Chapter 2

Concluded matters

2.1 This chapter considers responses to matters raised previously by the committee. The committee has concluded its examination of these matters on the basis of the responses received.

2.2 Correspondence relating to these matters is available on the committee's website.[1]

Bills

Appropriation Bills 2023-2024[2]

Purpose	These six bills[3] seek to appropriate money from the Consolidated Revenue Fund for services
Portfolio	Finance
Introduced	House of Representatives, 9 May 2023. Received Royal Assent on 19 June 2023
Rights	Multiple rights

2.3 The committee requested a response from the minister in relation to the bills in *Report 6 of 2023*.[4]

Appropriation of money

2.4 These bills (now Acts) appropriate money from the Consolidated Revenue Fund for a range of services. The portfolios, budget outcomes and entities for which these appropriations would be made, are set out in the schedules to each bill.

1 See https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Scrutiny_reports.

2 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Appropriation Bills 2023-2024, *Report 8 of 2023*; [2023] AUPJCHR 77.

3 Appropriation Bill (No. 1) 2023-2024; Appropriation Bill (No. 2) 2023-2024; Appropriation Bill (No. 3) 2022-2023; Appropriation Bill (No. 4) 2022-2023; Appropriation (Parliamentary Departments) Bill (No. 1) 2022-2023; and Appropriation (Parliamentary Departments) Bill (No. 2) 2022-2023.

4 Parliamentary Joint Committee on Human Rights, *Report 6 of 2023* (14 June 2023), pp. 9-15.

Summary of initial assessment

Preliminary international human rights legal advice

Multiple rights

2.5 Proposed government expenditure to give effect to particular policies may engage and limit, or promote, a range of human rights, including civil and political rights and economic, social and cultural rights (such as the rights to housing, health, education and social security).[5] The rights of people with disability, children and women may also be engaged where policies have a particular impact on vulnerable groups.[6]

2.6 Australia has obligations to respect, protect and fulfil human rights, including specific obligations to progressively realise economic, social and cultural rights using the maximum of resources available; and a corresponding duty to refrain from taking retrogressive measures (or backwards steps) in relation to the realisation of these rights.[7]

2.7 Economic, social and cultural rights may be particularly affected by appropriation bills, because any increase in funding would likely promote such rights. Any reduction in funding for measures which realise such rights, such as specific health and education services, may be considered to be retrogressive with respect to the attainment of such rights. Retrogressive measures must be justified for the purposes of international human rights law.

2.8 The statements of compatibility accompanying these bills do not identify that any rights are engaged by the bills.

Committee's initial view

2.9 The committee sought the advice of the Minister for Finance as to whether the appropriation bills (now Acts) are compatible with Australia's human rights obligations, and particularly:

(a) whether and how the bills are compatible with Australia's obligations of progressive realisation with respect to economic, social and cultural rights;

(b) if there are any reductions in the allocation of funding that affect human rights obligations, whether these are compatible with Australia's obligations not to unjustifiably take backward steps (a

5 Under the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights.

6 Under the Convention on the Rights of Persons with Disabilities; Convention on the Rights of the Child; and Convention on the Elimination of All Forms of Discrimination Against Women.

7 See, International Covenant on Economic, Social and Cultural Rights.

retrogressive measure) in the realisation of economic, social and cultural rights; and

(c) whether and how the allocations are compatible with the rights of vulnerable groups (such as children; women; Aboriginal and Torres Strait Islander Peoples; persons with disabilities; and ethnic minorities).

2.10 The full initial analysis is set out in *Report 6 of 2023*.

Minister's response[8]

2.11 The minister advised:

> As set out in the statements of compatibility with human rights in explanatory memoranda to the Appropriation Bills, given the limited legal effect of the Appropriation Bills, they do not engage or otherwise affect the rights or freedoms relevant to the *Human Rights (Parliamentary Scrutiny) Act 2011* (the Act). This position is consistent with that of successive Governments as previously expressed to the committee.
>
> The detail of proposed Government expenditure and the Budget generally, appears in the Budget Papers rather than Appropriation Bills, with more specific detail provided in the Portfolio Budget Statements prepared for each portfolio and authorised by the responsible Minister. This allows the examination of proposed expenditure and budgetary processes through the Senate Estimates process.
>
> The annual Appropriation Acts do not generally provide legislative authority for Commonwealth expenditure on particular activities. This authority is provided in other legislation or legislative instruments. It is more appropriate that an assessment of the impact of proposed Commonwealth expenditure on human rights, including those of vulnerable groups, be incorporated in explanatory documentation accompanying that other legislation, as per the current practice.
>
> It is neither practicable nor appropriate for explanatory memoranda to the Appropriation Bills to include an assessment of overall trends in Australia's progressive realisation of economic, social and cultural rights; the impact of budget measures on vulnerable groups; and an assessment of human rights compatibility for key individual measures.

Concluding comments

International human rights legal advice

2.12 The minister stated that appropriation bills do not affect human rights and it is not appropriate for the explanatory memoranda to the appropriation bills to include an assessment of overall trends in Australia's progressive realisation of

8 The minister's response to the committee's inquiries was received on 26 June 2023. This is an extract of the response. The response is available in full on the committee's website.

economic, social and cultural rights; the impact of budget measures on vulnerable groups; and an assessment of human rights compatibility for key individual measures. However, as set out in the initial analysis, without an assessment of the human rights compatibility of appropriation bills, it is difficult to assess whether, and to what extent, Australia is promoting human rights and realising its human rights obligations in respect of the measures proposed in the relevant budget. For example, a retrogressive measure in an individual bill may not, in fact, be retrogressive when understood within the budgetary context as a whole. Further, where appropriation measures may engage and limit human rights, an assessment of the human rights compatibility of the measure would provide an explanation as to whether that limitation would be permissible under international human rights law.

2.13 Further, the Office of the United Nations High Commissioner for Human Rights emphasises the close relationship between public budgets and human rights, and highlights instances in which international human rights oversight bodies have identified the importance of state budgets in their assessment of compliance with human rights obligations.[9] It states that:

> If governments are to use the budget to effectively realize people's rights, they need to understand the relationship of the budget to the human rights guarantees in their country's constitution and laws, and in the…international human rights treaties the government has ratified. They need to understand in detailed and concrete terms how they can meet their human rights obligations in the way they raise revenue, allocate, spend and audit the budget.[10]

2.14 The appropriation of any funds, or more funds in comparison with earlier amounts, may promote human rights. The provision of no funds, or a reduction in funding in comparison with earlier appropriated sums, may limit rights. Such a limit will not necessarily be impermissible, but it would require that the limit be identified, and explanation given as to whether the limitation is reasonable, necessary and proportionate.

2.15 The minister stated that the details of proposed government expenditure appear in the Budget Papers, and that more specific details appear in Portfolio Budget Statements. However, these documents do not identify whether specific measures promote or limit human rights. For example, the 2023-24 Department of Social Services Portfolio Budget Statement states that increased funding was provided to the housing and homelessness program as part of the indexation

9 UN Office of the High Commissioner for Human Rights, *Realising Human Rights through Government Budgets* (2017) p. 7.

10 UN Office of the High Commissioner for Human Rights, *Realising Human Rights through Government Budgets* (2017) p. 12.

framework.[11] However, it then indicates a reduction in funding relating to housing and homelessness outcomes pursuant to Appropriation Bill No. 1 in comparison with the prior financial year, and predicts further reductions in funding to the 2026-27 financial year.[12] The document does not explain whether a greater or lesser amount is being budgeted for this particular outcome overall, nor does it explain why the budgeted expenditure relating to housing and homelessness is intended to decrease, and how this is compatible with the right to housing (as an aspect of the right to an adequate standard of living).[13]

2.16 The minister also stated that legislation and legislative instruments provide legislative authority for Commonwealth expenditure on particular activities, and that it is more appropriate that an assessment of the impact of proposed Commonwealth expenditure on human rights, including those of vulnerable groups, be incorporated in explanatory documentation accompanying that other legislation. One source of legislative authority to spend appropriated funds is the *Financial Framework (Supplementary Powers) Act 1997* and legislative instruments made pursuant to it. However, because these individual legislative instruments facilitate the spending of already appropriated money on specific activities, the statements of compatibility with human rights will typically state that they will promote human rights. They do not consider the individual measures within their broader budgetary context and as such, if there is a reduction in spending (via a lower amount of appropriation), this will not be reflected in the statement of compatibility that accompanies the legislative instrument that allocates the funding that is available.

2.17 For example, the Financial Framework (Supplementary Powers) Amendments (Social Services Measure No. 2) Regulations 2023 established legislative authority for the funding of two disability services for two years.[14] The explanatory statement states that both of these services had existed prior to this legislation.[15] The statement of compatibility states that funding these services for two years will 'ensure these important services continue to operate', and concludes

11 Portfolio Budget Statements 2023–24, *Budget Related Paper No. 1.14, Social Services Portfolio* (2023) p. 18.

12 Portfolio Budget Statements 2023–24, *Budget Related Paper No. 1.14, Social Services Portfolio* (2023) pp. 69–71.

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

14 See Financial Framework (Supplementary Powers) Amendments (Social Services Measure No. 2) Regulations 2023 [F2023L00544]. Of note, the explanatory statement indicates that the constitutional authority for the making of this legislative instrument includes the external affairs power to support implementing Australia's obligations under the UN Convention on the Rights of Persons with Disabilities.

15 The explanatory statement notes that these services were established more than 20 years prior to this legislative instrument.

therefore that the measure promotes rights of people with disability.[16] However, the explanatory materials do not explain whether, viewed in its broader context, this specific funding constitutes a real increase, decrease, or maintenance in funding. Consequently, in this example, it is not clear at what stage consideration of the level of funding given to these specific services would have identified a real increase or reduction over time. This raises questions as to the sufficiency of the assessment of the impact of proposed Commonwealth expenditure on human rights in legislation authorising the expenditure, post appropriation.

2.18 It follows from the fact that appropriations may engage human rights for the purposes of international human rights law, that in order to assess such bills for compatibility with human rights, the statements of compatibility accompanying such bills should include an assessment of the budget measures contained in the bill, including an assessment of:

- overall trends in the progressive realisation of economic, social and cultural rights (including any retrogressive trends or measures);[17]
- the impact of budget measures (such as spending or reduction in spending) on vulnerable groups (including women, Aboriginal and Torres Strait Islander people, people with disability, children and ethnic minorities);[18] and
- key individual measures which engage human rights, including a brief assessment of their human rights compatibility.

2.19 In relation to the impact of spending or reduction in spending on vulnerable groups, relevant considerations may include:

- whether there are any specific budget measures that may disproportionately impact on particular groups (either directly or indirectly); and
- whether there are any budget measures or trends in spending over time that seek to fulfil the right to equality and non-discrimination for particular groups.[19]

16 Statement of compatibility, p. 1.

17 This could include an assessment of any trends indicating the progressive realisation of rights using the maximum of resources available; any increase in funding over time in real terms; any trends that increase expenditure in a way which would benefit vulnerable groups; and any trends that result in a reduction in the allocation of funding which may impact on the realisation of human rights and, if so, an analysis of whether this would be permissible under international human rights law.

18 Spending, or reduction of spending, may have disproportionate impacts on such groups and accordingly, may engage the right to equality and non-discrimination.

Committee view

2.20 The committee thanks the minister for their response. As the committee has consistently stated since 2013,[20] the appropriation of funds facilitates the taking of actions which may affect the progressive realisation of, or failure to fulfil, Australia's obligations under international human rights law. The committee considers that appropriations may, therefore, engage human rights for the purposes of international human rights law, because increased appropriation for particular areas may promote certain rights (such as housing, welfare, health or education) while reduced appropriations for particular areas may be regarded as retrogressive – a type of limitation on rights.

2.21 The committee acknowledges that appropriation bills may present particular difficulties given their technical and high-level nature as they generally include appropriations for a wide range of programs and activities across many portfolios. The committee notes the minister's advice that further information about expenditure can be found in budget statements and legislation authorising expenditure. However, as the budget itself is not legislation liable to this committee's scrutiny, and because individual legislation may not identify whether funding for specific measures is being increased or decreased, the committee considers that these are not sufficient alternatives.

2.22 The committee notes that it may not be appropriate to assess human rights compatibility for each individual measure in appropriation bills. However, the committee considers that the allocation of funds via appropriation bills is susceptible to a human rights assessment that is directed at broader questions of compatibility, namely, their impact on progressive realisation obligations and on vulnerable minorities or specific groups. The committee considers that appropriation bills are a

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19 There are a range of resources to assist in the preparation of human rights assessments of budgets. See, e.g. UN Office of the High Commissioner for Human Rights, *Realising Human Rights through Government Budgets* (2017); South African Human Rights Commission, *Budget Analysis for Advancing Socio-Economic Rights* (2016); Ann Blyberg and Helena Hofbauer, *Article 2 and Governments' Budgets* (2014); Diane Elson, *Budgeting for Women's Rights: Monitoring Government Budgets for Compliance with CEDAW* (2006); Rory O'Connell, Aoife Nolan, Colin Harvey, Mira Dutschke and Eoin Rooney, *Applying an International Human Rights Framework to State Budget Allocations: Rights and Resources* (Routledge, 2014).

20 Parliamentary Joint Committee on Human Rights, *Report 3 of 2013* (13 March 2013) pp. 65-67; *Report 7 of 2013* (5 June 2013) pp. 21-27; *Report 3/44* (4 March 2014) pp. 3-6; *Report 8/44* (24 June 2014) pp. 5-8; *Report 20/44* (18 March 2015) pp. 5-10; *Report 23/44* (18 June 2015) pp. 13-17; *Report 34/44* (23 February 2016) p. 2; *Report 9 of 2016* (22 November 2016) pp. 30-33; *Report 2 of 2017* (21 March 2017) pp. 44-46; *Report 5 of 2017* (14 June 2017) pp. 42-44; *Report 3 of 2018* (27 March 2018) pp. 97-100; *Report 5 of 2018* (19 June 2018) pp. 49-52; *Report 2 of 2019* (2 April 2019) pp. 106-111; *Report 4 of 2019* (10 September 2019) pp. 11-17; *Report 3 of 2020* (2 April 2020) pp. 15-18; *Report 12 of 2020* (15 October 2020) pp. 20-23; *Report 7 of 2021* (16 June 2021) pp. 11-15; *Report 2 of 2022* (25 March 2022) pp. 3-7; *Report 6 of 2022* (24 November 2022) pp. 11-15.

key opportunity for the Parliament (and for this committee) to consider the compatibility of these measures with human rights within the overall budgetary context.

Suggested action

2.23 The committee's expectation is that statements of compatibility with human rights accompanying appropriations bills should address the compatibility of measures which directly impact human rights and which are not addressed elsewhere in legislation. In particular, the committee expects that where the appropriations bills propose a real reduction in funds available for expenditure on certain portfolios or activities that may impact human rights, the statement of compatibility should identify this and explain why this is a permissible limit.

2.24 The committee draws these human rights concerns to the attention of the minister and the Parliament for consideration when statements of compatibility are prepared for future appropriations bills.

Inspector-General of Live Animal Exports Amendment (Animal Welfare) Bill 2023[1]

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

2.25 The committee requested a response from the minister in relation to the bill in *Report 7 of 2023*.[2]

Collection, use and disclosure of personal information

2.26 This bill seeks to amend the *Inspector-General of Live Animal Exports Act 2019* (the Act) to expand the functions of the Inspector-General of Animal Welfare (Inspector-General) in relation to their powers of review.[3] In particular, the Inspector-General would, among other things, be empowered to review the performance of functions, or exercise of powers, by livestock export officials under the animal welfare and live animal export legislation and standards in relation to the export of livestock.[4] A livestock export official means: an authorised officer (such as an employee of a Commonwealth body); an accredited veterinarian; or the Secretary of the Department of Agriculture, Fisheries and Forestry or a delegate of the

1 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Inspector-General of Live Animal Exports Amendment (Animal Welfare) Bill 2023, *Report 8 of 2023*; [2023] AUPJCHR 78.

2 Parliamentary Joint Committee on Human Rights, *Report 7 of 2023* (21 June 2023), pp. 7-12.

3 Items 11 and 12.

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

Secretary.[5] The Inspector-General would also be conferred ancillary powers to do all things necessary or convenient to be done for, or in connection with, the performance of the Inspector-General's functions.[6] The Act currently confers information gathering powers on the Inspector-General, enabling them to require a person to give information or documents if they reasonably believe the person has information or documents relevant to the review.[7] The Act also requires the Inspector-General to publish a report on each review conducted.[8]

Summary of initial assessment

Preliminary international human rights legal advice

Right to privacy

2.27 By expanding the Inspector-General's review powers, including broadening the scope of matters which may be subject to review, and conferring ancillary powers on the Inspector-General, the measure would have the effect of expanding the scope of information, including personal information, that may be obtained, used and disclosed by the Inspector-General in performance of these functions. The collection, use and disclosure of personal information engages and limits the right to privacy. The statement of compatibility acknowledges this, and notes that the Inspector-General may require the provision of information or documents from various persons in undertaking a review and must then, under the current Act, publish a report for each review undertaken.[9]

2.28 The right to privacy includes respect for informational privacy, including the right to respect for private and confidential information, particularly the storing, use and sharing of such information.[10] It also includes the right to control the

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

6 Item 12.

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

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

9 Statement of compatibility, pp. 26–27.

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

dissemination of information about one's private life.[11] 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.

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

2.30 However, questions remain in relation to proportionality. In order to be proportionate, a limitation on the right to privacy should only be as extensive as is strictly necessary to achieve its legitimate objective and must be accompanied by appropriate safeguards. The United Nations Human Rights Committee has stated that legislation must specify in detail the precise circumstances in which interferences with privacy may be permitted.[12]

Committee's initial view

2.31 The committee noted that the collection, use and disclosure of personal information engages and limits the right to privacy, and sought the minister's advice in relation to:

(a) the likely type or scope of personal information that may be obtained, used or disclosed by the Inspector-General in performance of their functions;

(b) the specific safeguards in the Privacy Act and in the information management framework under the current Act that would operate to protect the right to privacy in the context of this measure; and

(c) whether, where the report relating to a review conducted by the Inspector-General is required to be published, it would be publicly available, and if so, whether it would contain personal or identifying information.

2.32 The full initial analysis is set out in *Report 7 of 2023*

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

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

Minister's response[13]

2.33 The minister advised:

The likely type or scope of personal information that may be obtained, used or disclosed by the Inspector-General in the performance of their functions

It is likely that the type and scope of personal information that may be obtained, used or disclosed by the Inspector-General in the performance of their expanded functions will be substantially similar to what the Inspector-General of Live Animal Exports currently collects, which is described below.

Currently, the type and scope of personal information collected by the Inspector-General of Live Animal Exports includes names and contact details received through submissions from stakeholders made as part of a review process, and information regarding officials and exporters during the undertaking of a review, which may include the names of contact details of officials and exporters. Additionally, under the Act, the Inspector-General can compel any person (excluding a foreign person or body) to provide information or documents relevant to a review. There are appropriate safeguards around how information is handled, which are discussed below.

The Bill expands both the functions of the Inspector-General and the objects of the Act. The effect of this is that the Inspector-General may conduct reviews on a wider range of matters, all of which are critical to the performance of functions by the Inspector-General in that office's role to provide additional assurance and oversight on animal welfare within the livestock export industry.

As the Statement of Compatibility of the Bill acknowledges, the expansion of the Inspector General's functions (and therefore the expansion of the reviews the Inspector-General may conduct) may require the provision of information or documents from various persons.

However, whilst the Bill proposes to expand the functions of the Inspector-General, they are exhaustively delineated in new subsection 10(1) of the Bill. Further, each function is necessarily constrained by its express terms in subsection 10(1). Therefore, whilst the Inspector-General would be able to undertake reviews into an expanded set of matters (which may require the provision of personal information), the scope of those reviews are reasonably, appropriately and proportionately constrained by the Bill's provisions. This would, in turn, mean that any information collected as part of a review would be in pursuance of a legitimate objective and would similarly be reasonably, appropriately and proportionately constrained.

13 The minister's response to the committee's inquiries was received on 4 July 2023. This is an extract of the response. The response is available in full on the committee's website.

The ancillary powers under subsection 10(2A) of the Bill may only be exercised if necessary or convenient for, or in connection with, the performance of the Inspector-General's functions. As such, any ancillary powers may only be exercised in pursuance of the exhaustively defined functions, which are limited in scope in the legislation.

Further, the Bill provides expanded objects for the Act under new section 3. Similarly, these objects are exhaustively delineated and are to be achieved with a view to ensuring that the animal welfare and live animal export legislation and standards in relation to the export of livestock are complied with. As such, the performance of the Inspector-General's functions and the exercise of the Inspector-General's powers under the Act are by necessity reasonably, appropriately and proportionately constrained by the objects of the Act and may only be performed or exercised in pursuance of these objects.

The Bill does not impact on how the Inspector-General may conduct a review and does not specifically outline what specific information may be collected as it would not be appropriate to do so.

Therefore, it is unlikely that the proposed new objects and functions, and ancillary powers, will result in significantly different types, or a significantly different scope, of information being collected by the Inspector-General compared to what is currently collected.

The specific safeguards in the Privacy Act and in the information management framework under the current Act that would operate to protect the right to privacy in the context of this measure.

The Committee has requested advice on specific safeguards in the *Privacy Act 1988* (Privacy Act), and on the existing information management framework under the Act, that would operate to protect the right to privacy in the context of this Bill.

As noted in the Explanatory Memorandum, any information or documentation, required by the Inspector-General to be provided in order to conduct a review (including personal information), will be managed in compliance with both the Act and the Privacy Act.

The Act contains an existing information management framework in sections 23 to 31 which provide robust protection for information provided under or in accordance with the Act (defined as "protected information"). Protected information includes personal information collected under, or in accordance with, the Act. The Act's information management framework allows only for limited disclosure of protected information, for the below specified purposes and circumstances:

- for the purposes of performing functions or exercising powers under the Act (section 24)
- for the purposes of law enforcement or court proceedings (sections 25 and 26)

- where required to do so by an Australian law (section 27)
- with the consent of the person to whom the information relates (section 28)
- to the person who gave the information (section 29).

The effect of the Act's information management framework is that protected information may only be used or disclosed for, and in, these exhaustively delineated and limited purposes and circumstances. The framework is further supported by an offence provision for unauthorised use or disclosure (described below). This provides robust protection. Further, the purposes for which, and the circumstances in which, disclosure of protected information may occur are reasonable, appropriate and proportionate. They are also in pursuance of legitimate objectives - for example, where information is ordered to be disclosed by a court as it is relevant for proceedings, or where the information is reasonably necessary for, or directly related to, one or more enforcement related activities being conducted by, or on behalf of, that enforcement body.

Section 30 of the Act provides that rules (made by the Minister under section 41) may authorise a person to use or disclose the information for purposes other than those referred to in sections 24 to 29, however there are currently no rules made pursuant to section 30. If the Minister does make rules pursuant to section 30, such rules will be subject to Parliamentary scrutiny and may be disallowed, as provided by the *Legislation Act 2003,* as the rules are to be made by legislative instrument under section 41.

Section 31 of the Act contains an offence provision for the unauthorised disclosure of protected information. A person who contravenes this provision may face a maximum of 2 years imprisonment or a penalty of 120 penalty units, or both. As such, the Inspector-General's ability to use and disclose personal information will be constrained by both the Act and the Privacy Act.

It is not appropriate to further constrain the Inspector-General's management of information, without adversely impinging on the office's independence which is critical for the performance of its functions under the Act.

Relevantly, the Privacy Act also provides specific protections under the following Australian Privacy Principles (APPs):

- APP 5 - notification of the collection of personal information. APP 5 requires that entities must take reasonable steps to notify the individual on a number of matters as applicable in the circumstances in relation to the collection of personal information, including the purpose for which the entity collects the personal information.
- APP 6 - use or disclosure of personal information. If an entity holds personal information about an individual that was collected for a

particular purpose (the primary purpose), the entity must not use or disclose the information for another purpose (the secondary purpose) unless, relevantly:

- the individual has consented to the use or disclosure of the information; or
- one of the following exceptions applies:
    - the individual would reasonably expect the APP entity to use or disclose the personal information for the secondary purpose and the secondary purpose is related to the primary purpose.
    - the use or disclosure of the information is required or authorised by or under an Australian law or a court/tribunal order.
    - the APP entity reasonably believes that the use or disclosure of the information is reasonably necessary for one or more enforcement related activities conducted by, or on behalf of, an enforcement body.

While other exceptions are provided by the Privacy Act under APP 6, they would not generally be applicable in the context of the Inspector-General undertaking a review.

From a broader perspective, APP 1 also requires entities to take reasonable steps to implement practices, procedures and systems that will ensure compliance with the APPs and enable them to deal with enquiries or complaints about privacy compliance. In line with APP 1**,** the Inspector-General of Animal Welfare and Live Animal Exports will need to conduct an assessment of the impact of reviews and review reports on the privacy of individuals (beginning with preliminary or threshold assessment) to ensure that any impact on the privacy of individuals are appropriately managed to minimise or eliminate that impact. This will help ensure that the impact of any proposed disclosure of personal information is minimised or eliminated, while ensuring that the objects of the Act are met. For example, anonymous or redacted personal information in review reports could be effective safeguards where appropriate.

Whether, where a report relating to a review conducted by the Inspector-General is required to be published, it would be publicly available, and if so, whether it would contain personal or identifying information

Currently, the Inspector-General publishes reviews on their website, at www.iglae.gov.au. This is in line with requirements under the Act, including reports under subsection 10(3) (the Inspector General must publish a report on each review conducted). This requirement under the Act would continue to apply.

Furthermore, the information management provisions under the Act, and the Privacy Act, as outlined above, would also apply to these published

reviews. This would include with respect to personal or identifying information.

Concluding comments

International human rights legal advice

2.34 The minister advised that the proposed expansion of the Inspector-General's review powers is unlikely to result in significantly different types, or a significantly different scope, of information being collected by the Inspector-General compared to what is currently collected. The minister advised that currently, the type and scope of personal information collected includes names and contact details received through submissions from stakeholders during a review process, and information regarding officials and exporters during the undertaking of a review, which may include the names of contact details of officials and exporters. The minister states that the proposed new functions are comprehensively set out in the bill and as the scope of those reviews are reasonably, appropriately and proportionately constrained in the bill, any information collected as part of a review would be similarly constrained.

2.35 The minister gave detailed advice as to the applicable privacy protections in the Act and under the Privacy Act, including in relation to the notification of the collection of personal information; the use or disclosure of personal information; and the requirement to take reasonable steps to implement practices, procedures and systems that will ensure compliance with the privacy principles. In this regard, the minister advised that the Inspector-General will need to conduct an assessment of the impact of reviews and review reports on the privacy of individuals to ensure that any impact on the privacy of individuals is appropriately managed to minimise or eliminate that impact. The minister stated, as an example, that anonymous or redacted personal information in review reports could be effective safeguards where appropriate. Further, the minister advised that these privacy safeguards would also apply to published reviews by the Inspector-General.

2.36 Noting that the scope of the Inspector-General's review powers are constrained by the bill, the type of personal information likely to be obtained is relatively narrow, and the privacy protections that are applicable, it appears likely that any limitation on the right to privacy by this measure would be permissible.

Committee view

2.37 The committee thanks the minister for this response. The committee considers that expanding the Inspector-General's functions and review powers, to improve compliance with legislation and enhance accountability and transparency of public officials in the performance of their functions, pursues a legitimate objective for the purposes of international human rights law. The collection, use and disclosure of personal information also appears likely to be effective to achieve this objective. The committee considers there are sufficient safeguards to ensure that any limitation on the right to privacy is likely to be proportionate.

2.38 The committee considers that its concerns have therefore been addressed, and makes no further comment in relation to this bill.

Suggested action

2.39 The committee recommends that the statement of compatibility be updated to reflect the information provided by the minister.

Social Services Legislation Amendment (Child Support Measures) Bill 2023[1]

Purpose	This bill seeks to amend *the Child Support (Registration and Collection) Act 1988* in relation to the issue of departure authorisation certificates, expanding the circumstances in which Services Australia can deduct child support debts directly from a person's wages, and determining adjusted taxable income
Portfolio	Social Services
Introduced	House of Representatives, 29 March 2023 (received Royal Assent on 23 June 2023)
Rights	Freedom of movement; equality and non-discrimination

2.40 The committee first considered this bill in *Report 5 of 2023*, seeking a response from the minister. The minister responded to the committee's initial questions and the committee considered this response and requested a further response in *Report 6 of 2023*.[2]

Departure authorisation certificates

2.41 Currently Part VA of the *Child Support (Registration and Collection) Act 1988* (the Act) provides that where a person (or carer) has a child support liability (or carer liability), and they owe a child support debt, the Child Support Registrar (the Registrar) can make an order prohibiting the person from departing Australia (a departure prohibition order). Currently, a person who is subject to a departure prohibition order may apply for a certificate authorising them to leave Australia for a foreign country, and the Registrar must issue a certificate if:

(a) satisfied that it is likely the person will depart and return in an appropriate time period; and it is likely that the order will likely need to be revoked within a particular period of time (because either the person will no longer have a child support debt, satisfactory arrangements have been made for it to be discharged, or the liability is

1 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Social Services Legislation Amendment (Child Support Measures) Bill 2023, *Report 8 of 2023*; [2023] AUPJCHR 79.

2 Parliamentary Joint Committee on Human Rights, *Report 6 of 2023* (14 June 2023) pp. 16-25.

irrecoverable);[3] and it is not necessary for the person to give a security for their return; or

(b) the person has given a security for their return; or

(c) if the person is unable to give a security, the Registrar is satisfied the certificate should be issued on humanitarian grounds or because refusing to issue the certificate will be detrimental to Australia's interests.[4]

2.42 This bill seeks to amend the Act relating to when a departure authorisation certificate can be issued. In effect, the bill would provide that a certificate cannot be issued solely where a person has given a security for their return. They must have given a security for their return *and* have satisfied the Registrar that they will wholly or substantially discharge the outstanding child support or carer liability (or the debt is irrecoverable or they will likely no longer have such a debt).[5]

Summary of previous assessment

Preliminary international human rights legal advice

Rights to freedom of movement and equality and non-discrimination

2.43 By expanding the circumstances in which the Registrar may refuse to issue a departure authorisation certificate, which prevents persons from leaving Australia, the measure engages and limits the right to freedom of movement.

2.44 The right to freedom of movement 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, subject to some additional requirements. The European Court of Human Rights has stated that a restriction on the right to leave one's country on grounds of unpaid debt can only be justified as long as it serves its aim of recovering a debt, and if action is not taken to recover the debt, then a continuing restriction may not be permissible.[6]

2.45 Relevant case law also raises the question of whether Australian citizens with family connections overseas are less likely to be able to secure a departure certificate in practice, and as such whether departure prohibition orders may have a disproportionate impact based on nationality. As such, the measure also appears

3 These are the bases on which the Registrar must revoke a departure prohibition order pursuant to section 72I of the *Child Support (Registration and Collection) Act 1988*.

4 Part VA, Division 4.

5 See Schedule 1, Part 1. Schedule 1 Part 2 of the bill relates to extending employer withholding, and Part 3 deals with determining adjustable taxable income.

6 See, *Napijalo v Croatia* (13 November 2003) [79] and *Democracy and Human Rights Resources Centre and Mustafayev v Azerbaijan* (14 October 2021) [94]. See also, UN Human Rights Committee, *General Comment No. 27: Article 12 (Freedom of Movement)* (1999) [13].

likely to engage the right to equality and non-discrimination. This right provides that everyone is entitled to enjoy their rights without discrimination of any kind and that all people are equal before the law and entitled without discrimination to equal and non-discriminatory protection of the law.[7] The right to equality encompasses both 'direct' discrimination (where measures have a discriminatory intent) and 'indirect' discrimination (where measures have a discriminatory effect on the enjoyment of rights).[8] Indirect discrimination occurs where 'a rule or measure that is neutral at face value or without intent to discriminate' exclusively or disproportionately affects people with a particular protected attribute.[9] Differential treatment (including the differential effect of a measure that is neutral on its face) will not constitute unlawful discrimination if the differential treatment is based on reasonable and objective criteria such that it serves a legitimate objective, is rationally connected to that objective and is a proportionate means of achieving that objective.[10]

Committee view

2.46 The committee considered that further information was required to more fully assess the compatibility of this measure with the rights to freedom of movement and equality and non-discrimination, and in particular sought the minister's further advice in relation to:

(a) what other steps are taken to recover a debt while a departure prohibition order is in place;

(b) if a debt is likely to be deemed, within a period that the Registrar considers appropriate, to be irrecoverable, why the debtor would also need to provide a security to be allowed to leave Australia;

(c) noting that security is not currently accepted when the debtor borrows the money to pay the security, how is requiring the security to only be paid by the debtor effective to achieve the objective of encouraging

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

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

9 *Althammer v Austria*, UN Human Rights Committee Communication no. 998/01 (2003) [10.2]. The prohibited grounds of discrimination are race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Under 'other status' the following have been held to qualify as prohibited grounds: age, nationality, marital status, disability, place of residence within a country and sexual orientation. The prohibited grounds of discrimination are often described as 'personal attributes'. See Sarah Joseph and Melissa Castan, *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary*, 3rd edition, Oxford University Press, Oxford, 2013, [23.39].

10 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].

payment of the debt (noting they would appear not to have the money available to raise a security);

(d) what other steps must be taken to recover a child support debt prior to making a departure prohibition order;

(e) what is the average length of time that a departure prohibition order remains in place;

(f) noting the importance of recovering child support debts in order to provide maintenance for dependent children, where repayments are made towards a debt whether those repayments are directed first towards the outstanding maintenance amount or towards late penalties, and if the order remains in place if the debt mainly consists of late payment fees;

(g) whether the average debt amount indicated in the explanatory materials include late penalties, and if so, what is the average debt excluding such penalties;

(h) what threshold is applicable in determining when a child support debt is irrecoverable, and the circumstances in which a child support debt has been determined to be irrecoverable where a departure prohibition order is in place; and

(i) whether the denial to issue a departure authorisation certificate has a disproportionate impact on persons on the basis of nationality who may have a greater need to travel to or from Australia for family reasons.

2.47 This full analysis is set out in *Report 6 of 2023*.

Minister's response[11]

2.48 The minister advised:

Departure authorisation certificate

The measure amends the *Child Support (Registration and Collection) Act 1988* (the Act) to expand the circumstances in which a child support debtor who is subject to a departure prohibition order (restricting them from leaving Australia) may be refused a departure authorisation certificate (the certificate being necessary for them to leave Australia for another country).

The measure engages with the person's right to freedom of movement because the amendment provides the Child Support Registrar with an ability to refuse a departure authorisation certificate where a person

11 The minister's response to the committee's inquiries was received on 7 July 2023. This is an extract of the response. The response is available in full on the committee's website.

offers security, but the Registrar is not satisfied that arrangements will likely be made to wholly discharge the relevant outstanding child support or carer liability.

a. What other steps are taken to recover a debt while a departure prohibition order is in place?

While a departure prohibition order is in place, Services Australia will continue to pursue collection of outstanding amounts owed by the debtor using a range of powers, including:

• negotiated arrangements for voluntary payment by instalments;

• deducting child support from a parent's salary or wage;

• intercepting tax refunds;

• collecting via third parties such as banks;

• deducting payments from social security and other government payments;

• litigation action to recover the debt in any court with family law jurisdiction.

b. If a debt is likely to be deemed, within a period that the Registrar considers appropriate, to be irrecoverable, why the debtor would also need to provide a security to be allowed to leave Australia?

In some cases, a person applies for a departure authorisation certificate (section 72K) before the Registrar has made a decision about whether a departure prohibition order must be revoked (section 721) on the basis the liability is completely irrecoverable (paragraph 72I(l)(c)). The Registrar may require a person to give security for their return to Australia to guard against that person departing Australia with a child support liability that is not completely irrecoverable.

The Registrar may consider it *likely* (but not certain) that they will be required to revoke a departure prohibition order in the future (paragraph 72L(3)(a)(i)). The requirement to give security for the person's return to Australia (paragraph 72L(3)(a)(ii)) provides for this uncertainty. Note, the Registrar may decide a security is not required if satisfied the person is likely to comply with the requirements of the departure authorisation certificate, if issued (paragraph 72L(2)(b)).

Otherwise, if the Registrar is satisfied that a person's child support liability *is* completely irrecoverable, then the Registrar must revoke the person's departure prohibition order (paragraph 72I(l)(c)). If the Registrar revokes the departure prohibition order, the person need not apply for a departure authorisation certificate to depart Australia for a foreign country (subsection 72K(l)) negating the need to provide security.

c. Noting that security is not currently accepted when the debtor borrows the money to pay the security, how is requiring the security to only be paid by the debtor effective to achieve the objective of

encouraging payment of the debt (noting they would appear not to have the money available to raise a security)?

The Registrar is able to accept security where that security is raised by way of borrowed funds. Policy guidance is provided in Chapter 5.2.11 of the Child Support Guide which states "Security can be given by a bond or a deposit or by other means".

The Registrar will only accept a security that:

• is in a form that is readily convertible to cash, for example, bank cheque

• is offered by the debtor rather than third parties on the debtor's behalf

• is generally not significantly less in value than the amount of the debt owing.

Note: Security arising from a loan obtained by a debtor from a financial institution or a third party is not considered to be a payment from a third party.

d. What other steps must be taken to recover a child support debt prior to making a departure prohibition order?

The making of a departure prohibition order will only be considered by the Registrar once all other collection avenues have been investigated. This includes, but is not limited to the actions set out in the response to (a) above.

In addition, the Registrar also undertakes action to ensure the accuracy of the debt prior to making a departure prohibition order, including, but not limited to:

• resolving outstanding applications or changes that may affect the debt;

• ascertaining more accurate incomes for both parents;

• determining if a residence decision is required to be made; and

• advising the parent of their appeal rights if they disagree with a decision that led to the creation of the debt.

e. What is the average length of time that a departure prohibition order remains in place?

As at 23 June 2023, the average period of time a departure prohibition order was or has been in force (for all departure prohibition orders issued between 2017-18 and 2021-22) is:

• 463 days for departure prohibition orders which have been revoked.

• 1,275 days for departure prohibition orders which are still in force.

f. Noting the importance of recovering child support debts in order to provide maintenance for dependent children, where repayments are made towards a debt whether those repayments are directed first towards the outstanding maintenance amount or towards late penalties,

and if the order remains in place if the debt mainly consists of late payment fees?

When Services Australia receives a payment towards a child support parent's child support debt, the payment is allocated in priority to the debt first, and only then will any remainder be applied to late payment penalties or any other debt to the Commonwealth.

g. Whether the average debt amount indicated in the explanatory materials include late penalties, and if so, what is the average debt excluding such penalties?

The average debt amount indicated in the Explanatory Memorandum was inclusive of penalties, costs and fines. The average amount owed by a child support debtor subject to a departure prohibition order exclusive of penalties is **$27,320** (as at 23 June 2023).

h. What threshold is applicable in determining when a child support debt is irrecoverable, and the circumstances in which a child support debt has been determined to be irrecoverable where a departure prohibition order is in place?

Paragraph 72l(l)(c) of the Act provides that the Registrar must revoke a departure prohibition order in respect of a person if 'the Registrar is satisfied that the liability is *completely* irrecoverable.' The word 'completely' presents a high threshold to be satisfied *(Naboush and Child Support Registrar* [2014) AATA 930 (15 December 2014), at [13]).

The Administrative Appeals Tribunal applied Naboush and expanded the test in *Peters and Child Support Registrar* (Child support second review) [2019] AATA l 719 (5 July 2019) (at [27] to [28]).

> *A debt is completely irrecoverable when there is no prospect that the debtor will be able to make any payment towards it. A high threshold must be satisfied to prove that a debt is completely irrecoverable. Even where a debtor has not received any income from work or income support payments for many years, their debt will not be regarded as completely irrecoverable if it is possible that the debtor could obtain work or financial assistance at some time in the future to meet at least part of the debt.*
>
> *…*
>
> *The test is whether the liability is "completely irrecoverable" and is not whether the total amount can be recovered.*

i. Whether the denial to issue a departure authorisation certificate has a disproportionate impact on persons on the basis of nationality who may have a greater need to travel to or from Australia for family reasons.

As outlined in the response to question (b) above, the Registrar may permit a person subject to a departure prohibition order to travel on a number of grounds. The amendments made by the *Social Services Legislation Amendments (Child Support Measures) Act 2023* do not

substantively alter the existing provisions of the Act. That is, the nationality of a parent is not a relevant consideration in determining whether to revoke a departure prohibition order or issue a departure authorisation certificate.

Further, while some parents may have a greater need to travel due to their nationality, relevant considerations apply no more or less strenuously to those parents and do not operate, in intent or practice, to limit their travel more than any other parent.

The intent of the amendments, particularly those to subsection 72L(3) of the Act, is to prevent parents with financial means from exploiting a loophole of providing security to travel despite making no suitable arrangements to discharge their debt, and then having that security returned to them upon their return to Australia. The Act already permits the Registrar to issue a departure prohibition order upon a child support debtor limiting their right to freedom of movement; as such, these amendments do not create new restrictions on travel. Rather, they provide the Registrar greater discretion to consider the likelihood that the parent will discharge, or at least make suitable arrangements to discharge their debt when their travel concludes.

Concluding comments

International human rights legal advice

2.49 Further information was sought in relation to whether the measure would permissibly limit the right to freedom of movement. As to other steps that are taken to recover a debt while a departure prohibition order is in place, the minister advised that Services Australia will pursue outstanding debts using a range of powers, including: negotiated arrangements; deducting payments from a salary or government payment; intercepting tax refunds; collecting funds via third parties; or through litigation. As noted previously, the European Court of Human Rights has stated that a restriction on the right to leave one's country on grounds of unpaid debt can only be justified as long as it serves its aim of recovering a debt, and if action is not taken to recover the debt, then a continuing restriction may not be permissible.[12] The fact that Services Australia continues to use other powers to pursue outstanding child support debts while a departure prohibition order is in place makes the restriction on freedom of movement more likely to meet the threshold of exceptional circumstances, and therefore be permissible.

2.50 Further information was sought as to why, if a debt is likely to be deemed to be irrecoverable within a period that the Registrar considers appropriate, the debtor would also need to provide a security to be allowed to leave Australia (as required by

12 See, *Napijalo v Croatia* (13 November 2003) [79] and *Democracy and Human Rights Resources Centre and Mustafayev v Azerbaijan* (14 October 2021) [94]. See also, UN Human Rights Committee, *General Comment No. 27: Article 12 (Freedom of Movement)* (1999) [13].

this bill). The minister stated that there may be circumstances where a person applies for a departure authorisation certificate before the Registrar has determined whether a departure prohibition order must be revoked on the basis the liability is completely irrecoverable, and in these circumstances the Registrar may require them to give security for their return to guard against that person departing Australia with a child support liability that is not completely irrecoverable. Requiring security to be provided in these limited circumstances would appear to be directed towards the legitimate objective of improving the ability to enforce the payment of child support debts.

2.51 As to whether the measure is rationally connected to (that is, effective to achieve) the objective, further information was sought in relation to how requiring security to only be paid by the debtor (and not allow them to borrow the money for the security from a third party) would achieve the objective of encouraging payment of the debt (noting they would appear not to have the money available to raise a security themselves). The minister stated that the Registrar can accept security raised by way of borrowed funds and clarified that security arising from a loan obtained by a debtor from a financial institution or a third party is not precluded (as it is not considered to be a payment from a third party). Noting that if a debtor were to borrow money in order to travel, and therefore obtain a security in order to receive a certificate to travel, this would not appear to restrict travel in circumstances where a person does not themselves have the funds to pay for their travel. Consequently, the measure may be rationally connected to (that is, effective to achieve) the stated objective of encouraging payment of child support debts.

2.52 As to the proportionality of the measure, further information was sought regarding the average length of time that departure prohibition orders remain in place, and the average debt amount excluding fees. The minister stated that since 2017, departure prohibition orders that have since been revoked remained in place for 463 days on average, and that orders remaining in force have been in place for an average of 1,275 days (approximately 3.5 years). The minister advised that the average debt amount indicated in the explanatory memorandum includes penalties, costs and fines owed by a child support debtor subject to a departure prohibition order, and that excluding those penalties, the average debt is $27,320.[13] The minister advised that when Services Australia receives a payment towards a debt, the payment is allocated in priority to the debt first, and only then will any remainder be applied to late payment penalties or any other debt to the Commonwealth. This assists with the proportionality of the measure, noting the importance of providing outstanding funds to the family members concerned. However, it remains unclear

13 The explanatory materials state that this measure is expected to impact around 110 parents with an average child support debt of $43,100. The minister advised that this includes an average child support debt of $27,320, which indicates that late fees and penalties make up approximately 37 per cent of these total outstanding debts.

whether a departure prohibition order would be revoked where an outstanding debt consists only or largely of late payment fees and penalties. This is a relevant consideration noting the minister's advice that such late payment fees and penalties make up, on average, approximately 37 per cent of the average total debts cited in the explanatory materials. If a person's ability to travel overseas was limited *after* they had repaid the original child support debt, on the basis that they still owed late payment fees and other penalties to the Commonwealth, this would be unlikely to constitute a proportionate limit on the right to freedom of movement.

2.53 Further information was also sought regarding what other steps must be taken to recover a child support debt prior to making a departure prohibition order. In this regard, the minister stated that a departure prohibition order will only be considered after all other avenues have been investigated, and after steps have been taken to confirm the accuracy of the debt. While this would not appear to be a legislative requirement, it would appear that a departure prohibition order is treated as a method of last resort in practice, which assists with its proportionality.

2.54 As to safeguards, further information was sought as to when a child support debt may be regarded as irrecoverable, meaning that a departure prohibition order would need to be revoked. The minister stated that jurisprudence indicates that the threshold the Registrar must use to be satisfied that the liability is 'completely irrecoverable' is a high one: that is, where there is no prospect that the debtor will be able to make any payments towards the debt. They noted jurisprudence stating that a debt will not be regarded as irrecoverable even where a debtor has had no income from work or income support payments for many years, if it is possible that they could obtain work or financial assistance at some time in the future to meet at least part of the debt. Consequently, the power to write off child support debts (and therefore cancel the departure prohibition order) on the basis that they are completely irrecoverable would appear to have very limited safeguard value.

2.55 Based on the minister's advice, it appears that the measure seeks to achieve a legitimate objective, is rationally connected to that objective, and in some cases this measure may constitute a proportionate limit on the right to freedom of movement, noting the relevant safeguards and the practice of making departure prohibition orders only as a last resort. However, if a departure prohibition order were to remain in place on the basis that part of the debt may be recoverable at some time in the future (despite the debtor not currently having any income), and an outstanding debt consisted largely or solely of late fees and penalties, such circumstances may not constitute a proportionate limit on the right to freedom of movement.

2.56 Further information was also sought as to whether this measure limits the right to equality and non-discrimination and in particular, whether the denial to issue a departure authorisation certificate has a disproportionate impact on persons on the basis of nationality who may have a greater need to travel to or from Australia for family reasons. The minister stated that the nationality of a parent is not a

relevant consideration in determining whether to revoke a departure prohibition order or issue a departure authorisation certificate. The minister stated that, while some parents may have a greater need to travel due to their nationality, relevant considerations apply no more or less strenuously to those parents and do not operate, in intent or practice, to limit their travel more than any other parent. This indicates that the measure does not have a directly discriminatory intent (that is, that the measure is neutral on its face). However, as noted previously, the right to equality encompasses 'indirect' discrimination, which 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.[14] The minister did not advise whether the denial to issue a departure authorisation certificate has a disproportionate impact on persons on the basis of nationality in practice. As such, it is unclear whether there is a risk that this occurs. Differential treatment (including the differential effect of a measure that is neutral on its face) will not constitute unlawful discrimination if the differential treatment is based on reasonable and objective criteria such that it serves a legitimate objective, is rationally connected to that objective and is a proportionate means of achieving that objective.[15] As set out above, noting that this measure may, in some circumstances, not always constitute a proportionate limit on the right to freedom of movement, there may be a risk that, in some circumstances, the measure does not constitute permissible differential treatment, and so risks impermissibly limiting the right to equality and non-discrimination.

Committee view

2.57 The committee thanks the minister for the responses she has provided in relation to this measure. The committee notes the importance of seeking to ensure that parents pay their outstanding child support debt. In this regard, the committee considers that the measure seeks to achieve a legitimate objective for the purposes of international human rights law and would likely be rationally connected to (that is, effective to achieve) the stated objective.

2.58 The committee considers that, in many circumstances, the measure would constitute a proportionate limit on the right to freedom of movement, noting the

14 *Althammer v Austria*, UN Human Rights Committee Communication no. 998/01 (2003) [10.2]. The prohibited grounds of discrimination are race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Under 'other status' the following have been held to qualify as prohibited grounds: age, nationality, marital status, disability, place of residence within a country and sexual orientation. The prohibited grounds of discrimination are often described as 'personal attributes'. See Sarah Joseph and Melissa Castan, *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary*, 3rd edition, Oxford University Press, Oxford, 2013, [23.39].

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].

many safeguards that apply to the operation of the measure, and the fact that it is used only as a last resort. The committee notes, in particular, that repayments towards debts are first directed towards the child support debt owed to the child and their carer, rather than to late payment penalties and fees owing to Services Australia. However, the committee considers that if an outstanding debt consisted largely of late fees and penalties, but the child support debt itself had been largely paid back, an ongoing departure prohibition order may not constitute a proportionate limit on the right to freedom of movement.

2.59 The committee further considers that restricting the circumstances in which a debtor may travel overseas may risk disproportionately impacting on persons on the basis of nationality in practice (noting that they may be more likely to seek to travel outside Australia). Noting the risk that this measure may, in some circumstances, not constitute a proportionate limit on the right to freedom of movement, the committee considers that there may also be a risk that, in some circumstances, the measure does not constitute permissible differential treatment.

2.60 However, as the bill has now passed, the committee makes no further comment in relation to this bill.

Legislative instruments

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

Purpose	These regulations declare the Republic of North Macedonia to be an 'extradition country' for the purposes of section 5 of the Extradition Act 1988 and repeal the Extradition (Former Yugoslav Republic of Macedonia) Regulations 2009
Portfolio	Attorney-General
Authorising Legislation	*Extradition Act 1988*
Last Day to Disallow	15 sitting days after tabling (tabled in the House of Representatives and Senate on 9 May 2023. Notice of motion to disallow must be given by 7 August 2023 in the Senate)[2]
Rights	Life; torture and other cruel, inhuman or degrading treatment or punishment; liberty; fair hearing; presumption of innocence

2.61 The committee requested a response from the minister in relation to the instrument in *Report 7 of 2023*.[3]

Extradition to the Republic of North Macedonia

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

2.63 The effect of this is that Australia can consider and progress extradition requests from the Republic of North Macedonia relating to persons in Australia. A person may be subject to extradition where either a warrant is in force for their

1 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Extradition (Republic of North Macedonia) Regulations 2023 [F2023L00447], *Report 8 of 2023*; [2023] AUPJCHR 80.

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

3 Parliamentary Joint Committee on Human Rights, *Report 7 of 2023* (21 June 2023), pp. 13-24.

arrest in relation to an alleged serious offence;[4] or where they have been convicted of such an offence and there is either an intention to impose a sentence on them, or the whole or a part of a sentence imposed on the person as a consequence of the conviction remains to be served.[5] The Act also establishes that a person may be prosecuted in Australia for the conduct for which they may have been extradited, rather than being subject to extradition.[6]

2.64 A person may object to their extradition on limited grounds,[7] including where: the surrender of the person is actually sought for the purpose of prosecuting or punishing the person on account of their race, sex, sexual orientation, religion, nationality or political opinions or for a political offence in relation to the extradition country; or where, on surrender, the person may be prejudiced at their trial, or punished, detained or restricted in their liberty because of their race, sex, sexual orientation, religion, nationality or political opinions.[8]

Summary of initial assessment

Preliminary international human rights legal advice

2.65 Facilitating the extradition of persons in Australia to the Republic of North Macedonia to face proceedings in relation to serious offences (including alleged offences) pursuant to the Act engages and may limit multiple rights.[9] Assessing the compatibility of the regulations with international human rights law requires consideration of the compatibility of the Act as relevant to these regulations in relation to the multiple rights.[10]

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

5 *Extradition Act 1988*, section 6.

6 Section 45.

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

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

9 Note that the initial analysis incorrectly stated that the regulations were exempt from disallowance and that no statement of compatibility with human rights was provided, when the regulations are subject to disallowance and a detailed statement of compatibility accompanied the regulations.

10 Parts of the *Extradition Act 1988* apply only to extradition proceedings with New Zealand, and extradition to Australia.

2.66 As extradition would facilitate removal to a country in relation to an offence or alleged offence for which the punishment may include the death penalty, the measure engages and may limit the right to life. The right to life[11] imposes an obligation on the state to protect people from being killed by others or identified risks.[12] While the International Covenant on Civil and Political Rights does not completely prohibit the imposition of the death penalty, international law prohibits states which have abolished the death penalty (such as Australia) from exposing a person to the death penalty in another state. This prohibits states such as Australia from deporting or extraditing a person to a country where that person may face the death penalty.[13]

2.67 Noting that persons extradited to foreign countries may be at risk of torture and other poor treatment, this measure also engages the prohibition against torture. Australia has an obligation not to subject any person to torture or to cruel, inhuman or degrading treatment or punishment.[14] This prohibition is absolute and may never be subject to any limitations. The United Nations (UN) Human Rights Committee has held that this prohibits extradition of a person to a place where that person may be in danger of torture or cruel, inhuman or degrading treatment or punishment.[15]

2.68 Further, in not allowing for an extradition objection on the basis that a person may suffer a flagrant denial of justice in the extradition country, the measure engages and may limit the right to a fair hearing. The right to a fair trial and fair hearing requires that all persons shall be equal before the courts and that everyone has the right to a fair and public hearing in the determination of any criminal charge. Article 14 of the International Covenant on Civil and Political Rights in turn sets out a series of minimum guarantees in criminal proceedings, such as the right to be tried without undue delay.

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

12 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'.

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

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

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

2.69 An extradition request of itself does not amount to determination of a criminal charge.[16] However, jurisprudence from the European Court of Human Rights has recognised that fair trial rights may be engaged where a person is extradited in circumstances where there is a real risk of a flagrant denial of justice in the country to which the individual is to be extradited.[17] Such circumstances, the Court has stated, would render proceedings 'manifestly contrary to the provisions of Article 6 [the right to a fair trial in the European Convention] or the principles embodied therein'.[18] This means that, in the European context, the right to a fair hearing and fair trial includes an obligation not to return a person (*non-refoulement*) to a country where they risk a flagrant denial of justice.

2.70 The UN Human Rights Committee has not yet ruled on whether article 14 engages non-refoulement obligations.[19] However, the interpretation of the right to a fair trial and fair hearing under the European Convention on Human Rights is instructive.[20] Further, the position in European human rights law jurisprudence is consistent with the UN Model Treaty on Extradition, which includes a mandatory ground of refusing extradition if the person whose extradition is requested would not receive the minimum guarantees in criminal proceedings.[21]

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

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

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

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

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

21 *Model Treaty on Extradition*, adopted by the UN General Assembly resolution 45/116 as amended by General Assembly resolution 52/88.

2.71 In addition, the imposition of absolute liability in subsection 45(2) engages the right to a fair trial. The right to a fair trial protects the right to be presumed innocent until proven guilty according to law.[22] It usually requires that the prosecution prove each element of the offence beyond reasonable doubt (including fault elements and physical elements). Absolute liability offences engage the presumption of innocence because they allow for the imposition of criminal liability without the need to prove fault.

2.72 The Act also establishes a presumption against bail except in special circumstances. This presumption applies with respect to all stages of the extradition process: holding persons arrested under an extradition warrant on remand; committing a person to prison where they have consented to the surrender; where a magistrate or Judge is determining whether the person is eligible for surrender; where review of an order of a magistrate or Judge relating to extradition surrender is sought; and where judicial review is sought of a determination by the Attorney-General that the person is to be surrendered for extradition.[23] As such, a person subject to an extradition warrant will be presumed to be held in jail until the matter is resolved. In addition, extradition may result in lengthy detention in the foreign country while the person is awaiting trial. Consequently, the measure engages and limits the right to liberty.

2.73 The right to liberty prohibits the arbitrary and unlawful deprivation of liberty.[24] The notion of 'arbitrariness' includes elements of inappropriateness, injustice and lack of predictability. Accordingly, any detention must be lawful as well as reasonable, necessary and proportionate in all of the circumstances. Detention that may initially be necessary and reasonable may become arbitrary over time if the circumstances no longer require detention. In this respect, regular review must be available to scrutinise whether the continued detention is lawful and non-arbitrary. The right to liberty applies to all forms of deprivations of liberty.

2.74 The right to liberty includes the right to release pending trial. Article 9(3) of the International Covenant on Civil and Political Rights provides that the 'general rule' for people awaiting trial is that they should not be detained in custody. The UN Human Rights Committee has stated on several occasions that pre-trial detention should remain the exception and that bail should be granted except in circumstances where the likelihood exists that, for example, the accused would abscond, tamper

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

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

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

with evidence, influence witnesses or flee from the jurisdiction.[25] Measures that expand the circumstances in which there is a presumption against bail engage and limit this right.[26] Where a person poses a flight risk, refusing the grant of bail may be a proportionate limitation on the right to liberty.[27] However, a presumption against bail fundamentally alters the starting point of an inquiry as to the grant of bail.

2.75 Finally, the legislation establishes grounds for an extradition objection where a person may be prosecuted or punished on the basis of certain personal attributes. However, the list of personal attributes is limited and does not cover all attributes protected under international law. As such, the measure engages and may limit the right to equality and non-discrimination. 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.[28] The right to equality encompasses both 'direct' discrimination (where measures have a discriminatory intent) and 'indirect' discrimination (where measures have a discriminatory effect on the enjoyment of rights).[29] Indirect discrimination occurs where 'a rule or measure

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

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

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

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

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

that is neutral at face value or without intent to discriminate' exclusively or disproportionately affects people with a particular protected attribute.[30]

Committee's initial view

2.76 The committee considered that the measure engages and may limit multiple rights, and sought the advice of the Attorney-General as to:

(a) whether the statutory requirements in the Act meet Australia's obligations under international human rights law with respect to the death penalty, and whether and how compliance with diplomatic assurances relating to non-use of the death penalty are monitored in practice;

(b) whether the measure is consistent with Australia's obligations under article 7 of the International Covenant on Civil and Political Rights and article 3 of the Convention against Torture, and why the Act does not explicitly prohibit extradition where there is a risk of cruel, inhuman or degrading treatment or punishment;

(c) whether the Act is consistent with the right to fair trial and fair hearing, and in particular:

(i) why the Act does not include an extradition objection if, on surrender, a person may suffer a flagrant denial of justice in contravention of article 14 of the International Covenant on Civil and Political Rights;

(ii) whether, not requiring any evidence to be produced before a person can be extradited, and preventing a person subject to extradition from producing evidence about the alleged offence is compatible with the right to a fair trial and fair hearing; and

(iii) whether section 45 of the Act, in applying absolute liability, is consistent with the right to be presumed innocent;

(d) noting that extradition largely results in the detention of a person pending extradition and often lengthy detention in the foreign country while awaiting trial, whether allowing the extradition and detention of

30 *Althammer v Austria*, UN Human Rights Committee Communication no. 998/01 (2003) [10.2]. The prohibited grounds of discrimination are race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Under 'other status' the following have been held to qualify as prohibited grounds: age, nationality, marital status, disability, place of residence within a country and sexual orientation. The prohibited grounds of discrimination are often described as 'personal attributes'. See Sarah Joseph and Melissa Castan, *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary*, 3rd edition, Oxford University Press, Oxford, 2013, [23.39].

someone without first testing the basic evidence against them, is consistent with the right to liberty;

(e) whether the presumption against bail except for in 'special circumstances' is a permissible limit on the right to liberty; and

(f) whether the measure is consistent with the right to equality and non-discrimination, including why the Act does not permit an objection to extradition where a person may be persecuted because of personal attributes set out in international human rights law, including disability, language, opinions (other than political opinions), or social origin.

2.77 The full initial analysis is set out in *Report 7 of 2023*.

Attorney-General's response[31]

2.78 The Attorney-General advised:

(a) whether the statutory requirements in the Act meet Australia's obligations under international human rights law with respect to the death penalty, and whether and how compliance with diplomatic assurances relating to non-use of the death penalty are monitored in practice;

As the Committee has noted, Australia is a party to the *International Covenant on Civil and Political Rights* (ICCPR) and its Second Optional Protocol, which obliges it to ensure that no person within its jurisdiction is executed and that the death penalty is abolished. Article 6 of the ICCPR contains an implied *non-refoulement* obligation (to refrain from removing persons from Australia to another country) where there are substantial grounds for believing that there is a real risk of the person being subjected to the death penalty.

The Extradition Act requires the Attorney-General to consider death penalty risks before determining whether to surrender a person in response to an incoming extradition request. Paragraph 22(3)(c) of the Extradition Act provides that a person is only able to be surrendered for an offence that carries the death penalty if the requesting country provides an undertaking that either the person will not be tried for the offence; or if the person is tried for the offence, the death penalty will not be imposed; or if the death penalty is imposed on the person, it will not be carried out. This practically operates as a mandatory ground for which the Attorney-General must otherwise refuse extradition, and implements Australia's non-refoulement obligations under Article 6 of the ICCPR. Where a person elects to waive the extradition process, paragraph 15B(3)(b) of the Extradition Act also provides a safeguard by stipulating that the Attorney-General may only make a surrender determination where satisfied that

31 The minister's response to the committee's inquiries was received on 3 July 2023. This is an extract of the response. The response is available in full on the committee's website.

there is no real risk that the death penalty will be carried out on the person in relation to any offence should they be surrendered to the extradition country.

The use of death penalty undertaking is a well-established tool in international extradition. Undertakings are written government assurances and a breach of an undertaking would have serious consequences for both Australia's extradition relationship and broader bilateral relationship with the relevant foreign country. Breach of an undertaking may also have reputational consequences and negatively impact the relevant foreign country's law enforcement relationship with other countries. It is the Australian Government's long-standing experience that undertaking in relation to the death penalty in extradition cases have always been honoured.

The Attorney-General considers the reliability of any death penalty undertaking on a case by case basis, in line with the test for an acceptable death penalty undertaking in the Full Federal Court decision of *McCrea v Minister for Justice and Customs.*[32] The test requires that the Attorney-General be satisfied that 'the undertaking is one that, in the context of the system of law and government of the country seeking surrender, has the character of an undertaking by value of which the death penalty would not be carried out'.[33] If, notwithstanding the receipt of an undertaking, the Attorney-General considered that a real risk remained that the person will be subject to the death penalty, it would be open to the Attorney-General to refuse extradition as an exercise of the general discretion under paragraph 22(3)(f) of the Extradition Act.

Given the public nature of extradition, the Australian Government would most likely be made aware of a breach of a death penalty undertaking. The Australian Government monitors compliance with undertakings through the Department of Foreign Affairs and Trade. Australia also monitors Australian citizens who have been extradited through its consular network, in accordance with the Vienna Convention on Consular Relations.

The Attorney-General's Department has provided information on extradition matters in its annual reports to Parliament since the establishment of the Extradition Act, including whether there have been any breaches of undertakings by a foreign country in relation to a person extradited from Australia. No breaches of death penalty undertakings have been recorded to date.

Further detail on the monitoring of Australian citizens who have been extradited is outlined at paragraphs 40-41 of the Statement of Compatibility with Human Rights.

32 (2005) 145 FCR 269.

33 Ibid, 275.

(b) whether the measure is consistent with Australia's obligations under article 7 of the International Covenant on Civil and Political Rights and article 3 of the Convention against Torture, and why the Act does not explicitly prohibit extradition where there is a risk of cruel, inhuman or degrading treatment or punishment;

Both the measure and the Extradition Act more broadly are consistent with Australia's *non-refoulement* obligations under Article 3 of the Convention against Torture (CAT) and Article 7 of the ICCPR in relation to torture and cruel, inhuman or degrading treatment or punishment (CIDTP). The measure does not change the substance of Australia's existing extradition regime nor its consistency with obligations under the CAT or the ICCPR.

Torture

Paragraphs 15B(3)(a) and 22(3)(b) of the Extradition Act provide that the Attorney-General may only surrender a person if, among other things, the Attorney-General does not have substantial grounds for believing that, if the person were surrendered, they would be in danger of being subjected to torture.

When making a decision under section 15B or subsection 22(3) of the Extradition Act, the Attorney-General may consider all material reasonably available to assist in determining whether the person may be subjected to torture. This may include relevant international legal obligations, any representations or assurances from the requesting country, country-specific information, reports prepared by government or non-government sources, information provided through the diplomatic network and those matters raised by the person who is the subject of the extradition request.

Therefore, the decision on whether to surrender a person is made by the Attorney-General on a case-by-case basis, in accordance with the safeguards in the Extradition Act which are consistent with Australia's international obligations in Article 3 of the CAT and Article 7 of the ICCPR, with respect to torture.

CIDTP

As the Committee has noted, Australia also has *non-refoulement* obligations under Article 7 of the ICCPR in relation to CIDTP.

Although the Extradition Act does not explicitly reference CIDTP, the Attorney-General practically considers risks of CIDTP when determining whether to surrender a person under the Extradition Act. In particular, the Attorney-General's general discretion under subsection 15B(2) and paragraph 22(3)(f) of the Extradition Act provides a basis to refuse extradition where the Attorney-General has concerns based on CIDTP considerations.

The Extradition Act does not contain an exhaustive list of circumstances in which the Attorney-General may refuse surrender or factors that the

Attorney-General must consider. This ensures that decisions can be made on a case-by-case basis. In relation to paragraph 22(3)(f), the Federal Court of Australia has held that the Attorney-General's discretion 'is unfettered, and the Minister may, in the exercise of the discretion, take into account any matters, or no matters, provided that the discretion is exercised in good faith and consistently with the objects, scope and purpose of the [Extradition] Act.'[34]

The Attorney-General therefore makes surrender determinations on a case-by-case basis in accordance with the safeguards in the Extradition Act and in line with Australia's international legal obligations, including under Article 7 of the ICCPR. Subsection 15B(2) and paragraph 22(3)(f) therefore provide a mechanism for compliance with Australia's international obligations in relation to CIDTP.

(c) whether the Act is consistent with the right to fair trial and fair hearing, and in particular:

(i) why the Act does not include an extradition objection if, on surrender, a person may suffer a flagrant denial of justice in contravention of article 14 of the International Covenant on Civil and Political Rights;

Article 14 of the ICCPR sets out fair trial rights and a number of specific minimum guarantees in criminal proceedings.

As the Committee has noted, the UN Human Rights Committee has not yet provided views on whether Article 14 engages non-refoulement obligations.[35] Scholars, such as Manfred Nowak, note that in the ICCPR context, it is well accepted that the principle against *refoulement* applies to Articles 6 and 7, with no consistent opinion as to the application to Article 14.[36]

It is the Australian Government's view that Article 14 of the ICCPR does not extend to an obligation not to return a person to a country where they face a real risk of an unfair trial which could breach the obligations under

34 *Rivera v Minister/or Justice and Customs* (2007) 160 FCR 115, 119 [14] (Emmett J, with whom Conti J agreed). This position has been subsequently affirmed by the Full Court of the Federal Court of Australia: *Snedden v Minister for Justice (Cth) & Anor* (2014) 145 ALD 273,297 [150] (Middleton and Wigney JJ).

35 As noted by the Committee in footnote 21 of their report, the question of whether Article 14 contains a *non-refoulement* obligation has been raised in multiple complaints to the UN Human Rights Committee, and each time the Committee has make their decision on other bases. The question was raised in the Australian immigration context in *Kwok v Australia* UN HRC No. 1442/2005 (2009) "Having found a violation of article 9, paragraph 1, with respect to the author's detention, and potential violations of article 6 and article 7 ... the Committee does not consider it necessary to address whether the same facts amount to a violation of article 6, paragraph 2, article 9, paragraph 4, or article 14 of the Covenant" [9.8]

36 Manfred Nowak, *UN Covenant on Civil and Political Rights CCPR Commentary,* ed William A. Schabas (N.P. Engel, 2019), 48.

Article 14. In other words, the Australian Government considers that Article 14 does not contain *non-refoulement* obligations and therefore is not engaged in the context of Australia potentially surrendering a person to another country under the Extradition Act.

Nonetheless, as noted above, the Attorney-General has a general discretion to refuse surrender under subsection 15B(2) and paragraph 22(3)(f) of the Extradition Act. This enables the Attorney-General to consider fair trial or other human rights concerns where these arise.

Considerations may include whether an extradited individual would have access to a fair trial or whether to surrender a person convicted *in absentia* (and whether a person tried *in absentia* will have an opportunity to be retried). It is therefore not necessary to include an explicit extradition objection for this concern.

Further detail on the protections under the Extradition Act relevant to fair trial protections is outlined at paragraphs 66-71 of the Statement of Compatibility with Human Rights.

(ii) whether, not requiring any evidence to be produced before a person can be extradited, and preventing a person subject to extradition from producing evidence about the alleged offence is compatible with the right to a fair trial and fair hearing

The guarantee to a fair and public hearing by a competent, independent and impartial tribunal under Article 14(1) of the ICCPR is not engaged in relation to extradition proceedings in Australia, including in relation to the evidentiary standard that magistrates and eligible Judges apply to determine surrender eligibility under section 19 of the Extradition Act. This is because extradition is not a criminal process or trial designed to assess guilt or innocence, but rather an administrative process to determine whether a person in to be surrendered to face justice in the Requesting Party.

The United Nations Human Rights Committee has noted in its General Comment No. 32 that the right to a fair hearing by a court or tribunal under Article 14(1) of the ICCPR does not apply to extradition proceedings (amongst other types of proceedings) as, in these circumstances, there is no determination of criminal charges nor presence of a suit at law.[37]

However, the United Nations Human Rights Committee noted that other procedural guarantees may apply in extradition proceedings, including judicial review by an independent and impartial tribunal and, in these circumstances, guarantees of impartiality, fairness and equality as

37 Human Rights Committee, *General Comment No. 32: Article 14: Right to equality before courts and tribunals and to a fair trial,* UN HRC, 90th session, UN Doc CCPR/C/GC/32 (23 August 2007), para 17.

provided for in the first sentence of Article 14(1) of the ICCPR.[38] The availability of independent judicial review under section 39B of the Judiciary Act 1903 and section 75(v) of the Constitution at various stages of the extradition process satisfies these requirements.

(iii) whether section 45 of the Act, in applying absolute liability, is consistent with the right to be presumed innocent;

Section 45 of the Extradition Act enables the Attorney-General to consent to the prosecution of a person in Australia for conduct constituting an offence in another country where Australia has refused extradition. This is consistent with the principle that States should prosecute a person who has committed serious crimes in lieu of extradition (this exists as an obligation under a range of multilateral treaties for specific offences).

It also assists in preventing Australia from becoming an attractive safe haven for fugitives from countries whose criminal justice systems might give rise to grounds for refusal under the Extradition Act.

To achieve this, subsection 45(1) creates an offence to facilitate a person's prosecution in Australia. In order to establish this offence, the prosecution must prove that the person has been remanded in a State or Territory by order of a magistrate under section 15 of the Extradition Act (paragraph 45(1)1(a)). This establishes a nexus to the extradition process, as remand can only occur pursuant to section 15 if a person is arrested under an extradition arrest warrant issued in response to a request made by a foreign country.

Second, the prosecution must prove that the person has engaged in conduct outside Australia at an earlier time (paragraph 45(1)(b)), which would have constituted an offence had the conduct or equivalent conduct occurred in Australia (paragraph 45(1)(c)). This is referred to as the 'notional Australian offence'.

Subsection 45(2) provides that absolute liability attaches to the conduct described in paragraphs 45(1)(a) and 45(1)(b) and to the circumstances in paragraph 45(1)(c). This means that the prosecution need not prove that the person was reckless as to the elements required to establish the offence under subsection 45(1). These paragraphs are effectively factual preconditions for the existence of the offence. This ensures that the prosecution is not required to prove that the person intended to engage in conduct outside Australia at an earlier time or that the person was reckless as to whether that conduct would have constituted an offence in Australia had the conduct or equivalent conduct occurred in Australia.

38 Ibid, para 62. See further: Manfred Nowak, *UN Covenant on Civil and Political Rights CCPR Commentary*, ed William A. Schabas (N.P. Engel, 2019), 362-363; *Griffiths v Australia*, Communication No. 1973/2010, Views adopted 21 October 2012, UN Doc CCPR/C/l l 2/D/1973/2010, paragraph 6.5.

However, the prosecution is still required to establish physical and fault elements to make out the offence, in line with subsection 45(3).

Subsection 45(3) provides how the prosecution is to prove the notional Australian offence. Paragraph 45(3)(a) requires the prosecution to prove the physical and fault elements applicable to the notional Australian offence, which are the physical and fault elements for the relevant offence in the State or Territory in which the person is on remand. Paragraph 45(3)(b) provides that any defences or special liability provisions that apply in relation to the notional Australian offence will have effect.

The use of absolute liability in this provision is consistent with the right to the presumption of innocence. As noted above, the relevant paragraphs in section 45 attracting absolute liability are factual pre-conditions rather than substantive elements of the offence. There is still a requirement to establish the relevant physical and fault elements of the notional Australian offence.

This approach is consistent with the Guide to Framing Commonwealth Offences, which notes that strict or absolute liability may be appropriate for certain kinds of physical elements, such as jurisdictional elements which link the offence to the relevant legislative power of the Commonwealth.[39]

(d) noting that extradition largely results in the detention of a person pending extradition and often lengthy detention in the foreign country while awaiting trial, whether allowing the extradition and detention of someone without first testing the basic evidence against them, is consistent with the right to liberty;

Australia has an obligation under Article 9(1) of the ICCPR to protect the right to freedom from arbitrary detention. Further, Article 9(4) of the ICCPR imposes an obligation on States to ensure that persons who are arrested and detained are entitled to take proceedings before a court to decide the lawfulness of their detention.

As a matter of law, Australia considers the determining factor for arbitrary detention is not the length of the detention, but whether the grounds for detention are justifiable.

The test for whether detention is arbitrary under Article 9(1) of the ICCPR is whether, in all the circumstances, detention is reasonable, necessary and proportionate to the end that is sought.[40]

Factors relevant to assessing whether detention is arbitrary include the existence of avenues of review on the appropriateness of detention, as

39 Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers, page 21.

40 See, for example *Av Australia,* Communication No 560/1993, Views adopted 30 April 1997, UN Doc CCPR/C/59/D/560/1993, paragraph 9.2.

well as whether less intrusive alternatives to detention have been considered.[41]

An assessment of the compatibility of extradition detention with Article 9 of the ICCPR is set out below in response to paragraph (e) of the Committee's request.

(e) whether the presumption against bail except for in 'special circumstances' is a permissible limit on the right to liberty;

The presumption against bail as currently in place in the Extradition Act is reasonable, necessary and proportionate to the achieve the purposes of the Extradition Act and to comply with Australia's international obligations.

Bail is available as a statutory right at each stage of the extradition process, namely under section 15, subsection 18(3), subsection 19(9), paragraph 21(6)(f) and section 49C of the Act. At each stage, the test for grant of bail is whether there exist 'special circumstances' justifying release on bail. Where a person has elected to waive the extradition process, bail is not available, noting that a waiver will typically be chosen by the individual to facilitate return as soon as possible to the requesting country.

As outlined in paragraphs 51 to 63 of the Statement of Compatibility with Human Rights, the 'special circumstances' test is clearly defined in case law and is applied by decision-makers on a case-by-case basis, where the decision-maker is required to carefully consider whether the circumstances relied upon by a person, either individually or in combination, meet the test.

Notwithstanding the nature of the 'special circumstances' test, bail is available as a statutory right at various stages of the extradition process[42] and applicants can and do successfully obtain bail in Australia during the extradition process. The bail test is necessary as the 'special circumstances' test for bail upholds Australia's international obligations to secure the return of alleged offenders to face justice, given the serious flight risk posed in many extradition matters.

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41 *Bakhtiyari v Australia,* Communication No. 1069/2002, Views adopted 29 October 2003, UN Doc CCPR/C/79/D/1069/2002, paragraphs 9.2-9.4.

42 In addition to the statutory rights to bail under the Extradition Act, the Australian Government recognises that the Federal Court of Australia has the power to grant bail in the context of proceedings for judicial review of an extradition decision under section 39B of the *Judiciary Act 1903.* This power arises by virtue of section 23 of the *Federal Court Act 1976* (as confirmed in *Adamas v The Hon Brendan O'Connor (No 3)* [2012] FCA 365, [16]-[17] (Gilmour J)). Further, the High Court of Australia has the power to grant bail in extradition proceedings as an incident of its appellate jurisdiction granted by section 73 of the Constitution (as confirmed in *Cabal,* 182-183 [44] (Gleeson CJ, McHugh and Gummow JJ)).

The case-by-case nature of these decisions, as well as the established review mechanisms, ensure that the bail test is reasonable, necessary and proportionate to the overall legitimate objective of facilitating the apprehension and surrender of individuals for the purposes of criminal prosecution or to serve a prison sentence in another country, upholding Australia's international legal obligations and ultimately combatting serious transnational crime. Accordingly, the bail test ensures that detention is not arbitrary for the purposes of Article 9(1).

The Extradition Act and the Regulations are therefore consistent with the right to freedom from arbitrary detention in Article 9 of the ICCPR. To the extent that the Extradition Act and the Regulations may limit these rights, any limitation is reasonable, necessary and proportionate to achieve the legitimate objectives of the Extradition Act and Australia's extradition regime.

(f) whether the measure is consistent with the right to equality and non-discrimination, including why the Act does not permit an objection to extradition where a person may be persecuted because of personal attributes set out in international human rights law, including disability, language, opinions (other than political opinions), or social origin.

The Extradition Act is consistent with Australia's obligations under Articles 2 and 26 of the ICCPR to respect the right to equality and non-discrimination.

The Extradition Act contains safeguards to protect rights of equality and non-discrimination.

Sections 7(b) and 7(c) set out that there is an 'extradition objection' in relation to an extradition offence for which a person's surrender is sought if:

• the person is actually sought for the purpose of prosecuting or punishing the person on account of his or her race, sex, sexual orientation, religion, nationality or political opinions; or

• the person may be prejudiced at his or her trial, or punished, detained or restricted in his or her personal liberty, by reason of his or her race, sex, sexual orientation, religion, nationality or political opinions.

The presence of an extradition objection, including on the grounds listed above, has the effect of preventing both a finding by a magistrate or eligible Judge that a person is eligible for surrender pursuant to paragraph 19(2)(d), and a surrender determination by the Attorney-General pursuant to paragraph 22(3)(a) in those circumstances.

While the Extradition Act does not provide an extradition objection where a person may be persecuted because of other personal attributes set out in international human rights law, including disability, language, opinions (other than political opinions), or social origin, the Attorney-General would practically consider all relevant protected attributes when determining

whether to surrender a person under the Extradition Act, including when exercising the general discretion in paragraph 22(3)(f).

Further, any person subject to extradition has an opportunity to make representations to the Attorney-General on any matter before the Attorney-General makes a surrender determination, including in relation to any of the protected attributes in Article 26 of the ICCPR, so that such matters can be taken into consideration before reaching a decision.

As noted above in response to paragraph (b) of the Committee's request, paragraph 22(3)(f) provides the Attorney-General 'unfettered' discretion when determining whether to surrender a person, and provides an appropriate mechanism to consider any factor relevant to the individual case at hand. The Extradition Act is therefore consistent with the rights of equality and non-discrimination, notwithstanding that all protected attributes are not expressly listed in the Extradition Act.

Concluding comments

International human rights legal advice

Right to life

2.79 The Extradition Act provides that the Attorney-General may determine that a person can be surrendered to an extradition country where the relevant offence is punishable by the death penalty, but only where the Attorney-General is satisfied there is 'no real risk' that the death penalty will be carried out[43] and where the extradition country has given an undertaking that it will not be imposed, or if imposed, will not be carried out.[44] In this regard, the UN Human Rights Committee has cautioned that States Parties must: ensure that they monitor individuals who have been extradited, refrain from relying on diplomatic assurances where they cannot effectively monitor the treatment of people concerned, and take appropriate remedial action where assurances are not fulfilled.[45]

2.80 In this regard, the Attorney-General advised that the grounds for refusal in the Extradition Act practically operate as mandatory grounds for refusal. The Attorney-General advised that there are reputational and relationship consequences for governments in breaching undertakings and no breaches of death penalty undertakings have occurred to date. The Attorney-General advised that he considers each death penalty undertaking on a case-by-case basis in the context of the system of law and government of the country seeking surrender. The advice provided was that the government monitors compliance with undertakings through the Department of Foreign Affairs and Trade and monitors extradited citizens through its

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

44 Subsection 22(3)(c).

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

consular network. The Attorney-General's Department's annual reports also report to Parliament on extradition matters, including any breaches of undertakings.[46]

2.81 Noting that undertakings are regularly monitored, there has never been a breach of a death penalty undertaking provided to Australia and the requirement that the Attorney-General must be satisfied that there is no real risk that the death penalty will be imposed should the person be extradited, it appears that there is limited risk that the Extradition Act would enable the extradition of a person where there is a real concern they may be subject to the death penalty.

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

2.82 The Extradition Act also provides that the Attorney-General cannot determine that a person be surrendered to an extradition country if they have substantial grounds for believing that the person would be in danger of being subjected to torture.[47] The Act also provides a broad discretion for the Attorney-General not to surrender a person in relation to an offence.[48] However, it does not explicitly require the Attorney-General to consider whether there are substantial grounds to believe there is a real risk that a person may be subjected to other cruel, inhuman or degrading treatment or punishment, and does not explicitly prohibit extradition where such a risk is established.

2.83 In relation to torture, the Attorney-General explains that he may consider a wide range of information that may assist in determining if a person may be subjected to torture and such decisions are made on a case-by-case basis in accordance with the safeguards in the Extradition Act, which are consistent with Australia's international obligations. Given the prohibition in the Extradition Act on surrender if there are substantial grounds for believing the person would be in danger of being subjected to torture, this aspect of the prohibition against torture appears to be appropriately protected.

2.84 However, Australia's non-refoulement obligations apply to the prohibition against torture *and other cruel, inhuman or degrading treatment or punishment* in its entirety. The Extradition Act does not expressly provide that extradition must be refused where there are substantial grounds for believing a person may be in danger of being subject to cruel, inhuman or degrading treatment or punishment. The Attorney-General advised that, in practice, this risk is considered under the Attorney-General's general discretion to refuse extradition as considered on a case-by-case basis.

46 Statement of compatibility, p. 19.

47 Section 15B.

48 Subsection 22(3)(f).

2.85 However, where a measure limits a human right, discretionary or administrative safeguards alone may not be sufficient for the purpose of a permissible limitation under international human rights law. This is because an administrative or discretionary safeguard is less stringent than the protection of statutory processes as there is no requirement to follow it. This is particularly relevant when considering that the prohibition against torture and other cruel, inhuman or degrading treatment or punishment is absolute and can never be permissibly limited. While it may be that the Attorney-General *may* refuse extradition on the basis that a person may be subjected to cruel, inhuman or degrading treatment or punishment, there is no requirement that extradition be refused on this basis, and as such there is a risk that the Extradition Act is incompatible with this aspect of the prohibition against torture and other cruel, inhuman or degrading treatment or punishment.

Right to a fair trial and fair hearing

2.86 The Extradition Act does not provide that the risk of denial of a fair trial in the extradition country is a ground for an extradition objection. Although the Act provides a broad discretion for the Attorney-General not to surrender a person in relation to an offence,[49] it is not clear that such a non-compellable discretion would be a sufficient safeguard to protect the right to a fair trial and fair hearing. While the European Court of Human Rights has found countries should not return a person to a country where there is a real risk of an unfair trial, the UN Human Rights Committee has not definitively ruled on this issue. However, it has said that the risk of an unfair trial is a matter than must be given 'due weight' in considering whether deportation may result in a breach of the prohibition against torture and other cruel, inhuman or degrading treatment or punishment.[50] The Attorney-General advised that he do not consider that the right to a fair trial or hearing contains non-refoulement obligations. However, the Attorney-General advised that he may consider such concerns using his general discretionary power to refuse surrender to extradition and as such it is not necessary to include an explicit extradition objection for this concern.

2.87 As noted above, discretionary powers are not as stringent as legislative safeguards, and future Attorneys-General may not consider it necessary to consider such matters when exercising their discretion to allow surrender to extradition. Further, while the UN Human Rights Committee has not considered whether returning a person to face a flagrant denial of justice is a breach of the right to a fair trial, it has not ruled out that returning persons in such circumstances would be incompatible with rights. Given that this is a matter of settled law in the context of

49 Subsection 22(3)(f).

50 *Kwok Yin Fong v. Australia*, UN Human Rights Committee Communication No. 1442/2005 (2009), paragraph [9.7].

the European Convention on Human Rights[51] (which is substantially similar to the International Covenant on Civil and Political Rights), there is a risk that sending a person to a country where they may suffer a flagrant denial of justice would not be compatible with the right to a fair trial. As such, as there is no requirement in the Extradition Act that the Attorney-General consider the right to a fair trial when making decisions regarding surrender for extradition, the Extradition Act may not be compatible with this right.

2.88 In relation to whether not requiring any evidence to be produced before a person can be extradited, and preventing a person subject to extradition from producing evidence about the alleged offence, is consistent with the right to a fair hearing, the Attorney-General advised that this right is not engaged as extradition is an administrative process. The UN Human Rights Committee has stated that while principles of impartiality, fairness and equality of arms in article 14 of the International Covenant on Civil and Political Rights apply to extradition proceedings, the other guarantees do not apply to extradition procedures.[52] As such, the question of not requiring a prima facie case to answer before a person can be extradited is considered below in relation to the right to liberty pending extradition.

2.89 In relation to whether section 45 of the Extradition Act, in applying absolute liability, is consistent with the right to be presumed innocent, the Attorney-General provided a comprehensive explanation of how absolute liability attaches only to a jurisdictional element of the offence, applying to factual pre-conditions rather than the substantive element of the offence. On the basis of this advice, it appears that the application of absolute liability in this context is compatible with the right to the presumption of innocence.

Rights to liberty and effective remedy

2.90 The Extradition Act establishes a presumption that a person subject to extradition proceedings be held in jail at each stage of the extradition process, unless 'special circumstances' exist. Australian jurisprudence has established that 'special circumstances' are to be interpreted narrowly,[53] and that considerations of whether

51 See *R v Special Adjudicator ex parte Ullah* [2004] 2 AC 323, per Lord Steyn at [41].

52 UN Human Rights Committee, *General Comment No. 32: Article 14: Right to equality before courts and tribunals and to a fair trial,* UN HRC, 90th session, UN Doc CCPR/C/GC/32 (23 August 2007), paragraphs [17] and [62]

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

a person poses a flight risk are not relevant to an assessment of special circumstances.[54]

2.91 The Attorney-General advised that notwithstanding the nature of the 'special circumstances' test, bail is available as a statutory right at various stages of the extradition process and applicants can and do successfully obtain bail in Australia during the extradition process. The Attorney-General argued that the presumption against bail is necessary as it upholds Australia's international obligations to secure the return of alleged offenders to face justice, given the serious flight risk posed in many extradition matters. Further, the Attorney-General refers to the statement of compatibility which states that the Australian Government does not consider that detention pending extradition ordinarily falls within the scope of the prohibition against arbitrary detention in article 9 of the International Covenant on Civil and Political Rights.[55]

2.92 However, the UN Human Rights Committee in *Griffiths v Australia*[56] found a breach of the right to liberty in relation to a person detained under the Extradition Act. In this case, the UN Committee noted that extradition is not limited in time under Australian law and as a general rule in extradition cases, persons are to be held in custody whether or not their detention is necessary. It noted the 'special circumstances' test in the Extradition Act and that the length of detention does not amount to 'special circumstances' under the case law of the High Court. Under the right to liberty and the right to an effective remedy, the UN Committee held that judicial review of the lawfulness of detention is not limited to mere compliance of the detention with domestic law but must include the possibility to order a release if the detention is incompatible with these rights, with such a review needing to be, in its effects, real and not merely formal. As there is no opportunity under the Extradition Act to obtain substantive judicial review of the continued compatibility of detention with the rights to liberty and effective remedy, the UN Committee found there was a breach of these rights.[57]

2.93 The limitation on the right to liberty is exacerbated by the fact that the Extradition Act contains no requirement to require the requesting State to produce any evidence to demonstrate there is a case to answer before a person is extradited, and prohibits the person who may be subject to the extradition from producing any evidence to contradict an allegation that the person has engaged in conduct

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

55 Statement of compatibility, p. 22, paragraph [53].

56 *Griffiths v Australia*, UN Human Rights Committee, Communication no. 1973/2010 (2014).

57 *Griffiths v Australia*, UN Human Rights Committee, Communication no. 1973/2010 (2014), paragraphs [7.2] – [7.5].

constituting an extradition offence.[58] As such, a person may be subject to lengthy imprisonment pending extradition for an offence of which they ultimately may not have any prospect of being convicted.

2.94 Noting the lack of any time limits on detention pending extradition, the presumption against bail and the UN Human Rights Committee's findings in relation to this matter, the Extradition Act appears to be incompatible with the rights to liberty and an effective remedy. As such, this instrument, by enabling extradition pursuant to the Extradition Act to the Republic of North Macedonia, also risks incompatibility with these rights.

Right to equality and non-discrimination

2.95 A person may object to extradition where they will be prosecuted or punished, or may be prejudiced at trial or have their liberty restricted, on account of their 'race, sex, sexual orientation, religion, nationality or political opinions'. This is an important safeguard against limits on the right to equality and non-discrimination on those grounds. However, the list does not include all the grounds on which discrimination is prohibited under international human rights law, including disability, language, opinions (other than political opinions), or social origin. The Attorney-General advised that while the Extradition Act does not provide an extradition objection where a person may be persecuted because of other personal attributes set out in international human rights law, he would practically consider all relevant protected attributes when determining whether to surrender a person.

2.96 As noted above, discretionary powers are not as stringent as legislative safeguards, and future Attorneys-General may not consider it necessary to consider such matters when exercising their discretion to allow surrender to extradition. As such, there is a risk that a person may be extradited in circumstances where they may be unlawfully discriminated against, and as such, the Extradition Act may not fully protect the right to equality and non-discrimination.

Committee view

2.97 The committee thanks the minister for this response. The committee notes that in considering this legislative instrument for compatibility with human rights it has been necessary to consider the overall compatibility of the extradition framework under the Extradition Act. The committee notes it has considered the

58 Extradition Act, subsections 19(5) and 21A(4).

compatibility of the Extradition Act on previous occasions.[59] The committee is concerned that many of the safeguards referred to by the Attorney-General in relation to extradition are discretionary, relying on the Attorney-General to exercise their general discretion not to surrender a person for extradition in the following circumstances:

(a) where there are substantial grounds for believing that the person would be in danger of being subjected to cruel, inhuman or degrading treatment or punishment;

(b) where there are substantial grounds for believing that, if the person were surrendered to the extradition county, the person would suffer a flagrant denial of justice in the extradition country;

(c) where a person may be prosecuted, punished or detained or restricted in their liberty on the basis of personal attributes such as disability, language, non-political opinions, or social origin.

2.98 Noting the importance of the prohibition against torture and other cruel, inhuman or degrading treatment or punishment and the rights to a fair hearing and equality and non-discrimination, the committee is concerned that leaving protection of such matters to ministerial discretion is not sufficient to adequately protect these rights. The committee also considers that the presumption against bail in the Extradition Act, and the lack of any ability to challenge the lawfulness of such continued detention, is incompatible with the rights to liberty and effective remedy. As such, the committee considers that this instrument, by enabling extradition pursuant to the Extradition Act to the Republic of North Macedonia, also risks incompatibility with these rights.

Suggested action

2.99 The committee considers the human rights compatibility of the *Extradition Act 1988* would be improved were it amended:

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

(a) to expand the existing prohibition against torture to provide that the Attorney-General may only determine that a person be surrendered for extradition if they do not have substantial grounds for believing that the person would be in danger of being subjected to cruel, inhuman or degrading treatment or punishment;[60]

(b) to require the Attorney-General to be satisfied that there are no substantial grounds for believing that, if the person were surrendered to the extradition county, the person would suffer a flagrant denial of justice in the extradition country;

(c) to remove the presumption against bail[61] and require that detention pending extradition be subject to ongoing merits review considering the necessity of the continued detention; and

(d) to expand the meaning of an 'extradition objection' to include where a person may be prosecuted, punished or detained or restricted in their liberty on the basis of a broader range of personal attributes (such as disability, language, non-political opinions, or social origin).

2.100 The committee draws these human rights concerns to the attention of the Attorney-General and the Parliament.

60 *Extradition Act 1988*, paragraphs 15B(3)(a) and 22(3)(b).

61 *Extradition Act 1988*, subsection 15(6).

Migration (Specification of evidentiary requirements – family violence) Instrument (LIN 23/026) 2023 [F2023L00382][1]

Purpose	This legislative instrument repeals the Migration Regulations 1994 - Specification of Evidentiary Requirements - IMMI 12/116 and specifies the type and number of items of evidence for the purposes of paragraph 1.24(b) of the Migration Regulations 1994
Portfolio	Home Affairs
Authorising legislation	Migration Regulations 1994
Last day to disallow	Exempt from disallowance
Rights	Equality and non-discrimination

2.101 The committee requested a response from the minister in relation to the instrument in *Report 6 of 2023*.[2]

Evidence of family violence

2.102 This legislative instrument specifies the items of acceptable evidence for a non-judicially determined claim of family violence for the purposes of the Migration Regulations 1994 (Migration Regulations). If a person on a visa who was in a relationship with their sponsor can make out a claim of family violence, they may be eligible for a permanent visa.[3] If they are unable to make out such a claim, the consequences may be that they would be required to leave Australia.

2.103 Regulation 1.23 and 1.24 of the Migration Regulations require that where a person is applying for a visa and alleges they are a victim of family violence – where that violence has not been judicially determined – that they provide a statutory declaration in relation to the alleged violence, as well as evidence specified by the minister as set out in a legislative instrument. This legislative instrument specifies the evidence that must be provided, namely that an applicant must provide a minimum of two items of official evidence of family violence. The categories of acceptable evidence types include reports from medical practitioners, police officers, child

1 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Migration (Specification of evidentiary requirements – family violence) Instrument (LIN 23/026) 2023, *Report 6 of 2023*; [2023] AUPJCHR 81.

2 Parliamentary Joint Committee on Human Rights, *Report 6 of 2023* (14 June 2023) pp. 26-29.

3 See the Department of Home Affairs webpage on Domestic and family violence and your visa.

welfare officers, family violence support service providers, social workers, psychologists, and education professionals.[4] Two items of evidence must be provided, each of which must be a different type of evidence. For example, a person could not provide two separate hospital reports from a medical practitioner as evidence of family violence. They would also have to provide a second piece of different evidence, for example a police report. Further, all evidence must be in writing, in English, on a professional letterhead, and include the contact details of the relevant professional.[5]

Summary of initial assessment

Preliminary international human rights legal advice

Right to equality and non-discrimination

2.104 Restricting the types of evidence which will be accepted to official sources of information, within the context of applications for a visa, engages and may limit the right to equality and non-discrimination, noting that applicants from non-English speaking backgrounds or certain cultural backgrounds may face more difficulties in obtaining such evidence.

2.105 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 the equal and non-discriminatory protection of the law.[6] 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).[7] 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.[8]

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4 Schedule 1, item 1, table of types of evidence.

5 Subsection 4(3).

6 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.

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

8 *Althammer v Austria*, UN Human Rights Committee Communication no. 998/01 (2003) [10.2]. The prohibited grounds of discrimination are race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Under 'other status' the following have been held to qualify as prohibited grounds: age, nationality, marital status, disability, place of residence within a country and sexual orientation. The prohibited grounds of discrimination are often described as 'personal attributes'. See Sarah Joseph and Melissa Castan, *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary*, 3rd edition, Oxford University Press, Oxford, 2013, [23.39].

2.106 Differential treatment (including the differential effect of a measure that is neutral on its face) will not constitute unlawful discrimination if the differential treatment is based on reasonable and objective criteria such that it serves a legitimate objective, is rationally connected to that objective and is a proportionate means of achieving that objective.[9]

2.107 As this legislative instrument is exempt from disallowance, no statement of compatibility is required to be provided, and so no assessment of the measure's compatibility with the right to equality and non-discrimination is available.

Committee's initial view

2.108 The committee considered further information is required to assess the compatibility of this measure with the right to equality and non-discrimination, and therefore sought the advice of the minister in relation to:

(a) why applicants are required to provide a minimum of two pieces of evidence from two separate categories;

(b) why there is no discretion to permit the consideration of 'non-official' sources of information (for example, statutory declarations from a neighbour or friend);

(c) why the measure does not provide the decision-maker with the discretion to consider a range of evidence provided to them about alleged family violence and make a case-by-case determination; and

(d) whether people from non-English speaking backgrounds are more frequently unable to provide evidence of non-judicially determined family violence in practice.

2.109 The full initial analysis is set out in *Report 6 of 2023*

Minister's response[10]

2.110 The minister advised:

> **(a) why applicants are required to provide a minimum of two pieces of evidence from two separate categories;**
>
> The requirement for applicants to provide a minimum of two pieces of evidence from two separate categories has been in place since November 2012, when IMMI 12/116 was implemented.
>
> Given the extensive changes implemented with LIN 23/026 and the removal of the requirement for professionals and service providers to

9 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].

10 The minister's response to the committee's inquiries was received on 17 July 2023. This is an extract of the response. The response is available in full on the committee's website.

provide a statutory declaration, the Department considers maintaining the requirement for two pieces of evidence to provide the appropriate balance between providing more flexibility to applicants and retaining some basic integrity settings. Requiring evidence from two separate categories ensures the evidence is from at least two independent sources, who are employed or suitably trained in identifying family violence. LIN 23/026 is expected to make it easier for applicants to obtain evidence from professionals and service providers that they are already engaged with, rather than having to seek out specific services to provide evidence for the purposes of the instrument, potentially at added expense and potential re-traumatisation. It may also encourage applicants who are not already engaged with services to come forward to seek assistance from suitably qualified professionals and service providers who can help them to access appropriate support and assistance. Other people such as friends and neighbours may not be able to do this.

Where the applicant has not engaged with such professionals and service providers, the intent is for the applicant to engage with two independent sources who are employed or suitably trained in identifying family violence, to produce evidence that supports their claims.

The professionals and service providers listed against LIN 23/026 are employed in the family violence sector, or in health, policing and education roles where they may encounter or identify family violence. The Department must make a determination on whether family violence occurred, and evidence from two separate sources supports this assessment.

The Government has committed to a further review of LIN 23/026 in the next 12 months to ensure it continues to reflect community expectations and address any issues raised by stakeholders and applicants.

The Department has been monitoring feedback from stakeholders and any impacts on caseload processing since the commencement of LIN 23/026. Some stakeholders have raised that the requirement to provide evidence from two separate categories may present a challenge for some applicants. As such, concerns regarding the requirement for applicants to provide a minimum of two pieces of evidence from two separate categories will be considered as part of this review.

(b) why there is no discretion to permit the consideration of 'non-official' sources of information (for example, statutory declarations from a neighbour or friend);

Applicants are able to provide additional information to support their non-judicial family violence claim, as long as the minimum evidentiary requirements are met. This additional information must be taken into consideration by the decision-maker as part of a holistic assessment of the evidence.

The Department needs to maintain basic integrity settings and give decision-makers confidence in the evidence before them. Any widening of the instrument to include 'non-official' sources has been considered against expected uptake of this evidentiary pathway by applicants and impact on the assessment process. In practice, widening the scope may nullify the current intent of LIN 23/026.

A widening of the scope of evidence in the instrument to 'non-official' sources would need to be balanced against decision-makers being satisfied of family violence. While decision-makers are suitably trained in visa processing and sensitivities attached to family violence claims, they are not family violence professionals.

Consistent with paragraph 1.23(10)(c), if the Minister is not satisfied that the alleged victim has suffered the relevant family violence, the Minister must seek the opinion of an independent expert. Consideration must therefore be given to financial constraints of the current contract with the independent expert that is utilised where the decision-maker is unable to be satisfied family violence has occurred based on the evidence before them. The number of referrals to the independent expert and consequently costs to the Commonwealth could be expected to increase with a widening of scope.

On balance, the above factors are mitigated by relying on professionals and services providers listed against LIN 23/026 who are employed or suitably trained in identifying family violence.

The Department's Procedural Instruction *[Div1.5] Division 1.5 – Special provisions relating to family violence* provides information and guidance to decision-makers on assessing family violence claims under the family violence provisions. This includes instructions on considering additional evidence that may have been submitted as part of the claim (section 3.12.3).

The Department's website has recently been updated to advise applicants that they can provide other evidence to support their non-judicial family violence claim, in addition to the minimum evidentiary requirements. For more information see Family Violence Provisions (homeaffairs.gov.au)

(c) why the measure does not provide the decision-maker with the discretion to consider a range of evidence provided to them about alleged family violence and make a case-by-case determination; and

Decision-makers do have discretion to consider a range of evidence and all decisions are made on a case-by-case basis. Decision-makers are required to consider all evidence provided by the applicant as part of a holistic assessment of the evidence.

As noted above, the Department's Procedural Instruction *[Div1.5] Division 1.5 – Special provisions relating to family violence* provides information and guidance to decision-makers on assessing family violence claims under the family violence provisions. This includes instructions on

considering additional evidence that may have been submitted as part of the claim (section 3.12.3).

> 3.12.3. Additional evidence
>
> Under policy, any other evidence may also be provided in support of a non-judicial family violence claim, so long as the minimum evidentiary requirements prescribed above *[a statutory declaration by the alleged victim and at least two prescribed documents in accordance with the current legislative instrument]* are met.
>
> If relevant, additional evidence may be taken into consideration by the decision maker and given appropriate weighting (depending on the type and quality of the evidence provided) at the stage at which the decision maker must determine whether they are satisfied that relevant family violence did in fact take place.
>
> Evidence by objective, official and credible sources should be given more weight than more subjective forms of evidence, such as letters and testimonies from friends and relatives.

(d) whether people from non-English speaking backgrounds are more frequently unable to provide evidence of non-judicially determined family violence in practice.

The Department is unable to confirm whether people from non-English speaking backgrounds are more frequently unable to provide evidence of non-judicially determined family violence in practice.

Under policy, decision-makers should be mindful of the sensitivity of family violence claims and the complexity of obtaining required evidence when deciding how to proceed with cases that do not appear to meet the evidentiary requirements.

Where an applicant has submitted a non-judicial family violence claim that does not meet the evidentiary requirements, decision-makers must notify the applicant and give them the opportunity to submit further evidence consistent with the requirements of LIN 23/026 or to make a judicial claim under one of subregulations 1.23(2), (4) or (6). Decision-makers are also encouraged to be flexible in offering reasonable extensions of time to provide evidence.

In recognition of some of the additional challenges faced by applicants from non-English speaking or certain cultural backgrounds, the Department added ‘community, multicultural or other crisis support services providing domestic and family violence assistance or support’ to LIN 23/026 as part of the category of ‘Family violence support service provider’. This category in IMMI 12/116 was limited to ‘women's refuge or family/domestic violence crisis centre’. This has been well received by stakeholders.

Concluding comments

International human rights legal advice

2.111 As set out in the initial analysis, family violence has a disproportionate impact on women generally, and women may more generally seek to rely on these visa protection provisions.[11] Further, women from culturally and linguistically diverse backgrounds are particularly vulnerable to family violence.[12] By virtue of their background, women within this cohort may face additional challenges in seeking to produce evidence from official sources. These barriers may include language barriers, social isolation, social and community pressure not to report violence, financial barriers to accessing services, and a lack of trust in official services. In this regard, the minister stated that they were unable to advise whether people from non-English speaking backgrounds are more frequently unable to provide evidence of non-judicially determined family violence in practice. However, they also noted that in recognition of some of the additional challenges faced by applicants from non-English speaking or certain cultural backgrounds, the department had added 'community, multicultural or other crisis support services providing domestic and family violence assistance or support' as an official source of information. The minister stated that the previous version of the legislative instrument was limited to 'women's refuge or family/domestic violence crisis centre'. Based on this information, there would appear to be a risk that, because people from non-English speaking backgrounds face additional challenges in accessing relevant services, they may more frequently face challenges in providing evidence of non-judicially determined family violence in practice. As such, there would appear to be a risk that this measure may have an indirectly discriminatory impact against certain non-citizens based on their ethnicity or national origin (both protected characteristics).

2.112 As noted in the preliminary analysis, differential treatment will not constitute unlawful discrimination if it is based on reasonable and objective criteria such that it serves a legitimate objective, is rationally connected to that objective and is a proportionate means of achieving that objective.[13]

2.113 In this regard, the measure specifies the items of acceptable evidence for a non-judicially determined claim of family violence for the purposes of assessing whether the applicant is eligible for a visa independent of their visa sponsor, where that sponsor is alleged to be the perpetrator. Facilitating the administration of this visa system constitutes a legitimate objective under international human rights law,

11 See, Australian Bureau of Statistics, *Personal Safety, Australia* (2016).

12 See, for example, AMES Australia and Department of Social Services (Cth), *Violence against women in CALD communities: Understandings and actions to prevent violence against women in CALD communities*, 2016.

13 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].

and specifying the items of acceptable evidence is rationally connected to (that is, effective to achieve) that objective.

2.114 The key question is whether this measure constitutes a proportionate limit on the right to equality and non-discrimination. This requires consideration of several factors, including whether a proposed limitation is sufficiently circumscribed, whether it is accompanied by sufficient safeguards, whether it provides the flexibility to treat different cases differently, and the availability of review.

2.115 As to why applicants are required to provide a minimum of two pieces of evidence from two separate categories (and not two pieces of evidence from the same source), the minister stated that the department considers that this provides the appropriate balance between providing more flexibility to applicants and retaining basic integrity settings. The minister stated that the relevant professionals and service providers are employed in the family violence sector, or in health, policing and education roles where they may encounter or identify family violence. The minister stated that this ensures the evidence is from at least two independent sources, who are employed or suitably trained in identifying family violence. The minister stated that the measure is expected to make it easier for applicants to obtain evidence from professionals and service providers that they are already engaged with, rather than having to seek out specific services to provide evidence for the purposes of the visa application process, and requiring two separate sources may encourage applicants who are not already engaged with services to come forward to seek assistance. In this regard, requiring official evidence from a broad range of services may make it easier for some people to obtain the minimum two forms of acceptable evidence of family violence. However, there may also be instances where persons are connected with few or no relevant services, and so obtaining such evidence may therefore be more challenging for them.

2.116 As to the absence of a discretion for decision-makers to consider 'non-official' sources of information if the requisite two sources are not available (for example, statutory declarations from a neighbour or friend), the minister stated that the department needs to maintain basic integrity settings and give decision-makers confidence in the evidence before them. They stated that while decision-makers are suitably trained in visa processing and sensitivities attached to family violence claims, they are not family violence professionals. However, it is not clear why such departmental decision-makers may not be provided with training in identifying evidence of family violence (or otherwise have access to trained professionals to inform their decision-making) such that they are able to assess evidence more readily.

2.117 The minister further noted that where the requisite two sources of evidence are available and decision-makers are not satisfied that a person has suffered family violence (that has not been determined by a court), they are required to seek the opinion of an independent expert, which incurs an expense to the department. Currently, the safeguard of having an expert opinion is only enlivened where a

person had submitted a valid application, including providing a minimum of two pieces of evidence from two categories of official information. As such, it has no safeguard value with respect to individuals who cannot provide two separate categories of official evidence. As to why such an expert could not be consulted to determine claims of family violence in the absence of the two sources of official evidence, the minister stated that consideration must be given to 'financial constraints of the current contract with the independent expert that is utilised where the decision-maker is unable to be satisfied family violence has occurred based on the evidence before them'. The minister stated that the number of referrals to the independent expert and consequently costs to the Commonwealth could be expected to increase with a widening of the scope of acceptable evidence. Noting that Australia has obligations to immediately realise the rights under the International Covenant on Civil and Political Rights, including the right to equality and non-discrimination, the financial implications of enlivening an existing legislative safeguard are not relevant to an assessment of whether this measure is a proportionate limit on this right.

2.118 Further information was sought as to why the measure does not give a decision-maker the discretion to consider a range of evidence provided to them about alleged family violence and to make a case-by-case determination. The minister stated that decision-makers do have the discretion to consider a range of evidence, and make a holistic assessment of all evidence, but only if the minimum evidentiary requirements from two official sources have been met. The minister also highlighted internal procedural instructions which provide information and guidance to decision-makers on assessing family violence claims.[14] These instructions advise decision-makers that additional relevant evidence may be taken into consideration, but that 'evidence by objective, official and credible sources should be given more weight than more subjective forms of evidence, such as letters and testimonies from friends and relatives.' However, as in relation to the above safeguard, a decision-maker's ability to consider additional evidence would only be enlivened once a person had already satisfied the minimum two sources of evidentiary requirements. As such, this does not assist with the proportionality of the measure as it provides no additional flexibility to applicants who are unable to procure the requisite two sources of evidence from two different official sources.

2.119 Noting that there appears to be a risk that this measure may have a disproportionate impact on non-citizens for whom English is a second language or from certain cultural backgrounds, and that there is no flexibility to treat different cases differently (if the applicant cannot obtain the necessary two items of evidence) and that there are less rights-restrictive alternatives available (such as allowing

14 See, *[Div1.5] Division 1.5 – Special provisions relating to family violence*. The LEGEND database is not directly available to the public. To access it, individuals must themselves subscribe (costing between $730 and $800 per year) or via a library scheme.

decision-makers to make decisions on a case-by-case basis and, if necessary, seeking the advice of an expert) there is a risk that this measure impermissibly limits the right to equality and non-discrimination.

Committee view

2.120 The committee thanks the minister for this response. The committee considers that there is a risk that applicants from non-English speaking backgrounds or certain cultural backgrounds may face more difficulties obtaining evidence of family violence and, consequently, the measure appears to limit the right to equality and non-discrimination. The committee considers that it is not clear the measure provides sufficient flexibility, or is accompanied by sufficient safeguards, such that this would constitute a permissible limit on the right to equality and non-discrimination.

2.121 The committee notes that the minister stated the department has monitored feedback from stakeholders and some stakeholders have raised that the requirement to provide evidence from two separate categories may present a challenge for some applicants. The minister stated that the government has committed to a further review of this measure in the next 12 months.

Suggested action

2.122 The committee recommends that a review of this measure to be conducted in the next 12 months to consider the concerns noted in this report (including consideration of whether people from non-English speaking backgrounds or certain cultural backgrounds are more frequently unable to provide evidence of non-judicially determined family violence in practice).

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

Public Service Regulations 2023 [F2023L00368][1]

Purpose	These regulations provide for, among other things, the employer powers of Agency Heads; the review of Australian Public Service (APS) promotion and engagement decisions, and APS actions; the functions of the APS Commissioner and the Merit Protection Commissioner; entitlements on administrative arrangements and reorganisations; attachment of salaries to satisfy judgment debts and the authorisation of the use and disclosure of personal information
Portfolio	Prime Minister and Cabinet
Authorising legislation	*Public Service Act 1999*
Last Day to disallow	15 sitting days after tabling (tabled in the House of Representatives on 30 March 2023 and in the Senate on 9 May 2023. Notice of motion to disallow must be given by 7 August 2023 in the Senate)[2]
Rights	Privacy; work; equality and non-discrimination; people with disability

2.124 The committee requested a response from the minister in relation to the instrument in *Report 6 of 2023*.[3]

Direction to attend medical examination

2.125 Section 11 of the regulations allows an Agency Head[4] to direct an Australian Public Service (APS) employee to undergo a medical examination by a medical practitioner nominated by the Agency to assess the employee's fitness for duty and give the Agency Head a report of the examination within a specified period.[5] Such a direction may be made in circumstances where an Agency Head believes that the employee's state of health may be affecting their work performance; has caused, or

1 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Public Service Regulations, *Report 8 of 2023*; [2023] AUPJCHR 82.

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

3 Parliamentary Joint Committee on Human Rights, *Report 6 of 2023* (14 June 2023), pp. 30-38.

4 An Agency Head is defined as the Secretary of a Department, the Head of an Executive Agency of the Head of a Statutory Agency. See section 7 of the *Public Service Act 1999*.

5 Subsection 11(2).

may cause, an extended absence from work;[6] may be a danger to the employee; has caused, or may cause, the employee to be a danger to other employees or members of the public; or may be affecting the employee's standard of conduct.[7] An Agency Head may also direct an employee to attend a medical examination if the employee is to be assigned new duties and the employee's state of health may affect their ability to undertake the duties; or if the employee is to travel overseas as part of their employment.[8]

Summary of initial assessment

Preliminary international human rights legal advice

Rights to privacy, work and equality and non-discrimination and rights of people with disability

2.126 By directing an employee to undergo a medical examination and provide the results of that examination to their employer, the measure engages and limits the right to privacy. The right to privacy includes respect for informational privacy, including the right to respect for private and confidential information, particularly the storing, use and sharing of such information, as well as the right to personal autonomy and physical and psychological integrity.[9]

2.127 Further, to the extent that the measure has a disproportionate impact on people with disability, for example where a person's impairment may affect their work performance, it may engage and limit the rights of people with disability and the right to equality and non-discrimination. 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.[10] This right encompasses both 'direct' discrimination (where measures have a discriminatory intent) and 'indirect' discrimination (where measures have a

6 The Note in section 11 provides the following examples of extended absences from work: an absence from work of at least four continuous weeks; and a combined total of absences from work, within a 13-week period, whether based on a single or separate illness or injury, of at least four weeks.

7 Paragraph 11(1)(a).

8 Paragraph 11(1)(b)–(c).

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

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. The Convention on the Rights of Persons with Disabilities also protects the right to equality and prohibits all discrimination on the basis of disability, see in particular article 5.

discriminatory effect on the enjoyment of rights).[11] 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.[12]

2.128 The Convention on the Rights of Persons with Disabilities further describes the content of the right to equality and non-discrimination with respect to people with disability, including the various measures that state parties are required to take to guarantee the right to equality before and under the law for people with disabilities. This includes an obligation to take all appropriate steps to ensure that reasonable accommodations are provided.[13] Differential treatment (including the differential effect of a measure that is neutral on its face) will not constitute unlawful discrimination if the differential treatment is based on reasonable and objective criteria such that it serves a legitimate objective, is rationally connected to that objective and is a proportionate means of achieving that objective.[14]

2.129 Further, depending on the outcome of the medical examination and any consequential action taken by the employer, for example, if the report was used as a basis for termination or any other adverse employment action, the measure may also engage and limit the right to work. The right to work includes a right to freely accept or choose work and not to be unfairly deprived of work, and must be made available in a non-discriminatory way.[15] The Convention on the Rights of Persons with Disabilities elaborates on the content of this right with respect to people with disability. In particular, article 27 recognises the right of persons with disabilities to work on an equal basis with others and prohibits discrimination on the basis of

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

12 *Althammer v Austria*, UN Human Rights Committee Communication no. 998/01 (2003) [10.2]. The prohibited grounds of discrimination are race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Under 'other status' the following have been held to qualify as prohibited grounds: age, nationality, marital status, disability, place of residence within a country and sexual orientation. The prohibited grounds of discrimination are often described as 'personal attributes'. See Sarah Joseph and Melissa Castan, *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary*, 3rd edition, Oxford University Press, Oxford, 2013, [23.39].

13 Convention on the Rights of Persons with Disabilities, articles 4 and 5. See also UN Committee on Economic, Social and Cultural Rights, *General Comment No. 5: Persons with disabilities* (1994).

14 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].

15 International Covenant on Economic, Social and Cultural Rights, articles 6–7. See also, UN Committee on Economic, Social and Cultural Rights, *General Comment No. 18: the right to work (article 6)* (2005) [4] and *General Comment No. 5: People with Disabilities* (1994) [20] – [27].

disability with regard to all employment matters.[16] The UN Committee on the Rights of Persons with Disabilities has emphasised that 'impairments must not be taken as legitimate grounds for the denial or restriction of human rights', including the right to work.[17]

2.130 The above 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.[18] Further information is required as to whether there is a pressing and substantial concern which gives rise to the need for the specific measure, how the measure is likely to be effective in achieving the objective being sought and whether the limitation is proportionate.

Committee's initial view

2.131 The committee sought the minister's advice to assess the compatibility of the measure with the rights to privacy, work, equality and non-discrimination and the rights of persons with disability, in particular:

(a) why is it necessary to provide the Agency Head with information in relation to an employee's state of health and what is the pressing or substantial concern this seeks to address;

(b) how is the measure effective to achieve the objective being sought;

(c) what considerations would an Agency Head take into account in forming a belief that an employee's health may be affecting their work performance or standard of conduct, for example, how would an Agency Head measure whether an employee's work performance is 'affected';

(d) whether the written notice directing an employee to undergo a medical examination sets out the reasons underpinning the decision to issue such a direction in sufficient detail such that the employee may challenge the decision and effectively seek review, and why this requirement is not provided for in the regulations;

16 Convention on the Rights of Persons with Disabilities, article 27. See UN Committee on the Rights of Persons with Disabilities, *General comment No. 8 (2022) on the right of persons with disabilities to work and employment* (2022).

17 UN Committee on the Rights of Persons with Disabilities, *General comment No. 8 (2022) on the right of persons with disabilities to work and employment* (2022) [8].

18 It is noted that while the Convention on the Rights of Persons with Disabilities contains no general limitation provision, the general limitation test under international human rights law is applicable, noting that many rights in the Convention on the Rights of Persons with Disabilities are drawn from the International Covenant on Economic, Social and Cultural Rights and International Covenant on Civil and Political Rights.

(e) why it is necessary for the medical examination to be undertaken by a medical practitioner nominated by the Agency Head and is it possible for an employee to choose an alternative practitioner of their choice;

(f) whether it is possible for an employee to submit to an Agency Head a shadow report from a medical practitioner of their choice; and

(g) how will the information contained in the medical report be used by the Agency Head and what are the potential consequences of the medical examination and report, for example, is termination a possibility.

2.132 The full initial analysis is set out in *Report 6 of 2023*.

Minister's response[19]

2.133 The minister advised:

> *(a) why is it necessary to provide the Agency Head with information in relation to an employee's state of health and what is the pressing or substantial concern this seeks to address; (b) how is this measure effective to achieve the objective being sought*
>
> Agency Heads have a duty of care under the *Work Health and Safety Act 2011* towards their employees and must comply with the *Safety, Rehabilitation and Compensation Act 1988.* The power to direct an employee to attend a medical examination is necessary to give effect to the duties and obligations under both Acts.
>
> Some of the circumstances where it is necessary to provide an Agency Head with information in relation to an employee's state of health include:
>
> - if the employee presents with a severe injury and/or the employee has limitations for work capacity;
> - if clarification is required about the employee's physical/mental capabilities and any activities that must be avoided;
> - if there is medical evidence suggesting a possibility of re-injury at work;
> - where there is conflicting medical information particularly in relation to an employee's work capacity and treatment;
> - factors in the work environment, including any perceived or actual adverse relationships with supervisors or co-workers;
> - if the injury is slow onset and the symptoms have developed over a period of time;

19 The minister's response to the committee's inquiries was received on 7 July 2023. This is an extract of the response. The response is available in full on the committee's website.

- if there is a significant change in the employee's certified capacity for work or participation in rehabilitation;
- uncertainty on diagnosis of the employee's condition;
- there is insufficient or conflicting medical evidence;
- the treatment being received does not appear to be clinically justified and/or an opinion on treatment needs is required;
- an employee has developed a new or secondary condition (that may, or may not be, related to their work environment);
- an employee has submitted a claim, including for permanent impairment (subject to the use and application of powers in the SRC Act with respect to the claim);
- concerns about the current medical evidence;
- the condition seems to have stabilised; or
- recovery has stalled.

For example, an Agency Head may direct an employee to attend a medical examination following an extended absence from the workplace. The medical examination will provide the Agency Head with information to develop a return to work plan that may include recommendations on modified duties or a modified work pattern. The information from the medical examination assists the Agency Head to address the pressing or substantial concern to meet their duty of care and ensure the employee is able to return to the workplace successfully. If an employee makes a claim, this is likely to be in conjunction with the powers in the SRC Act, and Comcare publishes guidance on the use of those powers on its website.

An Agency Head may also direct an employee to attend a medical examination where the employee has notified the Agency Head that they have a medical condition influencing their ability to undertake their duties. In this situation, the Agency Head may direct the employee to attend a medical examination to ensure the employee remains safe in the workplace. The medical examination will ensure the Agency Head has the necessary information to understand the type of support required, or any changes required to the employee's role and address the pressing or substantial concern to make reasonable accommodation for the employee. This may include providing the employee with modified duties or, in consultation with the employee, moving them to an alternative role that is more suited to their current needs. This can be particularly pertinent in dangerous work environments, noting the public service undertakes a diverse range of roles across a breadth of work environments and workplaces, for example, abattoirs, national parks, the Antarctic, ports, wharfs, ships and vessels, and so forth.

The examples described above on the use of the power to attend a medical examination serve a legitimate objective, to assist Agency Heads to meet their duty of care towards employees under the WHS Act. They

are rationally connected to that objective, and are a proportionate means of achieving that objective. Likewise, the ability to direct an employee to attend a medical examination is instrumental to supporting the effective operation of the SRC Act in parallel to the powers in the Regulations.

(c) what considerations would an Agency Head take into account in forming a belief that an employee's health may be affecting their work performance or standard of conduct, for example, how would an Agency Head measure whether an employee's work performance is 'affected'

In determining whether an employee's heath may be affecting their work performance or standard of conduct, an Agency Head will usually make this determination following information received from the employee. An employee may volunteer this information with the aim of seeking support or assistance, or following a performance or conduct discussion, an employee may provide a health concern as the explanation for their behaviour. Where an employee raises their health as the explanation for a performance concern, a medical examination will assist an Agency Head to ensure any action taken is reasonable. For example, if a medical examination demonstrated an employee's underperformance may be attributable to, or the result of, a medical condition.

(d) whether the written notice directing an employee to undergo a medical examination sets out the reasons underpinning the decision to issue such a direction in sufficient detail such that the employee may challenge the decision and effectively seek review, and why this requirement is not provided for in the regulations

All ongoing, non-ongoing and casual APS employees (other than SES employees) can seek review of certain decisions or actions that relate to their employment. This right to seek a review is an entitlement built into section 33 of the *Public Service Act 1999*.

A written notice under section 11 must be a lawful and reasonable direction. Procedural fairness necessitates that where an Agency Head provides written notice to an employee to attend a medical examination they must include a reason for the decision.

However, should an Agency Head not provide sufficient detail in the written notice, this would not limit the employee's ability to seek a review in accordance with the review provisions in the Regulations.

(e) why is it necessary for the medical examination to be undertaken by a medical practitioner nominated by the Agency Head and is it possible for an employee to choose an alternative practitioner of their choice and (f) whether it is possible for an employee to submit to an Agency head a shadow report from a medical practitioner of their choice

The ability to nominate the medical practitioner who will undertake a medical examination does not limit an Agency Head from nominating a practitioner of the employee's preference. However, there are circumstances where an Agency Head may wish to nominate an alternative

practitioner. For example, in circumstances where the information provided by an employee's preferred medical practitioner does not align with the information provided by the employee, an Agency Head may need to seek further guidance from an independent medical practitioner.

For example, where an employee informs the Agency Head that the reason for their underperformance is due to a medical condition, an Agency Head may ask for evidence from the employee's doctor. However, if the employee's doctor confirms that the employee's medical condition should not impair the employee's performance but the employee still maintains their performance is impacted by their medical condition, the Agency Head may wish to seek an independent medical examination prior to deciding whether to commence an underperformance process. The Regulations do not limit an employee from providing a shadow medical report to the Agency Head. A shadow report would form part of the materials for consideration by an Agency Head prior to undertaking any action.

(g) how will the information contained in the medical report be used by the Agency Head and what are the potential consequences of the medical examination and report, for example, is termination a possibility

The information in the medical report will inform the Agency Head in decisions made relating to the employee. For example in the development of a return to work plan or a return to full time duties plan. The information could determine whether alternative duties or workplace support is necessary. While termination is possible, to terminate an employee on the ground of inability to perform duties because of physical or mental incapacity, the Agency Head would also need to ensure they have met their obligations under all relevant laws, including for example the *Disability Discrimination Act 1992* and SRC Act. This includes taking all reasonable steps to provide the injured employee with suitable employment or to assist the injured employee to find such employment. Therefore, information contained in the medical report would not be sufficient in isolation to terminate an employee's employment.

Concluding comments

International human rights legal advice

2.134 The minister advised that the power to direct an employee to attend a medical examination is necessary to give effect to work health and safety duties and obligations. The minister gave several examples of when such a power might be used and noted that this power serves the legitimate objective of assisting Agency Heads to meet their duty of care towards employees under work, health and safety legislation. Enabling heads of the public service to meet their work, health and safety obligations by ensuring people only return to work when it is safe to do so constitutes a legitimate objective for the purposes of international human rights law, and the direction power would appear rationally connected to this objective.

2.135 In relation to proportionality, and in particular whether the measure is sufficiently circumscribed, the circumstances in which an Agency Head may direct an employee to undergo a medical examination are drafted in broad terms, such as where an employee's state of health may affect their work performance or standard of conduct. The minister advised that in determining whether an employee's heath may be affecting their work performance or standard of conduct, an Agency Head will usually make this determination following information received from the employee. The minister advised that an employee may volunteer this information and where an employee raises their health as the explanation for a performance concern, a medical examination will assist an Agency Head to ensure that any action taken is reasonable. If the measure was restricted to only directing a medical examination, where an employee themselves has raised health concerns, this would appear to be appropriately circumscribed. However, the power in the regulations is not so limited. Rather, section 11 provides that the Agency Head may direct the medical examination if they 'believe' the state of health of the employee may be affecting the employee's work performance, has caused them (or may cause them) to have an extended absence from work, or may be a danger to the employer or others, or when assigning new duties. This would allow the Agency Head to unilaterally make such a direction, with limited criteria as to when the power can be exercised. As the minister's response did not address any circumstance other than voluntary disclosure by the employee, it is unclear in what other circumstances an Agency Head make may such a direction. For example, could an Agency Head make a direction to attend a medical examination for an employee on the basis that they believed there was an undiagnosed neurodivergent disorder which is affecting the employee's work performance? The effect of such a direction on a person's right to privacy, and particularly on the rights of persons with disability, may be significant.

2.136 In relation to whether the employee's medical practitioner could be asked to complete the report, the minister advised that the regulations do not specify the medical practitioner who can be nominated, so an Agency Head may nominate a practitioner of the employee's preference. However, the minister set out why there may be circumstances where an Agency Head may wish to nominate an alternative practitioner. The minister also advised that the regulations do not prevent an employee from providing a shadow medical report to the Agency Head, which could form part of the materials for consideration by an Agency Head prior to undertaking any action. In relation to what the report may be used for, the minister advised that the information in the medical report will inform the Agency Head in decisions made relating to the employee, such as in the development of a return to work plan or a return to full time duties plan. The minister advised that while termination of employment is possible, to terminate an employee on the ground of inability to perform duties because of physical or mental incapacity, the Agency Head would also need to ensure they have met their obligations under all relevant laws, including, for example, the *Disability Discrimination Act 1992*. As such, the information in the

medical report would not be sufficient in isolation to terminate an employee's employment.

2.137 In relation to applicable safeguards, the minister advised that procedural fairness requires an Agency Head to include reasons for the decision to direct an employee to undergo a medical examination. The minister also advised that all APS employees (other than SES employees) can seek review of certain decisions or actions that relate to their employment.[20] The availability of merits review serves as an important safeguard.

2.138 In conclusion, while the measure pursues a legitimate objective and appears rationally connected to this objective, concerns remain with respect to proportionality. The minister's response has provided detail as to the safeguards that apply and examples of when the direction is likely to be used. Noting these safeguards and the examples provided by the minister, were the power to only be used in the circumstances set out in the minister's response, it would be likely that the measure would be a proportionate limit on rights. However, section 11 is drafted in terms that allow a broader basis for issuing a direction than the circumstances set out in the minister's response. Noting that a medical report could form part of the basis on which a person's employment could be terminated (although noting discrimination laws continue to apply) and the significance this could have on a person's rights to work, it has not been fully established that any limitation on the right to privacy by this measure would be proportionate. As the measure does not appear to be sufficiently circumscribed it is also not clear whether any differential treatment of persons on the basis of disability would be based on reasonable and objective criteria, and as such there is a risk the measure may impermissibly limit the rights to equality and non-discrimination and the rights of persons with disabilities. However, as other existing discrimination and fair work protections continue to apply, it is likely that the measure does not impermissibly limit the right to work.

Committee view

2.139 The committee thanks the minister for this response. The committee considers that directing an APS employee to undergo a medical examination and providing an Agency Head with the results of that examination seeks to achieve the legitimate objective of upholding work, health and safety obligations and helping to ensure that people only return to work when it is safe to do so. The committee considers that the minister has detailed a number of safeguards that apply to the measure and the circumstances set out by the minister as to when this power is likely to be used, appear to be reasonable and proportionate. However, the committee is concerned that section 11 is drafted in broad terms that could allow an Agency Head to direct a person to undergo a medical examination in circumstances that may be an

20 *Public Service Act 1999*, section 33.

impermissible limit on the right to privacy and may unlawfully discriminate against persons with disabilities.

Suggested action

2.140 The committee considers the proportionality of this measure may be assisted were section 11 of the regulations amended to more clearly define the precise circumstances as to when an Agency Head may come to 'believe' that the state of health of an APS employee may be a relevant workplace consideration.

2.141 The committee recommends that the statement of compatibility be updated to reflect the information provided by the minister.

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

Use and disclosure of personal information

2.143 Section 103 authorises an Agency Head, the APS Commissioner and the Merit Protection Commissioner to use and disclose personal information that is in their possession or under their control in certain circumstances.[21] In particular, an Agency Head may use personal information where the use is necessary for, or relevant to, the exercise of the employer powers of the Agency Head.[22] An Agency Head may also disclose personal information where the disclosure is necessary for, or relevant to, the exercise of certain powers or functions.[23] The APS Commissioner may use personal information where the information was obtained as part of the Commissioner's review or inquiry functions and the use is necessary for, or relevant to, an inquiry relating to the Code of Conduct.[24] The APS Commissioner and the Merit Protection Commissioner may disclose personal information where the information was obtained as part of a review or inquiry and the disclosure is necessary for, or relevant to, an Agency Head's consideration of alleged misconduct by an APS employee.[25]

21 Subsection 103(2)–(3) relate to use and disclosure by an Agency Head; subsections 103(4)–(5) relate to use and disclosure by the APS Commissioner; and subsection 103(6) relates to disclosure by the Merit Protection Commissioner.

22 Subsection 103(2).

23 Subsection 103(3).

24 Subsection 103(4).

25 Subsections 103(5)–(6).

Summary of initial assessment

Preliminary international human rights legal advice

Rights to privacy

2.144 By authorising the use and disclosure of personal information, the measure engages and limits the right to privacy. The right to privacy includes the right to respect for private and confidential information, particularly the storing, use and sharing of such information, and the right to control the dissemination of information about one's private life.[26] 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.

2.145 Further information is required as to whether there is a pressing and substantial concern which gives rise to the need for the specific measure, how the measure is likely to be effective in achieving the objective being sought and if it is proportionate.

Committee's initial view

2.146 The committee sought the minister's advice to assess the compatibility of the measure with the right to privacy, in particular:

(a) why is it necessary to authorise the use and disclosure of personal information and what is the pressing or substantial concern this seeks to address;

(b) to whom may an Agency Head, the APS Commissioner and the Merit Protection Commissioner disclose personal information, and why do the regulations not limit to whom information may be disclosed; and

(c) what other safeguards, if any, accompany the measure.

Minister's response[27]

2.147 The minister advised:

> *(a) why is it necessary to authorise the use and disclosure of personal information and what is the pressing or substantial concern this seeks to address;*
>
> The Commonwealth is the sole employer of Australian Public Service employees regardless of which agency engages them. Under section 20 of the *Public Service Act 1999,* Agency Heads have all the rights, duties and

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

27 The minister's response to the committee's inquiries was received on 7 July 2023. This is an extract of the response. The response is available in full on the committee's website.

powers of an employer in respect of employees in their agency. However, the *Privacy Act 1988* treats each APS agency as a wholly separate entity for the purposes of handling personal information. This means that sharing personal information about APS employees between Commonwealth agencies-for example, when a staff member moves between agencies, or when a person applies for a job in another agency- would be a disclosure for the purposes of the Privacy Act. Historically this created significant administrative difficulty for Agency Heads to perform and give full effect to their employer powers for the benefit of both their employees, and the Commonwealth.

As a result, the PS Act and Regulations provide for authorised disclosures in certain circumstances between APS agencies under section 9.2. This ensures a common understanding of employment-related personal information disclosure across the APS. This expanded in 2013 to enable Agency Heads to use or disclose personal information necessary or relevant to any of their employer powers under the PS Act.

Section 103 is therefore an authorising provision for the purposes of the Privacy Act, to enable sharing of personal information where appropriate between and within agencies.

The personal information records of employees can transfer with the employee from one agency to another for a range of, ordinary employer purposes:

- recruitment, including promotion decisions;
- movements within agencies under a Machinery of Government process pursuant to section 72 of the PS Act;
- permanent or temporary transfers pursuant to section 26 of the PS Act;
- case management and provision of rehabilitation services to ill or injured employees;
- remuneration, tax, superannuation and other financial administration purposes; and
- where Code of Conduct or other personnel management processes might require appropriate disclosure to and use by non-employing agencies.

All APS employees must comply with common standards of behaviour through the APS Values, Employment Principles, and Code of Conduct, which reflect the expectations the Commonwealth has of APS employees in respect of their performance and behaviour, and ultimately maintain public confidence in the integrity of the APS.

Public confidence is likely to be undermined if Agency Heads are not able to manage APS employees in a practical, sensible way and consistent with the common standards set by Parliament in the PS Act. Should information about employee behaviour calling into question their adherence to the

common standards come to the attention of the Commonwealth, it is appropriate that the agency responsible for managing that employee consider and address it. Employees should have a reasonable expectation that this will occur, and the broader community would expect that public servants be treated fairly and not be protected by technical procedural requirements.

The provision also has the effect of providing clarity for employees seeking to report suspected misconduct, including suspected corruption. There is an expectation across the APS that employees will report behaviour suspected of breaching the Code of Conduct, or suspected breaches of other legislation, such as work health and safety or anti-discrimination law. Staff and agencies need assurance that making such a report within an agency, or to another agency, constitutes a disclosure or use of information that is 'required or authorised' by law.

(b) to whom may an Agency Head, the APS Commissioner and the Merit Protection Commissioner disclose personal information, and why do the regulations not limit to whom information may be disclosed;

An Agency Head, the APS Commissioner, and the Merit Protection Commissioner may disclose information both within and outside the Commonwealth. In practice, this includes their delegates and authorised employees who may exercise their relevant powers, functions or duties. In some circumstances, Agency Heads may need to consider disclosing personal information to a member of the public, for example to a non-APS complainant regarding the outcome of their complaint. The Commission has provided guidance to agencies on disclosing information to complainants (Circular 2008/3: Providing information on Code of Conduct investigation outcomes to complainants: currently under review).

Authorised use and disclosure of personal information under section 103 must still be consistent with the Privacy Act in all other respects. This includes notification to employees upon engagement of how their agency may disclose and use their personal information, in accordance with Australian Privacy Principle 5.

(c) what other safeguards, if any, accompany the measure.

I expect that APS agencies have regard to Australian Public Service Commission guidance in considering employment actions and decisions. The Commission has issued guidance, after consultation with the Office of the Australian Information Commissioner, on the application of section 103 of the Regulations (which is unchanged in substance from regulation 9.2 of the Public Service Regulations 1999). That guidance is in Circular 2016/2: Use and disclosure of employee information. The guidance sets out principles underpinning appropriate use and disclosure of information under section 103 of the Regulations:

> *4. Section 103 provides agencies with significant flexibility in the use and disclosure of personal information, including very sensitive*

personal information, of their employees. The personal information of employees should be used or disclosed carefully. Generally, personal information should not be used or disclosed for a *reason other than that for which it was collected.*

[...]

6. The use and disclosure of employees' personal information requires careful, balanced consideration in each case. On one hand, employees have a *right to expect that their personal information is held in confidence and only used or disclosed for proper, defensible reasons. On the other, APS agencies need to be able to:*

a. *use information they hold about their employees to make employment decisions that are lawful, sensible and based on the available evidence, and*

b. disclose employee information to other APS agencies to support their decision-making.

The further information and safeguards explained above recognise that the use and disclosure of personal information provided for by section 103 is not arbitrary, pursues a legitimate object, and is effective, and proportionate to achieving that objective.

Concluding comments

International human rights legal advice

2.148 The minister has provided further advice regarding why it is necessary to authorise the use and disclosure of personal information in these regulations. The minister advised that while the Commonwealth is the sole employer of APS employees, the *Privacy Act 1988* treats each APS agency as a separate entity for the purposes of handling personal information. This means that sharing personal information about APS employees between Commonwealth agencies, such as when employees move agencies, would be a disclosure for the purposes of the Privacy Act but for the existence of these authorised disclosure provisions. As such, these provisions ensure a common understanding of employment-related personal information disclosure across the APS. The minister advised that public confidence is likely to be undermined if Agency Heads are not able to manage APS employees in a practical, sensible way and consistent with common standards, and as such personal information about employees (including adherence to the Code of Conduct) may need to be shared between agencies. The minister advised that the broader community would expect that public servants be treated fairly and not be protected by technical procedural requirements. The minister also advised that this provision also provides clarity for employees seeking to report suspected misconduct, and this will constitute a disclosure or use of information that is 'required or authorised' by law.

2.149 Permitting the use and disclosure of personal information for the purposes of the effective management of employment related matters across the APS, including to manage any suspected misconduct and ensure public confidence in the

public service, is likely to constitute a legitimate objective for the purposes of international human rights law, and this provision appears rationally connected to that objective.

2.150 In relation to proportionality, 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 purposes for which personal information may be used and disclosed are drafted in reasonably specific terms, relating to employer powers or to specific powers or functions of the APS Commission. In relation to whom the information may be disclosed, the minister advised that an Agency Head, the APS Commissioner and the Merit Protection Commissioner 'may disclose information both within and outside the Commonwealth'. The minister advised that in practice this will be to other APS employees, but in some circumstances Agency Heads may disclose personal information to a member of the public, for example to a non-APS complainant regarding the outcome of their complaint. The minister advised that guidance is available in relation to this situation, and this guidance states that in considering what information to provide to complainants, agencies need to balance individual employees' right to privacy and the need to take reasonable steps to be transparent and accountable, with the identity of an individual employee not revealed unless it is necessary, appropriate and reasonable to do so.[28] The minister also advised that authorised use and disclosure of personal information must still be consistent with the Privacy Act in all other respects. The minister also advised that the Australian Public Service Commission has also issued guidance in relation to the principles underpinning the appropriate use and disclosure of information under section 103. This guidance provides that personal information of employees should be used or disclosed carefully, and generally should not be used or disclosed for a reason other than that for which it was collected.[29]

2.151 The availability of guidance with respect to disclosing personal information to a member of the public and within an agency and with other APS agencies would serve as an important safeguard. The guidance relating to disclosure of information under section 103, for example, states that information should generally not be used or disclosed for a reason other than that for which it was collected and where appropriate, consent from the employee may be sought to provide them with an opportunity to raise any concerns they may have regarding the use or disclosure of their personal information.[30] This safeguard, combined with the Privacy Act, may

28 Australian Public Service Commission, Circular 2008/3: Providing information on Code of Conduct investigation outcomes to complainants (currently under review).

29 Australian Public Service Commission, Circular 2016/2: Use and disclosure of employee information.

30 Australian Public Service Commission, Circular 2016/2: Use and disclosure of employee information, [4], [27]–[29].

assist to ensure that any limitation on the right to privacy is only as extensive as is strictly necessary. The measure therefore appears to be accompanied by sufficient safeguards to ensure that any limitation on the right to privacy would likely be permissible in practice.

Committee view

2.152 The committee thanks the minister for this response. The committee notes that authorising the use and disclosure of personal information in certain circumstances engages and limits the right to privacy. The committee considers that permitting the use and disclosure of personal information for the purposes of the effective management of employment related matters across the APS and to maintain public confidence in the APS is likely to constitute a legitimate objective for the purposes of international human rights law. The committee considers that the availability of guidance with respect to using and disclosing personal information, as well as existing safeguards in the Privacy Act, would assist to ensure that any limitation on the right to privacy is likely only as extensive as is strictly necessary. On this basis, the committee considers that the measure would likely constitute a permissible limitation on the right to privacy in practice.

Suggested action

2.153 The committee recommends that the statement of compatibility be updated to reflect the information provided by the minister.

2.154 The committee considers that its concerns have therefore been addressed and makes no further comment in relation to these regulations.

Telecommunications (Interception and Access) (Enforcement Agency—NSW Department of Communities and Justice) Declaration 2023 [F2023L00395][1]

Purpose	This legislative instrument declares the NSW Department of Communities and Justice to be an enforcement agency, and each staff member of Corrective Services NSW to be an officer, for the purpose of accessing telecommunications data
Portfolio	Home Affairs
Last day to disallow	15 sitting days after tabling (tabled in the House of Representatives and the Senate on 9 May 2023). Notice of motion to disallow must be given in the Senate by 7 August 2023[2]
Authorising legislation	*Telecommunications (Interception and Access) Act 1979*
Right	Privacy

2.155 The committee requested a response from the Attorney-General in relation to the instrument in *Report 6 of 2023*.[3]

Access to telecommunications data by corrective services authorities

2.156 The *Telecommunications (Interception and Access) Act 1979* (TIA Act) provides a legal framework for certain agencies to access telecommunications data for law enforcement and national security purposes. Telecommunications data is information about a communication – such as the phone number and length of call or email address from which a message was sent and the time it was sent – but does not include the content of the communication.[4] The TIA Act provides that an authorised officer in an enforcement agency can authorise the disclosure of such data if it is for the purposes of enforcing the criminal law or a law imposing a pecuniary penalty, or for the protection of public revenue.[5] An enforcement agency

1 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Telecommunications (Interception and Access) (Enforcement Agency—NSW Department of Communities and Justice) Declaration 2023, *Report 8 of 2023*; [2023] AUPJCHR 83.

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

3 Parliamentary Joint Committee on Human Rights, *Report 6 of 2023* (14 June 2023) pp. 39-44.

4 *Telecommunications (Interception and Access) Act 1979*, section 172.

5 *Telecommunications (Interception and Access) Act 1979*, Part 4.1, Division 4.

is defined as a criminal law enforcement agency[6] or an authority or body that the Attorney-General declares, by legislative instrument, to be an enforcement body.[7] A corrective services authority can be declared to be an enforcement body under this power. Such a declaration ceases to be in force 40 sitting days after it is made.[8]

2.157 This legislative instrument (the declaration) declares the New South Wales (NSW) Department of Communities and Justice (being that part known as Corrective Services NSW) to be an enforcement agency under the TIA Act. It also declares that each staff member of Corrective Services NSW is an officer for the purposes of the TIA Act – such that they can authorise the disclosure of telecommunications data.[9] The declaration is subject to the condition that officers cannot apply for a journalist information warrant, and it only applies to Corrective Services NSW.[10]

Summary of initial assessment

Preliminary international human rights legal advice

Right to privacy

2.158 The power to declare a corrective services authority as an enforcement body, which means it may access telecommunications data, engages and limits the right to privacy. The right to privacy includes respect for informational privacy, including the right to respect for private and confidential information, particularly the storing, use and sharing of such information.[11] It also includes the right to control the dissemination of information about one's private life. Communications data can reveal quite personal information about an individual, even without the content of the data being made available, by revealing who a person is in contact with, how often and where.[12] It is noted that a corrective services authority would be able to access information not only in relation to prisoners, but also anyone in contact with them. The right to privacy may be subject to permissible limitations where the

6 *Telecommunications (Interception and Access) Act 1979*, section 110A, which includes all state and territory police agencies, the Department of Home Affairs (for limited purposes), the Australian Competition and Consumer Commission, the Australian Securities and Investments Commission, the Australian Criminal Intelligence Commission, and various integrity and corruption Commissions.

7 *Telecommunications (Interception and Access) Act 1979*, subsection 176A(1).

8 *Telecommunications (Interception and Access) Act 1979*, paragraph 176A(10(b).

9 Section 3.

10 Section 4.

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

12 See *Digital Rights Ireland Ltd (C-293/12) and Kärntner Landesregierung ors (C-594/12), v Minister for Communications, Marine and Natural Resources and ors*, Court of Justice of the European Union (Grand Chamber), Case Nos. C-293/12 and C-594/12 (2014) [27].

limitation pursues a legitimate objective, is rationally connected to that objective and is a proportionate means of achieving that objective.

2.159 The objective of addressing the threat posed by illicit mobile phones in prison is, in general, likely to constitute a legitimate objective. However, under international human rights law, a legitimate objective must be one that is necessary and addresses an issue of public or social concern that is pressing and substantial enough to warrant limiting the right.

2.160 Further, a key aspect of whether a limitation on a right can be justified is whether the limitation is proportionate to the objective being sought. In this respect, it is necessary to consider a number of factors, including whether a proposed limitation is sufficiently circumscribed; whether it is accompanied by sufficient safeguards; and whether any less rights restrictive alternatives could achieve the same stated objective.

Committee's initial view

2.161 The committee considered that further information is required to assess the compatibility of this measure with the right to privacy and sought the advice of the Attorney-General in relation to:

(a) why it is not sufficient for Corrective Services NSW to seek access to telecommunications data via NSW law enforcement agencies;

(b) how many times has telecommunications data been accessed by Corrective Services NSW since it was declared to be an enforcement agency for the purposes of the TIA Act; and

(c) why are all staff of Corrective Services NSW declared as able to access telecommunications data, rather than the declaration being restricted to only those staff members who require access to telecommunications data to perform their functions.

2.162 The full initial analysis is set out in *Report 6 of 2023*

Attorney-General's response[13]

2.163 The Attorney-General advised:

> ***Question a: Why it is not sufficient for Corrective Services NSW to seek access to telecommunications data via NSW law enforcement agencies?***
>
> While NSW Police are able to access telecommunications data when the statutory threshold prescribed under the TIA Act is met, there are a

13 The Attorney-General's response to the committee's inquiries was received on 10 July 2023. This is an extract of the response. The response is available in full on the committee's website.

number of reasons why it should not be relied on to seek access to telecommunications data on behalf of Corrective Services NSW.

Corrective Services NSW plays a critical role in the detection, investigation and prosecution of serious crime and corruption under State and Commonwealth legislation, as well as the detection and disruption of terrorist activity. Direct access to telecommunications data and information, as facilitated by enforcement agency status under the TIA Act, is of immeasurable importance to the agency in supporting these functions and ensuring the good order and security of the correctional system.

Access to this critical information may be required within very tight timeframes, as it could mean the difference between a successful escape from custody, or violent/terrorist attack.

Relying on NSW Police to access telecommunications data on behalf of Corrective Services NSW would result in further privacy intrusions and cause unnecessary delays.

Such a process would require the resources of both NSW Police and Corrective Services NSW to request and access the relevant telecommunications data, and Corrective Service NSW investigations would be at the mercy of the knowledge, workload and priorities of the NSW Police.

NSW Police makes on average approximately 100,000 authorisations under the TIA Act annually and a particular officer may not have the ability to appropriately prioritise requests for data from Corrective Services NSW over its own agency activity at any given time. This may result in a significant delay in Corrective Services NSW accessing the required data, resulting in harm to an inmate, the good order of the correctional facility, or members of the community.

Further, the doubling [sic] handling of a request could result in further privacy intrusion, as a police officer who would not otherwise require knowledge of the Corrective Services NSW investigation would become privy to the details of that investigation, and the personal details and telecommunications data of the target.

Accordingly, I consider that it is appropriate for Corrective Services NSW to have the ability to access telecommunications data directly from a telecommunications service provider.

Question b: How many times has telecommunications data been accessed by Corrective Services NSW since it was declared to be an enforcement agency for the purposes of the TIA Act?

Corrective Services NSW has accessed telecommunications data twice since February 2022, with one authorisation currently on foot. Corrective Services NSW has advised that the ability to access telecommunications

data continues to be necessary to support its law enforcement, intelligence and investigative functions as set out above.

Corrective Services NSW has advised its judicious use of telecommunications data to date has been limited due to a number of factors. In particular, the February 2022 declaration was the first time Corrective Services NSW had been an enforcement agency in 7 years and required processes, policies, procedures and training to be developed, tested and refined to ensure the appropriate use of the powers.

As part of that process, the Office of the Commonwealth Ombudsman (OCO) undertook a health check of those processes, policies and procedures. Corrective Services NSW advised it took about 6 months for the OCO's recommendations to be actioned, approved, and fully implemented. Corrective Services NSW also advised that it did not use its powers, on the advice of the OCO, until those recommendations had been implemented. Corrective Services NSW was also delayed in its use of the powers as it needed to negotiate arrangements with service providers to be able to access such data.

With these matters now settled, Corrective Services NSW advises it is now in a strong position to use the powers when necessary and appropriate.

Further, the number of times that telecommunications data has been accessed and used is not reflective of the need for Corrective Services NSW to be able to seek access for operational and safety reasons. Use of this power correlates directly to illegal (or suspected) activity by staff and inmates. For example, there may be periods where such activity is minimal and can be addressed by existing, and less intrusive, search and intelligence capacity.

Conversely, there may be periods where such activity is high in volume, cannot be supported by existing intelligence capacity and access to telecommunications data may be required. As noted, telecommunications data is especially vital in establishing the ownership, use and location of mobile phones which cannot easily be established via other methods.

I do not consider Corrective Services NSW's judicious use of the powers to be reflective of a lack of utility and consider it appropriate for Corrective Services NSW to have authority to access telecommunication data when the relevant thresholds are met.

Question c: Why are all staff of Corrective Services NSW declared as able to access telecommunications data, rather than the declaration being restricted to only those staff members who require access to telecommunications data to perform their functions?

Under sections 5AB and 178 of the TIA Act, the ability to authorise the release of telecommunications data is limited to senior officers authorised by the Secretary of the NSW Department of Communities and Justice (NSW DCJ). As of 28 June 2023, the Secretary of the NSW DCJ has declared

six senior Corrective Services NSW positions that can authorise access to telecommunications data, significantly limiting the scope of access. Further, Corrective Services NSW has advised the ability to access and use telecommunications data is limited to two specific units within the organisation which have a specific need for the data.

In addition, and as noted above, Corrective Services NSW has also undergone a health check by the Commonwealth Ombudsman. This health check examined the policies and procedures in place to limit and guide the authorisation, access and use of telecommunications data. Corrective Services NSW has implemented all of the Ombudsman's recommendations.

The declaration of all members of Corrective Services NSW as 'officers' for the purposes of the TIA Act is consistent with the approach taken in the TIA Act for other agencies. For example, the definition of' officer' in paragraph 5(c) of the TIA Act in relation to a police force of a state or territory includes all officers of the police force. However, agencies limit this through internal policies and procedures to ensure only appropriate personnel can make authorisations and access data.

Concluding comments

International human rights legal advice

2.164 As stated in the initial analysis, the objective of addressing the threat posed by illicit mobile phones in prison is, in general, likely to constitute a legitimate objective. However, under international human rights law a legitimate objective must be one that is necessary and addresses an issue of public or social concern that is pressing and substantial enough to warrant limiting the right. In this context, the Attorney-General advised that Corrective Services NSW plays a critical role in the detection, investigation and prosecution of serious crime and corruption and direct access to telecommunications data and information is of immeasurable importance. The Attorney-General also advised that access to this information may be required within very tight timeframes, 'as it could mean the difference between a successful escape from custody, or violent/terrorist attack' and relying on NSW Police to access telecommunications data on behalf of Corrective Services NSW would cause unnecessary delays.

2.165 However, the Attorney-General also advised that in the past year Corrective Services NSW has only accessed telecommunications data twice. The Attorney-General advised that its use was limited due to a number of factors, including that this was the first time Corrective Services NSW had been declared an enforcement agency in seven years. Noting this advice, it appears that prior to the previous

declaration[14] Corrective Services NSW had not been able to directly access telecommunications data and since February 2022 has only accessed it twice. This raises questions as to whether direct access to such data is as critical as stated, and whether it addresses a pressing and substantial concern. It is also noted that other state correctional facilities are not declared enforcement agencies under the TIA Act; and these entities therefore investigate serious crime within their correctional facilities without being directly declared as an enforcement agency. While it is noted that the *Comprehensive Review of the Legal Framework of the National Intelligence Community* recommended that corrective services authorities should be granted the power to access telecommunications data, if the relevant state or territory government considers it to be necessary,[15] it also stated that several police authorities questioned the need to enable corrective services authorities to access telecommunications data in their own right, as such data can already be sought from police authorities. The review stated that 'evidence from several states indicates that well-managed, cooperative and joint investigative arrangements between police forces, integrity bodies and corrections agencies can work well to investigate criminal activity in prisons'.[16]

2.166 The Attorney-General also stated that if Corrective Services NSW were not declared to be an enforcement agency this could result in further privacy intrusions as relying on the police would mean the police would need to access the personal details and telecommunications data of the target, in addition to Corrective Services NSW. The TIA Act provides that telecommunications data under this power can only be disclosed for the purposes of enforcing the criminal law, administering a law imposing a pecuniary penalty or relating to protection of the public revenue.[17] As such, noting the Attorney-General's advice that such data is necessary to prevent serious concerns such as a prison escape or a violent/terrorist attack, it is unclear why the police would not be involved in accessing such data to investigate and/or enforce such matters in prisons. Further, it does not appear to be a less rights restrictive approach to declare the entirety of Corrective Services NSW to be an enforcement agency to better protect the privacy of those whose telecommunications data is accessed, rather than relying on the police (who already

14 Telecommunications (Interception and Access) (Enforcement Agency—NSW Department of Communities and Justice) Declaration 2022 [F2022L00154].

15 Mr Dennis Richardson AC , *'Comprehensive Review of the Legal Framework of the National Intelligence Community, Volume 2: Authorisations, Immunities and Electronic Surveillance,'* December 2019, recommendation 78.

16 Mr Dennis Richardson AC , *'Comprehensive Review of the Legal Framework of the National Intelligence Community, Volume 2: Authorisations, Immunities and Electronic Surveillance,'* December 2019, p. 278.

17 See *Telecommunications (Interception and Access) Act 1979*, subsection 176A(3B).

have such power) to access the relevant data and pass on only that which is relevant to the investigation.

2.167 The Attorney-General was also asked why all staff of Corrective Services NSW are declared as able to access telecommunications data, rather than the declaration being restricted to only those staff members who require access to telecommunications data to perform their functions. The Attorney-General advised that under the TIA Act the ability to authorise the release of telecommunications data is limited to senior authorised officers.[18] However, the declaration states that 'each staff member' of Corrective Services NSW are 'officers' of the NSW Department of Communities and Justice for the purposes of the TIA Act. It appears that this would mean that each staff member could be an officer authorised to access telecommunications data for the purposes of the TIA Act. The Attorney-General stated that to date only six senior Corrective Services NSW positions can authorise access to telecommunications data and the ability to access and use telecommunications data is limited to two specific units within the organisation that have a specific need for the data. It may assist with proportionality that access to the data is limited in practice to only certain officers, however, as a matter of law any of the over 10,000 officers[19] within Corrective Services NSW could be authorised to access this private telecommunications data. Where a measure limits a human right, discretionary or administrative safeguards alone may not be sufficient for the purpose of a permissible limitation under international human rights law. This is because administrative and discretionary safeguards are less stringent than the protection of statutory processes and can be amended or removed at any time.

2.168 Noting that it has not been clearly established that there is a pressing and substantial concern that warrants Corrective Services NSW having direct access to telecommunications data (rather than partnering with the police) and that the declaration is broadly framed and not limited only to those officers that require access to the data, there is a significant risk that this declaration does not constitute a permissible limitation on the right to privacy.

18 The Attorney-General's response referenced *Telecommunications (Interception and Access) Act 1979*, sections 5AB and 178. However, this declaration is made under subsection 176A(3) which states that the minister may, by legislative instrument, declare an authority or body to be an enforcement agency and persons specified in the declaration to be 'officers of the enforcement agency for the purposes of this Act'. This would suggest the declaration defines who is the authorised officer for the purposes of authorising access to information or documents under section 178, 179 and 180.

19 See NSW Department of Communities and Justice, 'Corrective Services NSW celebrates its staff,' Media Release, 10 January 2022, which stated that there were 10,000 corrective services staff.

Committee view

2.169 The committee thanks the Attorney-General for this response. The committee acknowledges the importance of correctional facilities being able to investigate criminal activity or threats to the order of the prison. The committee considers that seeking to address the threat posed by illicit mobile phones in correctional facilities is, in general terms, a legitimate objective. However, noting that all other corrective services agencies access such data via the police, and that Corrective Services NSW has traditionally done so, the committee considers the necessity of this power has not been established. Further, as the declaration enables thousands of employees of Corrective Services NSW to access telecommunications data, rather than restricting this to only those with a specific need to access such data, the declaration appears insufficiently circumscribed. As such, the committee considers this declaration is not compatible with the right to privacy.

Suggested action

2.170 At a minimum, the committee considers the proportionality of this measure may be assisted were the declaration amended to specify only those staff members who require access to telecommunications data to be officers for the purposes of the Act.

2.171 The committee draws these human rights concerns to the attention of the Attorney-General and the Parliament.

Mr Josh Burns MP

Chair