrimination specifically in relation to the human rights contained in the International Covenant on Economic, Social and Cultural Rights.

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

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

additional language may be more challenging. People with disabilities have the right to equality and non-discrimination, a right which may require that reasonable accommodations be made.[10] This right may be limited where such limitations are directed towards a legitimate objective, are rationally connected to (that is, effective to achieve) that objective, and are proportionate.

2.172 As this instrument is exempt from disallowance, no statement of compatibility is required to be included in the explanatory statement.[11] Consequently, there is insufficient information with which to assess the compatibility of the instrument with human rights. Further information is required in order to assess whether the rights to equality and non-discrimination and the rights of persons with disabilities may be engaged and limited, and in particular:

(a) whether a person's compliance with an undertaking to make reasonable efforts to learn English pursuant to this instrument is assessed following their agreement to the statement of values, and, if so, how;

(b) whether an undertaking to make reasonable efforts to learn English pursuant to this instrument is enforceable and, if so, what type of action could be taken in response to a failure to make such reasonable efforts (for example, whether a person's visa could be cancelled on that basis);

(c) whether the requirement that a person undertake to learn English could be severed from the remainder of the Australia values statement; and

(d) what kind of circumstances would be captured by the 'compelling circumstances' which may excuse an applicant from the requirement to sign a values statement, and whether this could include flexibility to excuse visa applicants based on their age, disability status, or other personal circumstances.

Committee's initial view

2.173 The committee noted that requiring that specified permanent visa subclass applicants undertake to make reasonable efforts to learn English, if it is not their native language, is likely to give rise to a number of positive benefits particularly in relation to the seeking of employment and to supporting applicants to integrate into the community.

10 Convention on the Rights of Persons with Disabilities, article 5 and International Covenant on Civil and Political Rights, article 26.

11 Legislation (Exemptions and Other Matters) Regulation 2015, section 10.

2.174 The committee noted this measure may have a disproportionate impact on some applicants on the basis of nationality, and may pose particular challenges for those with cognitive disabilities. The committee also noted that this may, therefore, engage the right to equality and non-discrimination, and the rights of persons with disabilities. The committee noted that these rights may be subject to permissible limitations if they are shown to be reasonable, necessary and proportionate.

2.175 In order to form a concluded view of the human rights implications of this legislative instrument, the committee sought the minister's advice as to the matters set out at paragraph [2.172].

2.176 The full initial analysis is set out in *Report 14 of 2020*.

Minister's response[12]

2.177 The minister advised:

> Signing the Australian Values Statement (AVS) is a requirement for grant of most visas if the person is 18 years and over, or in limited instances, 16 years and over. Only the version of the AVS for permanent visa applicants contains an undertaking about making reasonable efforts to learn English.
>
> As the Parliamentary Joint Committee on Human Rights (PJCHR) has noted, the purpose of including an undertaking about making reasonable efforts to learn the English language for persons seeking permanent residence in Australia is to support prospective migrants to understand the importance of learning English and the benefits this will bring them in their life in Australia. The previous version of the AVS included that applicants understood that the English language, as the national language, is an important unifying element of Australian society.
>
> The AVS seeks to support social cohesion within the Australian community.
>
> According to the Organisation for Economic Co-operation and Development (OECD), the integration of immigrants and their children is vital for social cohesion, inclusive growth and the ability of migrants to become self-reliant, productive citizens. It is also a prerequisite for the host population's acceptance of further immigration.
>
> Conversely, a lack of integration can result in significant economic costs due to lower productivity and growth. It can lead to political costs and instability and have negative effects on social cohesion.

12 The minister's response to the committee's inquiries was received on 7 December 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.

Only 13 per cent of those with no English skills are in work compared to 62 per cent of those who speak English well.[13]

Compared to other OECD countries, migrants in Australia achieve success in many areas contributing to integration, particularly given the diversity of our population. Migrants in Australia perform well above the average in terms of indicators like education, health and wellbeing, and job quality.

As the PJCHR has also noted, the Government has recently committed to increase access to publicly-funded English language tuition to assist new migrants.

The Government invests $250 million a year into the Adult Migrant English Program (AMEP), which helps people learn foundational English language and settlement skills to enable them to participate socially and economically in Australian society.

Major reforms to the AMEP were announced on 28 August 2020, to improve English language acquisition outcomes for migrants and humanitarian entrants in Australia.

Subject to amendment of the *Immigration (Education) Act 1971,* key changes will include:

- Uncapping the 510 hour English tuition entitlement, to provide unlimited hours of tuition;
- Raising the AMEP eligibility threshold and exit point for the program from functional to vocational English; and
- Removing the time limits on enrolling, commencing and completing AMEP tuition (for those already in Australia as at 1 October 2020).

This is the most significant reform to the AMEP in many years and means that more migrants will be able to access free English tuition for longer, and until they reach a higher level of proficiency.

English language proficiency is especially important, not only for communicating and connecting, but also because it improves employment prospects.

When a person undertakes to make reasonable efforts to learn English, they would do so in the context of what is reasonable in their own circumstances. In some cases, this may mean that they try to learn some basics to be able to undertake everyday interactions, such as shopping or talking to their neighbour.

Where an applicant does not sign the AVS, the delegate would seek to explain the AVS to the applicant and request again that they sign it. Where the applicant refuses, the delegate may consider if a waiver is applicable. If

13 Australian Bureau of Statistics Census 2016.

no waiver is applicable, the delegate, in consultation with the relevant policy area, would determine whether the application should be refused due to the applicant not satisfying a criteria for the grant of the visa.

1.84 In order to form a concluded view of the human rights implications of this legislative instrument, the committee seeks the minister's advice as to the matters set out at paragraph [1.80].

1.80 As this instrument is exempt from disallowance, no statement of compatibility is required to be included in the explanatory statement. Consequently, there is insufficient information with which to assess the compatibility of the instrument with human rights. Further information is required in order to assess whether the rights to equality and non-discrimination and the rights of persons with disabilities may be engaged and limited, and in particular:

(a) whether a person's compliance with an undertaking to make reasonable efforts to learn English pursuant to this instrument is assessed following their agreement to the statement of values, and, if so, how;

There is no compliance component associated with the AVS after the person has signed it.

The changes to the AVS do not alter English language requirements already in place as criteria for the grant of certain visas, and does not alter the Australian Citizenship Test which is conducted in English.

(b) whether an undertaking to make reasonable efforts to learn English pursuant to this instrument is enforceable and, if so, what type of action could be taken in response to a failure to make such reasonable efforts (for example, whether a person's visa could be cancelled on that basis);

As above, there is no compliance component associated with the AVS after the person has signed it, and hence it is not enforceable.

The changes to the AVS do not alter existing visa cancellation grounds.

(c) whether the requirement that a person undertake to learn English could be severed from the remainder of the Australia values statement; and

Australian values are the 'glue' that holds the nation together. They define and shape our country and culture. Among our values is the importance of a shared language as a unifying element of Australian society, and the requirement in the AVS that a permanent visa applicant undertakes to make reasonable efforts to learn English reflects this.

As compliance with this requirement is not assessed, I consider it unnecessary to sever it from the remainder of the AVS. However, as explained further below, the requirement to sign the statement may be waived.

The requirement to undertake to make reasonable efforts to learn English is only included in the AVS to be signed by permanent visa applicants. This

recognises that English language proficiency is a key contributor to successful migrant settlement and integration outcomes.

As outlined above, eligible migrants and humanitarian entrants are able to access free English language tuition through the AMEP.

(d) what kind of circumstances would be captured by the 'compelling circumstances' which may excuse an applicant from the requirement to sign a values statement, and whether this could include flexibility to excuse visa applicants based on their age, disability status, or other personal circumstances.

Where compelling circumstances exist, the Minister or delegate may decide that the applicant is not required to sign the AVS. Examples of compelling circumstances include where an applicant is mentally or physically incapacitated. However, there is no minimum threshold for circumstances to be 'compelling'. It is open to the Minister or delegate to regard other circumstances as 'compelling'.

As noted above, a person undertaking to make reasonable efforts to learn English would be doing so in the context of what is reasonable in their own circumstances, which would include circumstances such as age or disability. However, this will not be assessed by the Department.

Concluding comments

International human rights legal advice

2.178 The minister has advised that once a person has signed an Australian Values Statement, there is no follow-up assessment as to whether a person is making reasonable efforts to learn English, and as such this agreement is not enforceable. The minister advised that the purpose of including an undertaking about making reasonable efforts to learn English for persons seeking permanent residence in Australia is to support prospective migrants to understand the importance of learning English and the benefits this will bring them in their life in Australia. The minister also advised of recent reforms to the Adult Migrant English Program which will mean more migrants will be able to access free English tuition for longer, and until they reach a higher level of proficiency.

2.179 The minister advised that the requirement to sign the statement may be waived when compelling circumstances exist. Such examples could include where an applicant is mentally or physically incapacitated, but there is no minimum threshold for circumstances to be regarded as 'compelling' and it is open to the minister or delegate to regard other relevant circumstances.

2.180 As there is flexibility to exempt certain applicants from signing the Australian Values Statement, and there is no compliance component associated with the Australian Values Statement, it appears this measure would not adversely impact on applicants on the basis of nationality or disability. As such, the measure does not

appear to limit the right to equality and non-discrimination, and the rights of persons with disabilities.

Committee view

2.181 The committee thanks the minister for this response. The committee notes that this instrument approves the Australian Values Statement for specified subclasses of visas, and would require that for specified permanent visa subclasses, applicants must sign a values statement which includes an undertaking to make reasonable efforts to learn English, if it is not the applicant's native language.

2.182 The committee notes the minister's detailed advice as to the purpose of including an undertaking about making reasonable efforts to learn the English language for persons seeking permanent residence in Australia, that it is to support prospective migrants to understand the importance of learning English and the benefits this will bring them in their life in Australia. The committee considers that encouraging permanent migrants to learn English seeks to support social cohesion in the Australian community. The committee also notes the minister's advice as to major reforms to the Adult Migrant English Program which will mean more migrants will be able to access free English tuition for longer, and until they reach a higher level of proficiency.

2.183 Noting the minister's advice that there is flexibility to exempt certain applicants from signing the Australian Values Statement, and there is no compliance component associated with the Australian Values Statement, the committee considers the measure does not limit the right to equality and non-discrimination, and the rights of persons with disabilities.

Senator the Hon Sarah Henderson

Chair