

## Chapter 1

### New and ongoing matters

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

#### Bills

### Biosecurity Amendment (Advanced Compliance Measures) Bill 2023<sup>1</sup>

<b>Purpose</b>	This bill seeks to amend the <i>Biosecurity Act 2015</i> to: provide for greater access to information related to the biosecurity risk of travellers; alter provisions relating to approved arrangements; increase certain civil penalties; and create strict liability offences.
<b>Portfolio</b>	Agriculture, Fisheries and Forestry
<b>Introduced</b>	House of Representatives, 21 June 2023
<b>Rights</b>	Privacy, equality and non-discrimination, criminal process rights

#### Accessing information to assess biosecurity risk

1.2 Schedule 1 of the bill seeks to amend section 196 of the *Biosecurity Act 2015* (Biosecurity Act) to alter the Director of Biosecurity's (director's) existing power to require a person on an incoming aircraft or vessel to provide information to assess the biosecurity risk associated with them or goods in their possession. Item 7 would provide that the director may require a person or class of persons to produce a travel document (including a passport) to either assess their level of biosecurity risk or that of a good they possess, or for future profiling or assessment of biosecurity risks.<sup>2</sup>

1 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Biosecurity Amendment (Advanced Compliance Measures) Bill 2023, *Report 8 of 2023*; [2023] AUPJCHR 70.

2 Schedule 1, item 7, proposed subsection 196(3A). 'Biosecurity risk' is defined in section 9 of the *Biosecurity Act 2015* to mean the likelihood of a disease or pest entering Australian territory or establishing itself or spreading in Australia, and the potential for it to cause harm to: human, animal or plant health or the environment; or economic consequences associated with its entry, establishment or spread.

1.3 Currently, the director can only require the provision of information from an individual person, including by answering questions, and so the requirement to produce information may only occur in a one-to-one interaction between a biosecurity officer and an individual.<sup>3</sup> The explanatory memorandum states that the proposed amendments would allow the director to require information from classes of persons, for example by requiring *each* person on a particular flight or a vessel originating from a place that has high biosecurity risk associated with it at a particular point in time to provide specified information.<sup>4</sup>

1.4 The director would be empowered to scan relevant documents (such as passports) for either assessing biosecurity risk or for future profiling or assessment of biosecurity risks, and collect and retain personal information. Failure to comply with the requirement to produce a document would be a civil penalty punishable by up to 120 penalty units (currently \$37,560).<sup>5</sup> The explanatory memorandum states that, having scanned a travel document, a biosecurity officer could then access information from the Department of Agriculture, Fisheries and Forestry's systems about the individual which is relevant to their risk profile from a biosecurity perspective.<sup>6</sup>

### **Preliminary international human rights legal advice**

#### ***Rights to privacy and equality and non-discrimination***

1.5 Enabling the director to require the provision of travel documents for a class of persons, and to use those documents to obtain information from the department relating to their biosecurity risk, engages and limits the right to privacy.<sup>7</sup>

1.6 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.<sup>8</sup> It also includes the right to control the dissemination of information about one's private life. The right to privacy may be subject to permissible limitations where the limitation pursues a legitimate objective, is rationally connected to that objective and is a proportionate means of achieving that objective.

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3 Explanatory memorandum, p. 9. See, *Biosecurity Act 2015*, section 196.

4 Explanatory memorandum, p. 10.

5 As of 1 July 2023, the value of one penalty unit increased to \$313, in accordance with subsection 4AA(3) of the *Crimes Act 1914*, which provides for indexation of penalty units.

6 Explanatory memorandum, p. 11.

7 In seeking to reduce the risk of diseases spreading into Australia, the bill may also promote the right to health. This is noted in the statement of compatibility, pp. 94-95.

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

1.7 The statement of compatibility also states that this measure engages the right to equality and non-discrimination (although it does not specify exactly how).<sup>9</sup> The explanatory memorandum states that the bill would allow the director to include each person on a flight or a vessel (including a cruise ship) in a class.<sup>10</sup> It would appear that, depending on the vessel (or series of vessels) in question and where the vessel is originating from, this may have a disproportionate impact on passengers of a particular race, or national origin. 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.<sup>11</sup> It prohibits discrimination on several bases including race, national or social origin, and nationality. 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).<sup>12</sup> 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.<sup>13</sup>

1.8 If the measure may have an indirectly discriminatory impact in practice, it is necessary to consider whether any differential treatment would be permissible under international human rights law. Where a measure impacts on a particular group disproportionately, it establishes *prima facie* that there may be indirect discrimination.<sup>14</sup> 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

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9 Statement of compatibility, pp. 93–94.

10 Explanatory memorandum, p. 7.

11 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.

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

13 *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*, 3<sup>rd</sup> edition, Oxford University Press, Oxford, 2013, [23.39].

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

serves a legitimate objective, is rationally connected to that objective and is a proportionate means of achieving that objective.<sup>15</sup>

1.9 The statement of compatibility states that having the flexibility to require classes of persons, rather than just individuals, to produce documents would be a significant additional tool for biosecurity officers to assess biosecurity risks, and where appropriate, manage any risk arising.<sup>16</sup> It states that the proposed amendments would allow for the more efficient and effective management of biosecurity risks in order to protect Australia's economy, environment, flora and fauna, and the agricultural sector from diseases and pests, which could have a devastating effect should they enter Australian territory.<sup>17</sup> This constitutes a legitimate objective for the purposes of international human rights law, and the proposed measures would appear to be rationally connected to that objective.

1.10 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 making this assessment 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.

1.11 The statement of compatibility states that the proposed measure would be appropriately constrained in its scope.<sup>18</sup> It states that the proposed power could only be exercised for the 'discrete and limited purposes' of assessing the level of biosecurity risk associated with the person and any goods they have, and the future profiling, or future assessment, of biosecurity risks. Assessing the level of risk associated with an individual would appear to be a constrained purpose, however the future profiling, or future assessment, of biosecurity risks would appear to be broader (noting that such risks do not appear to relate to the individual traveller in question). Further, while the potential range of documents which may be required to be provided (a passport or other travel document) is limited, the range of information that is subsequently made available to assess a person's level of biosecurity risk is unclear. As such, further information is required as to whether the proposed measure is sufficiently circumscribed.

1.12 It is also unclear whether the exercise of the proposed measure would mean that the department is gathering more information about individuals (for example, a record of the dates, ports of departure and ports of arrival that an individual has travelled). The statement of compatibility states that depending on the nature and

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15 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].

16 Statement of compatibility p. 93.

17 Statement of compatibility, p. 93.

18 Statement of compatibility, p. 94.

scope of the relevant information, including a person's history of compliance with biosecurity laws, this would enable the officer to subsequently undertake more targeted intervention and investigation.<sup>19</sup> However, the nature and scope of information which would be visible to a biosecurity worker having scanned a person's travel document pursuant to this measure is not clear. It is also unclear whether such information would be recorded by the department on each occasion the power is exercised, including where a person's travel document is scanned and no information about their history of compliance with biosecurity laws appears. Further, the explanatory materials do not identify whether the Department of Agriculture, Fisheries and Forestry already has the legislative authority to access information about an individual's passport under the Biosecurity Act or other legislation, or whether this bill seeks to establish that legislative authority.

1.13 As to safeguards, the statement of compatibility states that it is intended that the information obtained using proposed subsection 196(3A) will only be held as long as is necessary to meet the purposes outlined above. However, the statement of compatibility does not explain whether this would be a legislative limitation (for example, under the *Privacy Act 1988*), and how long that period of time would be in practice. It also notes that offences and a civil penalty provision for the unauthorised use or disclosure of protected information would apply to this proposed power, and that the information obtained would be protected by the information management framework in the Biosecurity Act.<sup>20</sup> These offences and civil penalty have the capacity to serve as important safeguards. However, broader concerns have been raised by this committee regarding the proportionality of this information management framework as a whole.<sup>21</sup> In particular, sections 582, 583 and 586 of the Biosecurity Act authorise the disclosure of relevant information for specified purposes without limiting to whom any such disclosures may be made. Limiting the persons who are authorised to disclose relevant information and the purposes for which information may be disclosed, has the effect of limiting the persons to whom information may be disclosed. However, as the text of the legislation does not itself limit to whom information may be disclosed, the extent of the potential limit on privacy is not clear. Further information is therefore required in order to assess whether this proposed measure would constitute a proportionate limit on the right to privacy and equality and non-discrimination.

### Committee view

1.14 The committee notes that enabling the director to require the provision of travel documents for a class of persons, and to use those documents to obtain

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19 Statement of compatibility, p. 90.

20 Statement of compatibility, p. 91.

21 See, Parliamentary Joint Committee on Human Rights, Biosecurity Amendment (Strengthening Biosecurity) Bill 2022, [Report 6 of 2022](#) (25 November 2022), pp. 16–33, and [Report 1 of 2023](#) (8 February 2023), pp. 61–93.

information relating to their biosecurity risk, engages and limits the right to privacy, and engages and may limit the right to equality and non-discrimination.

1.15 The committee considers further information is required to assess the compatibility of this measure with these rights, and as such seeks the minister's advice in relation to:

- (a) whether, in practice, the measure may disproportionately impact people based on their ethnicity or national or social origin;
- (b) what personal information would be visible to a biosecurity worker or other officer who has scanned a person's travel document pursuant to this measure;
- (c) whether the department already has legislative authority to access information about a person's travel document, or whether this bill seeks to establish that authority;
- (d) whether the exercise of this power would result in the department collecting more information about individuals (for example, the dates of their travel or departure port, including where an assessment is made on the spot to not investigate them further);
- (e) the meaning of 'the future profiling, or future assessment, of biosecurity risks', and whether it is intended that information gathered under this power be used to profile biosecurity risks in general;
- (f) to whom information obtained under this measure may be disclosed; and
- (g) how long information obtained under this proposed power would be held, and whether this would be subject to a legislative limitation.

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### **Increased civil penalties**

1.16 Schedule 3 of the bill seeks to significantly increase a number of civil penalties that apply in the Biosecurity Act, some by up to 900 per cent. For example, the maximum penalty for failure to comply with an entry or exit requirement in section 44 of the Biosecurity Act would increase from 30 penalty units (currently \$9,390) to 150 penalty units (currently \$46,950).<sup>22</sup> The maximum penalty for failure to comply with a requirement of a human health response zone determination would increase from 30 to 120 penalty units (currently \$37,650).<sup>23</sup> Further, the maximum penalties for providing false or misleading information or documents in purported compliance with the Act, or to a biosecurity industry participant, would

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22 Schedule 3, items 1 and 3, section 46.

23 Schedule 3, item 6, section 116.

increase to 600 penalty units (currently \$187,800).<sup>24</sup> Currently, the maximum penalties for these breaches range from 60 penalty units (currently \$18,780) to 120 penalty units.

## **International human rights legal advice**

### ***Criminal process rights***

1.17 The proposed significant increase in civil penalties raises the risk that these penalties may be considered criminal in nature under international human rights law.

1.18 Under Australian law, civil penalty provisions are dealt with in accordance with the rules and procedures that apply in relation to civil matters (the burden of proof is on the balance of probabilities). However, if the new civil penalties are regarded as 'criminal' for the purposes of international human rights law, they will engage the criminal process rights under articles 14 and 15 of the International Covenant on Civil and Political Rights.

1.19 In assessing whether a civil penalty may be considered criminal, it is necessary to consider:

- the domestic classification of the penalty as civil or criminal (although the classification of a penalty as 'civil' is not determinative as the term 'criminal' has an autonomous meaning in international human rights law);
- the nature and purpose of the penalty: a civil penalty is more likely to be considered 'criminal' in nature if it applies to the public in general rather than a specific regulatory or disciplinary context, and where there is an intention to punish or deter, irrespective of the severity of the penalty; and
- the severity of the penalty.

1.20 If the civil penalty provisions were considered to be 'criminal' for the purposes of international human rights law, this does not mean that the relevant conduct must be turned into a criminal offence in domestic law, nor does it mean that the civil penalty is illegitimate. Instead, it means that the civil penalty provisions in question must be shown to be consistent with the criminal process guarantees set out in articles 14 and 15 of the International Covenant on Civil and Political Rights, including the right not to be tried twice for the same offence,<sup>25</sup> and the right to be presumed innocent until proven guilty according to law.<sup>26</sup>

1.21 The statement of compatibility notes the potential engagement of these rights. It states that the penalties are expressly classified as civil penalties, and thereby create solely pecuniary penalties in the form of a debt payable to the

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24 Schedule 3, items 7-8, sections 438, 439, 532 and 533.

25 International Covenant on Civil and Political Rights, article 14(7).

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

Commonwealth.<sup>27</sup> As noted, however, the domestic classification of a penalty as being civil is not determinative. The statement of compatibility does not directly address whether the penalties may apply to the public, however it would appear that several of the civil penalties in the bill (for example, failure to comply with an entry or exit requirement, or the provision of false or misleading information) would apply to the general public. As to the intention behind the penalties, the statement of compatibility states that the increased penalties would be commensurate with the potential harm that could be caused as a result of the contravening conduct and are intended to deter non-compliance with the requirements.<sup>28</sup> As to the potential severity of these penalties, it is noted that these represent the maximum penalty payable. In practice, a civil penalty provision enables a judicial officer to exercise their discretion in determining an appropriate sum in the particular circumstances, and there may be circumstances in which the maximum possible penalty is not handed down. However, because judicial officers would have the discretion to impose the maximum penalty, the risk that the application of some penalties may nevertheless be considered criminal in nature under international human rights law remains.

1.22 Noting that some of these civil penalty provisions would apply to the general public (and not only those operating in a regulatory context), that the penalty is intended to deter certain conduct and that the increased penalty may now be considered sufficiently severe, there is a risk that some of these penalties may be considered to be criminal penalties for the purposes of international human rights law. As such, such provisions must be shown to be consistent with international human rights law criminal process guarantees, including the right not to be tried twice for the same offence,<sup>29</sup> and the right to be presumed innocent until proven guilty according to law.<sup>30</sup> However, civil penalty provisions, which require proof of the conduct on the balance of probabilities, do not meet the guarantee that a person be proved guilty beyond all reasonable doubt.

### **Committee view**

1.23 The committee notes that civil penalties (as applicable to individuals) may be regarded as 'criminal' for the purposes of international human rights law, if they meet certain criteria, including if they apply to the general public and because of their potential severity. The committee notes that, where this is the case, these penalties must be shown to be consistent with criminal process guarantees, including the right to be presumed innocent until proven guilty according to law, which requires that the case against the person be demonstrated on the criminal standard

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27 Statement of compatibility, p. 81.

28 Statement of compatibility, p. 79.

29 International Covenant on Civil and Political Rights, article 14(7).

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



of proof of beyond reasonable doubt (not the lower civil standard of on the balance of probabilities).

1.24 The committee considers that, as this bill would significantly increase the maximum civil penalty for several provisions which would be applicable to members of the public, and noting that the intention is for these penalties to act as deterrents, there is a risk that these provisions may be regarded as criminal under international human rights law, and so not comply with the criminal process rights under international human rights law. In this regard, the committee notes that it has raised concerns regarding the compatibility of existing civil penalty provisions with criminal process rights on numerous occasions, including due to their potential severity.<sup>31</sup>

### **Suggested action**

1.25 The committee recommends that when civil penalties, which may apply to members of the public, are so severe such that there is a risk that they may be regarded as 'criminal' under international human rights law, consideration should be given to applying a higher standard of proof in the related civil penalty proceedings.

1.26 The committee draws its human rights concerns to the attention of the minister and the Parliament.

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31 See, relevantly, Biosecurity Amendment (Strengthening Penalties) Bill 2021 in [Report 2 of 2021](#) (24 February 2021) (initial consideration of the bill), and [Report 4 of 2021](#) (31 March 2021) (concluding advice on the bill).

## Counter-Terrorism Legislation Amendment (Prohibited Hate Symbols and Other Measures) Bill 2023<sup>1</sup>

<b>Purpose</b>	This bill seeks to make various amendments to the <i>Crimes Act 1914</i> , <i>Criminal Code Act 1995</i> and <i>Legislation (Exemptions and Other Matters) Regulation 2015</i> , including to: <ul style="list-style-type: none"> <li>• establish new criminal offences for the public display of prohibited symbols and for using a carriage service for violent extremist material;</li> <li>• expand the offence of advocating terrorism and increase the maximum penalty for this offence from 5 to 7 years imprisonment;</li> <li>• remove the sunseting requirement for instruments which list terrorist organisations.</li> </ul>
<b>Portfolio</b>	Attorney-General
<b>Introduced</b>	House of Representatives, 14 June 2023
<b>Rights</b>	Life; security of person; prohibition against inciting national, racial or religious hatred; freedom of expression; freedom of religion; equality and non-discrimination; rights of the child

### Criminalising the public display and trading of prohibited symbols

1.27 This bill seeks to create a new criminal offence relating to the public display of prohibited symbols.<sup>2</sup> A 'prohibited symbol' is defined as the Islamic State flag, the Nazi hakenkreuz, the Nazi double sig rune, and something that so nearly resembles these things that it is likely to be confused with, or mistaken for, that thing.<sup>3</sup> A prohibited symbol is 'displayed in a public place' if it is capable of being seen by a member of the public who is in a public place or the prohibited symbol is included in a document, such as a newspaper or magazine, film, video or television program, that is available or distributed to the public or a section of the public (including via the internet).<sup>4</sup> This includes, for example, the wearing of a prohibited symbol as part of a costume to a public place, the display of a poster or flag containing the

1 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Counter-Terrorism Legislation Amendment (Prohibited Hate Symbols and Other Measures) Bill 2023, *Report 8 of 2023*; [2023] AUPJCHR 71.

2 Schedule 1, item 5, new section 80.2H. The maximum penalty applicable for this new offence would be 12 months imprisonment.

3 Schedule 1, item 5, new section 80.2E.

4 Schedule 1, item 5, new section 80.2F.

prohibited symbol in a private home but visible from the street, the display of a prohibited symbol on a sticker on a motor vehicle or the circulation of a newsletter or other content which contains a prohibited symbol to subscribers.<sup>5</sup>

1.28 In particular, a person would commit an offence if they intentionally<sup>6</sup> caused a prohibited symbol to be displayed in a public place and one of the following circumstances apply, namely, a reasonable person would consider the conduct of publicly displaying the symbol either:

- involves dissemination of ideas based on racial superiority or racial hatred; or could incite another person or group of persons to offend, insult, humiliate or intimidate a targeted person or group because of their race; or
- involves advocacy of hatred of a targeted group or member of the group and constitutes incitement to offend, insult, humiliate, intimidate or use force or violence against the targeted group or member of that group; or
- is likely to offend, insult, humiliate or intimidate a reasonable person who is a member of a group of persons distinguished by race, colour, sex, language, religion, political or other opinion or national or social origin because of their membership of that group.<sup>7</sup>

1.29 There would be specific circumstances in which the offence would not apply, namely where a reasonable person would consider that the public display of the prohibited symbol is for a religious, academic, educational, artistic, literary or scientific purpose and not contrary to the public interest; or for the purposes of making a news report or a current affairs report that is in the public interest and made by a professional journalist.<sup>8</sup>

1.30 There would also be several defences to the offence, including where the conduct is necessary for enforcing, monitoring compliance with, or investigating contravention of, a law; is part of court or tribunal proceedings; the conduct is in connection with the performance of a public official's duties or functions; or the person displaying the symbol genuinely engages in conduct for the purpose of

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5 Explanatory memorandum, pp. 26–27.

6 Section 5.6 of the *Criminal Code Act 1995* states that if the law creating the offence does not specify a fault element for a physical element that consists only of conduct, intention is the fault element for that physical element. By application of this section, the fault element of intention would apply to the conduct in paragraph 80.2H(1)(a). See also explanatory memorandum, p. 29.

7 Schedule 1, item 5, new section 80.2H. The circumstance elements of the offence are set out in subsections 80.2H(3), (4) or (7) (as referred to in paragraph 80.2H(1)(c)). See explanatory memorandum, pp.29–34.

8 Schedule 1, item 5, new subsection 80.2H(9).

opposing Nazi or global jihadist ideology, fascism or related ideologies.<sup>9</sup> The defendant bears an evidential burden in relation to these defences.

1.31 The bill also seeks to create a new offence relating to the trade of prohibited symbols.<sup>10</sup> A person would commit an offence if they trade in goods; the goods depict or contain a prohibited symbol; the person knows that, or is reckless as to whether, the prohibited symbols are associated with Nazi ideology or global jihadist ideology; and one or more jurisdictional requirements apply. A person trades in goods if they sell or prepare for supply, transport, guard or conceal, or possess the goods with the intention of selling the goods.<sup>11</sup> There would be specific circumstances in which the offence would not apply. It would not apply where a reasonable person would consider that the traded goods are intended to serve a religious, academic, educational, artistic, literary or scientific purpose and the trading is not contrary to the public interest. It would also not apply if the traded goods contain news or current affairs reports, the prohibited symbol only appears in such a report and a reasonable person would consider that the report was made by a professional journalist and disseminating the report is in the public interest.<sup>12</sup> There would also be several defences to the offence, including if the traded goods contain commentary on public affairs, the prohibited symbol only appears in the commentary and the making of the commentary is in the public interest; or if the trading is necessary for enforcing, monitoring compliance with, or investigating a contravention of, a law or the administration of justice.<sup>13</sup>

1.32 Additionally, a police officer may direct a person to cease displaying a prohibited symbol in a public place in certain circumstances, including, for example, if the police officer reasonably suspects that the display of the symbol involves dissemination of ideas based on racial superiority or racial hatred, or could incite another person to offend, insult, humiliate or intimidate a targeted person because of their race.<sup>14</sup> The direction given must specify a reasonable time by which the prohibited symbol must cease to be displayed.<sup>15</sup> The direction may be given orally or in writing and may be left on, or at, land or premises at which the prohibited symbol is displayed, or affixed or placed in a conspicuous manner on an aircraft, vehicle or vessel on, or from which, the prohibited symbol is displayed.<sup>16</sup> The police officer may

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9 Schedule 1, item 5, new subsection 80.2H(10).

10 Schedule 1, item 5, new section 80.2J. The maximum penalty applicable for this new offence would be 12 months imprisonment.

11 Schedule 1, item 5, new section 80.2G.

12 Schedule 1, item 5, new subsections 80.2J(4) and (5).

13 Schedule 1, item 5, new subsections 80.2J(6)–(8).

14 Schedule 1, item 5, new sections 80.2K–80.2M.

15 Schedule 1, item 5, new subsection 80.2K(8).

16 Schedule 1, item 5, new section 80.2L.

give the direction if they suspect on reasonable grounds that the person either caused the prohibited symbol to be displayed; or the person is an owner or an occupier of the land or premises, or aircraft, vehicle or vessel on which the symbol is displayed; and there are steps the person can take to cause the prohibited symbol to cease to be displayed.<sup>17</sup>

1.33 A person would commit an offence if they were given such a direction and they do not cease to display the prohibited symbol.<sup>18</sup> The maximum penalty applicable is 20 penalty units. It would be a defence to this offence if the conduct was genuinely engaged in for a religious, academic, educational, artistic, literary or scientific purpose and is not contrary to the public interest; or for the purposes of making a news report or current affairs report that is in the public interest and made by a professional journalist.<sup>19</sup> It would also be a defence to this offence if both the person who received the direction (the recipient) did not cause the prohibited symbol to be displayed and when the direction is given, they are not an owner or occupier of the land or premises at which the symbol is displayed; or the recipient takes all reasonable steps to cause the prohibited symbol to cease to be displayed or there are no such steps that can be taken by the recipient.<sup>20</sup> The defendant would bear an evidential burden in relation to these defences.<sup>21</sup>

1.34 Further, the new offences of publicly displaying, or trading in, prohibited symbols would have retrospective effect insofar as a person who caused a symbol to be displayed in a public place before the commencement of this bill, and, on commencement, the symbol had not ceased to be displayed in a public place, the person would be taken to cause, on that commencement date, the symbol to be displayed in a public place.<sup>22</sup> This means, for example, that a person who displayed a prohibited symbol on their fence prior to the commencement of these provisions, and the symbol remained displayed on the fence after the commencement date, would be captured by the offence and potentially liable for up to 12 months imprisonment.<sup>23</sup>

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17 Schedule 1, item 5, new subsection 80.2L(2).

18 Schedule 1, item 5, new section 80.2M.

19 Schedule 1, item 5, new subsection 80.2M(3).

20 Schedule 1, item 5, new subsection 80.2M(5).

21 Schedule 1, item 5, new subsections 80.2M(3) and 80.2M(5).

22 Schedule 1, item 8.

23 Explanatory memorandum, p. 50.

## Preliminary international human rights legal advice

### ***Rights to life and security of person and prohibition against inciting national, racial or religious hatred***

1.35 The statement of compatibility states that the rights to life and security of person are promoted by establishing new criminal offences to deter and prevent the public display and dissemination of symbols – conduct which intelligence and operational agencies advise may radicalise individuals and incite them to commit offences that would risk a person's life or physical security.<sup>24</sup> It notes that the bill would also enhance the capabilities of law enforcement agencies to manage the risk posed by those seeking to radicalise others and mobilise vulnerable Australians to violence.<sup>25</sup>

1.36 To the extent that criminalising certain conduct relating to prohibited symbols would deter and prevent the commission of violent offences, the measures could promote a number of human rights, including the rights to life and security of person.<sup>26</sup> The right to life imposes an obligation on the state to protect people from being killed by others or identified risks.<sup>27</sup> The United Nations (UN) Human Rights Committee has stated the duty to protect life requires States parties to 'enact a protective legal framework that includes effective criminal prohibitions on all manifestations of violence or incitement to violence that are likely to result in the deprivation of life'.<sup>28</sup> The right to security of person requires the state to take steps to protect people against interference with personal integrity by others. This includes protecting people who are subject to death threats, assassination attempts, harassment and intimidation.

1.37 By criminalising the public display and trading of symbols associated with racial and religious hatred, extreme violence and terrorism, the measures would also

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24 Statement of compatibility, p. 7.

25 Statement of compatibility, p. 7.

26 International Covenant on Civil and Political Rights, articles 6 (right to life) and 9 (right to security of person).

27 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'.

UN Human Rights Committee, *General Comment No. 6: article 6 (right to life)* [5]: the right should not be understood in a restrictive manner. It requires States to adopt positive measures, noting that it would be desirable for State parties to take all possible measures to reduce infant mortality and increase life expectancy.

28 United Nations Human Rights Committee, *General Comment No. 36: article 6 (right to life)* (2019) [20].

promote the right to be free from racial and religious discrimination and hatred.<sup>29</sup> Indeed, the stated object of a number of the provisions is to give effect to articles 20 and 26 of the International Covenant on Civil and Political Rights and article 4 of the International Convention on the Elimination of All Forms of Racial Discrimination.<sup>30</sup> Article 20 of the International Covenant on Civil and Political Rights obliges states to prohibit by law any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence.<sup>31</sup> Article 26, which protects the right to equality and non-discrimination, also requires the state to prohibit by law any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race and religion.<sup>32</sup> The International Convention on the Elimination of All Forms of Racial Discrimination further describes the content of these obligations and the specific elements that States parties are required to take into account to ensure the elimination of discrimination on the basis of race, colour, descent, national or ethnic origin.<sup>33</sup> In particular, article 4 obliges States parties to adopt immediate and positive measures designed to eradicate all incitement to, or acts of, discrimination, including declaring an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination and acts of violence or incitement to such acts against any groups of a particular race, as well as declaring illegal propaganda activities and participation in such activities which promote and incite racial discrimination.

1.38 The statement of compatibility states that the measures would promote the above rights by preventing members of the community from experiencing discrimination, hatred, violence and racism through the public display or trade of Nazi and Islamic State symbols, which inherently represent discriminatory and hateful ideologies, and through exposure to violent extremist material. It states that

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29 International Covenant on Civil and Political Rights, articles 20 and 26; and International Convention on the Elimination of All Forms of Racial Discrimination, article 4.

30 See notes accompanying new subsections 80.2H(3) and (7) and subsections 80.2K(2), (3) and (6) in Schedule 1.

31 Article 20 of the International Covenant on Civil and Political Rights places limits on the rights to freedom of expression and freedom to manifest religion, providing that any expression or manifestation of religion or beliefs must not amount to propaganda for war or advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence.

32 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.

33 See articles 1, 2, 4 and 5 of the International Convention on the Elimination of All Forms of Racial Discrimination.

these rights would also be promoted by empowering law enforcement agencies to disrupt the use of prohibited symbols to perpetuate extremist ideologies.<sup>34</sup>

1.39 Insofar as the measures would protect the above rights, other human rights may also be consequently promoted, such as the right to freedom of religion, which encompasses the right to hold a religious or other belief or opinion and manifest religious or other beliefs by way of worship, observance, practice and teaching.<sup>35</sup> The UN Human Rights Committee has stated that measures taken in respect of article 20, namely laws prohibiting the advocacy of national, racial or religious hatred, 'constitute important safeguards against infringements of the rights of religious minorities and of other religious groups to exercise the rights guaranteed by articles 18 and 27, and against acts of violence or persecution directed toward those groups'.<sup>36</sup> The statement of compatibility states that the bill would promote the right to freedom of religion by supporting faith communities to worship, observe, practice and teach their religions without fear of harm or vilification and risks to personal safety.<sup>37</sup>

***Rights to freedom of expression, freedom of religion and equality and non-discrimination and rights of the child***

1.40 By criminalising certain forms of expression, including the display of, and trade in, prohibited symbols, which in effect would restrict a person's ability to seek, receive and impart certain information and ideas, the measures also engage and limit the right to freedom of expression.<sup>38</sup> This is acknowledged in the statement of compatibility.<sup>39</sup> The right to freedom of expression includes the freedom to seek, receive and impart information and ideas of all kinds, either orally, in writing or print, in the form of art, or through any other media of an individual's choice.<sup>40</sup> The UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression has stated that 'the right to freedom of expression includes expression of views and opinions that offend, shock or disturb'.<sup>41</sup> The UN Human

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34 Statement of compatibility, pp. 17–19.

35 International Covenant on Civil and Political Rights, article 18. See UN Human Rights Committee, *General Comment No. 22: Article 18 (Freedom of thought, conscience or religion)* (1993) [4].

36 UN Human Rights Committee, *General Comment No. 22: Article 18 (Freedom of thought, conscience or religion)* (1993) [9].

37 Statement of compatibility, p. 12. The statement of compatibility also states that the bill promotes the right to enjoy and benefit from culture and take part in cultural life, and the right to education: pp. 13–16, 19.

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

39 Statement of compatibility, pp. 13–16.

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

41 UN Human Rights Council, *Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue, A/HRC/17/27* (2011) [37].



Rights Committee has also stated that the right to freedom of expression encompasses expression that may be regarded as deeply offensive and insulting, although such expression may be restricted in accordance with articles 19(3) and 20 of the International Covenant on Civil and Political Rights (which obliges States parties to prohibit by law any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence).<sup>42</sup>

1.41 The right to freedom of expression carries with it special duties and responsibilities and accordingly may be subject to limitations that are necessary to protect the rights or reputations of others,<sup>43</sup> national security, public order, or public health or morals.<sup>44</sup> Such limitations must be prescribed by law, be rationally connected to the objective of the measures and be proportionate.<sup>45</sup> Noting the important status of this right under international human rights law, restrictions on the right to freedom of expression must be construed strictly and any restrictions must be justified in strict conformity with the limitation clause in article 19(3), including restrictions justified on the basis of article 20.<sup>46</sup>

1.42 Additionally, as the new offences would apply to children (from the age of 10),<sup>47</sup> the measures would engage and limit the rights of the child. Children have special rights under human rights law taking into account their particular vulnerabilities.<sup>48</sup> All children under the age of 18 years are guaranteed these rights, without discrimination on any grounds, including the right to freedom of expression.<sup>49</sup> In particular, Australia is required to ensure that, in all actions concerning children, the best interests of the child are a primary consideration.<sup>50</sup> This

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42 UN Human Rights Committee, *General comment No. 34: Article 19: Freedoms of opinion and expression*, CCPR/C/GC/34 (2011) [11] and [38].

43 Restrictions on this ground must be constructed with care. See UN Human Rights Committee, *General Comment No. 34: Article 19: Freedoms of Opinion and Expression* (2011) [28].

44 The concept of 'morals' derives from myriad social, philosophical and religious traditions. This means that limitations for the purpose of protecting morals must be based on principles not deriving exclusively from a single tradition. See UN Human Rights Committee, *General Comment No. 34: Article 19: Freedoms of Opinion and Expression* (2011) [32].

45 UN Human Rights Committee, *General Comment No. 34: Article 19: Freedoms of Opinion and Expression* (2011) [21]–[36].

46 UN Human Rights Committee, *General comment No. 34: Article 19: Freedoms of opinion and expression*, CCPR/C/GC/34 (2011) [2]–[3], [21]–[22], [52].

47 *Crimes Act 1914*, sections 4M and 4N provide that a child under 10 cannot be liable for an offence and a child aged 10–14 can be liable but only if they know their conduct is wrong.

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

49 UN Human Rights Committee, *General Comment No. 17: Article 24* (1989) [5]. See also International Covenant on Civil and Political Rights, articles 2 and 26. The right to freedom of expression is protected by article 13 of the Convention on the Rights of the Child.

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

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.<sup>51</sup>

1.43 International human rights law recognises that children have different levels of emotional, mental and intellectual maturity and psychological development than adults, and so are less culpable for their actions.<sup>52</sup> In this way, the Convention on the Rights of the Child provides that States parties should establish a minimum age of criminal responsibility of at least 14 years of age and, where appropriate and desirable and in a manner that respects human rights, deal with children accused of a crime without resorting to judicial proceedings, such as by way of diversionary programs.<sup>53</sup> This reflects the importance attributed to prevention and early intervention under international human rights law and the view that exposing a child to the criminal justice system causes them harm, limiting their chances of becoming a responsible adult.<sup>54</sup> The UN Committee on the Rights of the Child has emphasised the importance of non-judicial alternatives to prosecution and detention in relation to children accused of, and charged with, terrorism offences.<sup>55</sup> The Committee has urged States parties to 'refrain from charging and prosecuting [children] for

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51 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). The UN Committee on the Rights of the Child has said: '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].

52 Committee on the Rights of the Child, *General Comment No. 24 (2019) on children's rights in the child justice system* (2019) [2]; [United Nations Standard Minimum Rules for the Administration of Juvenile Justice \('The Beijing Rules'\)](#) (1985) [4.1].

53 Convention on the Rights of the Child, article 40(3). The UN Committee on the Rights of the Child has encouraged States parties to increase the minimum age of criminal responsibility to at least 14 years of age and has commended States parties that have a higher minimum age, such as 15 or 16 years of age. This recommendation is based on scientific findings that the 'maturity and the capacity for abstract reasoning is still evolving in children aged 12 to 13 years due to the fact that their frontal cortex is still developing. Therefore, they are unlikely to understand the impact of their actions or to comprehend criminal proceedings. They are also affected by their entry into adolescence...[which] is a unique defining stage of human development characterized by rapid brain development, and this affects risk-taking, certain kinds of decision-making and the ability to control impulses': *General Comment No. 24 (2019) on children's rights in the child justice system* (2019) [22].

54 Committee on the Rights of the Child, *General Comment No. 24 (2019) on children's rights in the child justice system* (2019) [2] and [6].

55 Committee on the Rights of the Child, *General Comment No. 24 (2019) on children's rights in the child justice system* (2019) [100].

expressions of opinion or for mere association with a non-State armed group, including those designated as terrorist groups'.<sup>56</sup>

1.44 Further, if the prohibition on publicly displaying and trading Nazi symbols or the Islamic flag (or something resembling them) had the effect of restricting the ability of people of certain religious groups to worship, practise or observe their religion, it may engage and limit the right to freedom of religion, particularly the right to demonstrate or manifest religious or other beliefs.<sup>57</sup> The freedom to manifest religion or belief in worship, observance, practice and teaching encompasses a broad range of acts, including ritual and ceremonial acts, the building of places of worship, the wearing of religious dress,<sup>58</sup> and preparing and distributing religious texts or publications.<sup>59</sup>

1.45 The statement of compatibility states that the new offences are not intended to capture persons or religious groups who genuinely display a prohibited symbol for religious reasons.<sup>60</sup> It states that a religious purpose would include the display of the sacred Swastika in connection with the Buddhist, Hindu and Jain religions, noting that this ancient symbol represents peace and good fortune.<sup>61</sup> The explanatory memorandum further notes that the bill specifies the Nazi hakenkreuz rather than the Swastika to acknowledge the immense significance of the sacred Swastika to people of Buddhist, Hindu and Jain religions.<sup>62</sup> On this basis, the statement of compatibility states that the measures would promote the right to freedom of religion by ensuring that the sacred Swastika may continue to be used in connection with religious observance.<sup>63</sup> If the provisions were to be applied consistently with the explanatory materials, that is, the public display of the sacred Swastika for the purposes of Buddhist, Hindu or Jain religions would not constitute a criminal offence, the right to freedom of religion for those of Buddhist, Hindu and Jain faith may be adequately protected. However, it is noted that the bill itself does not

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56 Committee on the Rights of the Child, *General Comment No. 24 (2019) on children's rights in the child justice system* (2019) [101].

57 International Covenant on Civil and Political Rights, article 18. See UN Human Rights Committee, *General Comment No. 22: Article 18 (Freedom of thought, conscience or religion)* (1993).

58 See *Yaker v France*, UN Human Rights Committee Communication No.2747/2016 (2018) [8.3]; *Türkan v Turkey*, UN Human Rights Committee Communication No.2274/2013 (2018) [7.2]–[7.3]; *FA v France*, UN Human Rights Committee Communication No.2662/2015 (2018) [8.3].

59 UN Human Rights Committee, *General Comment No. 22: Article 18 (Freedom of thought, conscience or religion)* (1993) [4].

60 Statement of compatibility, p. 12.

61 Statement of compatibility, pp. 12–13.

62 Explanatory memorandum, pp. 24–25.

63 Statement of compatibility, p. 13.

contain a specific exception with respect to displaying the sacred Swastika in connection with Buddhist, Hindu and Jain religions.

1.46 It is also not clear if people of Muslim faith would be afforded the same protections. The words inscribed on the Islamic State flag form the shahada and represent one of the five pillars of Islam.<sup>64</sup> The shahada is said to be a sacred symbol of the Islamic faith and is written by Muslims as part of their daily practice.<sup>65</sup> However, in contrast to the sacred Swastika, the explanatory materials do not acknowledge the sacred value of the shahada or make clear that the genuine use of the shahada by Muslim people or groups for religious reasons is not intended to be captured by the offences. There may therefore be a risk that people of Muslim faith who display, or trade material containing, the shahada are inadvertently captured by the new offences, as the shahada may be a symbol that so nearly resembles, or may be mistaken for, the Islamic State flag. If people of Muslim faith were disproportionately impacted by the measures, the rights to freedom of religion and equality and non-discrimination on the ground of religion would be limited.

1.47 The right to equality and non-discrimination provides that everyone is entitled to enjoy their rights without discrimination of any kind, including on the grounds of religion,<sup>66</sup> and that all people are equal before the law and entitled without discrimination to equal and non-discriminatory protection of the law.<sup>67</sup> 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.<sup>68</sup> Differential treatment (including the differential effect of a measure that is neutral on its face) will not constitute unlawful

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64 Kerem Doruk, 'Canberra Muslim community labels Islamic flag ban unfair, calls for review', *Canberra Times* (3 July 2023).

65 Kerem Doruk, 'Canberra Muslim community labels Islamic flag ban unfair, calls for review', *Canberra Times* (3 July 2023).

66 For jurisprudence of the European Court of Human Rights in relation to discrimination on the grounds of religion see *Yaker v France*, UN Human Rights Committee Communication No.2747/2016 (2018) [8.13]–[8.17]; *Türkan v Turkey*, UN Human Rights Committee Communication No.2274/2013 (2018) [7.7]–[7.8]; *FA v France*, UN Human Rights Committee Communication No.2662/2015 (2018) [8.10]–[8.13].

67 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.

68 *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'.

discrimination if the differential treatment is based on reasonable and objective criteria.<sup>69</sup>

1.48 The above rights may generally 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. This analysis will now consider if any limits on the above-mentioned rights are permissible as a matter of international human rights law.

#### *Legitimate objective and rational connection*

1.49 The statement of compatibility states that the measures seek to protect the right of members of the Australian community not to be intimidated or harassed, and to prevent the incitement of others to hatred, discrimination and violence.<sup>70</sup> It notes that the symbols prohibited represent racist and hateful ideologies, which cause significant harm to members of targeted groups in Australia, and are used as tools of vilification and radicalisation.<sup>71</sup> The explanatory memorandum states that the measures are intended to reduce the prevalence of these symbols in public spaces and commercial profiting from goods that bear these symbols<sup>72</sup>

1.50 In general terms, the stated objective of the measure has been recognised as constituting a legitimate objective for the purposes of international human rights law, noting that protecting the rights of others is a specified ground on which restrictions on the rights to freedom of expression and freedom of religion may be permitted, as well as Australia's obligations under article 20 to prohibit advocacy of national, racial and religious hatred.<sup>73</sup> By criminalising conduct that may incite racial and/or religious hatred, discrimination and violence, the measures appear to be rationally connected to (that is, effective to achieve) the stated objective.

1.51 However, in order to establish whether this objective is legitimate in the context of these specific measures, it must also be demonstrated that the measures

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69 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].

70 Statement of compatibility, p. 14.

71 Statement of compatibility, p. 14.

72 Explanatory memorandum, p. 23.

73 International Covenant on Civil and Political Rights, articles 18(3) and 19(3)(a). See UN Human Rights Committee, *General Comment No.34: Article 19: Freedoms of Opinion and Expression* (2011) [28]. National security and public order are also specified grounds on which restrictions on the right to freedom of expression may be permitted.

are necessary.<sup>74</sup> In this regard, the statement of compatibility states that the measures are necessary to protect the rights of others, particularly in light of the significant harm that the public display and trade of prohibited symbols causes to specific groups in the Australian community.<sup>75</sup> The explanatory memorandum states that the Australian Security Intelligence Organisation (ASIO) has advised that nationalist and racist violent extremists, including neo-Nazis, adopt specific imagery and terminology to indicate and perpetuate their ideology. It notes that symbols are a powerful tool to build belonging to the group and to intimidate or threaten ideological opponents to the group. Such extremists have used symbols to convey complex ideologies that transcend language, cultural and ethnic divides, and the specific symbols prohibited by the bill have been used as effective tools to recruit and radicalise due to their significant association with violent ideologies.<sup>76</sup>

1.52 While the statement of compatibility provides relevant information regarding the necessity of the measures, it does not fully address why current laws are insufficient to achieve the stated objective. In particular, section 18C of the *Racial Discrimination Act 1975* makes it unlawful for a person to do an act in public that is reasonably likely, in all the circumstances, to offend, insult, humiliate or intimidate another person or a group of people and the act is done because of the race, colour or national or ethnic origin of the other person or of some or all of the people in the group.<sup>77</sup> An act is done in public, that is, otherwise than in private, if it causes words, sounds, images or writing to be communicated to the public; or is done in a public place; or is done in the sight or hearing of people who are in a public place.<sup>78</sup> This provision would appear to capture some of the conduct sought to be criminalised by the measures, including publicly displaying a Nazi symbol or Islamic State flag in circumstances where such conduct is likely to offend, insult, humiliate or intimidate a reasonable person who is a member of a group distinguished by a protected attribute such as race, colour or national origin because of their membership of that group.<sup>79</sup> While the *Racial Discrimination Act 1975* does not criminalise such conduct,

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74 UN Human Rights Committee, *General Comment No.34: Article 19: Freedoms of Opinion and Expression* (2011) [33]. See also *Ross v Canada*, UN Human Rights Committee Communication No. 736/1997 (2000), where the UN Human Rights Committee found that the test of necessity was satisfied in the case of a teacher who had published materials that expressed hostility toward a religious community and was consequently transferred to a non-teaching position in order to protect the rights and freedoms of others. In particular, the Committee considered the views expressed by the teacher to be discriminatory towards persons of Jewish faith and thus restricting his freedom of expression was 'necessary to protect the right and freedom of Jewish children to have a school system free from bias, prejudice and intolerance': [116].

75 Statement of compatibility, p. 14; explanatory memorandum, p. 23.

76 Explanatory memorandum, p. 23.

77 *Racial Discrimination Act 1975*, subsection 18C(1).

78 *Racial Discrimination Act 1975*, subsection 18C(2).

79 Schedule 1, item 5, new subsections 80.2H(1) and (7).

it makes it unlawful and enables a person to make a complaint to the Australian Human Rights Commission, and subsequently to the Federal Court or Federal Circuit Court.<sup>80</sup> If a court finds a breach of section 18C (and no defences apply) it may order a range of outcomes including an order that the conduct not be repeated and payment of compensation.<sup>81</sup>

1.53 The statement of compatibility does not make any reference to the existing powers under section 18C and why these are insufficient. With respect to police powers to issue a direction to cease displaying a prohibited symbol, the explanatory memorandum states that this provision would address a gap in the application of existing police powers in relation to the new offence of publicly displaying a prohibited symbol.<sup>82</sup> It states that providing police with this power is necessary to ensure the central purpose of the offence is not frustrated and to ensure police have an appropriate tool to minimise the harm occasioned by publicly displaying the symbol. It is not clear whether current laws also deal with conduct relating to trading in prohibited symbols.

#### *Proportionality*

1.54 The key issue as to whether the proposed limitations are permissible is whether the limitations are 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.

1.55 As to whether the measures are sufficiently circumscribed, it is necessary to consider the breadth of the measures, including the form of expression that is to be prohibited and the means of its dissemination.<sup>83</sup> The UN Human Rights Committee has noted that restrictions on the right to freedom of expression must not be overly broad.<sup>84</sup> It has observed that:

When a State party invokes a legitimate ground for restriction of freedom of expression, it must demonstrate in specific and individualized fashion

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80 See *Racial Discrimination Act 1975*, section 26, which provides that unlawful acts are not offences unless expressly so provided; *Australian Human Rights Commission Act 1986*, section 46P, which allows people to make complaints to the Australian Human Rights Commission about unlawful acts.

81 *Australian Human Rights Commission Act 1986*, section 46PO.

82 Explanatory memorandum, p. 43.

83 In the case of restrictions on online communication, including restrictions on internet service providers, the UN Human Rights Committee has stated that 'restrictions generally should be content-specific' rather than 'generic bans on the operation of certain sites and systems': *General Comment No. 34, Article 19: Freedoms of opinion and expression* (2011) [33] and [43].

84 UN Human Rights Committee, *General Comment No.34: Article 19: Freedoms of Opinion and Expression* (2011) [34].

the precise nature of the threat, and the necessity and proportionality of the specific action taken, in particular by establishing a direct and immediate connection between the expression and the threat.<sup>85</sup>

1.56 The forms of expression that are sought to be prohibited are the Islamic State flag, the Nazi hakenkreuz and the Nazi double-sig rune as well as a symbol that so nearly resembles or is likely to be confused with, or mistaken for, one of these symbols.<sup>86</sup> While the bill specifies the forms of expression that are to be prohibited and the circumstances in which such expression would be prohibited, it does not define each of the prohibited symbols or provide a graphic depiction of the symbols. Rather, the symbols are described in the explanatory memorandum. The Islamic State flag is described as 'a rectangular, black emblem with white Arabic writing, and below the white Arabic writing is a white circle containing black Arabic writing'.<sup>87</sup> The Nazi hakenkreuz is described as a 'cross with the arms bent at right angles in a clockwise direction' and the Nazi double sig rune is described as 'a stylised depiction of two lightning-bolt-like symbols with flat ends positioned side-by-side'.<sup>88</sup> As to symbols that are likely to be confused with, or mistaken for, these symbols, the explanatory memorandum states that this could include any figure, drawing, symbol, pattern or design substantially similar to one of the prohibited symbols and capable of being reasonably recognised as derived from, or a modified version of, one of those symbols.<sup>89</sup> For example, an image would be substantially similar to the Nazi hakenkreuz, and thus a prohibited symbol, if it depicted a hooked cross but with lines skewed at slightly different angles.<sup>90</sup> The explanatory memorandum states that the legislation is intended to not be so prescriptive as to exclude variations in the ways in which the prohibited symbols are depicted.<sup>91</sup>

1.57 While the explanatory memorandum provides some guidance, it is not clear why a written definition and/or graphic depiction of the symbols that are sought to

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85 UN Human Rights Committee, *General Comment No.34: Article 19: Freedoms of Opinion and Expression* (2011) [35]. See also [33] regarding the test of necessity in relation to limitations on the right to freedom of expression. See, e.g. *Faurisson v France*, UN Human Rights Committee Communication No. 550/1993 (1996) separate opinions of Mrs Evatt, Mr Kretzmer and Mr Klein, [8]: 'The restriction [on freedom of expression] must be necessary to protect the given value [such as the rights of others]. This requirement of necessity implies an element of proportionality. The scope of the restriction imposed on freedom of expression must be proportional to the value which the restriction serves to protect. It must not exceed that needed to protect the value...the restriction must not put the very right itself in jeopardy'. See also *Ross v Canada*, UN Human Rights Committee Communication No. 736/1997 (2000), [116].

86 Schedule 1, item 5, new section 80.2F.

87 Explanatory memorandum, p. 24.

88 Explanatory memorandum, pp. 24–25.

89 Explanatory memorandum, p. 25.

90 Explanatory memorandum, p. 25.

91 Explanatory memorandum, pp. 25–26.



be prohibited are not included in the legislation itself. Without clear legislative guidance, and noting that an assessment of whether a symbol is likely to be confused with, or mistaken for, a prohibited symbol is inherently subjective, there may be substantial variation in the way the legislation is interpreted and applied in practice. As a result, the scope of expression that may be captured by the offences could be potentially wide. This may cause particular difficulties for the police who would be empowered to make directions that certain symbols be taken down. It is therefore not clear that in all circumstances in practice the expression that would be restricted by the measures would meet the threshold of racial or religious hate speech that incites discrimination, hostility or violence

1.58 Further, as outlined above (in paragraph [1.28]), the public display of a prohibited symbol would only constitute an offence if certain circumstances were to apply. Some of these circumstances may ensure that the expression prohibited is appropriately limited to expression that reaches the threshold of hate speech.<sup>92</sup> International human rights law jurisprudence has found limitations on freedom of expression to be permissible in such circumstances. Indeed, the Committee on the Elimination of Racial Discrimination has stated that:

the principle of freedom of speech has been afforded a lower level of protection in cases of racist and hate speech dealt with by other international bodies, and that the Committee's own General recommendation No 15 clearly states that the prohibition of all ideas based upon racial superiority or hatred is compatible with the right to freedom of opinion and expression.<sup>93</sup>

1.59 In particular, UN treaty bodies have found restrictions on freedom of expression may be permitted in circumstances where the expression is of a 'nature as to raise or strengthen anti-Semitic feeling, in order to uphold the Jewish communities' right to be protected from religious hatred'.<sup>94</sup>

1.60 However, it is not clear whether speech captured by the circumstances contained in paragraph 80.2H(3)(b) and subsection 80.2H(7) – namely, where a

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92 Notably, proposed paragraph 80.2H(3)(a) and subsection 80.2H(4) provide that it would be an offence to publicly display a prohibited symbol where a reasonable person would consider that such conduct either involves dissemination of ideas based on racial superiority or racial hatred; or advocacy of hatred of a targeted group or member of the group and constitutes incitement to offend, insult, humiliate, intimidate or use force or violence against the targeted group or member of that group.

93 *Jewish Community of Oslo v Norway*, UN Committee on the Elimination of Racial Discrimination Communication No. 30/2003 (2005) [10.5].

94 See *Ross v Canada*, UN Human Rights Committee Communication No. 736/1997 (2000); *Jewish Community of Oslo v Norway*, UN Committee on the Elimination of Racial Discrimination Communication No. 30/2003 (2005); *Faurisson v France*, UN Human Rights Committee Communication No. 550/1993 (1996), [2.5], [9.6]–[9.7]; *JRT and the WG Party v Canada*, UN Human Rights Committee Communication No. 104/1981 (1983).

reasonable person would consider that the conduct could incite another person or group of persons to offend, insult, humiliate or intimidate a targeted person or group because of their race; or the conduct is likely to offend, insult, humiliate or intimidate a reasonable person who is a member of a group of persons distinguished by a protected attribute such as race or religion because of their membership of that group – would necessarily reach the level of hate speech. It is noted that certain unpopular or offensive speech is afforded protection under international human rights law.<sup>95</sup> In this regard, it is relevant to consider how the phrase 'offend, insult, humiliate or intimidate' is likely to be interpreted. In the context of section 18C of the *Racial Discrimination Act 1975*, this phrase has been interpreted by Australian courts to collectively mean 'profound or serious effects, not to be likened to mere slights'.<sup>96</sup> This judicial interpretation suggests that expression captured by the circumstances in paragraph 80.2H(3)(b) and subsection 80.2H(7) would need to be more than merely offensive or insulting speech to justify prohibition. This would assist with the proportionality of the measures.

1.61 As to the means of dissemination, a prohibited symbol must be 'displayed in a public place' in order to constitute an offence. As set out above (in paragraph [1.27]), a symbol is taken to be displayed in a public place if it is capable of being seen by a member of the public who is in a public place or it is included in a document that is available or distributed to the public or a section of the public (including via the internet).<sup>97</sup> The bill clarifies that if a symbol is included in a document that is available to the public or a section of the public on a website, it is taken to be displayed in a public place.<sup>98</sup> The explanatory memorandum states that the term 'document' is intended to operate broadly, consistent with the definition in the *Acts Interpretation Act 1901*, that is, any record of information, including

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95 UN Human Rights Committee, *General comment No. 34: Article 19: Freedoms of opinion and expression*, CCPR/C/GC/34 (2011) [11] and [38]. See, also *Faurisson v France*, UN Human Rights Committee Communication No. 550/1993 (1996) separate opinions of Mrs Evatt, Mr Kretzmer and Mr Klein, [8]: 'The power given to States parties under article 19, paragraph 3, to place restrictions on freedom of expression, must not be interpreted as license to prohibit unpopular speech, or speech which some sections of the population find offensive. Much offensive speech may be regarded as speech that impinges on one of the values mentioned in article 19, paragraph 3 (a) or (b)...The Covenant therefore stipulates that the purpose of protecting one of those values is not, of itself, sufficient reason to restrict expression. The restriction must be necessary to protect the given value'.

96 *Creek v Cairns Post Pty Ltd* [2001] FCA 1007, Kiefel J at [16]; *Bropho v Human Rights and Equal Opportunity Commission* [2004] FCAFC 16, French J at [70] *Eatock v Bolt* [2011] FCA 1103, Bromberg J at [268].

97 Schedule 1, item 5, new section 80.2F.

98 Schedule 1, item 5, new section 80.2F, example.

symbols, images, drawings and photographs.<sup>99</sup> The terms 'available' and 'distributed' are to mean 'available or distributed as of right or by invitation, whether express or implied, and whether or not a charge is made'.<sup>100</sup> The explanatory memorandum provides a non-exhaustive list of examples, such as displaying a Nazi hakenkreuz on a sticker on a motor vehicle or on a poster outside a university library, or wearing a Nazi double rig rune symbol on a hat worn as part of a party costume in a public place.<sup>101</sup> It is not clear, however, whether the meaning of 'displayed in a public place' would extend to documents (including photographs and images) posted on social media, in particular private accounts. For example, would a photograph posted on a private social media account of a group of people, with one wearing a Nazi double rig rune symbol on a hat as part of a party costume, be taken to be a prohibited symbol displayed in a public place?

1.62 Regarding the provisions relating to directions to cease displaying a prohibited symbol, elements of these provisions are also drafted in broad terms, raising questions as to how the measure will likely operate in practice and whether, in all circumstances, it is sufficiently circumscribed. The time specified by which a direction must be complied with must be 'reasonable'.<sup>102</sup> The explanatory memorandum states that this requirement acknowledges that there are circumstances in which it may take time to comply with a direction to cease the display of a prohibited symbol.<sup>103</sup> For example, if the symbol is painted on a wall visible to the public, the occupier of the premises would need time to obtain paint or some other means to cover the symbol. Whereas a person holding a poster with the sign would be able to cease displaying the symbol immediately.<sup>104</sup> The explanatory memorandum states that it is intended that police have the discretion in selecting a time period that is reasonable in the circumstances, having considered the practicalities of complying with the direction as well as the harm being caused by the continued display of the symbol.<sup>105</sup> Noting that the concept of a reasonable period of time is vague, it is not clear why the legislation itself does not, at a minimum, include the factors that the issuing police officer must have regard to when determining what is reasonable in the circumstances, such as those factors mentioned in the

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99 *Acts Interpretation Act 1901*, section 2B. 'Any record of information' includes: anything on which there is writing; and anything on which there are marks, figures, symbols or perforations having a meaning for persons qualified to interpret them; and anything from which sounds, images or writings can be reproduced with or without the aid of anything else; and a map, plan, drawing or photograph.

100 Schedule 1, item 5, new subsection 80.2F(4).

101 Explanatory memorandum, p. 26.

102 Schedule 1, item 5, new subsection 80.2K(8).

103 Explanatory memorandum, p. 44.

104 Explanatory memorandum, p. 44.

105 Explanatory memorandum, p. 44.

explanatory memorandum. It is also not clear whether a person has access to review with respect to the time period specified in the direction. For example, if a prohibited symbol in a home is visible from the street and a police officer issues a direction to cease displaying the symbol within 3 days – if the notice is affixed to the house when the occupier is temporarily not present they may be unable to comply with the direction in the specified timeframe. If the occupier did not receive the direction until after the time specified in the direction had lapsed, would they be able to rely on any defence for non-compliance with the direction or seek review of the time period specified in the direction?

1.63 Proposed section 80.2M provides that it is not an offence to fail to comply with a direction if the recipient of the direction did not cause the symbol to be displayed and when the direction is given they are not an owner or occupier of the premises; or the recipient takes all reasonable steps to cause the symbol to be not displayed or there are no such steps that can be taken.<sup>106</sup> The explanatory memorandum notes that a recipient who is overseas or unable to remove the symbol because it would place them in a dangerous situation may be able to rely on the defence in paragraph 80.2M(5)(b) (that is, there being no reasonable steps that the recipient can take). However, noting that the concept of 'reasonable' is vague, it is not clear what would constitute 'reasonable steps' in all circumstances. For example, if a person had a tattoo depicting a prohibited symbol or something that so nearly resembled a symbol on a part of their body that was generally visible to the public, such as their hand, neck, face or ankle, would it be considered reasonable for them to remove the tattoo in order for them to go out in public and not be criminally liable? In circumstances where a symbol is displayed on a premises that is tenanted, what steps would the landlord need to take in order to cease the display of a prohibited symbol that was caused by the tenant or by graffiti?

1.64 As to the existence of safeguards, the measures include specific exceptions, namely where a reasonable person would consider that the conduct is engaged in for a religious, academic, educational, artistic, literary or scientific purpose and not contrary to the public interest, or for the purposes of making a news or current affairs report that is in the public interest and made by a professional journalist, as well as various defences to the offences (as set out above in paragraphs [1.29]–[1.31]). The inclusion of specific exceptions and defences to the offences would operate as a safeguard, although some questions arise as to whether this safeguard would be adequate in all circumstances. With respect to displaying or trading symbols for a religious purpose, the explanatory memorandum states that the requirement for the prosecution to establish that a reasonable person would consider that the public display or trade of the symbol was not done for a religious purpose in the public interest would ensure that the display or trade of the sacred Swastika in connection with Hindu, Buddhist and Jain religions would not be

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106 Schedule 1, item 5, new subsection 80.2M(5).

captured by the offences.<sup>107</sup> However, as noted above (in paragraph [1.57]), if the offences are not intended to prohibit the display and trade of the sacred Swastika or other genuine religious symbols, it is not clear why such exceptions are not set out in the legislation itself.

1.65 With respect to displaying a prohibited symbol or trading goods containing a prohibited symbol for the purposes of a news or current affairs report, the report must be made by a professional journalist in order to be exempted from the offence. The explanatory memorandum states that the requirement that the journalist be working in a professional capacity is intended to operate to exclude the displaying of prohibited symbols for the purpose of, for example, inciting violence or promoting hatred, while purporting to be journalism.<sup>108</sup> It notes that a news program live broadcasting a protest at which people held signs displaying a prohibited symbol would fall within the exception as it would be inappropriate for journalists and broadcasters to have to censor their report in order to avoid criminal liability.<sup>109</sup> While the inclusion of an exception to the offences for professional journalists assists with proportionality, questions arise as to whether the scope of this exception is too narrow, noting the UN Human Rights Committee's observation that:

journalism is a function shared by a wide range of actors, including professional full-time reporters and analysts, as well as bloggers and others who engage in forms of self-publication in print, on the internet or elsewhere.<sup>110</sup>

1.66 For example, if a citizen journalist filmed an event at which people held signs displaying a prohibited symbol and then posted that video online or shared the video with news outlets via social media, it would appear they would be unable to rely on the journalism defence and liable to conviction of an offence involving up to 12 months imprisonment.

1.67 Another relevant factor in assessing proportionality is whether there are less rights restrictive ways to achieve the stated objective. A less rights restrictive alternative may be to require police to first issue a direction to cease displaying the symbol before charging a person with the offence of publicly displaying a prohibited symbol. If a person complied with the direction, they would not then also be criminally liable for the conduct of displaying the symbol in the first instance. This

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107 Explanatory memorandum, p. 14.

108 Explanatory memorandum, pp. 34 and 40.

109 Explanatory memorandum, p. 34.

110 With respect to counter-terrorism measures that may restrict the freedom of expression of journalists, the UN Human Rights Committee has stated: 'The media plays a crucial role in informing the public about acts of terrorism and its capacity to operate should not be unduly restricted. In this regard, journalists should not be penalized for carrying out their legitimate activities'. See *General Comment No. 34, Article 19: Freedoms of opinion and expression* (2011) [46].

approach appears capable of achieving the stated objective of preventing and reducing the harm caused to others by the public display of the symbol.

1.68 The question of less rights restrictive alternatives is particularly relevant in relation to children, noting the position under international human rights law that states should implement non-judicial alternatives to prosecution and detention of children accused of, and charged with, terrorism offences.<sup>111</sup> This is because of the significant harm caused to children who are exposed to the criminal justice system.<sup>112</sup> Having regard to the obligations on States parties with respect to the rights of the child (as outlined above in paragraphs [1.42]–[1.43]), it is not clear why it is appropriate to subject children to criminal liability with respect to the offences of publicly displaying or trading in prohibited symbols or failing to comply with a direction to cease displaying a symbol. It would appear a less rights restrictive alternative would be to subject children to a diversionary program in order to avoid exposing children to the criminal justice system.

1.69 Additionally, at a minimum, it would be a lesser restriction on the rights of the child if the offences were to only apply to children over the age of 14 years, as per the recommended age of criminal responsibility under international human rights law.<sup>113</sup> Currently, the age of criminal responsibility for Commonwealth offences is 10 years of age, with children aged 10 years or more but under 14 years old held liable for an offence only if the prosecution proves that the child knows his or her conduct is wrong.<sup>114</sup> It is also not clear why the Attorney-General's consent is not required prior to commencing proceedings against a child defendant, noting that this safeguard is included with respect to offences relating to the use of a carriage service for violent extremist material (see below paragraphs [1.78] and [1.94]).

### Committee view

1.70 The committee notes with deep concern the rising number of disturbing events involving the public display of Nazi symbols. The committee emphasises that these displays of hate have no place in Australia. The committee considers there is a need to support law enforcement to help protect the community from those who plan, prepare and inspire others to do harm. Indeed, the committee notes that

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111 Committee on the Rights of the Child, *General Comment No. 24 (2019) on children's rights in the child justice system* (2019) [100]. At [101], the Committee urged States parties to 'refrain from charging and prosecuting [children] for expressions of opinion or for mere association with a non-State armed group, including those designated as terrorist groups'.

112 Committee on the Rights of the Child, *General Comment No. 24 (2019) on children's rights in the child justice system* (2019) [2], [6].

113 The UN Committee on the Rights of the Child has encouraged States parties to increase the minimum age of criminal responsibility to at least 14 years of age and has commended States parties that have a higher minimum age, such as 15 or 16 years of age: *General Comment No. 24 (2019) on children's rights in the child justice system* (2019) [22].

114 *Crimes Act 1914*, sections 4M and 4N.

Australia has obligations under international human rights law to prohibit by law any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence and to eliminate all incitement to, or acts of, racial discrimination. As such, the committee considers that if criminalising the public display and trading of prohibited symbols deters and prevents the commission of violent offences and reduces the harm caused to others by the display of symbols associated with racial and religious hatred, Schedule 1 of the bill would promote a number of human rights, including the rights to life and security of person and the prohibition against inciting national, racial or religious hatred. The committee considers that the measures represent an important step towards implementing Australia's obligations under international human rights law.

1.71 However, the committee notes that criminalising certain forms of expression would also necessarily engage and limit the right to freedom of expression. As the new offences would apply to children, the measures would also engage and limit the rights of the child. Further, if the measures had the effect of restricting the ability of people of certain religious groups to worship, practise or observe their religion (such as Buddhists displaying the sacred Swastika and Muslims using the words of the shahada in the Islamic flag), it may engage and limit the right to freedom of religion and possibly the right to equality and non-discrimination on the ground of religion.

1.72 The committee considers that the measures pursue a vitally important objective, namely, to protect members of the community from intimidation, hatred and discrimination. However, some scrutiny questions arise as to the scope of the proposed offence and the applicable safeguards. The committee therefore considers further information is required to assess their compatibility with the rights to freedom of expression and religion and equality and non-discrimination as well as the rights of the child, and as such seeks the Attorney-General's advice in relation to:

- (a) why current laws are insufficient to achieve the stated objective, noting that section 18C of the *Racial Discrimination Act 1975* appears to deal with some of the conduct sought to be criminalised;
- (b) why each of the prohibited symbols are not defined in the legislation itself, including a written description of the symbols (such as that contained in the explanatory memorandum) and a graphic depiction of the symbols;
- (c) why the bill does not contain a specific exception with respect to displaying the sacred Swastika in connection with Buddhist, Hindu and Jain religions;
- (d) what safeguards are in place to mitigate the risk that people of Muslim faith who are displaying the shahada for religious purposes are not inadvertently captured by the new offences, noting that the words of the shahada may constitute a symbol that so nearly resembles, or may be mistaken for, the Islamic State flag;

- (e) whether the meaning of 'displayed in a public place' would extend to documents (including photographs and images) posted on social media, including private accounts (for example, would a photograph posted on a private social media account of a group of people, with some wearing a Nazi costume, be taken to be displayed in a public place);
- (f) with respect to the requirement in subsection 80.2K(8) that a direction to cease displaying a prohibited symbol specify a reasonable time by which the direction must be complied with:
  - (i) why the legislation does not include the factors that the issuing police officer must have regard to when determining what is reasonable in the circumstances; and
  - (ii) whether a person has access to review with respect to the time period specified in the direction. For example, if a recipient of a direction did not receive the direction until after the time specified in the direction had lapsed, would they be able to rely on any defence for non-compliance with the direction or seek review of the time period specified in the direction;
- (g) whether there is any guidance regarding what would constitute 'reasonable steps' in the context of a person causing the prohibited symbol to cease to be displayed (as per paragraph 80.2M(5)(b)). For example, what would constitute reasonable steps to cause the symbol to cease to be displayed in the following circumstances:
  - (i) where a person has a tattoo depicting a prohibited symbol on a part of their body that is generally visible to the public, such as their hand, neck, face or ankle (including where the tattoo predated the commencement of this bill);
  - (ii) where a symbol is displayed by tenants and the landlord is issued with a direction as the owner of the premises;
  - (iii) where the symbol is on premises as a result of graffiti that is difficult to remove;
- (h) why the exceptions to the offence of publicly displaying a prohibited symbol in subsection 80.2H(9) do not extend to citizen journalists where their intention is to display the prohibited symbol only in the context of genuine dissemination of an event (for example, where a citizen journalist filmed neo-Nazis and posted that video online for informational purposes);
- (i) what other safeguards beyond the exceptions and defences to the offences are in place to ensure the proposed offences do not unduly restrict a person's freedom of expression (for example, will police be



issued with training and guidance about how to exercise their directions power);

- (j) why is it not required that police first issue a direction to cease displaying the symbol, and for that not to be complied with, before the offence of publicly displaying a prohibited symbol would apply;
- (k) why is it appropriate to subject children to criminal liability with respect to the offences of publicly displaying or trading in prohibited symbols or failing to comply with a direction to cease displaying a symbol;
- (l) why, at a minimum, the Attorney-General's consent is not required prior to commencing proceedings against a child defendant, noting that this safeguard is included with respect to offences relating to the use of a carriage service for violent extremist material; and
- (m) whether the ban on trading goods containing a prohibited symbol is a proportionate limit on the right to a private life.

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### **Criminalising the accessing or possession of 'violent extremist material'**

1.73 The bill seeks to create offences relating to the use of a carriage service<sup>115</sup> (such as an internet or mobile telephone service) for violent extremist material.<sup>116</sup> Violent extremist material is defined as material that:

- describes or depicts, or provides instruction on engaging in, or supports or facilitates, serious violence; and
- a reasonable person would consider that, in all the circumstances, the material is intended to:
  - directly or indirectly advance a political, religious or ideological cause; and
  - assist, encourage or induce a person to engage in, plan or prepare for an intimidatory act; or do a thing that relates to engaging in, planning or preparing for an intimidatory act; or join or associate with an organisation that is directly engaged in the doing of any intimidatory act, or that is preparing, planning, assisting in or fostering the doing of any intimidatory act.<sup>117</sup>

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115 Carriage service means a service for carrying communications by means of guided and/or unguided electromagnetic energy: *Telecommunications Act 1997*, section 7 and *Criminal Code Act 1995*, Dictionary.

116 Schedule 2, item 3.

117 Schedule 2, item 3, new subsection 474.45A(1).

1.74 'Serious violence' is defined as an action that falls within the elements of the existing definition of 'terrorist act' in the *Criminal Code Act 1995* (Criminal Code).<sup>118</sup> That is, an action that causes serious physical harm to a person; serious damage to property; causes a person's death; endangers a person's life; creates a serious risk to the health or safety of the public; or seriously interferes with, seriously disrupts, or destroys an electronic system (including a telecommunications, financial or transport system).

1.75 An 'intimidatory act' is defined as a violent action, or threat of violent action, where the action is done, or the threat is made, with the intention of coercing, or influencing by intimidation, the government of the Commonwealth or a state, territory or foreign country (or part of the government); or intimidating the public or a section of the public.<sup>119</sup>

1.76 A person would commit an offence if they use a carriage service to access violent extremist material; cause material or a link to material to be transmitted to a person; transmit, make available, publish, distribute, advertise or promote material; or solicit material.<sup>120</sup> A person would also commit an offence if they obtain violent extremist material using a carriage service and possess or control the material and store the material in data held in a computer or in a data storage device.<sup>121</sup> It would not matter whether the person obtained or accessed the material using a carriage service before, on or after the commencement of the relevant provision.<sup>122</sup> This means that if a person used a carriage service to obtain or access violent extremist material before the offence provisions commenced and they still possessed or controlled the material after the offence provisions commence, they could be held criminally liable.<sup>123</sup> The relevant fault elements that would apply to the offences would be intention with respect to the conduct (such as accessing, possessing or controlling the material) and recklessness with respect to whether the material is

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118 Schedule 2, item 3, new subsection 474.45A(2); *Criminal Code Act 1995*, subsection 100.1(2).

119 Schedule 2, item 3, new subsection 474.45A(3).

120 Schedule 2, item 3, new section 474.45B.

121 Schedule 2, item 3, new section 474.45C.

122 Schedule 2, item 6.

123 Explanatory memorandum, p. 62.

violent extremist material.<sup>124</sup> A maximum penalty of five years imprisonment would apply to these offences.

1.77 There would be several defences available in respect of the offences, including, for example, that the material relates to a news report or current affairs report that is in the public interest and was made by a professional journalist; the conduct is necessary for, or of assistance in, conducting scientific, medical, academic or historical research and the conduct is reasonable in the circumstances; or the conduct relates to the development, performance, exhibition or distribution, in good faith, of an artistic work.<sup>125</sup>

1.78 In relation to proceedings for an offence relating to violent extremist material involving a child, that is, a defendant under 18 years of age, proceedings must not be commenced without the Attorney-General's consent.<sup>126</sup> However, a child may be arrested for, charged with, or remanded in custody or on bail<sup>127</sup> in connection with an offence before the necessary consent has been given.<sup>128</sup>

1.79 Further, the bill seeks to expand the definition of 'terrorism offence' to include these new offences relating to the use of a carriage service for violent extremist material.<sup>129</sup> There are a number of implications of classifying these new offences as terrorism offences, including that the Australian Federal Police would have access to control orders under Division 104 of the Criminal Code to prevent or

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124 Schedule 2, item 3. Subsections 474.45B(2) and (3) clarify that intention is the fault element that applies to the action and recklessness is the fault element that applies to the material being violent extremist material, and absolute liability applies to the element that the person uses a carriage service. Subsections 474.45C(2)–(4) provide that intention is the fault element for possessing or controlling material; recklessness is the fault element for the type of material; strict liability applies to storing material and absolute liability applies to how the material was obtained. Subsection 474.45C(5) provides that if the prosecution proves possession or control of violent extremist material in the form of computer data, a presumption applies that the person used the carriage service to obtain or access the material, unless the defendant proves to the contrary. The defendant would bear the legal burden to rebut the presumption. The statement of compatibility notes that this provision engages the right to presumption of innocence but that this aspect of the offence is a jurisdictional element (to ensure the Commonwealth has constitutional capacity to legislate) and does not relate to the substance of the offence, pp. 10–11. Noting this explanation, and the likelihood that the [Senate Standing Committee for the Scrutiny of Bills](#) is likely to raise concerns regarding the reversal of legal burden this report entry makes no comment on this aspect of the offence.

125 Schedule 2, item 3, new section 474.45D. The defendant would bear an evidential burden in relation to the defences.

126 Schedule 2, item 3, new subsection 474.45E(1).

127 Although it is noted that there would be a presumption against bail with respect to this offence, see *Crimes Act 1914*, section 15AA, as discussed below.

128 Schedule 2, item 3, new subsection 474.45E(2).

129 Schedule 2, items 1 and 2.

respond to the commission of these offences, and advocating the commission of either of these offences would constitute an offence under section 80.2C (advocating terrorism) of the Criminal Code.<sup>130</sup>

### **Preliminary international human rights legal advice**

#### ***Right to life, right to security of person and prohibition against inciting national, racial or religious hatred***

1.80 To the extent that criminalising conduct relating to the possession, use and sharing of violent extremist material may deter and prevent terrorist-related conduct and violence, the measure could promote a number of human rights, including the rights to life and security of person and the prohibition against inciting national, racial or religious hatred (as set out above in paragraphs [1.35] to [1.39]).<sup>131</sup>

1.81 The statement of compatibility states that the rights to life and security of person are promoted by establishing new criminal offences to deter and prevent terrorist-related conduct and by enhancing the capabilities of law enforcement agencies to manage the risk posed by those seeking to radicalise others and mobilise vulnerable Australians to violence.<sup>132</sup> It states that violent extremist material may depict actions and advocate beliefs that undermine the rights to life and security of person, such as beheading videos and written guides on how to cause physical harm to a person. It notes that such material plays a role in radicalising individuals to violent extremism and terrorism, and such individuals may carry out acts which risk lives and physical security.<sup>133</sup>

1.82 The statement of compatibility states that the right to be free from racial and religious discrimination and hatred would be promoted by preventing members of the community from experiencing discrimination, hatred, violence and racism through exposure to violent extremist material.<sup>134</sup> It notes that violent extremist material often encourages or incites a person to coerce or influence others through violence or threats of violence, and this is often based on national, racial or religious grounds.<sup>135</sup> By criminalising the use of a carriage service to deal with such material, the statement of compatibility states that it would make it more difficult for

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130 Explanatory memorandum, p. 50.

131 International Covenant on Civil and Political Rights, articles 6 (right to life), 9 (right to security of person), 20 (prohibition against racial and religious discrimination and hatred) and 26 (right to equality and non-discrimination); Convention on the Elimination of All Forms of Racial Discrimination, article 4.

132 Statement of compatibility, p. 7.

133 Statement of compatibility, p. 8.

134 Statement of compatibility, p. 19.

135 Statement of compatibility, p. 19.

discriminatory and hateful ideas to be developed, circulated and gain additional support.<sup>136</sup>

### ***Rights to freedom of expression and rights of the child***

1.83 By criminalising the use of a carriage service to, among other things, access, obtain, share, possess and control certain material, the measure engages and limits the right to freedom of expression, which includes freedom to seek, receive and impart information and ideas (as set out in paragraphs [1.40] and [1.41]).<sup>137</sup> This is acknowledged in the statement of compatibility.<sup>138</sup> Additionally, as the offences would apply to children, the measure would engage and limit the rights of the child (as set out in paragraphs [1.42] and [1.43]).<sup>139</sup> These rights may generally 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.

#### *Legitimate objective and rational connection*

1.84 The statement of compatibility states that the general objectives pursued by the measure are to protect national security, public order and the rights and freedoms of others.<sup>140</sup> It states that the measure seeks to prevent the use of extremist material to encourage and instruct individuals in the commission of violent acts and radicalise vulnerable individuals to violent extremist ideologies.<sup>141</sup> It notes that the offences seek to disrupt the radicalisation process before individuals are incited to commit violence in the community.<sup>142</sup>

1.85 The stated objectives are capable of constituting legitimate objectives for the purposes of international human rights law, noting that restrictions on the right to

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136 Statement of compatibility, p. 19.

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

138 Statement of compatibility, pp. 13–16.

139 The statement of compatibility also states that the measure engages and limits the right to privacy because the new criminal offences relate to conduct potentially undertaken in the private home and would interfere with a person's private life and property: pp. 11–12. The statement of compatibility has sufficiently justified the potential limitation on the right to privacy and as such this issue will not be addressed in this report entry.

140 Statement of compatibility, p. 11.

141 Statement of compatibility, p. 14.

142 Statement of compatibility, p. 11.

freedom of expression may be permitted on the grounds of national security,<sup>143</sup> public order and the rights of others. However, in order to establish whether these are legitimate objectives in the context of this measure, it must also be demonstrated that the measure is necessary and addresses an issue of public or social concern that is pressing and substantial enough to warrant limiting rights. In this regard, it is relevant to consider whether the current laws are sufficient to achieve the stated objectives. The explanatory memorandum states that the measure seeks to address a gap in the offence regime in the *Criminal Code Act 1995*. In particular, it states:

Existing offences criminalise the possession of things connected with terrorist acts (section 101.4), and collecting or making documents likely to facilitate terrorist acts (section 101.5). These provisions attach criminality to the circumstances in which material is possessed, however there is currently no Commonwealth offence that attaches criminality to the nature of material possessed or dealt with. These existing offences also require a connection to a terrorist act, which means law enforcement may be unable to intervene at an earlier stage.

The current legislative regime dealing with abhorrent violent material in the Criminal Code (Subdivision H) targets persons or companies who provide content services or hosting services (as opposed to any person who uses such a service), who fail to expeditiously remove, or cease to host, that material. The new offences in Subdivision HA would target individuals who deal with violent extremist material.<sup>144</sup>

1.86 The explanatory memorandum states that the new offences would facilitate law enforcement intervention at an earlier stage in an individual's progression to violent radicalisation and provide greater opportunity for the disruption of violent extremist networks.

1.87 While the statement of compatibility provides some information regarding the necessity of the measure and the pressing and substantial concern which the measure seeks to address, questions remain as to whether it is necessary to criminalise all the circumstances that these proposed offences may apply to. The explanatory material states that attaching criminality to the nature of the material possessed is important to reflect the harm that is inherent in violent extremist

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143 Extreme care must be taken by States parties to ensure that treason laws and similar provisions relating to national security are crafted and applied in a manner that conforms to the strict requirements of article 19(3) of the International Covenant on Civil and Political Rights. It is not compatible with paragraph 3, for instance, to invoke such laws to suppress or withhold from the public information of legitimate public interest that does not harm national security or to prosecute journalists, researchers, environmental activists, human rights defenders, or others, for having disseminated such information. See UN Human Rights Committee, *General Comment No. 34: Article 19: Freedoms of Opinion and Expression* (2011) [30].

144 Explanatory memorandum, p. 51.

material insofar as it facilitates radicalisation and may encourage and assist in planning violent acts. Such acts can threaten public safety and Australia's core values and principles, and adversely affect social cohesion.<sup>145</sup> However, this assumes that all material that constitutes violent extremist material is in fact of such a nature as to be likely to facilitate violent radicalisation and the planning of violent acts. As discussed further below (at paragraphs [1.88] and [1.89]), the definition of 'violent extremist material' is broad and encompasses acts that cause harm to persons as well as serious damage to property or serious interference with, or disruption to, various electronic systems, including transport and financial systems. It could include, for example, material that describes the serious interference with a financial system of a foreign country by a foreign organisation seeking to advance its political cause and encourage others to associate with it. It is therefore not clear that all material potentially captured by this offence would in fact be of such a nature as to justify prohibition on the grounds of national security, public order or the rights of others.

### *Proportionality*

1.88 A key factor in assessing proportionality is whether the proposed limitations are sufficiently circumscribed. The breadth of the measure, including the forms of expression that would be restricted, is relevant in this regard. The bill seeks to prohibit 'violent extremist material', which among other things, would describe or depict, provide instruction on engaging in, or support or facilitate 'serious violence'. As outlined above (in paragraph [1.74]), 'serious violence' captures a broad range of acts, including material that describes serious damage to property, the serious interference with a financial system or the serious disruption of a transport system. The explanatory memorandum states that the term 'material' includes material in any form or combination of forms, capable of constituting a communication, including text, audio, visual or audio-visual material, such as text or internet-based messages, content on social media applications, email, radio or online chat forums.<sup>146</sup> The explanatory memorandum states that the material captured is intended to be 'extremist', including material that espouses or promotes extreme ideas, beliefs and attitudes and may be used to radicalise others to a particular ideology.<sup>147</sup> The explanatory memorandum states that the term 'serious violence', which uses the existing definition of 'terrorist act', has been defined in this way to ensure that violent extremist material includes only material that deals with conduct so serious as to engender public harm purely through its possession or distribution.<sup>148</sup> The explanatory memorandum gives examples of material that may be captured as including images and videos depicting terrorist incidents such as violent extremist manifestos and propaganda; and instructional material covering

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145 Explanatory memorandum, p. 51.

146 Explanatory memorandum, pp. 52 and 56.

147 Explanatory memorandum, p. 52.

148 Explanatory memorandum, p. 53.

topics such as how to build a bomb, attack a person, or manufacture harmful chemicals.<sup>149</sup>

1.89 Notwithstanding statements in the explanatory memorandum that the offences are intended to only capture material of an 'extremist character', as currently drafted the measure would encompass a considerably wider range of material, including material that arguably falls outside of the ordinary meanings of 'violent' and 'extremist'.<sup>150</sup> It is noted there are many political regimes that may be characterised as oppressive and non-democratic, and people may hold different opinions as to the desirability or legitimacy of such regimes. Accessing material that depicts the advocacy of regime change or the planning of civil disobedience or acts of political protest, even if possibly contentious or extreme, may therefore be captured by the proposed offences. For example, it appears that the following actions may subject a person to criminal liability for the offence of using a carriage service for violence extremist material, punishable by up to five years' imprisonment:

- accessing a blog post written by a member of a Ukrainian citizen army who describes the serious disruption of electronic systems used for or by the Russian army with the intention of advancing the political cause of Ukrainian independence from Russia and encouraging persons to associate with their organisation, which assists in the intimidation of the Russian government;
- sharing a link on social media of footage of protestors in Iran depicting serious damage to government property that is intended to advance the political cause of the protestors and the footage is intended to encourage others to associate with the organisation the protestors are part of;
- possessing on a computer an article written by a member of the Provisional Irish Republican Army (IRA) from the 1970s that describes violent actions by the IRA, where the article was intended to advance the IRA's political cause and encourage others to join the IRA – in circumstances where the person possessing the article downloaded it onto their computer before these

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149 Explanatory memorandum, p. 55.

150 The [Oxford English Dictionary](#) defines '[violent](#)' as an 'action, behaviour etc characterized by the doing of deliberate harm or damage; carried out or accomplished using physical violence; (law) involving an unlawful exercise or exhibition of force'; 'characterized by the prevalence of physical violence; involving, depicting, or notable for acts of violence; and 'of a person: using or disposed to use physical force or violence, esp. in order to injure or intimidate; committing harm or damage in this way'. '[Extremist](#)' is defined as 'a person who tends to go to the extreme; [especially] a person who holds extreme political or religious views, or who advocates illegal, violent, or other extreme measures' or of 'relating to extremists or extremism; having or characterized by extreme political views, or advocacy of illegal, violent, or other extreme measures'.



offence provisions commenced<sup>151</sup> and did so for personal interest (rather than academic or historical research).<sup>152</sup>

1.90 Further, the fault element of recklessness applies to whether the material is violent extremist material. A person is reckless if they are aware of a substantial risk that the circumstance exists (in this case, that certain material is violent extremist material), or will exist, and having regard to the circumstances known to them, it is unjustifiable to take the risk.<sup>153</sup> The explanatory memorandum notes that by operation of the fault element of recklessness, a person who accidentally comes across violent extremist material on the internet without any warning from the context would not be caught by the offence, because they would not have been reckless as to the nature of the material.<sup>154</sup> However, given the breadth of material covered by the offences and the fact that such material does not necessarily align with the ordinary meaning of the phrases 'violent' and 'extremist' (such as, for example, being unaware that accessing citizen-journalist footage of Ukrainians fighting back against Russian forces would constitute violent extremist material), there may be a risk that the threshold for satisfying this fault element is reasonably low in practice.

1.91 Additionally, the circumstances in which dealing with such material would be prohibited are broad. Indeed, the explanatory memorandum states that the offences are intended to cover a broad range of activities that a person could undertake in relation to violent extremist material, such as sending an electronic link that can be used to access the material.<sup>155</sup> It would include making the material available, which is defined in the Criminal Code as including, but not limited to, describing how to obtain access, or describing methods that are likely to facilitate access, to the material. For example, it would include setting out the name of a website, a password or the name of a newsgroup.<sup>156</sup> The explanatory memorandum states that other key terms in the measure would take on their ordinary meaning.<sup>157</sup> The ordinary meaning of the term 'accesses', for instance, is to obtain, to acquire, to get hold of, to retrieve data or a file, or to gain access to a system or network.<sup>158</sup> It is not clear, however, if this would include circumstances where a person views violent

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151 See Schedule 2, item 6, which provides that it does not matter whether the person obtained or accessed the material before the commencement of the provision.

152 Noting that the defences in proposed section 474.45D only apply to conducting scientific, medical, academic or historical research, and not mere personal interest.

153 *Criminal Code Act 1995*, section 5.4.

154 Explanatory memorandum, p. 56.

155 Explanatory memorandum, p. 56.

156 Explanatory memorandum, p. 56.

157 Explanatory memorandum, p. 56.

158 See [Oxford English Dictionary](#).

extremist material on a social media platform, in a situation where the material automatically appears on a person's feed, or a person views material as a result of searching for news content with respect to a violent situation overseas, such as the war in Ukraine. With respect to possessing or controlling such material, the explanatory memorandum states that the scope of the offence would include control of violent extremist material in the form of data, including material stored in remote data storage, such as cloud hosting, that may be physically located in Australia or overseas.<sup>159</sup>

1.92 The broad scope of expression captured by the offences and the wide range of circumstances in which such expression would be prohibited therefore raises significant questions as to whether the measure is sufficiently circumscribed. The breadth of the measure also raises concerns regarding the extent of potential interference with rights, noting that the greater the interference, the less likely the measure is to be considered proportionate. Other factors that may exacerbate the potential interference with rights include the retrospective effect of the measure, insofar as it would not matter whether the person obtained or accessed the material using a carriage service before, on or after the commencement of the relevant offence provision.<sup>160</sup> In addition, the new offences are to be defined as terrorism offences, meaning that police may issue control orders against a person convicted of these offences. It is noted that the Parliamentary Joint Committee on Human Rights has previously raised concerns regarding the likely incompatibility of the control order regime with multiple rights.<sup>161</sup> The fact that the new offences are to be defined as terrorism offences also means that advocating the commission of the offences (e.g. 'share this link to support Ukraine's fight against Russia') may constitute the offence of advocating terrorism (discussed further below from paragraph [1.98]).

1.93 As to the existence of safeguards, the statement of compatibility states that the defences (as outlined in paragraph [1.77]) to the offences would ensure that limitations on the right to freedom of expression are proportionate.<sup>162</sup> The inclusion of express defences to the offences would operate as a safeguard, although questions arise as to whether this safeguard would be adequate in all circumstances. For example, with respect to the journalist defence, the requirement that journalists must be working in a professional capacity may operate to exclude good faith citizen or independent journalists, raising questions as to whether the scope of this defence is too narrow. Further, the defence where the conduct is of 'scientific, academic or historical research' is unclear. The explanatory memorandum gives the example of

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159 Explanatory memorandum, p. 57.

160 Schedule 2, item 6.

161 See, e.g. Parliamentary Joint Committee on Human Rights, [Report 10 of 2018](#) (18 September 2019) pp. 21–36; [Report 10 of 2021](#) (25 August 2021) pp. 2–7; [Report 4 of 2022](#) (28 September 2022) pp. 7–11.

162 Statement of compatibility, p. 14.

where material is included in 'academic papers' or research into the use and impact of violent extremist material.<sup>163</sup> As such, it is unclear if someone could satisfy this defence if they were researching a current event out of personal interest but not in the context of formal academic studies.

1.94 Another safeguard in relation to the rights of the child identified in the explanatory memorandum is the requirement that the Attorney-General provide their consent to a prosecution of a child for offences relating to the use of violent extremist material.<sup>164</sup> It states that this would allow the Attorney-General to consider the appropriateness of a prosecution having considered the circumstances of the case, including the context of the conduct, the circumstances of the child, and the need to protect the broader community from the impacts of violent extremist material.<sup>165</sup> While this safeguard may assist with proportionality, it is noted that a child may still be arrested and remanded in custody in connection with an offence before the necessary consent has been given.<sup>166</sup> As outlined above (in paragraph [1.43]), exposing children to the criminal justice system causes significant harm and detention, including pre-trial detention, should be a last resort and for the shortest time possible. The UN Committee on the Rights of the Child has stated that '[p]retrial detention should not be used except in the most serious cases, and even then only after community placement has been carefully considered'.<sup>167</sup> As a consequence of classifying the new offences as terrorism offences, there would be a presumption against bail unless exceptional circumstances are established to justify bail.<sup>168</sup> In determining whether exceptional circumstances exist to justify granting bail to a child, the bail authority must have regard to the protection of the community as the paramount consideration; and the best interests of the person as a primary consideration.<sup>169</sup> Prioritising the protection of the community above the best interests of the child does not appear to be compatible with Australia's obligation to ensure that, in all actions concerning children, the best interests of the child are a primary consideration, meaning 'the child's best interests may not be considered on the same level as all other considerations'.<sup>170</sup> Thus, requiring the Attorney-General's

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163 Explanatory memorandum, p. 60.

164 Explanatory memorandum, p. 62.

165 Explanatory memorandum, p. 62.

166 Schedule 2, item 3, new subsection 474.45E(2).

167 Committee on the Rights of the Child, *General Comment No. 24 (2019) on children's rights in the child justice system* (2019) [86].

168 *Crimes Act 1914*, section 15AA.

169 *Crimes Act 1914*, subsection 15AA(3AA).

170 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); see also *IAM v Denmark*, UN Committee on the Rights of the Child Communication No.3/2016 (2018) [11.8].

consent prior to commencing prosecution does not appear to operate as a sufficient safeguard with respect to the rights of the child.

1.95 Further, as discussed above (in paragraphs [1.68] and [1.69]), it is not clear that the measure would pursue the least rights restrictive approach with respect to the rights of the child, noting the position under international human rights law that states should implement non-judicial alternatives to prosecution and detention of children accused of, and charged with, terrorism offences, and increase the age of criminal responsibility to at least 14 years of age.<sup>171</sup>

### **Committee view**

1.96 The committee notes that to the extent that criminalising conduct relating to the use of a carriage service for violent extremist material would deter and prevent terrorist-related conduct and violence, the measure could promote a number of human rights. However, the committee also notes that by criminalising the use of a carriage service to, among other things, access, obtain, share, possess and control certain material, the measure would engage and limit the right to freedom of expression. As the offences would apply to children, the measure would engage and limit the rights of the child.

1.97 The committee is concerned that these proposed new offences could capture conduct that does not appear to be illegitimate (for example, criminalising a person accessing material via social media of footage of protestors overseas taking action to overthrow unlawful regimes). As such, the committee considers further information is required to assess the compatibility of this measure with these rights, and seeks the Attorney-General's advice in relation to:

- (a) whether a person would be likely to be found guilty of an offence in the following circumstances:
  - (i) accessing a blog post written by a member of a Ukrainian citizen army who describes the serious disruption of electronic systems used by the Russian army, with the intention of advancing the political cause of Ukrainian independence from Russia and encouraging persons to associate with their organisation, which assists in the intimidation of the Russian government;
  - (ii) sharing a link on social media of footage of protestors in Iran depicting serious damage to government property that is intended to advance the political cause of the protestors and the footage is intended to encourage others to associate with the organisation the protestors are part of;

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171 Committee on the Rights of the Child, *General Comment No. 24 (2019) on children's rights in the child justice system* (2019) [100]. At [101], the Committee urged States parties to 'refrain from charging and prosecuting [children] for expressions of opinion or for mere association with a non-State armed group, including those designated as terrorist groups'.

- (iii) possessing on a computer an article written by a member of the Provisional Irish Republican Army (IRA) from the 1970s that describes violent actions by the IRA, where the article was intended to advance the IRA's political cause and encourage others to join the IRA – in circumstances where the person possessing the article downloaded it onto their computer before these offence provisions commenced and did so for personal interest (rather than academic or historical research)
- (b) whether a person would be considered to have 'accessed' violent extremist material in the following situations:
  - (i) where a person views violent extremist material on a social media platform, in a situation where the material automatically appears on a person's feed; and
  - (ii) where a person views material (that is not an official news source) as a result of searching for news content with respect to an unfolding situation overseas, such as the war in Ukraine;
- (c) why it is necessary for the definition of 'serious violence' in the context of the new offences to encompass all acts that currently constitute a terrorist act, noting that some acts would not fall within the ordinary meanings of 'violent' and 'extremist', such as serious electronic interference with financial systems;
- (d) whether viewing or sharing material relating to the advocacy of regime change or the planning of civil disobedience or acts of political protest, even if possibly contentious or extreme, would be captured by the proposed offences;
- (e) with respect to the journalist defence, why is it necessary to exclude citizen or independent journalists working in good faith but not strictly in a professional capacity;
- (f) with respect to the defence of action done for 'scientific, academic or historical research', would this apply to people conducting research in a non-professional context but out of personal interest;
- (g) what other safeguards beyond the defences to the offences are in place to ensure the proposed offences do not unduly restrict a person's right to freedom of expression;
- (h) what other, less rights restrictive approaches have been considered and why are they not appropriate to achieve the stated objectives; and
- (i) why is it appropriate to subject children to criminal liability with respect to the offences relating to the use of a carriage service for violent extremist material, noting the position under international human rights law that non-judicial alternatives should be implemented, and

the minimum age of criminal responsibility should be at least 14 years of age.

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## Expanding the offence of advocating terrorism

1.98 The bill seeks to expand the existing offence of advocating terrorism<sup>172</sup> and increase the applicable penalty from five to up to seven years imprisonment.<sup>173</sup> Currently, under section 80.2C of the Criminal Code, a person commits an offence if they advocate the doing of a terrorist act or the commission of a terrorism offence, and they engage in that conduct reckless as to whether another person will engage in a terrorist act or commit a terrorism offence.<sup>174</sup> A person advocates the doing of a terrorist act or the commission of a terrorism offence if they counsel, promote, encourage or urge the doing of a terrorist act or the commission of a terrorism offence.<sup>175</sup> This bill seeks to expand this definition of 'advocates' to include additional conduct that would constitute advocating a terrorist act. In particular, it would add: providing instruction on the doing of a terrorist act or the commission of a terrorism offence; or praising the doing of a terrorist act or the commission of a terrorism offence in circumstances where there is a substantial risk that such praise might lead other persons to commit terrorist acts or offences.<sup>176</sup>

## Preliminary international human rights legal advice

### *Rights to life and security of person*

1.99 To the extent that broadening the offence of advocating terrorism would deter and prevent terrorist acts and offences, the measure could promote the rights to life and security of person (as set out above in paragraphs [1.35]).<sup>177</sup> The statement of compatibility states that the measure would promote these rights by criminalising conduct that instructs on, or engenders a substantial risk that a person

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172 *Criminal Code Act 1995*, section 80.2C.

173 The maximum period of imprisonment would be for seven years or for the maximum term of imprisonment for the terrorism offence advocated if it is less than seven years. Schedule 3, items 1 and 2. Subsection 80.2C(2) of the *Criminal Code Act 1995* provides that the offence of advocating terrorism applies to terrorism offences that are punishable on conviction by imprisonment for five years or more and the offence is not one that is specified in paragraph 80.2C(2)(b).

174 *Criminal Code Act 1995*, subsection 80.2C(1).

175 *Criminal Code Act 1995*, subsection 80.2C(3).

176 Schedule 3, item 2.

177 International Covenant on Civil and Political Rights, articles 6 (right to life) and 9 (right to security of person).

might be led to engage in, an action which could cause a person's death or endanger a person's life.<sup>178</sup>

### ***Right to freedom of expression and rights of the child***

1.100 By criminalising certain forms of expression, including praising the doing of a terrorist act or offence, the measure would engage and limit the right to freedom of expression, which includes freedom to seek, receive and impart information and ideas (as set out in paragraphs [1.40] and [1.41]).<sup>179</sup> This is acknowledged in the statement of compatibility.<sup>180</sup> Additionally, as the new offences would apply to children, the measures would engage and limit the rights of the child (as set out in paragraphs [1.42] and [1.43]). The statement of compatibility does not provide an assessment as to the compatibility of the measure with the rights of the child.

1.101 These rights may generally 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.

#### *Legitimate objective and rational connection*

1.102 The statement of compatibility states that the measure serves the objective of preventing the commission of terrorist acts or offences. It notes advice from law enforcement and intelligence agencies that glorification of terrorism online has an impact on radicalising Australians, particularly youth, to violence.<sup>181</sup>

1.103 The general objective of preventing terrorism is capable of constituting a legitimate objective for the purposes of international human rights law, and criminalising the instruction and praising of a terrorist act or offence may be effective to achieve this objective. However, it must also be demonstrated that the measure is necessary to achieve the legitimate objective.<sup>182</sup> The explanatory memorandum states that the glorification of terrorism and violent extremism through praise has been of increasing concern to Commonwealth law enforcement and intelligence agencies in recent years, particularly in relation to young people online.<sup>183</sup> It notes that following the March 2019 Christchurch mosque shooting, numerous individuals used the internet to share video footage of the atrocity, and the perpetrator's manifesto – idealising the perpetrator and his actions and ideologies. The explanatory memorandum states that the inclusion of praising terrorism in the offence recognises that conduct of this nature could lead a person to engage in

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178 Statement of compatibility, p. 8.

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

180 Statement of compatibility, pp. 13–16.

181 Statement of compatibility, p. 15.

182 UN Human Rights Committee, *General Comment No.34: Article 19: Freedoms of Opinion and Expression* (2011) [33].

183 Explanatory memorandum, p. 64.

terrorism, and where it occurs in circumstances where there is a substantial risk of this, it is justifiably criminal.<sup>184</sup>

1.104 While the explanatory materials have articulated the substantial public concern that the measure seeks to address, it is not clear why existing legislation is inadequate to address this concern. In particular, there appear to be existing provisions in the Criminal Code that may capture the kind of conduct sought to be criminalised by this measure. For example, it is currently an offence to urge violence against the Commonwealth, a State or a Territory or an authority of the Commonwealth government; or a targeted group or a person of a targeted group distinguished by their race, religion, nationality, national or ethnic origin or political opinion.<sup>185</sup> There are also various offences relating to the provision and receipt of training in connection with the planning of a terrorist act or in connection with a terrorist organisation, as well as other offences relating to the planning or preparation for a terrorist act.<sup>186</sup> These existing offences may capture conduct relating to providing instruction on, or praising, terrorism.

1.105 Further, it is not clear why the existing definition of 'advocates' is insufficient, as arguably the terms 'counsels, promotes, encourages or urges' could encompass the instruction on, or the praising of, the doing of a terrorist act or the commission of a terrorism offence. The explanatory memorandum accompanying the bill that first introduced the offence of advocating terrorism explained that the expressions counselling, promoting, encouraging or urging have their ordinary meaning and should be interpreted broadly.<sup>187</sup> Further information is therefore required to demonstrate why the measure is necessary in light of existing offences that appear to capture the conduct sought to be criminalised.

### *Proportionality*

1.106 A key consideration in assessing proportionality is whether the measure is sufficiently circumscribed. This requires consideration of the breadth of the measure.

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184 Explanatory memorandum, p. 64.

185 *Criminal Code Act 1995*, sections 80.2–80.2B.

186 Section 101.2 of the *Criminal Code Act 1995* makes it an offence for a person to provide or receive training in connection with the preparation for, or engagement or assistance in, a terrorist act. Section 101.6 makes it an offence for a person to do any act in preparation of, or planning, a terrorist act. Section 102.5 makes it an offence for a person to intentionally provide training to, receive training from, or participate in training with, a terrorist organisation.

187 Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014, explanatory memorandum, [721]. The explanatory memorandum stated: 'some examples of the ordinary meaning of each of the expressions follow: to 'counsel' the doing of an act (when used as a verb) is to urge the doing or adoption of the action or to recommend doing the action; to 'encourage' means to inspire or stimulate by assistance of approval; to 'promote' means to advance, further or launch; and 'urge' covers pressing by persuasion or recommendation, insisting on, pushing along and exerting a driving or impelling force'.



The explanatory memorandum states that the terms 'instruction' and 'praises' are intentionally not defined in the bill and should take their ordinary meaning.<sup>188</sup> As to whether 'praise' has occurred in circumstances where there is a substantial risk that it might lead to another person committing terrorism, the explanatory memorandum states that it is a matter to be considered on a case-by-case basis and the legislation is intentionally silent on how this is to be determined to give the court maximum discretion in making this assessment.<sup>189</sup>

1.107 As currently drafted, the proposed definition of 'advocates' is very broad, as it encompasses a wide range of conduct and there is no clear legislative guidance as to how key terms, such as 'praises', are to be interpreted. It is also noted that the actions to which the conduct of praising etc would relate, namely actions constituting a terrorist act or terrorism offence, are also very broad, including, for example, causing serious property damage and seriously disrupting an electronic information system (as set out above in paragraph [1.74]).<sup>190</sup> As such, there may be a risk that the scope of expression restricted by the measure is overly broad. This is of particular concern when noting the UN Human Rights Committee's advice in the context of counter-terrorism measures that:

Such offences as "encouragement of terrorism" and "extremist activity" as well as offences of "praising", "glorifying", or "justifying" terrorism, should be clearly defined to ensure that they do not lead to unnecessary or disproportionate interference with freedom of expression. Excessive restrictions on access to information must also be avoided.<sup>191</sup>

1.108 It is also noted that the Parliamentary Joint Committee on Human Rights raised concerns regarding the breadth of the original offence of advocating terrorism when it was first introduced.<sup>192</sup> In particular, concerns were raised that the offence is overly broad in its application and may result in the criminalisation of speech and expression that does not genuinely advocate the commission of a terrorist act or terrorism offence. This is because the offence itself requires only that a person is 'reckless' as to whether their words will cause another person to engage in terrorism (rather than the person 'intends' that this be the case). Given the measure in this bill

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188 Explanatory memorandum, p. 64.

189 Explanatory memorandum, p. 64.

190 *Criminal Code Act 1995*, subsections 80.2C(2) and (3). Terrorism offence is defined in subsection 3(1) of the *Crimes Act 1914* and terrorist act is defined in section 100.1 of the *Criminal Code Act 1995*.

191 UN Human Rights Committee, *General Comment No. 34, Article 19: Freedoms of opinion and expression* (2011) [46].

192 Parliamentary Joint Committee on Human Rights, [Fourteenth Report of the 44<sup>th</sup> Parliament](#), Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014 (28 October 2014) pp. 50–52.

expands the forms of expression that may be captured by this offence, these concerns remain relevant.

1.109 The primary safeguard identified in the statement of compatibility is the 'substantial risk' qualifier, that is, the praising of terrorism will only constitute an offence if there is a substantial risk that such praise *might* have the effect of leading another person to engage in a terrorist act or to commit a terrorism offence.<sup>193</sup> The statement of compatibility states that this qualifier would assist with proportionality as where there is no such substantial risk, the praising of a terrorist act and offence would not be criminalised.<sup>194</sup> However, it is not clear how 'substantial risk' is to be interpreted and the inclusion of the term 'might' suggests that the threshold for establishing whether praise would lead another person to engage in terrorism may not be particularly high. The explanatory materials do not identify any other safeguards accompanying the measure. As such, it is not clear that the 'substantial risk' qualifier alone would be a sufficient safeguard.

1.110 Further, as discussed above (in paragraphs [1.68] and [1.69]), it is not clear that the measure would pursue the least rights restrictive approach with respect to the rights of the child, noting the position under international human rights law that states should implement non-judicial alternatives to prosecution and detention of children accused of, and charged with, terrorism offences, and increase the age of criminal responsibility to at least 14 years of age.<sup>195</sup>

### **Committee view**

1.111 The committee notes that expanding the existing offence of advocating terrorism may promote human rights, including the rights to life and security of person, to the extent that it would prevent terrorist-related conduct and violence. However, the committee also notes that the measure would expand the scope of expression that would be restricted and so would engage and limit the right to freedom of expression, and as the offences would apply to children, the measure would also engage and limit the rights of the child.

1.112 The committee considers that while the measure generally pursues the important aim of preventing terrorism, it is not clear why existing legislation is insufficient to achieve this objective and whether the measure represents a proportionate limitation on the right to freedom of expression and the rights of the child. Further information is therefore required to assess the compatibility of this

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193 Statement of compatibility, p. 15; explanatory memorandum, p. 64.

194 Statement of compatibility, p. 15.

195 Committee on the Rights of the Child, *General Comment No. 24 (2019) on children's rights in the child justice system* (2019) [100]. At [101], the Committee urged States parties to 'refrain from charging and prosecuting [children] for expressions of opinion or for mere association with a non-State armed group, including those designated as terrorist groups'.

measure with these rights, and as such the committee seeks the Attorney-General's advice in relation to:

- (a) why the measure is necessary and in particular, why the existing legislation is insufficient to achieve the stated objective, noting that there are a number of existing offences in the Criminal Code that appear to capture the conduct sought to be criminalised by the measure;
- (b) whether there will be any guidance provided with respect to the interpretation of key terms in the measure, including 'instruction', 'praises' and whether there is a 'substantial risk that such praise might have the effect of leading another person to engage in a terrorist act or commit a terrorism offence';
- (c) what other safeguards exist to ensure the measure does not unduly restrict a person's right to freedom of expression;
- (d) what other, less rights restrictive approaches have been considered and why are they not appropriate to achieve the stated objectives; and
- (e) how the measure is compatible with the rights of the child, noting that the statement of compatibility does not provide an assessment with respect to these rights.

## Intelligence Services Legislation Amendment Bill 2023<sup>1</sup>

<b>Purpose</b>	<p>The bill seeks to amend the <i>Intelligence Services Act 2001</i>, <i>Inspector-General of Intelligence and Security Act 1986</i> and other legislation for a number of purposes.</p> <p>Schedule 1 would expand the oversight jurisdictions of the Inspector-General of Intelligence and Security, and the Parliamentary Joint Committee on Intelligence and Security to include: the Australian Criminal Intelligence Commission, Australian Federal Police, Australian Transaction Reports and Analysis Centre, and Home Affairs.</p> <p>Schedule 2 would make a series of amendments consequential to this proposed expanded oversight jurisdiction.</p> <p>Schedule 3 would designate Australian Criminal Intelligence Commission records relating to a criminal intelligence assessment as exempt security records for the purposes of the <i>Administrative Appeals Tribunal Act 1975</i>.</p> <p>Schedule 4 would amend the <i>Criminal Code Act 1995</i> to introduce an exemption from certain civil and criminal liability for defence officials.</p> <p>Schedule 5 would make several application and transitional amendments.</p>
<b>Portfolio</b>	Attorney-General
<b>Introduced</b>	House of Representatives, 22 June 2023
<b>Rights</b>	Privacy, effective remedy

### Exemption from civil and criminal liability for defence officials and others

1.113 This bill seeks to amend 21 Acts to make a range of amendments, many of which relate to expanding the oversight powers of the Inspector-General of Intelligence and Security and the Parliamentary Joint Committee on Intelligence and Security. The committee makes no comment on these broader measures, but focuses on Schedule 4. Schedule 4 seeks to amend the *Criminal Code Act 1995* (Criminal Code) to exempt defence officials from civil and criminal liability for certain 'computer related conduct'.<sup>2</sup>

1 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Intelligence Services Legislation Amendment Bill 2023, *Report 8 of 2023*; [2023] AUPJCHR 72.

2 Schedule 4, item 4, proposed section 476.7.

1.114 Computer related conduct would be defined to mean a range of acts, events, circumstances or results involving the use of computers.<sup>3</sup>

1.115 Proposed subsection 476.7(1) provides that a defence official would not be liable for engaging in conduct inside or outside Australia where there was a reasonable belief that it is likely to cause a computer-related act, event, circumstance or result to take place outside Australia (whether or not it in fact takes place outside Australia). Proposed subsection 476.7(6) states that if this conduct causes material damage, interference or obstruction to a computer in Australia, and would otherwise constitute an offence against Part 10.7 of the Criminal Code, the person must provide written notice of the fact to the Australian Defence Force (ADF) as soon as practicable. The explanatory materials state that this proposed measure would ensure that the ADF can use offensive and defensive cyber capabilities for activities connected with the defence and security of Australia, as required as part of modern warfare.<sup>4</sup> As to the type of conduct that may constitute computer-related conduct in this context, the explanatory memorandum states that this may include 'routine activities such as computer intelligence gathering and exploitation'.<sup>5</sup>

1.116 'Defence official' refers to a wide range of persons, and would include a member of the ADF, a defence civilian, an employee of the Department of Defence, a consultant or contractor to the department, or any other person specified in a class of persons by the secretary or Chief of the ADF by legislative instrument.<sup>6</sup>

1.117 Proposed subsection 476.7(2) would further provide an exemption from civil or criminal liability for people who engage in activities, inside or outside Australia, that are preparatory to, in support of, or otherwise directly connected to overseas computer-related activities.<sup>7</sup>

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3 Schedule 4, item 1, proposed amendment to subsection 476.1(1) would insert a definition of 'computer related conduct'. Computer related conduct means an act, event, circumstance or result involving: the reliability, security or operation of a computer; access to, or modification of, data held in a computer or on a data storage device; electronic communication to or from a computer; the reliability, security or operation of any data held in or on a computer, computer disk, credit card, or other data storage device; possession or control of data held in a computer or on a data storage device; or producing, supplying or obtaining data held in a computer or on a data storage device.

4 Statement of compatibility, p. 14, and explanatory memorandum, pp. 159–160.

5 Explanatory memorandum, p. 159.

6 Schedule 4, item 4, proposed subsection 476.7(8).

7 Schedule 4, item 4, proposed subsection 476.7(3) states that this is not intended to permit any conduct in relation to premises, persons, computers, things, or carriage services in Australia being conduct which the Australian Security Intelligence Organisation (ASIO) could not engage with or obtain under specified legislation.

## Preliminary international human rights legal advice

### *Rights to privacy and an effective remedy*

1.118 Exempting persons from civil or criminal liability for computer related conduct engages and may limit the right to an effective remedy, should that conduct result in a breach of the civil and political rights of a person in Australia (such as the right to privacy).

1.119 The statement of compatibility states that these amendments may 'indirectly create a risk that' a person's right to privacy may be violated, including where conduct has inadvertently affected a computer or device inside Australia.<sup>8</sup> This suggests that the exercise (or purported exercise) of this power may result in a limitation of the right to privacy in Australia.<sup>9</sup> It is therefore necessary to consider whether such a limitation on the right to privacy would be permissible should this take place, and whether an affected person would have access to an effective remedy. 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.<sup>10</sup> It prohibits arbitrary and unlawful interferences with an individual's privacy, family, correspondence or home.<sup>11</sup> The right 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. 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 UN Human Rights Committee has stated that legislation must specify in detail the precise circumstances in which interferences with privacy may be permitted.<sup>12</sup>

1.120 The statement of compatibility states why it is necessary to provide exemptions from liability for officials engaging in a computer related act. But it does not explain how enabling officials to engage in such conduct is a permissible limit on the right to privacy (only why they need to be protected from liability). In particular, the explanatory memorandum states that this amendment is intended to address

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8 Statement of compatibility, p. 14.

9 In this regard, it is noted that Schedule 4, item 4, proposed subsection 476.7(2) would exempt 'a person' from liability for conduct preparatory to computer-related conduct (whereas proposed subsection 476.7(1) would exempt a defence official), and so would appear to potentially exempt a far broader range of persons from liability. It may also be that, in practice, computer-related conduct may directly or indirectly limit other rights, as a consequence of a particular breach of the right to privacy, depending on the nature of the conduct and the context.

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

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

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

recommendation 72 of the *Comprehensive Review of the Legal Framework of the National Intelligence Community* by Mr Dennis Richardson AC.<sup>13</sup> However, that review recommended only a limited immunity (applying only to ADF members, limited to immunity from the criminal offences set out in Part 10.7 of the Criminal Code, and applying only to acts done outside of Australia in the course of approved ADF operations and within legally approved rules of engagement). The proposed amendment—which would extend to both civil and criminal liability, apply to any defence official, whether inside or outside Australia, who holds a reasonable belief that their conduct is likely to cause a computer-related act to take place outside Australia—would be much broader than that recommended in the review.

1.121 The right to an effective remedy requires the availability of a remedy which is effective with respect to any violation of rights and freedoms recognised by the International Covenant on Civil and Political Rights.<sup>14</sup> It includes the right to have such a remedy determined by competent judicial, administrative or legislative authorities or by any other competent authority provided for by the legal system of the state. 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.<sup>15</sup>

1.122 The statement of compatibility does not identify that the right to an effective remedy may be engaged in respect of this measure. As such, no information is provided as to whether and how this proposed amendment is consistent with the right, and in particular, whether:

- where the exercise of this power may limit a person in Australia's right to privacy, this would constitute a permissible limitation on the right to privacy, (and whether any other rights may be limited in such circumstances);
- proposed subsection 476.7(2) would exempt a broader range of persons (beyond defence officials) from liability, and if so what persons;
- a person in Australia whose rights have been breached as a result of computer-related conduct by a defence official or other person would be aware of the breach and its cause;

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13 Explanatory memorandum, pp. 159–160.

14 International Covenant on Civil and Political Rights (ICCPR), article 2(3). See, *Kazantzis v Cyprus*, UN Human Rights Committee Communication No. 972/01 (2003) and *Faure v Australia*, UN Human Rights Committee Communication No. 1036/01 (2005), State parties must not only provide remedies for violations of the ICCPR, but must also provide forums in which a person can pursue arguable if unsuccessful claims of violations of the ICCPR. Per *C v Australia* UN Human Rights Committee Communication No. 900/99 (2002), remedies sufficient for the purposes of article 5(2)(b) of the ICCPR must have a binding obligatory effect.

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

- there are alternative remedies that may be available to persons in such circumstances (for example, standing to bring a civil claim against the Commonwealth, or access to a remedy via a regulatory oversight framework);
- safeguards regulating the operation of the immunity exist; and
- independent oversight and review of the operation of this immunity in practice exists.

### **Committee view**

1.123 The committee notes that exempting persons from civil or criminal liability for computer related conduct engages and may limit the right to privacy of a person in Australia, and consequently may also engage the right to an effective remedy.

1.124 The committee notes that the statement of compatibility does not identify the engagement of these rights, and therefore seeks the Attorney-General's advice as to:

- (a) whether, where the exercise of this power limits a person in Australia's right to privacy, this would constitute a permissible limitation on the right to privacy, and whether any other human rights may be limited in such circumstances;
- (b) whether the measure is consistent with the right to an effective remedy; and
- (c) what alternative remedies are available to persons where conduct contemplated by proposed section 476.7 results in a violation of their human rights.



## International Organisations (Privileges and Immunities) Amendment Bill 2023<sup>1</sup>

<b>Purpose</b>	This bill seeks to amend the <i>International Organisations (Privileges and Immunities) Act 1963</i> to provide a legislative basis for the enactment of regulations to: <ul style="list-style-type: none"> <li>• declare an organisation of which Australia is not a member as an international organisation under the Act;</li> <li>• confer privileges and immunities on categories of officials not prescribed in the Act, where requested by an international organisation and agreed to by Australia; and</li> <li>• increase flexibility in granting privileges and immunities to international organisations and connected persons</li> </ul>
<b>Portfolio</b>	Foreign Affairs and Trade
<b>Introduced</b>	Senate, 21 June 2023
<b>Rights</b>	Right of access to courts and tribunals; right to an effective remedy; torture and inhuman treatment

### Extending privileges and immunities

1.125 This bill seeks to amend the *International Organisations (Privileges and Immunities) Act 1963* (the Act) to permit an organisation of which two or more countries other than Australia are members, or that is constituted by two or more persons representing countries other than Australia, to be declared, by way of regulations, to be an international organisation to which the Act applies.<sup>2</sup> This would have the effect of permitting Australia to confer privileges and immunities under the Act on international organisations of which Australia is not a member.<sup>3</sup>

1.126 The bill also seeks to amend the Act to permit the conferral of privileges and immunities under the Act,<sup>4</sup> by way of regulations, on persons connected in a specified way with an international organisation and on persons who have ceased to

1 This entry can be cited as: Parliamentary Joint Committee on Human Rights, *International Organisations (Privileges and Immunities) Amendment Bill 2023, Report 8 of 2023*; [2023] AUPJCHR 73.

2 Schedule 1, item 5.

3 Explanatory memorandum, p. 4.

4 The relevant privileges and immunities are those specified in Parts 1 and 2 of the Second to Fifth Schedules of the *International Organisations (Privileges and Immunities) Act 1963*.

be connected with such an organisation.<sup>5</sup> The effect of this amendment would be to extend immunities and privileges to categories of officials not prescribed in the Act, where requested by an international organisation and agreed to by Australia.<sup>6</sup> The Act allows for the grant of both functional immunity (that is, immunity that attaches to those acts or functions undertaken by an individual in their official capacity as an officer of an international organisation) and personal immunity (that is, an absolute immunity attaching to all acts undertaken in an official or private capacity both before and during office).<sup>7</sup> The Act therefore allows individuals to be conferred with immunity from personal arrest or detention, and from suit and from other legal process.<sup>8</sup>

### **Preliminary international human rights legal advice**

#### ***Right of access to courts and tribunals, right to an effective remedy and obligations under the Convention Against Torture***

1.127 By extending privileges and immunities to international organisations to which Australia is not a member and to persons representing such organisations, as well as other categories of officials that are to be prescribed by regulations, the bill would engage and limit the right of access to courts and tribunals – an element of the right to equality before courts and tribunals, as well as the right to an effective remedy and Australia's obligations to investigate and prosecute (or extradite) persons alleged to have committed torture.<sup>9</sup> This is acknowledged in the statement of compatibility.<sup>10</sup>

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5 Schedule 2, item 3.

6 Explanatory memorandum, pp. 5–6.

7 Personal immunities which may be granted to representatives of international organisations are set out under Part 1 of the Second to Fifth Schedules of the *International Organisations (Privileges and Immunities) Act 1963*. Personal and functional immunities are also granted under other legislation, such as those accorded to a diplomatic agent, under the *Diplomatic Privileges and Immunities Act 1967*, specifically the Schedule – Vienna Convention on Diplomatic Relations. The *Foreign States Immunities Act 1985* also provides functional immunity to foreign states and their representatives in civil proceedings, and personal immunity from both civil and criminal proceedings for foreign heads of state (s 36).

8 See Parts 1 and 2 of the Second to Fifth Schedules of the *International Organisations (Privileges and Immunities) Act 1963*.

9 International Covenant on Civil and Political Rights, articles 2(3) and 14.

10 Statement of compatibility, p. 2–4. The statement of compatibility also states that the right to freedom of movement is engaged. However, it is not clear that enabling the continued application of immigration laws would engage and limit the right to freedom of movement as a matter of international human rights law, and as such, this right has not been addressed in this report entry.

1.128 The right to equality before courts and tribunals encompasses the right of access to the courts in cases of determination of criminal charges and rights and obligations in a suit at law.<sup>11</sup> The UN Human Rights Committee has stated that:

The failure of a State party to establish a competent tribunal to determine such rights and obligations or to allow access to such a tribunal in specific cases would amount to a violation of article 14 if such limitations are not based on domestic legislation, are not necessary to pursue legitimate aims such as the proper administration of justice, or are based on exceptions from jurisdiction deriving from international law such, for example, as immunities, or if the access left to an individual would be limited to an extent that would undermine the very essence of the right.<sup>12</sup>

1.129 The right to an effective remedy requires the availability of a remedy which is effective with respect to any violation of rights and freedoms recognised by the International Covenant on Civil and Political Rights.<sup>13</sup> It includes the right to have such a remedy determined by competent judicial, administrative or legislative authorities or by any other competent authority provided for by the legal system of the state. 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.<sup>14</sup>

1.130 In the context of this bill, the granting of immunities, including immunity from personal arrest or detention and from suit and other legal processes, to international organisations and other categories of officials, would involve an exclusion of the jurisdiction of Australian courts in criminal, civil and administrative cases. This, in effect, would restrict an individual's access to courts and tribunals, including for the purposes of determining an effective remedy for potential violations of human rights.

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11 UN Human Rights Committee, *General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial* [9].

12 UN Human Rights Committee, *General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial* [18]. See also UN Human Rights Committee, *Concluding observations on Zambia*, CCPR/C/79/Add.92 (1996) [10], where the UN committee found that it was incompatible with article 14 for persons to be vested with total immunity from suit.

13 International Covenant on Civil and Political Rights, article 2(3). See, *Kazantzis v Cyprus*, UN Human Rights Committee Communication No. 972/01 (2003) and *Faure v Australia*, UN Human Rights Committee Communication No. 1036/01 (2005), State parties must not only provide remedies for violations of the ICCPR, but must also provide forums in which a person can pursue arguable if unsuccessful claims of violations of the ICCPR. Per *C v Australia* UN Human Rights Committee Communication No. 900/99 (2002), remedies sufficient for the purposes of article 5(2)(b) of the ICCPR must have a binding obligatory effect.

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

1.131 In addition, as a State party to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Australia has an obligation to investigate and prosecute (or extradite) such cases of torture as defined in the Convention if an alleged torturer is found in Australia.<sup>15</sup> This obligation is enlivened even in a case where the alleged torturer may have enjoyed immunity from criminal proceedings in Australia and continues to enjoy immunity in relation to acts carried out in that person's official capacity.<sup>16</sup> Thus, by extending personal immunity to a broader range of organisations and individuals, including potentially those alleged to have committed torture, the bill would have implications for Australia's obligation to investigate and prosecute allegations of torture.

1.132 Restricting access to courts and tribunals and consequently the availability of a remedy for potential rights violations (other than in relation to torture) may not amount to a violation under international human rights law if such restrictions are

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15 Convention Against Torture, articles 5–8. The UN Human Rights Committee has stated that: 'States have granted amnesty in respect of acts of torture. Amnesties are generally incompatible with the duty of States to investigate such acts; to guarantee freedom from such acts within their jurisdiction; and to ensure that they do not occur in the future. States may not deprive individuals of the right to an effective remedy, including compensation and such full rehabilitation as may be possible': *General Comment No. 20: Article 7 (Prohibition of torture, or other cruel, inhuman or degrading treatment or punishment)* (1992) [15]. See also *Suleymane Guengueng et al. v Senegal*, UN Committee Against Torture Communication No. 181/2001 (2006), which found the failure by Senegal to prosecute the former head of state of Chad to be a violation of the Torture Convention.

16 The view that immunity may be limited as a result of the Convention against Torture is supported by jurisprudence, particularly the *Pinochet* case, and the views of the UN Committee against Torture. In the *Pinochet* case the House of Lords considered an extradition request for the surrender of the former President of Chile to face a number of charges of torture. As a former head of state, Pinochet enjoyed immunity for acts undertaken in his capacity as President of Chile. The House of Lords held that, even if the alleged acts of torture had been performed in his capacity as President, the effect of the Convention against Torture was that this immunity was abrogated in relation to alleged acts of torture as defined in that convention and to which the convention applied temporally. See *R v Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No 3)* [2000] 1 AC 147. Regarding the UN Human Rights Committee's views, see UN Committee Against Torture, *Consideration of reports submitted by states parties under article 19 of the Convention*, CAT/C/SR.354 (1998) [39]–[40], [46], where the UN Committee stated that article 5, paragraph 2 of the Convention Against Torture 'conferred on States parties universal jurisdiction over torturers present in their territory, whether former heads of State or not, in cases where it was unable or unwilling to extradite them. Whether they decided to prosecute would depend on the evidence available, but they must at least exercise their jurisdiction to consider the possibility'. See also *Conclusions and recommendations on the third periodic report of the United Kingdom of Great Britain and Northern Ireland and Dependent Territories*, CAT/C/SR.360 (1999) [11] and *Report of the Committee against Torture: United Kingdom of Great Britain and Northern Ireland and Dependent Territories*, CAT A/54/44 [77(f)] (1999).

based on immunities that are accepted as a matter of international law.<sup>17</sup> The granting of privileges and immunities to international organisations is commonly accepted practice in international law. Australia is bound under a number of multilateral and bilateral treaties to confer privileges and immunities on various international organisations and their officials, as well as on foreign States and their diplomatic and consular representatives. The extent of the privileges and immunities conferred varies among the different categories of conferee (a diplomatic representative has more extensive accepted immunities than a consular official, for example). Under customary international law Australia is also under additional obligations to afford immunity to certain types of high-level foreign officials, both personal immunity while they are in office and, functional immunity after they have left office.<sup>18</sup>

1.133 The statement of compatibility states that the purpose of the bill is threefold: to more closely align Australia's domestic legislation with its international obligations; to increase flexibility in the granting of privileges and immunities; and to assist in deepening Australia's international cooperation.<sup>19</sup> It notes that enabling Australia to declare an organisation of which Australia *is not a member* to be an 'international organisation', for the purposes of conferring privileges and immunities on that organisation and those connected with it, would benefit Australia by broadening the range of organisations with which Australia could partner and expanding the opportunities for cooperation.<sup>20</sup> In particular, the statement of compatibility notes that the proposed amendments would facilitate Australia giving effect to a Framework Agreement relating to the Organisation for Joint Armament Cooperation (OCCAR). According to the statement of compatibility, this Framework Agreement requires Australia to extend 'the full range of privileges and immunities to the OCCAR and connected persons in order to host meetings and receive program

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17 UN Human Rights Committee, *General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial* [18]. While the law remains unsettled and continues to evolve at the international level, it has not yet been accepted that there exists a 'human rights exception' to immunity under international law. See, eg, the rejection of this argument by the House of Lords in *Jones v Ministry of the Interior of the Kingdom of Saudi Arabia and another* [2007] 1 AC 270. For an earlier discussion of this issue, see Parliamentary Joint Committee on Human Rights, *International Organisations (Privileges and Immunities) Amendment Bill 2013, Fourth Report of 2014* (20 March 2013) pp. 42–47 and *Sixth Report of 2013* (15 May 2013) pp. 228–243.

18 *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)*, International Court of Justice (ICJ), 14 February 2002 [2002] ICJ Rep 3, especially at [51]-[55]

19 Statement of compatibility, p.1.

20 Statement of compatibility, p. 2.

benefits.<sup>21</sup> Further, the statement of compatibility states that the flexibility to grant privileges and immunities to a broader range of officials will ensure those immunities conferred are more accurate and will assist Australia in implementing its international obligations.<sup>22</sup>

1.134 While Australia has an obligation to grant certain immunities to international organisations to which Australia is a member, it is not clear that such an obligation exists under international law with respect to organisations (and associated officials) to which Australia is not a member. In order for such an obligation to exist, it must be derived from either a treaty commitment or because there is a relevant customary international law rule that applies. While Australia is not a member of OCCAR, it has a treaty obligation to grant immunities to OCCAR under the Framework Agreement. However, it is not clear that such a treaty commitment would exist with respect to other international organisations that may be declared under future regulations (as the bill envisages) for the purposes of conferring immunities. Without a treaty commitment, it is not clear that Australia would have an obligation to confer immunities on international organisations of which it is not a member, noting that there is insufficient evidence of a customary international law rule requiring states to confer immunities on international organisations of which they are not members.<sup>23</sup> Further information is therefore required to establish the source of Australia's obligation under international law to confer immunities in these circumstances.

1.135 Further, it is not clear whether the bill would enable the conferral of privileges and immunities on a broader category of individuals than those recognised as entitled to immunity under international law. The bill would allow immunities to be conferred by regulations on general classes of persons connected with international organisations. The immunities that may be conferred include full personal immunities, such as immunity from arrest and detention in Australia. This would appear to preclude Australian courts exercising jurisdiction over persons alleged to have committed torture or other serious human rights abuses, even where

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21 Statement of compatibility, p. 2; [Framework Agreement between the Government of Australia and the Organisation for Joint Armament Cooperation \(Organisation Conjointe de Coopération en Matière d'Armement \(OCCAR\)\) for the participation of Australia in OCCAR-managed programmes](#) [2022] ATS 3, article 3.3. The privileges and immunities that are to be granted are those in Annex I of the OCCAR Convention, which includes personal immunity for representatives of member states (article 13) and functional immunity for staff of OCCAR (article 15).

22 Statement of compatibility, p. 2.

23 In fact, it remains unsettled whether there is a rule of customary international law that international organisations enjoy immunity even with respect to states which *are* members of the international organisation. Michael Wood, Do International Organizations Enjoy Immunity Under Customary International Law? (2013) 10 *International Organizations Law Review* 287-318, especially at 316-17; Edward Chukwuemeke Okeke, *Jurisdictional Immunities of States and International Organizations* 2018, especially at 269, 275 and 278; Jan Klabbers, *An Introduction to International Organizations Law*, 4<sup>th</sup> ed 2022, 152.

such persons would not otherwise fall within the general category of individuals covered by personal immunity under general international law (e.g. heads of state).<sup>24</sup> The statement of compatibility states that the conferral of privileges and immunities on categories of officials would occur where requested by an international organisation and agreed to by Australia. It notes that the conferral of immunities would require a rational connection with the international organisation and its functions, thereby limiting the categories and number of persons benefiting from these protections.<sup>25</sup>

1.136 Questions therefore arise as to how the amendments in the bill are necessary to align Australia's domestic legislation with its international obligations. Further, in relation to the Framework Agreement with OCCAR in particular, the International Organisations (Privileges and Immunities) (Declaration of Organisation for Joint Armament Co-operation Related Meetings) Regulations 2022 already confer immunities on OCCAR representatives and staff under section 7 of the Act. Interestingly, the immunities conferred under these regulations appear to extend beyond those required under both customary international law and the Framework Agreement with OCCAR. The effect of the regulations is that representatives of OCCAR are entitled to the same immunities granted to diplomatic agents, including personal immunity from criminal jurisdiction and most civil jurisdiction;<sup>26</sup> yet the OCCAR Convention, which Australia is required to implement pursuant to article 3.3 of the Framework Agreement, requires only immunity from arrest and detention and functional immunity from jurisdiction for representatives of Member States,<sup>27</sup> and functional immunity for staff members of OCCAR.<sup>28</sup> In light of the privileges and immunities conferred by these regulations under the Act, questions arise as to whether the amendments in the bill are necessary to enable Australia to fulfil its international obligations, both in the specific case of the Framework Agreement with OCCAR and more generally.

1.137 As to the scope of immunities to be granted, the statement of compatibility states that it 'is expected that, for the most part, the officials benefiting from privileges and immunities will have functional immunity, meaning that their immunities are restricted by reference to the functions undertaken by the

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24 The category of individuals includes heads of state, heads of government, foreign ministers and other high-ranking ministers.

25 Statement of compatibility, p. 3.

26 Section 7(2)(a) of the Act. Further, official staff of representatives are also given personal immunity from criminal jurisdiction and functional immunity from civil jurisdiction: this is the effect of section 7(2)(b), which gives these individuals 'the privileges and immunities accorded to a [member of the administrative and technical staff](#) of a diplomatic mission' (set out in article 37(2) of the Vienna Convention on Diplomatic Relations 1961, which section 7 of the Diplomatic Privileges and Immunities Act 1967 gives the force of law in Australia).

27 OCCAR Convention, art 13.

28 OCCAR Convention, art 15.

international organisation'.<sup>29</sup> It states that while the bill is unlikely to give rise to situations involving Australia's obligations under international human rights law, including under the Convention Against Torture, if such cases were to arise, it 'would be open to the Australian Government to take a range of responses, including request that the organisation in question waive the immunity of the individual concerned'.<sup>30</sup> However, it is noted that such a waiver would not have to be granted by the organisation, and it would not appear that leaving this matter to the discretion of the organisation would be consistent with Australia's obligations under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

1.138 Further, while the statement of compatibility states that functional immunity will generally be conferred, there is nothing in the legislation itself to prevent personal immunity being granted. Indeed, the stated purpose of the amendments are to provide the Australian government with greater flexibility to confer immunities to categories of officials not prescribed in the Act. Without legislative safeguards to restrict the persons to whom personal immunity may be granted, there appears to be a risk that personal immunity from arrest and detention could be conferred on persons alleged to have committed torture or other serious human rights abuses. This may occur, for example, where an international organisation requests personal immunity for a person who is connected with the organisation and is also alleged to have committed torture, and Australia agrees to that request due to broader benefits that it may gain by cooperating with the organisation. The immunity in such cases would prevent Australia from complying with its international obligation to investigate and prosecute persons alleged to have committed torture.

### **Committee view**

1.139 The committee notes that by extending privileges and immunities, including an immunity from personal arrest or detention and from suit and other legal processes, to international organisations of which Australia is not a member as well as other categories of officials that are to be prescribed by regulations, the bill would engage and limit the right of access to courts and tribunals, as well as engage the right to an effective remedy and Australia's obligations to investigate and prosecute (or extradite) persons alleged to have committed torture.

1.140 The committee considers further information is required to assess the compatibility of this bill with these rights, and as such seeks the minister's advice in relation to:

- (a) which classes of persons are likely to receive personal immunity by way of regulations;

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29 Statement of compatibility, p. 4.

30 Statement of compatibility, p. 4.



- (b) are there any safeguards to limit who can be accorded personal immunity;
- (c) whether requesting an international organisation to waive immunity to enable investigation and prosecution of an individual accused of torture, rather than having a statutory exception to allow such investigation, prosecution or extradition, is consistent with Australia's obligations under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; and
- (d) does Australia currently have any obligations under international law, other than under the Framework Agreement with OCCAR, to confer privileges and immunities on organisations of which it is not a member, and if so, what are the sources of those obligations.

## Migration Amendment (Strengthening Employer Compliance) Bill 2023<sup>1</sup>

<b>Purpose</b>	The bill seeks to amend the <i>Migration Act 1958</i> to establish new employer sanctions including criminal offences and civil penalties related to exploitative work arrangements and to increase existing maximum penalties relating to sponsorship obligations.
<b>Portfolio</b>	Home Affairs
<b>Introduced</b>	House of Representatives, 22 June 2023
<b>Rights</b>	Just and favourable conditions of work; equality and non-discrimination; privacy

### Employer sanctions for coercive practices

1.141 Schedule 1, Part 1 of the bill seeks to establish new criminal offences and civil penalties for a person who unduly influences, unduly pressures, or coerces a non-citizen to breach a work-related condition of their visa, or accept an exploitative work arrangement to meet a work-related condition of their visa.<sup>2</sup>

1.142 Additionally, Schedule 1, Part 5 of the bill would expand the circumstances in which an inspector may exercise their existing powers. This includes authorising the giving of an enforceable compliance notice, which may be issued where an officer holds a reasonable belief that a person has contravened a work or sponsorship related offence provision, or a related provision,<sup>3</sup> and authorising the inspector to exercise their powers for the purpose of investigating whether another person who is, or was, an approved work sponsor has contravened that proposed provision.<sup>4</sup>

1.143 The inspector has existing powers to: enter business premises or another place without force at any time necessary, inspect things, interview persons, require the production of documents or records, and to inspect and make copies of documents or records.<sup>5</sup>

1 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Migration Amendment (Strengthening Employer Compliance) Bill 2023, *Report 8 of 2023*; [2023] AUPJCHR 74.

2 Schedule 1, item 2, proposed sections 245AA–245AAC.

3 Schedule 1, item 31, proposed section 140RB.

4 Schedule 1, item 32, proposed subsection 140X(aaa).

5 *Migration Act 1958*, sections 140XB–XF.

## International human rights legal advice

### ***Just and favourable conditions of work; prohibition against slavery; right to equality and non-discrimination***

1.144 The establishment of new offences and civil penalties for coercing or otherwise pressuring a person to breach a work-related condition of their visa, or accept an exploitative work arrangement to meet a work-related condition of their visa, engages and promotes several human rights, including the rights to just and favourable conditions of work, equality and non-discrimination and the prohibition against slavery.

1.145 The right to just and favourable conditions of work includes the right of all workers to adequate and fair remuneration, and safe working conditions.<sup>6</sup> The prohibition against slavery, servitude and forced labour prohibits exploiting or dominating another and subjecting them to 'slavery-like' conditions, or requiring a person to undertake work which he or she has not voluntarily consented to, but does so because of threats made, either physical or psychological.<sup>7</sup>

1.146 The statement of compatibility states that the measure would promote these rights by ensuring that employers do not misuse the migration program as an alternative source of cheap and exploitable labour.<sup>8</sup> With respect to slavery, the statement of compatibility states that these measures would address potential gaps in existing laws to address the issue of modern slavery, and would further the goal of protecting temporary migrant workers from the serious offences of slavery, slavery-like practices and trafficking in persons.<sup>9</sup>

1.147 Further, the measures would also engage and promote the right to equality and non-discrimination, insofar as they would establish additional protections for non-citizen workers who may be vulnerable to particular types of exploitation at work by virtue of their visa status, or otherwise because of their status as non-citizens. 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

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6 See, UN Committee on Economic, Social and Cultural Rights, *General Comment No. 18: the right to work (article 6)* (2005) [2].

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

8 Statement of compatibility, p. 96.

9 Statement of compatibility, p. 97.

non-discriminatory protection of the law.<sup>10</sup> The prohibited grounds of discrimination include gender, race, and national or social origin.<sup>11</sup>

### **Right to privacy**

1.148 Expanding the inspector's existing powers to include their exercise in relation to an enforceable compliance notice, engages and may limit the right to privacy. The right to privacy includes respect for informational privacy, including the right to respect for private and confidential information, particularly the storing, use and sharing of such information.<sup>12</sup> It also includes the right to control the dissemination of information about one's private life, and protects against arbitrary and unlawful interferences with an individual's privacy and attacks on reputation.<sup>13</sup>

1.149 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. 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.

1.150 The statement of compatibility does not identify that the proposed expansion of these existing powers engages and limits these rights, and so no analysis is provided. Enabling the inspector to enter premises, ask questions and require the provision of documentation in order to enforce compliance notices would facilitate the enforcement of provisions intended to protect workers. This would constitute a legitimate objective under international human rights law, and would be rationally connected to that objective. As to proportionality, the Migration Act constrains the circumstances in which, and purposes for which, an inspector may exercise their investigatory powers.<sup>14</sup> However, it also provides that the Secretary or Australian Border Force Commissioner may disclose any information the inspector has gathered for a broad range of purposes, including where they reasonably believe that it will assist in the administration of a law of the Commonwealth, or a state or

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10 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.

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

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

13 There is international case law to indicate that this protection only extends to attacks which are unlawful. See *RLM v Trinidad and Tobago*, UN Human Rights Committee Communication No. 380/89 (1993); and *IP v Finland*, UN Human Rights Committee Communication No. 450/91 (1993).

14 For example, sections 140X–XA.

territory.<sup>15</sup> It is unclear what safeguards would apply, and whether the exercise of these relevant powers would be subject to oversight and review.

### **Committee view**

1.151 The committee considers that establishing new mechanisms to prevent exploitative work practices, to protect vulnerable migrant workers, promotes the rights to just and favourable conditions of work, equality and non-discrimination and the prohibition against slavery and servitude. The committee considers the statement of compatibility should reflect that the measures would promote the right to equality and non-discrimination.

1.152 The committee notes that expanding the application of the inspector's investigatory powers may also engage and limit the right to privacy. The committee notes that the statement of compatibility does not identify the engagement of this right, and therefore seeks the minister's advice as to whether the measure constitutes a permissible limit on the right to privacy, including the presence of safeguards, the circumstances in which information gathered by the inspector may be disclosed, and relevant oversight and review mechanisms.

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### **Publication of information about prohibited employers**

1.153 Schedule 1, Part 2 would allow the minister or an authorised delegate to prohibit certain employers from employing any additional non-citizens, and would require the minister to make that decision public. Such a declaration may be made where the person is subject to a 'migrant worker sanction', and the sanction was imposed no more than five years prior.<sup>16</sup> 'Migrant worker sanction' refers to a person being sanctioned for certain work-related offences, civil penalties or contraventions of the *Fair Work Act 2009* or contraventions of enforceable undertakings,<sup>17</sup> but also includes sanctions imposed on the basis of the minister being satisfied of certain matters, such as:

- (a) where a bar has been placed on an approved sponsor on the basis that the 'minister is satisfied' that the person had failed to satisfy their sponsorship obligations (such as an obligation to keep certain records);<sup>18</sup>

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15 Section 140XJ.

16 Schedule 1, Part 2, item 5, proposed section 245AYK.

17 Schedule 1, Part 2, item 5, proposed sections 245AYE–245AYJ. These would include: being barred as an approved work sponsor; conviction or work-related offences under the Criminal Code; certain contravention of the *Fair Work Act 2009* or compliance notices pursuant to that Act; and certain contraventions of undertakings given to the Fair Work Ombudsman.

18 Schedule 1, Part 2, item 5, proposed section 245AYE, read together with section 140M of the *Migration Act 1958* and sections 2.89 of the Migration Regulations 1994.

- (b) where an inspector has given the person a compliance notice under the Fair Work Act 2009 and the 'minister is satisfied' that the person has failed to comply with the notice and does not have a reasonable excuse.<sup>19</sup>

1.154 A declaration that a person is a prohibited employer would have effect for the period specified in the declaration.<sup>20</sup> It would prevent a person from employing additional non-citizens, or having a material role in decisions by a body corporate or other body that allows a non-citizen to begin work.<sup>21</sup> Breach of the prohibition would be an offence punishable by imprisonment for two years or 360 penalty units (currently \$112,680)<sup>22</sup> or both, or a civil penalty punishable by 240 penalty units (currently \$75,120). After a person ceases to be a prohibited employer, for the following 12 months they would be required to advise the department where they have employed non-citizens.<sup>23</sup> The minister would be required to publish identifying information in relation to a prohibited employer online, except in prescribed circumstances.<sup>24</sup>

## **Preliminary international human rights legal advice**

### ***Multiple rights***

1.155 The establishment of new mechanisms to prevent exploitative work practices against non-citizens in Australia, including the prohibition of certain employers from employing further non-citizens, engages and promotes the right to just and favourable conditions of work, the absolute prohibition against slavery and servitude, and the right to equality and non-discrimination. The publication of information about prohibited employers may also promote these rights, insofar as it protects temporary migrant workers from employers found to have breached workplace laws. The content of these rights is outlined at paragraphs [1.144] to [1.147].

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19 Schedule 1, Part 2, item 5, proposed section 254AYJ.

20 Schedule 1, Part 2, item 5, proposed subsection 245AYK(8).

21 Schedule 1, Part 2, item 5, proposed section 245AYL.

22 As of 1 July 2023, the value of one penalty unit increased to \$313, in accordance with subsection 4AA(3) of the *Crimes Act 1914*, which provides for indexation of penalty units.

23 Schedule 1, Part 2, item 5, proposed section 245AYN. This would require that the employer tell the department the name of the non-citizen and their visa details. Contravention of this requirement would be a civil penalty of 48 penalty units (currently \$15,024)

24 Schedule 1, Part 2, item 5, proposed section 245AYM.

1.156 The statement of compatibility acknowledges that these rights are engaged.<sup>25</sup> It states that the measures in the bill may limit the right to equality and non-discrimination insofar as they would treat non-citizens differently to citizens.<sup>26</sup> It states that certain factors can make migrant workers particularly vulnerable to unscrupulous practices at work, including a poor knowledge of their workplace rights, being young and inexperienced, having low English language proficiency, and trying to fit in with cultural norms and expectation of other people from their home countries.<sup>27</sup> It states that this differential treatment would enhance the right of temporary migrant workers to enjoy equitable conditions at work. In this way, the measures would appear to promote the right to equality and non-discrimination. Further, aspects of these measures may have a particular impact on female non-citizen workers who are employed for the purposes of sexual exploitation, noting that the explanatory memorandum states that the measure may capture work in conditions of sexual servitude and in brothels.<sup>28</sup> In this regard, the United Nations (UN) Convention on the Elimination of all forms of Discrimination Against Women requires States Parties to take all appropriate measures to suppress all forms of traffic in women and exploitation of prostitution of women,<sup>29</sup> and recognises sexual exploitation as a form of gender-based violence and discrimination against women.<sup>30</sup> As such, the measure is likely to promote the rights of women.

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25 Statement of compatibility, pp. 93–96, and 101. It also states, at page 94, that prohibiting an employer from employing additional temporary migrants may limit a temporary worker's opportunity to work for a certain business, and so limit the right to work. However, it states that the primary focus is the protection of those workers and on regulating the behaviour of the employer.

26 Statement of compatibility, p. 101.

27 Statement of compatibility, p. 101.

28 See, for example, the proposed broad definition of 'work' in proposed section 245AYB, which the explanatory memorandum states is intended to capture work in conditions of sexual servitude with no remuneration, and the proposed definition of 'premises' in proposed section 245AYC, which is intended to capture persons who lease or licence premises for the provision of sexual services in brothels. See, explanatory memorandum pp. 30–31.

29 Article 6.

30 See, UN Committee on the Elimination of all forms of Discrimination Against Women, *General recommendation No. 19: Violence Against Women* (1992); *General recommendation No. 28 on the core obligations of States parties under article 2 of the Convention on the Elimination of All Forms of Discrimination against Women* (16 December 2010).

1.157 However, requiring the publication of information identifying prohibited employers online, also engages and limits the right to privacy.<sup>31</sup> The content of this right, and the circumstances in which it may be permissibly limited, are outlined at paragraphs [1.148] to [1.149].

1.158 The statement of compatibility states that the publication of information about prohibited employers is intended to visibly demonstrate that the minister will take action to protect vulnerable workers and act as a deterrent to other employers.<sup>32</sup> Protecting vulnerable migrant workers by publishing information about prohibited employers is a legitimate objective for the purposes of international human rights law. The publication of this information may be rationally connected (that is, effective to achieve) those objectives. However, it is not clear whether information about prohibited employers needs to be accessible to the general public in order to achieve the stated objective of protecting migrant workers, particularly given that failure to comply with a prohibition order would itself be a serious criminal offence. In addition, the statement of compatibility states that 'much of the information to be published will have already been publicly available through the publication of court findings, or entries on the [Australian Border Force] Register of Sanctioned Employers'.<sup>33</sup> In those circumstances, it is not clear whether the additional publication of that information would be necessary to achieve the stated objectives.

1.159 A key question is whether the measure is proportionate. In this regard, the circumstances in which an employer may be declared a prohibited employer (and so have their information published online) is relevant. The bill provides that an employer may be prohibited on numerous grounds, but the circumstances in which conviction for a particular offence, or in which an order has been made against them, may result in prohibition would be set out in regulations and not all of this is set out in the bill itself.<sup>34</sup> Further, there are some provisions that do not require a finding of fault by a court or other independent body but rather rely on the minister being

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31 Schedule 1 Part 5 would extend the existing powers of an inspector under the Act to include the exercise of powers for the purpose of investigating whether another person who is or was an approved work sponsor has contravened proposed subsection 140RB(5). The inspector has investigatory powers including the power to enter premises, inspect things, and require the provision of information or documents. Information they acquire may then be disclosed by the Secretary or Australian Border Force Commissioner where they believe it is necessary for the performance of specific functions or to assist in the administration or enforcement of a law of Australia (section 140XJ). The statement of compatibility does not identify that the proposed expansion of these existing powers would engage and limit the right to privacy, and may engage and limit other human rights.

32 Statement of compatibility, p. 87.

33 Statement of compatibility, p. 88.

34 For example, proposed subsection 245AYF(3)(a) provides that a person is subject to a migrant worker sanction if they have been convicted of an offence under the *Fair Work Act 2009* that has been prescribed by the regulations, and in any circumstances specified in the regulations.



satisfied that the person has failed in their obligations or compliance.<sup>35</sup> The statement of compatibility states that the circumstances in which a person may be declared a 'prohibited employer' are set at a high threshold, and that these are aimed at employers with a history of deliberate, repeated or serious non-compliance with relevant laws and obligations in their treatment of migrant workers.<sup>36</sup> It states that it aims to target employers that have a disregard of their employment obligations and the law, as well as deter those who are considering exploiting temporary migrant workers as a means of sourcing an artificially cheap workforce. This may mean that, in practice, an employer may only be liable to a prohibition declaration in restricted circumstances. However, the scope of those circumstances is not clear on the face of the bill. Further, an employer may be declared a prohibited employer because of conduct for which they were sanctioned up to five years prior. The explanatory materials do not explain why this period of time, and not a shorter period, is proposed, and why it is proportionate.

1.160 As to the potential severity of a prohibition declaration, the bill does not specify the maximum length of time for which a declaration may be in force, meaning that there would be no legislative bar to their imposition for lengthy periods. Further, while an employer would be able to make a written submission as to why a declaration should not be made, it is not clear that they could make a submission in relation to the length of time a declaration may be in force. The statement of compatibility does state that the minister must consider not only any written submissions, but any other matters prescribed by regulations. It states that this may include consideration of the person's history of non-compliance, the seriousness of the contravention giving rise to the prohibition being considered, and any extenuating circumstances.<sup>37</sup> Considerations of these matters could assist with the proportionality of the measure in practice, though it is not clear why these considerations are not required in the bill itself. In addition, proposed section 245AYN would require that in the year after a prohibition period has ended, the employer would be required to provide information (including personal information) to the department about each non-citizen they employ during that period. The statement of compatibility states that this is to ensure that the employer is aware of and complying with their obligations. However, it is not clear why less rights restrictive alternatives (such as the ability to seek a waiver of this requirement, or requiring such reporting for a shorter overall period) would not be as effective to achieve that objective.

1.161 Further, proposed subsection 245AYM(5) states that the minister is not required to arrange for the removal from the department's website of information

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35 Schedule 1, Part 2, item 5, proposed section 245AYE, read together with section 140M of the *Migration Act 1958* and sections 2.89 of the *Migration Regulations 1994*, and proposed section 254AYJ.

36 Statement of compatibility pp. 85–86.

37 Statement of compatibility, p. 87.

published about a prohibited employer. It is not clear why the bill would not require the removal of information where, for example, a prohibition declaration has expired, is subject to appeal, or has been successfully appealed. It is also unclear whether the minister would be required to amend information about a prohibited employer which was inaccurate or otherwise misleading.

1.162 The scope of personal information published is also relevant in considering whether the limitation on the right to privacy is only as extensive as is strictly necessary. The statement of compatibility states that the intention is for the website to list the minimum details necessary for implementation.<sup>38</sup> Proposed section 245AYM would require the minister to publish the person's name, the reasons for the declaration, the period in which it is in force, and 'any other information that the minister considers is reasonably necessary to identify the person'. It is not clear what other information may be published about a person (for example, where two employers of the same name are declared to be prohibited, whether details about their state of residence or the name of their business would be included).

1.163 As to whether the measure would have the flexibility to treat different cases differently, the bill would provide some flexibility as to the publication of information. The minister would be empowered to prescribe in regulations the circumstances in which publication is not required.<sup>39</sup> This has the capacity to serve as an important safeguard, however it is not clear what circumstances those may include, and whether considerations of the employer's right to privacy would be relevant. In addition, the statement of compatibility notes that a decision to declare a person to be a prohibited employer would be subject to review by the Administrative Appeals Tribunal.<sup>40</sup> The availability of independent review also assists with the proportionality of the measure.

1.164 As to safeguards, the statement of compatibility states that the department has commissioned a Privacy Impact Assessment to support the publication process to ensure privacy concerns are addressed, and that procedures will be considered to adhere to the recommendations of that assessment.<sup>41</sup> This has the capacity to serve as a safeguard, however without knowing the content of that assessment, its safeguard value is unclear. The statement of compatibility also states that the requirement to seek a submission from an employer in advance of declaring them to be a prohibited employer—described as the 'show cause process'—gives the employer an opportunity to respond and to outline any extenuating circumstances.<sup>42</sup> This process has the capacity to serve as an important safeguard, however as noted

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38 Statement of compatibility, p. 100.

39 Statement of compatibility, p. 100.

40 Statement of compatibility, p. 88.

41 Statement of compatibility, p. 88.

42 Statement of compatibility, p. 87.

above, the consideration of extenuating circumstances described is not contained in the bill itself, but may be prescribed by delegated legislation.

1.165 Finally, it is not clear that other, less rights restrictive alternatives (such as providing relevant information to the public on a request basis, or facilitating access to the information only to non-citizens as part of the visa application process) would be ineffective to achieve the stated objective of the measure. The statement of compatibility does not provide information in this regard.

### **Committee view**

1.166 The committee considers that establishing new mechanisms to prevent exploitative work practices against non-citizens in Australia, including by prohibiting certain employers from employing further non-citizens, are directed towards the important objective of protecting vulnerable migrant workers. The committee notes that these proposed measures would promote the right to just and favourable conditions of work, the absolute prohibition against slavery and servitude, and the right to equality and non-discrimination.

1.167 The committee notes one aspect of these proposed measures would be the publication of declarations that a person is a prohibited employer. The committee considers that the publication of this information may also promote those human rights, insofar as it may protect temporary migrant workers from employers found to have breached workplace laws. The committee considers that this also engages and limits the right to privacy. The committee considers that 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) why information identifying a prohibited employer, and the grounds for their prohibition, needs to be published online in order to achieve the stated objectives;
- (b) why it is proposed that regard may be had to migrant worker sanctions issued in the previous five years, and not a shorter period;
- (c) what is the maximum period for which a person may be declared to be a prohibited employer;
- (d) whether an employer would be permitted to make submissions relating to the potential length of a prohibition declaration, and whether such a submission would be relevant to an assessment of how long a declaration may remain in force;
- (e) why the minister does not have the discretion to determine that an employer may not be required to provide additional information in the twelve months after a prohibition declaration has ended, or that this requirement may be otherwise altered in certain circumstances;
- (f) why the bill would not require the minister to correct inaccurate or misleading information relating to a prohibition declaration; and

- (g) whether other, less rights restrictive alternatives (such as providing relevant information to the public on a request basis, or facilitating access to the information only to non-citizens as part of the visa application process) would be ineffective to achieve the stated objective of the measure.

## National Occupational Respiratory Disease Registry Bill 2023<sup>1</sup>

<b>Purpose</b>	The bill seeks to establish a National Occupational Respiratory Disease Registry, to which specified physicians would be required to provide information about persons diagnosed with, or being treated for, occupational respiratory diseases
<b>Portfolio</b>	Health and Aged Care
<b>Introduced</b>	House of Representatives, 21 June 2023
<b>Rights</b>	Health; just and favourable conditions of work; privacy

### Establishment of a registry containing personal data

1.168 This bill seeks to establish a National Occupational Respiratory Disease Registry (registry). The registry would capture and share data on respiratory diseases thought to be occupationally caused or exacerbated, and the agents that are believed to have caused them.

1.169 The bill would require a prescribed medical practitioner<sup>2</sup> to notify diagnoses of a prescribed occupational respiratory disease<sup>3</sup> and would allow for the voluntary notification of other occupational respiratory diseases.<sup>4</sup> A medical practitioner who fails to notify of a diagnosis or treatment of a prescribed occupational respiratory disease would be liable to a civil penalty of up to 30 penalty units (currently \$9 390),<sup>5</sup> regardless of whether or not the patient has themselves consented to the notification.<sup>6</sup> The register must include 'minimum notification information', and may include 'additional notification information', both of which may be determined by

- 1 This entry can be cited as: Parliamentary Joint Committee on Human Rights, National Occupational Respiratory Disease Registry Bill 2023, *Report 8 of 2023*; [2023] AUPJCHR 75.
- 2 Clause 8, definition of 'prescribed medical practitioner' means a medical practitioner of a kind prescribed in the rules.
- 3 Clause 8, definition of 'prescribed occupational respiratory disease' means an occupational respiratory disease as prescribed by the rules. An 'occupational respiratory disease' is defined to mean a medical condition associated with an individual's respiratory system that is likely to have been caused or exacerbated, in whole or in part, by the individual's work or workplace.
- 4 Clauses 1415. Where a practitioner is treating a patient for a prescribed occupational respiratory disease (which the patient was diagnosed with before this bill were to commence) they may, with the patient's consent, provide information about the patient to the registry if that information is not already included.
- 5 As of 1 July 2023, the value of one penalty unit increased to \$313, in accordance with subsection 4AA(3) of the *Crimes Act 1914*, which provides for indexation of penalty units.
- 6 Clause 14.

the Commonwealth Chief Medical Officer (CMO) by legislative instrument.<sup>7</sup> An individual may ask the CMO to correct personal information about them in the registry, and the CMO must correct the registry if they receive a request to do so.<sup>8</sup>

1.170 A person would be permitted to collect, make a record of, disclose or otherwise use protected information on the registry in a range of circumstances, including where:

- (a) they are an officer or employee of a Commonwealth authority or are engaged to perform work relating to the purposes of the registry, and are doing so for the purposes of the registry;
- (b) they are a prescribed medical practitioner accessing information about a diagnosis or progression of an occupational respiratory disease in relation to an individual and it is for the purposes of providing healthcare to that person, or checking whether that information is already on the registry;
- (c) the person does so for the purposes of performing functions or duties, or exercising powers, under this bill;
- (d) they are required or authorised to do so by or under a law of the Commonwealth, or a state or territory;<sup>9</sup>
- (e) they are the CMO and are doing so for the purposes of disclosing information to an enforcement body;
- (f) the information is disclosed to the person for the purpose of including information in the registry (under clause 21), and the collection, recording, disclosure or use is for the purpose for which the information was disclosed to the person; or
- (g) pursuant to a court, tribunal or coronial order.<sup>10</sup>

1.171 Subclause 21(3) would restrict the type of information that may be disclosed to a person where it is for the purposes of research. In these circumstances, the person must not be provided with information that identifies or could identify the most recent workplace (or main workplace) where they were exposed to a

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7 Clause 12.

8 Clause 19.

9 In this regard, the minister's [second reading speech](#) states that Queensland and New South Wales have existing registers that require the mandatory reporting of some occupational respiratory diseases by physicians, and the bill allows for states with such registers to provide in their state legislation that the notification of these diseases will occur through the National Registry so that there is no need for a physician in those states and territories to notify twice: Ms Ged Kearney, [Senate Hansard](#), Wednesday 21 June 2023, p. 9..

10 Subclause 21(2). A note related to subclause 21(2) states that this subclause is an authorisation for the purposes of other laws, including the Australian Privacy Principles.

respiratory disease-causing agent, or the prescribed medical practitioner who notified the information.<sup>11</sup>

1.172 The CMO, or a contracted service provider, would also be permitted to disclose any minimum notification information in relation to an individual on the registry to a Commonwealth authority prescribed by the rules for purposes connected with the performance of its functions or exercise of its powers.<sup>12</sup> That authority could then collect, make a record of, disclose or otherwise use that information for any of the purposes for which it was disclosed.<sup>13</sup>

1.173 Clause 23 would provide, with some exceptions, that it is an offence to record, disclose or otherwise use protected information other than as the bill authorises.<sup>14</sup>

1.174 The CMO would be required to publish an annual report containing statistical information relating to the registry, and may publish other reports at any time relating to information included on the registry and of a kind prescribed by legislative instrument.<sup>15</sup> If protected information were to be published or otherwise made available, the CMO would be required to 'take such steps as are reasonable in the circumstances to ensure that the information is de-identified' (meaning that the information is no longer about an identifiable or reasonably identifiable person, workplace, employer or business).<sup>16</sup>

## **Preliminary international human rights legal advice**

### ***Rights to health and just and favourable conditions of work***

1.175 By establishing a registry to track instances of occupational respiratory diseases, this measure would likely promote the right to health and the right to just and favourable conditions of work. The right to health is the right to enjoy the highest attainable standard of physical and mental health.<sup>17</sup> The right to just and favourable conditions of work includes the right of all workers to safe working

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11 Subclause 21(3) states that further restrictions may be set out in the rules. Subclause 21(4) further provides that if guidelines approved under section 95 or 95A of the *Privacy Act 1988* would apply to a disclosure, the use of the information must be in accordance with the guidelines.

12 Clause 22.

13 Subclause 22(2). Subclause 22(3) further provides for disclosure to state or territory authorities where the information relates to a person residing in that state or territory.

14 See also clauses 2425.

15 Clause 26.

16 Subclauses 26(4)(5).

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

conditions.<sup>18</sup> The statement of compatibility notes that these rights would be promoted by this measure.<sup>19</sup> The statement of compatibility states that the bill assists the advancement of these rights as the registry would help identify industries, occupations, job tasks and workplaces where there is a risk of exposure to respiratory disease-causing agents and this would enable the application of timely and targeted interventions and prevention activities to reduce worker exposure and disease.<sup>20</sup>

### **Right to privacy**

1.176 Establishing a registry which requires the provision of personal information, including potentially identifying affected workers by name on the registry without their consent, and permitting the use and disclosure of that personal information, also engages and limits the right to privacy.

1.177 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.<sup>21</sup> It also includes the right to control the dissemination of information about one's private life.

1.178 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.

1.179 The statement of compatibility identifies that the right to privacy would be limited by this bill.<sup>22</sup> With respect to the objective of the bill, it states that the registry will capture and share data on the incidence of respiratory diseases thought to be occupationally caused or exacerbated and that this information will aid the detection of new and emerging threats to workers' respiratory health, inform incidence trends, and assist in targeting and monitoring the effectiveness of interventions and prevention strategies.<sup>23</sup> This is a legitimate objective for the purposes of international human rights law, and the creation of this registry would appear to be rationally connected with that objective.

1.180 In considering the proportionality of the proposed limitation on the right to privacy, in order to be proportionate, a limitation should only be as extensive as is strictly necessary to achieve its legitimate objective and must be accompanied by

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18 See, UN Committee on Economic, Social and Cultural Rights, *General Comment No. 18: the right to work (article 6)* (2005) [2].

19 Statement of compatibility, p. 8.

20 Statement of compatibility, p. 8.

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

22 Statement of compatibility, pp. 4–8.

23 Statement of compatibility p. 3.



appropriate safeguards.<sup>24</sup> In making this assessment, it is necessary to consider several 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.

1.181 As to the medical conditions to which this registry may operate, the registry would distinguish between prescribed and non-prescribed occupational respiratory diseases, and would provide that conditions which have been prescribed by the legislative instrument must be notified to the registry, regardless of whether the patient consents. The statement of compatibility states that initially, silicosis will be the only prescribed occupational respiratory disease, reflecting a recommendation of the Final Report of the National Dust Disease Taskforce<sup>25</sup>, and states that the minister would be able to prescribe further occupationally caused or exacerbated respiratory diseases after consultation with the CMO and state and territory authorities.<sup>26</sup> It would appear, therefore, that the scope of the registry will expand in future beyond the initial prescription of silicosis, and that more information about more people would therefore be provided to it.<sup>27</sup>

1.182 As to the scope of information which would be included on the register, the bill would provide for the making of a legislative instrument defining two categories of information to be included: minimum and additional notification information. These terms are not defined in the bill. The statement of compatibility states that 'minimum notification information' (which would be required to be provided) will include 'information identifying the individual diagnosed with an occupational respiratory disease, the respiratory disease, the individual's lung function, and the individual's belief as to where the last and main exposures occurred'.<sup>28</sup> However, it does not specify what 'identifying information' would include. The statement of compatibility further states that 'additional notification information' (which may only be provided with a patient's consent) may include 'information about an individual's relevant medical test results, demographic and lifestyle information including their smoking history, and details on each job where the individual believes they had an exposure to a respiratory disease-causing agent'.<sup>29</sup> Given the specificity with which

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24 The United Nations (UN) Human Rights Committee has stated that legislation must specify in detail the precise circumstances in which interferences with privacy may be permitted *NK v Netherlands*, UN Human Rights Committee Communication No.2326/2013 (2018) [9.5].

25 Australian Government Department of Health and Aged Care, [National Dust Disease Taskforce Final Report to Minister for Health and Aged Care](#), June 2021.

26 Statement of compatibility, p. 8.

27 For example, Safe Work Australia lists [the following other occupational respiratory diseases](#): aluminosis, asbestosis, byssinosis, coal workers' pneumoconiosis, hard metal pneumoconiosis, talcosis, work-related asthma, chronic obstructive pulmonary disease, chronic bronchitis.

28 Statement of compatibility, p. 4.

29 Explanatory statement, p. 13.

these two categories of information are described in the explanatory materials, it is not clear why these definitions are not included in the bill itself. As drafted, the bill does not constrain the information which may be included in these categories.

1.183 The bill would require prescribed medical practitioners to notify the registry of the minimum notification information associated with diagnoses of occupational respiratory diseases prescribed by legislative instrument.<sup>30</sup> The scope of medical practitioners who may be required to provide this information is not clear, as they may be prescribed by legislative instrument. The explanatory memorandum states that initially, this will be limited to those practitioners with a medical speciality of respiratory and sleep medicine or occupational and environmental medicine.<sup>31</sup> However, it is not clear why this is not set out in the bill itself.

1.184 The bill further proposes requiring the provision of personal information to the registry without the consent of the individual, however the explanatory materials do not explain why this is necessary and proportionate. It is unclear why information which identifies a person, and not merely information identifying their respiratory condition and the circumstances in which they believe it was caused (including the type of workplace), is necessary to be provided to the register in order for it to achieve its stated objective (including given that the mechanism proposed would mean that the individual is already connected with medical treatment). In this regard, it is also unclear whether there may be a risk that persons could avoid seeking medical treatment or diagnoses because of these mandatory notification obligations. It is also unclear why an individual may not object to the provision of their personal information (or some of their personal information) to this registry. In addition, the explanatory materials do not explain why it is necessary for this information to be required to be provided in circumstances where the person in question objects, and why it does not establish a mechanism by which the person (or the relevant physician) may request their case be treated differently (for example, where they are afraid of an employer finding out they allege they contracted the lung illness at their workplace, or because of other privacy concerns).

1.185 The bill would provide that a person must consent to the undefined 'additional notification information' being provided to the registry. However, it is not clear whether patients would be advised that the information they agree to provide (for example, about their medical test results) may then be accessed and disclosed by a range of agencies for a range of purposes. As such, further information is required in order to establish whether the bill would ensure that patients provide informed consent. It is also unclear why the bill does not allow flexibility to provide only limited information where, for example, a doctor considers it to be in the best interests of the patient.

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30 Clause 14.

31 Explanatory memorandum, p. 16.

1.186 As to how access to the registry would function, clause 21 provides that a range of persons may access, disclose or otherwise use information on the registry. The minister's second reading speech states that the registry would be maintained as an online portal.<sup>32</sup> However, it is not clear how that information would be accessed (for example, whether a person authorised to access the registry would be able to see all entries on the registry and scroll through them, whether they could search by name or other identifying information to see individual entries, or whether they would be required to submit a request in relation to an individual entry and would see no information if no such entry existed).

1.187 An additional consideration in assessing the proportionality of the measure is whether it is subject to oversight and review. In this regard, the bill does not provide for a review of the scheme to be undertaken, nor does it establish a mechanism by which a person may seek a review of the inclusion of their information on the registry, or subsequent decisions relating to its use or disclosure. Consequently, further information is required to assess the proportionality of this proposed measure.

### **Committee view**

1.188 The committee considers that establishing a National Occupational Respiratory Diseases Registry, to help identify risks of exposure to respiratory disease-causing agents, promotes the rights to health and to just and favourable conditions of work, but also engages and limits the right to privacy. The committee considers further information is required to assess the compatibility of this measure with the right to privacy, and as such seeks the minister's advice in relation to:

- (a) why the bill does not define key terms (including listing silicosis as an occupational respiratory disease, and defining categories of medical practitioner and minimum and additional notification information to which the registry would apply);
- (b) why information which identifies a person is necessary to be provided to the register in order for it to achieve its stated objective;
- (c) why the bill does not establish a mechanism by which the patient (or their relevant physician) may request they not be required to provide all or some information to the registry;
- (d) whether individuals would be advised of how their information could be disclosed and used if they elected to provide additional notification information;
- (e) why the bill does not provide flexibility to provide only limited information where, for example, a doctor considers it to be in the best interests of the patient;

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32 See, the minister's [second reading speech](#).

- (f) the process by which information on the registry would be accessed, and whether persons required to provide information to the registry, or those empowered to access the registry, would be able to see the content on the registry generally; and
- (g) what oversight and review mechanism of the proposed scheme, and decisions made in relation to it, would apply.

## Legislative instruments

### Migration (Granting of contributory parent visas, parent visas and other family visas in financial year 2022/2023) Instrument (LIN 23/016) 2023 [[F2023L00609](#)]<sup>1</sup>

<b>Purpose</b>	This legislative instrument determines the maximum number of visas that may be granted for certain classes of visas in the financial year from 1 July 2022 to 30 June 2023
<b>Portfolio</b>	Home Affairs
<b>Authorising legislation</b>	<i>Migration Act 1958</i>
<b>Last day to disallow</b>	Exempt from disallowance
<b>Rights</b>	Protection of the family; rights of the child

#### Capping numbers of parent visas

1.189 This legislative instrument determines the maximum number of visas that may be granted for certain classes of visas<sup>2</sup> between 1 July 2022 and 30 June 2023 (inclusive). In particular, the instrument specifies that a maximum of 6,700 contributory parent visas, 1,700 parent visas and 500 other family visas may be granted in the 2022–2023 financial year.<sup>3</sup>

#### Preliminary international human rights legal advice

##### ***Right to protection of the family and rights of the child***

1.190 Capping the number of parent visas and other family visas, which may limit the ability of certain family members (including parents of children aged under 18) to join others in Australia, engages and may limit the right to protection of the family

<sup>1</sup> This entry can be cited as: Parliamentary Joint Committee on Human Rights, Migration (Granting of contributory parent visas, parent visas and other family visas in financial year 2022/2023) Instrument (LIN 23/016) 2023 [F2023L00609], *Report 8 of 2023*; [2023] AUPJCHR 76.

<sup>2</sup> The classes of visas are 'contributory parent visa', 'parent visa' and 'other family visa'. The types of visas that fall within each class are set out in subsection 3(1).

<sup>3</sup> Sections 4–6. Subsections 4(2) and 5(2) provide that of the maximum number of contributory parent visas and parent visas, a specified maximum number of visas may be granted to applicants who satisfy additional criteria set out in the Migration Regulations 1994 relating to investor retirement and retirement subclass visas.

and the rights of the child.<sup>4</sup> An important element of protection of the family<sup>5</sup> is to ensure family members are not involuntarily separated from one another. Laws and measures which prevent family members from being together will therefore engage this right. While the state has a right to control immigration, the right to protection of the family requires Australia to create the conditions conducive to family formation and stability, including the interest of family reunification.<sup>6</sup> The term 'family' is to be understood broadly as to include all those comprising a family as understood in the society concerned,<sup>7</sup> and is not necessarily displaced by geographical separation if there is a family bond to protect.<sup>8</sup> This includes couples and the parent-child relationship, and may include parents and their adult children<sup>9</sup> and other family members,<sup>10</sup> depending on the level of dependency, shared life and emotional ties. As such, in relation to those applicants who can demonstrate that there is a family bond with persons in Australia to protect, a failure to allow for their family reunification due to the visa caps set by this instrument limits the right to protection of the family.

1.191 Additionally, Australia is required to ensure that, in all actions concerning children, the best interests of the child are a primary consideration, and to treat applications by minors for family reunification in a positive, humane and expeditious

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<sup>4</sup> See, for example, *Sen v the Netherlands*, European Court of Human Rights Application no. 31465/96 (2001); *Tuquabo-Tekle And Others v The Netherlands*, European Court of Human Rights Application no. 60665/00 (2006) [41]; *Maslov v Austria*, European Court of Human Rights Application no. 1638/03 (2008) [61]-[67]. The Parliamentary Joint Committee of Human Rights has raised these human rights concerns in relation to similar instruments in previous years. See, e.g. Migration (Granting of contributory parent visas, parent visas and other family visas in the 2020/2021 financial year) Instrument (LIN 21/025) 2021 [F2021L00511], [Report 6 of 2021](#) (13 May 2021) and [Report 7 of 2021](#) (16 June 2021).

<sup>5</sup> Protected by articles 17 and 23 of the International Covenant on Civil and Political Rights and article 10 of the International Covenant on Economic, Social and Cultural Rights. Those treaties state that the family 'is the natural and fundamental group unit of society and is entitled to protection by society and the State' and that the 'widest possible protection and assistance should be accorded to the family'.

<sup>6</sup> See *Ngambi and Nebol v France*, United Nations Human Rights Committee, Communication No. 1179/2003 (2004) [6.4]-[6.5].

<sup>7</sup> See General Comment No. 16, *The right to respect of privacy, family, home and correspondence, and protection of honour and reputation (Art. 17)*, 8 April 1988.

<sup>8</sup> See *Ngambi and Nebol v France*, United Nations Human Rights Committee, Communication No. 1179/2003 (2004) [6.4].

<sup>9</sup> See *Warsame v Canada*, United Nations Human Rights Committee, Communication No. 1959/2010 (2011) [8.8].

<sup>10</sup> See *Nystrom v Australia*, United Nations Human Rights Committee, Communication No. 1557/2007 (2011) [7.8], where the Committee referenced the applicant's family life with his mother, sister and nephews.

manner.<sup>11</sup> As such, capping the number of parent visas for parents of children aged under 18, which may result in the separation, or continued separation, of children from their parent (such as where a child is in Australia with one parent but the other parent is in another country and is ineligible for any other type of visa), engages and limits the rights of the child.

1.192 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.

1.193 As this legislative instrument is exempt from disallowance by the Parliament, it is not required to be accompanied by a statement of compatibility with human rights.<sup>12</sup> As such, no assessment of the compatibility of this measure with the rights to protection of the family or the rights of the child has been provided. It is therefore not clear what is the legitimate objective of this measure, nor whether the measure is proportionate to that objective. Further information is therefore required to assess the compatibility of this instrument with these rights.

### **Committee view**

1.194 The committee notes that capping the number of parent visas and other family visas for the 2022–2023 financial year engages and may limit the right to protection of the family and the rights of the child. Noting that the instrument is not accompanied by a statement of compatibility (as this is not required as a matter of law), the committee considers further information is required to assess the compatibility of this measure with these rights, and as such seeks the minister's advice in relation to:

- (a) whether setting a cap on the number of parent and other family visas seeks to achieve a legitimate objective for the purposes of international human rights law;
- (b) whether the cap on the number of visas is a reasonable and proportionate measure to achieve the stated objective;
- (c) whether any children under 18 years would be likely to be separated from their parents as a result of caps imposed on the numbers of parent visas granted;
- (d) whether there is any discretion to ensure family members are not involuntarily separated as a result on the cap of the number of parent and other family visas;
- (e) what is the average length of time for visas capped under this legislative instrument to be finally processed, and are these timeframes

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<sup>11</sup> Convention on the Rights of the Child, articles 3(1) and 10.

<sup>12</sup> *Human Rights (Parliamentary Scrutiny) Act 2011*, section 9.

consistent with the right to protection of the family and the rights of the child; and

- (f) whether the right to the protection of the family and the rights of the child were considered when these capped numbers were determined.