Parliamentary Joint Committee on Human Rights

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Committee information

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

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

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

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

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

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

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

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

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

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

Chapter 1[1]

New and continuing matters

1.1 In this chapter the committee has examined the following bills and legislative instruments for compatibility with human rights:

- bills introduced into the Parliament between 7 to 10 December 2020;
- legislative instruments registered on the Federal Register of Legislation between 2 to 23 December 2020;[2] and
- two bills previously deferred.[3]

1.2 Bills and legislative instruments from this period that the committee has determined not to comment on are set out at the end of the chapter, and bills the committee has deferred its consideration of are listed in the Appendix.

1.3 The committee comments on the following bills and legislative instrument, and in some instances, seeks a response or further information from the responsible minister.

1 This section can be cited as Parliamentary Joint Committee on Human Rights, New and continuing matters, *Report 1 of 2021*; [2021] AUPJCHR 2.

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

3 Australian Immunisation Register Amendment (Reporting) Bill 2020 and Surveillance Legislation Amendment (Identify and Disrupt) Bill 2020, which were previously deferred in *Report 15 of 2020*.

Bills

Australian Immunisation Register Amendment (Reporting) Bill 2020[4]

Purpose	This bill seeks to amend the *Australian Immunisation Register Act 2015* to: • introduce provisions under which recognised vaccination providers are required to report certain information in relation to certain vaccinations administered, both within and outside Australia; • authorise the collection and use of Commonwealth assigned identifiers, known as a 'provider identification information'; • introduce civil penalties should vaccination providers not comply with the legislated requirements; and • provide power for the secretary of the Department of Health to require a recognised vaccination provider to produce information if they do not comply with this reporting requirement
Portfolio	Health
Introduced	House of Representatives, 3 December 2020
Rights	Health; privacy

Requirement to report vaccination information

1.4 The *Australian Immunisation Register Act 2015* (AIR Act) establishes the Australian Immunisation Register (the Register), which records the vaccinations given to all people enrolled in Medicare in Australia. Currently, the AIR Act does not require vaccination providers to report information relating to vaccinations (it is done on a voluntary basis). This bill seeks to amend the AIR Act to create a requirement for vaccination providers to report information relating to certain relevant vaccinations administered both in and outside Australia to the Register.[5] It would also create a power to require a provider to give specified information if they do not comply with this requirement. The bill does not specify the kind of vaccination this will apply to, and the information that will be reported, leaving such matters to be set out in

4 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Australian Immunisation Register Amendment (Reporting) Bill 2020, *Report 1 of 2021*; [2021] AUPJCHR 3.

5 Schedule 1, item 7, proposed new Division 2A.

delegated legislation. Failure to comply with these reporting requirements would be subject to a civil penalty of up to 30 penalty units for each failure to report.[6]

Preliminary international human rights legal advice

Rights to health and privacy

1.5 In increasing the ability for the government to enhance the monitoring of vaccine preventable diseases, and contributing to enriched monitoring and statistics on health related issues, this measure appears to promote the right to health. The right to health is the right to enjoy the highest attainable standard of physical and mental health.[7] It is a right to have access to adequate health care as well as to live in conditions which promote a healthy life (such as access to safe drinking water, housing, food, and a healthy environment).[8]

1.6 However, in requiring vaccination providers to provide personal information about individuals who receive vaccinations (such as a COVID-19 vaccination),[9] while noting that access to information stored on the Register is strictly controlled and limited, the measure also appears to limit the right to privacy. The right to privacy includes respect for informational privacy, including the right to respect for private and confidential information, particularly the storing, use and sharing of such information.[10] It also includes the right to control the dissemination of information about one's private life. 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.

1.7 In assessing whether the measure seeks to achieve a legitimate objective, the statement of compatibility states that the bill provides the legislative infrastructure to assist in the objective of protecting the health of individuals and the community by enhanced monitoring of vaccine preventable diseases. This would appear to constitute a legitimate objective for the purposes of international human rights law and the measure appears rationally connected to that objective. In relation to proportionality, the statement of compatibility states that the type of information to be collected under the reporting obligation is the same as that currently collected on a voluntary basis, the amendments do not change the existing provisions in relation to the use and disclosure of information stored on the Register, and individuals have control under

6 Schedule 1, item 7, proposed subsections 10A(5) and 10B(3).

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

8 UN Economic, Social and Cultural Rights Committee, *General Comment No. 14: the right to the Highest Attainable Standard of Health* (2000) [4]. See also, *General Comment No. 12: the right to food (article 11)* (1999); *General Comment No. 15: the right to water (articles 11 and 12)* (2002); and *General Comment No. 22: the right to sexual and reproductive health* (2016).

9 See, explanatory memorandum, p. 1.

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

the AIR Act over how their personal information is used or disclosed.[11] It is noted that the ability of an individual to request that their personal information not be disclosed from the Register could constitute an important safeguard to ensure the consent of a person to the disclosure of their personal information. However, the effect of this as a safeguard in practice would depend on the availability and accessibility of information as to how a person can request their personal information not be disclosed.

1.8 Section 23 of the AIR Act currently provides that it is an offence for a person to record, disclose or use protected information (including personal information) obtained, or derived, under the AIR Act, unless they are authorised to do so. A person is authorised to record, disclose or use protected information if they do so in order to include the information on the Register or to otherwise perform functions under the AIR Act, to disclose the information to a court or coroner, or where authorised to do so under another law.[12] However, the AIR Act includes a broad power for the minister (or their delegate) to authorise a person to use or disclose protected information for a specified purpose where satisfied 'it is in the public interest' to do so.[13] Under international human rights law, when considering whether a limitation on a right is proportionate to achieve the stated objective, it is necessary to consider whether there are sufficient safeguards in place to protect the right to privacy and whether there are other less rights restrictive ways to achieve the stated objective. It is not clear why it is necessary for such a broad discretionary power to enable the disclosure of the personal vaccination information of almost all Australians to any person if it is considered to be in the (undefined) 'public interest'.

1.9 As was set out in the committee's analysis of the bill that subsequently became the AIR Act,[14] the measure, by empowering the minister to disclose protected information to 'a person' rather than 'a specified person or to a class of person', appears to enable disclosure without specifying or limiting the recipients of the information. In addition, it is not clear why specific purposes for disclosure are not set out in legislation, rather than being left to a broad ministerial discretion. The statement of compatibility states that one of the main purposes of the bill is to track and trace the administration of every COVID-19 vaccine administered, to ensure that the Register contains a complete and reliable dataset of vaccines administered in Australia.[15] It goes on to list the purposes for which this information could then be used, including to be able to 'prove vaccination for entry to child care, and school, and

11 Statement of compatibility, p. 4.

12 *Australian Immunisation Register Act 2015*, section 22.

13 *Australian Immunisation Register Act 2015*, subsection 22(3).

14 Parliamentary Joint Committee on Human Rights, *Thirty-Second Report of the 44th Parliament* (1 December 2015) p. 53.

15 Statement of compatibility, p. 3.

for employment purposes'.[16] It is not clear how information regarding an individual's vaccination status would be provided for such purposes. As a matter of statutory interpretation, it appears the measure would enable the minister to make broader authorisations to enable disclosure of personal information on the Register. It is difficult to assess the privacy implications of requiring vaccination providers to report information relating to vaccinations to the Register, without knowing the extent to which such information may be disclosed or the purposes for which it may be used.

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

(a) in what circumstances would personal information held on the Register be disclosed to employers, child-care centres and schools;

(b) if it is intended that the minister will specify classes of persons to whom information regarding individuals' COVID-19 vaccination status will be disclosed under the public interest exception (or any other basis), and if so, to whom will it be disclosed; and

(c) whether, in making disclosures of personal information on broad public interest grounds, the decision-maker would be required to consider the impact of such disclosure on the privacy of an affected individual.

Committee view

1.11 The committee notes that this bill would create a requirement for vaccination providers to report information relating to certain relevant vaccinations administered both in and outside Australia to the Australian Immunisation Register. The committee notes this will enable the government to track and trace every COVID-19 vaccine administered, and help to ensure this information can be used to monitor the effectiveness of the vaccines, monitor vaccination coverage across Australia and identify any parts of Australia at risk during the disease outbreak, and inform immunisation policy and research. The committee considers that increasing the ability for the government to enhance the monitoring of vaccine preventable diseases, this measure promotes the right to health.

1.12 The committee also notes that requiring vaccination providers to provide personal information about individuals who receive vaccinations also appears to limit the right to privacy. The committee notes that this right may be subject to permissible limitations if they are shown to be reasonable, necessary and proportionate.

1.13 The committee considers that monitoring information about vaccination coverage in order to identify health-related issues constitutes a legitimate objective for the purposes of international human rights law and the measure is rationally

16 Statement of compatibility, p. 3.

connected to that objective. The committee considers further information is required to assess the proportionality of the measure.

1.14 The committee has not yet formed a concluded view in relation to this matter. It considers further information is required to assess the human rights implications of this bill, and accordingly seeks the minister's advice as to the matters set out at paragraph [1.10].

Migration and Citizenship Legislation Amendment (Strengthening Information Provisions) Bill 2020[17]

Purpose	This bill seeks to amend various Acts relating to migration and Australian citizenship to: • provide a framework to protect disclosure of confidential information provided by gazetted law enforcement and intelligence agencies for consideration in visa decisions or citizenship decisions made on character grounds; • enable the minister to disclose confidential information to a court for the purposes of proceedings before the court; • allow the minister to issue a non-disclosure certificate on public interest grounds in relation to information relating to a decision made under the *Australian Citizenship Act 2007* where that decision is reviewable by the Administrative Appeals Tribunal; and • make it an offence for Commonwealth officers to disclose unauthorised confidential information relating to visa and citizenship decisions
Portfolio	Home Affairs
Introduced	House of Representatives, 10 December 2020
Rights	Fair hearing; prohibition against expulsion of aliens without due process

Protected information framework

1.15 The bill seeks to amend the *Migration Act 1958* (Migration Act) and the *Australian Citizenship Act 2007* (Citizenship Act), and make consequential amendments to other laws, for the purposes of introducing a 'protected information framework'. The framework would protect disclosure of confidential information[18] provided by intelligence and law enforcement agencies where the information is used for decisions made to refuse or cancel a visa on character grounds; or revoke or set

17 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Migration and Citizenship Legislation Amendment (Strengthening Information Provisions) Bill, *Report 1 of 2021*; [2021] AUPJCHR 4.

18 Confidential information means information communicated to an authorised Commonwealth officer by a gazetted agency on the condition that it be treated as confidential information and is relevant to the exercise of a specified power, including refusing, cancelling or revoking citizenship or citizenship cessation: Schedule 1, item 3, proposed section 52A. See also Schedule 1, item 9, proposed substituted section 503A (in relation to migration matters).

aside such decisions; or decisions made to refuse, cancel, revoke or cease citizenship.[19] The bill would prohibit an officer to whom confidential information is communicated to disclose that information to another person, except in very limited circumstances, or to be required to produce or give the information to a court, tribunal, parliament or parliamentary committee.[20] The bill would make unauthorised disclosure of confidential information an offence, carrying a penalty of 2 years' imprisonment.[21]

1.16 The bill would allow the minister, in specified circumstances, to declare that confidential information be disclosed to a specified minister, Commonwealth officer, court or tribunal.[22] Where information is disclosed in these circumstances, the receiving officer or member of a tribunal must not onwards disclose the information to any other person. In consideration or exercise of this power by the minister, the bill states that the rules of natural justice would not apply.[23]

1.17 Additionally, the bill would allow the High Court, Federal Court of Australia or Federal Circuit Court to order that confidential information be produced to the court if the information was supplied by law enforcement or intelligence agencies and the information is for the purpose of the substantive proceedings.[24] If information is ordered to be produced, any party to proceedings may make submissions concerning how the court should use the information, including any weight to be given to the information and the impact of disclosing the information on the public interest.[25] However, a party can only make submissions or tender evidence with respect to the information if they are lawfully aware of the content of the information.[26] The bill would require the court to order that any party which does not qualify to make submissions relating to the information must be excluded from the hearing of those submissions, including the applicant and their legal representative.[27] After considering the information and any submissions, the court would be required to make a determination as to whether disclosing the information would create a real risk of damage to the public interest and, if so, the court must not disclose the information

19 Schedule 1, item 3, proposed section 52A and item 9, proposed section 503A.

20 Schedule 1, item 3, proposed subsections 52A(2) and (3) and item 9, proposed subsections 503A(2) and (3).

21 Schedule 1, item 3, proposed subsection 52A(6) and item 9, proposed subsection 503A(6).

22 Schedule 1, item 3, proposed section 52B and item 9, proposed section 503B.

23 Schedule 1, item 3, proposed subsection 52B(9) and item 9, proposed subsection 50BA(9).

24 Schedule 1, item 3, proposed subsection 52C(1) and item 9, proposed subsection 503C(1).

25 Schedule 1, item 3, proposed subsection 52C(2) and item 9, proposed subsection 503C(2).

26 Schedule 1, item 3, proposed subsection 52C(3) and item 9, proposed subsection 503C(3). A person must not become aware of the content of the information unlawfully or by way of an action for breach of confidence.

27 Schedule 1, item 3, proposed subsection 52C(4) and item 9, proposed subsection 503C(4).

to any person, including the applicant and their legal representative.[28] In deciding whether such a risk exists, the court would be required to have regard to the list of matters set out in the bill (and only those matters), which includes the protection and safety of informants; Australia's relations with other countries; Australia's national security; and any other matters specified in regulations.[29] The bill would permit the court to give such weight to the information as it considers appropriate in the circumstances, having regard to any submission made regarding the use of the information.[30]

1.18 Schedule 2 of the bill would also establish a new framework for the management of disclosure of certain sensitive and confidential information to, and by, the Administrative Appeals Tribunal (AAT). The secretary of the Department would be prohibited from giving a document or protected information to the AAT in relation to the AAT's review of a decision if the minister certifies that disclosing the document or information would be contrary to the public interest because it would prejudice the security, defence or international relations of Australia, or involve the disclosure of cabinet deliberations or decisions.[31] Where a document or information has been given to the AAT and the minister has certified that disclosing that information would be contrary to the public interest, or the information was given to the minister in confidence, the AAT may disclose the information, including to the applicant, if it thinks it appropriate to do so having regard to any advice given to it by the secretary. If the information is disclosed, the AAT would be required to give a direction prohibiting or restricting the publication or other disclosure of that information if it is in the public interest to prohibit or restrict disclosure.[32]

Preliminary international human rights legal advice

Right to a fair hearing and prohibition against expulsion of aliens without due process

1.19 As regards decisions relating to Australian citizens, the measure appears to engage and limit the right to a fair hearing to the extent that it would restrict such persons from accessing confidential information on which the decision was based and exclude such persons from making submissions relating to the use of that information

28 Schedule 1, item 3, proposed subsections 52C(5)–(6) and item 9, proposed subsections 503C(5)–(6).

29 Schedule 1, item 3, proposed subsection 52C(5) and item 9, proposed subsection 503C(5).

30 Schedule 1, item 3, proposed subsection 52C(7) and item 9, proposed subsection 503C(7).

31 Schedule 2, item 5, proposed section 52G; explanatory memorandum, p. 37.

32 Schedule 2, item 5, proposed section 52H; *Administrative Appeals Tribunal Act 1975,* subsections 35(4)–(5).

in proceedings.[33] Article 14(1) of the International Covenant on Civil and Political Rights requires 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.[34] The concept of 'suit at law' encompasses judicial procedures aimed at determining rights and obligations, equivalent notions in the area of administrative law and also extends to other procedures assessed on a case-by-case basis in light of the nature of the right in question.[35] A decision involving the removal of an existing right, such as revocation of citizenship or an existing visa, would create a suit at law for the purposes of article 14.[36]

1.20 In order to constitute a fair hearing, the hearing must be conducted by an independent and impartial court or tribunal, before which all parties are equal, and have a reasonable opportunity to present their case.[37] The UK courts and the European Court of Human Rights have held that the right to a fair hearing is violated where a person is not provided with sufficient information about the allegations against them so that they are able to give effective instructions in relation to those allegations, and

33 To the extent that the effect of this bill would be to limit a person's ability to challenge a migration or citizenship decision, the consequence of that decision being the person's detention and deportation from Australia or prevention of return to Australia for citizens overseas, the measure may also engage and limit a number of other rights. In particular, the right to liberty (as immigration detention may be a consequence of a decision); right to protection of the family (as family members may be separated); right to non-refoulement (if the consequence of a decision is deportation and removal from Australia); freedom of movement (if cancellation of a visa or cessation of citizenship prevents a person from re-entering and remaining in Australia as their own country); and rights of the child (if the decision relates to a child's nationality). The rights implications of citizenship cessation are discussed in Parliamentary Joint Committee on Human Rights, *Report 8 of 2017* (15 August 2017) pp. 2–31; and *Report 6 of 2019* (5 December 2019), pp. 2–19.

34 International Covenant on Civil and Political Rights, article 14

35 UN Human Rights Committee, *General Comment 32: Article 14, Right to Equality before Courts and Tribunals and to Fair Trial* (2007) [16]. At [17], the UN Human Rights Committee has indicated that the guarantees in article 14 do not generally apply to expulsion or deportation proceedings, although the procedural guarantees of article 13 are applicable to such proceedings. See, for example, *PK v Canada*, UN Human Rights Committee Communication No.1234/03 (2007), especially at [7.5] where the Committee rejected the applicability of article 14 to a claim relating to the complainant's right to receive protection in the state party's territory. See also, *Zündel v Canada*, UN Human Rights Committee Communication No.1341/2005, (2007) at [6.7] which held that 'proceedings relating to the determination of whether a person constitutes a threat to national security, and his or her resulting deportation' do not fall within the scope of article 14.

36 For previous commentary on the right to a fair hearing in the context of revocation of citizenship see Parliamentary Joint Committee on Human Rights, *Report 8 of 2017* (15 August 2017) pp. 2–31; *Report 6 of 2019* (5 December 2019), pp. 2–19.

37 See UN Human Rights Committee, *General Comment 32: Article 14, Right to Equality before Courts and Tribunals and to Fair Trial* (2007) [18].

have an opportunity to challenge the allegations, even in circumstances where full disclosure of information is not possible for reasons of national security.[38] There can be no fair hearing if a case against a person is based solely or to a decisive degree on closed materials or where open material consists only of general assertions.[39] As regards this bill, a person's right to a fair hearing may be limited by the measure insofar as it would restrict the disclosure of information to the person, including information that was used in character-related decision-making, such as criminal allegations against a person, as well as excluding the person from making submissions about the use of the information in proceedings. The measure appears to have the effect of withholding sufficient information from the person to the extent that they are unable to effectively provide instructions in relation to, and challenge, the information, including possible criminal allegations against them.

1.21 As regards decisions relating to the expulsion or deportation of non-citizens or foreign nationals who are lawfully in Australia, the measure also appears to engage and limit the prohibition against expulsion of aliens without due process. This right is protected by article 13 of the International Covenant on Civil and Political Rights, which provides that:

> An alien lawfully in the territory of a State Party…may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority.

1.22 Article 13 incorporates notions of due process also reflected in article 14 of the International Covenant on Civil and Political Rights and should be interpreted in

38 See, *Secretary of State for the Home Department v AF (No. 3)* [2009] UKHL 28, especially at [59] where the court ruled that 'the controlee must be given sufficient information about the allegations against him to enable him to give effective instructions in relation to those allegations. Provided that this requirement is satisfied there can be a fair trial notwithstanding that the controlee is not provided with the detail or the sources of the evidence forming the basis of the allegations'. See also, *A v United Kingdom*, European Court of Human Rights (Grand Chamber), Application no. 3455/05 (2009), especially [218] where the Court stated that 'it was essential that as much information about the allegations and evidence against each applicant was disclosed as was possible without compromising national security or the safety of others. Where full disclosure was not possible, Article 5(4) required that the difficulties this caused were counterbalanced in such a way that each applicant still had the possibility effectively to challenge the allegations against him'.

39 *Secretary of State for the Home Department v AF (No. 3)* [2009] UKHL 28 [59]; *A v United Kingdom*, European Court of Human Rights (Grand Chamber), Application no. 3455/05 (2009) [220].

light of that right.[40] In particular, the United Nations (UN) Human Rights Committee has stated that article 13 encompasses 'the guarantee of equality of all persons before the courts and tribunals as enshrined in [article 14(1)] and the principles of impartiality, fairness and equality of arms implicit in this guarantee are applicable'.[41] The UN Committee has further stated that article 13 requires that 'an alien…be given full facilities for pursuing [their] remedy against expulsion so that this right will in all circumstances of [their] case be an effective one'.[42]

1.23 The measure limits the due process requirements in article 13 to the extent that it restricts a person's access to information that informed the decision leading to their expulsion or deportation, as well as their ability to make submissions on the use of that information or the weight to be attributed to the information by the court. Such restrictions would appear to have the effect of preventing a person in Australia whose visa is refused or cancelled from effectively contesting or correcting potentially erroneous information, thereby hindering their ability to effectively challenge the decision and pursue a remedy against expulsion.[43]

1.24 The due process guarantees in article 13 may be departed from, but only when 'compelling reasons of national security' so require.[44] It is unclear whether this exception would apply to this measure. The bill seeks to depart from due process requirements where there is a real risk of damage to the 'public interest'. While Australia's national security is a factor to be considered by the court in determining whether disclosing the information would create a real risk of damage to the public interest, it is not the only factor. There are other factors to be considered by the court which are broader than national security reasons, such as Australia's relations with

40 UN Human Rights Committee, *General Comment No. 32: The right to equality before courts and tribunals and to a fair trial* (2007) [17], [63].

41 UN Human Rights Committee, *General Comment No. 32: The right to equality before courts and tribunals and to a fair trial* (2007) [17], [63].

42 UN Human Rights Committee, *General Comment No. 15: The position of aliens under the Covenant* (1986) [10]. The Committee has also stated that 'Article 13 directly regulates only the procedure and not the substantive grounds for expulsion. However, by allowing only those carried out "in pursuance of a decision reached in accordance with law", its purpose is clearly to prevent arbitrary expulsions'.

43 See Committee on the Elimination of Racial Discrimination, *General Comment No. 30: discrimination against non-citizens* (2004) at [25], where the Committee on the Elimination of Racial Discrimination stressed the importance of the right to challenge expulsion and access an effective remedy, noting that States should ensure that 'non-citizens have equal access to effective remedies, including the right to challenge expulsion orders, and are allowed effectively to pursue such remedies'.

44 International Covenant on Civil and Political Rights, article 13; UN Human Rights Committee, *General Comment No. 15: The position of aliens under the Covenant* (1986) [10]. Note that if there are compelling reasons of national security not to allow an alien to submit reasons against their expulsion, the right will not be limited. Where there are no such grounds, the right will be limited, and then it will be necessary to engage in an assessment of the limitation using the usual criteria (of necessity and proportionality).

other countries and the risk of discouraging informants. Furthermore, the UN Human Rights Committee appears to have interpreted the exception of 'compelling reasons of national security' to be a reasonably high threshold which States parties must meet before departing from their due process obligations.[45] As such, it would appear that article 13 is engaged and limited, yet the statement of compatibility did not identify it as being engaged by the bill, and accordingly no assessment was provided as to whether the limitation was permissible.

1.25 The right to a fair hearing and the prohibition against expulsion of aliens without due process may be subject to permissible limitations where the limitation pursues a legitimate objective, is rationally connected to that objective and is a proportionate means of achieving that objective.

1.26 As regards the objective being pursued by the bill, the statement of compatibility states that it aims to uphold the good order of the Australian community and protect the public interest by protecting confidential information as well as the methodologies, priorities and capabilities of law enforcement agencies in obtaining that information.[46] It notes that disclosure of confidential information has the potential to expose and jeopardise intelligence and law enforcement capabilities and activities.[47] The statement of compatibility explains that the existing threshold for public interest immunity does not adequately protect the type of confidential information used in character-related decisions, such as a person's criminal background and associations, thereby creating a real risk of onwards disclosure by the

45 See, for example, *Mansour Leghaei and others v Australia,* United Nations Human Rights Committee Communication No. 1937/2010 (2015): the partially dissenting opinion of Committee members Sarah Cleveland and Víctor Manuel Rodríguez-Rescia (dissenting only because the Committee as a whole did not consider the article 13 arguments) is noteworthy with respect to the national security exception in article 13. The Committee concluded at [10.4] that 'the author was never formally provided with the reasons for the refusal to grant him the requested visa which resulted in his duty to leave the country, except for the general explanation that he was a threat to national security based on security assessment of which he did not even receive a summary'. In light of this finding, Committee members Cleveland and Rodríguez-Rescia concluded at [5] that the 'invocation of "compelling reasons of national security" to justify the expulsion of the author…did not exempt the State from the obligation under article 13 to provide the requisite procedural safeguards. The fact that the State failed to provide the author with these procedural safeguards constitutes a breach of the obligation under article 13 to allow the author to submit the reasons against his expulsion…This means that he should have been given the opportunity to comment on the information submitted to them, at least in summary form'. See also, *Mansour Ahani v Canada,* United Nations Human Rights Committee Communication No. 1051/2002 (2004) [10.8]: 'Given that the domestic procedure allowed the author to provide (limited) reasons against his expulsion and to receive a degree of review of his case, it would be inappropriate for the Committee to accept that, in the proceedings before it, "compelling reasons of national security" existed to exempt the State party from its obligation under that article to provide the procedural protections in question'.

46 Statement of compatibility, p. 47.

47 Statement of compatibility, p. 48.

AAT or courts of confidential information and its source to other persons, including non-citizens.[48] Additionally, the statement of compatibility notes that the bill responds to the High Court of Australia decisions of *Graham* and *Te Puia*.[49] The objective of protecting national security and associated law enforcement and intelligence capabilities would likely constitute a legitimate objective for the purposes of international human rights law. Insofar as the measure seeks to establish a framework to prevent the disclosure of confidential information in circumstances where disclosure may damage the public interest, including national security, the measure would appear to be rationally connected to the stated objective.

1.27 In assessing proportionality, it is necessary to consider whether the proposed limitation is sufficiently circumscribed. The matters specified in proposed subsections 52C(5) and 503C(5) that are to be considered by the court in determining whether disclosing the information would create a real risk of damage to the public interest, would appear, in some ways, to be quite broad. Indeed, the statement of compatibility notes that the bill would require the courts to consider the potential damage to the wider concept of public interest, not only national security, in determining whether to order onwards disclosure.[50] The use of the broader concept of public interest rather than the narrower concept of national security would appear to create a lower threshold which must be met in order to prohibit the disclosure of information to any person, including the person to whom the information pertains. Additionally, some matters specified in proposed subsections 52C(5) and 503C(5) are drafted in vague terms, such as 'Australia's relations with other countries' or 'other matters specified in regulations', making it difficult to ascertain the precise circumstances in which rights may be limited. It is also not clear that all of the listed matters are relevant to achieving the stated objective of protecting law enforcement and intelligence capabilities. This raises questions as to whether the measure is sufficiently circumscribed.

1.28 Other relevant factors in assessing the proportionality of the measure include whether it is accompanied by sufficient safeguards; whether it provides sufficient flexibility to treat different cases differently; and whether any less rights restrictive alternatives could achieve the same stated objective. The statement of compatibility states that any limits to human rights are reasonable, necessary and proportionate but does not identify any safeguards which assist with the proportionality of the measure.[51] While the role of the court could operate as a safeguard or oversight mechanism, its role is severely restricted by the practical operation of the measure. The court is only permitted to hear submissions regarding the use of the information

48 Statement of compatibility, pp. 46 and 48.

49 Statement of compatibility, p. 42. See *Graham v Minister for Immigration and Border Protection; Te Puia v Minister for Immigration and Border Protection* [2017] HCA 33.

50 Statement of compatibility, p 48.

51 Statement of compatibility, pp. 47 and 49.

and any weight to be given to the information from parties who are lawfully aware of the content of that information. Given the confidential nature of the information and its source, as well as the intent of the measure to prevent disclosure of the information to other parties, particularly non-citizens, it appears unlikely that any other party except the minister would be aware of the content of the information. In effect, the person to whom the information pertains, and their legal representative, would be excluded from proceedings.

1.29 The jurisprudence of the European Court of Human Rights offers some guidance in considering possible safeguards in the context of domestic laws that restrict disclosure of information to parties for reasons of national security. The European Court of Human Rights has identified special advocates as an important safeguard to 'counterbalance procedural unfairness' through 'questioning the State's witnesses on the need for secrecy and through making submissions to the judge regarding the case for additional disclosure'.[52] The European Court of Human Rights has stated:

> the special advocate could perform an important role in counterbalancing the lack of full disclosure and the lack of a full, open, adversarial hearing by testing the evidence and putting arguments on behalf of the detainee during the closed hearings. However, the special advocate could not perform this function in any useful way unless the detainee was provided with sufficient information about the allegations against him to enable him to give effective instructions to the special advocate.[53]

1.30 It is noted that in other Commonwealth legislation where information is withheld from the affected person on national security grounds, there is a process by which the affected person is provided with a summary of the information and a special advocate is appointed to represent the person's interests in closed hearings.[54]

1.31 Additionally, by prescribing an exhaustive list of matters to which the court must have regard, the court has minimal flexibility to treat individual cases differently and consider matters and information that it considers appropriate and necessary, having regard to the merits of each individual case. The court is prevented from considering procedural fairness and the rights of the affected person in determining whether to disclose the information, notwithstanding that the human rights implications for the affected person may be profound, such as detention and deportation.

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52 *A v United Kingdom*, European Court of Human Rights (Grand Chamber), Application no. 3455/05 (2009) [209] and [219].

53 *A v United Kingdom*, European Court of Human Rights (Grand Chamber), Application no. 3455/05 (2009) [220].

54 See *National Security Information (Criminal and Civil Proceedings) Act 2004*. Although note the human rights concerns regarding the adequacy of these measures to safeguard the right to a fair hearing, see Parliamentary Joint Committee on Human Rights, *Report 13 of 2020* (13 November 2020) pp. 54–61.

1.32 The proportionality of the measure would likely be assisted if the court was able to undertake some form of balancing exercise, whereby it may weigh the risk of damage to the public interest against the right to a fair hearing or other matters that it considers appropriate and necessary.[55] Without being able to properly test the evidence and to receive submissions from the person to whom the information relates, it would appear very difficult for the court to effectively perform its judicial review task, including determining the appropriate weight to be given to the information in substantive proceedings.[56] The court also has no flexibility to treat individual cases differently as regards disclosure of information. Where it has been determined that disclosure would create a real risk of damage to the public interest, the court is prevented from disclosing even part of the confidential information, such as a summary of the information or a discrete element of the information, even in circumstances where partial disclosure could assist the court without creating a real risk of damage to the public interest. As such, an applicant could be left in the situation of trying to challenge a decision without having any understanding of the reasons for which the decision was made.

1.33 Noting the lack of safeguards to protect the rights of affected persons and the inability of the court to consider procedural fairness in determining whether to disclose the information, it is not apparent that the measure would be the least rights restrictive means of achieving the stated objective. Insofar as information is sought to be protected from disclosure to the public or the affected person for reasons of public interest, the statement of compatibility does not address alternative means that may be available that would protect such information only to the extent required for the public interest, or alternative processes that would still allow such information to be tested in some way before a court. It seems that a less rights restrictive means of achieving the stated objective would be to allow the court to order the disclosure of as much information as possible without compromising the public interest so as to ensure the applicant has the possibility to challenge the information and any allegations against them.

1.34 The availability of review is also relevant in assessing proportionality, as well as being a key component of States parties' procedural fairness obligations under international human rights law. Importantly, as discussed above, the right to review

55 See *A v United Kingdom*, European Court of Human Rights (Grand Chamber), Application no. 3455/05 (2009) at [206] where the Court stated that the right to a fair trial may not be violated in circumstances where, having full knowledge of the issues in the trial, the judge is able to carry out a balancing exercise and take steps to ensure that the defence (whose rights are limited) is kept informed and is permitted to make submissions and participate in the decision-making process so far as is possible without disclosing the confidential material.

56 Schedule 1, item 3, proposed subsection 52C(7) and item 9, proposed subsection 503C(7).

under article 13 must be in all the circumstances an *effective* one.[57] The statement of compatibility states that the bill does not amend the relevant procedures and review mechanisms under the Migration Act and Citizenship Act. It states that review of decisions made under these Acts is available, including merits review by the AAT and/or judicial review for decisions made by a delegate, and judicial review of decisions made by the minister.[58] However, while review is theoretically available, the measure would appear to render the practical efficacy of review meaningless in many cases. Without access to all relevant information, notably critical information on which the decision was based, it is unclear on what basis an affected person would be able to effectively challenge the decision. Furthermore, as discussed above, the court's ability to properly perform its judicial review task is severely hampered by the measure. This raises serious concerns that there may not be *effective* access to review.

1.35 In conclusion, the measure seeks to achieve the legitimate objective of protecting national security and associated law enforcement and intelligence capabilities. However, there are concerns as to whether the proposed limitation on the right to a fair hearing and the prohibition against expulsion of aliens without due process is proportionate. The use of the broader concept of public interest as opposed to national security raises questions as to whether the measure is sufficiently circumscribed. The statement of compatibility does not identify any safeguards or address whether there are less rights restrictive means of achieving the stated objective, making it difficult to assess the proportionality of the measure. While review is available, its effectiveness is significantly weakened by the measure insofar as it prevents the applicant's access to potentially all relevant information and places restrictions on the court's ability to consider all matters appropriate and necessary to perform its judicial review task, such as being able to consider procedural fairness obligations or receive submissions from the applicant to test the reliability, relevance and accuracy of the information.

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

(a) why it is necessary and appropriate to use 'public interest' as opposed to 'national security' as the threshold concept for determining whether confidential information can be disclosed to another person, and a rationale for the inclusion of each of the grounds in proposed subsections 52C(5) and 503C(5);

57 UN Human Rights Committee, *General Comment No. 15: The position of aliens under the Covenant* (1986) [10]. See also, UN Human Rights Council, *Arbitrary deprivation of nationality: report of the Secretary-General*, A/HRC/10/34 (2009) at [31], with respect to decisions relating to nationality, such as cessation or revocation of citizenship, the former UN Secretary-General emphasised States' obligations under international law 'to provide for an opportunity for meaningful review of nationality decisions, including on substantive issues'.

58 Statement of compatibility, pp. 48–49.

(b) why it is necessary and appropriate for the matters specified in proposed subsections 52C(5) and 503C(5) to be exhaustive;

(c) why it is not possible to allow the court to disclose the relevant information (or a summary of it) to the extent that is necessary to ensure procedural fairness in circumstances where partial disclosure could be achieved without creating a real risk of damage to the public interest;

(d) why procedural fairness, particularly as relates to the applicant, is not included as a matter that the court must have regard to when determining whether disclosing the information would create a real risk of damage to the public interest;

(e) what other matters are likely to be specified in the regulations in relation to proposed subsections 52C(5) and 503C(5);

(f) why is there no process by which a special advocate or equivalent safeguard is able to represent the applicant's interests if it is determined that relevant information be withheld from the applicant; and

(g) what, if any, other safeguards exist to ensure that the proposed limit on the right to a fair trial and the prohibition against expulsion without due process are proportionate.

Committee view

1.37 The committee notes that the bill seeks to amend the *Migration Act 1958* and the *Australian Citizenship Act 2007* for the purposes of introducing a 'protected information framework'. The framework would protect disclosure of confidential information provided by intelligence and law enforcement agencies where the information is used for certain migration or citizenship decisions. The bill would allow the courts to order the production of confidential information in certain circumstances, however, it would be prohibited from onward disclosing the information to any person, including the applicant and their legal representative, where it is determined that disclosure would create a real risk of damage to the public interest.

1.38 The committee notes that the bill engages and limits the right to a fair hearing and the prohibition against expulsion of aliens without due process, to the extent that it restricts a person's access to information that is relevant to the decision which affects them, and excludes the person from hearings where they are not lawfully aware of the contents of the information. The committee notes that these rights may be subject to permissible limitations if they are shown to be reasonable, necessary and proportionate.

1.39 The committee considers that the bill pursues the legitimate objective of upholding law enforcement and intelligence capabilities, and insofar as the measure protects disclosure of confidential information where disclosure may jeopardise law enforcement or intelligence activities, the bill is rationally connected to this

objective. The committee considers further information is required to assess the proportionality of the measure.

1.40 The committee has not yet formed a concluded view in relation to this matter. It considers further information is required to assess the human rights implications of this bill, and accordingly seeks the minister's advice as to the matters set out at paragraph [1.36].

Surveillance Legislation Amendment (Identify and Disrupt) Bill 2020[59]

Purpose	This bill seeks to amend the *Surveillance Devices Act 2004* and other Acts to introduce new powers and warrants to enhance the enforcement and intelligence gathering powers of the Australian Federal Police (AFP) and the Australian Criminal Intelligence Commission (ACIC), including: • data disruption warrants to enable the AFP and the ACIC to disrupt data by modifying, adding, copying or deleting data in order to frustrate the commission of serious offences online; • network activity warrants to allow agencies to collect intelligence on serious criminal activity being conducted by criminal networks; and • account takeover warrants to provide the AFP and the ACIC with the ability to take control of a person's online account for the purposes of gathering evidence to further a criminal investigation
Portfolio	Home Affairs
Introduced	House of Representatives, 3 December 2020
Rights	Privacy; effective remedy; life; and torture or cruel, inhuman or degrading treatment or punishment

Enhanced law enforcement and intelligence gathering powers and warrants

1.41 The bill seeks to introduce new law enforcement and intelligence gathering powers and warrants to enhance the ability of the Australian Federal Police (AFP) and the Australian Criminal Intelligence Commission (ACIC) to frustrate crime and gather intelligence and evidence of criminal activity.

1.42 Schedule 1 would introduce a data disruption warrant which would allow the AFP and ACIC to access data held in computers to frustrate the commission of relevant offences (being offences generally subject to imprisonment of three years or more).[60] The AFP or ACIC may apply to an eligible judge or nominated Administrative Appeals

59 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Surveillance Legislation Amendment (Identify and Disrupt) Bill 2020, *Report 1 of 2021*; [2021] AUPJCHR 5.

60 Schedule 1, item 13, proposed section 27KE. See the definition of 'relevant offences' in section 6 of the *Surveillance Devices Act 2004*.

Tribunal (AAT) member for a data disruption warrant if they suspect on reasonable grounds that:

- one or more relevant offences have been, are being, are about to be, or are likely to be committed;[61]
- the offences involve or are likely to involve data held in a computer; and
- disruption of that data is likely to substantially assist in frustrating the commission of one or more relevant offences.[62]

1.43 An eligible judge or nominated AAT member may issue a data disruption warrant if satisfied that there are reasonable grounds for the suspicion founding the application for the warrant; and the disruption of data authorised by the warrant is justifiable and proportionate, having regard to the offences.[63] In considering issuing the warrant, the judge or AAT member must have regard to various considerations, including the:

- nature and gravity of the offences;
- likelihood the disruption of data will frustrate the commission of the offences; and
- existence of any alternative means of frustrating the commission of the offences.[64]

1.44 A non-exhaustive list of things that may be authorised by a data disruption warrant are set out in proposed subsection 27KE(2), including entering a premises; using computers, telecommunications facilities, electronic equipment or data storage devices to obtain access to and disrupt data, including adding, copying, deleting or altering data; and intercepting a passing communication.[65] Additionally, the bill would authorise a broad range of things to be done for the purposes of concealing anything done in relation to the data disruption warrant.[66]

1.45 Schedule 2 would introduce a network activity warrant which would authorise the AFP and ACIC to access data held in computers and collect intelligence on criminal

61 A relevant offence is an offence which carries a maximum sentence of imprisonment of 3 years or more: *Surveillance Devices Act 2004*, section 6.

62 Schedule 1, item 13, proposed section 27KA. An AFP or ACIC officer may also apply for an emergency authorisation for disruption of data held in a computer if certain conditions are met: Schedule 1, item 15, proposed new subsection 28(1C).

63 Schedule 1, item 13, proposed subsection 27KC(1).

64 Schedule 1, item 13, proposed subsection 27KC(2).

65 Schedule 1, item 13, proposed subsection 27KE(2). Data would be covered by the warrant if the disruption of data would be likely to substantially assist in frustrating the commission of a relevant offence: Schedule 1, item 13, proposed subsection 27KE(5).

66 Schedule 1, item 13, proposed subsection 27KE(9).

networks operating online. An AFP or ACIC officer may apply to an eligible judge or nominated AAT member for a network activity warrant if they suspect on reasonable grounds that:

- a group of individuals is a criminal network of individuals;[67] and
- access to data held in a computer that is, from time to time, used or likely to be used by any of the individuals in the group, will substantially assist in the collection of intelligence that relates to the group or individuals in the group, and is relevant to the prevention, detection or frustration of one or more relevant offences.[68]

1.46 An eligible judge or AAT member may issue a network activity warrant if satisfied that there are reasonable grounds for the suspicion founding the application for the warrant and having regard to prescribed matters, including the:

- nature and gravity of the alleged offences;
- extent to which access to data will assist in the collection of intelligence;
- likely intelligence value of any information sought to be obtained and whether the things authorised by the warrant are proportionate to that intelligence value; and
- existence of any alternative, or less intrusive, means of obtaining the information sought.[69]

1.47 Similarly to a data disruption warrant, a broad range of things may be authorised by a network activity warrant in relation to the computer that holds the data sought to be obtained, including things to be done for the purposes of concealing anything done in relation to the warrant.[70]

1.48 Schedule 3 would introduce an account takeover warrant which would authorise the AFP or ACIC to take control of a person's online account for the purposes of gathering evidence of criminal activity.[71] A law enforcement officer may apply to a

67 A criminal network of individuals is defined as an electronically linked group of individuals, where one or more of the individuals in the group have engaged, are engaging, or are likely to engage, in conduct that constitutes a relevant offence; or have facilitated, are facilitating, or are likely to facilitate, the engagement, by another person (where or no an individual in the group), in conduct that constitutes a relevant offence. It is immaterial whether the identities of the individuals in the groups or the details of the offences can be ascertained; or there are changes in the composition of the group from time to time: Schedule 2, item 8, proposed section 7A.

68 Schedule 2, item 9, proposed section 27KK.

69 Schedule 2, item 9, proposed subsection 27KM(2).

70 Schedule 2, item 9, proposed subsections 27KP(1), (2) and (8).

71 Schedule 3, item 4, proposed section 3ZZUJ.

magistrate for an account takeover warrant if they suspect on reasonable grounds that:

- one or more relevant offences have been, are being, are about to be, or are likely to be, committed; and
- an investigation into those offences is being, will be, or is likely to be, conducted; and
- taking control of one or more online accounts is necessary, in the course of the investigation, to enable evidence to be obtained of the offence.[72]

1.49 A magistrate may issue an account takeover warrant if satisfied that there are reasonable grounds for the suspicion founding the application for the warrant and having regard to prescribed matters, including the:

- nature and gravity of the alleged offence;
- any alternative means of obtaining the evidence;
- extent to which the privacy of any person is likely to be affected; and
- likely evidentiary value of the evidence sought.[73]

1.50 Similarly to the other warrants, a broad range of things may be authorised by an account takeover warrant in relation to the target account, including taking exclusive control of the account; accessing, adding, copying, deleting or altering account-based data and account credentials; and the doing of anything reasonably necessary to conceal anything done in relation to the warrant.[74]

Preliminary international human rights legal advice

Multiple rights

1.51 To the extent that the new powers and warrants would facilitate the investigation, disruption and prevention of serious crimes against persons, including protecting children from harm, the measure may promote multiple rights, including the right to life and the rights of the child. The right to life imposes an obligation on the state to protect people from being killed by others or identified risks.[75] The right imposes a duty on States to take positive measures to protect the right to life, including an obligation to take adequate preventative measures in order to protect persons

72 Schedule 3, item 4, proposed subsection 3ZZUN(1).

73 Schedule 3, item 4, proposed section 3ZZUP.

74 Schedule 3, item 4, proposed section 3ZZUR.

75 International Covenant on Civil and Political Rights, article 6(1) and Second Optional Protocol to the International Covenant on Civil and Political Rights, article 1. UN Human Rights Committee, *General Comment No. 6: article 36 (right to life)* (2019) [3]: the right 'concerns the entitlement of individuals to be free from acts and omissions that are intended or may be expected to cause their unnatural or premature death, as well as to enjoy a life with dignity'.

from reasonably foreseen threats, such as terrorist attacks or organised crime, as well as an obligation to take appropriate measures to address the general conditions in society that may threaten the right to life, such as high levels of crime and gun violence.[76] Furthermore, States have an obligation to investigate and, where appropriate, prosecute perpetrators of alleged violations of the right to life, even where the threat to life did not materialise.[77] Regarding the rights of the child, children have special rights under human rights law taking into account their particular vulnerabilities.[78] States have an obligation to protect children from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual exploitation and abuse.[79]

1.52 The statement of compatibility states that the bill promotes the right to life by providing the AFP and ACIC with additional tools to manage the risk posed by cyber-enabled serious and organised crime and respond to a heightened online threat environment.[80] It states that the bill is intended to target serious and organised offenders who are using anonymising technologies to engage in online criminal activity, such as terrorism, child exploitation and drugs and firearms trafficking.[81] The second reading speech noted that the threat of online child sexual abuse has recently increased. It stated that the Australian Centre to Counter Child Exploitation has identified a 163 per cent increase in child abuse material downloaded in the three months of April to June 2020 compared to the same period in 2019.[82] If the measure was effective in preventing or disrupting serious crime and facilitating the investigation and prosecution of alleged violations of rights, it may promote multiple rights, including the right to life and the rights of the child.

1.53 However, the measure also engages and limits other rights, notably the right to privacy, by authorising the AFP and ACIC to access and interfere with personal data and information.

76 UN Human Rights Committee, *General Comment No. 6: article 36 (right to life)* (2019) [21], [26]. See also UN Human Rights Committee, *General Comment No. 6: article 6 (right to life)* (1982) [5].

77 UN Human Rights Committee, *General Comment No. 6: article 36 (right to life)* (2019) [27]. The UN Human Rights Committee has stated that investigations in alleged violations of the right to life 'must always be independent, impartial, prompt, thorough, effective, credible and transparent': [28].

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

79 Convention on the Rights of the Child, articles 19, 34, 35 and 36.

80 Statement of compatibility, p. 16.

81 Statement of compatibility, p. 16.

82 Second reading speech, p. 2.

Right to privacy

1.54 The measure engages and limits the right to privacy by authorising the AFP and ACIC to take various actions that may interfere with a person's privacy, including taking actions to:

- access, use and modify an individual's personal data, such as altering a person's bank account credentials or monitoring and re-directing a person's funds held in a bank account;
- collect personal information and intelligence about individuals;
- add, copy, delete or alter other data to obtain access to data held in a target computer in order to determine whether the data is covered by a warrant;
- take control of an individual's online account through accessing and modifying data, such as changing a person's password in order to take control of a person's account and assume that person's identity; and
- enter an individual's home or workplace to do a thing specified in the warrant.[83]

1.55 The right to privacy includes respect for informational privacy, including the right to respect for private and confidential information, particularly the storing, use and sharing of such information.[84] It also includes the right to control the dissemination of information about one's private life. Additionally, the right to privacy prohibits arbitrary and unlawful interferences with an individual's privacy, family, correspondence or home.[85] 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.

1.56 The statement of compatibility acknowledges that the bill limits the right to privacy. It states that the objective of the bill is to protect national security, ensure public safety, address online crime, and protect the rights and freedoms of individuals by providing law enforcement agencies with the tools they need to keep the Australian community safe.[86] Such objectives would appear to constitute legitimate objectives

83 See eg explanatory memorandum, pp. 32, 33, 38, 39, 152.

84 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 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].

85 UN Human Rights Committee, *General Comment No. 16: Article 17* (1988) [3]-[4].

86 Statement of compatibility, p. 13.

for the purposes of international human rights law, and the measure appears to be rationally connected to this objective.

1.57 The key question is whether the measure is proportionate to achieving the stated objective. Of particular relevance in assessing proportionality is whether the limitation is only as extensive as is strictly necessary to achieve its legitimate objective; whether the measure is accompanied by sufficient safeguards; whether any less rights restrictive alternatives could achieve the same stated objective; and whether there is the possibility of oversight and the availability of review.

1.58 The statement of compatibility details numerous safeguards that exist in the bill to ensure that any interference with the right to privacy is not unlawful or arbitrary, including:

- mandatory considerations to which the issuing authority must have regard before granting a data disruption, network activity or account takeover warrant;
- limited interference with data and property through statutory prohibitions on certain actions;
- protection of information collected under the warrants; and
- measures governing security requirements and record keeping for protected information gathered under the warrants.[87]

1.59 These are important safeguards and likely assist with the proportionality of the measure. However, questions arise as to whether these safeguards are adequate in all circumstances. The strength of the above safeguards, as well as additional safeguards identified in the bill, are assessed in turn below.

Issuing authority

1.60 The bill provides that an application for data disruption and network activity warrants may be made to an eligible judge or a nominated AAT member.[88] An application for an account takeover warrant may be made to a magistrate.[89] Where the relevant issuing authority is a judicial officer, including an eligible judge or magistrate, the right to privacy is more likely to be safeguarded, noting that judicial

87 Statement of compatibility, pp. 13–15.

88 Schedule 1, item 13, proposed new subsection 27KA(2); Schedule 2, item 9, proposed new subsection 27KK(3). The explanatory memorandum states that an eligible judge is a person who is a judge of a court and has consented to be declared as an eligible judge by the Attorney-General. A nominated AAT member is a person who is either the Deputy President, senior member or member of the AAT, and has been nominated by the Attorney-General: Explanatory memorandum, pp. 26–27. See *Surveillance Devices Act 2004*, sections 12–13.

89 Schedule 3, item 4, proposed new subsection 3ZZUN.

authorisation of surveillance methods is considered to be 'best practice'[90] at international law. However, where the issuing authority is an AAT member, questions arise as to whether it is appropriate to entrust supervisory control to a non-judicial officer. As the European Court of Human Rights has stated in relation to interception:

> In a field where abuse is potentially so easy in individual cases and could have such harmful consequences for democratic society as a whole, it is in principle desirable to entrust supervisory control to a judge, judicial control offering the best guarantees of independence, impartiality and a proper procedure.[91]

1.61 The European Court of Human Rights has further stated that 'control by an independent body, normally a judge with special expertise, should be the rule and substitute solutions the exception, warranting close scrutiny'.[92] This approach has also been supported by the United Nations Special Rapporteur on the right to privacy, who included, in the 2018 draft general principles of the right to privacy, that where domestic law provides for the use of surveillance systems, that law shall:

> provide that the individual concerned is likely to have committed a serious crime or is likely to be about to commit a serious crime and in all such cases such domestic law shall establish that an independent authority, having all the attributes of permanent independent judicial standing, and operating from outside the law enforcement agency or security or intelligence agency concerned, shall have the competence to authorise targeted surveillance using specified means for a period of time limited to what may be appropriate to the case.[93]

1.62 Noting that AAT members do not have security of tenure, or generally the same level of expertise as judges, it is not clear that they would necessarily have all the attributes of permanent independent judicial authority. As such, there are concerns that the right to privacy may not be adequately safeguarded by enabling non-judicial officers, with potentially only five years of experience as a legal

90 See *Case of Big Brother Watch and Others v The United Kingdom*, European Court of Human Rights, application nos. 58170/13, 62322/14 and 24960/15, (13 September 2019), [320].

91 *Roman Zakharov v Russia*, European Court of Human Rights, Grand Chamber, application no. 47143/06 (4 December 2015) [233]. See also *Klass and Others v Germany*, European Court of Human Rights, application no. 5029/71), (6 September 1978) [55]: 'The rule of law implies, inter alia, that an interference by the executive authorities with an individual's rights should be subject to an effective control which should normally be assured by the judiciary, at least in the last resort, judicial control offering the best guarantees of independence, impartiality and a proper procedure'.

92 *Szabó and Vissy v Hungary*, European Court of Human Rights, application no. 37138/14 (6 June 2016) [77].

93 United Nations Special Rapporteur on the right to privacy, *Draft Legal Instrument on Government-led Surveillance and Privacy*, Version 0.6 (2018), p. 16.

practitioner, to issue warrants that have the potential to significantly interfere with an individual's privacy.[94]

Mandatory considerations prior to issuing warrants

1.63 The bill provides that in considering whether to grant a warrant, the issuing authority must have regard to specific considerations, including the nature and gravity of the alleged offences; the likely value of the intelligence or evidence to be obtained; the likelihood that the doing of the thing specified in the warrant would be effective in preventing, detecting or frustrating the alleged offence; and the existence of any alternative means of realising the intention of the warrant.[95] With respect to a network activity warrant, the issuing authority must also consider whether the things authorised by the warrant are proportionate to the likely intelligence value of any information obtained, and the extent to which the warrant will result in access to data of persons who are lawfully using the computer. With respect to an account takeover warrant, the issuing authority must also have regard to the extent to which the privacy of any person is likely to be affected.

1.64 The statement of compatibility states that when considering whether the actions authorised by the warrants are justified and proportionate, the issuing authority will consider, for example, the scope of the warrant in terms of who and how many people are affected, the exact nature of the potential intrusion on people's private information, and whether that intrusion is justified by the serious nature of the criminality that is being targeted.[96] The statement of compatibility notes that consideration of alternative means of realising the intention of the warrant is particularly important for ensuring that avenues of investigation, information collection and disruption that are less intrusive on individual privacy are considered. It states that where there are narrower activities that involve a more targeted approach, for example, this should be taken into account by the issuing authority.[97] The explanatory memorandum notes that considering alternative means does not require exhaustion of all other methods of access but rather requires the issuing authority to take into account the circumstances before them and balance the impact on privacy against the benefit to the intelligence operation.[98]

94 AAT members must have been enrolled as a legal practitioner for at least 5 years or in the opinion of the Governor-General, have special knowledge and skills relevant to their duties as either a Deputy President, senior member or member: *Administrative Appeals Tribunal Act 1975*, section 7.

95 Schedule 1, item 13, proposed subsection 27KC(2); Schedule 2, item 9, proposed subsection 27KM(2); Schedule 3, item 4, proposed subsection 3ZZUP(2).

96 Statement of compatibility, p. 13.

97 Statement of compatibility, pp. 13–14.

98 Explanatory memorandum, p. 76.

1.65 These mandatory considerations are important safeguards to mitigate the risk of arbitrary interference with the right to privacy. The consideration of alternative means of frustrating an offence with respect to the data disruption warrant and alternative or less intrusive means of obtaining information with respect to the network activity and account takeover warrants, assists with the proportionality of the measure by ensuring that less rights restrictive ways of achieving the objective are considered and pursued where appropriate. However, noting the particular value of an issuing authority explicitly considering the extent to which the privacy of any person is likely to be affected, it is unclear why this mandatory consideration is limited to account takeover warrants only and cannot also apply to data disruption and network activity warrants. Likewise, it is unclear why issuing authorities are not required to consider, with respect to all warrants rather than only network activity warrants, whether the warrant is proportionate having regard to the nature and gravity of the offence and the likely value of information sought to be obtained, as well as the extent of possible interference with the privacy of third parties.

Statutory limits on interference with data and property

1.66 The measure prohibits certain actions under the warrants, except in certain circumstances, in order to limit interference with data and property. All three warrants would prohibit the addition, deletion or alteration of data or the doing of anything that is likely to materially interfere with, interrupt or obstruct a communication in transit or the lawful use by other persons of a computer, unless the action is necessary to do one or more of the things specified in the warrant.[99] The warrants would also prohibit actions that cause any material loss or damage to other persons lawfully using a computer, unless in the case of a data disruption warrant, the loss or damage is justified and proportionate having regard to the offences covered by the warrant.[100] Additional statutory conditions apply to data disruption and account takeover warrants, including that the warrants cannot be executed in a manner that results in loss or damage to data unless justified and proportionate, and cannot cause a person to suffer permanent loss of money, digital currency or property (other than data).[101] However, the bill provides that these statutory conditions do not, by implication, limit the conditions to which the warrants may be subject.[102] The statement of compatibility states that the prohibition of certain actions and the additional statutory

99 Schedule 1, item 13, proposed subsection 27KE(7); Schedule 2, item 9, proposed subsection 27KP(6); Schedule 3, item 4, proposed subsection 3ZZUR(5). See also Statement of compatibility, p. 14.

100 Schedule 1, item 13, proposed subsection 27KE(7); Schedule 2, item 9, proposed subsection 27KP(6); Schedule 3, item 4, proposed subsection 3ZZUR(5).

101 Schedule 1, item 13, proposed subsection 27KE(12); Schedule 3, item 4, proposed subsection 3ZZUR(8).

102 Schedule 1, item 13, proposed subsection 27KE(13); Schedule 3, item 4, proposed subsection 3ZZUR(9).

conditions protect against unlawful and arbitrary interference with privacy and ensure that activities carried out under the warrants are justified and proportionate.[103]

1.67 The statutory limits on interference with data and property would appear to be an important safeguard against arbitrary interference with privacy. With respect to data disruption and account takeover warrants, the additional statutory conditions requiring that loss or damage to data in the execution of the warrants be justified and proportionate would appear to assist with the proportionality of the measure by ensuring that any interference with privacy is only as extensive as is strictly necessary. However, the strength of this safeguard may be weakened by the qualification that the statutory conditions do not limit the conditions to which a warrant may be subject. As a matter of statutory interpretation, it would appear that in specifying things that may be authorised by a data disruption warrant or an account takeover warrant, the issuing authority is not bound by the statutory conditions and may authorise actions that do, perhaps indirectly, result in loss or damage to data or cause a person to suffer a permanent loss of money, digital currency or property. It is unclear to what extent the statutory qualification would lessen the effectiveness of this safeguard in practice.

Restrictions on the use and disclosure of protected information

1.68 The measure contains restrictions regarding the use and disclosure of protected information. With respect to data disruption and account takeover warrants, information gathered under these warrants is deemed protected information and as such, can only be used, recorded, communicated or published in limited circumstances.[104] With respect to network activity warrants, the statement of compatibility states that intelligence gathered under this warrant cannot be used in evidence in a criminal proceeding except in limited circumstances, including further investigations into criminal conduct made under other warrants or to promote the right to a fair trial and facilitate adequate oversight mechanisms.[105] The bill sets out numerous circumstances in which protected information obtained under a network activity warrant can be lawfully used and admitted into evidence, such as disclosure in proceedings in open court, for the purposes of the AFP collecting, correlating, analysing or disseminating criminal intelligence, or the doing of a thing authorised by the warrant.[106]

1.69 The measure also prohibits the unauthorised use or disclosure of protected information with respect to all warrants. The statement of compatibility notes that it is an offence to use, disclose, record, communicate or publish protected information except in limited circumstances, such as where necessary for the investigation of a

103 Statement of compatibility, p. 14.

104 Schedule 1, item 28; Schedule 3, item 4, proposed section 3ZZVH. See also *Surveillance Devices Act 2004,* part 6, division 1.

105 Statement of compatibility, p. 15.

106 Schedule 2, item 19, proposed subsections 45B(3)–(9); Statement of compatibility, p. 15.

relevant offence, a relevant proceeding or the making of a decision as to whether or not to prosecute a person for a relevant offence, or where necessary to help prevent or reduce the risk of serious violence to a person or substantial damage to a property.[107]

1.70 While restricting the use and disclosure of protected information would appear to be an important safeguard, the broad range of exceptions to the statutory protections raises concerns as to whether this safeguard is adequate. For example, the bill would allow protected network activity warrant information to be shared with ASIO or any agency within the meaning of the *Intelligence Services Act 2001* if it relates or appears to relate to any matter within the functions of those organisations or agencies.[108] As drafted, these exceptions would appear to allow protected information obtained under a warrant for a specified purpose to be shared for other broader purposes and potentially purposes that are unrelated to the objectives of this bill. There are questions as to whether some of the exceptions are drafted in broader terms than is strictly necessary.

Storage and destruction of protected information

1.71 The measure requires that protected information obtained under all warrants is kept in a secure location that is not accessible to unauthorised persons and that records or reports are destroyed as soon as practicable if no civil or criminal proceedings have been or are likely to be commenced and the material is unlikely to be required, or within five years after the making of the report or record (which must be reviewed every five years).[109] The statement of compatibility states that requiring the security and destruction of records ensures that private data of individuals subject to a warrant is not handled by those without a legitimate need for access, and is not kept in perpetuity where there is not a legitimate reason for doing so.[110]

1.72 The requirement that protected information be securely stored and destroyed within a specified period of time may operate as a safeguard against arbitrary interference with privacy. In particular, it may ensure that irrelevant data or data that is no longer necessary for a purpose specified under the bill is destroyed and not retained. However, it is unclear whether the specified time period of five years is an

107 Statement of compatibility, p. 14.

108 Schedule 2, item 19, proposed subsection 45B(4); Statement of compatibility, p. 14.

109 Schedule 1, item 38 and *Surveillance Devices Act 2004*, section 46; Schedule 2, item 20, proposed section 46AA; Schedule 3, item 4, proposed section 3ZZVJ; Statement of compatibility, p. 15.

110 Statement of compatibility, p. 15.

appropriate period of time for the purposes of operating as an effective safeguard.[111] In particular, it is not clear why the chief officer is not required to review the continued need for the retention of such records or reports on a more regular basis.

Discontinuance and revocation provisions

1.73 The measure includes discontinuance and revocation provisions that apply in circumstances where the warrant is no longer necessary. The warrants can be issued for no more than 90 days but an extension can be sought more than once if certain conditions are met.[112] If a warrant is no longer required, the necessary steps must be taken to revoke the warrant and ensure that the things authorised under the warrant are discontinued.[113] The measure also places an obligation on law enforcement officers to immediately inform the chief officer of the law enforcement agency when they believe that the warrant is no longer necessary. These provisions would likely serve as an important safeguard against arbitrary interference with privacy and help to ensure that any limitation is only as extensive as is strictly necessary.[114]

Oversight frameworks and access to review

1.74 The statement of compatibility states that the Commonwealth Ombudsman will have oversight functions regarding the use of account takeover and data disruption warrants by the AFP and ACIC. It notes that the Inspector-General of Intelligence and Security (IGIS) will have oversight functions with respect to network activity warrants, including the power to review the activities of the AFP and ACIC in relation to the legality, propriety and human rights implications of the warrant.[115] Regarding the availability of review, the statement of compatibility states that the bill does not provide for merits review and excludes judicial review under the *Administrative Decisions (Judicial Review) Act 1977* (ADJR Act), although notes that courts will retain jurisdiction for judicial review of decisions by a judge or AAT member

111 In *Roman Zakharov v Russia*, the European Court of Human Rights held that the 'six-month storage time-limit set out in Russian law for such data reasonable. At the same time, it deplore[d] the lack of a requirement to destroy immediately any data that are not relevant for the purpose for which they have been obtained…the automatic storage for six months of clearly irrelevant data cannot be considered justified under Article 8': *Roman Zakharov v Russia*, European Court of Human Rights, Grand Chamber, application no. 47143/06 (4 December 2015) [254].

112 Schedule 1, item 13, proposed sections 27KD and 27KF; Schedule 2, item 9, proposed sections 27KN and 27KQ; Schedule 3, item 4, proposed section 3ZZUQ.

113 Schedule 1, item 13, proposed sections 27KG and 27KH; Schedule 2, item 9, proposed sections 27KR and 27KS; Schedule 3, item 4, proposed sections 3ZZUT and 3ZZUU.

114 International case law provides that legislation authorising surveillance warrants should set out the circumstances in which it must be cancelled when no longer necessary, and that without this, the law will not contain sufficient guarantees against arbitrary interference with the right to privacy: *Roman Zakharov v Russia*, European Court of Human Rights, Grand Chamber, application no. 47143/06 (4 December 2015) [250]-[252].

115 Statement of compatibility, p. 17.

to issue a warrant under the *Judiciary Act 1903*. The statement of compatibility states that this approach is consistent with similar decisions made for national security and law enforcement purposes, noting that such decisions are unsuitable for merits review.[116]

1.75 While the measure provides the possibility of oversight by the Commonwealth Ombudsman and IGIS, there is limited access to review. Additionally, there are concerns regarding the likely effectiveness of any review mechanisms given the covert nature and purpose of the measure. Persons whose privacy would be interfered with are invariably excluded from participating in any review proceedings or indeed, the proceedings dealing with the initial warrant application. In these circumstances, it is unclear why additional safeguards, such as public interest monitors,[117] are not available. As the person whose data or information is sought to be obtained is not able to be personally represented at the application for the warrant, having an independent expert to appear at the hearing to test the content and sufficiency of the information relied on, to question any person giving information, and to make submissions as to the appropriateness of granting the application, is an important safeguard to protect the rights of the affected person. As the European Court of Human Rights has held:

> the very nature and logic of secret surveillance dictate that not only the surveillance itself but also the accompanying review should be effected without the individual's knowledge. Consequently, since the individual will necessarily be prevented from seeking an effective remedy of his own accord or from taking a direct part in any review proceedings, it is essential that the procedures established should themselves provide adequate and equivalent guarantees safeguarding his rights.[118]

1.76 The statement of compatibility does not include information regarding the possibility of public interest monitors or similar safeguards. Noting the inclusion of a role for public interest monitors in similar legislation,[119] it is not clear why this measure does not include public interest monitors as a safeguard to ensure the interests of the affected person are protected in any warrant application or review proceedings.

Further information sought

1.77 In order to assess the compatibility of this measure with the right to privacy, in particular the adequacy of existing safeguards, further information is required as to:

(a) why the power to issue a data disruption warrant and network activity warrant is conferred on a member of the AAT, of any level and with a

116 Statement of compatibility, p. 17.

117 Such as the Victorian or Queensland Public Interest Monitor.

118 *Roman Zakharov v Russia*, European Court of Human Rights, Grand Chamber, application no. 47143/06 (4 December 2015) [233].

119 See *Telecommunications (Interception and Access) Act 1979* in relation to Public Interest Monitors (for example, see section 44A, 45, 46 and 46A).

minimum of five years' experience as an enrolled legal practitioner, and whether this is consistent with the international human rights law requirement that judicial authorities issue surveillance warrants;

(b) why the bill does not require, in relation to all warrants, that the issuing authority must consider the extent to which the privacy of any person is likely to be affected, noting that as drafted, this consideration only applies to account takeover warrants;

(c) why the bill does not require, in relation to all warrants, that the issuing authority must consider whether the warrant is proportionate having regard to the nature and gravity of the offence and the likely value of the information or evidence sought to be obtained, as well as the extent of possible interference with the privacy of third parties, noting that as drafted, these considerations only apply to network activity warrants;

(d) how the qualification that the statutory conditions do not limit the conditions to which a data disruption warrant or an account takeover warrant may be subject would operate in practice. In particular, would this qualification allow an issuing authority to authorise an action that can only be executed in a manner that results in loss or damage to data or causes the permanent loss of money, digital currency or property;

(e) whether all of the exceptions to the restrictions on the use, recording or disclosure of protected information obtained under the warrants are appropriate and whether any exceptions are drafted in broader terms than is strictly necessary; and

(f) why the bill does not include provision for public interest monitors or a similar safeguard to protect the rights of the affected person in warrant application and review proceedings; and

(g) why the chief officer is not required to review the continued need for the retention of records or reports comprising protected information on a more regular basis than every five years.

Right to an effective remedy

1.78 If warrants were to be issued inappropriately, or unauthorised actions carried out under the warrant, a person's right to privacy may be violated. The right to an effective remedy requires access to an effective remedy for violations of human rights.[120] This may take a variety of forms, such as prosecutions of suspected perpetrators or compensation to victims of abuse. While limitations may be placed in particular circumstances on the nature of the remedy provided (judicial or otherwise),

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

states parties must comply with the fundamental obligation to provide a remedy that is effective.[121]

1.79 The statement of compatibility identifies that the right to an effective remedy is engaged by the measure. It states that the bill does not provide merits review and excludes judicial review under the ADJR Act, although notes that judicial review is still available for decisions by a judge or AAT member to issue a warrant.[122] This would provide an avenue to challenge unlawful decisions where there has been a jurisdictional error. The statement of compatibility also notes the oversight functions of the Commonwealth Ombudsman and IGIS. It states that, with respect to network activity warrants, the IGIS would be able to review AFP and ACIC activities to ensure they are legal, proper, and consistent with human rights.

1.80 While the oversight functions of the Commonwealth Ombudsman and IGIS may serve as a useful safeguard to help ensure decision-makers are complying with the legislation, this would not appear to provide any remedy to individuals. Further, given that the warrants are designed to be sought covertly and noting the broad concealment powers, it is also unclear how an applicant could practically seek judicial review of a decision of which they are unaware. United Nations bodies and the European Court of Human Rights have provided specific guidance as to what constitutes an effective remedy where personal information is being collected in the context of covert surveillance activities. The United Nations High Commissioner for Human Rights has explained that in the context of violations of privacy through digital surveillance, effective remedies may take a variety of judicial, legislative or administrative forms, but those remedies must be known and accessible to anyone with an arguable claim that their rights have been violated.[123] The European Court of Human Rights has also stated that if an individual is not subsequently notified of surveillance measures which have been used against them, there is 'little scope for recourse to the courts by the individual concerned unless the latter is advised of the measures taken without his knowledge and thus able to challenge their legality retrospectively'.[124] The court acknowledged that, in some instances, notification may not be feasible where it would jeopardise long-term surveillance activities.[125] However, it explained that:

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

122 Statement of compatibility, p. 17.

123 Report of the Office of the United Nations High Commissioner for Human Rights on the right to privacy in the digital age (A/HRC/27/37) [40].

124 *Roman Zakharov v Russia*, European Court of Human Rights, Grand Chamber, (Application no. 47143/06) 2015, [234]. See also, *Klass and Others v Germany*, European Court of Human Rights, Plenary Court, (Application no. 5029/71) 1978, [57].

125 *Roman Zakharov v Russia*, European Court of Human Rights, Grand Chamber, (Application no. 47143/06) 2015, [287].

> [a]s soon as notification can be carried out without jeopardising the purpose of the restriction after the termination of the surveillance measure, information should, however, be provided to the persons concerned.[126]

1.81 It is not clear that a person whose privacy might have been interfered with through, for example, their online account being taken over or their personal data being accessed, used, copied, modified or deleted, would ever be made aware of that fact (if it does not lead to a prosecution). It is therefore unclear how such a person could have access to an effective remedy for any potential violation of their right to privacy.

1.82 In order to assess whether any person whose right to privacy might be violated by the proposed warrants would have access to an effective remedy, further information is required as to:

(a) whether a person who was the subject of a warrant will be made aware of that after the investigation has been completed; and

(b) if not, how such a person would effectively access a remedy for any violation of their right to privacy.

Committee view

1.83 The committee notes that the bill seeks to introduce new law enforcement and intelligence gathering powers and warrants to enhance the ability of the Australian Federal Police (AFP) and the Australian Criminal Intelligence Commission (ACIC) to frustrate crime and gather intelligence and evidence of criminal activity. Specifically, the committee notes that the bill would introduce three new warrants, including data disruption warrants, network activity warrants and account takeover warrants.

1.84 The committee considers that to the extent that the new powers and warrants would facilitate the investigation, disruption and prevention of serious crimes against persons, including in particular protecting children from harm and exploitation, the measure may promote multiple rights, including the right to life and the rights of the child.

1.85 However, the committee notes that the measure also engages and limits the right to privacy by authorising the AFP and ACIC to access, use and modify an individual's personal data and information. The committee notes that the right to privacy may be subject to permissible limitations if they are shown to be reasonable, necessary and proportionate.

1.86 The committee considers that the measure, in seeking to protect national security and ensure public safety, pursues a legitimate objective and these new law enforcement and intelligence gathering powers and warrants would appear to be

126 *Roman Zakharov v Russia*, European Court of Human Rights, Grand Chamber, (Application no. 47143/06) 2015 [287]. See also *Klass and Others*, [58].

rationally connected to that objective. The committee considers further information is required to assess the proportionality of the measure and determine whether the measure limits the right to an effective remedy.

1.87 The committee has not yet formed a concluded view in relation to these matters. It considers further information is required to assess the human rights implications of this bill, and accordingly seeks the minister's advice as to the matters set out at paragraphs [1.77] and [1.82].

Assistance orders

1.88 The bill would allow the AFP or ACIC to apply to an eligible judge, nominated AAT member or magistrate for an assistance order requiring a specified person to provide any information or assistance that is reasonable and necessary to allow the law enforcement officer to do a specified thing with respect to data disruption, network activity or account takeover warrants.[127] A specified person includes a person reasonably suspected of having committed the alleged offence as well as third parties who may have relevant knowledge, such as an employee of the owner of the computer that holds data sought to be obtained.[128] A person would commit an offence if they are subject to an assistance order, are capable of complying with a requirement in the order and they fail to comply with the requirement of the order.[129] The maximum penalty for contravention of an assistance order is 10 years imprisonment.

Preliminary international human rights legal advice

Right to privacy

1.89 To the extent that the measure may compel a person to provide personal information to the AFP or ACIC, such as a password to access their computer or other personal device, or information enabling the decryption of personal data, the measure engages and limits the right to privacy. The right to privacy includes respect for informational privacy, including the right to respect for private and confidential information, particularly the storing, use and sharing of such information.[130] It also includes the right to control the dissemination of information about one's private life. The right to privacy may be subject to permissible limitations which are provided by law and are not arbitrary. In order for limitations not to be arbitrary, the measure must pursue a legitimate objective, and be rationally connected to (that is, effective to achieve) and proportionate to achieving that objective. The statement of compatibility

127 Schedule 1, item 47, proposed section 64B; Schedule 2, items 30 and 31; Schedule 3, item 4, proposed section 3ZZVG.

128 Schedule 1, item 47, proposed section 64B; Schedule 3, item 4, proposed section 3ZZVG.

129 Schedule 1, item 47, proposed subsection 64B(3); Schedule 2, item 30; Schedule 3, item 4, proposed subsection 3ZZVG(3).

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

does not identify that the right to privacy is engaged and limited by this measure, and as such does not provide an assessment as to the compatibility of assistance orders with the right to privacy.

1.90 The statement of compatibility states that the overall objective of the bill is to enhance the enforcement powers of the AFP and ACIC in order to combat cyber-enabled serious and organised crime.[131] Regarding this measure specifically, the explanatory memorandum states that assistance orders would ensure that should a warrant be issued under this bill, the AFP or ACIC would have the power to compel a person to assist in accessing devices, accessing and disrupting data, copying data, converting documents and accessing and taking control of an online account.[132] It states that the purpose of this measure is to compel assistance from a person with the relevant knowledge, rather than assistance from industry. Assistance orders could be used to compel suspects to provide access to computers or devices to assist law enforcement officers to do a specified thing, such as disrupt data held in their personal computer.[133] The explanatory memorandum notes, however, that the measure would not abrogate the common law right to freedom from self-incrimination. It states that assistance orders do not engage this right because they do not compel individuals to provide evidence against their legal interest.[134]

1.91 The objective pursued by this measure would appear to be combatting serious online crime, which would be a legitimate objective for the purposes of international human rights law. By facilitating the investigation and disruption of crime, the measure would appear to be rationally connected to this objective. However, there are questions as to whether the measure is proportionate to this objective, particularly, whether the measure is accompanied by sufficient safeguards.

1.92 In considering whether to grant an assistance order, the issuing authority must be satisfied of specified criteria. The applicable criteria differ in relation to each warrant. In considering whether to grant an assistance order with respect to a data disruption warrant, the issuing authority must be satisfied that disruption of data held in the computer is likely to substantially assist in frustrating the commission of the offence and is justifiable and proportionate, having regard to the offence.[135] In considering whether to grant an assistance order with respect to a network activity warrant, the issuing authority must be satisfied that access to data held in the computer will substantially assist in the collection of intelligence that relates to the group and is relevant to the prevention, detection or frustration of a relevant

131 Statement of compatibility, p. 9.

132 Explanatory memorandum, pp. 54 and 95.

133 Explanatory memorandum, p. 56.

134 Explanatory memorandum, pp. 56, 164.

135 Schedule 1, item 47, proposed subsection 64B(2).

offence.[136] In considering whether to grant an assistance order with respect to an account takeover warrant, the issuing authority must be satisfied that taking control of the account is necessary, in the course of the investigation, for the purpose of enabling evidence to be obtained relating to the alleged offence to which the warrant is issued.[137]

1.93 The criteria to grant an assistance order would appear to operate as some form of a safeguard against arbitrary interference with privacy. In particular, in relation to a data disruption warrant, the criterion that disruption of data held in the computer is justifiable and proportionate, having regard to the offences, would appear to assist with the proportionality of the measure by ensuring that any interference with privacy is only as extensive as is strictly necessary. However, it is unclear why the issuing authority is not required to be satisfied of this criterion with respect to assistance orders relating to all warrants.

1.94 In order to assess the compatibility of this measure with the right to privacy, in particular the adequacy of the safeguards that apply, further information is required as to:

(a) why the issuing authority is not required to be satisfied that an assistance order is justifiable and proportionate, having regard to the offences to which it would relate, with respect to all warrants, noting that this criterion only applies to an assistance order with respect to data disruption warrants; and

(b) whether the measure is accompanied by any other safeguards that would ensure that any interference with the right to privacy is not arbitrary and only as extensive as is strictly necessary.

Committee view

1.95 The committee notes that the bill would allow the AFP or ACIC to apply to an eligible judge, nominated AAT member or magistrate for an assistance order requiring a specified person to provide any information or assistance that is reasonable and necessary to allow the law enforcement officer to do a specified thing with respect to the warrants.

1.96 The committee notes that this measure would appear to engage and limit the right to privacy insofar as it may compel a person to provide personal information to the AFP or ACIC. The committee notes that the right to privacy may be subject to permissible limitations if they are shown to be reasonable, necessary and proportionate. The committee notes that the statement of compatibility did not identify this right as being limited and therefore did not provide an assessment as to the compatibility of the measure. The committee considers that the measure

136 Schedule 2, item 31, proposed subsection 64(6A).

137 Schedule 3, item 4, proposed subsection 3ZZVG(2).

pursues the legitimate objective of combatting serious online crime, and as the assistance order would facilitate the investigation and disruption of crime, the measure is rationally connected to this objective. The committee considers further information is required to assess the proportionality of the measure.

1.97 The committee has not yet formed a concluded view in relation to this matter. It considers further information is required to assess the human rights implications of this bill, and accordingly seeks the minister's advice as to the matters set out at paragraph [1.94].

Information sharing with foreign governments

1.98 The bill would allow protected information obtained under the warrants to be disclosed to foreign countries in certain circumstances. For example, protected information obtained under an account takeover warrant and a network activity warrant (other than through the use of a surveillance device), may be used or disclosed in connection with the functions of the AFP under section 8 of the *Australian Federal Police Act 1979.*[138] The AFP's functions include providing police services to assist or cooperate with a foreign law enforcement or intelligence or security agency.[139]

Preliminary international human rights legal advice

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

1.99 By authorising the sharing of protected information to foreign governments the measure engages and limits the right to privacy. The right to privacy includes respect for informational privacy, including the right to respect for private and confidential information, particularly the storing, use and sharing of such information.[140] It also includes the right to control the dissemination of information about one's private life.

1.100 To the extent that the measure authorises protected information to be shared with foreign police, intelligence or security agencies and results in the investigation and prosecution of an offence that is punishable by the death penalty in that foreign country, the measure may also engage and limit the right to life.[141] The right to life imposes an obligation on Australia to protect people from being killed by others or from identified risks. While the International Covenant on Civil and Political Rights

138 Schedule 2, item 19, proposed subsection 45B(5)(a); Schedule 3, item 4, proposed subsection 3ZZVH(3)(b).

139 *Australian Federal Police Act 1979*, subsection 8(1)(bf).

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

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

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.[142] The provision of information to other countries that may be used to investigate and convict someone of an offence to which the death penalty applies is also prohibited.[143] In 2009, the UN 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'.[144]

1.101 The statement of compatibility states that protected information can be shared with a foreign country, the International Criminal Court or a War Crimes Tribunal if relevant to an international assistance authorisation.[145] It also notes that similar allowances are made for protected information to be shared under the *Mutual Assistance in Criminal Matters Act 1987* (Mutual Assistance Act) and the *International Criminal Court Act 2002.*[146] The Mutual Assistance Act provides that a request by a foreign country for assistance under the Act must be refused if the offence is one in respect of which the death penalty may be imposed.[147] However, the Act qualifies this by stating that this prohibition will not apply if 'the Attorney-General is of the opinion, having regard to the special circumstances of the case, that the assistance requested should be granted'.[148] Consequently, it appears that the Mutual Assistance Act creates a risk of facilitating the exposure of individuals to the death penalty.[149]

1.102 Additionally, the sharing of protected information, including personal information, with foreign countries, may, in some circumstances, expose individuals to a risk of torture or other cruel, inhuman or degrading treatment or punishment. International law absolutely prohibits torture and cruel, inhuman or degrading

142 Second Optional Protocol to the International Covenant on Civil and Political Rights.

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

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

145 Statement of compatibility, p. 14.

146 Statement of compatibility p. 14.

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

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

149 This was previously observed by the Parliamentary Joint Committee on Human Rights in 2013. See, Parliamentary Joint Committee on Human Rights, *Report 6 of 2013*, Mutual Assistance in Criminal Matters (Cybercrime) Regulation 2013, pp. 167-169.

treatment or punishment.[150] There are no circumstances in which it will be permissible to subject this right to any limitations.

1.103 The statement of compatibility acknowledges that the measure engages and limits the right to privacy. However, it does not identify that the right to life or the prohibition against torture or cruel, inhuman or degrading treatment or punishment may be engaged. As such, there is no compatibility assessment provided with respect to either of these rights.

1.104 The rights to privacy and life may be subject to permissible limitations where the limitation pursues a legitimate objective, is rationally connected to that objective and is a proportionate means of achieving that objective.

1.105 Regarding the objective pursued, the broader purpose of the bill is to protect national security, ensure public safety, and to address online crime.[151] While this objective may be capable of constituting a legitimate objective for the purposes of international human rights law, the statement of compatibility provides no information about the importance of this objective in the specific context of the measure. In order to demonstrate that the measure pursues a legitimate objective for the purposes of international human rights law and has a rational connection to that objective, further information is required as to the specific objective being pursued by the measure, including the substantial and pressing concern that is being addressed. Further, as the statement of compatibility does not address the right to life or the prohibition against torture or cruel, inhuman or degrading treatment or punishment, it is not clear what safeguards, if any, exist to ensure that protected information is not shared with a foreign country in circumstances that could expose a person to the death penalty or lead to a person being tortured, or subjected to cruel, inhuman or degrading treatment or punishment.

1.106 In order to fully assess the compatibility of the measure with the rights to privacy and life as well as the prohibition against torture or cruel, inhuman or other degrading treatment or punishment, further information is required as to

(a) what is the objective being pursued by the measure and how is the measure rationally connected to that objective;

(b) what safeguards are in place to ensure that protected information obtained under the warrants is not shared with a foreign country in circumstances that could expose a person to the death penalty or to torture or cruel, inhuman or degrading treatment or punishment. In particular, why is there no legislative requirement 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

150 International Covenant on Civil and Political Rights, article 7; Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

151 Statement of compatibility, p. 13.

penalty or to torture or cruel, inhuman or degrading treatment or punishment, protected information must not be shared with that government.

Committee view

1.107 The committee notes that the bill would allow protected information obtained under the warrants to be shared with foreign countries in certain circumstances. The committee notes that the disclosure of protected information with foreign police, intelligence or security agencies engages and limits the right to privacy. To the extent that there may be a risk that disclosure of protected information to a foreign country could expose a person to the death penalty or to torture or cruel, inhuman or degrading treatment or punishment, the measure may also engage and limit the right to life and have implications for the prohibition against torture or cruel, inhuman or degrading treatment or punishment.

1.108 The committee notes that the right to privacy may be subject to permissible limitations if they are shown to be reasonable, necessary and proportionate. The committee notes that the statement of compatibility did not provide information regarding the specific objective being pursued by this measure and did not provide an assessment of the compatibility of the measure with the right to life and the prohibition against torture or cruel, inhuman or degrading treatment or punishment.

1.109 The committee has not yet formed a concluded view in relation to this matter. It considers further information is require to assess the human rights implications of this bill, and accordingly seeks the minister's advice as to the matters set out at paragraph [1.106].

Legislative instruments

Commonwealth Grant Scheme Guidelines 2020 [F2020L01609][1]

Purpose	This instrument re-makes the Commonwealth Grant Scheme Guidelines 2012, including specifying which units of higher education study will be included in each funding cluster.
Portfolio	Education, Skills and Employment
Authorising legislation	*Higher Education Support Act 2003*
Last day to disallow	15 sitting days after tabling (tabled in the Senate and the House of Representatives on 2 February 2021). Notice of motion to disallow must be given by 18 March 2021[2]
Rights	Education

Increasing the cost of student contribution amounts for certain disciplines

1.110 Chapter 5 of the guidelines specifies which of the four higher education funding clusters (or part of those clusters) a unit of study will be included in.[3] As the explanatory statement notes, these changes are primarily intended to give effect to amendments made by the *Higher Education Support Amendment (Job-Ready Graduates and Supporting Regional and Remote Students) Act 2020.*[4] By establishing which funding cluster a unit of study falls within, the instrument establishes the cost to a Commonwealth-supported student for a place within that unit of study.[5]

International human rights legal advice

Right to education

1.111 In specifying which funding cluster (or part of a cluster) a unit of study will be included in, and thereby establishing how much that unit of study will cost a

1 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Commonwealth Grant Scheme Guidelines 2020 [F2020L01609], *Report 1 of 2021*; [2021] AUPJCHR 6.

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 For the purposes of section 33-35 of the *Higher Education Support Act 2003*.

4 Explanatory statement, p. 1.

5 For example, the maximum student contribution amount for a place in a unit of study within funding cluster 1 (Law, Accounting, Administration, Economics, Commerce, Communications, Society and Culture) is $14,500. See, *Higher Education Support Act 2003,* section 93-10.

Commonwealth-supported student, this instrument largely raises the same human rights issues as those raised with respect to the bill that became the *Higher Education Support Amendment (Job-Ready Graduates and Supporting Regional and Remote Students) Act 2020*.[6] As such, the advice provided in relation to that bill in *Report 11 of 2020*,[7] and *Report 13 of 2020*[8] is reiterated in relation to this instrument.

Committee view

1.112 The committee notes that this instrument specifies which units of higher education study will be included in each funding clusters, and that this has the effect of establishing how much that unit of study will cost a Commonwealth-supported student.

1.113 The committee notes that these changes are primarily intended to give effect to amendments made by the *Higher Education Support Amendment (Job-Ready Graduates and Supporting Regional and Remote Students) Act 2020.* The committee assessed the human rights compatibility of the bill that became that Act in *Report 13 of 2020*,[9] including the human rights implications of amending the maximum student contribution amounts for a place in a unit of study.

1.114 As such, the committee refers the minister and parliamentarians to that report in relation to the assessment of the human rights compatibility of this instrument.

6 The bill passed both houses of Parliament on 19 October 2020.

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

8 Parliamentary Joint Committee on Human Rights, *Report 13 of 2020* (13 November 2020), pp. 91–109.

9 Parliamentary Joint Committee on Human Rights, *Report 13 of 2020* (13 November 2020), pp. 91–109.

Bills and instruments with no committee comment[1]

1.115 The committee has no comment in relation to the following bills which were introduced into the Parliament between 7 to 12 December 2020. This is on the basis that the bills do not engage, or only marginally engage, human rights; promote human rights; and/or permissibly limit human rights:[2]

- COAG Reform Fund Amendment (No Electric Vehicle Taxes) Bill 2020;
- Customs Amendment (Banning Goods Produced By Uyghur Forced Labour) Bill 2020; and
- Data Availability and Transparency (Consequential Amendments) Bill 2020;
- Defence Amendment (Parliamentary Approval of Overseas Service) Bill 2020;
- Environment Protection and Biodiversity Conservation Amendment (Regional Forest Agreements) Bill 2020;
- Fair Work Amendment (Ten Days Paid Domestic and Family Violence Leave) Bill 2020;
- Fair Work Amendment (Ten Days Paid Domestic and Family Violence Leave) Bill 2020 [No. 2];
- Fair Work (Registered Organisations) Amendment (Withdrawal from Amalgamations) Bill 2020;
- Financial Sector Reform (Hayne Royal Commission Response No. 2) Bill 2020;
- Intelligence Oversight and Other Legislation Amendment (Integrity Measures) Bill 2020;
- Live Animal Export Prohibition (Ending Cruelty) Bill 2020;
- National Consumer Credit Protection Amendment (Supporting Economic Recovery) Bill 2020;
- Offshore Petroleum and Greenhouse Gas Storage Amendment (Benefit to Australia) Bill 2020;
- Security Legislation Amendment (Critical Infrastructure) Bill 2020;
- Therapeutic Goods Amendment (2020 Measures No. 2) Bill 2020; and

1 This section can be cited as Parliamentary Joint Committee on Human Rights, Bills and instruments with no committee comment, *Report 1 of 2021*; [2021] AUPJCHR 7.

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

- Treasury Laws Amendment (News Media and Digital Platforms Mandatory Bargaining Code) Bill 2020.

1.116 The committee has examined the legislative instruments registered on the Federal Register of Legislation between 2 to 23 December 2020.[3] The committee has reported on one legislative instrument from this period earlier in this chapter. The committee has determined not to comment on the remaining instruments from this period on the basis that the instruments do not engage, or only marginally engage, human rights; promote human rights; and/or permissibly limit human rights.

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

Chapter 2

Concluded matters

2.1 This chapter considers 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

Additional comments by Labor members[1]

1.1 Australian Labor Party members (Labor members) of the Parliamentary Joint Committee on Human Rights (the committee) seek to make additional comments in relation to the Federal Court and Federal Circuit Court Amendment (Fees) Regulations 2020 [F2020L01416].

1.2 The instrument amends the Federal Court and Federal Circuit Court Amendment (Fees) Regulation 2012 to increase the application fee for migration matters in the Federal Circuit Court from $690 to $3,330, an increase of 483 per cent. The instrument also provides that where a 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, or in some cases may be exempt from paying any fee. The decision to reduce or waive fees would be at the discretion of the Federal Circuit Court Registrars and Authorised Officers.

1.3 Increasing the application fee for migration matters by 483 per cent may, in many cases, engage and limit the right to a fair hearing. Labor members note that the international human rights legal advice to the committee, in concluding whether the increase may limit the right of access to justice, said that much would 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. If persons who 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.

1.4 The most recent Annual Report of the Federal Circuit Court reported that 49 per cent of migration matters heard by the court were for protection visas. Of the remaining 51 per cent of migration matters, 48 per cent were for student visas.[2]

1.5 Labor members of the committee note that 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 there is estimated to be an additional 1,000 migration matters per year and the additional funding will enable the court to finalise those matters as well as enhancing the court's capacity to resolve family law matters.

1 This section can be cited as Parliamentary Joint Committee on Human Rights, Additional comments by Labor members, *Report 1 of 2021;* [2021] AUPJCHR 14.

2 Federal Circuit Court of Australia, *Annual Report 2019-2020*, p. 40.

1.6 Labor members consider that it would be difficult to raise an additional $36.4 million if most applicants are granted a waiver of fees. Furthermore, 79 per cent of migration applications filed in the Federal Circuit Court last year were filed by asylum seekers or international students. The waiver of fees is a discretion exercisable by Federal Circuit Court Registrars or Authorised Officers. The Attorney-General advised the committee that internal court guidelines would assist the making of that discretionary decision.

1.7 Labor members are very concerned that raising application fees for migration matters in the Federal Circuit Court by such an extraordinary amount will be a deterrent to applicants. The fee hike will prevent (in a real and practical sense), access to justice for those litigants.

1.8 In the last Annual Report of the Federal Circuit Court, the court summarised seven cases that were heard in the migration division of the court. Four of those applications were by asylum seekers seeking protection visas and their applications were upheld.[3]

1.9 One application summarised in the report was by a family of Iranian nationals whose protection visa had been cancelled by the minister. The Administrative Appeals Tribunal (AAT) had upheld the minister's decision. The court found that the AAT had not approached the matter correctly as the United Nations Convention on the Rights of the Child required the AAT to take into account the best interests of the children as a 'primary consideration'.[4]

1.10 The migration division of the Federal Circuit Court considers and determines important matters of law including people seeking asylum due to religious persecution. The decisions the court makes have life-changing consequences. In some circumstances a practical denial of access to this court could be fatal for the applicants.

1.11 Signalling that application fees in the migration division of the Federal Circuit Court are exceptionally costly will not promote access to justice. Labor members consider it will do the opposite.

Graham Perrett MP
Deputy Chair
Member for Moreton

Steve Georganas MP
Member for Adelaide

3 Federal Circuit Court of Australia, *Annual Report 2019-2020*, pp. 77-79.

4 *CFE16 v Minister for Immigration & Anor and CFD16 v Minister for Immigration & Anor* [2020] FCCA 1083

Senator Nita Green
Senator for Queensland

Senator Pat Dodson
Senator for Western Australia

Appendix 1

Deferred legislation[1]

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

- Data Availability and Transparency Bill 2020; and
- Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2020.

1 This appendix can be cited as: Parliamentary Joint Committee on Human Rights, Deferred legislation, *Report 1 of 2021*; [2021] AUPJCHR 15.