

Chapter 1

New and ongoing matters

1.1 The committee comments on the following bill and legislative instrument, and seeks a response or further information from the relevant minister.

Bill

Inspector-General of Live Animal Exports Amendment (Animal Welfare) Bill 2023¹

Purpose	The bill seeks to make a number of amendments to the <i>Inspector-General of Live Animal Exports Act 2019</i> , including to expand the office of the Inspector-General and rename it the 'Inspector-General of Animal Welfare and Live Animal Exports'; expand the objects of the Act and the functions of the Inspector-General; expand the ways in which a review may be started; provide for the independence of the Inspector-General; clarify administrative arrangements; and make consequential amendments to the <i>National Anti-Corruption Commission Act 2022</i> to reflect the renaming of the Inspector-General
Portfolio	Agriculture, Fisheries and Forestry
Introduced	House of Representatives, 24 May 2023
Rights	Privacy

Collection, use and disclosure of personal information

1.2 This bill seeks to amend the *Inspector-General of Live Animal Exports Act 2019* (the Act) to expand the functions of the Inspector-General of Animal Welfare (Inspector-General) in relation to their powers of review.² In particular, the Inspector-General would, among other things, be empowered to review the performance of functions, or exercise of powers, by livestock export officials under the animal welfare

1 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Inspector-General of Live Animal Exports Amendment (Animal Welfare) Bill 2023, *Report 7 of 2023*; [2023] AUPJCHR 65.

2 Items 11 and 12.

and live animal export legislation and standards in relation to the export of livestock.³ A livestock export official means: an authorised officer (such as an employee of a Commonwealth body); an accredited veterinarian; or the Secretary of the Department of Agriculture, Fisheries and Forestry or a delegate of the Secretary.⁴ The Inspector-General would also be conferred ancillary powers to do all things necessary or convenient to be done for, or in connection with, the performance of the Inspector-General's functions.⁵ The Act currently confers information gathering powers on the Inspector-General, enabling them to require a person to give information or documents if they reasonably believe the person has information or documents relevant to the review.⁶ The Act also requires the Inspector-General to publish a report on each review conducted.⁷

Preliminary international human rights legal advice

Right to privacy

1.3 By expanding the Inspector-General's review powers, including broadening the scope of matters which may be subject to review, and conferring ancillary powers on the Inspector-General, the measure would have the effect of expanding the scope of information, including personal information, that may be obtained, used and disclosed by the Inspector-General in performance of these functions. The collection, use and disclosure of personal information engages and limits the right to privacy. The statement of compatibility acknowledges this, and notes that the Inspector-General may require the provision of information or documents from various persons in undertaking a review and must then, under the current Act, publish a report for each review undertaken.⁸

1.4 The right to privacy includes respect for informational privacy, including the right to respect for private and confidential information, particularly the storing, use

3 Item 11, proposed paragraph 10(1)(a).

4 *Inspector-General of Live Animal Exports Act 2019*, section 5. An authorised officer and an accredited veterinarian have the meaning given in the *Export Control Act 2020*, see sections 12, 291 and 312.

5 Item 12.

6 *Inspector-General of Live Animal Exports Act 2019*, section 11. The Inspector-General may also make copies of, or take extracts from, a document produced. A person may be liable to a civil penalty if they do not comply with the requirement to answer questions, give information or produce documents: subsection 11(3). A person may commit an offence or be liable to a civil penalty if the person gives false or misleading information or produces false or misleading documents: see sections 34 and 35 and sections 137.1 and 137.2 of the *Criminal Code*.

7 *Inspector-General of Live Animal Exports Act 2019*, subsection 10(3).

8 Statement of compatibility, pp. 26–27.

and sharing of such information.⁹ It also includes the right to control the dissemination of information about one's private life.¹⁰ The right to privacy may be subject to permissible limitations which are provided by law and are not arbitrary. In order for limitations not to be arbitrary, the measure must pursue a legitimate objective and be rationally connected to (that is, effective to achieve) and proportionate to achieving that objective.

1.5 The stated objective of the measure is to facilitate the Inspector-General conducting reviews to ensure the accountability of livestock export officials in the performance of their functions or exercise of their powers, and the accountability of the Commonwealth in relation to its systems for the administration of livestock exports and the effectiveness of its reporting.¹¹ The statement of compatibility states that the expanded functions of the Inspector-General, together with the existing information gathering powers are crucial to the proposed expanded role of the Inspector-General, as these provisions enhance the Inspector-General's focus on animal welfare in livestock exports and allow the Inspector-General to fulfil the proposed expanded objects of the Act.¹² In general terms, the expanded objects of the Act would be to monitor, investigate and report on the implementation of animal welfare and live export legislation and standards, enhance accountability and transparency, and ensure livestock export officials are considering the welfare of animals in exercising their powers.¹³

1.6 Expanding the Inspector-General's functions and review powers in order to improve compliance with legislation and enhance accountability and transparency of public officials in the performance of their functions, is capable of constituting a legitimate objective for the purposes of international human rights law. The collection, use and disclosure of personal information appears likely to be effective to achieve this objective.

1.7 In order to be proportionate, a limitation on the right to privacy should only be as extensive as is strictly necessary to achieve its legitimate objective and must be accompanied by appropriate safeguards. The United Nations Human Rights

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

10 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].

11 Statement of compatibility, p. 28.

12 Statement of compatibility, p. 27.

13 Item 3.

Committee has stated that legislation must specify in detail the precise circumstances in which interferences with privacy may be permitted.¹⁴

1.8 The statement of compatibility states that any information or documentation required to be provided to the Inspector-General in order to conduct a review will be managed in compliance with the information management framework under the current Act and the *Privacy Act 1988* (Privacy Act).¹⁵ The information management framework sets out the purposes for which personal information may be used and disclosed. For example, the Act authorises the use and disclosure of personal information to an enforcement body if the person disclosing the information reasonably believes that the disclosure is necessary for, or directly related to, one or more enforcement related activities being conducted by, or on behalf of, that enforcement body.¹⁶ The enforcement body may use or disclose the information for the purposes of conducting one or more enforcement related activities.¹⁷ In general, specifying in legislation the circumstances in which information may be used or disclosed may assist with proportionality, depending on the scope of the authorisation. However, the information management framework under the current Act provides broad authorisation for the use and disclosure of personal information obtained using powers under the Act, including authorising the sharing of personal information with enforcement bodies unrelated to monitoring, investigating or reporting on live animal exports.¹⁸ As such, it is not clear that the information management framework would operate as a sufficient safeguard in the context of this measure.

1.9 As to the safeguard value of the Privacy Act, compliance with the Privacy Act and associated Australian Privacy Principles (APPs) are not a complete answer to concerns about interference with the right to privacy for the purposes of international

14 *NK v Netherlands*, UN Human Rights Committee Communication No.2326/2013 (2018) [9.5].

15 *Inspector-General of Live Animal Exports Act 2019*, sections 23–31.

16 *Inspector-General of Live Animal Exports Act 2019*, subsection 26(1).

17 *Inspector-General of Live Animal Exports Act 2019*, subsection 26(2).

18 The Parliamentary Joint Committee on Human Rights has raised similar concerns regarding the sharing of personal information obtained by officials using powers under the Biosecurity Act to enforce any other law, unrelated to any biosecurity risk or for the administration of the Biosecurity Act. See Parliamentary Joint Committee on Human Rights, *Biosecurity Amendment (Strengthening Biosecurity) Bill 2022*, [Reports 6 of 2022](#) (24 November 2022) pp. 16–33 and [1 of 2023](#) (8 February 2023) pp. 61–93.

human rights law.¹⁹ This is because they contain a number of exceptions to the prohibition on use or disclosure of personal information for a secondary purpose, including where its use or disclosure is authorised under an Australian Law,²⁰ such as those circumstances set out in the information management framework, which may be a broader exception than permitted in international human rights law.²¹ Therefore, further information is required as to the operation of the specific safeguards in the Privacy Act so as to determine whether that Act provides effective safeguards of the right to privacy in these circumstances.

1.10 Another consideration with respect to proportionality is the extent of any interference with human rights. The greater the interference, the less likely the measure is to be considered proportionate. The scope of the information that may be obtained, used and disclosed is relevant in this regard. There do not appear to be any restrictions on the type or scope of personal information that may be used or disclosed by the Inspector-General so long as it is obtained in performance of their review functions. The statement of compatibility states that any personal information collected would be incidental to the Inspector-General's primary function of carrying out reviews in order to meet the objects of the Act.²² However, noting that one of the Inspector-General's functions would be to conduct reviews of the performance of functions, or exercise of powers, by livestock export officials, it appears likely that the Inspector-General would need to obtain personal information about individual officials in order to carry out any such review. Further, the Inspector-General is required to publish a report on each review, although it is not clear where the report must be published or whether the report would contain identifying information. If the report was published on a public website and contained personal information about individual export officials, the interference with the right to privacy would likely be greater and the measure less likely proportionate.

Committee view

1.11 The committee notes that by expanding the matters in relation to which the Inspector-General may conduct a review, and conferring ancillary powers on them to do all things necessary or convenient to be done for, or in connection with, the

19 There are 13 APPs, which govern the rights, standards and obligations around: the collection, use and disclosure of personal information, an organisation or agency's governance and accountability, integrity and correction of personal information, and the rights of individuals to access their personal information. See Office of the Australian Information Commissioner, [Australian Privacy Principles](#).

20 APP 9; APP 6.2(b).

21 There is also a general exemption in the APPs on the disclosure of personal information for a secondary purpose where it is reasonably necessary for one or more enforcement related activities conducted by, or on behalf of, an enforcement body: APP; 6.2(e).

22 Statement of compatibility, p. 28.

performance of their expanded functions, the measure would have the effect of expanding the scope of information, including personal information, that may be obtained, used and disclosed by the Inspector-General. The collection, use and disclosure of personal information engages and limits the right to privacy. The committee considers further information is required to assess the compatibility of this measure with this right, and as such seeks the minister's advice in relation to:

- (a) the likely type or scope of personal information that may be obtained, used or disclosed by the Inspector-General in performance of their functions;
- (b) the specific safeguards in the Privacy Act and in the information management framework under the current Act that would operate to protect the right to privacy in the context of this measure; and
- (c) whether, where the report relating to a review conducted by the Inspector-General is required to be published, it would be publicly available, and if so, whether it would contain personal or identifying information.

Legislative instrument

Extradition (Republic of North Macedonia) Regulations 2023 [F2023L00447]¹

Purpose	These regulations declare the Republic of North Macedonia to be an 'extradition country' for the purposes of section 5 of the <i>Extradition Act 1988</i> and repeal the Extradition (Former Yugoslav Republic of Macedonia) Regulations 2009
Portfolio	Attorney-General
Authorising legislation	<i>Extradition Act 1988</i>
Last day to disallow	Exempt from sunseting by section 12 item 26 of the Legislation (Exemptions and Other Matters) Regulation 2015
Rights	Life; torture and other cruel, inhuman or degrading treatment or punishment; liberty; fair trial; presumption of innocence

Extraditions to the Republic of North Macedonia

1.12 To reflect Australia's recognition that the country previously known as the Former Yugoslav Republic of Macedonia has changed its name to the Republic of North Macedonia, these regulations repeal regulations declaring the Former Yugoslav Republic of Macedonia to be 'an extradition country' for the purposes of the *Extradition Act 1988* ('the Act'), and instead declare the Republic of North Macedonia to be 'an extradition country' for the purposes of the Act.

1.13 The effect of this is that Australia can consider and progress extradition requests from the Republic of North Macedonia relating to persons in Australia. A person may be subject to extradition where either a warrant is in force for their arrest in relation to an alleged serious offence;² or where they have been convicted of such an offence and there is either an intention to impose a sentence on them, or the whole or a part of a sentence imposed on the person as a consequence of the conviction

1 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Extradition (Republic of North Macedonia) Regulations 2023 [F2023L00447], *Report 7 of 2023*; [2023] AUPJCHR 66.

2 Section 5 of the *Extradition Act 1988* provides that an extradition offence means an offence for which the maximum penalty is death or imprisonment or other deprivation of liberty for 12 months or more, or conduct which, under an extradition treaty, is required to be treated as an offence for which the surrender of persons is permitted by the requesting country and Australia.

remains to be served.³ The Act also establishes that a person may be prosecuted in Australia for the conduct for which they may have been extradited, rather than being subject to extradition.⁴

1.14 A person may object to their extradition on limited grounds,⁵ including where: the surrender of the person is actually sought for the purpose of prosecuting or punishing the person on account of their race, sex, sexual orientation, religion, nationality or political opinions or for a political offence in relation to the extradition country; or where, on surrender, the person may be prejudiced at their trial, or punished, detained or restricted in their liberty because of their race, sex, sexual orientation, religion, nationality or political opinions.⁶

Preliminary international human rights legal advice

1.15 Facilitating the extradition of persons in Australia to the Republic of North Macedonia to face proceedings in relation to serious offences (including alleged offences) pursuant to the Act engages and may limit multiple rights. Assessing the compatibility of the regulations with international human rights law requires consideration of the compatibility of the Act as relevant to these regulations.⁷

1.16 These regulations are exempt from disallowance, meaning that no statement of compatibility with human rights is required. As such, no assessment of the compatibility of the measure is available.

Right to life

1.17 As extradition would facilitate removal to a country in relation to an offence or alleged offence for which the punishment may include the death penalty, the measure engages and may limit the right to life.⁸ imposes an obligation

3 *Extradition Act 1988*, section 6.

4 Section 45.

5 Sections 19 and 22 provide that a magistrate or Judge, or the Attorney-General may consider extradition objections.

6 Section 7. Further bases include where the extradition is for a political offence, where the conduct would not have constituted an offence under Australian criminal law, where the person has been pardoned or acquitted for the offence, and where the person has already been punished for the offence.

7 Parts of the Extradition Act apply only to extradition proceedings with New Zealand, and extradition to Australia.

8 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.

on the state to protect people from being killed by others or identified risks.⁹ While the International Covenant on Civil and Political Rights does not completely prohibit the imposition of the death penalty, international law prohibits states which have abolished the death penalty (such as Australia) from exposing a person to the death penalty in another state. This prohibits states such as Australia from deporting or extraditing a person to a country where that person may face the death penalty.¹⁰

1.18 In this regard, the Act provides that the Attorney-General may only determine that a person be surrendered to an extradition country if they are satisfied that there is 'no real risk' that the death penalty will be carried out upon the person in relation to any offence.¹¹ Section 22 further provides that a person is only to be surrendered in relation to an offence punishable by a penalty of death, if, by virtue of an undertaking given by the extradition country to Australia: the person will not be tried for the offence; or if the person is tried for the offence, the death penalty will not be imposed on the person; or, if the death penalty is imposed on the person, it will not be carried out.¹² In this regard, the United Nations (UN) Human Rights Committee has cautioned that States Parties must: ensure that they monitor individuals who have been extradited, refrain from relying on diplomatic assurances where they cannot effectively monitor the treatment of people concerned, and take appropriate remedial action where assurances are not fulfilled.¹³ As such, further information is required as to whether the statutory requirements in the Act would meet Australia's obligations under international human rights law with respect to the death penalty, and whether and how compliance with diplomatic assurances as to the non-use of the death penalty are monitored in practice.

Prohibition on torture and other cruel, inhuman or degrading treatment or punishment

1.19 Noting that persons extradited to foreign countries may be at risk of torture and other poor treatment, this measure also engages the prohibition against torture.

1.20 Australia has an obligation under article 7 of the International Covenant on Civil and Political Rights not to subject any person to torture or to cruel, inhuman or

9 UN Human Rights Committee, *General Comment No. 36: article 6 (right to life)* (2019) [3]: the right should not be interpreted narrowly and it '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'.

10 *Judge v Canada*, UN Human Rights Committee Communication No.929/1998 (2003) [10.4]; *Kwok v Australia*, UN Human Rights Committee Communication No.1442/05 (2009) [9.4], and [9.7].

11 Extradition Act, subsection 15B(3)(b).

12 Subsection 22(3)(c).

13 See, UN Human rights Committee, *Concluding observations on the second periodic report of Kazakhstan*, CCPR/C/KAZ/CO/2 (9 August 2016), at [44].

degrading treatment or punishment.¹⁴ This prohibition on torture and cruel, inhuman and degrading treatment or punishment is absolute and may never be subject to any limitations. The UN Human Rights Committee has held that article 7 prohibits extradition of a person to a place where that person may be in danger of torture or cruel, inhuman or degrading treatment or punishment.¹⁵ Australia also has obligations under article 3 of the Convention against Torture and other Cruel, Inhuman or Degrading Treatment not to extradite a person to another country where there are substantial grounds for believing that he or she would be in danger of being subjected to torture.

1.21 In this regard, the Act provides that the Attorney-General cannot determine that a person be surrendered to an extradition country if they have substantial grounds for believing that the person would be in danger of being subjected to torture.¹⁶ The Act also provides a broad discretion for the Attorney-General not to surrender a person in relation to an offence.¹⁷ However, it does not explicitly require the Attorney-General to consider whether there are substantial grounds to believe there is a real risk that a person may be subjected to cruel, inhuman or degrading treatment or punishment, and does not explicitly prohibit extradition where such a risk is established. It is not clear why the Act does not explicitly prohibit extradition where a risk of such treatment exists. Further information is therefore required as to whether the measure is consistent with Australia's obligations under article 7 of the International Covenant on Civil and Political Rights and article 3 of the Convention against Torture.

Right to a fair trial and fair hearing

1.22 Three elements of the Act raise questions as to compatibility with the right to a fair trial and fair hearing.

Non-refoulement and the right to a fair trial

1.23 In not allowing for an extradition objection on the basis that a person may suffer a flagrant denial of justice in the extradition country, the measure engages and may limit the right to a fair hearing. It also engages Australia's obligations under the International Covenant on Civil and Political Rights not to return a person to a

14 International Covenant on Civil and Political Rights, article 7; and Convention against Torture and other Cruel, Inhuman, Degrading Treatment or Punishment, articles 3–5.

15 UN Human Rights Committee, *General Comment No.20: Article 7 (Prohibition of Torture, or other Cruel, Inhuman or Degrading Treatment of Punishment)* (1992) [9]; UN Human Rights Committee, *General Comment No. 3: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant* (2004) [12]. See also UN Committee against Torture, *General Comment No.4 on the implementation of article 3 of the Convention in the context of article 22* (2018) [26].

16 Section 15B.

17 Subsection 22(3)(f).

jurisdiction where they may face a serious violation of rights guaranteed by article 14 and other provisions of the International Covenant on Civil and Political Rights.

1.24 The right to a fair trial and fair hearing requires that all persons shall be equal before the courts and that everyone has the right to a fair and public hearing in the determination of any criminal charge. Article 14 of the International Covenant on Civil and Political Rights in turn sets out a series of minimum guarantees in criminal proceedings, such as the right to be tried without undue delay. The right to a fair trial may be permissibly limited, but only where a limitation seeks to achieve a legitimate objective, is rationally connected to that objective, and is a proportionate means of achieving it.

1.25 An extradition request of itself does not amount to determination of a criminal charge.¹⁸ However, jurisprudence from the European Court of Human Rights has recognised that fair trial rights may be engaged where a person is extradited in circumstances where there is a real risk of a flagrant denial of justice in the country to which the individual is to be extradited.¹⁹ Such circumstances, the Court has stated, would render proceedings 'manifestly contrary to the provisions of Article 6 [the right to a fair trial in the European Convention] or the principles embodied therein'.²⁰ This means that, in the European context, the right to a fair hearing and fair trial includes an obligation not to return a person (*non-refoulement*) to a country where they risk a flagrant denial of justice.

1.26 The UN Human Rights Committee has not yet ruled on whether article 14 engages non-refoulement obligations.²¹ However, the interpretation of the right to a fair trial and fair hearing under the European Convention on Human Rights is

18 *Griffiths v Australia*, UN Human Rights Committee Communication No. 193/2010 (2014) [6.5].

19 See, *Al Nashiri v Poland*, European Court of Human Rights Application No.28761/11 (2014) [562]-[569]; *Othman (Abu Qatada) v United Kingdom*, European Court of Human Rights Application No. no. 8139/09 (2012), [252]-[262]; *R v Special Adjudicator ex parte Ullah* [2004] 2 AC 323, per Lord Steyn at [41].

20 See, *Stoichkov v Bulgaria*, European Court of Human Rights, Application No. 9808/02 (24 March 2005) at [54].

21 The question has been raised in several individual complaints to the UN Human Rights Committee; however, the committee has decided these complaints on other bases without ruling on the question: see, for example, *ARJ v Australia*, UN Human Rights Committee Communication No. 692/1996 (1997) [6.15]; *Kwok v Australia*, UN Human Rights Committee Communication No. 1442/2005 (2009) [9.8]; and *Alzery v Sweden*, UN Human Rights Committee Communication No. 1416/2005 (2006) [11.9].

instructive.²² Further, the position in European human rights law jurisprudence is consistent with the UN Model Treaty on Extradition, which includes a mandatory ground of refusing extradition if the person whose extradition is requested would not receive the minimum guarantees in criminal proceedings, as contained in article 14.²³

1.27 The Act does not provide that the risk of denial of a fair trial or fair hearing in the extradition country is a ground for an extradition objection. Although, the Act provides a broad discretion for the Attorney-General not to surrender a person in relation to an offence,²⁴ it is not clear that such a non-compellable discretion would be a sufficient safeguard to protect the right to a fair trial and fair hearing. Consequently, further information is required as to whether this aspect of the Act is consistent with the right to a fair trial.

The 'no-evidence' model

1.28 The Act does not require (or permit)²⁵ the production of any evidence about an alleged offence before a person can be extradited. The review provisions in the Act also expressly prohibit a person from adducing such evidence, and the court from receiving such evidence, on review or appeal.²⁶ This also engages and may limit the right to a fair hearing, as there is no requirement for a prima facie case to be established in order for extradition to be facilitated.

1.29 The absence of any requirement that there be a case to answer before a person is extradited raises questions as to whether there are sufficient safeguards in place to ensure that extradition of persons occurs in a manner that is compatible with the right to a fair hearing and fair trial. In 2001, the Australian Joint Standing Committee on Treaties reviewed Australia's law and policy on extradition. It considered the 'no evidence' model and noted that 'the consequences for a person

22 In 2007 the UN Working Group on Arbitrary Detention noted the reluctance of states to extend the application of the prohibition of refoulement to articles 9 and 14. However the Working Group continued by stating that 'to remove a person to a State where there is a genuine risk that the person will be detained without legal basis, or without charges over a prolonged time, or tried before a court that manifestly follows orders from the executive branch, cannot be considered compatible with the obligation in article 2 of the International Covenant on Civil and Political Rights, which requires that States parties respect and ensure the Covenant rights for all persons in their territory and under their control': see *Report of the Working Group on Arbitrary Detention to the Human Rights Council*, UN Doc. A/HRC/4/40 (2007) [44]–[49].

23 [Model Treaty on Extradition](#), adopted by the UN General Assembly resolution 45/116 as amended by General Assembly resolution 52/88.

24 Subsection 22(3)(f).

25 Subsection 19(5) prohibits a person to whom extradition proceedings relate from adducing evidence to contradict an allegation that the person has engaged in conduct constituting an extradition offence for which the surrender of the person is sought.

26 Subsection 21A(4).

who is facing extradition to a foreign country, where the legal system, language and availability of legal assistance may present great difficulties, mean that extradition cannot be treated merely as an administrative step'.²⁷ The committee noted concerns regarding the situation where another country sought the extradition of an Australian to face trial in circumstances where, if the alleged offence were committed in Australia, there would be insufficient evidence to justify prosecution.²⁸ The committee concluded that to provide better protection for the rights of individuals whose extradition was being sought, there were persuasive grounds to consider increasing Australia's evidentiary requirements from the default 'no evidence' model'.²⁹

1.30 Further information is required as to whether not requiring any evidence to be produced before a person can be extradited and preventing a person subject to extradition from producing evidence about the alleged offence, is consistent with the right to a fair hearing under article 14 of the International Covenant on Civil and Political Rights.

Presumption of innocence

1.31 Section 45 of the Act makes it an offence, where a person has been remanded in custody for an extradition offence, for the person to have earlier engaged in conduct which would have constituted an offence against Australian law if the conduct had occurred in Australia. The purpose of this provision is to enable a person to be prosecuted in Australia for the offence rather than being extradited. Subsection 45(2) provides that absolute liability applies to the requirements that the person has been remanded, that they engaged in conduct outside Australia at an earlier time, and that the conduct would have constituted an offence under Australian law had the conduct occurred in Australia. Absolute liability means the prosecution is not required to prove fault and so such provisions limit the right to be presumed innocent until proven guilty.

1.32 The right to a fair trial protects the right to be presumed innocent until proven guilty according to law.³⁰ It usually requires that the prosecution prove each element of the offence beyond reasonable doubt (including fault elements and physical elements). Absolute liability offences engage the presumption of innocence because they allow for the imposition of criminal liability without the need to prove fault. They will not necessarily be inconsistent with the presumption of innocence provided that they are within reasonable limits which take into account the importance of the objective being sought and maintain the defendant's right to a defence. In other

27 Joint Standing Committee on Treaties, [Report 40: Extradition – a review of Australia's law and policy](#) (August 2001) at [3.80].

28 Joint Standing Committee on Treaties, [Report 40: Extradition – a review of Australia's law and policy](#) (August 2001) at [3.76].

29 Joint Standing Committee on Treaties, [Report 40: Extradition – a review of Australia's law and policy](#) (August 2001) at [3.80].

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

words, such offences must be reasonable, necessary and proportionate to that objective.

1.33 When this provision was amended in 2012, the explanatory memorandum explained that this means that the prosecution need not prove that the person was reckless as to the elements required to establish the offence:

This will ensure that the prosecution is not required to prove that the person intended to engage in conduct outside Australia at an earlier time or that the person was reckless as to whether that conduct would have constituted an offence in Australia had the conduct or equivalent conduct occurred in Australia. Further, new subsection 45(3) will set out the physical and fault elements that need to be established by the prosecution.³¹

1.34 Further information is required as to whether section 45, in applying absolute liability to the offence, is consistent with the right to be presumed innocent under article 14 of the International Covenant on Civil and Political Rights.

Right to liberty

1.35 The Act establishes a presumption against bail except in special circumstances. This presumption applies with respect to all stages of the extradition process: holding persons arrested under an extradition warrant on remand; committing a person to prison where they have consented to the surrender; where a magistrate or Judge is determining whether the person is eligible for surrender; where review of an order of a magistrate or Judge relating to extradition surrender is sought; and where judicial review is sought of a determination by the Attorney-General that the person is to be surrendered for extradition.³² As such, a person subject to an extradition warrant will be presumed to be held in jail until the matter is resolved. In addition, extradition may result in lengthy detention in the foreign country while the person is awaiting trial. Consequently, the measure engages and limits the right to liberty.

1.36 The right to liberty prohibits the arbitrary and unlawful deprivation of liberty.³³ The notion of 'arbitrariness' includes elements of inappropriateness, injustice and lack of predictability. Accordingly, any detention must be lawful as well as reasonable, necessary and proportionate in all of the circumstances. Detention that may initially be necessary and reasonable may become arbitrary over time if the circumstances no longer require detention. In this respect, regular review must be

31 *Extradition and Mutual Assistance in Criminal Matters Legislation Amendment Act 2012*, explanatory memorandum, p. 31.

32 See, remand (subsection 15(6)); consent to surrender (subsection 18(3)); determination of eligibility for surrender (subsection 19(9A)); review (section 21); and judicial review (section 49C).

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

available to scrutinise whether the continued detention is lawful and non-arbitrary. The right to liberty applies to all forms of deprivations of liberty.

1.37 The right to liberty includes the right to release pending trial. Article 9(3) of the International Covenant on Civil and Political Rights provides that the 'general rule' for people awaiting trial is that they should not be detained in custody. The UN Human Rights Committee has stated on several occasions that pre-trial detention should remain the exception and that bail should be granted except in circumstances where the likelihood exists that, for example, the accused would abscond, tamper with evidence, influence witnesses or flee from the jurisdiction.³⁴ Measures that expand the circumstances in which there is a presumption against bail engage and limit this right.³⁵ Where a person poses a flight risk, refusing the grant of bail may be a proportionate limitation on the right to liberty.³⁶ However, a presumption against bail fundamentally alters the starting point of an inquiry as to the grant of bail.

1.38 In general, the right to liberty may be subject to permissible limitations where the limitation pursues a legitimate objective, is rationally connected to that objective and is a proportionate means of achieving that objective.

1.39 It is unclear why the Act establishes a presumption that a person subject to extradition proceedings be held in jail at each stage of the extradition process, unless 'special circumstances' exist. Australian jurisprudence has established that 'special circumstances' are to be interpreted narrowly,³⁷ and that considerations of whether a

34 *Smantser v Belarus*, UN Human Rights Committee Communication No. 1178/03 (2008); *WBE v the Netherlands*, UN Human Rights Committee Communication No. 432/90 (1992); and *Hill and Hill v Spain*, UN Human Rights Committee Communication No. 526/93 (1997).

35 See, *In the Matter of an Application for Bail by Isa Islam* [2010] ACTSC 147 (19 November 2010): the ACT Supreme Court declared that a provision of the *Bail Act 1992* (ACT) was inconsistent with the right to liberty under section 18 of the *ACT Human Rights Act 2004* which required that a person awaiting trial not be detained in custody as a 'general rule'. Section 9C of the *Bail Act 1992* (ACT) required those accused of murder, certain drug offences and ancillary offences, to show 'exceptional circumstances' before having a normal assessment for bail undertaken.

36 *Smantser v Belarus*, UN Human Rights Committee Communication No. 1178/03 (2008); *WBE v the Netherlands*, UN Human Rights Committee Communication No. 432/90 (1992); and *Hill and Hill v Spain*, UN Human Rights Committee Communication No. 526/93 (1997).

37 The High Court of Australia has stated that: '[I]t is an error in a bail application in an extradition matter to take into account that there is "a predisposition against unnecessary or arbitrary detention in custody". The Parliament has made it plain that bail is not to be granted unless special circumstances are proved...[I]t is erroneous to take into account "those circumstances which ordinarily would fall for consideration on an application for bail where a person is charged domestically for the commission of a crime". Those circumstances ...can play no part in determining whether the applicant has established special circumstances.' See, *United Mexican States v Cabal* [2001] HCA 60 at [72].

person poses a flight risk are not relevant to an assessment of special circumstances.³⁸ As such, further information is required as to whether these provisions constitute a permissible limit on the right to liberty.

Right to equality and non-discrimination

1.40 The legislation establishes grounds for an extradition objection where a person may be prosecuted or punished on the basis of certain personal attributes. However, the list of personal attributes is limited and does not cover all attributes protected under international law. As such, the measure engages and may limit the right to equality and non-discrimination.

1.41 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 before the law and entitled without discrimination to equal and non-discriminatory protection of the law.³⁹ 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).⁴⁰ 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.⁴¹

1.42 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, is rationally connected to that objective and is a proportionate means of achieving that objective.⁴²

38 See, most recently *Pauga v Chief Executive of Queensland Corrective Services* [2023] FCAFC 58 (13 April 2023).

39 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.

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

41 *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'. See Sarah Joseph and Melissa Castan, *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary*, 3rd edition, Oxford University Press, Oxford, 2013, [23.39].

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

1.43 A person may object to extradition where they will be prosecuted or punished, or may be prejudiced at trial or have their liberty restricted, on account of their 'race, sex, sexual orientation, religion, nationality or political opinions'. This is an important safeguard against limits on the right to equality and non-discrimination on those grounds. However, the list does not include all the grounds on which discrimination is prohibited under international human rights law, including disability, language, opinions (other than political opinions), or social origin. This raises concerns that extradition may be allowed in circumstances which could give rise to unlawful discrimination on these grounds. As a result, further information is required as to whether the Act is consistent with the right to equality and non-discrimination.

Committee view

1.44 The committee notes that this legislative instrument facilitates the extradition of persons in Australia to the Republic of North Macedonia to face proceedings in relation to serious offences (including alleged offences) pursuant to the *Extradition Act 1988*, and so extends the application of this Act to this country. The committee notes that questions relating to the compatibility of the *Extradition Act 1988* with human rights do not necessarily relate to the Republic of North Macedonia itself but relate to the operation of the Act more broadly. The committee considers that the measure therefore engages and may limit multiple rights, and notes that the committee has considered the compatibility of the *Extradition Act 1988* on previous occasions.⁴³

1.45 As this legislative instrument is exempt from disallowance, and so no statement of compatibility with human rights is required to be provided, further information is required to assess the compatibility of this measure with human rights. As such, the committee seeks the Attorney General's advice in relation to:

- (a) whether the statutory requirements in the Act meet Australia's obligations under international human rights law with respect to the death penalty, and whether and how compliance with diplomatic

43 Parliamentary Joint Committee on Human Rights, [First Report of 2013](#) (6 February 2013), p. 111; [Sixth Report of 2013](#), pp. 149–160; [Tenth Report of 2013](#), pp. 56–75; [Twenty-second Report of the 44th Parliament](#) (13 May 2015), Extradition (Vietnam) Regulation 2013 [F2013L01473] pp. 108–110; [Report 2 of 2017](#) (21 March 2017), Crimes Legislation Amendment (International Crime Cooperation and Other Measures) Bill 2016, pp. 8–9; [Report 4 of 2017](#) (9 May 2017), Extradition (People's Republic of China) Regulations 2017 [F2017L00185], pp. 70–73, and Crimes Legislation Amendment (International Crime Cooperation and Other Measures) Bill 2016, pp. 90–98; [Report 3 of 2018](#) (27 March 2018), Extradition (El Salvador) Regulations 2017 [F2017L01581] and Extradition Legislation Amendment (2017 Measures No. 1) Regulations 2017 [F2017L01575], pp. 16–29; and [Report 5 of 2018](#) (19 June 2018) Extradition (El Salvador) Regulations 2017 [F2017L01581] and Extradition Legislation Amendment (2017 Measures No. 1) Regulations 2017 [F2017L01575], pp. 77–108.

- assurances relating to non-use of the death penalty are monitored in practice;
- (b) whether the measure is consistent with Australia's obligations under article 7 of the International Covenant on Civil and Political Rights and article 3 of the Convention against Torture, and why the Act does not explicitly prohibit extradition where there is a risk of cruel, inhuman or degrading treatment or punishment;
 - (c) whether the Act is consistent with the right to fair trial and fair hearing, and in particular:
 - (i) why the Act does not include an extradition objection if, on surrender, a person may suffer a flagrant denial of justice in contravention of article 14 of the International Covenant on Civil and Political Rights;
 - (ii) whether, not requiring any evidence to be produced before a person can be extradited, and preventing a person subject to extradition from producing evidence about the alleged offence is compatible with the right to a fair trial and fair hearing; and
 - (iii) whether section 45 of the Act, in applying absolute liability, is consistent with the right to be presumed innocent;
 - (d) noting that extradition largely results in the detention of a person pending extradition and often lengthy detention in the foreign country while awaiting trial, whether allowing the extradition and detention of someone without first testing the basic evidence against them, is consistent with the right to liberty;
 - (e) whether the presumption against bail except for in 'special circumstances' is a permissible limit on the right to liberty; and
 - (f) whether the measure is consistent with the right to equality and non-discrimination, including why the Act does not permit an objection to extradition where a person may be persecuted because of personal attributes set out in international human rights law, including disability, language, opinions (other than political opinions), or social origin.

Mr Josh Burns MP

Chair