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 23 August 2021 to 2 September 2021; and
- legislative instruments registered on the Federal Register of Legislation between 5 August 2021 to 1 September 2021.[2]

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

1 This section can be cited as Parliamentary Joint Committee on Human Rights, New and continuing matters, *Report 11 of 2021*; [2021] AUPJCHR 107.

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.

Bills

Aged Care and Other Legislation Amendment (Royal Commission Response No. 2) Bill 2021[1]

Purpose	This bill seeks to amend various Acts relating to aged care, health and aged care pricing, and information sharing in relation to veterans and military rehabilitation and compensation Schedule 1 would enable the introduction of the Australian National Aged Care Classification, to replace the Aged Care Funding Instrument as the residential aged care subsidy calculation model from 1 October 2022 Schedule 2 would establish nationally consistent pre-employment screening for aged care workers of approved providers to replace existing police checking obligations Schedule 3 would allow the Aged Care Quality and Safety Commissioner (Commissioner) to make and enforce a Code of Conduct that applies to approved providers and their workers, including governing persons Schedule 4 would extend the Serious Incident Response Scheme from residential care to home care and flexible care delivered in a home or community setting from 1 July 2022 Schedule 5 would introduce new governance and reporting responsibilities for approved providers Schedule 6 would increase information sharing between Commonwealth bodies across the aged care, disability and veterans' affairs sectors in relation to non-compliance of providers and their workers Schedule 7 would enable the Secretary or Commissioner to request information or documents from a provider or borrower of a loan made using a refundable accommodation deposit or bond Schedule 8 would expand the functions of the Independent Health and Aged Care Pricing Authority to include the provision of advice on health and aged care pricing and costing matters, and the performance of certain functions

1 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Aged Care and Other Legislation Amendment (Royal Commission Response No. 2) Bill 2021, *Report 11 of 2021*; [2021] AUPJCHR 108.

Portfolio	Health
Introduced	House of Representatives, 1 September 2021
Rights	Health; rights of persons with disability; privacy

Register of banning orders

1.3 This bill seeks to make numerous amendments to implement eight measures in response to recommendations of the Royal Commission into Aged Care Quality and Safety.[2] This includes requiring the Aged Care Quality and Safety Commissioner (Commissioner) to establish and maintain a register of all individuals against whom a banning order has been made at any time (including banning orders no longer in force). This register must contain the relevant individual's name; ABN (if any); details of the banning order (including any conditions to which the order is subject); and any other information specified in the rules.[3] The register may be kept in any form that the Commissioner considers appropriate and the rules may specify matters as to making the register, in whole or in part, publicly available, or specified information in the register publicly available.[4]

International human rights legal advice

Right to health, rights of persons with disability and right to privacy and reputation

1.4 Insofar as the register of banning orders helps to ensure that unsuitable people who may present a risk to aged care recipients are not engaged in the provision of their care, this measure appears to promote the rights to health and, as many people in aged care live with disability, the rights of people with disability. The right to health is the right to enjoy the highest attainable standard of physical and mental health.[5] The right to health requires available, accessible, acceptable and quality health care. The right to be free from all forms of violence, abuse and exploitation in article 16 of the Convention on the Rights of Persons with Disabilities requires that States Parties shall take all appropriate legislative, administrative, social, educational and other measures to protect persons with disabilities, both within and outside the home, from all forms of exploitation, violence and abuse.[6] Further, '[i]n order to prevent the occurrence of all forms of exploitation, violence and abuse, States Parties

2 Note that the committee is not commenting on the other measures in this bill on the basis that they do not engage, or only marginally engage, human rights; promote human rights; and/or permissibly limit human rights.

3 Schedule 3, item 25, proposed subsections 74GI(1)-(2).

4 Schedule 3, item 25, proposed subsections 74GI(3)-(4).

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

6 Convention on the Rights of Persons with Disabilities, article 16(1).

shall ensure that all facilities and programmes designed to serve persons with disabilities are effectively monitored by independent authorities'.[7]

1.5 However, by requiring a register of banning orders which may be made public and which names the individuals subject to those orders, the measure also engages and limits the right to privacy. The right to privacy protects against arbitrary and unlawful interferences with an individual's privacy and attacks on reputation. It includes respect for informational privacy, including the right to respect for private and confidential information, particularly the storing, use and sharing of such information. It also includes the right to control the dissemination of information about one's private life.[8]

1.6 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, be rationally connected to that objective and proportionate to achieving that objective.

1.7 The statement of compatibility recognises generally that Schedule 3, which seeks to make numerous amendments, engages and limits the right to privacy. It states that the measures in general seek to promote the rights of aged care recipients to be protected from violence, exploitation and abuse, and their right to the highest attainable standard of health and an adequate standard of living, but does not provide information as to the specific objective of the register.[9] The explanatory memorandum provides further information as to this:

> The purpose of this provision is to make information about banned individuals accessible to the public, including future employers of such individuals in the aged care sector. This aims to ensure the safety of care recipients by putting employers on notice of individuals who were found unsuitable to provide aged care or specified types of aged care services. This provision aligns with the approach taken under the NDIS (see section 73ZS of the NDIS Act) Publication of this information is considered reasonable, necessary and proportionate in order to protect the safety of vulnerable older Australians.[10]

1.8 Protecting the safety of vulnerable aged care recipients is a legitimate objective for the purposes of international human rights law. Making information about banned individuals accessible to the public, including future employers, is likely to be effective to achieve that objective. The key question is whether the measure is proportionate. In assessing the proportionality of the measure, relevant considerations include whether the limitation is only as extensive as is strictly

7 Convention on the Rights of Persons with Disabilities, article 16(3).

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

9 Statement of compatibility, p. 14.

10 Explanatory memorandum, p. 76.

necessary; whether there are other less rights restrictive means to achieve the objective; and whether there are appropriate safeguards accompanying the measure.

1.9 The scope of personal information published on the register is relevant in considering whether the limitation on the right to privacy is only as extensive as is strictly necessary. The bill provides that the register must contain the relevant individual's name; ABN (if any); details of the banning order (including any conditions to which the order is subject); and any other information specified in the rules.[11] The explanatory memorandum states that it is not anticipated that the matters which may be included in the register prescribed by the rules will extend to any highly sensitive or highly personal information, but where an individual or business has a common name, it may be necessary to include further information, to publish an amount of information that is sufficient to ensure the person can be identified, but this would not extend to the nature of the incident that prompted the making of the banning order.[12]

1.10 It is noted that inclusion on the register indicates that a banning order has been made against the individual (even if the order is no longer in force). A banning order may be made against an individual on a number of grounds, including that the Commissioner considers they are not complying, or are likely not to comply with, the new Code of Conduct, or that they are not suitable to be involved in the provision of aged care.[13] This may be based on a number of factors, including their experience in aged care or other relevant forms of care; that they have been subject to relevant adverse findings; or convicted of an indictable offence.[14] As such, even though the only identifying information may be an individual's name, publication of the fact of the banning order, and details of the order, is likely to have a considerable effect on the individual's right to privacy and reputation, as it indicates they are not suitable to be involved in providing aged care services. The register also includes any banning order made, including if it is no longer in force. This would appear to include banning orders that may have been revoked or overturned on review, potentially because they were invalidly made. It is also not clear if the register would make clear where a person was seeking review of a banning order.

1.11 In considering whether the limitation on the right to privacy is no more than is strictly necessary, it is not clear why the register would need to be accessible to the general public. The explanatory memorandum states that the purpose is to put employers on notice of individuals who were found unsuitable to provide aged care services (as can be provided for in the rules).[15] However, it is not clear why it would be

11 Schedule 3, item 25, proposed subsections 74GI(1)-(2).

12 Explanatory memorandum, p. 75.

13 Schedule 3, item 25, proposed section 74GB.

14 Schedule 5, item 26, proposed new section 8C, which sets out 'suitability matters'.

15 Schedule 3, item 25, proposed subsections 74GI(3)-(4).

necessary to make the information available to the public at large, rather than restrict access to employers in the aged care sector.

1.12 Noting that the rules may make provision for making the register, in whole or in part, publicly available, much will depend on what is ultimately prescribed by the rules. If the register is made available to the general public, such that it can be available via an internet search (for example, if searching a banned individual's name on google would return a search linking them to the register) this is unlikely to be the least rights restrictive way to achieve the aim of ensuring employers can determine who is subject to a banning order. If, however, the rules prescribe that the information may be made available to employers in the aged care sector on request, or via a secure online portal only, the register of banning orders is likely to be a proportionate limit on the right to privacy.

Committee view

1.13 The committee notes this bill seeks to make a number of important amendments to implement eight measures in response to recommendations of the Royal Commission into Aged Care Quality and Safety. One such measure is to establish and maintain a register of all individuals against whom a banning order has been made, relating to suitability to deliver aged care services. The rules may specify matters as to making the register, in whole or in part, publicly available, or specified information in the register publicly available.

1.14 The committee considers that as the register of banning orders may help to ensure that unsuitable people who may present a risk to aged care recipients are not engaged in the provision of their care, this measure promotes the rights to health and, as many people in aged care have disability, the rights of people with disability.

1.15 By requiring a register of banning orders which may be made public and which names the individuals subject to those orders, the measure also engages and limits the right to privacy. The right to privacy may be subject to permissible limitations if they are shown to be reasonable, necessary and proportionate.

1.16 The committee notes that the rules are likely to make provision for making the register publicly available, and the explanatory memorandum states it is intended to make information about banned individuals 'accessible to the public' in order to put employers on notice of individuals who are unsuitable to provide aged care services. Protecting vulnerable older Australians is clearly a legitimate objective, and publishing this information is likely to be effective to achieve this objective. However, if the information were to be made available to the public via a general internet search this may not be the least rights restrictive way of ensuring employers are aware of any banning order. The committee notes that much will depend on what the rules provide and it will examine such rules should they be made.

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

Biosecurity Amendment (Enhanced Risk Management) Bill 2021[1]

Purpose	This bill seeks to amend the *Biosecurity Act 2015* to: • expand pre-arrival reporting requirements for aircraft and vessels; • create a mechanism to make a human biosecurity group direction; • increase civil and criminal penalties for contraventions relating to biosecurity risks to goods and non-compliance with negative pratique requirements; • conduct a risk assessment for the purposes of making certain determinations or granting an import permit; • permit the Agriculture Minister and Health Minister to authorise the expenditure directly through the Act
Portfolio	Agriculture, Water and the Environment
Introduced	House of Representatives, 1 September 2021
Rights	Life; health; liberty; freedom of movement; privacy; rights of the child; and rights of persons with disability

Human biosecurity group directions

1.18 The bill seeks to make a number of amendments to the *Biosecurity Act 2015* (Biosecurity Act), including to allow a chief human biosecurity officer or a human biosecurity officer to make a human biosecurity group direction (direction). This direction could cover a class of people on board an aircraft or vessel that is in, or landing in, Australian territory. The officer must be satisfied that one or more individuals in that class have, or have been exposed to, a listed human disease.[2] The direction would initially be in force for no more than eight hours, but this may be extended, but by no more than 4 hours.[3] However, if the time expires and the officer is satisfied that the class of individuals still requires management, the officer may consider making a new direction for a further eight to 12 hours.[4]

1 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Biosecurity Amendment (Enhanced Risk Management) Bill 2021, *Report 11 of 2021*; [2021] AUPJCHR 109.

2 Schedule 1, item 16, proposed section 108B.

3 Schedule 1, item 16, proposed paragraph 108C(1)(f) and subsection 108F(3).

4 Statement of compatibility, p. 15.

1.19 A direction would be able to require each individual in the class of individuals specified in the direction to do one or more of the following:

- provide the prescribed contact information of anyone they have been, or will be, in close proximity with (if they know the contact details), and information about their past location;[5]
- go to, and remain at, a specified place for a specified period, and to not visit a specified place, or specified class of place, for a specified period (which cannot be longer than the period during which the direction is in force);[6]
- wear either or both specified clothing and equipment designed to prevent a disease from emerging, establishing itself or spreading. The relevant officer may give an individual an exemption from this requirement; [7]
- undergo a specified kind of examination relating to determining the presence in the individual of a listed human disease. The direction can specify the kind of examinations that require consent for an examination, and how that consent is to be given.[8] This must be carried out in a manner consistent with appropriate medical standards and appropriate other relevant professional standards;[9]
- for those who have undergone such an examination, require them to provide specified body samples for the purpose of determining the presence of a listed human disease. This only applies if the person gives consent (however, the bill notes that these new powers do not override the existing powers to impose human biosecurity control orders over an individual).[10] The taking of the body samples must also be carried out in a manner consistent with appropriate medical standards and other relevant professional standards.[11] The regulations will prescribe the requirements for taking, storing, transporting, labelling and using the body samples provided.[12]

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5 Schedule 1, item 16, proposed section 108K. Note, existing section 635 of the *Biosecurity Act 2015* is applied to this provision (see Schedule 1, item 18), so the privilege against self-incrimination is abrogated, although section 635 contains both a use and derivative use immunity.

6 Schedule 1, item 16, proposed section 108L. See also explanatory memorandum at p. 22.

7 Schedule 1, item 16, proposed section 108M.

8 Schedule 1, item 16, proposed section 108N.

9 Schedule 1, item 16, proposed section 108R.

10 Schedule 1, item 16, proposed sections 108P and 108J. In relation to existing human biosecurity control orders, see Part 3 of the *Biosecurity Act 2015*.

11 Schedule 1, item 16, proposed section 108R.

12 Schedule 1, item 16, proposed subsection 108P(4).

1.20 The bill also provides that force must not be used against an individual to require compliance.[13] Instead, non-compliance with a direction may result in the imposition of a civil penalty of up to 30 penalty units, or $6,660.[14] This includes a failure by an accompanying person for a child or incapable person to comply with a direction to ensure the compliance of the child or incapable person.[15] The bill also makes amendments to provide that an accompanying person for a child or incapable person may give consent on behalf of the child or incapable person for the purposes of these new directions powers.[16] The Biosecurity Act defines a 'child or incapable person' as someone less than 18 years old, or 18 years and older and either incapable (whether permanently or temporarily) of understanding the general nature and effect of, and purposes of carrying out, a biosecurity measure, or of indicating whether he or she consents to a biosecurity measure.[17]

Preliminary international human rights legal advice

Rights to life, health, liberty, freedom of movement, privacy and rights of the child and persons with disability

1.21 The power to issue directions to require groups of individuals to provide personal information, specify where individuals must go for up to 12 hours (or longer if a further direction is made), require certain clothing and equipment to be worn and require individuals to undergo specified kinds of examinations, engages a number of human rights. As the directions power is intended to prevent the spread of serious communicable diseases (such as COVID-19), which may cause high levels of morbidity and mortality, the bill may promote the rights to life and health.[18] The right to life requires States parties to take positive measures to protect life.[19] The United Nations (UN) Human Rights Committee has stated that the duty to protect life implies that States parties should take appropriate measures to address the conditions in society that may give rise to direct threats to life, including life threatening diseases.[20] The

13 Schedule 1, item 16, proposed section 108S.

14 Schedule 1, item 16, proposed section 108T.

15 Schedule 1, item 12.

16 Schedule 1, item 13, proposed amendments to section 40.

17 *Biosecurity Act 2015*, section 9.

18 International Covenant on Civil and Political Rights, articles 6 (right to life) and 12 (right to health).

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

20 See UN Human Rights Committee, *General Comment No. 36, Article 6 (Right to Life)* (2019) [26].

right to health requires that States parties shall take steps to prevent, treat and control epidemic diseases.[21]

1.22 However, this potentially coercive power is likely to engage and limit a number of rights, including the rights to liberty and freedom of movement, the right to a private life and the rights of the child and persons with disabilities. The right to liberty prohibits states from depriving a person of their liberty except in accordance with the law, and provides that no one shall be subject to arbitrary detention.[22] It applies to deprivations of liberty, rather than mere restrictions on whether a person can freely move around. However, a restriction on a person's movement may be to such a degree and intensity that it would constitute a 'deprivation' of liberty, particularly if an element of coercion is present. The right to freedom of movement encompasses the right to move freely within a country for those who are lawfully within the country.[23] This right is linked to the right to liberty—a person's movements should not be unreasonably limited by the state. The directions power also limits the right to a private life, which prohibits arbitrary and unlawful interferences with an individual's privacy.[24] A private life is linked to notions of personal autonomy and human dignity. It includes the idea that individuals should have an area of autonomous development; a 'private sphere' free from government intervention and excessive unsolicited intervention by others.

1.23 There are also specific rights owed to children and to persons with disabilities, which the bill may limit by enabling an accompanying person to give consent on behalf of a 'child or incapable person' to any requirements in the direction, and in requiring the wearing of certain clothing or equipment, which may create particular difficulties for persons with certain impairments.

1.24 Children have special rights under human rights law taking into account their particular vulnerabilities.[25] Australia is required to ensure that, in all actions concerning children, the best interests of the child are a primary consideration.[26] This requires legislative, administrative and judicial bodies and institutions to systematically consider how children's rights and interests are or will be affected directly or indirectly by their decisions and actions.[27] Further, States parties are

21 International Covenant on Economic, Social and Cultural Rights, article 12(2)(c).

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

23 International Covenant on Civil and Political Rights, article 12; UN Human Rights Committee, *General Comment 27: Article 12 (Freedom of movement)* (1999) [5], [8].

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

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

26 Convention on the Rights of the Child, article 3(1).

27 UN Committee on the Rights of Children, *General Comment 14 on the right of the child to have his or her best interest taken as primary consideration* (2013).

required to assure to a child capable of forming his or her own views the right to express those views freely in all matters affecting the child.[28] The views of the child must be given due weight in accordance with the age and maturity of the child.

1.25 The rights of persons with disabilities includes the obligation for the State to take into account the protection and promotion of the human rights of persons with disabilities in all policies and programmes.[29] Further, persons with disabilities have the right to equal recognition before the law, which includes the right to enjoy legal capacity on an equal basis with others in all aspects of life.[30] The UN Committee on the Rights of Persons with Disabilities has emphasised that prior to the provision of medical treatment or health care or the making of decisions relating to a person's physical or mental integrity, decision-makers must obtain the free and informed consent of persons with disabilities.[31] States parties should take appropriate measures to provide access to support for persons with disabilities in exercising their legal capacity, and substituted decision-making should be replaced by supported decision-making.[32]

1.26 While the bill may limit these rights, most of these rights may be permissibly limited where it is demonstrated that the limitation pursues a legitimate objective, is rationally connected to (that is, effective to achieve) that objective and is proportionate to that objective.

1.27 The statement of compatibility recognises that the directions power promotes the right to health, and limits the right to liberty and privacy, but does not acknowledge that the measure may limit the right to freedom of movement or the rights of the child or persons with disabilities.[33] The statement notes that the bill seeks to bolster the biosecurity legislative framework to promote the protection of public health, particularly against risks posed by people entering Australia on international

28 Convention on the Rights of the Child, article 12.

29 Convention on the Rights of Persons with Disability, article 12.

30 Convention on the Rights of Persons with Disability, article 4(1)(c).

31 Committee on the Rights of Persons with Disabilities, *General comment No. 1 – Article 12: Equal recognition before the law* (2014) [40]–[41].

32 Committee on the Rights of Persons with Disabilities, *General comment No. 1 – Article 12: Equal recognition before the law* (2014) [15]–[16], [21]. '"Support" is a broad term that encompasses both informal and formal support arrangements, of varying types and intensity. For example, persons with disabilities may choose one or more trusted support persons to assist them in exercising their legal capacity for certain types of decisions, or may call on other forms of support, such as peer support, advocacy (including self-advocacy support), or assistance with communication' and '[w]here, after significant efforts have been made, it is not practicable to determine the will and preferences of an individual, the "best interpretation of will and preferences" must replace the "best interests" determinations'.

33 Statement of compatibility, p. 13.

aircraft or vessels.[34] Protecting public health is a legitimate objective for the purposes of international human rights law, and ensuring the Commonwealth has suitable mechanisms to identify and control the spread of serious communicable diseases appears rationally connected to that objective. A key aspect of whether a limitation on a right can be justified is whether the limitation is proportionate to the objective being sought. In this respect, it is necessary to consider a number of factors, including whether a proposed limitation is sufficiently circumscribed; whether it is accompanied by sufficient safeguards; and whether any less rights restrictive alternatives could achieve the same stated objective.

1.28 The statement of compatibility identifies a number of safeguards that apply to these measures, including that in making a decision to exercise a power under Chapter 2 of the Biosecurity Act (which would include this new directions power) the person making the decision must be satisfied that to do so:

- is likely to be effective in, or to contribute to, managing the risk of contagion of a listed human disease or managing the risk of a listed human disease entering, emerging, establishing itself or spreading in Australia;
- is appropriate and adapted to manage this risk;
- that the circumstances are sufficiently serious;
- that the measure, and how it is exercised or imposed, is no more restrictive or intrusive than is required in the circumstances; and
- that the period for the exercise of the power is only as long as is necessary.[35]

1.29 The Biosecurity Act, as sought to be amended by this bill, also provides that the exercise of the power to make a human biosecurity group direction, or the imposition of a biosecurity measure in relation to a class of individuals, must not interfere with any urgent or life-threatening medical needs.[36] The statement of compatibility also identifies a number of other safeguards, including that:

- force cannot be used to require compliance;
- the order cannot be in force for more than 8 hours, and can only be extended once for up to four hours (although a new order can be made if it satisfies all of the above preconditions);
- there are procedural requirements that the notice be in writing and given to the affected persons before it comes into effect; and

34 Statement of compatibility, p. 13.

35 *Biosecurity Act 2015*, section 34.

36 *Biosecurity Act 2015*, section 35.

- that if people subject to a direction to go to, and remain at, a place are not Australian citizens, then they must be informed of their right to request consular assistance.[37]

1.30 In relation to the right to privacy, the statement of compatibility additionally states that an individual would be required to provide certain contact information and past location information as this is necessary to ensure that, if they become ill due to a listed human disease, then the officer can identify and contact any persons who may have been exposed to the ill individual, or any other persons in past locations that the individual has visited. It further provides that individuals must give consent to give a body sample, and that there will be specified examinations that require consent before they can be undertaken.[38]

1.31 The requirements that a direction can only be made if it is appropriate and adapted to the risk posed, where circumstances are sufficiently serious and only for so long as is necessary and that it is no more restrictive or intrusive than is required in the circumstances, are all important safeguards that help to protect the proportionality of the measure. There are also some important safeguards built into the new directions power, such as the requirement for consent to be given in certain circumstances, and that the direction can last for no longer than 12 hours in total. However, given the potential impact on a number of human rights, some questions arise as to whether the safeguards are sufficient in all circumstances. In particular:

- The direction may require individuals to wear specified types of clothing or equipment, although the officer may give an individual an exemption from this requirement.[39] While this offers flexibility, it provides no guidance as to when this discretionary exemption power will be exercised. The explanatory memorandum provides that such exemptions will be provided where appropriate and officers will, drawing on their clinical expertise or qualifications, decide whether to grant an exemption, 'for example, where the officer considers that the individual has a disability that would prevent the individual from wearing a facemask or gloves'.[40] This may operate to safeguard the rights of persons with disabilities, however, much will depend on whether this discretionary exemption power is exercised in practice. It is not clear why the legislation does not require that if an officer is made aware of a disability that would affect the person's ability to comply with the direction, that they must consider making an exemption.

37 Statement of compatibility, p. 15.

38 Statement of compatibility, p. 16.

39 Schedule 1, item 16, proposed section 108M.

40 Explanatory memorandum, p. 23.

- The direction may require individuals to undergo a specified kind of examination relating to determining the presence in the individual of a listed human disease. The direction itself can specify the kind of examinations that require consent, and how that consent is to be given.[41] The explanatory memorandum states '[d]epending on the circumstances of the specified examination and consistent with relevant medical and other professional standards (see new section 108R), certain examinations would require consent'.[42] While the requirement for examinations to be undertaken in accordance with appropriate medical and other professional standards may operate as an important safeguard, given the potential interference with rights it is not clear why there is not some legislative criteria as to the type of examinations that will require consent (e.g. anything invasive) and a specific requirement that such examinations be undertaken with regard to the dignity, and where necessary, privacy of the person being examined. It is also unclear why there is no flexibility for officers to grant exemptions for some individuals where appropriate from the requirement to undergo certain examinations.
- Where body samples are taken, the bill does not say how long such samples will be retained for and when (and whether) they will be destroyed. Rather, it just provides that the regulations must prescribe the requirements for taking, storing, transporting, labelling and using the body samples provided.[43] It is not clear why the bill provides no guidance as to when such samples must be destroyed (for example, once testing has been completed), noting that body samples can contain sensitive personal information.

1.32 In addition to these discrete concerns, there is a broader concern regarding how consent is gained from children or 'incapable persons'. The bill provides that an accompanying person for a child or incapable person may give consent on behalf of the child or incapable person for the purposes of these new directions powers.[44] The Biosecurity Act defines a 'child or incapable person' as someone less than 18 years old, or 18 years and older and either incapable (whether permanently or temporarily) of understanding the general nature and effect of, and purposes of carrying out, a biosecurity measure, or of indicating whether he or she consents to a biosecurity measure.[45] An 'accompanying person' is defined as 'a parent, guardian or next of kin of the child or incapable person', or a person authorised by a parent, guardian or next of kin. The Biosecurity Act states only that an accompanying person may give consent on behalf of the child or incapable person, and once that consent is given it is taken to

41 Schedule 1, item 16, proposed section 108N.

42 Explanatory memorandum, p. 24.

43 Schedule 1, item 16, proposed subsection 108P(4).

44 Schedule 1, item 13, proposed amendments to section 40 of the *Biosecurity Act 2015*.

45 *Biosecurity Act 2015*, section 9.

be consent by the child or incapable person. It does not appear that any consideration would be required to be given to the wishes of the child or the 'incapable person' before this consent is given.[46]

1.33 As noted above, the Convention on the Rights of the Child provides that in all actions concerning children, the best interests of the child must be a primary consideration,[47] and when determining a child's best interests, the child's views must be taken into account, consistent with their evolving capacities and taking into account their characteristics (pursuant to article 12 of the Convention).[48] The UN Committee on the Rights of the Child has explained that article 12 of the Convention has the effect that any decision that does not take into account the child's views or does not give their views due weight according to their age and maturity, does not respect the possibility for the child or children to influence the determination of their best interests.[49] The UN Committee on the Rights of the Child has also emphasised that children have a right to privacy, which takes on increasing significance during adolescence.[50]

1.34 Further, the Convention on the Rights of Persons with Disabilities requires health professionals to provide care of the same quality to persons with disabilities as to others including on the basis of free and informed consent.[51] The UN Committee on the Rights of Persons with Disabilities has said:

> In conjunction with the right to legal capacity on an equal basis with others, States parties have an obligation not to permit substitute decision-makers to provide consent on behalf of persons with disabilities. All health and medical personnel should ensure appropriate consultation that directly engages the person with disabilities. They should also ensure, to the best of their ability, that assistants or support persons do not substitute or have undue influence over the decisions of persons with disabilities.[52]

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46 Subsection 40(2) of the *Biosecurity Act 2015* (which would apply to consent relating to this new directions power, see Schedule 1, item 13 of this bill).

47 Convention on the Rights of the Child, article 3.

48 UN Committee on the Rights of the Child, *General Comment No. 14 on the right of the child to have his or her best interests taken as a primary consideration* (2013) [43]. See also, *General Comment No. 20 on the implementation of the rights of the child during adolescence* (2016) [22].

49 UN Committee on the Rights of the Child, *General comment 14 on the right of the child to have his or her best interests taken as a primary consideration* (2013) [53].

50 UN Committee on the Rights of the Child, *General Comment No. 20 on the implementation of the rights of the child during adolescence* (2016) [46].

51 Convention on the Rights of Persons with Disabilities, article 25(d).

52 Committee on the Rights of Persons with Disabilities, *General comment No. 1 – Article 12: Equal recognition before the law* (2014) [41].

1.35 In enabling an accompanying person to give consent on behalf of a child or 'incapable person' to undergo certain examinations and give body samples, it does not appear that the obligation to give due weight to the views of the child (according to their age and maturity), or the rights of persons with disabilities to give free and informed consent, has been taken into account in this legislation.

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

(a) why the legislation does not require that if an officer is made aware of a disability that would affect a person's ability to comply with the direction, that they must consider making an exemption;

(b) why there is no legislative criteria as to the type of examinations that will require consent (e.g. anything invasive) and a specific requirement that such examinations be undertaken with regard to the dignity, and where necessary, privacy, of the person being examined;

(c) why there is no flexibility for officers to grant exemptions from the requirement to undergo certain examinations;

(d) why the bill provides no guidance as to when body samples must be destroyed (for example, once testing has been completed), noting that body samples can contain sensitive personal information; and

(e) how empowering an accompanying person of a 'child or incapable person' to give consent on their behalf to undergo examinations and provide body samples, without requiring any consideration as to the wishes of the child or incapable person, is compatible with the rights of the child and the rights of persons with disabilities.

Committee view

1.37 The committee notes that this bill seeks to introduce a new power for the making of a human biosecurity group direction, which would allow health officers to give directions to people on board aircraft or vessels in Australia if satisfied that one or more individuals have, or have been exposed to, a listed human disease. The direction, which could be in force for up to 12 hours (and remade), could require groups of individuals to provide personal information, specify where individuals must go for up to 12 hours (or longer if further directions are made), require certain clothing and equipment to be worn, and require individuals to undergo specified kinds of examinations.

1.38 As this measure is designed to prevent the spread of serious communicable diseases (such as COVID-19), the committee considers it promotes the rights to life and health, noting that the right to life requires that Australia takes positive measures to protect life, and the right to health requires that Australia takes steps to prevent, treat and control epidemic diseases.

1.39 The committee also considers that these potentially coercive powers also engage and limit a number of other rights, including the rights to liberty and freedom of movement, the right to a private life and the rights of the child and persons with disabilities. Most of these rights may be subject to permissible limitations if they are shown to be reasonable, necessary and proportionate.

1.40 The committee considers the measure seeks to achieve the legitimate objective of protecting public health, and ensuring the Commonwealth has suitable mechanisms to identify and control the spread of serious communicable diseases appears rationally connected to that objective. However, the committee notes questions remain as to the proportionality of the measure.

1.41 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 as such seeks the minister's advice as to the matters set out at paragraph [1.36].

Crimes Amendment (Remissions of Sentences) Bill 2021[1]

Purpose	This bill seeks to amend the *Crimes Act 1914* to repeal remissions or reductions granted under state or territory laws to those serving federal sentences
Portfolio	Attorney-General
Introduced	Senate, 25 August 2021
Right	Liberty

Non-recognition of remissions or reductions in sentences for federal offenders

1.42 Section 19AA of the *Crimes Act 1914* currently provides that where a state or territory law provides for the remission or reduction of state or territory prison sentences, this applies also to the remission or reduction of a federal sentence for prisoners in that state or territory.[2] Remissions or reductions are usually granted in recognition of restrictions placed on prisoners that are necessary in various emergency circumstances, like restrictions on out-of-cell time as a result of natural disasters (such as COVID-19) or staffing shortages.

1.43 This bill seeks to repeal section 19AA of the *Crimes Act 1914* so that it would no longer apply reductions or remissions in sentences granted to prisoners serving periods of imprisonment for federal offences. The bill would apply to federal offenders who are serving a sentence in a state or territory prison immediately before the date of commencement, meaning that any remissions or reductions they had already been granted are taken to be of no effect. It does not apply to any federal offender already released from prison.

Preliminary international human rights legal advice

Right to liberty

1.44 Where a prisoner has already had a remission or reduction applied to their prison sentence, this bill, in cancelling that remission or reduction will result in some prisoners having to serve a longer period of imprisonment than they otherwise would have. This therefore engages and would appear to limit the right to liberty. The right to liberty prohibits the arbitrary and unlawful deprivation of liberty.[3] Consideration for

1 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Crimes Amendment (Remissions of Sentences) Bill 2021, *Report 11 of 2021*; [2021] AUPJCHR 110.

2 *Crimes Act 1914*, section 19AA, although noting it generally does not apply to remit or reduce the non-parole period or pre-release period in respect of the federal sentence.

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

parole or other forms of early release must be in accordance with the law and such release must not be denied on grounds that are arbitrary.[4] The United Nations Human Rights Committee has said that the notion of arbitrariness 'is not to be equated with "against the law", but must be interpreted more broadly to include elements of inappropriateness, injustice, lack of predictability and due process of law, as well as elements of reasonableness, necessity and proportionality'.[5] It is therefore necessary to consider whether the bill, by revoking existing remissions or reductions in sentences, would be denying early release to federal offenders on grounds that are arbitrary. In assessing this, it is useful to consider if the limitation pursues a legitimate objective, is rationally connected to that objective and is a proportionate means of achieving that objective.

1.45 The statement of compatibility states that since the beginning of the COVID-19 pandemic Victoria has granted a high number of remissions (known as emergency management days (EMDs)), with the highest so far being 342 days for one federal offender.[6] The statement of compatibility identifies a number of reasons as to why the bill is necessary, including:

- to ensure that federal offenders will serve the sentence as set down by the sentencing court;
- to mitigate against the risks to community safety as a result of the high numbers of EMDs being granted to federal offenders, including high risk federal offenders, such as terrorists, during the COVID-19 pandemic;
- as uncertainty around release dates makes it more challenging to make applications for control orders or requiring urgent rather than standard applications to be made to courts in relation to such offenders;
- where high numbers of EMDs have been applied, the period the offender will serve in the community under parole supervision will be shorter than that set down by the court at sentencing, which puts the community at risk by limiting rehabilitation and reintegration options available to these offenders and increasing the likelihood of recidivism.[7]

1.46 Mitigating risks to community safety is a legitimate objective for the purposes of international human rights law, and it may be that ensuring offenders serve longer prison sentences or longer periods of parole is rationally connected to (that is, effective to achieve) this objective. A key aspect of whether a limitation on a right can

4 UN Human Rights Committee, *General Comment No. 35: Article 9 (Liberty and security of person)* (2014) [20].

5 UN Human Rights Committee, *General Comment No. 35: Article 9 (Liberty and security of person)* (2014) [12].

6 Statement of compatibility, p. 6.

7 Statement of compatibility, pp. 10–11.

be justified is whether the limitation is proportionate to the objective being sought. In relation to whether the measure is an 'arbitrary' deprivation of liberty, as set out above, it is necessary to consider questions of inappropriateness, injustice, lack of predictability and due process of law, as well as elements of reasonableness and proportionality.

1.47 In relation to proportionality, the statement of compatibility states that the measure is proportionate as it does not apply to federal offenders already released from prison, who had their sentences reduced. It also states that the bill 'will ensure high risk federal offenders who are serving a sentence of imprisonment…will serve the sentence set down by the sentencing court, preserving the careful balance struck between head sentence expiry and the non-parole period'. However, it is noted that the bill does not only apply to 'high risk' offenders, but applies to all persons serving a term of imprisonment for a federal offence.

1.48 The main concern as to whether the measure is arbitrary, is that it does not only apply prospectively to ensure future grants of remissions will not apply to federal offenders, but also applies retrospectively so that those who have already had remissions applied will no longer receive them. It is noted that in Victoria, which the statement of compatibility says is the only jurisdiction to have granted COVID-19 related remissions, EMDs are not granted to all prisoners, but only to those that have been of good behaviour while suffering disruption or deprivation during circumstances of an unforeseen and special nature.[8] As such, the effect of the bill will be to deprive federal offenders of a benefit that has already been granted to them. It would appear that such federal offenders would have a reasonable expectation that their period of imprisonment would be reduced according to how many EMDs they had been granted. As such, there appears to be some risk that depriving them of this benefit lacks predictability and may appear to be unjust, and therefore may amount to an arbitrary deprivation of liberty.

1.49 In order to assess the compatibility of this measure with the right to liberty, further information is required as to how depriving federal offenders of the benefit of EMDs already accrued is appropriate, just and predictable and therefore not arbitrary.

Committee view

1.50 The committee notes this bill seeks to repeal the recognition of remissions or reductions in prison sentences under state or territory law for federal offenders. The committee notes that during the COVID-19 pandemic, prisoners in Victoria have been granted a high number of remissions or reductions to their sentences in recognition of good behaviour while experiencing greater restrictions placed on prisoners during the pandemic. This bill would mean that existing and future

8 *Corrections Act 1986* (Vic), section 58E.

remissions or reductions would not be applied for federal offenders serving periods of imprisonment.

1.51 The committee considers that cancelling existing remissions or reductions to sentences will result in some federal prisoners having to serve a longer period of imprisonment than they otherwise would have, which therefore engages and would appear to limit the right to liberty. The committee notes that under the right to liberty consideration for any forms of early release from prison must not be denied on grounds that are arbitrary, which includes questions of inappropriateness, injustice, lack of predictability and due process of law, as well as reasonableness, necessity and proportionality.

1.52 The committee considers that the measure seeks to achieve the legitimate objective of mitigating risks to community safety by ensuring prisoners are not released early, and potentially before they have been able to utilise all rehabilitation and reintegration options available to them. However, questions remain as to whether the measure is arbitrary, noting that it does not only apply prospectively to ensure future grants of remissions will not apply to federal offenders, but also applies retrospectively so that those who have already had remissions applied will no longer receive them.

1.53 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 as such seeks the Attorney-General's advice as to the matters set out at paragraph [1.49].

Foreign Intelligence Legislation Amendment Bill 2021[1]

Purpose	This bill (now Act) amends the *Telecommunications (Interception and Access) Act 1979* and the *Australian Security Intelligence Organisation Act 1979* to: • enable the Director-General of Security to apply for a warrant authorising the interception of a communication for the purpose of obtaining foreign intelligence from foreign communications; and • enable the Attorney-General to issue foreign intelligence warrants to collect foreign intelligence on Australians in Australia who are acting for, or on behalf of, a foreign power
Portfolio	Home Affairs
Introduced	House of Representatives, 25 August 2021 *Passed both Houses on 26 August 2021*
Rights	Life; security of the person; privacy; effective remedy; rights of the child; life; torture and ill-treatment

Foreign communications and foreign intelligence warrants

1.54 This bill (now Act) amends the *Telecommunications (Interception and Access) Act 1979* (TIA Act) and the *Australian Security Intelligence Organisation Act 1979* (ASIO Act) to expand the application of Australia's foreign intelligence warrant framework to domestic communications and Australian citizens and permanent residents.[2]

1.55 Schedule 1 of the bill allows the Director-General of Security to apply to the Attorney-General for a foreign communications warrant authorising the interception of communications to obtain foreign intelligence, including where the geographic location of the sender and recipient cannot be determined prior to interception.[3] The effect of this measure is to authorise interception of domestic communications, which was otherwise prohibited under section 11C of the TIA Act.[4] The warrant application is required to specify how the proposed interception of communications would be

1 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Foreign Intelligence Legislation Amendment Bill 2021, *Report 11 of 2021*; [2021] AUPJCHR 111.

2 Foreign intelligence is defined as intelligence about the capabilities, intentions or activities of people or organisations outside Australia. See Explanatory memorandum, p. 2.

3 Schedule 1, items 2–5.

4 *Telecommunications (Interception and Access) Act 1979*, subsection 11C(2).

conducted, including how the risk of intercepting domestic communications would be minimised.[5] New subsection 11C(6) of the TIA Act requires the Attorney-General to issue a mandatory procedure for the screening of intercepted communications; the destruction of domestic communications; and notifying the Inspector-General of Intelligence and Security (IGIS) of any identified domestic communications that would not be destroyed because they relate, or appear to relate, to activities that present a significant risk to a person's life.[6] The mandatory procedure must be in force in order for the Attorney-General to issue a foreign communications warrant.[7] The amendments made by the bill also require all records of irrelevant intercepted communications (not just domestic communications) to be destroyed unless the communication relates, or appears to relate, to activities that present a significant risk to a person's life.[8]

1.56 Schedule 2 of the bill enables the Attorney General to issue foreign intelligence warrants, telecommunications service warrants, named person warrants and foreign communications warrants to collect foreign intelligence on Australian citizens or permanent residents in Australia who are reasonably suspected of acting for, or on behalf of, a foreign power[9] A foreign power is defined as a foreign government, an entity that is directed or controlled by a foreign government or governments, or a foreign political organisation.[10] Warrants for the collection of foreign intelligence can authorise a broad range of acts or things (including surveillance, intercepting communications and entering premises) for the purpose of obtaining foreign intelligence relating to a matter that is in the interests of Australia's national security, Australia's foreign relations or Australia's national economic well-being.[11] An application for these warrants to be issued in relation to an Australian citizen or permanent resident must include the grounds on which the Director-General of Security suspects that the person is acting for, or on behalf of, a foreign power, and the Attorney-General must be satisfied that the person is, or is reasonably suspected of acting for a foreign power.[12]

5 Schedule 1, item 6, proposed paragraph 11C(3)(a).

6 Schedule 1, item 10, proposed subsection 11C(6).

7 Schedule 1, item 7, subsection 11C(4).

8 Schedule 1, item 9, proposed paragraph 11C(5)(c)–(d).

9 Schedule 2, items 1–2, 4–7.

10 *Australian Security Intelligence Organisation Act 1979*, section 4 as applied by Schedule 2, item 3. .

11 *Australian Security Intelligence Organisation Act 1979*, paragraphs 27A(1)(a) and (b); *Telecommunications (Interception and Access) Act 1979*, sections 11A, 11B and 11C.

12 Schedule 2, items 2, 4–6.

International human rights legal advice

Multiple human rights

Rights to life and security of the person

1.57 To the extent that the expanded application of the foreign intelligence warrant framework to Australian citizens and permanent residents would facilitate the investigation, disruption and prevention of serious crimes against persons (such as terrorist attacks), the measures may promote the right to life and security of the person. The right to life imposes an obligation on the state to protect people from being killed by others or identified risks.[13] 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 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.[14] 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.[15] The right to security of the person requires the state to take steps to protect people against interference with personal integrity by others.[16]

1.58 The statement of compatibility states that the rights to life and security of the person are promoted by the bill insofar as it enhances the ability of intelligence agencies to identify and respond to foreign threats, including malicious cyber activity targeting Australian interests, terrorist communication, and foreign intelligence services operating inside Australia.[17] More specifically, it notes that by removing the prohibition on intercepting domestic communications and allowing foreign intelligence to be collected on Australians, the measures will resolve a critical operational gap for intelligence agencies, thereby improving the agencies' ability to

13 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'.

14 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].

15 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].

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

17 Statement of compatibility, p. 19.

collect intelligence on, and uncover, terrorist plots and other serious threats to Australia.[18]

Rights to privacy, effective remedy and rights of the child

1.59 However, by authorising the interception of domestic communications and the issuing of warrants to collect foreign intelligence on Australian citizens and permanent residents, noting that such warrants authorise a broad range of acts or things (including surveillance, intercepting communications and entering premises), the measures also engage and limit the right to privacy. This limit on rights is acknowledged in the statement of compatibility.[19] 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.[20] 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.[21]

1.60 In addition, to the extent that the interception powers and foreign intelligence warrants are applied to children, it may also engage and limit the rights of the child, including the right not to be subject to arbitrary or unlawful interference with their privacy[22] and the right to have their interests taken into account as a primary consideration in all actions concerning them.[23] The latter right requires legislative, administrative and judicial bodies and institutions to systematically consider how children's rights and interests are or will be affected directly or indirectly by their decisions and actions.[24] The child's best interests includes the enjoyment of the rights set out in the Convention on the Rights of the Child, and, in the case of individual

18 Statement of compatibility, pp. 19–20.

19 Statement of compatibility, pp. 12–15.

20 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].

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

22 Convention on the Rights of the Child, article 16.

23 Convention on the Rights of the Child, article 3(1).

24 UN Committee on the Rights of Children, *General Comment 14 on the right of the child to have his or her best interest taken as primary consideration* (2013).

decisions, 'must be assessed and determined in light of the specific circumstances of the particular child'.[25]

1.61 The statement of compatibility states that the bill may limit the rights of the child because it makes no distinction between children and adults in the proposed amendments to foreign communications warrants or foreign intelligence warrants more broadly.[26] It notes that while the bill is not specifically directed at children, there is a legitimate need to collect foreign intelligence, even if the subject of the intelligence gathering is a child.[27] Specifically, the statement of compatibility states that the right of the child to have their best interests taken as a primary consideration in all actions concerning them is engaged by the bill insofar as it authorises the interception of children's communications under a foreign communications warrant and allow agencies to collect foreign intelligence on Australian children.[28]

1.62 Furthermore, if the warrants for the collection of foreign intelligence 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.[29] 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), states parties must comply with the fundamental obligation to provide a remedy that is effective.[30] The statement of compatibility does not acknowledge that the measures may have implications for the right to an effective remedy and as such, there is no human rights compatibility assessment in this regard.

1.63 The right to privacy and the rights of the child may be subject to permissible limitations where the limitation pursues a legitimate objective, is rationally connected to that objective and is a proportionate means of achieving that objective. However, the right to effective remedy is absolute in requiring there be a remedy that is effective.

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25 UN Committee on the Rights of the Child, *General comment 14 on the right of the child to have his or her best interests taken as a primary consideration* (2013) p. 3. The UN Committee has further stated 'the expression "primary consideration" means that the child's best interests may not be considered on the same level as all other considerations. This strong position is justified by the special situation of the child'. See also *IAM v Denmark*, UN Committee on the Rights of the Child Communication No.3/2016 (2018) [11.8].

26 Statement of compatibility, p. 20.

27 Statement of compatibility, p. 20.

28 Statement of compatibility, pp. 20–21.

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

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

1.64 The statement of compatibility states that the measures pursue the objective of national security.[31] It states that the current prohibition on the interception of domestic communications results in intelligence agencies not intercepting a number of foreign communications that would likely be of foreign intelligence value, as it could risk the incidental interception of domestic communications.[32] By removing this prohibition and resolving a critical operational gap for intelligence agencies, the statement of compatibility notes that the ability of intelligence agencies to uncover terrorist plots, malicious cyber activity and other serious threats will be improved.[33] It further states that authorising the collection of foreign intelligence on Australians will close the current gap in the legal framework where foreign intelligence may be collected offshore on an Australian working for a foreign power, but that same intelligence cannot be collected inside Australia on that Australian under a warrant.[34] These objectives would appear to constitute legitimate objectives for the purposes of international human rights law, and the measures appear to be rationally connected to these objectives.

1.65 The key question is whether the measures are proportionate to achieving the stated objectives. Of particular relevance in assessing proportionality is whether the limitation is only as extensive as is strictly necessary to achieve the stated objectives; whether the measures are sufficiently circumscribed; whether the measures are accompanied by sufficient safeguards; and whether there is the possibility of oversight and the availability of review.[35] In this regard, European Court of Human Rights case law offers some useful guidance as to 'minimum safeguards that should be set out in law to avoid abuses of power' in the context of secret measures of surveillance.[36] Such safeguards include:

31 Statement of compatibility, pp. 13–14.

32 Statement of compatibility, p. 13.

33 Statement of compatibility, p. 13.

34 Statement of compatibility, p. 14.

35 In assessing whether the limitation is only as extensive as is strictly necessary to achieve its legitimate objective, the case of *Szabó and Vissy v Hungary*, European Court of Human Rights, Application no. 37138/14 (2016) provides some guidance. At [73], the Court held that the test of strict necessity is to be applied in the context of secret surveillance, stating that 'given the particular character of the interference in question and the potential of cutting-edge surveillance technologies to invade citizens' privacy, the Court considers that the requirement "necessary in a democratic society" must be interpreted in this context as requiring "strict necessity"'. The Court further stated that a secret surveillance measure must be strictly necessary in two aspects: for safeguarding democratic institutions and for obtaining vital intelligence in an individual operation.

36 *Szabó and Vissy v Hungary*, European Court of Human Rights, Application no. 37138/14 (2016) [56]–[57].

> the nature of offences which may give rise to an interception order; the definition of the categories of people liable to have their telephones tapped; a limit on the duration of telephone tapping; the procedure to be followed for examining, using and storing the data obtained; the precautions to be taken when communicating the data to other parties; and the circumstances in which recordings may or must be erased or destroyed.[37]

1.66 The European Court of Human Rights has reiterated the 'importance of adequate legislation of sufficient safeguards in the face of the authorities' enhanced technical possibilities to intercept private information' and collect masses of data.[38]

1.67 The statement of compatibility details numerous safeguards accompanying the measures, including:

- a request for a foreign communications warrant must specify how the risk of intercepting domestic communications will be minimised;[39]
- a request for foreign intelligence warrants must include details about the grounds on which the Director-General of Security suspects that the person is acting for, or on behalf of, a foreign power; and the Attorney-General must not issue a warrant unless they are satisfied that the person is, or is reasonably suspected by the Director-General of Security of, acting for, or on behalf of, a foreign power;[40]
- the Attorney-General must be satisfied, on advice from either the Minister for Defence or the Minister for Foreign Affairs, that the collection of foreign intelligence is in the interests of Australia's national security, foreign relations or economic well-being; and that it is necessary to intercept communications in order to collect foreign intelligence;[41]
- the Attorney-General must issue a mandatory written procedure for screening and destroying any identified domestic communications that may have been incidentally intercepted and a foreign communications warrant must not be issued unless that procedure is in force;[42]

37 *Szabó and Vissy v Hungary*, European Court of Human Rights, Application no. 37138/14 (2016) [56].

38 *Szabó and Vissy v Hungary*, European Court of Human Rights, Application no. 37138/14 (2016) [68].

39 Statement of compatibility, p. 9.

40 Statement of compatibility, p. 11.

41 Statement of compatibility, pp. 11 and 14.

42 Statement of compatibility, p. 13.

- domestic communications and irrelevant intercepted communications must be destroyed unless the communication relates, or appears to relate, to activities that present a significant risk to a person's life; and[43]
- the oversight functions of the IGIS.[44]

1.68 The statement of compatibility further notes that existing safeguards under the TIA Act and ASIO Act will also continue to apply, such as the ability for the Attorney-General to place conditions and restrictions on warrants to limit the impact on the privacy of Australians, and the requirement that a foreign communications warrant be a warrant of last resort (that is, the Attorney-General must be satisfied that relying on another foreign intelligence warrants (a telecommunications service warrant or a named person warrant) would be ineffective).[45]

1.69 These are important safeguards, some of which reflect the minimum safeguards identified by the European Court of Human Rights, and would likely assist with the proportionality of the measures. In particular, the requirement that the Director-General of Security specify how the risk of intercepting domestic communications will be minimised in their request for a foreign communications warrant may assist to ensure that any interference with privacy is only as extensive as is strictly necessary.[46]

1.70 However, questions arise as to whether these safeguards are adequate in all circumstances and in relation to all rights that may be limited. In particular, it is noted that many of the above safeguards rely on the executive being satisfied of certain matters, and these measures also appear to be directed towards protecting the right to privacy as opposed to the rights of the child. The statement of compatibility acknowledged that it is not possible to include particular safeguards to prevent the interception of children's communications given that it is impossible to know the age of the person prior to interception.[47] It notes that the general safeguards outlined above will also apply to children.[48] The strength of some of the above safeguards are assessed in turn below.

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43 Statement of compatibility, p. 13.

44 Statement of compatibility, p. 12.

45 Statement of compatibility, pp. 10, 14–15.

46 Schedule 1, item 6, proposed paragraph 11C(3)(a). It is noted that while this amendment may assist with proportionality, it is not clear why existing paragraph 11C(3)(a) of the TIA Act would need to be repealed and why it could not remain as an additional criterion. Existing paragraph 11C(3)(a) of the TIA Act requires a warrant application to 'include a description that is sufficient to identify the part of the telecommunications system that is likely to carry the foreign communications whose interception is sought'.

47 Statement of compatibility, p. 21.

48 Statement of compatibility, p. 20.

Issuing criteria

1.71 As noted above, a warrant must only be issued if the Attorney-General is satisfied that the Australian citizen or permanent resident is, or is reasonably suspected by the Director-General of Security of, acting for, or on behalf of, a foreign power, and the collection of foreign intelligence must relate to a matter that is in the interests of Australia's national security, foreign relations or national economic well-being.[49] As noted in paragraph [1.65], the European Court of Human Rights has observed that a clear definition of the categories of people liable to have their communications intercepted is an important safeguard. More generally, in the context of mass surveillance and other broad measures to collect and retain communications data of large populations, the European Court of Human Rights has emphasised the importance of precisely circumscribing the extent of interference with fundamental rights, notably the right to privacy, to ensure that the interference is limited to what is strictly necessary.[50] Where a measure applies to a broad range of 'persons for whom there is no evidence capable of suggesting that their conduct might have a link, even an indirect or remote one, with serious crime', the European Court of Human Rights has held that the consequent interference with privacy may not be limited to what is strictly necessary.[51]

1.72 While the bill defines the category of people to whom the measures would apply, this category is likely to encompass a wide range of people, including any Australian citizen or permanent resident who acts, or is suspected of acting, for, or on behalf of, a foreign government, foreign political organisation or other organisation directed or controlled by a foreign government. The purposes for which foreign intelligence would be collected are also broad, namely matters relating to Australia's national security, foreign relations or national economic well-being. It is noted that it

49 Schedule 2, items 2, 4–6; *Australian Security Intelligence Organisation Act 1979*, paragraphs 27A(1)(a) and (b).

50 *Digital Rights Ireland Ltd v Ireland,* European Court of Human Rights (Grand Chamber), Joined Cases C-293/12 and C-594/12 (2014) [65]. More generally, at [54], the Court stated that 'the EU legislation in question must lay down clear and precise rules governing the scope and application of the measures in question and imposing minimum safeguards so that the persons whose data have been retained have sufficient guarantees to effectively protect their personal data against the risk of abuse and against any unlawful access and use of that data'.

51 *Digital Rights Ireland Ltd v Ireland,* European Court of Human Rights (Grand Chamber), Joined Cases C-293/12 and C-594/12 (2014) [58]: regarding whether the interference caused by European Union Directive 2006/24, which authorised the collection and retention of communications data of 'practically the entire European population', was limited to what was strictly necessary, the Court stated that the Directive 'affects, in a comprehensive manner, all persons using electronic communications services, but without the persons whose data are retained being, even indirectly, in a situation which is liable to give rise to criminal prosecutions. It therefore applies even to persons for whom there is no evidence capable of suggesting that their conduct might have a link, even an indirect or remote one, with serious crime'.

does not appear to be a requirement that there be a link with serious crime. Noting the breadth of people to whom these measures may apply and the broad purposes for which foreign intelligence would be collected, questions remain as to whether the measures are sufficiently circumscribed and the potential interference with privacy is only as extensive as is strictly necessary.

Mandatory procedure

1.73 A key safeguard identified in the statement of compatibility is the requirement that the Attorney-General issue a written mandatory procedure for the screening and destruction of domestic communications and that mandatory procedure must be in force for a foreign communications warrant to be issued (as outlined in paragraph [1.55]). The mandatory procedure is required to be reviewed within one year of it being issued and then every three years.[52] The explanatory materials explain that the screening for domestic communications is intended to be a continuous process and would involve a range of automated and manual processes.[53] It states that identification of domestic communications may occur through different processes and at different points in time, and the requirement to screen for, and destroy, identified intercepted domestic communications does not cease following a single assessment; rather it is an ongoing requirement.[54]

1.74 The exception to destroying intercepted domestic communications is where it relates, or appears to relate, to activities that present a significant risk to a person's life. This exception also applies to the destruction of irrelevant intercepted communications. The explanatory memorandum explains that assessing whether the risk is significant will depend on how imminent the threat to a person's life is and the likelihood of it coming to pass, taking into account the circumstances of the case.[55] It states that the term is intended to capture circumstances where there is a high likelihood that a person's life is imminently in danger – for example, where a communication indicates a strong likelihood that a person has been taken hostage or an imminent terrorist attack will be carried out.[56] In these exceptional circumstances, the statement of compatibility states that the communication may be shared with relevant authorities in order to reduce or remove the risk to the person.[57] The statement of compatibility notes that this exception is very limited and would only apply to a significant risk to a person's life, where the likelihood of loss of life is real

52 Schedule 1, Item 10, subsection 11C(10).

53 Explanatory memorandum, pp. 26–27; statement of compatibility, p. 10.

54 Explanatory memorandum, pp. 26–27.

55 Explanatory memorandum, p. 26.

56 Explanatory memorandum, p. 27; statement of compatibility, p. 19.

57 Statement of compatibility, p. 19.

and imminent, or the scale of the threat is substantial.[58] The mandatory procedure would also require the IGIS to be notified any time this exception is relied on.[59]

1.75 The requirement to issue a mandatory procedure that provides for the screening and destruction of intercepted domestic communications would likely operate as an important safeguard against arbitrary interference with privacy. The exception to the requirement to destroy domestic communications appears to be sufficiently narrow to ensure that any interference with privacy through the interception, retention and sharing of domestic communications is only as extensive as is strictly necessary. Further, the person dealing with the domestic communications intercepted under a foreign communications warrant is required to comply with the mandatory procedure to the extent that it applies to them, with the IGIS overseeing compliance.[60] This requirement would further assist with the proportionality of the measures, although the strength of these safeguards will likely depend on how they operate in practice, including the contents of the mandatory procedure and its enforcement.

IGIS oversight and review mechanisms

1.76 A relevant factor in assessing whether a measure is proportionate is whether there is the possibility of oversight and the availability of review. In relation to the oversight functions of the IGIS, the statement of compatibility notes that the IGIS has strong powers to review the activities and procedures of intelligence agencies, including the issuing of warrants and the mandatory procedure, to ensure they act lawfully, with propriety and in a manner which respects human rights.[61] In the context of surveillance measures, the committee has previously noted that the availability of oversight by the IGIS may serve as an important safeguard against arbitrary and unlawful interference with privacy.[62] As recommended by the UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, 'there must be no secret surveillance system that is not under review of an independent oversight body and all interferences must be authorised through an independent body'.[63]

58 Statement of compatibility, p. 19.

59 Schedule 1, item 10, paragraph 11C(6)(c). See also explanatory memorandum, p. 27.

60 Schedule 1, item 10, subsection 11C(8); explanatory memorandum, p. 10, 27–28.

61 Statement of compatibility, pp. 14, 15 and 21; explanatory memorandum, p. 28.

62 See Parliamentary Joint Committee on Human Rights, *Report 3 of 2021* (17 March 2021), pp. 91–95.

63 UN Human Rights Council, *Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism*, A/HRC/13/37 (2009) [62].

1.77 However, the strength of these oversight frameworks will depend on the broader legislative context, in this case, the TIA Act and the ASIO Act. In its previous consideration of the *Surveillance Legislation Amendment (Identify and Disrupt) Bill 2020* (now Act), the committee commented that the oversight functions of the IGIS in relation to the powers under that bill had potential safeguard value, however its effectiveness in practice would depend on the clarity, precision and scope of the legislation.[64] In the absence of a foundational human rights assessment of the TIA Act and the ASIO Act, it is difficult to assess the strength of these oversight frameworks in the context of these measures.

1.78 As to review, the statement of compatibility does not address the availability of review mechanisms beyond the review functions of the IGIS. It is therefore not clear whether individuals subject to warrants for the collection of foreign intelligence would have access to effective review. In the context of covert surveillance measures, the committee has raised serious concerns that access to judicial review may not be effective in practice. This is because persons whose privacy would be interfered with are highly unlikely to be aware that they are the subject of a warrant application and will invariably be excluded from participating in the application proceedings. In cases where there is no requirement to notify the affected person once a surveillance warrant has been issued, it is highly unlikely that the person will be able to effectively access judicial review.[65] This has implications for the right to an effective remedy. In this regard, 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.[66]

1.79 In considering what constitutes an effective remedy where personal information is being collected in the context of covert surveillance activities, United

64 Parliamentary Joint Committee on Human Rights, *Report 3 of 2021* (17 March 2021), p. 93. The comments of the IGIS in relation to the *Surveillance Legislation Amendment (Identify and Disrupt) Bill 2020* are relevant in the context of this bill. It stated that 'effective oversight is more readily achieved where the scope and content of intelligence or law enforcement powers are articulated clearly and fully on the face of the legislation and where consistency is sought, where possible, across like regimes. This is especially so in respect of coercive or covert powers'. See Inspector-General of Intelligence and Security, *Submission 18*, p. 8 to the Parliamentary Joint Committee on Intelligence and Security, *Review of the Surveillance Legislation Amendment (Identify and Disrupt) Bill 2020*.

65 Parliamentary Joint Committee on Human Rights, *Report 3 of 2021* (17 March 2021), p. 93–94.

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

Nations (UN) bodies and the European Court of Human Rights have observed that while effective remedies can take a variety of forms, they must be known and accessible to anyone with an arguable claim that their rights have been violated.[67] The European Court of Human Rights has held that:

> the question of subsequent notification of surveillance measures is inextricably linked to the effectiveness of remedies and hence to the existence of effective safeguards against the abuse of monitoring powers, since there is in principle little scope for any recourse by the individual concerned unless the latter is advised of the measures taken without his or her knowledge and thus able to challenge their justification retrospectively.[68]

1.80 The European Court of Human Rights acknowledged that, in some instances, notification may not be feasible where it would jeopardise long-term surveillance activities.[69] However, it explained that:

> [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. [70]

1.81 It is not clear that a person whose privacy might have been interfered with under foreign intelligence warrants would ever be made aware of that fact (if it does not lead to a prosecution). In such circumstances, it does not appear that such a person would have access to adequate review mechanisms or to an effective remedy for any potential violation of their right to privacy. The existence of other safeguards and oversight frameworks, none of which offer an individual remedy, are unlikely to be sufficient to fulfil the international standard required for an effective remedy.

Issuing authority

1.82 Another relevant consideration in assessing the proportionality of measures dealing with surveillance and interception is the issuing authority for warrants authorising interference with privacy. While not an absolute requirement, judicial

67 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].

68 *Szabó and Vissy v Hungary*, European Court of Human Rights, Application no. 37138/14 (2016) [86]. See also *Roman Zakharov v Russia*, European Court of Human Rights, Grand Chamber, Application no. 47143/06 (2015) [234] and *Klass and Others v Germany*, European Court of Human Rights, Plenary Court, Application no. 5029/71 (1978) [57].

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

70 *Roman Zakharov v Russia*, European Court of Human Rights, Grand Chamber, Application no. 47143/06 (2015) [287]. See also *Klass and Others v Germany*, European Court of Human Rights, Plenary Court, Application no. 5029/71 (1978) [58] and *Szabó and Vissy v Hungary*, European Court of Human Rights, Application no. 37138/14 (2016) [86].

authorisation of surveillance activities is considered 'best practice' in international human rights law jurisprudence.[71] 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.[72]

1.83 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'.[73] This approach has also been supported by the UN Special Rapporteur on the right to privacy, who included, in the 2018 draft general principles of the right to privacy, the requirement 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.[74]

1.84 The UN Human Rights Committee has also recommended that States parties provide for 'judicial involvement in the authorization or monitoring of surveillance

71 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 (2019) [320]. See also *Roman Zakharov v Russia*, European Court of Human Rights, Grand Chamber, Application no. 47143/06 (2015) [233]; *Klass and Others v Germany*, European Court of Human Rights, Application no. 5029/71 (1978) [55]; *Szabó and Vissy v Hungary*, European Court of Human Rights, Application no. 37138/14 (2016) [77].

72 *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'.

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

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

measures' and consider establishing 'strong and independent oversight mandates with a view to preventing abuses'.[75]

1.85 Noting that the issuing authority for warrants for collection of foreign intelligence is the Attorney-General on request of the Director-General of Security, it is necessary to closely scrutinise whether it is appropriate in these circumstances to entrust supervisory control to a non-judicial officer.[76] A key consideration in this regard is whether the issuing 'authority is sufficiently independent from the executive'.[77] In the context of these measures, the issuing authority is part of the executive, which departs from best practice under international human rights law. Noting the expansive powers contained in the bill and the likely significant interference with the right to privacy arising from the exercise of these powers, there are serious concerns that the right to privacy may not be adequately safeguarded by non-judicial authorisation of surveillance and interception activities.

Concluding remarks

1.86 While the measures pursue the legitimate objectives of protecting national security, closing intelligence gaps and improving intelligence capabilities, questions remain as to whether the measures are proportionate. Noting that the measures will substantially interfere with the right to privacy, the existence of strong safeguards is critical to ensure that such interference is lawful, not arbitrary and only as extensive as is strictly necessary. The measures are accompanied by some important safeguards, such as the mandatory procedure for the screening and destruction of domestic communications. However, questions remain as to whether these safeguards are sufficient in all circumstances and, noting the broad category of people to whom these measures apply, whether the measures are sufficiently circumscribed. Noting that judicial authorisation of surveillance and interception warrants is considered best practice in international human rights law, the fact that the relevant issuing authority is part of the executive raises concerns. Additionally, while the oversight functions of the IGIS are an important safeguard, it is unclear whether there is access to effective review, noting that it is unlikely the person whose right to privacy is limited will be aware of the use of the warrant against them. As such, there appears to be a risk that these measures may constitute an arbitrary limitation on the right to privacy, including the right of the child to privacy, and, in circumstances where the person whose privacy

75 UN Committee on Human Rights, *Concluding observations on the fourth periodic report of the United States of America*, CCPR/C/USA/CO/4 (2014) [22]. See also UN Special Rapporteur on the right to privacy, *Draft Legal Instrument on Government-led Surveillance and Privacy*, Version 0.6 (2018), p. 16.

76 *Telecommunications (Interception and Access) Act 1979*, sections 11A, 11B and 11C; *Australian Security Intelligence Organisation Act 1979*, section 27A.

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

might have been interfered with is unaware of that fact, there does not appear to be access to an effective remedy for any potential violation of their rights.

Committee view

1.87 The committee notes that this Act expands the application of Australia's foreign intelligence warrant framework by removing the prohibition on interception of domestic communications and authorising the application of warrants to collect foreign intelligence on Australian citizens and permanent residents who are reasonably suspected of acting for, or on behalf of, a foreign power.

1.88 The committee considers that to the extent that these measures would facilitate the investigation, disruption and prevention of serious crimes against persons (such as terrorist attacks), they may promote the right to life and security of the person. However, the committee notes that by authorising the interception of domestic communications and the collection of foreign intelligence on Australian citizens and permanent residents, the measures also engage and limit the right to privacy, and to the extent that the powers and warrants are applied to children, it may also engage and limit the rights of the child. These rights may be subject to permissible limitations if they are shown to be reasonable, necessary and proportionate. It also engages the right to an effective remedy for any violation of rights.

1.89 The committee considers that these measures, in seeking to protect national security, close intelligence gaps and improve intelligence capabilities, pursue legitimate objectives and would appear to be rationally connected to the stated objectives. However, the committee considers that questions remain as to whether the measures are a proportionate means of achieving the stated objectives.

1.90 The committee considers that the measures are accompanied by some important safeguards, such as the mandatory procedure for the screening and destruction of domestic communications. However, questions remain as to whether these safeguards are sufficient in all circumstances and, noting the broad category of people to whom these measures apply, whether the measure is sufficiently circumscribed. The committee notes that judicial authorisation of surveillance and interception warrants is considered best practice in international human rights law, yet this bill provides that the relevant issuing authority is part of the executive. Additionally, the committee considers that the oversight functions of the IGIS are an important safeguard but notes that it does not appear there is access to effective review. This is because it is unlikely the person whose right to privacy is limited will be aware of the use of the warrant against them. As such, the committee considers that there appears to be a risk that these measures may constitute an arbitrary limitation on the right to privacy, to which they may not have access to an effective remedy.

1.91 The committee notes with some concern from a scrutiny perspective that this bill passed both Houses of Parliament one sitting day after its introduction,

before the committee had an opportunity to scrutinise this legislation. As the bill has now passed, the committee makes no further comment.

Information sharing arrangements

1.92 Subsection 65(1) of the TIA Act allows the Director-General of Security to communicate to another person lawfully intercepted information (other than ASIO computer access intercept information) and interception warrant information.[78] Subsection 137(1) of the TIA Act allows the Director-General of Security to communicate lawfully accessed information, preservation notice information and stored communications warrant information to another person. Schedule 3 of this bill allows a person to whom foreign intelligence information has been communicated,[79] to communicate that information to such persons, and in such a manner, as approved by the Attorney-General.[80] The person may also use that foreign intelligence information for such purposes as are approved by the Attorney-General and a record of the information may be made.[81]

International human rights legal advice

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

1.93 By authorising the sharing of protected foreign intelligence information to such persons, and in such a manner, as approved by the Attorney-General as well as authorising the use and recording of that information, 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.[82] It also includes the right to control the dissemination of information about one's private life.

1.94 As it is unclear who the protected information would be shared with in practice, it is unclear whether other human rights may be engaged by this measure.

78 Subsections 65(3)–(6) of the *Telecommunications (Interception and Access) Act 1979* set out exceptions and qualifications to the authorisation to communicate information in subsections 65(1) and (2).

79 In accordance with subsections 65(1) or 137(1) or in accordance with an approval given under subsections 65(2) or 137(3) of the *Telecommunications (Interception and Access) Act 1979*.

80 Schedule 3, item 2, proposed paragraph 65(2)(a) and item 5, proposed paragraph 137(3)(c).

81 Schedule 3, item 2, proposed paragraphs 65(b) and (c) and item 5, proposed paragraph 137(3)(d) and (e). The explanatory memorandum on p. 33. clarifies that the Attorney-General's ability to determine the purposes for which such information may be used includes the ability to limit the purposes for which such information may be used.

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

For example, if the effect of the measure was to authorise the sharing of protected information with foreign persons, such as foreign police, intelligence or security agencies, and this resulted 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.[83] 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 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.[84] 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.[85]

1.95 Additionally, the sharing of protected information, including personal information, with foreign persons, 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 treatment or punishment.[86] There are no circumstances in which it will be permissible to subject this right to any limitations.

1.96 It is noted that the statement of compatibility did not provide a human rights compatibility assessment in relation to this measure, and as such, it is difficult to assess whether the proposed limitation on the right to privacy as well as any other rights is permissible. While the broader objectives of this bill are likely to be legitimate (as discussed as paragraph [1.64]), it is not clear whether there is a pressing and substantial concern that gives rise to the need for this specific measure. In considering proportionality, it is not clear what safeguards or other oversight mechanisms exist to protect the right to privacy. The European Court of Human Rights has highlighted the importance of external supervision and remedial measures in the context of governments 'transferring and sharing amongst themselves intelligence retrieved by

83 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.

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

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

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

virtue of secret surveillance'.[87] The Court found 'external, preferably judicial, *a posteriori* control of secret surveillance activities, both in individual cases and as general supervision' to be of particular importance.[88] It observed:

> The significance of this control cannot be overestimated in view of the magnitude of the pool of information retrievable by the authorities applying highly efficient methods and processing masses of data, potentially about each person, should he be, one way or another, connected to suspected subjects or objects of planned terrorist attacks.[89]

1.97 It is does not appear that the bill contains such a control mechanism whereby an independent, preferably judicial, authority has oversight or control over the provisions which authorise the onwards disclosure of protected information. In addition, noting there does not appear to be any legislative limit on the purposes for which the information may be used, so long as it is approved by the Attorney-General, there are questions as to whether the measure is sufficiently circumscribed and any interference with privacy is only as extensive as is strictly necessary.

1.98 It is also not clear whether any safeguards exist to ensure that protected information is not shared with a foreign person 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.

Committee view

1.99 The committee notes the Act allows a person to whom foreign intelligence information has been communicated to further communicate that information to such persons, and in such a manner, as approved by the Attorney-General. Such persons may use that foreign intelligence information for such purposes as are approved by the Attorney-General and make a record of the information.

1.100 The committee notes that by authorising the sharing, use and recording of protected foreign intelligence information, the measure engages and limits the right to privacy. However, as the statement of compatibility did not provide a human rights compatibility assessment in relation to this measure, the committee notes that it is difficult to assess whether the proposed limitation on the right to privacy is permissible. The committee considers that, in the future, the statement of compatibility for such bills should include an assessment of each proposed measure in order to assist the committee in undertaking its analysis. The committee notes

87 *Szabó and Vissy v Hungary*, European Court of Human Rights, Application no. 37138/14 (2016) [78].

88 *Szabó and Vissy v Hungary*, European Court of Human Rights, Application no. 37138/14 (2016) [79].

89 *Szabó and Vissy v Hungary*, European Court of Human Rights, Application no. 37138/14 (2016) [79].

that it is also unclear whether the measure may have implications for other human rights. For example, if the measure had the effect of facilitating information sharing with foreign persons, such as foreign police or intelligence agencies, it may have implications for the right to life and the prohibition against torture or other cruel, inhuman or degrading treatment or punishment.

Suggested action

1.101 The committee considers that the proportionality of this measure, particularly as regards the right to privacy, may be assisted were the Act amended to:

(a) provide some form of control mechanism whereby an independent, preferably judicial, authority has oversight or control over the provisions which authorise the onwards disclosure of protected information, particularly if disclosure involves foreign persons;

(b) specify the persons or class of persons who the Attorney-General may approve for the purposes of information sharing and limit such persons to those who perform certain relevant functions, such as intelligence gathering and law enforcement;

(c) require that, prior to sharing protected information with a foreign person, the authorised officer must be satisfied that adequate privacy protections are in place around the handling of personal information and protection of personal information from unauthorised disclosure by the foreign country; and

(d) prohibit the sharing of protected information with a foreign person where there are substantial grounds for believing there is a real risk that disclosure of information to that person may expose a person to the death penalty or to torture or cruel, inhuman or degrading treatment or punishment.

1.102 The committee notes that as this bill has now passed both Houses of Parliament it makes no further comment.

Social Security Legislation Amendment (Remote Engagement Program) Bill 2021[1]

Purpose	This bill seeks to introduce a new supplementary payment for eligible job seekers in remote engagement program pilot communities until 30 June 2024
Portfolio	Indigenous Australians
Introduced	House of Representatives, 1 September 2021
Rights	Work; social security; adequate standard of living; equality and non-discrimination

Remote engagement program payment

1.103 This bill would establish a new supplementary payment under the remote engagement program for people in remote areas receiving a qualifying remote income support payment. The qualifying payment would include JobSeeker Payment, Youth Allowance, Parenting Payment and Disability Support Pension (DSP) as well as any other income support payment determined by the minister by legislative instrument.[2] The rate of payment would be $100–$190 per fortnight, although the exact rate would be determined by legislative instrument.[3] To qualify for this payment, a person receiving a qualifying remote income support payment must receive employment services from a remote engagement program provider; voluntarily participate in a remote engagement placement for between 15 and 18 hours per week; and satisfy any other qualification requirements determined by the minister by legislative instrument.[4] A person who performs work in accordance with a placement would not be classified as a worker or an employee for the purposes of work health and safety,

1 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Social Security Legislation Amendment (Remote Engagement Program) Bill 2021, *Report 11 of 2021*; [2021] AUPJCHR 112.

2 Schedule 1, item 7, proposed sections 661A and 661B. Section 661B defines 'qualifying remote income support payment' to include people receiving the DSP and Parenting Payment who are required to meet participation requirements (unless covered by an exemption) and people receiving Youth Allowance and Jobseeker Payment who are required to satisfy the activity test (unless covered by an exemption).

3 Schedule 1, item 7, proposed section 661E.

4 Schedule 1, item 7, proposed sections 661A and 661B.

fair work and superannuation legislation.[5] Further, the remote engagement program payment would not be payable to a person who has received the payment for a continuous period of 104 weeks and in circumstances specified by the minister by legislative instrument.[6]

International human rights legal advice

Rights to work, social security, adequate standard of living and equality and non-discrimination

Rights potentially promoted

1.104 To the extent that the measure provides opportunities for job seekers to develop employment skills with the aim of obtaining paid employment, it may promote the right to work. 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.[7] The right to work also requires States to provide a system of protection guaranteeing access to employment, including 'technical and vocational guidance and training programs, policies and techniques to achieve steady economic, social and cultural development and productive employment'.[8] This right must be made available in a non-discriminatory way.[9] The statement of compatibility states that the measure will promote the right to work insofar as it will strengthen existing incentives for remote jobseekers to actively engage with Commonwealth employment programs, which will improve their skills and assist them to transition to, and remain in, paid work in the open labour market.[10]

1.105 Insofar as the measure would introduce a supplementary social security payment, thereby increasing the amount of social security benefits payable to participants in the remote engagement program, it may also promote the rights to social security and an adequate standard of living. The statement of compatibility acknowledges this and notes that the measure would not affect a participant's other social security entitlements, meaning that they can receive their usual income support payments as well as the remote engagement program payment.[11] The right to social

5 Schedule 1, item 7, proposed section 661F. The relevant legislation is the *Work Health and Safety Act 2011, Safety, Rehabilitation and Compensation Act 1988, Superannuation Guarantee (Administration) Act 1992* and *Fair Work Act 2009*.

6 Schedule 1, item 7, proposed section 661C and subsection 661D(1).

7 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].

8 International Covenant on Economic, Social and Cultural Rights, article 6(2).

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

10 Statement of compatibility, p. 18.

11 Statement of compatibility, p. 19.

security recognises the importance of adequate social benefits in reducing the effects of poverty and plays an important role in realising many other economic, social and cultural rights, particularly the rights to an adequate standard of living and health.[12] Social security benefits must be adequate in amount and duration.[13] States must also have regard to the principles of human dignity and non-discrimination so as to avoid any adverse effect on the levels of benefits and the form in which they are provided.[14] The right to an adequate standard of living requires Australia to take steps to ensure the availability, adequacy and accessibility of food, clothing, water and housing for all people in Australia, and also imposes on Australia the obligations listed above in relation to the right to social security.[15] Further, under the Convention on the Rights of the Child, children have the right to benefit from social security and to a standard of living adequate for a child's physical, mental, spiritual, moral and social development.[16] Noting that people receiving Parenting Payment are eligible to receive the remote engagement program payment, the rights of the child may also be promoted.

Rights potentially limited

1.106 However, in other ways, the measure may engage and limit the rights to work, social security and an adequate standard of living. In particular, if work performed as part of the remote engagement program placement was characterised as a form of employment for the purposes of international human rights law, the measure may engage and limit the right to just and favourable conditions of work. The right to just and favourable conditions of work includes the right to fair wages and equal renumeration for work of equal value without distinction of any kind; a decent living for the worker and their families; and safe and healthy working conditions.[17] The United Nations (UN) Committee on Economic, Social and Cultural Rights has noted that '[f]or the clear majority of workers, fair wages are above the minimum wage' and 'should be paid in a regular, timely fashion and in full'.[18] It has stated that 'renumeration' encompasses a worker's wage or salary as well as additional direct or

12 International Covenant on Economic, Social and Cultural Rights, article 9. See also, UN Economic, Social and Cultural Rights Committee, *General Comment No. 19: The Right to Social Security* (2008).

13 UN Committee on Economic, Social and Cultural Rights*, General Comment No. 19: The Right to Social Security* (2008) [22].

14 UN Committee on Economic, Social and Cultural Rights*, General Comment No. 19: The Right to Social Security* (2008) [22].

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

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

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

18 UN Committee on Economic, Social and Cultural Rights, *General Comment No. 23: on the right to just and favourable conditions of work* (2016) [10].

indirect allowances in cash or in kind that should be of fair and reasonable amount, such as contributions to health insurance, on-site affordable childcare facilities and housing and food allowances.[19] This measure provides that a person performing work in accordance with a remote engagement placement, such as performing a role in government services or a community organisation, would not be considered a worker or employee for the purposes of domestic labour legislation.[20] The explanatory memorandum states that this provision reflects the longstanding view that jobseeker participation in activities under a Commonwealth employment program whilst in receipt of income support payments does not constitute an employment relationship.[21] It further notes that Australian governments may, where reasonable, require certain social security recipients to participate in activities that promote their well-being and enhance their employment prospects.[22] The statement of compatibility states that the income support payment plus the remote engagement program payment would be approximately equivalent to the minimum wage for the hours a person participates in work like activities under the program, but would not be high enough that people would avoid taking up paid employment.[23]

1.107 Notwithstanding that the measure does not characterise individuals performing work-like activities under the program as employees or workers, the UN Committee on Economic, Social and Cultural Rights has emphasised that the right to just and favourable conditions of work is a right of everyone, without distinction of any kind, meaning that it applies to all workers in all settings, including unpaid workers.[24] Depending on the nature and hours of work performed in accordance with the placement, if such work were to constitute a form of employment for the purposes of international human rights law, there could be a risk that the amount of social security payable to the individual (of $100–$190 per fortnight for 15–18 hours work) may not amount to fair renumeration, particularly where participants perform work of equal value to work performed by actual employees of the remote engagement program provider.

19 UN Committee on Economic, Social and Cultural Rights, *General Comment No. 23: on the right to just and favourable conditions of work* (2016) [7].

20 Schedule 1, item 7, proposed section 661F; statement of compatibility, p. 18. The relevant legislation is the *Work Health and Safety Act 2011, Safety, Rehabilitation and Compensation Act 1988, Superannuation Guarantee (Administration) Act 1992* and *Fair Work Act 2009*.

21 Explanatory memorandum, p. 12.

22 Explanatory memorandum, p. 12.

23 Statement of compatibility, p. 18.

24 UN Committee on Economic, Social and Cultural Rights, *General Comment No. 23: on the right to just and favourable conditions of work* (2016) [5]. At [47] on p. 13, the committee observed that excessive use of unpaid internships and training programs is not in line with the right to just and favourable conditions of work.

1.108 The measure may also engage and limit the rights to social security and an adequate standard of living to the extent that the remote engagement program payment may be removed from a person, noting that the payment is not payable to a person in circumstances specified in a legislative instrument.[25] The right to social security includes the right not to be subject to arbitrary and unreasonable restrictions of existing social security coverage, and States must guarantee the equal enjoyment by all of minimum and adequate protection.[26] The right also requires accessibility, which includes the requirement that qualifying conditions for benefits must be reasonable, proportionate and transparent.[27] The UN Committee on Economic, Social and Cultural Rights has applied similar criteria to the removal of social security benefits, stating:

> The withdrawal, reduction or suspension of benefits should be circumscribed, based on grounds that are reasonable, subject to due process, and provided for in national law.[28]

1.109 The UN Committee on Economic, Social and Cultural Rights has further stated that '[u]nder no circumstances should an individual be deprived of a benefit on discriminatory grounds or of the minimum essential level of benefits'.[29] It is noted that neither the bill nor the explanatory materials provide guidance as to what may be contained in such a legislative instrument regarding circumstances in which the payment is not payable. The explanatory memorandum merely states that the purpose of conferring the minister with these powers is to provide sufficient flexibility

25 Schedule 1, item 7, proposed section 661C.

26 UN Committee on Economic, Social and Cultural Rights*, General Comment No. 19: The Right to Social Security* (2008) [4] and [9].

27 UN Economic, Social and Cultural Rights Committee, *General Comment No. 19: The Right to Social Security* (2008) [24].

28 UN Economic, Social and Cultural Rights Committee, *General Comment No. 19: The Right to Social Security* (2008) [24].

29 UN Committee on Economic, Social and Cultural Rights, *General Comment No. 19: The Right to Social Security* (2008) [78]. This approach has also been echoed in the European context. The European Committee of Social Rights has stated that the European Social Charter requires that 'reducing or suspending social assistance benefits can only be in conformity with the Charter if it does not deprive the person of his/her means of subsistence'. See European Committee of Social Rights Conclusions, decision of 06 December 2017, Norway, 2013/def/NOR/13/1/EN. See also Magdalena Sepúlveda Carmona, Carly Nyst and Heidi Hautala, 'The Human Rights Approach to Social Protection' (Report, Ministry for Foreign Affairs of Finland) 1 June 2012. At p. 49, the former Special Rapporteur on extreme poverty and human rights, Ms Magdalena Sepúlveda Carmona stated: 'non-compliance with conditionalities attached to social protection programmes must not result in the exclusion of beneficiaries from programmes and services which are essential to their enjoyment of minimum essential levels of basic human rights. The imposition of conditionalities, therefore, should be analysed with respect to the overall set of obligations of the State and the need to meet minimum essential levels of economic, social and cultural rights'.

in the design of the program to accommodate the outcomes of the co-design process with community and make improvements in the design of the program identified through feedback from participants and providers.[30] However, without more information as to what qualifying conditions and circumstances of suspension or withdrawal may be specified in a legislative instrument, it is difficult to assess whether they would be reasonable, proportionate and non-discriminatory.[31]

1.110 In addition, by specifying certain social security payments as qualifying payments for the purposes of the program, including JobSeeker Payment, Youth Allowance, Parenting Payment and the DSP, the measure may have a disproportionate impact on people with certain protected attributes, including people with disability, young people and mothers, and so engages the right to equality and non-discrimination. In addition, noting that the measure applies to people in remote areas, it may also have a disproportionate impact on Aboriginal and Torres Strait Islander peoples. The statement of compatibility notes that the remote engagement program is intended to provide a framework for piloting new approaches to delivering employment services in remote communities, ahead of replacing the Community Development Program (CDP) in 2023.[32] As 83 per cent of CDP participants identify as Aboriginal and Torres Strait Islander people, it seems likely that this measure would also disproportionately apply to Aboriginal and Torres Strait Islander people.[33] The former Special Rapporteur on the rights of indigenous peoples has observed that the requirements of the CDP are 'discriminatory, being substantially more onerous than those that apply to predominantly non-indigenous jobseekers', namely those not in remote areas.[34]

1.111 The right to equality and non-discrimination provides that everyone is entitled to enjoy their rights without discrimination of any kind and that all people are equal

30 Explanatory memorandum, pp. 1 and 9.

31 More generally, the UN Committee on Economic, Social and Cultural Rights has expressed concern about conditionalities such as mutual obligations in Australia's social security system on the basis that they may have a punitive effect on disadvantaged and marginalised families, women and children (including Indigenous families). See UN Committee on Economic, Social and Cultural Rights, *Concluding observations on Australia*, E/C.12/AUS/CO/4 (12 June 2009) [20]. See also, *Concluding observations on the fifth periodic report of Australia* E/C.12/AUS/CO/5 (11 July 2017) [31] and [32(c)], where the UN Committee recommended that Australia review its existing and envisaged conditionalities for eligibility to social assistance and unemployment benefits and penalties for non-compliance, and ensure that all beneficiaries receive adequate benefits, without discrimination.

32 Statement of compatibility, p. 17.

33 UN Human Rights Council. *Report of the Special Rapporteur on the rights of indigenous peoples on her visit to Australia,* A/HRC/36/46/Add.2 (2017) [58].

34 UN Human Rights Council. *Report of the Special Rapporteur on the rights of indigenous peoples on her visit to Australia,* A/HRC/36/46/Add.2 (2017) [58].

before the law and entitled without discrimination to equal and non-discriminatory protection of the law.[35] 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).[36] 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 (including race, gender, age and place of residence).[37]

1.112 The statement of compatibility states that the right to equality and non-discrimination is advanced by providing jobseekers in remote areas with opportunities to build their skills and employability. It states that the measure is designed to overcome the inherent imbalance in employment opportunities and consequential disadvantage experienced in parts of remote Australia.[38] If the measure was to have the effect of promoting the right to work for people with protected attributes in rural areas, including people with disability, mothers, young people and Aboriginal and Torres Strait Islander people, it may not constitute unlawful discrimination, noting that differential treatment for the purpose of advancing the human rights of a certain disadvantaged group may not constitute unlawful discrimination.[39]

1.113 However, without the provision of reasonable accommodation and supports to ensure that the program placements are made available in a non-discriminatory way, for example by ensuring that work is open, inclusive and accessible to people with disability, and appropriate childcare facilities are available for parents, there is a risk that, in practice, the payment may not necessarily be accessible to people with certain protected attributes. While the rights to work, social security and an adequate

35 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. See also UN Committee on Economic, Social and Cultural Rights, *General Comment 20: non-discrimination in economic, social and cultural rights* (2009) [7].

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

37 *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'.

38 Statement of compatibility, pp. 19–20.

39 For example, article 1(4) of the Convention on the Elimination of All Forms of Racial Discrimination provides for special measures 'taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms'.

standard of living may be progressively realised, Australia has immediate obligations to ensure these rights are made available in a non-discriminatory way.[40] As part of the obligation not to discriminate, the UN Committee on Economic, Social and Cultural Rights has stated that 'States parties should give special attention to those individuals and groups who traditionally face difficulties in exercising [the] right [to social security]', including people with disability, and States should consider the impact of any policy changes on these groups.[41] If in practice people with certain protected attributes were unable to participate in the remote engagement program due to a lack of reasonable accommodation and supports, and so in effect would receive a lower social security payment than those that could, questions arise as to whether the measure may indirectly discriminate against those groups.

1.114 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 such that it serves a legitimate objective (one which, where an economic, social and cultural right is in question, is solely for the purpose of promoting the general welfare in a democratic society),[42] is rationally connected to that objective and is a proportionate means of achieving that objective.[43] Further, where a person possesses characteristics which make them particularly vulnerable to intersectional discrimination, such as on the grounds of both race and disability, the UN Committee on Economic, Social and Cultural Rights has

40 See, UN Committee on Economic, Social and Cultural Rights*, General Comment No. 19: The Right to Social Security* (2008) [40]. For example, in the context of the right to work, States parties are required to implement measures to eliminate discrimination against women in the field of employment, including 'the provision of the necessary supporting social services to enable parents to combine family obligations with work responsibilities and participation in public life, in particular through promoting the establishment and development of a network of child care facilities'. See Convention on the Elimination of All Forms of Discrimination against Women, article 11(2)(c).

41 United Nations Committee on Economic, Social and Cultural Rights, *General Comment No. 19: The right to social security*, (2008), [22] and [31].

42 International Covenant on Economic, Social and Cultural Rights, article 4.

43 UN Human Rights Committee, *General Comment 18: Non-Discrimination* (1989) [13] and UN Committee on Economic, Social and Cultural Rights, *General Comment 20: non-discrimination in economic, social and cultural rights* (2009) [13]. See also *Althammer v Austria*, UN Human Rights Committee Communication No. 998/01 (2003) [10.2].

highlighted that 'particularly special or strict scrutiny is required in considering the question of possible discrimination'.[44]

Assessment of potential limitations on rights

1.115 The statement of compatibility states that the purpose of the measure is to pilot new approaches to deliver employment services to remote communities. It states that the new program will build the skills and vocational capabilities of participants in remote areas and provide a pathway for jobseekers to find employment. It notes that the work performed by participants in the placements will also deliver goods or services to benefit local communities.[45] These objectives may be capable of constituting a legitimate objective for the purposes of international human rights law.

1.116 Under international human rights law, it must also be demonstrated that any limitation on a right has a rational connection to (that is, is effective to achieve) the objective sought to be achieved. As the detailed aspects of the program will be set out in legislative instruments and policy guidance – including all of those who may qualify for the program; the qualifying conditions for the payment; the rate of pay; and the circumstances in which the payment is not payable – it is difficult to assess whether the measure would in practice be effective to achieve the objectives sought. For example, while the measure applies to people with disability receiving the DSP and seeks to provide opportunities to enhance their prospects of securing a job, it is unlikely to be effective to achieve this objective if the placements are not open, inclusive and accessible and reasonable accommodations are not provided in the workplace. Likewise, if childcare facilities are not available for parents for between 15 and 18 hours per week, parents receiving parenting payment may not be able to participate in the program. Without more information as to how the measure will operate in practice, it is not possible to conclude that it is rationally connected to the objectives sought.

1.117 In assessing proportionality, it is necessary to consider a number of factors, including whether a proposed limitation is sufficiently circumscribed and whether it is accompanied by sufficient safeguards. As noted in paragraph [1.116], key operational aspects of the measure are to be set out in legislative instruments made by the

44 *Marcia Cecilia Trujillo Calero v. Ecuador*, UN Committee on Economic, Social and Cultural Rights, Communication No. 10/2015, E/C.12/63/D/10/2015 (26 March 2018) [19.2]. See also *Rodriguez v Spain,* UN Committee on Economic, Social and Cultural Rights, Communication No. 1/2013 E/C.12/57/D/1/2013 (20 April 2016) [14.1]; UN Committee on Economic, Social and Cultural Rights, *General Comment 20: non-discrimination in economic, social and cultural rights* (2009) [17] and *General Comment 16: the equal right of men and women to the enjoyment of all economic, social and cultural rights* (2005) [5]; and Committee on the Elimination of Discrimination against Women, *General Recommendation No. 28: The Core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women*, CEDAW/C/GS/28 (16 December 2010) [28].

45 Statement of compatibility, p. 17.

minister. The statement of compatibility states that this approach allows flexibility to adjust the program as lessons are learned from the pilots.[46] It states that the pilots will be co-designed with remote communities, including Indigenous communities, and the legislative instruments will be informed by the outcomes of this co-design process.[47] It is acknowledged that co-designing the program with communities that are to be affected by the measure is an important aim. Indeed, as part of its obligations in relation to respecting the right to self-determination, Australia has an obligation under customary international law to consult with indigenous peoples in relation to actions which may affect them.[48] The right of indigenous peoples to be consulted is a critical component of free, prior and informed consent.[49] However, it is noted that it is unclear whether communities have been genuinely consulted about the proposed measure prior to the introduction of this bill, noting that the obligation to consult under international human rights law includes the right of indigenous peoples to 'influence the outcome of decision-making processes affecting them, not a mere right to be involved in such processes or merely to have their views heard'.[50]

1.118 As to the existence of safeguards, the explanatory memorandum notes that a decision made under proposed subsection 661A(1)(d), which requires a person to satisfy qualification requirements determined by the minister in legislative instrument, is reviewable under the *Social Security (Administration) Act 1999*.[51] Access to review in relation to this provision is an important safeguard. However, it is unclear whether review would be available for other decisions made in relation to this measure, such as where a person's payment is determined to be no longer payable. More generally,

46 Statement of compatibility, p. 17.

47 Statement of compatibility, p. 17.

48 See Parliamentary Joint Committee on Human Rights, *Report 4 of 2017* (9 May 2017) p.122-123; *Report 15 of 2021* (9 December 2020) pp. 9–26.

49 United Nations Human Rights Council, *Free, prior and informed consent: a human rights-based approach - Study of the Expert Mechanism on the Rights of Indigenous Peoples,* A/HRC/39/62 (2018) [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) [15]-[16]. The UN Human Rights Council further advised that the obligation to 'consult with indigenous peoples should consist of a qualitative process of dialogue and negotiation, with consent as the objective' and that consultation involves 'a process of dialogue and negotiation over the course of a project, from planning to implementation and follow-up'. In the context of special measures, the UN Committee on the Elimination of Racial Discrimination has stated that special measures should be 'designed and implemented on the basis of prior consultation with affected communities and the active participation of such communities'. See United Nations Committee on the Elimination of Racial Discrimination, *General Recommendation No. 32* (2009) [16]–[18].

51 Explanatory memorandum, p. 9.

the fact that the measure is time-limited, ending on 1 July 2024,[52] may also assist with proportionality, as it may allow improvements to be made were the measure to limit rights in practice. It is not clear that these safeguards alone, however, would be adequate to ensure that any limitation on rights is proportionate.

Concluding remarks

1.119 To the extent that the measure would provide opportunities for job seekers to develop employment skills and increase the amount of social security benefits payable to program participants, it may promote the rights to work, social security and an adequate standard of living. However, these rights may also be engaged and limited depending on how the measure operates in practice. Noting that the measure would have a disproportionate impact on people with certain protected attributes, including people with disability, young people, parents, Aboriginal and Torres Strait Islander peoples and people residing in rural areas, the measure would also engage and limit the right to equality and non-discrimination. These rights 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. While the objectives sought to be achieved by the measure are capable of constituting legitimate objectives, it is not possible to conclude that the measure would be effective to achieve these objectives as key aspects of the measure are not contained in the bill and instead are to be set out in legislative instruments and policy guidance. This lack of operational detail also makes it difficult to assess the proportionality of the measure, with questions remaining as to whether the measure is sufficiently circumscribed and accompanied by adequate safeguards. As such, without knowing the detail to be contained in the legislative instruments, it is not possible to conclude that the measure would permissibly limit the rights to work, social security, an adequate standard of living and equality and non-discrimination.

Committee view

1.120 The committee notes this bill would establish a new supplementary payment under the remote engagement program for people in remote areas receiving JobSeeker Payment, Youth Allowance, Parenting Payment and the Disability Support Pension.

1.121 The committee considers that to the extent that the measure would provide opportunities for job seekers in remote areas to develop employment skills and increase the amount of social security benefits payable to program participants, it may promote the rights to work, social security and an adequate standard of living. However, depending on how the measure operates in practice, the committee notes

52 Schedule 1, item 7, proposed subsection 661D(2). It is noted that Schedule 1, Parts 3 and 4 would repeal and omit provisions relating to the Community Development Employment Projects Scheme, noting that this program would be replaced by the remote engagement program.

that the measure may also engage and limit these rights, as well as the right to equality and non-discrimination. These rights may be subject to permissible limitations if they are shown to be reasonable, necessary and proportionate.

1.122 The committee considers that the objectives of building the skills and vocational capabilities of participants in remote areas and providing a pathway for jobseekers to find employment are capable of constituting legitimate objectives for the purpose of international human rights law. The committee notes that key aspects of the measure are to be set out in legislative instruments and policy guidance so as to allow the program to be co-designed with affected communities. The committee considers that co-designing the program and tailoring it to the needs of the local community is an important aim. However, the committee notes that the lack of operational detail contained in the measure also makes it difficult to assess whether it would likely be effective to achieve the stated objectives and be a proportionate means of achieving the objectives. As such, it is not possible for the committee to conclude that the measure would permissibly limit the rights to work, social security, an adequate standard of living and equality and non-discrimination. The committee notes that much will depend on what the relevant legislative instruments provide and it will examine such instruments should they be made.

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

Legislative Instruments

Migration Amendment (Clarifying International Obligations for Removal) Regulations 2021 [F2021L01078][1]

Purpose	This legislative instrument prescribes a period of 120 days for the Administrative Appeals Tribunal to make its decision in relation to review of a decision under subsection 197D(2) of the *Migration Act 1958*, and to notify the applicant of that decision
Portfolio	Home Affairs
Authorising legislation	*Migration Act 1958*
Last day to disallow	15 sitting days after tabling (tabled in the Senate on 10 August 2021 and the House of Representatives on 9 August 2021). Notice of motion to disallow must be given by 21 October 2021 In the House of Representatives and 22 November 2021 in the Senate[2]
Rights	Prohibition against expulsion of aliens without due process; non-refoulement

Time period for review of decisions that a person is not owed protection

1.124 This legislative instrument amends the *Migration Regulations 1994* to prescribe a time period of 120 days for the Administrative Appeals Tribunal (the AAT) to make its decision in relation to review of a decision made under subsection 197D(2) of the *Migration Act 1958* (the Migration Act), and notify the applicant of that decision.[3] Subsection 197D(2) of the Migration Act allows the minister to make a decision that an unlawful non-citizen in relation to whom a protection finding is made (but who is ineligible for a grant of a visa on character or other grounds) is no longer a

1 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Migration Amendment (Clarifying International Obligations for Removal) Regulations 2021 [F2021L01078], *Report 11 of 2021*; [2021] AUPJCHR 113.

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 Schedule 1, Item 1, section 4.34A. The amendments made by this legislative instrument are consequential to the amendments made by the *Migration Amendment (Clarifying International Obligations for Removal) Act 2021*, which the Parliamentary Joint Committee on Human Rights commented on in *Report 5 of 2021* (29 April 2021) pp. 13–28 and *Report 7 of 2021* (16 June 2021) pp. 100–124.

person in respect of whom any protection finding would be made.[4] Paragraph 197C(3)(c) of the Migration Act permits the removal powers in section 198 to operate where a decision is made under section 197D(2).[5] However, the individual to whom the section 197D(2) decision applies cannot be removed under section 198 until the merits review process (to which this instrument relates) is finalised.[6] The prescribed time period starts when the application for review is received by the AAT and ends after 120 days.[7] If this time period is insufficient, subsection 419(2) of the Migration Act enables the AAT, with the applicant's consent, to extend this period.

International human rights legal advice

Prohibition against expulsion of aliens without due process and non-refoulement obligations

1.125 The consequence of a decision made under subsection 197D(2) is deportation of a non-citizen from Australia potentially to the country in relation to which a protection finding was previously made.[8] Therefore, by prescribing a time limit in which review of a subsection 197D(2) decision must be made (after which, the individual may be removed from Australia), this instrument may engage the prohibition against expulsion of aliens without due process and have implications for Australia's non-refoulement obligations.[9] The prohibition against expulsion of aliens without due process is contained in article 13 of the International Covenant on Civil and Political Rights. Article 13 provides that an alien may be expelled only in

4 If the minister makes a decision under subsection 197D(2), the minister must notify the non-citizen of the decision and the reasons for the decision as well as their review rights in relation to the decision. See *Migration Act 1958*, subsection 197D(4).

5 Section 198 of the *Migration Act 1958* sets out the circumstances in which mandatory removal of an 'unlawful non-citizen' is authorised. An 'unlawful non-citizen' is a person who is a non-citizen in the migration zone and does not hold a lawful visa. See *Migration Act 1958*, sections 13–14. Migration zone is defined in section 5.

6 *Migration Act 1958*, subparagraph 197C(3)(c)(ii) and subsection 197D(6). Statement of compatibility, p. 3.

7 Schedule 1, Item 1, section 4.34A. Subsection (b) specifies that the time period ends at the end of 120 days starting on the first working day after the day on which the application is received by the Tribunal.

8 Sections 189, 196 and 198 of the *Migration Act 1958* require an unlawful non-citizen (individuals who do not have a valid visa) to be detained and kept in immigration detention until they are: granted a visa or removed from Australia as soon as reasonably practicable.

9 To the extent that the effect of this instrument would be to limit a person's ability to challenge a subsection 197D(2) decision, the consequence of that decision being the person's detention and deportation from Australia, the measure may also engage and limit a number of other rights, including: 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); and freedom of movement (if the person is prevented from re-entering and remaining in Australia as their own country).

accordance with a decision made under law and must be allowed to submit reasons against their expulsion and to have their case reviewed by a competent authority, and be represented for the purpose of that review. The UN Human Rights Committee has indicated that the guarantees in article 14 (the right to a fair hearing) do not generally apply to expulsion or deportation proceedings, but the procedural guarantees of article 13 are applicable to such proceedings.[10] The UN Human Rights Committee has stated that article 13 should be interpreted in light of article 14 and encompasses 'the guarantee of equality of all persons before the courts and tribunals…and the principles of impartiality, fairness and equality of arms implicit in this guarantee are applicable'.[11] 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'.[12] If the effect of this measure were to limit the procedural guarantees of article 13 such that the individual is unable to *effectively* submit reasons against their expulsion, article 13 may be engaged and limited.

1.126 Further, Australia has non-refoulement obligations under the International Covenant on Civil and Political Rights and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. This means that Australia must not return any person to a country where there is a real risk that they would face persecution, torture or other serious forms of harm, such as the death penalty; arbitrary deprivation of life; or cruel, inhuman or degrading treatment or punishment.[13] To the extent that the effect of this measure may be to limit a person's ability to effectively challenge a decision which may lead to their expulsion or deportation, possibly to a country where they would face persecution, torture or other serious forms of harm, there is a risk that it may not be consistent with Australia's non-refoulement obligations, which include the requirement for independent, effective and impartial review of non-refoulement decisions, and the right to an effective

10 UN Human Rights Committee, *General Comment 32: Article 14, Right to Equality before Courts and Tribunals and to Fair Trial* (2007) [17].

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

12 UN Human Rights Committee, *General Comment No. 15: The position of aliens under the Covenant* (1986) [10]. The UN 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'.

13 UN Committee against Torture, *General Comment No.4 (2017) on the implementation of article 3 in the context of article 22* (2018) and UN Human Rights Committee, *General Comment No. 20: article 7 (prohibition against torture)* (1992) [9].

remedy.[14] It is noted that Australia's non-refoulement obligations are absolute and may not be subject to any limitations.[15]

1.127 While the statement of compatibility notes that the measure has implications for Australia's non-refoulement obligations, it does not address the possible limitations on the prohibition against expulsion of aliens without due process. This latter right may be subject to permissible limitations where the limitation pursues a legitimate objective, is rationally connected to that objective and is a proportionate means of achieving that objective.[16]

1.128 The statement of compatibility states that prescribing a period of 120 days will help to ensure the AAT makes a decision expeditiously. It notes that the prescribed period is intended to strike a balance between providing the AAT with an appropriate period of time to conduct a review, with the need to provide certainty for the applicant about the time in which a decision may be made, noting that the applicant may be in immigration detention while awaiting the outcome of review.[17] Ensuring the review

14 The committee has previously noted that a decision made under subsection 197D(2) may have significant human rights implications, particularly in relation to Australia's non-refoulement obligations, because it allows the minister to overturn a protection finding, thereby exposing the person to the risk of being returned to the country in relation to which a protection finding was previously made. See Parliamentary Joint Committee on Human Rights, *Report 7 of 2021* (16 June 2021) pp. 121–122. More generally, the reports of the Parliamentary Joint Committee on Human Rights have previously considered Australia's non-refoulement obligations in the context of citizenship cessation and amendments to the Migration Act, see, eg: *Report 1 of 2020* (5 February 2020), pp. 124–125; *Thirty-sixth report of the 44th Parliament* (16 March 2016) pp. 57–58; pp. 182-183; *Thirty-fourth report of the 44th Parliament* (23 February 2016) pp. 34–37; *Fourth report of the 44th Parliament* (18 March 2014) [3.57]–[3.66]; *Second report of the 44th Parliament* (11 February 2014) [1.189]–[1.197].

15 Regarding effective remedy with respect to non-refoulement decisions see, *Agiza v Sweden*, UN Committee against Torture Communication No.233/2003 (2005) [13.7]; *Singh v Canada*, UN Committee against Torture Communication No.319/2007 (2011) [8.8]-[8.9]; *Josu Arkauz Arana v France*, UN Committee against Torture Communication No.63/1997 (2000); *Alzery v Sweden*, UN Human Rights Committee Communication No.1416/2005 (2006) [11.8]. See generally UN Committee Against Torture, *General Comment No. 4 on the implementation of article 3 of the Convention in the context of article 22* (2017) [13]. For an analysis of this jurisprudence, see Parliamentary Joint Committee on Human Rights, *Thirty-sixth report of the 44th Parliament* (16 March 2016) pp. 182-183.

16 Note that the due process guarantees in article 13 may be departed from, but only when 'compelling reasons of national security' so require. Thus, 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 (as appears to be the case in relation to this measure), 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). See 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].

17 Statement of compatibility, p. 4.

process is undertaken expeditiously and providing individuals in immigration detention with some certainty as to the time period in which the review process will be completed (which may in turn reduce the risk of indefinite detention for such individuals), would appear to be legitimate objectives for the purpose of international human rights law. The measure would also appear to be rationally connected to these objectives.

1.129 The key question is whether the limitation is proportionate to the objectives being sought. A relevant consideration in this regard is whether the measure is accompanied by sufficient safeguards. The primary safeguard identified in the statement of compatibility is the AAT's ability to extend the prescribed time period. The statement of compatibility states that this safeguard provides the AAT with flexibility in circumstances where the decision on review is particularly complex or other circumstances arise which may result in the AAT not meeting the prescribed time period of 120 days.[18] Further, the statement of compatibility notes that a decision made after the expiry of the prescribed time period, including where the applicant has not consented to an extension, is still valid, and involuntary removal from Australia will continue not to be authorised under the Migration Act until the AAT completes its review.[19] This safeguard would appear to assist with the proportionality of the measure by providing flexibility to treat different cases differently and ensuring that involuntary removal from Australia continues to be unauthorised while review is ongoing.

1.130 However, the ability to extend the time period is a discretionary power exercised by the AAT and it is unclear whether the applicant can have the time period extended on their own motion – for example, where the applicant requires more time to gather evidence, prepare submissions and organise representation (noting that there is also a limit on the time period within which an application for review can be made).[20] The strength of such a safeguard will depend on how it is exercised in practice. In this regard, Part 7 of the Migration Act sets out the AAT's powers in relation to Part 7-reviewable decisions and provides an exhaustive statement of the requirements of the natural justice hearing rule.[21] In particular, in conducting reviews, the AAT is required to act 'according to substantial justice and the merits of the case'

18 Statement of compatibility, p. 5.

19 Statement of compatibility, p. 5.

20 Paragraph 412(1)(b) of the *Migration Act 1958* requires an application for review of a Part 7-reviewable decision to be given to the AAT within the prescribed time period, ending not later than 28 days after the notification of the decision. Subsection 197D(4) requires the minister to notify the non-citizen of this time period within which an application for review can be made. However, subsection 197D(5) provides that failure to comply with these notification requirements does not affect the validity of the subsection 197D(2) decision.

21 *Migration Act 1958*, Part 7.

as well as in a way that is 'fair and just'.[22] While these natural justice requirements are important general safeguards, it will likely depend on the circumstances of each case as to whether they are sufficient in practice. If, for example, the AAT were to refuse an applicant's request to extend the time period, the effect may be that the applicant is unable to effectively submit reasons against their expulsion. In such circumstances, there is a risk that the safeguards accompanying the measure may not be sufficient in all circumstances to ensure that any limitation on rights is proportionate.

Committee view

1.131 The committee notes this legislative instrument prescribes a time period of 120 days for the AAT to make a decision in relation to review of a ministerial decision that a person is not owed protection. The committee notes that the consequence of such a decision is deportation of a non-citizen from Australia potentially to the country in relation to which a protection finding was previously made. As such, by prescribing a time limit in which review of such a decision must be made (after which, the individual may be removed from Australia), this instrument may engage and limit the prohibition against expulsion of aliens without due process and have implications for Australia's non-refoulement obligations. The prohibition against expulsion without due process may be subject to permissible limitations if it is shown to be reasonable, necessary and proportionate.

1.132 The committee considers that the measure pursues the legitimate objectives of ensuring the review process is undertaken expeditiously and providing individuals in immigration detention with some certainty as to the time period in which the review process would be completed. Importantly, this may reduce the risk of indefinite detention for such individuals. As regards proportionality, the committee considers that the measure is accompanied by some important safeguards, including the AAT's ability to extend the time period if it proves to be insufficient. However, the committee notes that some questions remain as to how this safeguard will operate in practice, in particular, whether the applicant can have the time period extended on their own motion. Having regard to the serious human rights implications of a decision denying a person protection obligations, the committee emphasises the importance of having adequate safeguards accompanying the measure.

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

22 *Migration Act 1958*, subsection 420(b) and 422B(3).

Bills and instruments with no committee comment[1]

1.134 The committee has no comment in relation to the following bills which were introduced into the Parliament between 23 August and 2 September 2021. 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]

- Aboriginal Land Rights (Northern Territory) Amendment (Economic Empowerment) Bill 2021;
- Aged Care Amendment (Registered Nurses Ensuring Quality Care) Bill 2021;
- COAG Legislation Amendment Bill 2021;
- Corporations (Aboriginal and Torres Strait Islander) Amendment Bill 2021;
- Customs Amendment (Regional Comprehensive Economic Partnership Agreement Implementation) Bill 2021;
- Customs Legislation Amendment (Commercial Greyhound Export and Import Prohibition) Bill 2021;
- Customs Tariff Amendment (Regional Comprehensive Economic Partnership Agreement Implementation) Bill 2021;
- Health Insurance Amendment (Enhancing the Bonded Medical Program and Other Measures) Bill 2021;
- Investment Funds Legislation Amendment Bill 2021;
- Live Performance Federal Insurance Guarantee Fund Bill 2021;
- National Health Amendment (COVID-19) Bill 2021;
- National Redress Scheme for Institutional Child Sexual Abuse Amendment Bill 2021;
- No Requirement for Medical Treatment (Including Experimental Injections) Without Consent (Implementing Article 6 of the Universal Declaration on Bioethics and Human Rights) Bill 2021;
- Offshore Electricity Infrastructure Bill 2021;
- Offshore Electricity Infrastructure (Regulatory Levies) Bill 2021;

1 This section can be cited as Parliamentary Joint Committee on Human Rights, Bills and instruments with no committee comment, *Report 11 of 2021*; [2021] AUPJCHR 114.

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.

- Paid Parental Leave Amendment (COVID-19 Work Test) Bill 2021;
- Territories Stolen Generations Redress Scheme (Consequential Amendments) Bill 2021;
- Territories Stolen Generations Redress Scheme (Facilitation) Bill 2021; and
- Treasury Laws Amendment (2021 Measures No. 7) Bill 2021.

1.135 The committee has examined the legislative instruments registered on the Federal Register of Legislation between 5 August and 1 September 2021.[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.

Private senators' bills that may limit human rights

1.136 The committee notes that the following senators' bills appear to engage and may limit human rights. Should either of these bills proceed to further stages of debate, the committee may request further information from the legislation proponent as to the human rights compatibility of the bill:

- Commonwealth Electoral Amendment (Integrity of Elections) Bill 2021; and
- Federal Environment Watchdog Bill 2021.

Dr Anne Webster MP

Chair

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.