Chapter 2
Concluded matters

2.1 The committee comments on the following bill and legislative instruments, and in some instances, seeks a response or further information from the relevant minister.

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

Bills

Biosecurity Amendment (Advanced Compliance Measures) Bill 2023[2]

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

2.3 The committee requested a response from the minister in relation to the bill in *Report 8 of 2023*.[3]

Accessing information to assess biosecurity risk

2.4 Schedule 1 of the bill (now Act) amends section 196 of the *Biosecurity Act 2015* (Biosecurity Act) to alter the Director of Biosecurity's (director's) existing power to require a person on an incoming aircraft or vessel to provide information to assess the biosecurity risk associated with them or goods in their possession. Item 7 provides that the director may require a person or class of persons to produce a travel document (including a

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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, Biosecurity Amendment (Advanced Compliance Measures) Bill 2023, *Report 9 of 2023*; [2023] AUPJCHR 89.

3 Parliamentary Joint Committee on Human Rights, *Report 8 of 2023* (2 August 2023) pp. 13-21.

passport) to either asses their level of biosecurity risk or that of a good they possess, or for future profiling or assessment of biosecurity risks.[4]

2.5 Previously, the director could only require the provision of information from an individual person, including by answering questions, and so the requirement to produce information could only occur in a one-to-one interaction between a biosecurity officer and an individual.[5] The explanatory memorandum states that the amendments allow the director to require information from classes of persons, for example by requiring *each* person on a particular flight or a vessel originating from a place, that has high biosecurity risk associated with it at a particular point in time, to provide specified information.[6]

2.6 The director is now empowered to scan relevant documents (such as passports) for either assessing biosecurity risk or for future profiling or assessment of biosecurity risks, and collect and retain personal information. Failure to comply with the requirement to produce a document is a civil penalty punishable by up to 120 penalty units (currently $37,560).[7] The explanatory memorandum states that, having scanned a travel document, a biosecurity officer could then access information from the Department of Agriculture, Fisheries and Forestry's systems about the individual which is relevant to their risk profile from a biosecurity perspective.[8]

Summary of initial assessment

Preliminary international human rights legal advice

Rights to privacy and equality and non-discrimination

2.7 Enabling the director to require the provision of travel documents for a class of persons, and to use those documents to obtain information from the department relating to their biosecurity risk, engages and limits the right to privacy.[9]

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

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

6 Explanatory memorandum, p. 10.

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

8 Explanatory memorandum, p. 11.

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

2.8 The right to privacy includes respect for informational privacy, including the right to respect for private and confidential information, particularly the storing, use and sharing of such information.[10] It also includes the right to control the dissemination of information about one's private life. The right to privacy may be subject to permissible limitations where the limitation pursues a legitimate objective, is rationally connected to that objective and is a proportionate means of achieving that objective.

2.9 The statement of compatibility also states that this measure engages the right to equality and non-discrimination (although it does not specify exactly how).[11] The explanatory memorandum states that the bill would allow the director to include each person on a flight or a vessel (including a cruise ship) in a class.[12] It would appear that, depending on the vessel (or series of vessels) in question and where the vessel is originating from, this may have a disproportionate impact on passengers of a particular race, or national origin. The right to equality and non-discrimination provides that everyone is entitled to enjoy their rights without discrimination of any kind and that all people are equal before the law and entitled without discrimination to equal and non-discriminatory protection of the law.[13] It prohibits discrimination on several bases including race, national or social origin, and nationality. The right to equality encompasses both 'direct' discrimination (where measures have a discriminatory intent) and 'indirect' discrimination (where measures have a discriminatory effect on the enjoyment of rights).[14] 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.[15]

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

11 Statement of compatibility, pp. 93–94.

12 Explanatory memorandum, p. 7.

13 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.

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

15 *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].

2.10 If the measure may have an indirectly discriminatory impact in practice, it is necessary to consider whether any differential treatment would be permissible under international human rights law. Where a measure impacts on a particular group disproportionately, it establishes *prima facie* that there may be indirect discrimination.[16] 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.[17]

Committee's initial view

2.11 The committee considered further information was required to assess the compatibility of this measure with the rights to privacy and equality and non-discrimination. It sought the minister's advice in relation to seven questions as set out in the minister's response below.

2.12 The full initial analysis is set out in *Report 8 of 2023*.

Minister's response[18]

2.13 The minister advised:

> *a) whether, in practice, the measure may disproportionately impact people based on their ethnicity or national or social origin;*
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> The proposed subsection 196(3A) would enable the Director of Biosecurity (the Director), or a delegate (for example, a biosecurity officer), the power to require a person who intends to enter, or enters, Australian territory on an incoming aircraft or vessel, to produce their passport or travel document(s) to the Director. The Director may then scan that person's passport or travel document for the purpose of assessing the level of biosecurity risk associated with the person and any goods the person has brought with them into Australian territory, as well as for future profiling, or assessment of, biosecurity risks.
>
> The Department of Agriculture, Fisheries and Forestry (the department) uses data to develop profiles of passengers who may carry a higher risk of non-compliance, to enable biosecurity officers to identify such passengers for

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

17 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].

18 The minister's response to the committee's inquiries was received on 17 August 2023. This is an extract of the response. The response is available in full on the committee's webpage.

screening. This is a legitimate purpose as it is intended to protect Australia, its plant and animal health, its economy and environment. The purposes for which this information is collected and used are reasonable, necessary and proportionate for the legitimate objective of protecting Australia's unique biosecurity status. The information collected and used to develop profiles to manage biosecurity would be based on an assessment of objective information (e.g. prior imports and non-compliance by persons of particular nationalities). This would only be used to intercept, question and search passengers on the basis of objective evidence of their nationality through their passport or travel documents. This would allow the department to build better profiles which identify travellers who are more likely to be carrying goods in contravention of import conditions, reducing inspections of compliant travellers.

The proposed amendments are intended to ensure that the data collected in relation to biosecurity interventions with all incoming travellers can be consistently recorded and analysed to support a more intelligence and evidence-based approach to predicting and managing the biosecurity risk posed by future traveller cohorts. As such, the requirement to provide a passport or other travel document to a biosecurity officer upon request will necessarily apply to all persons, regardless of their ethnicity or national or social origin.

b) what personal information would be visible to a biosecurity worker or other officer who has scanned a person's travel document pursuant to this measure;

The personal information to be collected from the production or scanning of a person's passport or travel document under proposed subsection 196(3A) may include a person's name, place of birth, date of birth, date of issuance, date of expiry, document number, photo and signature. It is intended that some or all of this personal information may be used.

The personal information collected under proposed subsection 196(3A) will be considered 'relevant information', defined under section 9 of the Act as information that has been obtained or generated by a person in the course of, or for the purposes of, performing functions, duties or exercising powers under the Biosecurity Act, or assisting another person to do so. This information will therefore be subject to the information management provisions set out in Division 3 of Part 2 of Chapter 11 of the Biosecurity Act. Each provision in Division 3 provides an authorisation for the purposes of the *Privacy Act* 1988 (the Privacy Act) and other laws.

Proposed subsection 196(3A) will not enable the collection of any additional personal information beyond the personal information contained within a passport and travel document. The collection of any sensitive information as defined in section 6 of the Privacy Act is protected information under the

Biosecurity Act and an offence or civil penalty may apply if the protected information is used or disclosed and no exception applies.

c) *whether the department already has legislative authority to access information about a person's travel document, or whether this bill seeks to establish that authority;*

Section 196 of the Biosecurity Act currently enables the Director to require a person who intends to enter, or enters, Australian territory on an incoming aircraft or vessel, and is included in a prescribed class of persons, to provide information for the purpose of assessing the level of biosecurity risk associated with the person and any goods the person has with them. This information may include the details that a person includes in their incoming passenger card (IPC), some of which may be the same information from a person's travel document. Section 53 of the *Biosecurity Regulation 2016* provides that, for paragraph 196(1)(b) of the Biosecurity Act, persons who were, are or will be passengers on an incoming aircraft or vessel, members of the crew of an incoming aircraft or vessel or the person in charge of an incoming aircraft or vessel are prescribed.

Subsection 196(3A) of the Bill is intended to extend this authority to enable the Director to require information from each person included in a class of persons, as opposed to on an individual to individual basis.

By way of example, these proposed measures would allow the Director to include each person on a particular flight or a vessel originating from a place that has high biosecurity risk associated with it at a particular point in time, in a class of persons, and then to require every person in that class to provide information so the Director can assess the level of biosecurity risk associated with them and the goods they have with them, rather than having to require the provision of information from each person individually.

The flexibility to be able to require classes of persons to provide information for the purpose of assessing biosecurity risk, rather than just individuals, would be a significant and important addition to the current options used by biosecurity officers at the border to assess biosecurity risk, and where appropriate, manage any risk arising. These proposed amendments would allow for the more efficient and effective management of biosecurity risk in order to protect Australia's economy, environment, flora and fauna, and the agricultural sector from diseases and pests which could have a devastating effect should they enter Australian territory.

d) *whether the exercise of this power would result in the department collecting more information about individuals (for example, the dates of their travel or departure port, including where an assessment is made on the spot to not investigate them further);*

The technology used by the department to scan a person's passport relies on optical character recognition technology that reads the machine-readable zone at the bottom of the passport's biographical data page. This page contains some information that is not already provided by an incoming traveller on their IPC such as the date of issuance and the date of expiry of a passport. As such, the exercise of power under proposed subsection 196(3A) will in effect result in the department collecting more information about individuals.

The purpose of exercising the power under proposed subsection 196(3A) is to enable the collection of required information from a broader portion of the traveller cohort to support the analysis and management of biosecurity risks associated with incoming travellers and their goods. Further, the information to be collected under the proposed amendments will improve the effectiveness and efficiency of biosecurity screening activities at the Australian border and place a focus on high-risk entities.

Information relating to a person's last port of departure before arriving in Australia is already collected and used as part of a person's IPC.

e) *the meaning of 'the future profiling, or future assessment, of biosecurity risks', and whether it is intended that information gathered under this power be used to profile biosecurity risks in general;*

The department currently collects and analyses data in relation to biosecurity interventions that are undertaken in response to travellers who demonstrate non-compliance with biosecurity requirements at the Australian border. The analysis of this data is used to inform the development of traveller cohort profiles which enhance the prediction and management of the biosecurity risks posed by future traveller cohorts, as well as to modify and enhance biosecurity screening activities, at international airports and ports. These traveller cohort profiles are developed in collaboration with the Centre of Excellence for Biosecurity Risk Analysis.

The data is used to determine the likelihood that a cohort of travellers will fail to declare high biosecurity risk goods and prioritise these cohorts for biosecurity intervention. However, this involves the use of complex statistical processes to account for a lack of data for travellers who undergo biosecurity screening but are found to be compliant with biosecurity requirements, which is not currently incorporated into the datasets that are used to build the cohort profiles. The proposed amendments are intended to enable the department to obtain information from all travellers, instead of just those provided voluntarily or in relation to those who demonstrate non-compliance with biosecurity requirements, for the development of a reliable and complete dataset.

The proposed amendments are intended to ensure that the data collected in relation to biosecurity interventions with all incoming travellers can be

consistently recorded and analysed, which will enable a more intelligence and evidence-based approach to predicting and managing the biosecurity risk posed by future traveller cohorts.

f) to whom information obtained under this measure may be disclosed;

Any personal information collected in accordance with proposed subsection 196(3A) will only be disclosed if authorised under the Biosecurity Act.

The information management provisions are set out in Division 3 of Part 2 of Chapter 11 of the Biosecurity Act. Each provision in Division 3 provides an authorisation for the purposes of the Privacy Act and other laws. This includes, but is not limited to, disclosure to a Commonwealth entity or a law enforcement body.

g) how long information obtained under this proposed power would be held, and whether this would be subject to a legislative limitation.

The management of information and records is governed by a number of legislative requirements, international standards and guidance from the National Archives of Australia (NAA). The department has worked with the NAA to develop specific records authorities to cover the department's core business functions including assessing and managing biosecurity risks.

The collection and retention of travel documents for the purposes of section 196(3A) is intended to be managed in accordance with the department's relevant record authority. The information intended to be obtained in accordance with proposed subsection 196(3A) will be collated into an intervention record which is then retained for 12 years in line with the BIOSECURITY – Quarantine Clearance – Assessment record Authority (Record Authority and Disposal Class: 61242).

Concluding comments

International human rights legal advice

2.14 To determine whether the measure limits the right to equality and non-discrimination, further information was sought as to whether the changes in the bill (now Act) may disproportionately impact people based on their ethnicity or national or social origin in practice. Relatedly, further information was also sought as to the meaning of 'the future profiling, or future assessment, of biosecurity risks'. The minister stated that the department currently collects and analyses data in relation to biosecurity interventions that are undertaken in response to travellers who demonstrate non-compliance with biosecurity requirements at the Australian border, and that the analysis of this data is used to 'inform the development of traveller cohort profiles which enhance the prediction and management of the biosecurity risks posed by future traveller cohorts, as well as to modify and enhance biosecurity screening activities'. However, the minister advised that

this currently involves the use of complex statistical processes to account for a lack of data for travellers who undergo biosecurity screening but are found to be compliant with biosecurity requirements, which is not currently incorporated into the datasets that are used to build the cohort profiles. The minister stated that the amendments are intended to enable the department to obtain information from *all* travellers, not merely information provided voluntarily or in relation to those who demonstrate non-compliance with biosecurity requirements, for the development of a reliable and complete dataset. That is, the requirement to provide a passport or other travel document to a biosecurity officer on request would apply to all persons, regardless of their ethnicity or national or social origin.

2.15 In terms of how that data would be used, the minister advised that the department uses data it collects to develop profiles of passengers who may carry a higher risk of non-compliance, for example prior non-compliance by persons of particular nationalities. The minister stated that this would be used to 'intercept, question and search passengers on the basis of objective evidence of their nationality'. Consequently, while all affected persons would be required to provide their travel document, the intended purpose of the power is to develop profiles of travellers who may be considered to be at greater risk of non-compliance with Australia's biosecurity requirements—including on the basis of their nationality—and to target biosecurity inspections towards travellers based on that characteristic, not merely based on an individual's own history of compliance.

2.16 It would appear, therefore, that one intended use of this power is to facilitate differential treatment towards travellers based on nationality. For example, if the use of this power produces data indicating that there is a general trend of travellers from Indonesia being more likely to have prohibited biosecurity items in their luggage, the intended result would appear to be that all Indonesian nationals may be intercepted, questioned, and searched on entry into Australia solely because of their nationality. Further, depending on the nationality in question, it may be that in practice the effect of the measure therefore disproportionately impacts on persons from certain ethnicities more than others. Differential treatment 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. However, retaining the data of travellers regardless of their history of compliance in order to obtain more data to obtain statistical trends with respect to risks of biosecurity non-compliance would not appear to constitute reasonable and objective criteria such that this would constitute lawful discrimination, and so justify differential treatment. Consequently, the intended purpose behind the use of this power would appear to constitute unlawful non-discrimination, and so be impermissible under international human rights law.

2.17 This measure also engages and limits the right to privacy. As set out in the initial analysis, better managing biosecurity risks, in order to protect Australia's economy, environment, flora and fauna, and the agricultural sector from diseases and pests, constitutes a legitimate objective for the purposes of international human rights law, and the proposed measures would appear to be rationally connected to that objective. A key aspect of whether a limitation on a right can be justified is whether the limitation is proportionate to the objective being sought.

2.18 As to what personal information would be visible to a biosecurity worker or other officer who has scanned a person's travel document, the minister advised that the personal information to be collected from the production or scanning of a person's passport or travel document may include a person's name, place of birth, date of birth, date of issuance, date of expiry, document number, photo and signature (that is, personal details associated with a passport). The minister stated that proposed subsection 196(3A) would not enable the collection of any additional personal information beyond the personal information contained within a passport and travel document. Rather, scanning a person's travel document pursuant to this power would establish a mechanism by which the information already being collected by the department in relation to compliance with biosecurity measures would be associated with individual persons, and by reference to the types of personal information associated with passports to identify trends (e.g. nationality). However, the minister advised that the technology used to scan a person's passport relies on optical character recognition technology that reads the machine-readable zone at the bottom of the passport's biographical data page, which contains some information that is not already provided by an incoming traveller on their incoming passenger card such as the date of issuance and the date of expiry of a passport. As such, the exercise of this power will result in the department collecting more information about individuals.

2.19 Further, applying the measure to classes of persons (not specified individuals who raise concerns regarding non-compliance with biosecurity requirements) will greatly increase the number of people required to provide this information. While assessing the level of risk associated with an individual would appear to be a constrained purpose, the future profiling, or future assessment, of biosecurity risks would appear to be broader (noting that such risks do not appear to relate to the individual traveller in question). It does not appear that expanding the dataset, in order to obtain better travel profiles, is sufficiently circumscribed such as to constitute a proportionate limit on the right to privacy.

2.20 In terms of to whom information obtained under this measure may be disclosed, the minister advised that any personal information collected could be disclosed where authorised by the Act. The committee has raised broader concerns regarding the

proportionality of the information management framework to which the minister has referred.[19] In particular, sections 582, 583 and 586 of the Biosecurity Act authorise the disclosure of relevant information for specified purposes without limiting to whom any such disclosures may be made. Limiting the persons who are authorised to disclose relevant information and the purposes for which information may be disclosed, has the effect of limiting the persons to whom information may be disclosed. However, as the text of the legislation does not itself limit to whom information may be disclosed, the extent of the potential limit on privacy is not clear. There is a risk that the safeguards in the Biosecurity Act may not be adequate in all circumstances so as to ensure that any limitation on the right to privacy will be proportionate in practice.

2.21 As to how long information obtained under this proposed power would be held, and whether this would be subject to a legislative limitation, the minister advised that the information would be collated into an 'intervention record' which would be retained for 12 years. It is not clear why the personal travel information of all travellers – including those who have no history of non-compliance with the Biosecurity Act, needs to be retained for 12 years.

Committee view

2.22 The committee thanks the minister for this response. The committee considers that enabling the director to require cases of persons to produce travel documents to assess their level of biosecurity risk or for future profiling of biosecurity risk engages and limits the rights to privacy and non-discrimination. The committee notes that the right to privacy may be limited if it reasonable, necessary and proportionate to do so, and that differential treatment will not constitute unlawful treatment if it is based on reasonable and objective criteria.

2.23 The committee is concerned that requiring classes of persons to produce their passports in order for the department to build better profiles of travellers who are more likely to be carrying goods in contravention of import conditions, will lead to travellers being targeted for questioning based on their nationality. The committee does not consider the justification of the need to build a profiling database of personal information to be based on reasonable and objective criteria and, as such, considers the measure is unlikely to be compatible with the right to equality and non-discrimination.

2.24 The committee is also concerned that the measure is not a proportionate limit on the right to privacy, particularly because it is not appropriately circumscribed, does not

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

contain sufficient safeguards, and that the retention of the data for 12 years is disproportionate.

Suggested action

2.25 The committee considers the proportionality of this measure may be assisted were the Act amended:

(a) to remove the ability for the Director of Biosecurity to require classes of person to produce travel documents for the purpose of future profiling or assessments of biosecurity risks;[20]

(b) require any personal information obtained following the production or scanning of documents to be destroyed after a reasonable timeframe where the relevant individual does not have a history of biosecurity non-compliance.

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

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

Increased civil penalties

2.28 Schedule 3 of the bill (now Act) seeks to significantly increase a number of civil penalties that apply in the Biosecurity Act, some by up to 900 per cent. For example, the maximum penalty for failure to comply with an entry or exit requirement in section 44 of the Biosecurity Act has increased from 30 penalty units (currently $9,390) to 150 penalty units (currently $46,950).[21] The maximum penalty for failure to comply with a requirement of a human health response zone determination has increased from 30 to 120 penalty units (currently $37,650).[22] Further, the maximum penalties for providing false or misleading information or documents in purported compliance with the Act, or to a biosecurity industry participant, have increased to 600 penalty units (currently $187,800).[23] Previously, the maximum penalties for these breaches ranged from 60 penalty units (currently $18,780) to 120 penalty units.

20 Schedule 1, item 7, proposed subparagraph 196(3A)(a)(ii).

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

22 Schedule 3, item 6, section 116.

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

Summary of initial assessment

Preliminary international human rights legal advice

Criminal process rights

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

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

2.31 Noting that some of these civil penalty provisions would apply to the general public (and not only those operating in a regulatory context), that the penalty is intended to deter certain conduct and that the increased penalty may now be considered sufficiently severe, there is a risk that some of these penalties may be considered to be criminal penalties for the purposes of international human rights law. As such, such provisions must be shown to be consistent with international human rights law criminal process guarantees, including the right not to be tried twice for the same offence,[24] and the right to be presumed innocent until proven guilty according to law.[25] However, civil penalty provisions, which require proof of the conduct on the balance of probabilities, do not meet the guarantee that a person be proved guilty beyond all reasonable doubt.

Committee's initial view

2.32 The committee considered that, as this bill would significantly increase the maximum civil penalty for several provisions which would be applicable to members of the public, and noting that the intention is for these penalties to act as deterrents, there is a risk that these provisions may be regarded as criminal under international human rights law, and so not comply with the criminal process rights under international human rights law. In this regard, the committee noted that it has raised concerns regarding the compatibility of existing civil penalty provisions with criminal process rights on numerous occasions, including due to their potential severity.[26]

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

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

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

Minister's response[27]

2.33 The minister advised:

> As discussed in the Statement of Compatibility with Human Rights, civil penalty provisions may engage criminal process rights under Article 14 of the ICCPR regardless of the distinction between criminal and civil penalties in domestic law. Having regard to the classification of the penalty provisions under Australian domestic law, the nature and purpose of the penalties and the severity of the penalties, the increase to the civil penalties in this Bill should not be regarded as elevating the civil penalties to be criminal in nature.
>
> The Bill only seeks to increase the applicable civil penalties under the Act to reflect the seriousness of the non-compliance with Australia's biosecurity laws and the impact the contraventions may have on Australia's biosecurity status, market access and economy. This is necessary as the current penalty regime no longer serves as an effective deterrent against non-compliance.
>
> The proposed increases to the civil penalty provisions are proportionate and appropriate in the regulatory context of the Act, to reflect the seriousness of contraventions, and the corresponding need for deterrence. Contraventions of the provisions proposed to be amended may have significant impacts on Australia's agriculture industry.
>
> For example, the increased maximum penalty of 1,000 penalty units in subsection 46(2) of the Act for contravention of exit requirements by the operator of an aircraft or vessel reflects the serious consequences posed by the potential spread and transmission out of Australian territory of a listed human disease, and reflects that a lower penalty may not be a proportionate deterrent to non-compliance in the commercial context to which exit requirements apply.
>
> On balance, in the context of this regulatory regime for industry participants, the penalties should not be considered severe, noting:
>
> - They are all pecuniary penalties (rather than a more severe punishment like imprisonment)
> - There is no sanction of imprisonment for non-payment of penalties
> - The maximum amount of each civil penalty is no more than the corresponding criminal offence (except where applied to corporations)
> - The penalties, for the most part, apply in a corporate context (to individuals and businesses such as commercial importers and biosecurity industry participants)

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[27] The minister's response to the committee's inquiries was received on 17 August 2023. This is an extract of the response. The response is available in full on the committee's webpage.

- The maximum civil penalty quantum for the provisions is set to provide a proportionate and reasonable deterrent, particularly for corporate entities in relation to the gaining of financial benefit from non-compliance and
- There is no mandatory minimum penalty and the court has the discretion to determine the appropriate penalty having regard to all the circumstances of the matter.

The current penalties are insufficient to effectively deter non-compliance with the Act. In the context of the commercial profits that can be made from the importation of goods in contravention of Australia's biosecurity framework, the increased penalties are a proportionate measure to deter non-compliance.

In civil proceedings, the standard of proof required is 'on the balance of probabilities'. This means that, for a person to be found liable, a contravention of a civil penalty provision must be proven on the balance of probabilities. The higher standard of proof of 'beyond reasonable doubt' is required in criminal proceedings, but this is because a finding of guilt in criminal proceedings may result in a conviction being recorded on a person's criminal record and may also result in a period of imprisonment being imposed.

As explained above, while the Bill increases the maximum civil penalties for some civil penalty provisions, there is no criminal conviction recorded and there is no period of imprisonment imposed for any contraventions of those civil penalty provisions. As such, I do not consider that it is necessary to apply a higher standard of proof in civil penalty proceedings that relate to provisions of the Biosecurity Act that are proposed to be amended by this Bill.

Committee view

2.34 The committee reiterates that civil penalties (as applicable to individuals) may be regarded as 'criminal' for the purposes of international human rights law, if they meet certain criteria, including if they apply to the general public and because of their potential severity. The committee notes that, where this is the case, these penalties must be shown to be consistent with criminal process guarantees, including the right to be presumed innocent until proven guilty according to law, which requires that the case against the person be demonstrated on the criminal standard of proof of beyond reasonable doubt (not the lower civil standard of on the balance of probabilities).

2.35 The committee notes the minister's advice that the civil penalties, *for the most part*, apply in a corporate context. In relation to individuals such as commercial importers and biosecurity industry participants, it is likely that the penalties apply in a sufficiently regulatory context to ensure the penalty is more likely to be considered to be civil in nature under international human rights law. However, there are provisions which have been significantly increased that apply to the public at large. As such, in relation to these

provisions, noting that the penalties are intended to act as deterrents, there is a risk these provisions may be regarded as criminal for the purposes of international human rights law. In this regard, the application of the civil standard of proof would be unlikely to be compatible with the right to a fair trial.

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

Counter-Terrorism Legislation Amendment (Prohibited Hate Symbols and Other Measures) Bill 2023[28]

Purpose	This bill seeks to make various amendments to the *Crimes Act 1914, Criminal Code Act 1995* and *Legislation (Exemptions and Other Matters) Regulation 2015*, including to: • establish new criminal offences for the public display of prohibited symbols and for using a carriage service for violent extremist material; • expand the offence of advocating terrorism and increase the maximum penalty for this offence from 5 to 7 years imprisonment; • remove the sunsetting requirement for instruments which list terrorist organisations.
Portfolio	Attorney-General
Introduced	House of Representatives, 14 June 2023
Rights	Life; security of person; prohibition against inciting national, racial or religious hatred; freedom of expression; freedom of religion; equality and non-discrimination; rights of the child

2.37 The committee requested a response from the Attorney-General in relation to the bill in *Report 8 of 2023*.[29]

Criminalising the public display and trading of prohibited symbols

2.38 This bill seeks to create a new criminal offence relating to the public display of prohibited symbols.[30] A 'prohibited symbol' is defined as the Islamic State flag, the Nazi hakenkreuz, the Nazi double sig rune, and something that so nearly resembles these things that it is likely to be confused with, or mistaken for, that thing.[31] A prohibited symbol is 'displayed in a public place' if it is capable of being seen by a member of the

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28 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Counter-Terrorism Legislation Amendment (Prohibited Hate Symbols and Other Measures) Bill 2023; [2023] AUPJCHR 90.

29 Parliamentary Joint Committee on Human Rights, *Report 8 of 2023* (2 August 2023) pp. 22–63.

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

31 Schedule 1, item 5, proposed section 80.2E.

public who is in a public place or the prohibited symbol is included in a document, such as a newspaper or magazine, film, video or television program, that is available or distributed to the public or a section of the public (including via the internet).[32] This includes, for example, the wearing of a prohibited symbol as part of a costume to a public place, the display of a poster or flag containing the prohibited symbol in a private home but visible from the street, the display of a prohibited symbol on a sticker on a motor vehicle, or the circulation of a newsletter or other content which contains a prohibited symbol to subscribers.[33]

2.39 In particular, a person would commit an offence if they intentionally[34] cause a prohibited symbol to be displayed in a public place and one of the following circumstances apply, namely, a reasonable person would consider the conduct of publicly displaying the symbol either:

- involves dissemination of ideas based on racial superiority or racial hatred; or could incite another person or group of persons to offend, insult, humiliate or intimidate a targeted person or group because of their race; or
- involves advocacy of hatred of a targeted group or member of the group and constitutes incitement to offend, insult, humiliate, intimidate or use force or violence against the targeted group or member of that group; or
- is likely to offend, insult, humiliate or intimidate a reasonable person who is a member of a group of persons distinguished by race, colour, sex, language, religion, political or other opinion or national or social origin because of their membership of that group.[35]

2.40 There would be specific circumstances in which the offence would not apply, namely where a reasonable person would consider that the public display of the prohibited symbol is for a religious, academic, educational, artistic, literary or scientific purpose and not contrary to the public interest; or for the purposes of making a news

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32 Schedule 1, item 5, proposed section 80.2F.

33 Explanatory memorandum, pp. 26–27.

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

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

report or a current affairs report that is in the public interest and made by a professional journalist.[36]

2.41 There would also be several defences to the offence, including where the conduct is necessary for enforcing, monitoring compliance with, or investigating contravention of, a law; is part of court or tribunal proceedings; the conduct is in connection with the performance of a public official's duties or functions; or the person displaying the symbol genuinely engages in conduct for the purpose of opposing Nazi or global jihadist ideology, fascism or related ideologies.[37] The defendant bears an evidential burden in relation to these defences.

2.42 The bill also seeks to create a new offence relating to the trade of prohibited symbols.[38] A person would commit an offence if they trade in goods; the goods depict or contain a prohibited symbol; the person knows that, or is reckless as to whether, the prohibited symbols are associated with Nazi ideology or global jihadist ideology; and one or more jurisdictional requirements apply. A person trades in goods if they sell or prepare for supply, transport, guard or conceal, or possess the goods with the intention of selling the goods.[39] There would be specific circumstances in which the offence would not apply. It would not apply where a reasonable person would consider that the traded goods are intended to serve a religious, academic, educational, artistic, literary or scientific purpose and the trading is not contrary to the public interest. It would also not apply if the traded goods contain news or current affairs reports, the prohibited symbol only appears in such a report and a reasonable person would consider that the report was made by a professional journalist and disseminating the report is in the public interest.[40] There would also be several defences to the offence, including if the traded goods contain commentary on public affairs, the prohibited symbol only appears in the commentary and the making of the commentary is in the public interest, or if the trading is necessary for enforcing, monitoring compliance with, or investigating a contravention of, a law or the administration of justice.[41]

2.43 Additionally, a police officer may direct a person to cease displaying a prohibited symbol in a public place in certain circumstances, including, for example, if the police

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36 Schedule 1, item 5, proposed subsection 80.2H(9).

37 Schedule 1, item 5, proposed subsection 80.2H(10).

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

39 Schedule 1, item 5, proposed section 80.2G.

40 Schedule 1, item 5, proposed subsections 80.2J(4) and (5).

41 Schedule 1, item 5, proposed subsections 80.2J(6)–(8).

officer reasonably suspects that the display of the symbol involves dissemination of ideas based on racial superiority or racial hatred, or could incite another person to offend, insult, humiliate or intimidate a targeted person because of their race.[42] The direction given must specify a reasonable time by which the prohibited symbol must cease to be displayed.[43] The direction may be given orally or in writing and may be left on, or at, land or premises at which the prohibited symbol is displayed, or affixed or placed in a conspicuous manner on an aircraft, vehicle or vessel on, or from which, the prohibited symbol is displayed.[44] The police officer may give the direction if they suspect on reasonable grounds that the person either caused the prohibited symbol to be displayed or the person is an owner or an occupier of the land or premises, or aircraft, vehicle or vessel on which the symbol is displayed; and there are steps the person can take to cause the prohibited symbol to cease to be displayed.[45]

2.44 A person would commit an offence if they were given such a direction and they do not cease to display the prohibited symbol.[46] The maximum penalty applicable is 20 penalty units. It would be a defence to this offence if the conduct was genuinely engaged in for a religious, academic, educational, artistic, literary or scientific purpose and is not contrary to the public interest; or for the purposes of making a news report or current affairs report that is in the public interest and made by a professional journalist.[47] It would also be a defence to this offence if both the person who received the direction (the recipient) did not cause the prohibited symbol to be displayed and when the direction is given, they are not an owner or occupier of the land or premises at which the symbol is displayed; or the recipient takes all reasonable steps to cause the prohibited symbol to cease to be displayed or there are no such steps that can be taken by the recipient.[48] The defendant would bear an evidential burden in relation to these defences.[49]

2.45 Further, the new offences of publicly displaying, or trading in, prohibited symbols would have retrospective effect insofar as a person who caused a symbol to be displayed in a public place before the commencement of this bill, and, on commencement, the symbol had not ceased to be displayed in a public place, the person would be taken to

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42 Schedule 1, item 5, proposed sections 80.2K–80.2M.

43 Schedule 1, item 5, proposed subsection 80.2K(8).

44 Schedule 1, item 5, proposed section 80.2L.

45 Schedule 1, item 5, proposed subsection 80.2L(2).

46 Schedule 1, item 5, proposed section 80.2M.

47 Schedule 1, item 5, proposed subsection 80.2M(3).

48 Schedule 1, item 5, proposed subsection 80.2M(5).

49 Schedule 1, item 5, proposed subsections 80.2M(3) and 80.2M(5).

cause, on that commencement date, the symbol to be displayed in a public place.[50] This means, for example, that a person who displayed a prohibited symbol on their fence prior to the commencement of these provisions, and the symbol remained displayed on the fence after the commencement date, would be captured by the offence and potentially liable for up to 12 months' imprisonment.[51]

Summary of initial assessment

Preliminary international human rights legal advice

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

2.46 To the extent that criminalising certain conduct relating to prohibited symbols would deter and prevent the commission of violent offences, the measures could promote a number of human rights, including the rights to life and security of person.[52] The right to life imposes an obligation on the state to protect people from being killed by others or identified risks.[53] The United Nations (UN) Human Rights Committee has stated that the duty to protect life requires States parties to 'enact a protective legal framework that includes effective criminal prohibitions on all manifestations of violence or incitement to violence that are likely to result in the deprivation of life'.[54] The right to security of person requires the state to take steps to protect people against interference with personal integrity by others. This includes protecting people who are subject to death threats, assassination attempts, harassment and intimidation.

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

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50 Schedule 1, item 8.

51 Explanatory memorandum, p. 50.

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

53 UN Human Rights Committee, *General Comment No. 36: article 6 (right to life)* (2019) [3]: the right should not be interpreted narrowly and it 'concerns the entitlement of individuals to be free from acts and omissions that are intended or may be expected to cause their unnatural or premature death, as well as to enjoy a life with dignity'.

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

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

the right to be free from racial and religious discrimination and hatred.[55] Indeed, the stated object of a number of the provisions is to give effect to articles 20 and 26 of the International Covenant on Civil and Political Rights and article 4 of the International Convention on the Elimination of All Forms of Racial Discrimination.[56] Article 20 of the International Covenant on Civil and Political Rights obliges states to prohibit by law any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence.[57] Article 26, which protects the right to equality and non-discrimination, also requires the state to prohibit by law any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race or religion.[58] The International Convention on the Elimination of All Forms of Racial Discrimination further describes the content of these obligations and the specific elements that States parties are required to take into account to ensure the elimination of discrimination on the basis of race, colour, descent, national or ethnic origin.[59] In particular, article 4 obliges States parties to adopt immediate and positive measures designed to eradicate all incitement to, or acts of, discrimination, including declaring an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination and acts of violence or incitement to such acts against any groups of a particular race, as well as declaring illegal propaganda activities and participation in such activities which promote and incite racial discrimination.

2.48 Insofar as the measures would protect the above rights, other human rights may also be consequently promoted, such as the right to freedom of religion, which encompasses the right to hold a religious or other belief or opinion and manifest religious

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

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

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

58 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.

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

or other beliefs by way of worship, observance, practice and teaching.[60] The UN Human Rights Committee has stated that measures taken in respect of article 20, namely laws prohibiting the advocacy of national, racial or religious hatred, 'constitute important safeguards against infringements of the rights of religious minorities and of other religious groups to exercise the rights guaranteed by articles 18 and 27, and against acts of violence or persecution directed toward those groups'.[61]

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

2.49 By criminalising certain forms of expression, including the display of, and trade in, prohibited symbols, which in effect would restrict a person's ability to seek, receive and impart certain information and ideas, the measures also engage and limit the right to freedom of expression.[62] This is acknowledged in the statement of compatibility.[63] The right to freedom of expression includes the freedom to seek, receive and impart information and ideas of all kinds, either orally, in writing or print, in the form of art, or through any other media of an individual's choice.[64] The UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression has stated that 'the right to freedom of expression includes expression of views and opinions that offend, shock or disturb'.[65] The UN Human Rights Committee has also stated that the right to freedom of expression encompasses expression that may be regarded as deeply offensive and insulting, although such expression may be restricted in accordance with articles 19(3) and 20 of the International Covenant on Civil and Political Rights (which obliges States parties to prohibit by law any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence).[66]

2.50 The right to freedom of expression carries with it special duties and responsibilities and accordingly may be subject to limitations that are necessary to protect the rights or

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

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

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

63 Statement of compatibility, pp. 13–16.

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

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

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

reputations of others,[67] national security, public order, or public health or morals.[68] Such limitations must be prescribed by law, be rationally connected to the objective of the measures and be proportionate.[69] Noting the important status of this right under international human rights law, restrictions on the right to freedom of expression must be construed strictly and any restrictions must be justified in strict conformity with the limitation clause in article 19(3), including restrictions justified on the basis of article 20.[70]

2.51 Additionally, as the new offences would apply to children (from the age of 10),[71] the measures would engage and limit the rights of the child. Children have special rights under human rights law taking into account their particular vulnerabilities.[72] All children under the age of 18 years are guaranteed these rights, without discrimination on any grounds, including the right to freedom of expression.[73] In particular, Australia is required to ensure that, in all actions concerning children, the best interests of the child are a primary consideration.[74] This requires legislative, administrative and judicial bodies and institutions to systematically consider how children's rights and interests are or will be affected directly or indirectly by their decisions and actions.[75]

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

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

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

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

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

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

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

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

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

2.52 International human rights law recognises that children have different levels of emotional, mental and intellectual maturity and psychological development than adults, and so are less culpable for their actions.[76] In this way, the Convention on the Rights of the Child provides that States parties should establish a minimum age of criminal responsibility of at least 14 years of age and, where appropriate and desirable and in a manner that respects human rights, deal with children accused of a crime without resorting to judicial proceedings, such as by way of diversionary programs.[77] This reflects the importance attributed to prevention and early intervention under international human rights law and the view that exposing a child to the criminal justice system causes them harm, limiting their chances of becoming a responsible adult.[78] The UN Committee on the Rights of the Child has emphasised the importance of non-judicial alternatives to prosecution and detention in relation to children accused of, and charged with, terrorism offences.[79] The Committee has urged States parties to 'refrain from charging and prosecuting [children] for expressions of opinion or for mere association with a non-State armed group, including those designated as terrorist groups'.[80]

2.53 Further, if the prohibition on publicly displaying and trading Nazi symbols or the Islamic flag (or something resembling them) had the effect of restricting the ability of people of certain religious groups to worship, practise or observe their religion, it may engage and limit the right to freedom of religion, particularly the right to demonstrate or

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

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

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

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

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

manifest religious or other beliefs.[81] The freedom to manifest religion or belief in worship, observance, practice and teaching encompasses a broad range of acts, including ritual and ceremonial acts, the building of places of worship, the wearing of religious dress,[82] and preparing and distributing religious texts or publications.[83]

2.54 If the provisions were to be applied consistently with the explanatory materials, that is, the public display of the sacred Swastika for the purposes of Buddhist, Hindu or Jain religions would not constitute a criminal offence, the right to freedom of religion for those of Buddhist, Hindu and Jain faith may be adequately protected. However, it is noted that the bill itself does not contain a specific exception with respect to displaying the sacred Swastika in connection with Buddhist, Hindu and Jain religions.

2.55 It is also not clear if people of Muslim faith would be afforded the same protections. The words inscribed on the Islamic State flag form the Shahada and represent one of the five pillars of Islam.[84] The Shahada is said to be a sacred symbol of the Islamic faith and is written by Muslims as part of their daily practice.[85] However, in contrast to the sacred Swastika, the explanatory materials do not acknowledge the sacred value of the Shahada or make clear that the genuine use of the Shahada by Muslim people or groups for religious reasons is not intended to be captured by the offences. There may therefore be a risk that people of Muslim faith who display, or trade material containing, the Shahada are inadvertently captured by the new offences, as the Shahada may be a symbol that so nearly resembles, or may be mistaken for, the Islamic State flag. If people of Muslim faith were disproportionately impacted by the measures, the rights to freedom of religion and equality and non-discrimination on the ground of religion would be limited.

2.56 The right to equality and non-discrimination provides that everyone is entitled to enjoy their rights without discrimination of any kind, including on the grounds of

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

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

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

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

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

religion,[86] and that all people are equal before the law and entitled without discrimination to equal and non-discriminatory protection of the law.[87] 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.[88] 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.[89]

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

Committee's initial view

2.58 The committee considered that the measures pursue a vitally important objective, namely, to protect members of the community from intimidation, hatred and discrimination. However, some scrutiny questions arose as to the scope of the proposed offence and the applicable safeguards. The committee therefore considered further information is required to assess their compatibility with the rights to freedom of expression and religion and equality and non-discrimination as well as the rights of the child and sought the Attorney-General's advice in relation to 14 questions as set out in the Attorney-General's response.

2.59 The full initial analysis is set out in *Report 8 of 2023*.

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

87 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.

88 *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'.

89 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].

Attorney-General's response[90]

2.60 The Attorney-General advised:

Criminalising the public display and trading of prohibited symbols

(a) why current laws are insufficient to achieve the stated objective, noting that section 18C of the *Racial Discrimination Act 1975* appears to deal with some of the conduct sought to be criminalised

The measures in the Bill would provide stronger protections for persons against racial hatred and vilification than are currently available under the *Racial Discrimination Act 1975*, in circumstances in which prohibited symbols are used to affect these harms. Section 18C of the *Racial Discrimination Act 1975* provides protection in the form of civil penalties if a person does an act that is likely to 'offend, insult, humiliate or intimidate' someone because of their race or ethnicity. The criminal penalties in the Bill (12 months imprisonment) is a more severe punishment than the civil penalties available for contravening section 18C of the *Racial Discrimination Act 1975*, due to its impact on an individual's personal rights and freedoms. The criminal penalty in the Bill is appropriate given the nature of the conduct warrants more severe punishment that would operate to deter the most serious offending.

The Bill would establish criminal offences, punishable by up to 12 months' imprisonment for the public display and trading of a prohibited symbol. This is a necessary measure as ideologically and religiously motivated violent extremists are finding new ways to promote hatred, instil fear and harass people within the community. Symbology is an effective tool that extremists are using to signal their ideology to a wide-reaching audience, to vilify members of the community, and to recruit and radicalise others. It is important that law enforcement is able to intervene at an early stage to protect the community by preventing the use of symbols to affect radicalisation, violence and the incitement of hatred, and that this conduct is met with a criminal justice response.

(b) why each of the prohibited symbols are not defined in the legislation itself, including a written description of the symbols (such as that contained in the explanatory memorandum) and a graphic depiction of the symbols

New section 80.2E defines the term 'prohibited symbol' for the purposes of the offences in new sections 80.2H and 80.2J. Graphic depictions of the prohibited symbols were not included in the legislation because it would be contrary to the intent of the public display offence for the legislation itself to contain (and

90 The Attorney-General's response to the committee's inquiries was received on 21 August 2023. This is an extract of the response. The response is available in full on the committee's webpage.

thereby display) the symbols. The Explanatory Memorandum provides a description of the three prohibited symbols.[91]

(c) why the bill does not contain a specific exception with respect to displaying the sacred Swastika in connection with Buddhist, Hindu and Jain religions

The Government acknowledges the significance of the sacred Swastika to Buddhist, Hindu and Jain communities as an ancient symbol of peace and good fortune.

The public display offence would not apply to the use of the sacred Swastika in connection with religious observance. New paragraph 80.2H(9)(a) would provide that the public display offence does not apply if a reasonable person would consider that a person caused a prohibited symbol to be displayed in a public place for a religious purpose. As provided in the Explanatory Memorandum, this would extend to the use of the sacred Swastika in connection with the practice of Buddhism, Hinduism or Jainism.[92] The sacred Swastika is an ancient symbol of peace and good fortune that holds immense significance to these faith communities.

Paragraph 80.2H(9)(a) is intended to apply to the public display of any of the prohibited symbols in connection with any religion, including Buddhism, Hinduism and Jainism. The exemption provision is intentionally non-prescriptive to ensure coverage is provided for all faith communities who may publicly display these symbols for religious purposes.

(d) what safeguards are in place to mitigate the risk that people of Muslim faith who are displaying the Shahada for religious purposes are not inadvertently captured by the new offences, noting that the words of the Shahada may constitute a symbol that so nearly resembles, or may be mistaken for, the Islamic State flag

The Bill does not criminalise the use or display of the Shahada. The amendments make clear that the Islamic State flag is prohibited – not the individual parts of that symbol, for example the text or creed.[93]

The Bill provides that a prohibited symbol includes a symbol that so nearly resembles the Islamic State flag that it is likely to be confused with, or mistaken for, an Islamic State flag (new paragraphs 80.2E(a) and (d)). This recognises that

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[91] Explanatory Memorandum, paragraphs 21, 25 and 29.

[92] Explanatory Memorandum, paragraph 87.

[93] The Explanatory Memorandum describes the prohibited symbol in the following terms: The Islamic State flag is a rectangular, black emblem with white Arabic writing, and below the white Arabic writing is a white circle containing black Arabic writing. The white writing is an Islamic creed declaring 'There is no God but Allah, and Muhammad is his messenger'. The black writing translates to three words: 'God, messenger, Muhammad' (para 21).

there may be some variations in the way in which the Islamic State flag is depicted, and is intended to avoid situations in which an individual could seek to avoid criminal liability under new legislation by slightly altering an Islamic State flag before engaging in otherwise prohibited conduct. These amendments would not, for example, result in criminal liability for publicly displaying the Shahada.

The Government acknowledges the importance of education to address these concerns, and has commenced early work to consider public awareness raising and education initiatives to support the implementation of these measures, should the Bill pass. The Government will ensure that clear and appropriate public messaging is disseminated, particularly to ensure that the new offences operate effectively to address the harms caused by the conduct they target. This will be particularly important in relation to communities which the prohibited symbols measures are designed to protect, including communities of faith.

(e) whether the meaning of 'displayed in a public place' would extend to documents (including photographs and images) posted on social media, including private accounts (for example, would a photograph posted on a private social media account of a group of people, with some wearing a Nazi costume, be taken to be displayed in a public place)

The Bill would insert a definition of 'public place' into the Dictionary of the *Criminal Code Act 1995* (Cth) (Criminal Code).

The term 'public place' would include any place to which the public, or a section of the public, have access as of right or by invitation, whether express or implied and whether or not a charge is made for admission to a place.

It is intended that this would extend to online spaces. The statutory note under new subsection 80.2F(3) includes an example to clarify that if a thing is included in a document that is publicly available on a website, then the thing is displayed in a public place.

(f) with respect to the requirement in subsection 80.2K(8) that a direction to cease displaying a prohibited symbol specify a reasonable time by which the direction must be complied with:

(i) why the legislation does not include the factors that the issuing police officer must have regard to when determining what is reasonable in the circumstances; and

(ii) whether a person has access to review with respect to the time period specified in the direction. For example, if a recipient of a direction did not receive the direction until after the time specified in the direction had lapsed, would they be able to rely on any defence for non-compliance

with the direction or seek review of the time period specified in the direction.

New subsection 80.2K(8) provides that a direction issued under subsection 80.2K(1) must specify the time by which the prohibited symbol must cease to be displayed in a public place, and that the time must be reasonable. This would ensure the person to whom the direction is issued can clearly understand what is being required of them in order to comply with the direction.

The requirement that the time be reasonable acknowledges that there are circumstances in which it may take time to comply with a direction to cease the display of a prohibited symbol in a public place. For example, if a direction is issued to an occupier of a property that has a prohibited symbol displayed on its front lawn and there is no one at the premises, the occupier would need to arrive at home before the direction could be complied with. Another example may be where the prohibited symbol is painted on a wall that is visible to the public and the directed person needs to obtain paint or some other means to cover the symbol. In other circumstances, it may be reasonable for the direction to stipulate that the prohibited symbol must be taken down immediately, for example, where someone is holding a poster.

The legislation does not set out specific criteria about what a police officer must have regard to when considering a reasonable time. It is intended that the police officer has the discretion in selecting a time period that is reasonable in the circumstances, having considered the practicalities of complying with the direction as well as the harm being caused by the continued display of the prohibited symbol.

New paragraph 80.2L(2)(b) provides that a direction may only be given if the police officer suspects on reasonable grounds that there are steps the person can take to cause the prohibited symbol to cease to be displayed in a public place. This requirement acts as a safeguard to ensure that a police officer cannot direct a person to take steps where it would not be possible for a person to take those steps. It would also ensure that the most appropriate person is directed by the police officer, having considered the practicalities of removing the prohibited symbol from display.

The legislation does not include a review mechanism. Police officers exercising these powers will be subject to existing accountability mechanisms, which include review mechanisms, and will be required to record the use of these powers in accordance with existing procedures and requirements.

Additionally, the requirement in new subsection 80.2K(8) that the time period specified is reasonable serves as a further safeguard to ensure the police officer turns their mind to the specific circumstances in which the direction is issued.

If a person was charged with an offence under section 80.2M because they did not comply with a direction, the Court may consider whether the police officer gave the direction in accordance with the requirements of subsection 80.2K(1), including whether the time period specified in the direction was reasonable. A person may also rely upon a defence set out in paragraph 80.2M(5)(b) if there were no reasonable steps that they could take to cause the prohibited symbol to cease to be displayed in a public place.

(g) whether there is any guidance regarding what would constitute 'reasonable steps' in the context of a person causing the prohibited symbol to cease to be displayed (as per paragraph 80.2M(5)(b)). For example, what would constitute reasonable steps to cause the symbol to cease to be displayed in the following circumstances:

(i) where a person has a tattoo depicting a prohibited symbol on a part of their body that is generally visible to the public, such as their hand, neck, face or ankle (including where the tattoo predated the commencement of this bill);

(ii) where a symbol is displayed by tenants and the landlord is issued with a direction as the owner of the premises;

(iii) where the symbol is on premises as a result of graffiti that is difficult to remove.

New paragraph 80.2L(2)(b) provides that a direction may only be given if the police officer suspects on reasonable grounds that there are steps a person can take to cause the prohibited symbol to cease to be publicly displayed. This ensures that the police officer would consider the practicalities involved in removing the symbol from public display, and that the most appropriate person is issued the direction.

What constitutes reasonable steps will depend on the circumstances and context in which the direction is issued. When considering what is reasonable, a Court may consider the actions that a person took to cause a prohibited symbol to cease to be displayed, and any constraints or potential risks.

It would not be appropriate for the Government to provide advice as to whether or not specific circumstances will fall within the elements of the offences.

(h) why the exceptions to the offence of publicly displaying a prohibited symbol in subsection 80.2H(9) do not extend to citizen journalists where their intention is to display the prohibited symbol only in the context of genuine dissemination of an event (for example, where a citizen journalist filmed neo-Nazis and posted that video online for informational purposes)

Read together with new paragraph 80.2H(1)(d), new paragraph 80.2H(9)(b) would have the effect that the public display offence does not apply if a reasonable person would consider that a person caused a prohibited symbol to be displayed in a public place for the purpose of making a news report, or a current affairs report that is in the public interest, and is made by a person working in a professional capacity as a journalist. This paragraph would exempt bona fide journalism from the offence, recognising the critical role that the dissemination of news plays in our democratic society.

For example, if a news programme was live broadcasting at a protest at which people held signs publicly displaying the Nazi hakenkreuz, it would be inappropriate for journalists and broadcasters reporting fairly and accurately on this event to have to censor their report in order to avoid criminal liability under new section 80.2H.

The public interest requirement and the requirement that the journalist or broadcaster is working in a professional capacity are intended to operate to exclude the displaying of prohibited symbols for the purpose of, for example, inciting violence or promoting hatred, while purporting to be journalism.

(i) what other safeguards beyond the exceptions and defences to the offences are in place to ensure the proposed offences do not unduly restrict a person's freedom of expression (for example, will police be issued with training and guidance about how to exercise their directions power)

The exceptions and defences in the Bill play a critical role in safeguarding against undue restrictions on the right to freedom of expression. They were specifically designed to protect the right to freedom of expression in recognition of circumstances in which the public display or trade of prohibited symbols are legitimate.

New paragraph 80.2H(1)(c) would require the prosecution to establish one or more of the 'matters in subsections 80.2H(3), (4) and (7) in order to satisfy a court that the public display offence has been committed. These matters are that:

- a reasonable person would consider that the public display of the prohibited symbol involves dissemination of ideas based on racial superiority or racial hatred, or could incite another person or a group of persons to offend, insult, humiliate or intimidate targeted individuals or groups, because of the targeted individuals' or group members' race (new subsection 80.H(3))
- the public display of the prohibited symbol involves advocacy of hatred of a group of persons distinguished by race, religion or nationality (a targeted group), or a member of a targeted group; and involves advocacy that constitutes incitement of another person or group of

persons to offend, insult, humiliate, intimidate or use force against the targeted group or a member thereof (new subsection 80.H(4)), or

- the public display of the prohibited symbol is likely to offend, insult, humiliate or intimate a reasonable person who is a member of a group of persons distinguished by race, colour, sex, language, religion, political or other opinion or national or social origin, because of the reasonable person's membership of that group (new subsection 80.H(7)).

This requirement is designed to ensure that the public display offence only restricts individuals' freedom of expression in circumstances where their expression would violate the rights of others under Article 4 of the *International Convention on the Elimination of All Forms of Racial Discrimination* (new subsection 80.H(3)) or Articles 20 or 26 of the *International Covenant on Civil and Political Rights* (ICCPR) (new subsections 80.H(4) and (7)).

The Government has commenced work on public awareness raising and education initiatives to support the implementation of these measures should the Bill pass. This will include working with the Commonwealth Director of Public Prosecutions (CDPP) and the Australian Federal Police (AFP) to ensure that prosecutors and law enforcement are equipped with appropriate guidance on matters, including the directions powers and protections and defences that will play a critical role in ensuring these new offences are fit for purpose and do not unduly encroach upon citizens' personal rights and freedoms.

(j) why is it not required that police first issue a direction to cease displaying the symbol, and for that not to be complied with, before the offence of publicly displaying a prohibited symbol would apply

The power in new section 80.2K for a police officer to direct a person to remove a prohibited symbol from public display is intended to support the enforcement of the offence in new section 80.2H and minimise the harm occasioned by the public display of a prohibited symbol. It is not intended to serve as warning or precursor to a charge under new section 80.2H. The Government does not consider a warning or precursor mechanism to be necessary or desirable because the conduct described in new subsection 80.2H(1) is serious enough to warrant constituting a criminal offence in its own right. The offence in new section 80.2M for failing to comply with a direction to remove a prohibited symbol from public display is intended to serve a different purpose, which is to incentivise compliance with directions given by police officers in recognition of the harm that public display of prohibited symbols causes to the community.

(k) why is it appropriate to subject children to criminal liability with respect to the offences of publicly displaying or trading in prohibited symbols or failing to comply with a direction to cease displaying a symbol

Publicly displaying and trading in goods that bear prohibited Nazi or Islamic State symbols causes significant harm to many Australians. These prohibited symbols – the Nazi hakenkreuz (or hooked cross), the Nazi double sig rune (the Schutzstaffel insignia or 'SS bolts') and the Islamic State flag – are widely recognised as representing and conveying ideologies of hatred, violence and racism which are incompatible with Australia's multicultural and democratic society. Extremists also use these symbols to recruit and radicalise vulnerable Australians to violence.

Given the significant harm engendered by the public display or trade of these symbols, it is appropriate that criminal liability apply if the prosecution establishes that any person, regardless of age, has engaged in the relevant conduct set out at section 80.2H.

Where children are involved in the alleged or the commission of offending, the AFP, its partner agencies within the Joint Counter Terrorism Teams and the CDPP have discretion about whether to progress a matter for investigation or prosecution. The AFP with their partners will consider diversionary tactics where appropriate. The AFP works collaboratively with state, territory and Commonwealth partners in considering the most appropriate support services available to law enforcement for children. Investigative decisions may also involve engagement with children and their parents or guardians to deter them from committing further offences or prevent further radicalisation, rather than progressing charges. This has the potential to curb further offending and issuing a caution may induce a more positive outcome for the young person rather than treating them as an alleged criminal. The Government considers that these safeguards will minimise the risk of inappropriate charging and prosecution of minors in relation to the new offences.

(l) why, at a minimum, the Attorney-General's consent is not required prior to commencing proceedings against a child defendant, noting that this safeguard is included with respect to offences relating to the use of a carriage service for violent extremist material; and

The Attorney-General's consent to prosecute is required in certain circumstances to ensure there is appropriate oversight of a prosecutorial process that is particularly sensitive. These circumstances include where national security concerns require Ministerial oversight (see, for example section 83.5 of the Criminal Code), where matters could affect Australia's international or foreign relations (see, for example, section 268.121 of the Criminal Code) or when an alleged offender is under the age of 18 years (see, for example, section 270.7B of the Criminal Code).

The Attorney-General's consent is not required prior to commencing proceedings against a child defendant for the public display and trade offences because these are lower level offences when compared to the violent extremist

material offences. This is reflected in the respective penalties for the offences. The public display or trade offences have a maximum penalty of 12 months' imprisonment, whereas the violent extremist material offences have a maximum penalty of five years' imprisonment.

(m) whether the ban on trading goods containing a prohibited symbol is a proportionate limit on the right to a private life.

Article 17 of the ICCPR prohibits unlawful or arbitrary interferences with a person's privacy, family, home and correspondence. The right to privacy may be limited where the limitation is lawful and not arbitrary. In order for any interference with the right to privacy not to be arbitrary, the interference must be for a reason consistent with the provisions, aims and objectives of the ICCPR and be reasonable in particular circumstances. The United Nations Human Rights Committee has interpreted reasonableness in this context to imply that any interference with privacy must be proportionate to the end sought and be necessary in the circumstances of any given case.

The trading offence is reasonable, necessary and proportionate to achieve the legitimate objectives of protecting national security, public order, and the rights and freedoms of others. Prohibited symbols represent hateful and violent ideologies. Trading in goods which bear those symbols supports the further dissemination of these ideologies as well as the continuation of an economy which allows for profiting from extremist and hateful ideologies. Accordingly, banning the trade in goods bearing prohibited symbols supports other rights including the right to life and security; the right to freedom of means of achieving a legitimate objective to protect national security, public order and the rights and freedoms of others.

The trading offence is also appropriately limited because it does not apply to the private ownership of goods that bear prohibited symbols. The scope of the trading offence is also limited through defences and exemptions, which would provide legitimate avenues to trade such items, including for religious, academic, educational, artistic, scientific or literary purpose or public interest journalism. The trading offence would also not apply if the goods that are traded contain commentary on public affairs, the prohibited symbol appears in the commentary and making the commentary is in the public interest; the trading is necessary for, or of assistance in, enforcing, monitoring compliance with or investigating a contravention of the law, or for the administration of justice; and the trading is done by a public official or a person assisting a public official, in connection with the performance of the official's duties or functions, and the trading is reasonable in the circumstances for that purpose.

Accordingly, the limitation on the right to privacy would be permissible as it is a reasonable, necessary and proportionate means of achieving a legitimate

objective to protect national security, public order and the rights and freedoms of others.

Concluding comments

International human rights legal advice

Legitimate objective and rational connection

2.61 The initial analysis noted that the stated objective of the measure, that is, to protect members of the community from intimidation and harassment and to prevent incitement to hatred, discrimination and violence, has generally been recognised as constituting a legitimate objective for the purposes of international human rights law and the measures appear to be rationally connected to (that is, effective to achieve) the stated objective.[94]

2.62 However, questions arose as to whether the current laws are sufficient to achieve the stated objective, noting that section 18C of the *Racial Discrimination Act 1975* appears to capture some of the conduct sought to be criminalised by the measures. The Attorney-General advised that the measures would provide stronger protections for persons against racial hatred and vilification than are currently available, noting that the measure would impose a more severe punishment (up to 12 months' imprisonment) than the civil penalties available for contravening section 18C. The Attorney-General advised that this higher criminal penalty is appropriate given the conduct sought to be criminalised warrants more severe punishment to deter the most serious offending. He noted that it is important that law enforcement is able to intervene at an early stage to protect the community by preventing the use of symbols to affect radicalisation, violence and the incitement of hatred. Noting the current law does not criminalise the public display of prohibited symbols and the stated objective of the measures are to do so, it would appear that the current laws are insufficient to fully achieve this objective and thus the measures appear to constitute a legitimate objective under international human rights law.[95]

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94 Noting that protecting the rights of others, national security and public order are specified grounds on which restrictions on the right to freedom of expression may be permitted. International Covenant on Civil and Political Rights, articles 18(3), 19(3)(a) and 20. See UN Human Rights Committee, *General Comment No.34: Article 19: Freedoms of Opinion and Expression* (2011) [28].

95 It is noted that article 4 of the Convention on the Elimination of All Forms of Racial Discrimination obliges States parties to adopt immediate and positive measures designed to eradicate all incitement to, or acts of, discrimination, including declaring an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination and acts of violence or incitement to such acts against any groups of a particular race.

Proportionality

2.63 A key factor in assessing proportionality is whether the measures are sufficiently circumscribed. A relevant consideration in this regard is the breadth of the measures, including the form of expression that is to be prohibited and the means of its dissemination.[96] The UN Human Rights Committee has noted that restrictions on the right to freedom of expression must not be overly broad and restrictions should be specific and directly connected to the threat posed by the particular expression.[97] The forms of expression that are sought to be prohibited are the Islamic State flag, the Nazi hakenkreuz and the Nazi double-sig rune as well as a symbol that so nearly resembles or is likely to be confused with, or mistaken for, one of these symbols.[98] While the bill specifies the forms of expression that are to be prohibited and the circumstances in which such expression would be prohibited, it does not define each of the prohibited symbols or provide a graphic depiction of the symbols. Rather, the symbols are described in the explanatory memorandum.[99] Further information was therefore sought as to why the prohibited symbols are not defined in the legislation itself. The Attorney-General stated it would be contrary to the intent of the public display offence for the legislation itself to contain (and thereby display) the symbols. However, it remains unclear why a written description of the prohibited symbols, such as that contained in the explanatory memorandum, cannot

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

97 UN Human Rights Committee, *General Comment No.34: Article 19: Freedoms of Opinion and Expression* (2011) [34]. At [35], the Committee observed: 'When a State party invokes a legitimate ground for restriction of freedom of expression, it must demonstrate in specific and individualized fashion the precise nature of the threat, and the necessity and proportionality of the specific action taken, in particular by establishing a direct and immediate connection between the expression and the threat'. Regarding the related test of necessity see e.g. *Faurisson v France*, UN Human Rights Committee Communication No. 550/1993 (1996) separate opinions of Mrs Evatt, Mr Kretzmer and Mr Klein, [8]: 'The restriction [on freedom of expression] must be necessary to protect the given value [such as the rights of others]. This requirement of necessity implies an element of proportionality. The scope of the restriction imposed on freedom of expression must be proportional to the value which the restriction serves to protect. It must not exceed that needed to protect the value…the restriction must not put the very right itself in jeopardy'. See also *Ross v Canada*, UN Human Rights Committee Communication No. 736/1997 (2000), [116].

98 Schedule 1, item 5, proposed section 80.2F.

99 Explanatory memorandum, pp. 24–25.

be included in the legislation itself, noting that similar legislation in other jurisdictions has included written descriptions of the symbols sought to be prohibited.[100]

2.64 As noted in the preliminary analysis, without clear legislative guidance, and noting that an assessment of whether a symbol is likely to be confused with, or mistaken for, a prohibited symbol is inherently subjective, there may be substantial variation in the way the legislation is interpreted and applied in practice. As a result, the scope of expression that may be captured by the offences could be potentially wide. This may cause particular difficulties for the police who would be empowered to make directions that certain symbols be taken down.

2.65 Further, as outlined in the initial analysis, the public display of a prohibited symbol would only constitute an offence if certain circumstances were to apply (see above paragraph [2.39]). Some of these circumstances may ensure that the expression prohibited is appropriately limited to that which reaches the threshold of hate speech.[101] In this regard, the Attorney-General stated that these circumstances ensure that individuals' freedom of expression is only restricted in circumstances where their expression would violate the rights of others under article 4 of the Convention on the Elimination of All Forms of Racial Discrimination and articles 20 or 26 of the International Covenant on Civil and Political Rights. Indeed, the UN Committee on the Elimination of Racial Discrimination has stated that:

> the principle of freedom of speech has been afforded a lower level of protection in cases of racist and hate speech dealt with by other international bodies, and that the Committee's own General recommendation No 15 clearly states that the prohibition of all ideas based upon racial superiority or hatred is compatible with the right to freedom of opinion and expression.[102]

2.66 In particular, UN treaty bodies have found restrictions on freedom of expression may be permitted in circumstances where the expression is of a 'nature as to raise or

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100 See, e.g. *Summary Offences Act 1966* (Vic), section 41J, which defines 'Nazi symbol' as '(a) a Hakenkreuz, being a symbol of a cross with the arms bent at right angles in a clockwise direction; or (b) a symbol that so nearly resembles a symbol referred to in paragraph (a) that it is likely to be confused with or mistaken for that symbol', for example, 'a cross with arms bent at right angles in a counter clockwise direction'. See also *Criminal Code 2002* (ACT), section 751.

101 Schedule 1, item 5, proposed paragraph 80.2H(3)(a) and subsection 80.2H(4) provide that it would be an offence to publicly display a prohibited symbol where a reasonable person would consider that such conduct either involves dissemination of ideas based on racial superiority or racial hatred; or advocacy of hatred of a targeted group or member of the group and constitutes incitement to offend, insult, humiliate, intimidate or use force or violence against the targeted group or member of that group.

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

strengthen anti-Semitic feeling, in order to uphold the Jewish communities' right to be protected from religious hatred'.[103]

2.67 However, as noted in the initial analysis, it is not clear whether speech captured by the circumstances contained in some provisions of the bill relating to offending, insulting, humiliating or intimidating a person[104] would necessarily reach the level of hate speech. It is noted that certain unpopular or offensive speech is afforded protection under international human rights law.[105] In this regard, it is relevant to consider how the phrase 'offend, insult, humiliate or intimidate' is likely to be interpreted. In the context of section 18C of the *Racial Discrimination Act 1975*, this phrase has been interpreted by Australian courts to collectively mean 'profound or serious effects, not to be likened to mere slights'.[106] This judicial interpretation suggests that expression captured by the circumstances in the bill[107] would need to be more than merely offensive or insulting speech to justify prohibition. This would assist with the proportionality of the measures.

2.68 As to the means of dissemination, a prohibited symbol must be 'displayed in a public place' in order to constitute an offence. As set out above (in paragraph [2.38]), a

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

104 See Schedule 1, item 5, proposed paragraph 80.2H(3)(b) and subsection 80.2H(7) – namely, where a reasonable person would consider that the conduct could incite another person or group of persons to offend, insult, humiliate or intimidate a targeted person or group because of their race; or the conduct is likely to offend, insult, humiliate or intimidate a reasonable person who is a member of a group of persons distinguished by a protected attribute such as race or religion because of their membership of that group.

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

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

107 In Schedule 1, item 5, proposed paragraphs 80.2H(3)(b) and subsection 80.2H(7).

symbol is taken to be displayed in a public place if it is capable of being seen by a member of the public who is in a public place or it is included in a document that is available or distributed to the public or a section of the public (including via the internet).[108] The Attorney-General advised that the measures are intended to extend to online spaces and if a symbol is included in a document that is publicly available on a website, then it is taken to be displayed in a public place. It remains unclear, however, whether a private social media account (but which is accessible by a large group of people) would be considered to be a publicly available website. For example, would a photograph, posted on a private social media account, of a person wearing a costume party hat that included the Nazi double rig rune symbol be taken to be causing a prohibited symbol to be displayed in a public place? Questions therefore remain as to the scope of this measure and its application in practice.

2.69 The initial analysis also raised questions as to how the provisions relating to directions to cease displaying a prohibited symbol will likely operate in practice and whether, in all circumstances, they are sufficiently circumscribed. The time specified by which a direction must be complied with must be 'reasonable'.[109] However, noting that the concept of a reasonable period of time is vague, the initial analysis raised questions as to why the legislation itself does not include the factors that the issuing police officer must have regard to when determining what is reasonable in the circumstances, such as those factors mentioned in the explanatory memorandum.[110] Questions were also raised as to whether a person has access to review with respect to the time period specified in the direction. The Attorney-General advised that the requirement that the time specified be reasonable acknowledges that there are circumstances in which it may take time to comply with a direction to cease displaying a prohibited symbol. As to why the legislation does not contain specific criteria about what a police officer must have regard to when considering a reasonable time, the Attorney-General stated that it is intended the police officer has the discretion in selecting a time period that is reasonable in the circumstances, having considered the practicalities of complying with the direction as well as the harm being caused by the continued display of the symbol. However, international human rights law jurisprudence indicates that discretionary powers conferred on authorities must indicate with sufficient clarity the scope of any such discretion and the manner of its exercise.[111] This is because, without sufficient safeguards, broad powers may be exercised in such a way as to be incompatible with human rights. At a minimum,

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108 Schedule 1, item 5, proposed section 80.2F.

109 Schedule 1, item 5, proposed subsection 80.2K(8).

110 Explanatory memorandum, p. 44.

111 *Hasan and Chaush v Bulgaria*, European Court of Human Rights App No.30985/96 (2000) [84].

the provision of guidelines to guide police in exercising their discretion would assist to circumscribe this measure.

2.70 As to the availability of review, the Attorney-General advised that the legislation does not include a review mechanism. He noted that police officers exercising the powers will be subject to existing accountability mechanisms, which include review mechanisms, and will be required to record the use of these powers in accordance with existing procedures and requirements. It is not clear, however, whether these existing accountability and review mechanisms are accessible to members of the public seeking review. If a person issued with a direction is not informed of the availability of these existing accountability mechanisms, such mechanisms may offer minimal safeguard value.

2.71 Further information was also sought regarding whether there is any guidance as to what would constitute 'reasonable steps' in the context of a person causing the prohibited symbol to cease to be displayed.[112] The Attorney-General advised that the requirement that a direction may only be given if there are steps that can be taken to cause the symbol to cease to be displayed would act as a safeguard to ensure that a police officer cannot direct a person to take steps where it would not be possible for a person to take those steps. He noted that the requirement would also ensure that the police officer would consider the practicalities involved in removing the symbol from public display and that the most appropriate person is issued the direction. The Attorney-General noted that it would not be appropriate for the government to provide advice as to whether or not specific circumstances will fall within the elements of the offences. However, where legislation may limit human rights, the onus is on the government, as the proponent of the legislation, to advise how it is intended to operate and the circumstances that are likely to be captured by the proposed offences. For example, it remains unclear what would be considered reasonable steps to cease displaying a prohibited symbol in circumstances where a person has a tattoo depicting a prohibited symbol on a part of their body that is generally visible to the public. In such circumstances, under the bill as currently drafted, a person would re-commit an offence each time they were in a public place when their tattoo was visible. Requiring the removal of the tattoo in order to avoid criminal liability would arguably constitute a greater interference with rights, as it involves interference with bodily autonomy. It is noted that in other jurisdictions with similar legislation there are specific exceptions to the offence of publicly displaying a Nazi symbol where the symbol is displayed on the person's body by means of tattooing or other like

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112 Schedule 1, item 5, proposed paragraph 80.2M(5)(b).

process.[113] Without further clarity as to the circumstances that are likely to be captured by the measure, concerns remain regarding its breadth.

2.72 Another factor in assessing proportionality is whether the measures are accompanied by adequate safeguards. The initial analysis noted that the inclusion of specific exceptions and defences to the offences (as set out above in paragraphs [2.40]–[2.42]) would operate as safeguards, although raised questions as to whether these would be adequate in all circumstances. The Attorney-General advised that paragraph 80.2H(9)(a), which provides that the public display offence does not apply if a reasonable person would consider that a person caused a prohibited symbol to be displayed in a public place for a religious purpose, is intended to extend to the use of the sacred Swastika in connection with the practice of Buddhism, Hinduism or Jainism. He stated that the paragraph 80.2H(9)(a) is intentionally non-prescriptive to ensure coverage is provided for all faith communities who may publicly display these symbols for religious purposes. While the Attorney-General's response clarifies the intended operation of the provision, it does not address why the legislation itself cannot include a specific exception with respect to displaying the sacred Swastika in connection with Buddhist, Hindu and Jain religions. Such an exception may be drafted in a non-exhaustive way so as to allow broader coverage with respect to other faith communities where appropriate. It is noted that similar legislation in other jurisdictions have included such an exception.[114]

2.73 Further information was also sought regarding what safeguards are in place to mitigate the risk that people of Muslim faith who are displaying the Shahada for religious purposes are not inadvertently captured by the new offences, noting that the words of the Shahada may constitute a symbol that so nearly resembles, or may be mistaken for, the Islamic State flag. The Attorney-General advised that the bill does not criminalise the use or display of the Shahada – it is only the Islamic State flag as a whole rather than the individual parts of that symbol, such as the text or creed, that is prohibited. The Attorney-General stated that the prohibition of symbols that so nearly resemble the Islamic State flag is intended to avoid situations in which an individual could seek to avoid criminal liability under new legislation by slightly altering an Islamic State flag before engaging in otherwise prohibited conduct. If the display of the Shahada is not intended to be captured by the offences, it is not clear why this cannot be made clear in the text of the legislation

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113 See, e.g. *Summary Offences Act 1966* (Vic), subsection 41K(3) and *Criminal Code 2002* (ACT), paragraph 752(2)(a).

114 See, e.g. *Summary Offences Act 1966* (Vic), section 41K, which includes examples in the text of the legislation to clarify that persons of Hindu, Jain or Buddhist faiths who display a swastika for religious purposes are not criminally liable; and *Police Offences Act 1935* (Tas), subsection 6C(2), which provides: 'For the avoidance of doubt, the display of a swastika in connection with Buddhism, Hinduism or Jainism does not constitute the display of a Nazi symbol for the purposes of subsection (1)'. See also *Criminal Code 2002* (ACT), subsection 752(2).

itself, or, at a minimum, in the explanatory memorandum, as is the case with respect to the use of the sacred Swastika. While the Attorney-General explained the intended operation of the provision, he did not identify any specific safeguards that would mitigate the risk that people of Muslim faith displaying the Shahada are inadvertently captured by the offences. As such, there appears to remain a risk that people of Muslim faith may be disproportionately impacted by the measure.

2.74 With respect to the exception relating to journalists, further information was sought regarding why the exception does not extend to citizen journalists where their intention is to display the prohibited symbol only in the context of genuine dissemination of an event (for example, where a citizen journalist films neo-Nazis and posts that video online for informational purposes). The Attorney-General stated that the exception would exempt only bona fide journalism from the offence, for example, if a news programme was live broadcasting at a protest at which people held signs publicly displaying the Nazi hakenkreuz. The Attorney-General stated that the public interest requirement and the requirement that the journalist or broadcaster is working in a professional capacity are intended to operate to exclude the displaying of prohibited symbols for the purpose of, for example, inciting violence or promoting hatred, while purporting to be journalism. However, as noted in the initial analysis, the requirement that journalists be working in a strictly professional capacity would mean that citizen journalists would be unable to rely on the journalism defence and liable to conviction of an offence involving up to 12 months imprisonment. The concern therefore remains that the scope of the journalist exception is drafted too narrowly, noting the UN Human Rights Committee's observation that:

> journalism is a function shared by a wide range of actors, including professional full-time reporters and analysts, as well as bloggers and others who engage in forms of self-publication in print, on the internet or elsewhere.[115]

2.75 As to the existence of any other safeguards, the Attorney-General stated that the government has commenced work on public awareness raising should the bill pass, including working with prosecutors and law enforcement to ensure they are equipped with appropriate guidance on matters, including the directions powers and protections and defences. The provision of education and training to relevant authorities as well as broader public awareness raising assists with proportionality.

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

2.76 A further consideration is whether there are less rights restrictive ways to achieve the stated objective. The initial analysis noted that a less rights restrictive alternative may be to require police to first issue a direction to cease displaying the symbol before charging a person with the offence of publicly displaying a prohibited symbol. If a person complied with the direction, they would not then also be criminally liable for the conduct of displaying the symbol in the first instance. As to why this approach is not appropriate, the Attorney-General stated that the power to issue a direction is not intended to serve as a warning or precursor to a charge under the new offence of publicly displaying a prohibited symbol. Rather, the offence of failing to comply with a direction is intended to incentivise compliance with directions given by police officers in recognition of the harm that public display of prohibited symbols causes to the community. The Attorney-General stated that the government does not consider a warning or precursor mechanism to be necessary or desirable because the conduct of publicly displaying a prohibited symbol is serious enough to warrant constituting a criminal offence in its own right.

2.77 The question of less rights restrictive alternatives is also particularly relevant in relation to children, noting the position under international human rights law that States should implement non-judicial alternatives to prosecution and detention of children accused of, and charged with, terrorism offences.[116] The initial analysis raised the question of why it is appropriate to subject children to criminal liability with respect to the offences of publicly displaying or trading in prohibited symbols or failing to comply with a direction to cease displaying a symbol. The Attorney-General advised that given the significant harm engendered by the public display or trade of prohibited symbols, it is appropriate that any person, regardless of age, is held criminally liable for the conduct. The Attorney-General stated that the relevant authorities have discretion about whether to progress a matter for investigation or prosecution and will consider diversionary tactics where appropriate. He noted that children may be issued with a caution rather than progressing charges, which may induce a more positive outcome for children and curb further offending. If these diversionary options were implemented, they may serve as an important safeguard to mitigate the risk of significant harm caused to children who are exposed to the criminal justice system.[117] However, as a discretionary safeguard, it is unlikely to be sufficient on its own to protect the rights of the child. This is because a

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

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

discretionary safeguard is less stringent than the protection of statutory processes as there is no requirement to follow it.

2.78 Further information was also sought as to why the Attorney-General's consent is not required prior to commencing proceedings against a child defendant, noting that this safeguard is included with respect to offences relating to the use of a carriage service for violent extremist material (see below paragraphs [2.95] and [2.112]). The Attorney-General advised that his consent is not required because the public display and trade of prohibited symbols are lower-level offences when compared to the violent extremist material offences, as reflected in the lower penalty of a maximum of 12 months' imprisonment (as opposed to a maximum of five years' imprisonment). However, given the significant harm caused to children through exposure to the criminal justice system and Australia's obligations with respect to the rights of the child, including to ensure the best interests of the child are a primary consideration, an offence attracting a maximum penalty of 12 months' imprisonment cannot be said to be lower level. It therefore remains unclear why this safeguard is not available with respect to children charged with the offences of publicly displaying and trading in prohibited symbols. As noted in the analysis below (at paragraph [2.113]) such a safeguard alone would not be sufficient but, alongside other safeguards, would assist with proportionality. It is noted that similar legislation in other jurisdictions contains such a safeguard. For example, in the ACT, a proceeding against a child for the offence of publicly displaying a Nazi symbol must not be started without written consent of the director of public prosecutions.[118]

2.79 Additionally, as noted in the initial analysis, at a minimum, it would be a lesser restriction on the rights of the child if the offences were to only apply to children over the age of 14 years, as per the recommended age of criminal responsibility under international human rights law.[119] Currently, the age of criminal responsibility for Commonwealth offences is 10 years of age, with children aged 10 years or more but under 14 years old held liable for an offence only if the prosecution proves that the child knows his or her conduct is wrong.[120] The Attorney-General noted that a number of Australian jurisdictions are actively considering, or have committed to, raising the minimum age of criminal responsibility, but gave no indication as to whether the Commonwealth is considering raising the minimum age of criminal responsibility.

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118 *Criminal Code 2002* (ACT), subsection 752(3).

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

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

2.80 Thus, in the absence of any requirement to consider non-judicial alternatives to the prosecution and detention of children or any other legislative safeguards to protect the rights of the child, concerns remain that subjecting children as young as 10 years old to criminal liability with respect to the new offences would not be the least rights restrictive approach, nor would subjecting children to such offences be likely to be in the best interests of the child.

2.81 In conclusion, while the measures pursue a legitimate objective for the purposes of international human rights law, noting in particular Australia's obligations under the Convention on the Elimination of All Forms of Racial Discrimination, questions remain as to whether the proposed limitations on human rights would be proportionate in all circumstances. The absence of clear definitions of the symbols that are sought to be prohibited as well as other key terms and concepts, such as what constitutes 'reasonable steps' with respect to complying with a direction to cease displaying a prohibited symbol, raises concerns that the measure is not sufficiently circumscribed. While there are some important safeguards accompanying the measure, such as the inclusion of defences and exceptions to the offences and the provision of training to relevant authorities and public awareness raising, many safeguards identified by the Attorney-General are discretionary and thus not as strong as those embedded in the legislation itself. It is therefore not clear that the existing safeguards are sufficient to ensure that any limitation on human rights is proportionate. As such, depending on how the measures are implemented in practice, there may be a risk that they are not compatible with the rights to freedom of expression, freedom of religion and equality and non-discrimination.

2.82 Regarding the rights of the child, noting the clear position under international human rights law with respect to raising the minimum age of criminal responsibility to at least 14 years and prioritising the best interests of the child, including by way of non-judicial alternatives to prosecution and detention of children accused of terrorist offences, there appears to be a significant risk that the measures are not compatible with the rights of the child.

Committee view

2.83 The committee thanks the Attorney-General for this response. The committee reiterates its deep concern as to the rising number of disturbing events involving the public display of Nazi symbols. The committee emphasises that these displays of hate have no place in Australia. The committee considers there is a need to support law enforcement to help protect the community from those who plan, prepare and inspire others to do harm. Indeed, the committee reiterates that Australia has obligations under international human rights law to prohibit by law any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence and to eliminate all incitement to, or acts of, racial discrimination. As such, the committee

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

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

2.85 The committee considers that the measures pursue a vitally important objective, namely, to protect members of the community from intimidation, hatred and discrimination. The committee considers that the measures are accompanied by some important safeguards. For example, the committee notes the Attorney-General's advice that the government has commenced work on public awareness raising and education initiatives to support the implementation of these measures should the bill pass. However, the committee notes that many of the safeguards identified are discretionary and are thus not as strong as those embedded in legislation. As such, the committee retains some concerns that these safeguards may not be adequate in all circumstances to ensure that any limitation on human rights is necessarily proportionate.

2.86 The committee considers that in circumstances where the measures restrict expression that reaches the threshold of hate speech, it would likely constitute a permissible limitation on the right to freedom of expression. However, the committee is concerned that there is a risk that in some circumstances, depending on how the measures are implemented by law enforcement in practice, the measures may not be fully compatible with the rights to freedom of expression, freedom of religion and equality and non-discrimination. Finally, the committee considers that in the absence of any requirement to consider non-judicial alternatives to prosecution and detention of children or any other legislative safeguards to protect the rights of the child, there is a significant risk that the measures are not compatible with the rights of the child.

Suggested action

2.87 The committee considers the proportionality of these measures may be assisted were the bill amended to:

(a) define each of the prohibited symbols that are to be prohibited, including, at a minimum, a written description of the symbols (such as that contained in the explanatory memorandum);

(b) include the factors that the issuing police officer must have regard to when determining what is a 'reasonable' time by which the direction to cease displaying a prohibited symbol must be complied with, or at a minimum, provide guidelines to assist police in exercising their discretion;

(c) provide guidance as to what would be considered 'reasonable steps' with respect to complying with a direction to cease displaying a prohibited symbol;

(d) provide some flexibility regarding the criminalisation of prohibited symbols displayed by way of an existing tattoo, noting that a person may continually commit an offence if in public if they have a prohibited tattoo in a visible place on their body;

(e) include a specific exception with respect to displaying the sacred Swastika in connection with Buddhist, Hindu and Jain religions as well as the Shahada in connection with the Muslim religion;

(f) broaden the exception to the offences with respect to journalists to exempt citizen journalists making a news or current affairs report that is in the public interest and made in good faith;

(g) only apply the offences of publicly displaying and trading in prohibited symbols to children over the age of 14 years, as per the recommended age of criminal responsibility under international human rights law;

(h) require diversionary options to be considered prior to prosecuting a child defendant in order to avoid exposing children to the criminal justice system;

(i) require the Attorney-General's consent prior to commencing proceedings against a child defendant;

(j) require a review of Schedule 1 within two years to assess whether the provisions are operating as intended in practice.

2.88 The committee recommends that the statement of compatibility be updated to reflect the information provided by the Attorney-General.

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

Criminalising the accessing or possession of 'violent extremist material'

2.90 The bill seeks to create offences relating to the use of a carriage service[121] (such as an internet or mobile telephone service) for violent extremist material.[122] Violent extremist material is defined as material that:

- describes or depicts, or provides instruction on engaging in, or supports or facilitates, serious violence; and
- a reasonable person would consider, in all the circumstances, to be intended to:
  - directly or indirectly advance a political, religious or ideological cause; and
  - assist, encourage or induce a person to engage in, plan or prepare for an intimidatory act; or do a thing that relates to engaging in, planning or preparing for an intimidatory act; or join or associate with an organisation that is directly engaged in the doing of any intimidatory act, or that is preparing, planning, assisting in or fostering the doing of any intimidatory act.[123]

2.91 'Serious violence' is defined as an action that falls within the elements of the existing definition of 'terrorist act' in the *Criminal Code Act 1995* (Criminal Code).[124] That is, an action that causes serious physical harm to a person; serious damage to property; causes a person's death; endangers a person's life; creates a serious risk to the health or safety of the public; or seriously interferes with, seriously disrupts, or destroys an electronic system (including a telecommunications, financial or transport system).

2.92 An 'intimidatory act' is defined as a violent action, or threat of violent action, where the action is done, or the threat is made, with the intention of coercing, or influencing by intimidation, the government of the Commonwealth or a state, territory or foreign

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

122 Schedule 2, item 3.

123 Schedule 2, item 3, proposed subsection 474.45A(1).

124 Schedule 2, item 3, proposed subsection474.45A(2); *Criminal Code Act 1995*, subsection 100.1(2).

country (or part of the government); or intimidating the public or a section of the public.[125]

2.93 A person would commit an offence if they use a carriage service to access violent extremist material; cause material or a link to material to be transmitted to a person; transmit, make available, publish, distribute, advertise or promote material; or solicit material.[126] A person would also commit an offence if they obtain violent extremist material using a carriage service and possess or control the material and store the material in data held in a computer or in a data storage device.[127] It would not matter whether the person obtained or accessed the material using a carriage service before, on or after the commencement of the relevant provision.[128] This means that if a person used a carriage service to obtain or access violent extremist material before the offence provisions commenced and they still possessed or controlled the material after the offence provisions commence, they could be held criminally liable.[129] The relevant fault elements that would apply to the offences would be intention with respect to the conduct (such as accessing, possessing or controlling the material) and recklessness with respect to whether the material is violent extremist material.[130] A maximum penalty of five years' imprisonment would apply to these offences.

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125 Schedule 2, item 3, proposed subsection 474.45A(3).

126 Schedule 2, item 3, proposed section 474.45B.

127 Schedule 2, item 3, proposed section 474.45C.

128 Schedule 2, item 6.

129 Explanatory memorandum, p. 62.

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

2.94 There would be several defences available in respect of the offences, including, for example, that the material relates to a news report or current affairs report that is in the public interest and was made by a professional journalist; the conduct is necessary for, or of assistance in, conducting scientific, medical, academic or historical research and the conduct is reasonable in the circumstances; or the conduct relates to the development, performance, exhibition or distribution, in good faith, of an artistic work.[131]

2.95 In relation to proceedings for an offence relating to violent extremist material involving a child, that is, a defendant under 18 years of age, proceedings must not be commenced without the Attorney-General's consent.[132] However, a child may be arrested for, charged with, or remanded in custody or on bail[133] in connection with an offence before the necessary consent has been given.[134]

2.96 Further, the bill seeks to expand the definition of 'terrorism offence' to include these new offences relating to the use of a carriage service for violent extremist material.[135] There are a number of implications of classifying these new offences as terrorism offences, including that the Australian Federal Police would have access to control orders under Division 104 of the Criminal Code to prevent or respond to the commission of these offences, and advocating the commission of either of these offences would constitute an offence under section 80.2C (advocating terrorism) of the Criminal Code.[136]

Summary of initial assessment

Preliminary international human rights legal advice

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

2.97 To the extent that criminalising conduct relating to the possession, use and sharing of violent extremist material may deter and prevent terrorist-related conduct and violence, the measure could promote a number of human rights, including the rights to

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

132 Schedule 2, item 3, proposed subsection 474.45E(1).

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

134 Schedule 2, item 3, proposed subsection 474.45E(2).

135 Schedule 2, items 1 and 2.

136 Explanatory memorandum, p. 50.

life and security of person and the prohibition against inciting national, racial or religious hatred (as set out above in paragraphs [2.46] to [2.48]).[137]

Rights to freedom of expression and rights of the child

2.98 By criminalising the use of a carriage service to, among other things, access, obtain, share, possess and control certain material, the measure engages and limits the right to freedom of expression, which includes freedom to seek, receive and impart information and ideas (as set out in paragraphs [2.49] and [2.50]).[138] Additionally, as the offences would apply to children, the measure would engage and limit the rights of the child (as set out in paragraphs [2.51] and [2.52]).[139] These rights may generally be subject to permissible limitations where the limitation pursues a legitimate objective, is rationally connected to that objective and is a proportionate means of achieving that objective.

Committee's initial view

2.99 The committee noted that to the extent that criminalising conduct relating to the use of a carriage service for violent extremist material would deter and prevent terrorist-related conduct and violence, the measure could promote a number of human rights. However, the committee also noted that by criminalising the use of a carriage service to, among other things, access, obtain, share, possess and control certain material, the measure would engage and limit the right to freedom of expression and, where applied to children, the rights of the child. The committee considered further information was required to assess the compatibility of the measure with these rights. The Attorney-General's response sets out the questions asked of the Attorney-General.

2.100 The full initial analysis is set out in *Report 8 of 2023*.

Attorney-General's response[140]

2.101 The Attorney-General advised:

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

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

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

140 The Attorney-General's response to the committee's inquiries was received on 21 August 2023. This is an extract of the response. The response is available in full on the committee's webpage.

(a) whether a person would be likely to be found guilty of an offence in the following circumstances:

(i) accessing a blog post written by a member of a Ukrainian citizen army who describes the serious disruption of electronic systems used by the Russian army, with the intention of advancing the political cause of Ukrainian independence from Russia and encouraging persons to associate with their organisation, which assists in the intimidation of the Russian government;

(ii) sharing a link on social media of footage of protestors in Iran depicting serious damage to government property that is intended to advance the political cause of the protestors and the footage is intended to encourage others to associate with the organisation the protestors are part of;

(iii) possessing on a computer an article written by a member of the Provisional Irish Republican Army (IRA) from the 1970s that describes violent actions by the IRA, where the article was intended to advance the IRA's political cause and encourage others to join the IRA – in circumstances where the person possessing the article downloaded it onto their computer before these offence provisions commenced and did so for personal interest (rather than academic or historical research)

Counter-terrorism investigations are conducted by the AFP through Joint Counter Terrorism Teams (JCTT) with state and territory police, the intelligence community and international law enforcement partners. The investigations are required to meet a certain threshold and are subject to internal oversight bodies. The proposed offences would be investigated in line with the standard JCTT operational practices. Any referral of conduct demonstrating support for, or a tendency towards, violence would be assessed on a case-by-case basis to determine whether there was sufficient evidence to establish the elements of the offence (or whether the conduct contravened any alternative offences). This gives law enforcement maximum discretion to consider any relevant matters in making their assessment. The elements that would need to be made out for each offence can be found in the Bill (see subsections 474.45B(1) and 474.45C(1)).

The AFP would determine potential charges based on the evidence available, in consultation with the CDPP, to form comprehensive pathways in a criminal investigation. It would not be appropriate for the Government to provide advice as to whether or not specific circumstances will fall within the elements of the offences.

(b) whether a person would be considered to have 'accessed' violent extremist material in the following situations:

(i) where a person views violent extremist material on a social media platform, in a situation where the material automatically appears on a person's feed; and

(ii) where a person views material (that is not an official news source) as a result of searching for news content with respect to an unfolding situation overseas, such as the war in Ukraine

For an offence under section 474.45B to be made out, the prosecution must establish that the person intended to access the material, or cause the material to be transmitted to the person, transmit, make available, publish, distribute, advertise, promote or solicit material, or any of the prior conduct in relation to a link that can be used to access the material (paragraphs 474.45B(1)(a) and (2)(a)); the person used a carriage service to do so (paragraph 474.45B(1)(b)); and the person must be reckless that the material is violent extremist material (paragraphs 474.45B(1)(c) and (2)(b)). This means that a person who accidentally comes across violent extremist material on the internet without any warning from the context would not engage the offence, because they would not have intended to access the material. A person would also not be considered to have 'accessed' violent extremist material if a defence in section 474.45D is established.

(c) why it is necessary for the definition of 'serious violence' in the context of the new offences to encompass all acts that currently constitute a terrorist act, noting that some acts would not fall within the ordinary meanings of 'violent' and 'extremist', such as serious electronic interference with financial systems

The definition of 'serious violence' in subsection 474.45A(2) is action that falls within subsection 100.1(2) of the Criminal Code. This ensures that violent extremist material includes only material that deals with conduct so serious as to engender public harm purely through its possession or distribution. The definition of 'serious violence' of the purpose of the new offences has been modelled on the definition of that term in the broader definition of 'terrorist act' to ensure that harmful material, including instructional terrorist material and terrorist recruitment material, is appropriately covered.

In relation to the specific example identified by the Committee, electronic interference may also be addressed through other existing offences including offences in the Criminal Code Act 1995 for unauthorised modification of data and creation and distribution of malicious software (Parts 10.7 and 10.8).

(d) whether viewing or sharing material relating to the advocacy of regime change or the planning of civil disobedience or acts of political protest, even if possibly contentious or extreme, would be captured by the proposed offences

Paragraph 474.45D(1)(h) would provide a defence to the offences in new subsections 474.45B(1) and 474.45C(1) where the conduct is for the purpose of

advocating a lawful procurement of a change to any matter established by law, policy or practice in any Australian jurisdiction or in a foreign country (or part thereof), and the conduct is reasonable in the circumstances for that purpose.

This could include, for example, material published by a civil society body for the purpose of denouncing the laws, policy or practice that enabled the conduct recorded or streamed in that material.

(e) with respect to the journalist defence, why is it necessary to exclude citizen or independent journalists working in good faith but not strictly in a professional capacity

The defence in new 474.45D(1)(e) would exempt bonda [sic] fide journalism from the effect of the offences in section 474.45B and 474.45C. The public interest requirement and requirement that the journalist is working in a professional capacity are intended to operate to exclude material that has been published by individuals or organisations for the purpose of, for example, inciting violence or promoting hatred, but which purports to be journalism.

(f) with respect to the defence of action done for 'scientific, academic or historical research', would this apply to people conducting research in a non-professional context but out of personal interest

In order for the defence in paragraph 474.45D(1)(d) to apply, the Court must consider that the conduct was reasonable in the circumstances for the purpose of conducting the research. The legislation does not require the research to be done in a specific context, rather that the conduct is reasonable for the purpose for which the research is undertaken.

(g) what other safeguards beyond the defences to the offences are in place to ensure the proposed offences do not unduly restrict a person's right to freedom of expression

Together with the defences, the definition of violent extremist material would ensure that the new offences for using a carriage service to deal with this material would only restrict a person’s right to freedom of expression to an extent that is reasonable, proportionate and adapted for the purpose of protecting national security, public order and the rights and freedoms of others. In order to constitute violent extremist material:

- the material must depict or describe, provide instruction on engaging in, or support or facilitate serious violence (new subsection 474.45A(1)(a))
- a reasonable person would need to consider that, in all the circumstances, the material is intended to, directly or indirectly, advance a political, religious or ideological cause (new subsection 474.45A(1)(b)), and

- a reasonable person would need to consider that, in all the circumstances, the material is intended to assist, encourage or induce a person in relation to an intimidatory act (new subsection 474.45A(1)(c)).

It is appropriate that the offences restrict a person's ability to use a carriage service to seek, receive and impart material that meets the above criteria, as this is necessary and reasonable to achieve the objective of preventing the use of violent extremist material to encourage and instruct individuals in the commission of violent acts, and radicalise vulnerable individuals to violent extremist ideologies.

(h) what other, less rights restrictive approaches have been considered and why are they not appropriate to achieve the stated objectives

Commonwealth counter-terrorism investigations often identify individuals viewing and sharing violent extremist material, which the AFP consider can be a precursor or catalyst for an escalation to violence, criminal offending or acts of terrorism. Such material can contribute to a person engaging in conduct consistent with violent ideologies, planning attacks and mobilisation of groups. For example, the broad dissemination of violent extremist material online allows groups to magnify their impact.

The Government considered less rights restrictive approaches in the development of the Bill but determined they were not able to achieve the policy intent.

(e) how the measure is compatible with the rights of the child, noting that the statement of compatibility does not provide an assessment with respect to these rights

The Convention on the Rights of the Child provides that States parties should establish a minimum age of criminal responsibility of at least 14 years of age and, where appropriate and desirable and in a manner that respects human rights, deal with children accused of a crime without resorting to judicial proceedings, such as by way of diversionary programs. The violent extremist material offences limit the rights of the child by subjecting children to judicial proceedings. This limitation is necessary and reasonable to achieve the legitimate objective of preventing the use of extremist material to encourage and instruct individuals in the commission of violent acts, and radicalise vulnerable individuals (including children) to violent extremist ideologies.

Under the Crimes Act 1914 (Cth) (Crimes Act), the minimum age of criminal responsibility for Commonwealth offences is 10 years of age, meaning that a child under the age of 10 years old cannot be liable for an offence against the law of a Commonwealth. Children that are older than 10 years but under 14 years of age can only be liable for an offence against a law of the Commonwealth if the child knows that his or her conduct is wrong. The burden

of proving that the child has sufficient capacity to know that the act was one they ought not to do or make is on the prosecution. A number of Australian jurisdictions are actively considering, or have committed to, raising the minimum age of criminal responsibility.

The Bill includes a safeguard that the Attorney-General consent to the prosecution of a person under the age of 18. This provides an opportunity for the Attorney-General to consider the appropriateness of the prosecution's consideration of all the circumstances of the case, including the context of the conduct, the particular circumstances of the child, and the need to protect the broader community from the impacts of violent extremist material.

Where children are involved in the alleged or the commission of offending, the AFP with their partners will consider diversionary tactics where appropriate. The AFP works collaboratively with state, territory and Commonwealth partners in considering the most appropriate wrap-around support services available to law enforcement for children.

(i) why is it appropriate to subject children to criminal liability with respect to the offences relating to the use of a carriage service for violent extremist material, noting the position under international human rights law that non-judicial alternatives should be implemented, and the minimum age of criminal responsibility should be at least 14 years of age

The Government notes paragraphs 21 to 25 of the AFP submission to the Parliamentary Joint Committee on Intelligence and Security's review of the Bill, which noted the increasing prevalence of young people being investigated for terrorism offences. The submission also discusses youth radicalisation and how the AFP manages this risk, including by pursuing avenues other than criminal liability.[141]

It is appropriate to subject children to criminal liability with respect to these offences given this increasing prevalence. By attaching criminality to the nature of material possessed, the offences would reflect the harm that is inherent in violent extremist material. Violent extremist material is harmful because it facilitates radicalisation, and may encourage and assist in planning violent acts. Without these offences, law enforcement will be limited in its ability to prosecute people for dealing with violent extremist material. These offences would facilitate law enforcement intervention at an earlier stage in an individuals' progress to violent radicalisation and provider [sic] greater opportunities for rehabilitation and disruption of violent extremist networks.

A number of Australian jurisdictions are actively considering, or have committed to, raising the minimum age of criminal responsibility. Under the

[141] Australian Federal Police submission 102, Submissions – Parliament of Australia (aph.gov.au).

> Crimes Act, the minimum age of criminal responsibility for Commonwealth offences is 10 years of age, meaning that a child under the age of 10 years old cannot be liable for an offence against the law of a Commonwealth.
>
> Children that are older than 10 years but under 14 years of age can only be liable for an offence against a law of the Commonwealth if the child knows that his or her conduct is wrong. The burden of proving that the child has sufficient capacity to know that the act was one they ought not to do or make is on the prosecution.
>
> Where children are involved in the alleged or the commission of offending, the AFP and the CDPP have discretion about whether to progress a matter for investigation or prosecution. The AFP with their partners will consider diversionary tactics where appropriate. The AFP works collaboratively with state, territory and Commonwealth partners in considering the most appropriate support services available to law enforcement for children. Investigative decisions may also involve engagement with children and their parents or guardians to deter them from committing further offences or prevent further radicalisation, rather than progressing charges. This has the potential to curb further offending and issuing a caution may induce a more positive outcome for the young person rather than treating them as an alleged criminal.
>
> The Government considers that these safeguards will minimise the risk of inappropriate charging and prosecution of minors in relation to the new offences.

Concluding comments

International human rights legal advice

Legitimate objective and rational connection

2.102 The initial analysis noted that the stated objectives of national security, public order and the rights and freedoms of others are capable of constituting legitimate objectives for the purposes of international human rights law, noting that restrictions on the right to freedom of expression may be permitted on these grounds. However, in order to establish whether these are legitimate objectives in the context of this measure, it must also be demonstrated that the measure is necessary and addresses an issue of public or social concern that is pressing and substantial enough to warrant limiting rights. In particular, the initial analysis raised questions as to whether it is necessary to criminalise all the circumstances that these proposed offences may apply to. It noted that it is not clear that all material that constitutes violent extremist material is in fact of such a nature as to be likely to facilitate violent radicalisation and the planning of violent acts, noting that this is the justification provided in the explanatory memorandum for attaching

criminality to all material that falls within the definition of 'violent extremist material'.[142] The definition of 'violent extremist material' is broad and encompasses acts that cause harm to persons as well as serious damage to property or serious interference with, or disruption to, various electronic systems, including transport and financial systems. It could include, for example, material that describes the serious interference with a financial system of a foreign country by a foreign organisation seeking to advance its political cause and encourage others to associate with it.

2.103 As to why it is appropriate to apply such a broad definition, the Attorney-General advised that this ensures that violent extremist material includes only material that deals with conduct so serious as to engender public harm purely through its possession or distribution. He stated that the definition of 'serious violence' for the purpose of the new offences has been modelled on the definition of that term in the broader definition of 'terrorist act' to ensure that harmful material, including instructional terrorist material and terrorist recruitment material, is appropriately covered. However, as discussed further below (at paragraphs [2.104] and [2.104]), the current definition of 'violent extremist material' encompasses material that falls outside of the ordinary meanings of 'violent' and 'extremist' and so may not necessarily amount to conduct so serious as to engender public harm purely through its possession and distribution. There therefore remains a risk that all material potentially captured by this offence would not necessarily be of such a nature as to justify prohibition on the grounds of national security, public order or the rights of others.

Proportionality

2.104 A key factor in assessing proportionality is whether the proposed limitations are sufficiently circumscribed. The breadth of the measure, including the forms of expression that would be restricted, is relevant in this regard. As outlined in the initial analysis, the bill seeks to prohibit 'violent extremist material', which, among other things, would describe or depict, provide instruction on engaging in, or support or facilitate 'serious violence'. As set out above (in paragraph [2.91]), 'serious violence' captures a broad range of acts, including material that describes serious damage to property, the serious interference with a financial system or the serious disruption of a transport system. The explanatory memorandum states that the material captured is intended to be 'extremist', including material that espouses or promotes extreme ideas, beliefs and attitudes and may be used to radicalise others to a particular ideology.[143] The Attorney-General advised that the offence is intended to only capture material that deals with conduct so serious as to engender public harm purely through its possession and distribution. However, as

142 Explanatory memorandum, p. 51.

143 Explanatory memorandum, p. 52.

currently drafted the measure would encompass a considerably wider range of material, including material that arguably falls outside of the ordinary meanings of 'violent' and 'extremist'.[144] It is noted there are many political regimes that may be characterised as oppressive and non-democratic, and people may hold different opinions as to the desirability or legitimacy of such regimes. Accessing material that depicts the advocacy of regime change or the planning of civil disobedience or acts of political protest, even if possibly contentious or extreme, may therefore be captured by the proposed offences. For example, it appears that the following actions may subject a person to criminal liability for the offence of using a carriage service for violence extremist material, punishable by up to five years' imprisonment:

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

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

commenced[145] and did so for personal interest (rather than academic or historical research).[146]

2.105 As to whether the above scenarios would be captured by the offences, the Attorney-General advised that it would not be appropriate for the government to provide advice as to whether or not specific circumstances will fall within the elements of the offences. The Attorney-General noted that law enforcement has discretion to consider any relevant matters in making their decision as to whether to investigate and prosecute a matter. He stated that any referral of conduct demonstrating support for, or a tendency towards, violence would be assessed on a case-by-case basis to determine whether there was sufficient evidence to establish the elements of the offence (or whether the conduct contravened any alternative offences). However, as the proponent of legislation that limits human rights, it is incumbent on the government to advise how the legislation is intended to operate and the circumstances that are likely to be captured by the proposed offences.

2.106 Further information was also sought as to whether viewing or sharing material relating to the advocacy of regime change or the planning of civil disobedience or acts of political protest more generally would be captured by the proposed offences. The Attorney-General advised that where the conduct is for the purpose of advocating a lawful procurement of a change to any matter established by law, policy or practice in any Australian jurisdiction or in a foreign country (or part thereof), and the conduct is reasonable in the circumstances for that purpose, the defence in proposed paragraph 474.45D(1)(h) may be relied on. He stated that this could include, for example, material published by a civil society body for the purpose of denouncing the laws, policy or practice that enabled the conduct recorded or streamed in that material. While this defence would somewhat assist with proportionality, it is not clear whether it goes far enough. For example, it is not clear if it would exempt material that advocates regime change more broadly, as opposed to change of a particular law, policy or practice, or acts of civil disobedience against a state. It remains unclear if a person who accesses footage supporting Ukrainian soldiers fighting against Russia would be guilty of this offence, noting it is not clear if their actions would be considered 'lawful procurement of a change to any matter established by law, policy or practice'. There appears to remain a risk that the measure may criminalise conduct that does not appear to be illegitimate (such as those circumstances listed above). Without clarity as to the scope of the measure and its likely operation, concerns remain regarding the breadth of the measure.

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

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

2.107 Further, as noted in the initial analysis, the fault element of recklessness applies to whether the material is violent extremist material. A person is reckless if they are aware of a substantial risk that the circumstance exists (in this case, that certain material is violent extremist material), or will exist, and having regard to the circumstances known to them, it is unjustifiable to take the risk.[147] The Attorney-General advised that a person who accidentally comes across violent extremist material on the internet without any warning from the context would not be caught by the offence, because they would not have intended to access the material.[148] However, it remains unclear whether a person who views material as a result of searching for news content with respect to a violent situation overseas, such as the war in Ukraine, would be held criminally liable. In such a situation, the person intended to search for, and view, news content relating to the Ukraine war, but may not be aware of whether such material reaches the threshold of 'violent extremist material'. Given the breadth of material covered by the offences and the fact that such material does not necessarily align with the ordinary meaning of the phrases 'violent' and 'extremist' (such as, for example, being unaware that accessing citizen-journalist footage of Ukrainians fighting back against Russian forces would constitute violent extremist material), there may be a risk that the threshold for satisfying this fault element is reasonably low in practice.

2.108 The broad scope of expression captured by the offences and the wide range of circumstances in which such expression would be prohibited therefore raises significant concerns that the measure is not sufficiently circumscribed. The breadth of the measure also raises concerns regarding the extent of potential interference with rights, noting that the greater the interference, the less likely the measure is to be considered proportionate. Other factors that may exacerbate the potential interference with rights include the retrospective effect of the measure, insofar as it would not matter whether the person obtained or accessed the material using a carriage service before, on or after the commencement of the relevant offence provision.[149] In addition, the new offences are to be defined as terrorism offences, meaning that police may issue control orders against a person convicted of these offences. It is noted that the Parliamentary Joint Committee on Human Rights has previously raised concerns regarding the likely incompatibility of the control order regime with multiple rights.[150] The fact that the new offences are to be defined as terrorism offences also means that advocating the

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147 *Criminal Code Act 1995,* section 5.4.

148 See also explanatory memorandum, p. 56.

149 Schedule 2, item 6.

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

commission of the offences (e.g. 'share this link to support Ukraine's fight against Russia') may constitute the offence of advocating terrorism (discussed further below from paragraph [2.123]).

2.109 As to the existence of safeguards, the initial analysis noted that the defences (as outlined in paragraph [2.94]) to the offences would operate as a safeguard, although questions were raised as to whether this safeguard would be adequate in all circumstances. In particular, further information was sought regarding the defences relating to journalists and 'scientific, academic or historical research'. The Attorney-General advised that the requirement that journalists be working in a professional capacity is intended to operate to exclude material that has been published by individuals or organisations for the purpose of, for example, inciting violence or promoting hatred, but which purports to be journalism. However, as discussed above (at paragraph [2.74]), the requirement that journalists must be working in a professional capacity appears to exclude good faith citizen or independent journalists, raising concerns that the scope of this defence is too narrow.

2.110 As to whether the defence of conduct done for 'scientific, academic or historical research' would apply to people conducting research in a non-professional context but out of personal interest, the Attorney-General advised that in order for the defence to apply, the conduct must be reasonable in the circumstances for the purpose of conducting the research. He stated that the defence does not require the research to be done in a specific context, rather that the conduct is reasonable for the purpose for which the research is undertaken. While it appears that this defence is not limited to research undertaken in a strictly academic context, it is not clear how the requirement that the conduct be reasonable in the circumstances is to be interpreted in practice, noting that the explanatory materials do not provide any guidance with respect to this issue.[151]

2.111 Further information was also sought regarding any other safeguards that are in place beyond the defences to the offences. The Attorney-General advised that together with the defences, the definition of violent extremist material would ensure that the new offences for using a carriage service to deal with this material would only restrict a person's right to freedom of expression to an extent that is reasonable, proportionate and adapted for the stated purpose of the measure. However, as outlined above (in paragraphs [2.103]–[2.104]), there are significant concerns regarding the breadth of the definition of violent extremist material and as such this definition does not offer any safeguard value.

2.112 With respect to the rights of the child, the main safeguard appears to be the requirement that the Attorney-General provide their consent to a prosecution of a child

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151 Explanatory memorandum, p. 60.

for offences relating to the use of violent extremist material.[152] The Attorney-General advised that this requirement would allow him to consider the appropriateness of a prosecution having considered the circumstances of the case, including the context of the conduct, the circumstances of the child, and the need to protect the broader community from the impacts of violent extremist material.

2.113 As noted in the initial analysis, while this safeguard may assist with proportionality, a child may still be arrested and remanded in custody in connection with an offence before the necessary consent has been given.[153] As outlined above (in paragraph [2.52]), exposing children to the criminal justice system causes significant harm and detention, including pre-trial detention, should be a last resort and for the shortest time possible. The UN Committee on the Rights of the Child has stated that '[p]retrial detention should not be used except in the most serious cases, and even then only after community placement has been carefully considered'.[154] As a consequence of classifying the new offences as terrorism offences, there would be a presumption against bail unless exceptional circumstances are established to justify bail.[155] In determining whether exceptional circumstances exist to justify granting bail to a child, the bail authority must have regard to the protection of the community as the paramount consideration; and the best interests of the person as a primary consideration.[156] Prioritising the protection of the community above the best interests of the child does not appear to be compatible with Australia's obligation to ensure that, in all actions concerning children, the best interests of the child are a primary consideration, meaning 'the child's best interests may not be considered on the same level as all other considerations'.[157] Thus, given the legislative context in which this measure would operate, requiring the Attorney-General's consent prior to commencing prosecution does not appear to be a sufficient safeguard in and of itself with respect to the rights of the child.

2.114 Further, as discussed above (in paragraphs [2.77]–[2.80]), it is not clear that the measure would pursue the least rights restrictive approach with respect to the rights of the child, noting the position under international human rights law that States should implement non-judicial alternatives to the prosecution and detention of children accused

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152 Explanatory memorandum, p. 62.

153 Schedule 2, item 3, proposed subsection 474.45E(2).

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

155 *Crimes Act 1914*, section 15AA.

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

157 UN Committee on the Rights of the Child, *General comment 14 on the right of the child to have his or her best interests taken as a primary consideration* (2013); see also *IAM v Denmark*, UN Committee on the Rights of the Child Communication No.3/2016 (2018) [11.8].

of, and charged with, terrorism offences, and increase the age of criminal responsibility to at least 14 years of age.[158] As to the appropriateness of applying these offences to children, the Attorney-General advised that this is appropriate given the increasing prevalence of young people being investigated for existing terrorism offences and the trend of youth radicalisation. The Attorney-General stated that the relevant authorities have discretion about whether to progress a matter involving a child for investigation or prosecution and consider appropriate support services and diversionary options, such as the issuing of a caution. As noted above (in paragraph [2.77]), if such diversionary options were implemented, they may serve as an important safeguard to mitigate the risk of significant harm caused to children who are exposed to the criminal justice system.[159] However, as a discretionary safeguard, it is unlikely to be sufficient on its own to protect the rights of the child, noting that discretionary safeguards are less stringent than the protection of statutory processes as there is no requirement to follow it.

2.115 Thus, in the absence of any requirement to consider non-judicial alternatives to prosecution and detention of children or any other legislative safeguards to protect the rights of the child beyond the requirement that the Attorney-General consent to the prosecution, concerns remain that potentially subjecting children as young as 10 years old to criminal liability for accessing or possessing 'violent extremist material' (particularly noting the concerns about the breadth of this definition) would not be the least rights restrictive approach.

2.116 In conclusion, while the stated objectives of national security, public order and the rights and freedoms of others are capable of constituting legitimate objectives for the purposes of international human rights law, given the breadth of the measure, there remains a risk that all material potentially captured by the measure would not necessarily be of such a nature as to justify prohibition on the grounds of national security, public order or the rights of others. There are also significant concerns that the measure may criminalise conduct that does not appear to be illegitimate, such as material relating to the advocacy of regime change or the planning of civil disobedience or acts of political protest, even if possibly unlawful, contentious or extreme. Without clarity as to the scope of the measure and its likely operation, including the type of material captured by the offences and the circumstances in which 'accessing' such material would be criminal, it is not possible to conclude that the measure is sufficiently circumscribed. While the

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

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

defences and exceptions to the offences would assist with proportionality, there are concerns that some of the defences are too narrowly drafted, thereby reducing their safeguard value. It is therefore not clear that the existing safeguards are sufficient to ensure that any limitation on human rights is proportionate. As such, the measure does not appear to be compatible with the right to freedom of expression. Regarding the rights of the child, noting the clear position under international human rights law with respect to raising the minimum age of criminal responsibility to at least 14 years and prioritising the best interests of the child, including by way of non-judicial alternatives to prosecution and detention of children accused of terrorist offences, the measure does not appear to be compatible with the rights of the child.

Committee view

2.117 The committee thanks the Attorney-General for this response. The committee reiterates that criminalising the use of a carriage service to access, obtain, share, possess and control 'violent extremist material' could promote a number of human rights, insofar as it would deter and prevent terrorist-related conduct and violence. However, the measure would also engage and limit the right to freedom of expression and, where applied to children, the rights of the child.

2.118 The committee considers that the measure pursues the legitimate objectives of national security, public order and the rights and freedoms of others. The committee notes with concern the Attorney-General's advice regarding the increasing prevalence of young people being radicalised and investigated for terrorism offences and considers the prevention of such radicalisation to be an important aim. However, the committee notes that given the breadth of the measure, in particular the broad definition of 'violent extremist material', there remains a risk that all material potentially captured by the measure would not necessarily be of such a nature so as to justify prohibition on the grounds of national security, public order or the rights of others.

2.119 The committee is concerned that these proposed new offences could capture conduct that does not appear to be illegitimate (for example, criminalising a person accessing material via social media of footage of protestors overseas taking unlawful action to overthrow unlawful regimes). The committee considers that there are some important safeguards accompanying the measure, such as the various defences and exceptions to the offences. However, it has not been demonstrated that these safeguards alone would be sufficient to ensure that any limitation on human rights is proportionate. As such, the measure does not appear to be compatible with the right to freedom of expression. With respect to the rights of the child, the committee considers that in the absence of any requirement to consider non-judicial alternatives to prosecution and detention of children or any other legislative safeguards to protect the rights of the child

beyond the requirement that the Attorney-General consent to the prosecution, the measure does not appear to be compatible with the rights of the child.

Suggested action

2.120 If this measure were to proceed notwithstanding the significant human rights concerns raised above, the committee considers the proportionality of this measure may be assisted were the bill amended to:

(a) narrow the definition of 'violent extremist material' such that it more closely aligns with the ordinary meanings of the terms 'violent' and 'extremist', including to confine it to violent actions against people and not property or electronic systems;

(b) provide clearer guidance as to the type of material captured by the offences and the circumstances in which 'accessing' such material would be criminal;

(c) broaden the exception to the offences with respect to journalists to exempt citizen journalists making a news or current affairs report that is in the public interest and made in good faith;

(d) broaden the exemption to the offences with respect to conduct for the purpose of advocating change to ensure it would encompass conduct that seeks to overthrow unlawful foreign regimes;

(e) only apply the offences with respect to using a carriage service for violent extremist material to children over the age of 14 years, as per the recommended age of criminal responsibility under international human rights law;

(f) require diversionary options to be considered prior to prosecuting a child defendant in order to avoid exposing children to the criminal justice system;

(g) require a review of Schedule 2 within two years to assess whether the provisions are operating as intended in practice and are necessary.

2.121 The committee recommends that the statement of compatibility be updated to reflect the information provided by the Attorney-General.

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

Expanding the offence of advocating terrorism

2.123 The bill seeks to expand the existing offence of advocating terrorism[160] and increase the applicable penalty from five to up to seven years' imprisonment.[161] Currently, under section 80.2C of the Criminal Code, a person commits an offence if they advocate the doing of a terrorist act or the commission of a terrorism offence, and they engage in that conduct reckless as to whether another person will engage in a terrorist act or commit a terrorism offence.[162] A person advocates the doing of a terrorist act or the commission of a terrorism offence if they counsel, promote, encourage or urge the doing of a terrorist act or the commission of a terrorism offence.[163] This bill seeks to expand this definition of 'advocates' to include additional conduct that would constitute advocating a terrorist act. In particular, it would add: providing instruction on the doing of a terrorist act or the commission of a terrorist offence; or praising the doing of a terrorist act or the commission of a terrorism offence in circumstances where there is a substantial risk that such praise might lead other persons to commit terrorist acts or offences.[164]

Summary of initial assessment

Preliminary international human rights legal advice

Rights to life and security of person

2.124 To the extent that broadening the offence of advocating terrorism would deter and prevent terrorist acts and offences, the measure could promote the rights to life and security of person (as set out above in paragraph [2.46]).[165] The statement of compatibility states that the measure would promote these rights by criminalising

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

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

162 *Criminal Code Act 1995*, subsection80.2C(1).

163 *Criminal Code Act 1995*, subsection80.2C(3).

164 Schedule 3, item 2.

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

conduct that instructs on, or engenders a substantial risk that a person might be led to engage in, an action which could cause a person's death or endanger a person's life.[166]

Right to freedom of expression and rights of the child

2.125 By criminalising certain forms of expression, including praising the doing of a terrorist act or offence, the measure would engage and limit the right to freedom of expression, which includes freedom to seek, receive and impart information and ideas (as set out in paragraphs [2.49] and [2.50]).[167] This is acknowledged in the statement of compatibility.[168] Additionally, as the new offences would apply to children, the measures would engage and limit the rights of the child (as set out in paragraphs [2.51] and [2.52]). The statement of compatibility does not provide an assessment as to the compatibility of the measure with the rights of the child.

2.126 These rights may generally be subject to permissible limitations where the limitation pursues a legitimate objective, is rationally connected to that objective and is a proportionate means of achieving that objective.

Committee's initial view

2.127 The committee noted that expanding the existing offence of advocating terrorism may promote human rights, including the rights to life and security of person, to the extent that it would prevent terrorist-related conduct and violence. However, the committee also noted that the measure would expand the scope of expression that would be restricted and so would engage and limit the right to freedom of expression, and if applied to children, the rights of the child. The committee considered further information was required to assess the compatibility of the measure with these rights. The Attorney-General's response sets out the questions asked of the Attorney-General.

2.128 The full initial analysis is set out in *Report 8 of 2023*.

Attorney-General's response[169]

2.129 The Attorney-General advised:

> (a) why the measure is necessary and in particular, why the existing legislation is insufficient to achieve the stated objective, noting that there are a number

166 Statement of compatibility, p. 8.

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

168 Statement of compatibility, pp. 13–16.

169 The Attorney-General's response to the committee's inquiries was received on 21 August 2023. This is an extract of the response. The response is available in full on the committee's webpage.

of existing offences in the Criminal Code that appear to capture the conduct sought to be criminalised by the measure

The glorification of terrorism and violent extremism through praise has been of increasing concern to Commonwealth law enforcement and intelligence agencies in recent years. For example, following the March 2019 Christchurch mosque shooting, numerous individuals used the internet to share video footage of the atrocity, and the perpetrator's manifesto – idealising the perpetrator and his actions and ideologies. New paragraph 80.2C(3)(c) is necessary as it recognises that conduct of this nature could lead a person to engage in terrorism, and where it occurs in circumstances where there is a substantial risk of this, it is justifiably criminal.

(b) whether there will be any guidance provided with respect to the interpretation of key terms in the measure, including 'instruction', 'praises' and whether there is a 'substantial risk that such praise might have the effect of leading another person to engage in a terrorist act or commit a terrorism offence'

The terms 'instruction' and 'praises' are not defined and would take their ordinary meaning. These terms are undefined to ensure that they capture a rage of conduct by which a person could provide instruction on, or praise, the doing of a terrorist act or commission of a terrorist offence. For example, instruction could include providing or distributing a guide or manual on how to carry out a terrorist act; filming a video stepping out how to perform a beheading; or guiding someone on how to obtain material in order to engage in a terrorist act.

The Bill is intentionally silent on the contexts in which the qualifier that a substantial risk that praise might have the effect of leading another person to engage in a terrorist act or commit a terrorism offence would apply. This would be considered on a case-by-case basis to give the courts maximum discretion to consider any matters it considers relevant in making an assessment about whether the elements of the offence are satisfied.

(c) what other safeguards exist to ensure the measure does not unduly restrict a person's right to freedom of expression

The right to freedom of expression is limited proportionately as the Bill would only criminalise praising the doing of a terrorist act or commission of a terrorism offence where the praising has occurred in circumstances where there is a substantial risk that such praise might have the effect of leading another person to engage in a terrorist act or commit a terrorism offence. Where such a risk exists, restricting a person's right to freedom of expression by criminalising this praising serves the legitimate objective of preventing the commission of terrorist acts or offences, which can have extremely grave

consequences including causing deaths, and promotes other rights. Where there is no such substantial risk, the praising of terrorist acts and offences would not be caught by the offence.

(d) what other, less rights restrictive approaches have been considered and why are they not appropriate to achieve the stated objectives

The measure that has been introduced in this Bill is the least rights-restrictive option considered that would achieve the stated objectives. The alternative options considered were:

- Criminalising the praising the doing of a terrorist acts or the commission of a terrorism offence without the qualifier that there must be a substantial risk that such praise might have the effect of leading another person to engage in a terrorist act or commit a terrorism offence.
- Establishing a standalone offence for the glorification of terrorism.

Neither of these options were pursued because the approach taken in the Bill was identified as a less rights-restrictive means of addressing the significant concerns identified by law enforcement regarding the glorification of terrorism and violent extremism.

Concluding comments

International human rights legal advice

Legitimate objective and rational connection

2.130 The initial analysis noted that the general objective of preventing terrorism is capable of constituting a legitimate objective for the purposes of international human rights law, and criminalising the instruction and praising of a terrorist act or offence may be effective to achieve this objective. However, it must also be demonstrated that the measure is necessary to achieve the legitimate objective.[170] In this regard, the Attorney-General advised that glorification of terrorism and violent extremism through praise has been of increasing concern to Commonwealth law enforcement and intelligence agencies in recent years. The Attorney-General stated that the measure is necessary as it recognises that conduct of this nature could lead a person to engage in terrorism, and where it occurs in circumstances where there is a substantial risk of this, it is justifiably criminal. While the Attorney-General has articulated the substantial public concern that the measure seeks to address, in very similar terms as to what was set out in the explanatory memorandum, he did not address why existing legislation is inadequate to address this concern. As noted in the initial analysis, there appear to be existing provisions

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

in the Criminal Code that may capture the kind of conduct sought to be criminalised by this measure. For example, it is currently an offence to urge violence against the Commonwealth, a State or a Territory or an authority of the Commonwealth government; or a targeted group or a person of a targeted group distinguished by their race, religion, nationality, national or ethnic origin or political opinion.[171] There are also various offences relating to the provision and receipt of training in connection with the planning of a terrorist act or in connection with a terrorist organisation, as well as other offences relating to the planning or preparation for a terrorist act.[172] These existing offences may capture conduct relating to providing instruction on, or praising, terrorism.

2.131 Further, it is not clear why the existing definition of 'advocates' is insufficient, as arguably the terms 'counsels, promotes, encourages or urges' could encompass the instruction on, or the praising of, the doing of a terrorist act or the commission of a terrorism offence. The explanatory memorandum accompanying the bill that first introduced the offence of advocating terrorism explained that the expressions counselling, promoting, encouraging or urging have their ordinary meaning and should be interpreted broadly.[173] The further information provided by the Attorney-General has not demonstrated why the measure is necessary in light of existing offences that appear to capture the conduct sought to be criminalised. In the absence of this information it is not possible to conclude that the measure pursues a legitimate objective that is necessary for the purposes of international human rights law.

Proportionality

2.132 A key consideration in assessing proportionality is whether the measure is sufficiently circumscribed. This requires consideration of the breadth of the measure. The explanatory memorandum states that the terms 'instruction' and 'praises' are

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

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

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

intentionally not defined in the bill and should take their ordinary meaning.[174] The Attorney-General advised that these terms are undefined to ensure that they capture a rage of conduct by which a person could provide instruction on, or praise, the doing of a terrorist act or commission of a terrorist offence. For example, instruction could include providing or distributing a guide or manual on how to carry out a terrorist act; filming a video stepping out how to perform a beheading; or guiding someone on how to obtain material in order to engage in a terrorist act. As to whether 'praise' has occurred in circumstances where there is a substantial risk that it might lead to another person committing terrorism, the explanatory memorandum states that it is a matter to be considered on a case-by-case basis and the legislation is intentionally silent on how this is to be determined to give the court maximum discretion in making this assessment.[175] The Attorney-General reiterated that the bill is intentionally silent on the contexts in which the qualifier would apply. Without clear guidance with respect to the interpretation of key terms in the measure, concerns remain that the measure is not sufficiently circumscribed.

2.133 Further, the proposed definition of 'advocates' is very broad, as it encompasses a wide range of conduct and, as noted above, there is no clear legislative guidance as to how key terms, such as 'praises', are to be interpreted. It is also noted that the actions to which the conduct of praising etc. would relate, namely actions constituting a terrorist act or terrorism offence, are also very broad, including, for example, causing serious property damage and seriously disrupting an electronic information system (as set out above in paragraph [2.91]).[176] As such, there may be a risk that the scope of expression restricted by the measure is overly broad. This is of particular concern when noting the UN Human Rights Committee's advice in the context of counter-terrorism measures that:

> Such offences as "encouragement of terrorism" and "extremist activity" as well as offences of "praising", "glorifying", or "justifying" terrorism, should be clearly defined to ensure that they do not lead to unnecessary or disproportionate interference with freedom of expression. Excessive restrictions on access to information must also be avoided.[177]

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174 Explanatory memorandum, p. 64.

175 Explanatory memorandum, p. 64.

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

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

2.134 It is also noted that the Parliamentary Joint Committee on Human Rights raised concerns regarding the breadth of the original offence of advocating terrorism when it was first introduced.[178] In particular, concerns were raised that the offence is overly broad in its application and may result in the criminalisation of speech and expression that does not genuinely advocate the commission of a terrorist act or terrorism offence. This is because the offence itself requires only that a person is 'reckless' as to whether their words will cause another person to engage in terrorism (rather than the person 'intends' that this be the case). Given the measure in this bill expands the forms of expression that may be captured by this offence, these concerns remain relevant.

2.135 The primary safeguard identified in the statement of compatibility is the 'substantial risk' qualifier, that is, the praising of terrorism will only constitute an offence if there is a substantial risk that such praise *might* have the effect of leading another person to engage in a terrorist act or to commit a terrorism offence.[179] It is not clear how 'substantial risk' is to be interpreted, noting that the Attorney-General's response did not clarify this issue, and the inclusion of the term 'might' suggests that the threshold for establishing whether praise would lead another person to engage in terrorism may not be particularly high. The Attorney-General did not identify any other safeguards accompanying the measure. As such, it is not clear that the 'substantial risk' qualifier alone would be a sufficient safeguard.

2.136 Further, as to whether other, less rights restrictive approaches were considered, the Attorney-General advised that two alternative options were considered, namely, criminalising the praising of the doing of a terrorist act or the commission of a terrorist offence without the 'substantial risk' qualifier or establishing a standalone offence for the glorification of terrorism. The Attorney-General advised that neither of these options were pursued because the approach taken in the bill was identified as the least rights restrictive. However, detailing options that involved a greater interference with rights does not appear to answer the question as to whether there were any other *less* rights restrictive alternatives.

2.137 Further, as discussed above (in paragraphs [2.77]–[2.80]), it is not clear that the measure would pursue the least rights restrictive approach with respect to the rights of the child, noting the position under international human rights law that states should implement non-judicial alternatives to prosecution and detention of children accused of,

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178 Parliamentary Joint Committee on Human Rights, *Fourteenth Report of the 44th Parliament*, Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014 (28 October 2014) pp. 50–52.

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

and charged with, terrorism offences, and increase the age of criminal responsibility to at least 14 years of age.[180]

2.138 In conclusion, while the general objective of preventing terrorism is capable of constituting a legitimate objective, it has not been demonstrated why the measure is necessary in light of existing offences that appear to capture the conduct sought to be criminalised. There remain significant concerns regarding the breadth of the measure, noting that there is no clear legislative guidance with respect to key terms, such as 'instruction' and 'praises', and the proposed definition of 'advocates' is very broad. The primary safeguard accompanying the measure does not appear to be sufficient on its own and it is not clear that the measure pursues the least rights restrictive approach with respect to the rights of the child. As such, the measure does not appear to be compatible with the right to freedom of expression and the rights of the child, noting the clear position under international human rights law with respect to raising the minimum age of criminal responsibility to at least 14 years and prioritising the best interests of the child, including by way of non-judicial alternatives to prosecution and detention of children accused of terrorist offences.

Committee view

2.139 The committee thanks the Attorney-General for this response. The committee notes that expanding the existing offence of advocating terrorism may promote the rights to life and security of person to the extent that it would prevent terrorist-related conduct and violence. However, the committee also notes that the measure would expand the scope of expression that would be restricted and so would engage and limit the right to freedom of expression, and if applied to children, the rights of the child.

2.140 The committee considers that while the measure generally pursues the important aim of preventing terrorism, the Attorney-General has not provided sufficient advice to make it clear why existing legislation is insufficient to achieve this objective and whether the measure represents a proportionate limitation on these rights. The committee notes that in the absence of clear guidance with respect to the interpretation of key terms in the measure, concerns remain that the measure may not be sufficiently circumscribed. The committee notes that while the 'substantial risk' qualifier may offer some safeguard value, it is not sufficient of itself to ensure that any limitation on rights would be proportionate in all circumstances. As such, the committee considers that the measure does not appear to be compatible with the right to freedom of expression and the rights

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

of the child, noting the clear position under international human rights law with respect to raising the minimum age of criminal responsibility to at least 14 years and prioritising the best interests of the child.

Suggested action

2.141 If this measure were to proceed notwithstanding the significant human rights concerns raised above, the committee considers the proportionality of this measure may be assisted were the bill amended to:

(a) provide guidance as to the interpretation of key terms in the measure, including 'instruction, 'praises' and whether there is a 'substantial risk that such praise might have the effect of leading another person to engage in a terrorist act or commit a terrorism offence';

(b) only apply the offence of advocating terrorism to children over the age of 14 years, as per the recommended age of criminal responsibility under international human rights law;

(c) require diversionary options to be considered prior to prosecuting a child defendant in order to avoid exposing children to the criminal justice system;

(d) require a review of Schedule 3 within two years to assess whether the provisions are operating as intended in practice and are necessary.

2.142 The committee recommends that the statement of compatibility be updated to reflect the information provided by the Attorney-General.

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

International Organisations (Privileges and Immunities) Amendment Bill 2023[181]

Purpose	This bill seeks to amend the *International Organisations (Privileges and Immunities) Act 1963* to provide a legislative basis for the enactment of regulations to: • declare an organisation of which Australia is not a member as an international organisation under the Act; • confer privileges and immunities on categories of officials not prescribed in the Act, where requested by an international organisation and agreed to by Australia; and • increase flexibility in granting privileges and immunities to international organisations and connected persons
Portfolio	Foreign Affairs and Trade
Introduced	Senate, 21 June 2023
Rights	Right of access to courts and tribunals; right to an effective remedy; torture and inhuman treatment

2.144 The committee requested a response from the minister in relation to the bill in *Report 8 of 2023*.[182]

Extending privileges and immunities

2.145 This bill seeks to amend the *International Organisations (Privileges and Immunities) Act 1963* (the Act) to permit an organisation of which two or more countries other than Australia are members, or that is constituted by two or more persons representing countries other than Australia, to be declared, by way of regulations, to be an international organisation to which the Act applies.[183] This would have the effect of

181 This entry can be cited as: Parliamentary Joint Committee on Human Rights, International Organisations (Privileges and Immunities) Amendment Bill 2023, *Report 9 of 2023*; [2023] AUPJCHR 91.

182 Parliamentary Joint Committee on Human Rights, *Report 8 of 2023* (2 August 2023) pp. 69-77.

183 Schedule 1, item 5.

permitting Australia to confer privileges and immunities under the Act on international organisations of which Australia is not a member.[184]

2.146 The bill also seeks to amend the Act to permit the conferral of privileges and immunities under the Act,[185] by way of regulations, on persons connected in a specified way with an international organisation and on persons who have ceased to be connected with such an organisation.[186] The effect of this amendment would be to extend immunities and privileges to categories of officials not prescribed in the Act, where requested by an international organisation and agreed to by Australia.[187] The Act allows for the grant of both functional immunity (that is, immunity that attaches to those acts or functions undertaken by an individual in their official capacity as an officer of an international organisation) and personal immunity (that is, an absolute immunity attaching to all acts undertaken in an official or private capacity both before and during office).[188] The Act therefore allows individuals to be conferred with immunity from personal arrest or detention, and from suit and from other legal process.[189]

Summary of initial assessment

Preliminary international human rights legal advice

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

2.147 By extending privileges and immunities to international organisations to which Australia is not a member and to persons representing such organisations, as well as other categories of officials that are to be prescribed by regulations, the bill would engage and limit the right of access to courts and tribunals – an element of the right to equality before

184 Explanatory memorandum, p. 4.

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

186 Schedule 2, item 3.

187 Explanatory memorandum, pp. 5–6.

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

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

courts and tribunals, as well as the right to an effective remedy and Australia's obligations to investigate and prosecute (or extradite) persons alleged to have committed torture.[190] This is acknowledged in the statement of compatibility.[191]

2.148 The right to equality before courts and tribunals encompasses the right of access to the courts in cases of determination of criminal charges and rights and obligations in a suit at law.[192] The UN Human Rights Committee has stated that:

> The failure of a State party to establish a competent tribunal to determine such rights and obligations or to allow access to such a tribunal in specific cases would amount to a violation of article 14 if such limitations are not based on domestic legislation, are not necessary to pursue legitimate aims such as the proper administration of justice, or are based on exceptions from jurisdiction deriving from international law such, for example, as immunities, or if the access left to an individual would be limited to an extent that would undermine the very essence of the right.[193]

2.149 The right to an effective remedy requires the availability of a remedy which is effective with respect to any violation of rights and freedoms recognised by the International Covenant on Civil and Political Rights.[194] It includes the right to have such a remedy determined by competent judicial, administrative or legislative authorities or by any other competent authority provided for by the legal system of the state. This may take a variety of forms, such as prosecutions of suspected perpetrators or compensation to victims of abuse. While limitations may be placed in particular circumstances on the

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

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

192 UN Human Rights Committee, *General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial* (2007) [9].

193 UN Human Rights Committee, *General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial* (2007) [18]. See also UN Human Rights Committee, *Concluding observations on Zambia*, CCPR/C/79/Add.92 (1996) [10], where the UN committee found that it was incompatible with article 14 for persons to be vested with total immunity from suit.

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

nature of the remedy provided (judicial or otherwise), States parties must comply with the fundamental obligation to provide a remedy that is effective.[195]

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

2.151 In addition, as a State party to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Australia has an obligation to investigate and prosecute (or extradite) such cases of torture as defined in the Convention if an alleged torturer is found in Australia.[196] This obligation is enlivened even in a case where the alleged torturer may have enjoyed immunity from criminal proceedings in Australia and continues to enjoy immunity in relation to acts carried out in that person's

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

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

official capacity.[197] Thus, by extending personal immunity to a broader range of organisations and individuals, including potentially those alleged to have committed torture, the bill would have implications for Australia's obligation to investigate and prosecute allegations of torture.

2.152 Restricting access to courts and tribunals and consequently the availability of a remedy for potential rights violations (other than in relation to torture) may not amount to a violation under international human rights law if such restrictions are based on immunities that are accepted as a matter of international law.[198] The granting of privileges and immunities to international organisations is commonly accepted practice in international law. Australia is bound under a number of multilateral and bilateral treaties to confer privileges and immunities on various international organisations and their officials, as well as on foreign States and their diplomatic and consular representatives. The extent of the privileges and immunities conferred varies among the different categories of conferee (for example, a diplomatic representative has more

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

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

extensive accepted immunities than a consular official). Under customary international law Australia is also under additional obligations to afford immunity to certain types of high-level foreign officials, both personal immunity while they are in office and, functional immunity after they have left office.[199]

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

Committee's initial view

2.154 The committee considered further information is required to assess the compatibility of this bill with the rights of access to courts and tribunals and effective remedy and Australia's obligations to investigate and prosecute (or extradite) persons alleged to have committed torture, and as such sought the minister's advice in relation to:

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

(b) are there any safeguards to limit who can be accorded personal immunity;

(c) whether requesting an international organisation to waive immunity to enable investigation and prosecution of an individual accused of torture, rather than having a statutory exception to allow such investigation, prosecution or extradition, is consistent with Australia's obligations under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; and

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

(d) does Australia currently have any obligations under international law, other than under the Framework Agreement with OCCAR (Organisation for Joint Armament Cooperation), to confer privileges and immunities on organisations of which it is not a member, and if so, what are the sources of those obligations.

2.155 The full initial analysis is set out in *Report 8 of 2023*.

Minister's response[200]

2.156 The minister advised:

> *Conferral of personal immunities on representatives of international organisations*
>
> The proposed amendments will improve the implementation of Australia's international obligations.
>
> At present, Australian must 'match' the category of officials to whom we have agreed to grant privileges and immunities to the predetermined categories contained in the Act, and these do not always align. This issue has arisen in the context of the tax concessions accorded to the officials of international organisations, whereby a very small number of officials have not received the concessions Australia has agreed by treaty to grant.
>
> Given there are only 70 officials accredited to 14 international organisations in Australia at present, this issue arises rarely but nonetheless warrants rectification. The amendments will enable future regulations to use the same terminology as in the relevant treaty. This will minimise the gaps between our international obligations and implementation.
>
> Further, the amendments will enable the Government to choose specifically which of the existing privileges and immunities available under the Act are appropriate in the individual case, rather than being tied to a particular schedule of immunities in the Act. This will increase Australia's ability to ensure that only those privileges and immunities that are necessary and reasonable are granted, having regard to the applicable treaty. It will also ensure closer alignment of the privileges and immunities agreed by Australia in treaty and those accorded under the Act.
>
> It is also important to note that personal jurisdictional immunity (immunity for acts performed in a personal as well as an official capacity) is only conferred on a very limited class of persons in Australia, namely 'high officers' of international organisations. Only the most senior officers of an international

200 The minister's response to the committee's inquiries was received on 17 August 2023. This is an extract of the response. The response is available in full on the committee's webpage.

organisation are accredited as 'high officers' for the purposes of the Act. There are currently only three people accredited as such in Australia – the Executive Secretaries of:

- The Commission for the Conservation of Southern Bluefin Tuna, headquartered in Canberra;
- The Secretariat to the Meeting of the Parties to the Agreement on the Conservation of Albatrosses and Petrels, headquartered in Hobart; and
- The Commission for the Conservation of Antarctic Marine Living Resources, headquartered in Hobart.

Other international organisations with a presence in Australia which are granted privileges and immunities do not have officers of sufficiently high rank to be accredited as 'high officers'.

The Act accords personal jurisdictional immunity on 'high officers' by conferring like privileges and immunities as are accorded to a diplomatic agent (Schedule 2 to Part 1 of the Act). This includes immunity from criminal jurisdiction and from civil and administrative jurisdiction, with certain exceptions relating to actions for private immovable property, succession and professional or commercial activity exercised outside of official functions. Lower ranking 'officers' of international organisations only enjoy functional immunities under the Act. This means that they only have immunities from legal process for acts done and things said in the exercise of their official functions. The scope of a person's official functions is limited by reference to the functions of the international organisation in question, which are generally set out in the relevant treaty.

As explained below, the mechanism for granting privileges and immunities also requires regulations to be made, ensuring that as a limitation on human rights, any privileges and immunities are based on domestic legislation and there is a high degree of parliamentary oversight of which persons in an organisation will be conferred which privileges and immunities.

Procedural safeguards

The processes for conferring privileges and immunities on an organisation incorporates robust safeguards, including parliamentary scrutiny.

Under the Act, conferral of privileges and immunities on an international organisation and its officials occurs by way of regulations made by the Governor-General. The Bill in no way affects this process. This means that regulations implementing the Bill will be required to be tabled in Parliament and will be disallowable in each case. Parliament will have the opportunity to consider each set of regulations and either House of Parliament may stop their operation by a vote. At present, the decision to grant privileges and immunities

will be a decision for the Australian Government, with the highest level of government oversight and subject to parliamentary scrutiny.

This safeguard increases consistency with human rights, ensuring privileges and immunities are based on domestic legislation, considered by the Government to be appropriate to pursue legitimate aims, and closely align with applicable international obligations.

As a matter of general practice, privileges and immunities are also only conferred where Australia has agreed to do so. International agreements requiring Australia to accord privileges and immunities are subject to the treaty making process under Australian law, which includes ministerial and parliamentary scrutiny (by the Joint Standing Committee on Treaties) of the proposed treaty and its domestic and foreign policy impacts.

Consistency with obligations under the Convention

Australia has an unwavering commitment to the absolute prohibition against torture and cruel, inhuman or degrading treatment or punishment, for all people and in all circumstances. Australia is a party to the Convention and acts consistently with its international law obligations under the Convention. Australia regularly advocates against torture bilaterally, multilaterally and through the Universal Periodic Review mechanism.

The purpose of privileges and immunities is not to shield the individual, but rather to protect them in the fulfillment of their functions. The proposed amendments will not increase the immunities available in Australia to representatives of international organisations or promote the conferral of personal jurisdictional immunities to categories of officials other than as are currently conferred under the Act. Rather, as set out above, these amendments will provide greater flexibility and efficiency to the process of conferring the existing suite of privileges and immunities in the Act to officials, overcoming the divergences between rigid classifications contained in the Act and the variety of different designations and structures adopted by the many organisations that exist in the multilateral environment.

Australia will at all times continue to act consistently with its international human rights obligations, including under the Convention.

Obligations under international law to confer privileges and immunities on organisations

The granting of privileges and immunities to international organisations is a commonly accepted practice in international law. Australia is bound under a number of multilateral and bilateral treaties to confer privileges and immunities on various international organisations and their officials.

> One of the purposes of the Bill is to enable Australia, in accordance with its national interests, to enter into treaties with organisations which require the conferral of privileges and immunities to that organisation, and meet the obligations contained in those treaties. This scenario, whereby the privileges and immunities capable of conferral under the Act do not strictly align with the treaty, is demonstrated by the current OCCAR example. We anticipate other scenarios of this nature will arise as Australia expands its international cooperation.
>
> The proposed changes to the Act will help broaden and deepen Australia's engagement with the international community, including international organisations of which Australia is not a member. They will benefit Australia's international engagements in the commercial, defence, humanitarian, scientific and other fields. They will open up opportunities for industry engagement, attracting international expertise and promoting the exchange of information, knowledge and ideas.
>
> Where Australia accepts obligations to confer privileges and immunities with an organisation by entering into an agreement, this will be subject to the treaty process (including parliamentary and Vice-Regal consideration) outlined above. Additionally, whether such organisations are ultimately conferred privileges and immunities will be subject to parliament's agreement do so, as this will require the creation of regulations which will be subject to parliamentary scrutiny and Vice-Regal action.

Concluding comments

International human rights legal advice

2.157 As set out in the initial analysis, restricting access to courts and tribunals and consequently the availability of a remedy for potential rights violations (other than in relation to torture) may not amount to a violation under international human rights law if such restrictions are based on immunities that are accepted as a matter of international law.[201] The minister advised that Australia is bound under a number of treaties to confer privileges and immunities on various international organisations and their officials. The

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

minister advised that the proposed changes to the Act will help broaden and deepen Australia's engagement with the international community, including international organisations of which Australia is not a member.

2.158 However, as set out in the initial analysis, while Australia may have an obligation to grant certain immunities to international organisations to which Australia *is a member*, it is not clear that such an obligation exists under international law with respect to organisations (and associated officials) to which Australia is *not a member*.[202] In order for such an obligation to exist, it must be derived from either a treaty commitment or because there is a relevant customary international law rule that applies. However, there appears to be insufficient evidence of a customary international law rule requiring states to confer immunities on international organisations of which they are not members.[203] The minister's response did not address the question of whether Australia currently has any obligations under international law to confer privileges and immunities on organisations of which it is not a member.

2.159 In the absence of a clear international law obligation to grant the immunities as allowed for by this bill, it is necessary to consider the compatibility of granting such immunities with the right to access the courts and the right to an effective remedy. In relation to the right to an effective remedy, this right requires the availability of a remedy which is effective with respect to any violation of rights and freedoms recognised by the International Covenant on Civil and Political Rights.[204] While limitations may be placed in particular circumstances on the nature of the remedy provided (judicial or otherwise), States parties must comply with the fundamental obligation to provide a remedy that is

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202 As is proposed by Schedule 1, item 5.

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

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

effective.[205] The granting of immunities, including immunity from personal arrest or detention and from suit and other legal processes, to international organisations and other categories of officials, would involve an exclusion of the jurisdiction of Australian courts in criminal, civil and administrative cases. This, in effect, would restrict an individual's access to courts and tribunals, including for the purposes of determining an effective remedy for potential violations of human rights. As the granting of immunities would preclude an individual seeking a remedy against someone who may have violated their rights, the bill (by allowing regulations to be made to grant such immunities in circumstances where there is no clear international law obligation to do so) does not appear to be compatible with the right to an effective remedy.

2.160 In relation to whether granting immunities would be compatible with the right to access the courts, this would depend on the nature of the immunities granted and whether to do so was necessary and reasonable in all the circumstances. As each immunity would be granted by regulations, it would be necessary to assess each regulation for compatibility with this right.

2.161 In addition, and as set out in the initial analysis, the bill (and Act) appears to enable the conferral of personal immunities (immunity for acts performed in a personal as well as an official capacity) on a broader category of individuals than those recognised as entitled to immunity under general international law. The bill would allow immunities to be conferred by regulations on general classes of persons connected with international organisations. The minister advised that the amendments in the bill will enable the government to choose which of the existing privileges and immunities available under the Act are appropriate in the individual case, rather than being tied to a particular schedule of immunities in the Act. Depending on the breadth of the immunities that are granted in each individual case, the immunities granted may be consistent with general international law. However, there is nothing in the legislation that would ensure that only those privileges and immunities that are appropriate under international law would be granted. The minister advised that personal jurisdictional immunity is currently only conferred on a very limited class of persons in Australia, with only the most senior officers of an international organisation accredited as 'high officers' for the purposes of the Act. The minister advised currently only three people are accredited as such in Australia, being the Executive Secretaries of organisations relating to the conservation of marine animals and albatrosses and petrels. While this current practice would appear to be broadly consistent with Australia's obligations under international law, the amendments to the bill would allow personal immunities to be granted to a much wider range of persons. Noting that there is no requirement in the bill for such immunities only to be granted where required

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

under international law, there is a risk that the bill would allow the granting of personal immunities (with the potential to limit the right to an effective remedy and the right to access the courts) in situations where there is no basis in international law for doing so.

2.162 Further, the granting of personal immunity would appear to preclude Australian courts exercising jurisdiction over persons alleged to have committed torture or other serious human rights abuses, even where such persons would not otherwise fall within the general category of individuals covered by personal immunity under general international law (e.g. heads of state).[206] The statement of compatibility states that the conferral of privileges and immunities on categories of officials would occur where requested by an international organisation and agreed to by Australia.[207] It states that while the bill is unlikely to give rise to situations involving Australia's obligations under international human rights law, including under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Convention), if such cases were to arise, it 'would be open to the Australian Government to take a range of responses, including request that the organisation in question waive the immunity of the individual concerned'.[208]

2.163 The minister advised that Australia has an unwavering commitment to the absolute prohibition against torture and cruel, inhuman or degrading treatment or punishment, and will continue to act consistently with its human rights obligations. The minister advised that the proposed amendments will not increase the immunities available in Australia or promote the conferral of personal jurisdictional immunities to categories of officials other than as are currently conferred – but will provide greater flexibility and efficiency to the process of conferring the existing suite of privileges and immunities. In circumstances where personal immunity has been granted by Australia under the Act, it would appear that the ability to investigate, prosecute or extradite a person for torture would rely on the relevant organisation granting a waiver. Leaving this matter to the discretion of the organisation would not appear to be consistent with Australia's obligations under the Convention. While the bill may not increase the immunities available, it does, in providing greater flexibility and efficiency to the process of conferring the existing suite of privileges and immunities in the Act, make those immunities more widely available. This increases the risk that privileges and immunities may be granted in circumstances which are incompatible with Australia's obligations under the Convention.

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206 Under customary international law, this category of individuals includes heads of state, heads of government, foreign ministers and other high-ranking ministers.

207 Statement of compatibility, p. 3.

208 Statement of compatibility, p. 4.

Committee view

2.164 The committee thanks the minister for this response. The committee acknowledges the desirability of improving Australia's engagement with the international community. However, the committee also notes the importance of ensuring that the granting of privileges and immunities to organisations and officials, which includes immunity from personal arrest or detention and from suit and other legal processes, is compatible with Australia's international human rights obligations.

2.165 The committee notes that the bill would extend privileges and immunities to officials attached to international organisations of which Australia is not a member. In the absence of a clear international law obligation to grant the immunities as allowed for by this bill, it is necessary to consider the compatibility of granting such immunities with the right to access the courts and the right to an effective remedy. In relation to the right to an effective remedy, as the granting of immunities would preclude an individual seeking a remedy against someone who may have violated their rights, the committee considers that the bill (by allowing regulations to be made to grant such immunities in circumstances where there is no clear international law obligation to do so) does not appear to be compatible with the right to an effective remedy. In relation to the right to access the courts, the committee considers the compatibility of the measure would depend on the nature of the immunities granted and whether to do so was necessary and reasonable in all the circumstances. As such, the committee will carefully consider the compatibility of any future regulations made under the Act for compatibility with this right.

2.166 Further, the amendments to the bill would allow personal immunities to be granted to a much wider range of persons. Noting that there is no requirement in the bill for such immunities only to be granted where required under international law, the committee considers there is a risk that the bill would allow the granting of personal immunities (with the potential to limit the right to an effective remedy and the right to access the courts) in situations where there is no basis in international law for doing so. Again, the committee will carefully consider the compatibility of any future regulations that confer such personal immunities.

2.167 Finally, the committee considers there is a risk under the existing Act that the granting of privileges and immunities to individuals is not compatible with Australia's obligations under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (as it appears that the ability to investigate, prosecute or extradite a person for torture would rely on the relevant organisation granting a waiver). The bill, in providing greater flexibility and efficiency to the process of conferring the existing suite of privileges and immunities in the Act, makes those immunities more widely available, and therefore increases the risk that privileges and immunities may be

granted in circumstances which are incompatible with Australia's obligations under the Convention.

Suggested action

2.168 The committee considers the compatibility with human rights of this measure may be assisted were the Act amended to:

(a) ensure that privileges and immunities may only be granted where this is required as a matter of international law; and

(b) to ensure that any such immunities do not override Australia's obligations in relation to the prohibition against torture or other cruel, inhuman or degrading treatment or punishment.

2.169 The committee further considers that the explanatory materials accompanying any future regulations granting such privileges and immunities should make clear how the measure is compatible with international law (as well as international human rights law).

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

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

Migration Amendment (Strengthening Employer Compliance) Bill 2023[209]

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

2.172 The committee requested a response from the minister in relation to the bill in *Report 8 of 2023*.[210]

Employer sanctions for coercive practices

2.173 Schedule 1, Part 1 of the bill seeks to establish new criminal offences and civil penalties for a person who unduly influences, unduly pressures, or coerces a non-citizen to breach a work-related condition of their visa, or accept an exploitative work arrangement to meet a work-related condition of their visa.[211]

2.174 Additionally, Schedule 1, Part 5 of the bill would expand the circumstances in which an inspector may exercise their existing powers. This includes authorising the giving of an enforceable compliance notice, which may be issued where an officer holds a reasonable belief that a person has contravened a work or sponsorship related offence provision, or a related provision,[212] and authorising the inspector to exercise their powers for the purpose of investigating whether another person who is, or was, an approved work sponsor has contravened that proposed provision.[213]

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209 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Migration Amendment (Strengthening Employer Compliance) Bill 2023, *Report 9 of 2023*; [2023] AUPJCHR 92.

210 Parliamentary Joint Committee on Human Rights, *Report 8 of 2023* (2 August 2023), pp. 78–88.

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

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

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

2.175 The inspector has existing powers to: enter business premises or another place without force at any time necessary, inspect things, interview persons, require the production of documents or records, and to inspect and make copies of documents or records.[214]

Summary of initial assessment

Preliminary international human rights legal advice

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

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

2.177 The right to just and favourable conditions of work includes the right of all workers to adequate and fair remuneration, and safe working conditions.[215] The prohibition against slavery, servitude and forced labour prohibits exploiting or dominating another and subjecting them to 'slavery-like' conditions, or requiring a person to undertake work which he or she has not voluntarily consented to, but does so because of threats made, either physical or psychological. [216]

2.178 Further, the measures would also engage and promote the right to equality and non-discrimination, insofar as they would establish additional protections for non-citizen workers who may be vulnerable to particular types of exploitation at work by virtue of their visa status, or otherwise because of their status as non-citizens. The right to equality and non-discrimination provides that everyone is entitled to enjoy their rights without discrimination of any kind and that all people are equal before the law and entitled

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

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

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

without discrimination to equal and non-discriminatory protection of the law.[217] The prohibited grounds of discrimination include gender, race, and national or social origin.[218]

Right to privacy

2.179 Expanding the inspector's existing powers to include their exercise in relation to an enforceable compliance notice, engages and may limit the right to privacy. The right to privacy includes respect for informational privacy, including the right to respect for private and confidential information, particularly the storing, use and sharing of such information.[219] It also includes the right to control the dissemination of information about one's private life, and protects against arbitrary and unlawful interferences with an individual's privacy and attacks on reputation.[220]

2.180 The right to privacy may be subject to permissible limitations, which are provided by law and are not arbitrary. In order for limitations not to be arbitrary, the measure must pursue a legitimate objective and be rationally connected to (that is, effective to achieve) and proportionate to achieving that objective. In order to be proportionate, a limitation on the right to privacy should only be as extensive as is strictly necessary to achieve its legitimate objective, and must be accompanied by appropriate safeguards.

Committee's initial view

2.181 The committee noted that the statement of compatibility does not identify the engagement of the right to privacy, and therefore sought the minister's advice as to whether the measure constitutes a permissible limit on the right to privacy, including the presence of safeguards, the circumstances in which information gathered by the inspector may be disclosed, and relevant oversight and review mechanisms.

2.182 The full initial analysis is set out in *Report 8 of 2023*.

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217 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.

218 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].

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

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

Minister's response[221]

2.183 The minister advised:

> The SEC Bill expands the compliance tools available under the *Migration Act* by providing enforcement officers with the power to accept and enforce undertakings under the *Regulatory Powers (Standard Provisions) Act 2014* (the Regulatory Powers Act) or issue a Compliance Notice. The Bill would also allow inspectors to utilise existing investigative powers available under the Migration Act in an additional circumstance, that is, to investigate whether a person who is or was an approved work sponsor has acted in contravention of a compliance notice. As the Committee has noted, enabling the inspector to enter premises, ask questions and require the provision of documentation in order to enforce compliance notices would facilitate the enforcement of provisions intended to protect workers, and the Migration Act constrains the circumstances in which, and purposes for which, an inspector may exercise their investigatory powers.
>
> It is intended that the processes for inspectors exercising their existing powers in this additional circumstance will be consistent with all relevant laws, as well as the current policies and practices in relation to the use of such powers and information sharing.
>
> In terms of use of powers, these are guided by policies and procedures developed under the Home Affairs Policy and Procedure Control Framework, which includes extensively consulted procedures to ensure conformity with the law as well as an assurance and control matrix to support ongoing compliance with those policies and procedures. Enforcement officers also require appropriate training in order to use the enforcement powers.
>
> In terms of oversight, there are a range of mechanisms in place to detect, investigate and resolve issues of non-compliance, including the Home Affairs Integrity & Professional Standards strategy and resources which include avenues for referral to the National Anti-Corruption Commission (previously the Australian Commission for Law Enforcement Integrity). In addition, complaints could potentially be made to the Australian Human Rights Commission, the Commonwealth Ombudsman or, where there is concern about a breach of law, state and territory law enforcement (including police).
>
> The Department is subject to a number of legislative provisions that restrict the disclosure of information. If disclosure of the information is authorised under section 140XJ of the Migration Act, it will be a disclosure authorised by law and permitted under paragraph 42(2)(c) in Part 6 of the *Australian Border Force Act 2015* (the ABF Act) and Australian Privacy Principle (APP) 6.2(b) in

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221 The minister's response to the committee's inquiries was received on 28 August 2023. This is an extract of the response. The response is available in full on the committee's webpage.

> Schedule 1 to the *Privacy Act 1988* (the Privacy Act). All officers and contracted service providers dealing with these kinds of information must be aware of the Department's obligations under the APPs in the Privacy Act. The Privacy Act determines how officers must handle personal information, and covers the collection, accuracy, storage, access, modification, use and disclosure of the information.
>
> If enforcement officers require advice on whether information may be lawfully disclosed under the ABF Act or the Privacy Act, they are advised in internal procedural instructions to contact the Department's Privacy and Information Disclosure Section.
>
> As noted above, all enforcement actions are restricted by the powers conferred under the Migration Act, and (where relevant) the details approved in the warrant for the activity. The disclosure of information obtained during an activity would occur where it is lawful, including to refer suspected breaches of law to the relevant enforcement agency. This may include referrals to the Fair Work Ombudsman (for suspected breaches of the Fair Work Act), the Police (for criminal offences, including the identification of possible indicators of human trafficking).

Concluding comments

International human rights legal advice

2.184 As set out in the initial analysis, the proposed powers of the inspector are intended to facilitate the enforcement of legislative provisions intended to protect workers, which would constitute a legitimate objective under international human rights law, and would be rationally connected to that objective. As to proportionality, the Migration Act constrains the circumstances in which, and purposes for which, an inspector may exercise their investigatory powers. In particular, the minister advised that there are legislative provisions that restrict the disclosure of information.

2.185 The minister advised that the Migration Act and any warrant enabling the enforcement activity to limit the powers available to an inspector, and the disclosure of information obtained during an activity might include referral of suspected breaches of law to the relevant enforcement agency. The minister has advised that if disclosure of the information is authorised under the Migration Act, it will be a disclosure authorised by law and therefore permitted to be disclosed for secondary purposes. However, the minister has advised that all officers and contracted service providers dealing with these kinds of information must be aware of the department's obligations under the Australian Privacy Principles and the *Privacy Act 1988*, and this determines how officers must handle personal information, and covers the collection, accuracy, storage, access, modification, use and disclosure of the information.

2.186 The minister has further advised that the use of powers are guided by policies and procedures and appropriate training of enforcement officers. The minister noted there are a range of mechanisms to detect, investigate and resolve issues of non-compliance, including avenues for referral to the National Anti-Corruption Commission or complaints to the Australian Human Rights Commission, the Commonwealth Ombudsman or, where there is concern about a breach of law, state and territory law enforcement.

2.187 Noting this advice regarding the applicable safeguards and the availability of oversight mechanisms it appears that expanding the inspector's existing powers are likely a proportionate limit on the right to privacy.

Committee view

2.188 The committee thanks the minister for this response. As set out in the initial analysis, the committee considers that establishing new mechanisms to prevent exploitative work practices, to protect vulnerable migrant workers, promotes the rights to just and favourable conditions of work, equality and non-discrimination and the prohibition against slavery and servitude. The committee notes that expanding the application of the inspector's investigatory powers may also engage and limit the right to privacy. However, based on the advice provided by the minister regarding the applicable safeguards and oversight mechanisms, the committee considers this to be a permissible and proportionate limit on the right to privacy.

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

Suggested action

2.190 The committee recommends that the statement of compatibility be updated to reflect that the measures would promote the right to equality and non-discrimination and limit the right to privacy and reflect the information provided by the minister.

Publication of information about prohibited employers

2.191 Schedule 1, Part 2 would allow the minister or an authorised delegate to prohibit certain employers from employing any additional non-citizens, and would require the minister to make that decision public. Such a declaration may be made where the person is subject to a 'migrant worker sanction', and the sanction was imposed no more than five years prior.[222] 'Migrant worker sanction' refers to a person being sanctioned for certain

[222] Schedule 1, Part 2, item 5, proposed section 245AYK.

work-related offences, civil penalties or contraventions of the *Fair Work Act 2009* or contraventions of enforceable undertakings,[223] but also includes sanctions imposed on the basis of the minister being satisfied of certain matters, such as:

(c) where a bar has been placed on an approved sponsor on the basis that the 'minister is satisfied' that the person had failed to satisfy their sponsorship obligations (such as an obligation to keep certain records);[224]

(d) where an inspector has given the person a compliance notice under the *Fair Work Act 2009* and the 'minister is satisfied' that the person has failed to comply with the notice and does not have a reasonable excuse.[225]

2.192 A declaration that a person is a prohibited employer would have effect for the period specified in the declaration.[226] It would prevent a person from employing additional non-citizens, or having a material role in decisions by a body corporate or other body that allows a non-citizen to begin work.[227] Breach of the prohibition would be an offence punishable by imprisonment for two years or 360 penalty units (currently $112,680)[228] or both, or a civil penalty punishable by 240 penalty units (currently $75,120). After a person ceases to be a prohibited employer, for the following 12 months they would be required to advise the department where they have employed non-citizens.[229] The minister would be required to publish identifying information in relation to a prohibited employer online, except in prescribed circumstances.[230]

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

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

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

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

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

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

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

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

Summary of initial assessment

Preliminary international human rights legal advice

Multiple rights

2.193 The establishment of new mechanisms to prevent exploitative work practices against non-citizens in Australia, including the prohibition of certain employers from employing further non-citizens, engages and promotes the right to just and favourable conditions of work, the absolute prohibition against slavery and servitude, and the right to equality and non-discrimination. The publication of information about prohibited employers may also promote these rights, insofar as it protects temporary migrant workers from employers found to have breached workplace laws. The content of these rights is outlined at paragraphs [2.176] to [2.178].

2.194 The measures would appear to promote the right to equality and non-discrimination by seeking to ensure temporary migrant workers enjoy equitable conditions at work. Further, aspects of these measures may have a particular impact on female non-citizen workers who are employed for the purposes of sexual exploitation, noting that the explanatory memorandum states that the measure may capture work in conditions of sexual servitude and in brothels.[231] In this regard, the United Nations (UN) Convention on the Elimination of all forms of Discrimination Against Women requires States parties to take all appropriate measures to suppress all forms of traffic in women and exploitation of prostitution of women,[232] and recognises sexual exploitation as a form of gender-based violence and discrimination against women.[233] As such, the measure is likely to promote the rights of women.

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

232 Article 6.

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

2.195 However, requiring the publication of information identifying prohibited employers online, also engages and limits the right to privacy.[234]

2.196 Protecting vulnerable migrant workers by publishing information about prohibited employers is a legitimate objective for the purposes of international human rights law. The publication of this information may be rationally connected (that is, effective to achieve) those objectives. However, it is not clear whether the additional publication of that information would be necessary to achieve the stated objectives. Further questions remain as to whether the measure is proportionate to the objective sought to be achieved.

Committee's initial view

2.197 The committee sought further information to assess the measure's compatibility with the right to privacy and sought the minister's advice in relation to seven questions, as set out in the minister's response below.

Minister's response[235]

2.198 The minister advised:

> *(a) why information identifying a prohibited employer, and the grounds for their prohibition, needs to be published online in order to achieve the stated objectives*
>
> The prohibition is a protective and general deterrent measure. By publishing the details of the prohibition, existing and prospective employees can make an informed decision about whether to work for that employer. Publishing this information will also support enforcement of the prohibition measure as it allows third parties to report concerns to Home Affairs if they believe the employer is acting in breach of the prohibition and deters employers from

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

235 The minister's response to the committee's inquiries was received on 28 August 2023. This is an extract of the response. The response is available in full on the committee's webpage.

engaging in exploitative work practices where they see there are consequences for doing so in terms of prohibition and adverse publicity for their business.

This is in line with the existing registers, including:

- The Register of sanctioned employers on the Australian Border Force website, which lists details of sponsors who have breached their sponsorship obligations, and
- The register of Disciplinary decisions on the Office of the Migration Agent's Registration Authority (OMARA) section on the Home Affairs website, which details disciplinary decisions made by the OMARA.

(b) why it is proposed that regard may be had to migrant worker sanctions issued in the previous five years, and not a shorter period

While the Government will seek to consider imposing a prohibition as soon as reasonably practicable, not all proceedings for workplace-related contraventions are brought by the Commonwealth – cases may be brought privately, including by a non-government entity, such as a union or community legal centre. In addition, some matters will involve the imposition of a sanction by the Fair Work Commission under the Fair Work Act, or by a Court, without the involvement of the Department of Home Affairs. Therefore, not all 'migrant worker sanctions' will be immediately known to the Department of Home Affairs and it may take some time for the Department to gather the information that is needed for the consideration of imposing the prohibition declaration, including natural justice processes and review processes available to the employer. In this context, it is appropriate to allow a reasonable period of time before an employer is no longer in scope for the prohibition.

The prohibition initiative is both a protective measure and general deterrent safeguarding the interests of temporary migrant workers. Given its intent (to protect temporary migrant workers from employers who have engaged in serious, repeated or deliberate non-compliance involving migrant workers), the timeframe for making a prohibited employer declaration draws from the existing framework for 'spent convictions' which permits most convictions to no longer be disclosed after a period of good behaviour, in effect reflecting that the person is considered 'reformed'. Under Commonwealth law, a conviction is generally deemed 'spent' after 10 years, making 5 years an appropriate mid-point after which it is considered to no longer be appropriate for the Minister to make the employer prohibition declaration.

(c) what is the maximum period for which a person may be declared to be a prohibited employer

The Bill does not specify a minimum or maximum period for which the person may be declared to be a prohibited employer and the duration of the prohibition will depend on the circumstances of the case. It should be noted

that in Canada, for example, there are employers who have been permanently banned from hiring temporary workers. Recognising that the prohibition measure may be triggered by some of the most serious offences of exploitation under the Criminal Code (including cases of modern slavery), the Minister may consider an extended prohibition appropriate in the most serious and small number of cases (such as human trafficking or modern slavery). Mandating any minimum or maximum period could adversely affect the Minister's discretion to act or not to act in individual circumstances of a particular matter and for this reason are avoided.

It is noted that under current employer sponsorship provisions, employer prohibitions are generally issued for a period of a few years.

(d) whether an employer would be permitted to make submissions relating to the potential length of a prohibition declaration, and whether such a submission would be relevant to an assessment of how long a declaration may remain in force

As noted by the Committee, the prohibition measure includes a 'show cause' process under which the Minister provides persons subject to a migrant worker sanction with an opportunity to outline any extenuating circumstances to inform the Minister's decision. An employer can use this submission to put forward a case on the potential length of the prohibition. The Minister must take into account any written submissions made by the person as part of this process. For clarity and completeness, the Minister could specify in this invitation the proposed duration of the prohibition in order to provide the persons subject to the migrant worker sanction an opportunity to make a case for the duration to be shorter, if the prohibition were to be imposed.

It should be noted that the Minister's intention is that migrant worker sanctions will be imposed where there are demonstrable cases of serious, deliberate or repeated non-compliance, usually involving a court finding about the non-compliance or non-compliance that is in breach of an enforceable undertaking or compliance notice. In effect, the prohibition declaration will follow a process through which the person will have already had an opportunity to appeal a court finding or contest a sanction.

The Minister's decision to declare a person to be a prohibited employer is also subject to merits review under section 43 of the *Administrative Appeals Tribunal Act 1975*.

In effect, the Tribunal has all of the powers of the original decision maker and could, for example, make a decision that imposes a different prohibition period than that imposed by the original decision-maker.

(e) why the minister does not have the discretion to determine that an employer may not be required to provide additional information in the twelve months

after a prohibition declaration has ended, or that this requirement may be otherwise altered in certain circumstances

The proposed additional reporting period is intended to re-establish trust that employers found to have engaged in serious, deliberate or repeated non-compliance will comply with their obligations. The reporting is not onerous, and is necessary for reinforcing the importance of compliance.

(f) why the bill would not require the minister to correct inaccurate or misleading information relating to a prohibition declaration

Under Australian Privacy Principle (APP) 13 – correction of personal information, the Department of Home Affairs (as an APP entity) must take reasonable steps to correct personal information as defined in section 6 of the Privacy Act to ensure that, having regard to the purpose for which it is held, it is accurate, up-to-date, complete, relevant and not misleading. The requirement to take reasonable steps applies in two circumstances: where an APP entity is satisfied that personal information it holds is incorrect, or at the request of an individual to whom the personal information relates.

Home Affairs' privacy policy sets out how an individual can seek correction of personal information held by the Department. Policies and procedures will be developed to support implementation of this measure in line with the Australian Privacy Principles. In line with the Policy and Procedure Control Framework, these policies and procedures will include a robust assurance and control matrix.

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

The prohibition is aimed at protecting migrant workers from unscrupulous and exploitative work practices by employers. Transparency about the prohibition, and prohibited employers, is essential for achieving the objectives of the measure. Appropriate disclosure will help temporary migrant workers and other existing and prospective employees to be informed about any previous exploitative actions of the employer, allowing them to decide whether or not to work for that employer.

Publication will also help to hold the employer to account, supporting monitoring of prohibited employers as third parties will be able to report suspected breaches of the prohibition.

Finally, publication of prohibited employer information should also deter employers from engaging in exploitative practices.

These objectives could not be achieved through more limited disclosure of the information.

The proposed publication of this information is also consistent with existing practices under the Register of sanctioned employers on the Australian Border Force website.

Concluding comments

International human rights legal advice

2.199 The initial analysis asked whether information about prohibited employers needs to be accessible to the general public in order to achieve the stated objective of protecting migrant workers. The minister advised that transparency is essential for achieving the objectives of the measure. By publishing the details of the prohibition, employees can make an informed decision about whether to work for that employer and it will support enforcement as it allows third parties to report concerns to Home Affairs if they believe the employer is acting in breach of the prohibition. The minister also advised that publication deters employers from engaging in exploitative work practices where they see there are consequences for doing so in terms of prohibition and adverse publicity for their business. Based on this advice it appears likely that the publication of prohibition declarations is likely to be effective to achieve (that is, rationally connected to) the stated objective of protecting migrant workers.

2.200 With respect to whether the limitation is proportionate, it would appear that there are a number of safeguards in place that would assist with the proportionality of the measure. There are procedural safeguards that would apply before a declaration is made, giving the employer an opportunity to respond and to outline any extenuating circumstances,[236] and a decision to declare a person to be a prohibited employer would be subject to merits review by the Administrative Appeals Tribunal.[237] Further, the minister would be empowered to prescribe in regulations the circumstances in which publication is not required.[238] These all assist with the proportionality of the measure.

2.201 However, further advice was sought as to whether the measure is sufficiently circumscribed, what safeguards apply and whether there are any other less rights restrictive alternatives.

2.202 In relation to the length of time an employer may be declared a prohibited employer (and have their information published online), the bill does not specify any period of time. The minister advised that the time period will depend on the

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236 Statement of compatibility, p. 87.

237 Statement of compatibility, p. 88.

238 Statement of compatibility, p. 100.

circumstances of each case and this is best left to ministerial discretion. The minister advised that under the current law employer prohibitions are generally issued for a period of a few years, but that for the most serious offences of exploitation the minister may consider an extended prohibition appropriate. The minister advised that an employer could make a submission to the minister about the length of time they should be subject to sanctions, and this would then be required to be taken into account by the minister when making a decision. However, leaving the length of time for a prohibition declaration to remain in force entirely to the discretion of the minister could result in sanctions being applied that go beyond that which is reasonable and appropriate. It is therefore not clear why the bill does not set out, at a minimum, some criteria to guide the exercise of this power, such as ensuring that the period imposed be proportionate to the significance of the sanction imposed. There is also no requirement that the continuing appropriateness of the prohibition be reviewed on a regular basis. Without such a review an employer prohibition may become unreasonable and be a disproportionate limit on the right to privacy as time goes on.

2.203 As to why an employer may be declared a prohibited employer because of conduct for which they were sanctioned up to five years prior, the minister advised that not all sanctions will be known to the department immediately and it may take some time for the information regarding a prohibition declaration to be published, and as such it is appropriate to allow a reasonable period of time before an employer is no longer in scope for the prohibition.

2.204 In terms of who will be subject to an employer prohibition declaration, from the minister's advice and the statement of compatibility it is clear that the *intent* of these provisions is that sanctions will be imposed for cases of serious, deliberate or repeated non-compliance, and as the minister says, usually involving a court finding about the non-compliance or non-compliance that is in breach of an enforceable undertaking or compliance notice. The minister advised that the prohibition declaration will follow a process through which the person will have already had an opportunity to appeal a court finding or contest a sanction. If sanctions are imposed in such circumstances, and publication follows this process, it is likely that this would be a proportionate limit on the right to privacy.

2.205 However, the bill itself does not set out the circumstances in which conviction for a particular offence, or in which an order has been made against them, may result in

prohibition – rather these would be set out in regulations.[239] As such, it will be necessary to consider the regulations closely to determine their compatibility with human rights.

2.206 Further, there are some provisions that do not require a finding of fault by a court or other independent body but rather rely on the minister being satisfied that the person has failed in their obligations or compliance.[240] The statement of compatibility states that the circumstances in which a person may be declared a 'prohibited employer' are set at a high threshold, and that these are aimed at employers with a history of deliberate, repeated or serious non-compliance with relevant laws and obligations in their treatment of migrant workers.[241] It states that it aims to target employers that have a disregard of their employment obligations and the law, as well as deter those who are considering exploiting temporary migrant workers as a means of sourcing an artificially cheap workforce. This may mean that, in practice, an employer may only be liable to a prohibition declaration in restricted circumstances. However, the scope of those circumstances is not clear on the face of the bill.

2.207 The statement of compatibility also states that the minister must consider not only any written submissions, but any other matters prescribed by regulations. It states that this may include consideration of the person's history of non-compliance, the seriousness of the contravention giving rise to the prohibition being considered, and any extenuating circumstances.[242] Considerations of these matters could assist with the proportionality of the measure in practice, though it is not clear why these considerations are not required in the bill itself.

2.208 Finally, proposed subsection 245AYM(5) states that the minister is not required to arrange for the removal of published information about a prohibited employer from the department's website. The minister was asked why the bill does not require the minister to correct inaccurate or misleading information relating to a prohibition declaration. The minister advised that the department is required under the Australian Privacy Principles to take reasonable steps to correct personal information where satisfied that the persons information it holds is incorrect or at the request of an individual to whom the personal information relates. However, it remains unclear why it is necessary to continue to record information about employers after the prohibition declaration has expired. As such, the

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

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

241 Statement of compatibility, pp. 85–86.

242 Statement of compatibility, p. 87.

bill appears to be insufficiently circumscribed in allowing such information to continue to be publicly displayed when the prohibition is no longer in force.

Committee view

2.209 The committee thanks the minister for this response. The committee reiterates that establishing new mechanisms to prevent exploitative work practices against non-citizens in Australia, including by prohibiting certain employers from employing further non-citizens, are directed towards the important objective of protecting vulnerable migrant workers. The committee considers these proposed measures would promote the right to just and favourable conditions of work, the absolute prohibition against slavery and servitude, and the right to equality and non-discrimination. The committee also considers that publishing on the department's website a list of prohibited employers may also promote those human rights, insofar as it may protect temporary migrant workers from employers found to have breached workplace laws.

2.210 However, the publication of all employers who have ever been subject to an employment prohibition declaration also engages and limits the right to privacy. The committee considers the limitation seeks to achieve the legitimate objective of protecting temporary migrant workers from unscrupulous employers. However, the committee is concerned that, as currently drafted, the measure may not be sufficiently circumscribed (noting much of the detail is to be left to regulations). While the measure may constitute a proportionate limit on the right to privacy if only used in the circumstances that the minister states is the intention behind the legislation, the committee remains concerned that the legislation itself does not contain sufficient safeguards to sufficiently protect against an arbitrary interference with the right to privacy.

Suggested action

2.211 The committee considers the proportionality of this measure may be assisted were the bill amended to:

(a) set out guidance or criteria relevant to the minister's decision to make a prohibited employer declaration, including that it apply to employers with a history of deliberate, repeated or serious non-compliance with relevant laws and obligations in their treatment of migrant workers (as is the stated intention of the measure);

(b) limit the scope of the ministerial discretion to determine the length of time an employer may be subject to a declaration;

(c) require a review after a set period of time as to the continuing appropriateness of a prohibited employer declaration;

(d) require the removal of information about prohibited individual employers (not companies) on the department's website within a reasonable period once that prohibition has expired or been removed.[243]

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

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

[243] In effect this would require an amendment to Schedule 1, item 5, proposed subsection 245AYM(5), which provides that the minister is not required to arrange for the removal from the department's website of information about employers when they stop being a prohibited employer.

National Occupational Respiratory Disease Registry Bill 2023[244]

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

2.214 The committee requested a response from the minister in relation to the bill in *Report 8 of 2023*.[245]

Establishment of a registry containing personal data

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

2.216 The bill would require a prescribed medical practitioner[246] to notify diagnoses of a prescribed occupational respiratory disease[247] and would allow for the voluntary notification of other occupational respiratory diseases.[248] A medical practitioner who fails to notify of a diagnosis or treatment of a prescribed occupational respiratory disease

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244 This entry can be cited as: Parliamentary Joint Committee on Human Rights, National Occupational Respiratory Disease Registry Bill 2023, *Report 9 of 2023*; [2023] AUPJCHR 93.

245 Parliamentary Joint Committee on Human Rights, *Report 8 of 2023* (2 August 2023), pp. 89–97.

246 Clause 8, definition of 'prescribed medical practitioner' means a medical practitioner of a kind prescribed in the rules.

247 Clause 8, definition of 'prescribed occupational respiratory disease' means an occupational respiratory disease as prescribed by the rules. An 'occupational respiratory disease' is defined to mean a medical condition associated with an individual's respiratory system that is likely to have been caused or exacerbated, in whole or in part, by the individual's work or workplace.

248 Clauses 1415. Where a practitioner is treating a patient for a prescribed occupational respiratory disease (which the patient was diagnosed with before this bill were to commence) they may, with the patient's consent, provide information about the patient to the registry if that information is not already included.

would be liable to a civil penalty of up to 30 penalty units (currently $9 390),[249] regardless of whether or not the patient has themselves consented to the notification.[250] The register must include 'minimum notification information', and may include 'additional notification information', both of which may be determined by the Commonwealth Chief Medical Officer (CMO) by legislative instrument.[251] An individual may ask the CMO to correct personal information about them in the registry, and the CMO must correct the registry if they receive a request to do so.[252]

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

(a) they are an officer or employee of a Commonwealth authority or are engaged to perform work relating to the purposes of the registry, and are doing so for the purposes of the registry;

(b) they are a prescribed medical practitioner accessing information about a diagnosis or progression of an occupational respiratory disease in relation to an individual and it is for the purposes of providing healthcare to that person, or checking whether that information is already on the registry;

(c) the person does so for the purposes of performing functions or duties, or exercising powers, under this bill;

(d) they are required or authorised to do so by or under a law of the Commonwealth, or a state or territory;[253]

(e) they are the CMO and are doing so for the purposes of disclosing information to an enforcement body;

(f) the information is disclosed to the person for the purpose of including information in the registry (under clause 21), and the collection, recording,

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

250 Clause 14.

251 Clause 12.

252 Clause 19.

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

disclosure or use is for the purpose for which the information was disclosed to the person; or

(g) pursuant to a court, tribunal or coronial order.[254]

2.218 Subclause 21(3) would restrict the type of information that may be disclosed to a person where it is for the purposes of research. In these circumstances, the person must not be provided with information that identifies or could identify the most recent workplace (or main workplace) where they were exposed to a respiratory disease-causing agent, or the prescribed medical practitioner who notified the information.[255]

2.219 The CMO, or a contracted service provider, would also be permitted to disclose any minimum notification information in relation to an individual on the registry to a Commonwealth authority prescribed by the rules for purposes connected with the performance of its functions or exercise of its powers.[256] That authority could then collect, make a record of, disclose or otherwise use that information for any of the purposes for which it was disclosed.[257]

2.220 Clause 23 would provide, with some exceptions, that it is an offence to record, disclose or otherwise use protected information other than as the bill authorises.[258]

2.221 The CMO would be required to publish an annual report containing statistical information relating to the registry, and may publish other reports at any time relating to information included on the registry and of a kind prescribed by legislative instrument.[259] If protected information were to be published or otherwise made available, the CMO would be required to 'take such steps as are reasonable in the circumstances to ensure that the information is de-identified' (meaning that the information is no longer about an identifiable or reasonably identifiable person, workplace, employer or business).[260]

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

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

256 Clause 22.

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

258 See also clauses 2425.

259 Clause 26.

260 Subclauses 26(4)(5).

Summary of initial assessment

Preliminary international human rights legal advice

Rights to health and just and favourable conditions of work

2.222 By establishing a registry to track instances of occupational respiratory diseases, this measure would likely promote the right to health and the right to just and favourable conditions of work. The right to health is the right to enjoy the highest attainable standard of physical and mental health.[261] The right to just and favourable conditions of work includes the right of all workers to safe working conditions.[262]

Right to privacy

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

2.224 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.[263] It also includes the right to control the dissemination of information about one's private life.

2.225 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.

Committee's initial view

2.226 The committee considered that further information was required to assess the compatibility of this measure with the right to privacy, and as such sought the minister's advice in relation to:

(a) why the bill does not define key terms (including listing silicosis as an occupational respiratory disease, and defining categories of medical practitioner and minimum and additional notification information to which the registry would apply);

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

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

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

(b) why information which identifies a person is necessary to be provided to the register in order for it to achieve its stated objective;

(c) why the bill does not establish a mechanism by which the patient (or their relevant physician) may request they not be required to provide all or some information to the registry;

(d) whether individuals would be advised of how their information could be disclosed and used if they elected to provide additional notification information;

(e) why the bill does not provide flexibility to provide only limited information where, for example, a doctor considers it to be in the best interests of the patient;

(f) the process by which information on the registry would be accessed, and whether persons required to provide information to the registry, or those empowered to access the registry, would be able to see the content on the registry generally; and

(g) what oversight and review mechanism of the proposed scheme, and decisions made in relation to it, would apply.

2.227 The full initial analysis is set out in *Report 8 of 2023*.

Minister's response[264]

2.228 The minister advised:

(a) why the Bill does not define key terms (including listing silicosis as an occupational respiratory disease, and define categories of medical practitioner and minimum and additional notification information to which the registry would apply)

The Bill seeks to achieve an appropriate balance between embedding the obligations and processes for the National Registry in primary legislation while ensuring operational detail that may need to be amended to ensure currency of the National Registry, is set out in disallowable legislative instruments.

The Bill embeds the fixed policy parameters recommended by the National Dust Disease Taskforce for notification of the diagnosis of an occupational respiratory disease to the National Registry by prescribed medical practitioners. The operational elements of the National Registry will be set out in the

264 The minister's response to the committee's inquiries was received on 16 August 2023. This is an extract of the response. The response is available in full on the committee's webpage.

supporting rules and determinations to allow for adjustments when responding to new developments where appropriate.

The Bill provides the Minister for Health and Aged Care or delegate with the power to make rules prescribing which occupational respiratory disease diagnoses require notification.

As indicated in the Explanatory Memorandum to the Bill, silicosis is intended to initially be the only prescribed occupational respiratory disease, consistent with the recommendations of the National Dust Disease Taskforce. This reflects concerns about the continued exposure to silica dust in the workplace and the limited information currently available on silicosis, to inform further action to protect workers. However, the Bill will provide for other occupationally caused or exacerbated respiratory diseases to be prescribed by the Minister for Health and Aged Care, after consultation with the Commonwealth Chief Medical Officer and state and territory authorities through their respective Health Ministers has occurred, in accordance with clause 33 of the Bill. This will allow the National Registry to evolve and adapt to new and emerging risks to the respiratory health of workers.

Providing for the prescribing of occupational respiratory diseases in the rules ensures the National Registry can respond in a timely manner to threats to workers' respiratory health as they arise in future. The ability to quickly mandate the notification of a disease will ensure information on incidence, exposure, task, job and occupation can be made available to inform decision makers. This will ensure governments can take informed action to reduce or eliminate further exposures in the workplace and protect the health of Australian workers.

Similarly, the Bill provides the Minister for Health and Aged Care or a delegate with the power to make rules prescribing the kinds of medical practitioners that can make notifications to the National Registry.

The kinds of medical practitioners to be prescribed in the rules are intended to be reflective of the necessary skills and experience required to ensure accurate diagnoses of occupational respiratory diseases. This definition of a prescribed medical practitioner will need to remain representative of the varied medical expertise required to diagnose prescribed occupational respiratory diseases, particularly those of a novel nature.

The Bill also allows the Commonwealth Chief Medical Officer to determine the scope of minimum and additional notification information that will be captured in the National Registry. This will allow for changes to the type of information notified to the National Registry, when appropriate, and ensure it remains capable of supporting further investigation of emerging issues and research into occupational respiratory diseases.

(b) why information which identifies a person is necessary to be provided to the register in order for it to achieve its stated objective

The collection, use and disclosure of personal information is necessary to allow the National Registry to accurately record the incidence of occupational respiratory diseases in Australia and assist in preventing further worker exposure to respiratory disease-causing agents.

The National Registry must allow for a clear distinction to be made between the notifications made in respect of each individual diagnosed with an occupational respiratory disease. For new or emerging diseases, the number of diagnoses may initially be low and the potential for duplicate reporting would significantly undermine the utility of the data to inform policy decision making with respect to addressing the risks of occupational respiratory disease. The handling of information which identifies a person will allow the Department of Health and Aged Care, through the operator of the National Registry, to ensure the accuracy of national statistics and provide confidence in the data held in the National Registry.

The handling of personal information is also required to ensure state and territory agencies can effectively act on notifications to investigate the occurrence of occupational respiratory disease within a workplace. This information will ensure agencies, if necessary, can seek additional information directly from the individual to ensure they appropriately assess the risks of occupational exposure with respect to disease development. States and territories will only receive personal information relating to individuals diagnosed, residing or exposed to disease causing agents in their jurisdiction.

With this information, these agencies will be able to consider controls or actions to ensure further worker exposure does not occur, reducing the likelihood of another individual developing the disease.

The collection, use and disclosure of personal information is also necessary for the National Registry to operate effectively, including meeting certain purposes of the Bill, by:

- allowing physicians to demonstrate they have met their obligation to notify the diagnosis of a prescribed occupational respiratory disease
- ensuring a treating medical practitioner can be provided with access to a patient's records to provide health care for the relevant occupational respiratory disease, or to check whether a previous diagnosis had been notified to the National Registry.

(c) why the bill does not establish a mechanism by which the patient (or their relevant physician) may request they not be required to provide all or some information to the registry

The Bill requires mandatory notification to the Commonwealth Chief Medical Officer of minimum notification information only when an individual is diagnosed with a prescribed occupational respiratory disease. As indicated in the Explanatory Memorandum to the Bill, the scope of minimum notification information covers information to identify the individual, the respiratory disease, the individual's lung function and the workplaces where the individual considers the last and main exposures occurred. This information is necessary to allow an accurate record of the incidence of occupational respiratory diseases in Australia and to assist in preventing further worker exposure to respiratory disease-causing agents.

The notification of any other information (e.g. additional notification information and the notification of non-prescribed occupational respiratory diseases) will require the individual's consent. A person may withhold or withdraw consent to the collection, recording, use or disclosure of any additional notification information or information on non-prescribed occupational respiratory diseases, or information on occupational respiratory diseases diagnosed prior to the anticipated commencement of the National Occupational Respiratory Disease Registry Act 2023, that is their personal information.

Information notified pursuant to the Bill and the relevant subordinate legislation is intended to reflect data collected by both the New South Wales Dust Disease Register and the Queensland Notifiable Dust Lung Disease Register. These registers are existing state-based mandatory notification systems established to monitor and analyse the incidence of particular occupational respiratory diseases, and both involve the handling of personal information.

If the National Registry did not require mandatory notification of diagnoses of prescribed occupational respiratory diseases, it is reasonable to expect both jurisdictions would retain their state-based registers, resulting in a duplicative reporting obligation for medical practitioners. If mandatory reporting on a national level was not required by the Bill, diagnosing medical practitioners in New South Wales and Queensland would still be required by state law to provide this information, but it may not be captured in the National Registry. This would compromise the efficacy of a national reporting system in providing an understanding of the nature, extent and potential causes of occupational respiratory diseases in Australia.

Medical practitioners making notifications to the National Registry will do so through an online portal currently being developed on the Department of Health and Aged Care ICT infrastructure. This portal prompts medical practitioners to enter the information needed to make a notification and seeks confirmation that patient consent has been provided where necessary.

When making a notification, a medical practitioner must provide details that:

- identify the patient
- identify the occupational respiratory disease
- identify the state or territory in which the last and main exposures were believed to have occurred
- allow the patient to be contacted by state and territory work health safety agencies for additional information, if necessary, to ensure they can appropriately assess the risks of occupational exposure with respect to disease development.

For the remaining information set out in the minimum notification, a medical practitioner may indicate 'not stated or unknown' for several mandatory fields, recognising the patient may be unable or unwilling to provide this detail.

(d) whether individuals would be advised of how their information could be disclosed and used if they elected to provide additional notification information

As part of confirming consent to the collection of additional notification information, individuals will be advised of how their information will be handled for the purposes of the National Registry.

A privacy notice has been prepared to accompany the operation of the National Registry and will be made available to individuals prior to notification. This document will be available from the Department of Health and Aged Care's public National Registry website, in addition to being provided to patients by the diagnosing or treating medical practitioner.

The privacy notice sets out how the Department of Health and Aged Care will handle personal information and notes this information is protected by law, including the *Privacy Act 1988* and the Australian Privacy Principles.

The notice also outlines when personal information will be collected, what types of information will be collected (i. e. the scope of minimum notification information and additional notification information) and how this information will be used and disclosed. The privacy notice indicates that an individual's personal information notified to the National Registry may be shared:

- with their treating medical practitioner to improve the individual's health care (where consent is provided)
- with researchers for research purposes associated with occupational respiratory diseases
- with subcontractors engaged to assist in delivering services for the National Registry

- as otherwise authorised or required by law.

The privacy notice further indicates that only minimum notification information will be shared with relevant state and territory agencies and bodies. This information will be shared to enable those agencies to identify industries, occupations, job tasks and workplaces where there is a risk of occupational respiratory disease and to facilitate intervention and action to prevent future worker exposure.

In consenting to the notification of additional notification information, patients are asked to confirm their understanding that this information may be used or disclosed as described in the privacy notice, including to support research into occupational respiratory diseases. The patient's medical practitioner is required to confirm that consent has been provided prior to notifying additional notification information.

(e) why the bill does not provide flexibility to provide only limited information where, for example, a doctor considers it to be in the best interests of the patient

The Bill requires the collection, use and disclosure of personal information necessary to allow the National Registry to accurately record the diagnoses of occupational respiratory diseases in Australia and assist in preventing further worker exposure to respiratory disease-causing agents.

To fulfil the objectives of the National Registry, the Bill requires medical practitioners to provide for limited fields of information in making notifications. A medical practitioner must provide details that:

- identify the patient
- identify the occupational respiratory disease
- identify the state or territory in which the last and main exposures were believed to have occurred
- allow the patient to be contacted by state and territory work health safety agencies for additional information, if necessary, to ensure they can appropriately assess the risks of occupational exposure with respect to disease development.

The scope of this information has been significantly informed by the existing requirements of the New South Wales Dust Disease Register and the Queensland Notifiable Dust Lung Disease Register, and feedback from key stakeholders throughout the development of National Registry, including medical peak bodies, worker representative organisations and state and territory agencies.

Stakeholders have expressed concern that medical practitioners are unlikely to provide information which is not mandatory. The current set of minimum fields have been determined as critical for accurately recording incidence of occupational respiratory diseases in Australia and preventing further worker exposure to respiratory disease-causing agents.

While the notification of prescribed occupational respiratory diseases will be mandatory, medical practitioners have been provided with a degree of flexibility to indicate 'not stated or unknown' for several mandatory fields. This flexibility recognises that the patient may at the time of diagnosis be unable or unwilling to provide such information.

(f) the process by which information on the registry would be accessed, and whether persons required to provide information to the registry, or those empowered to access the registry, would be able to see the content on the registry generally

Direct access to information held in the National Registry is limited through the online portal to prescribed medical practitioners and state and territory agencies.

The Commonwealth Chief Medical Officer will also publish de-identified statistical information on notifications made to the National Registry each year and provide for other de-identified information on occupational respiratory disease to be publicly released.

Medical practitioners will be verified to access the National Registry via MyGov. Diagnosing and treating medical practitioners may only access content held in the National Registry for relation to patients they have diagnosed or are treating for an occupational respiratory disease when consent requirements have been met.

An individual may also request a copy of information about them held in the National Registry from their medical practitioner or via the Registry Operator.

Officers nominated by state and territory work health and safety agencies will be verified to access the National Registry via MyGov. Once verified, relevant state and territory officers will have access to minimum notification information via a separate agency portal.

For notifications relating to individuals diagnosed, residing or whose last or main exposure occurred in the relevant jurisdiction, relevant state and territory officers will be provided detailed extracts showing information identifying patients, workplaces and medical practitioners. Relevant state and territory officers also have access to de-identified summary reports which do not identify patients, workplaces or medical practitioners.

(g) what oversight and review mechanism of the proposed scheme, and decisions made in relation to it, would apply

The continued operation of the National Registry and assessment of whether it continues to meet its objectives will be overseen by the Minister for Health and Aged Care, with the support of the Commonwealth Chief Medical Officer, the Secretary of the Department of Health and Aged Care and relevant Senior Executives in the department.

Additionally, the ongoing operation of the National Registry will be supported by the establishment of a departmental operational advisory group to inform the ongoing development of the National Registry over time, taking into consideration feedback from key stakeholders.

Concluding comments

International human rights legal advice

2.229 Further information was sought as to why the bill does not define key terms (including listing silicosis as an occupational respiratory disease, and defining categories of medical practitioner and minimum and additional notification information to which the registry would apply). The minister stated that the bill seeks to achieve an appropriate balance between embedding the obligations and processes for the registry in the bill, and providing that operational detail will be set out in legislative instruments where it may be more readily amended to ensure the currency of the registry. It would appear, therefore, that the scope of the registry would likely expand in future beyond the initial prescription of silicosis, and that more information about a greater number of patients would therefore be required to be included in the registry.[265]

2.230 With respect to the definition of medical practitioners, the minister stated that the kinds of medical practitioners to be prescribed in the rules are intended to be reflective of the necessary skills and experience required to ensure accurate diagnoses of occupational respiratory diseases, and stated that this definition will need to remain representative of the varied medical expertise required to diagnose prescribed occupational respiratory diseases, particularly those of a novel nature. However, it is not clear why the types of medical practitioners who are already able to diagnose silicosis are not included in the bill itself.

2.231 As to the definitions of 'minimum' and 'additional' notification information, the minister stated that the bill allows the Commonwealth Chief Medical Officer to determine the scope of minimum and additional notification information that will be captured in the

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

registry, stating that this will allow for changes to the type of information notified, when appropriate, and ensures it remains capable of supporting further investigation of emerging issues and research into occupational respiratory diseases. However, the explanatory memorandum provides some specific detail as to the information that it is already intended that these two categories should include. As such, it remains unclear why details of the intended information is not included in the bill itself, while retaining flexibility to include further information by legislative instrument in future. As drafted, the bill does not constrain the type of information that may be included in these categories. This means that the full extent of the potential limitation on the right to privacy is not clear and, depending on how these provisions are defined, could potentially be broad.

2.232 As to why information which identifies a person is necessary to be provided to the register in order for it to achieve its stated objective, the minister stated that this is required to accurately record the incidence of relevant diseases and assist in preventing future exposure to disease-causing agents. The minister stated that personal information is required to ensure state and territory agencies can act on notifications to investigate the occurrence of occupational respiratory disease within a workplace and seek additional information directly from the individual if necessary. However, it is not immediately clear why a state or territory agency could not act on a notification with respect to a suspected disease-causing agent or potential exposure site without naming an individual patient. The minister further stated that using personal information is necessary to allow doctors to demonstrate that they have met their obligation to provide that information. However, this would not appear to be a relevant consideration with respect to the proportionality of the limit on the patients' right to privacy. The minister further stated that the provision of identifying information will ensure that other doctors can access a patient's records to provide them with healthcare or check whether a previous diagnosis has been notified to the registry. It is not clear, however, why it is necessary to allow other doctors access to patient's records without their consent in order for them to provide healthcare or why the system could not (for example) identify duplicate notifications internally.

2.233 Further information was sought as to why the bill does not establish a mechanism by which the patient (or their relevant physician) may request they not be required to provide all or some information to the registry, including for example, where the doctor considers it to be in the best interests of the patient. The minister stated that stakeholders had expressed concern that medical practitioners would be unlikely to provide information which was not mandatory, and stated that the current set of minimum fields have been determined as critical for accurately recording the incidence of occupational respiratory diseases. However, this would not appear to constitute a sufficient justification for requiring the provision of personal information about every patient,

including those who do not consent to that disclosure. Administrative convenience, in and of itself, is unlikely to be sufficient to constitute a legitimate objective for the purposes of international human rights law.

2.234 The minister stated that information notified under this legislation is intended to reflect data collected by both the New South Wales Dust Disease Register and the Queensland Notifiable Dust Lung Disease Register – existing state-based mandatory notification systems established to monitor and analyse the incidence of particular occupational respiratory diseases. The minister further stated that if the National Registry did not require mandatory notification of diagnoses 'it is reasonable to expect both jurisdictions would retain their state-based registers, resulting in a duplicative reporting obligation for medical practitioners', and that this would compromise the efficacy of a national reporting system. However, the existence of existing registers within individual states is not directly relevant to the question of why the bill does not enable patients to determine how much (if any) personal identifying or medical information they consent to provide.

2.235 The minister further stated that the registry system would allow a doctor to select 'not stated or unknown' for several mandatory fields (other than those identifying the patient, the disease, the state or territory of exposure, and allowing the patient to be contacted), but did not identify which fields those are. Consequently, the system would permit some flexibility, albeit indirectly, but not with respect to information which would identify a patient and their contact information. It also gives the medical practitioner the power to determine the information to be provided, rather than the patient themselves. As such, this would appear to have limited safeguard value with respect to privacy.

2.236 As to whether individuals would be advised of how their information could be disclosed and used if they elected to provide additional notification information, the minister stated that a privacy notice has been prepared to accompany the operation of the registry, which will be included on the website, made available to individuals prior to notification and provided to patients by the diagnosing or treating doctors. The minister also advised that an individual may request a copy of information about them held in the National Registry from their medical practitioner or via the Registry Operator. These have the capacity to serve as a safeguard, and ensure that patients provide informed consent should they elect to provide additional information. However, they would not have safeguard value with respect to information that is to be mandatorily notified.

2.237 Further information was sought in relation to the process by which information on the registry would be accessed, and whether persons required to provide information to the registry, or those empowered to access the registry, would be able to see the content on the registry generally. The minister stated that direct access would be limited to medical practitioners and state and territory agencies via an online portal. The minister

stated that doctors would be verified to access the registry via MyGov and would only be able to access content in the registry in relation to patients they have diagnosed or are treating for an occupational respiratory disease when consent requirements have been met. The access of doctors to the registry would, therefore, appear to be reasonably constrained. However, the minister advised that for notifications relating to individuals diagnosed, residing or whose last or main exposure occurred in the relevant jurisdiction, relevant state and territory officers would be provided detailed extracts showing information identifying patients, workplaces and medical practitioners, as well as de-identified summary reports. As such, it would appear that multiple employees of state and territory agencies would be able to see personal identifying information about every patient in their relevant jurisdiction, which raises questions as to whether the measure would be sufficiently constrained (and why it is necessary for such officials to be provided with the names of each patient).

2.238 Lastly, with respect to any oversight and review mechanisms of the proposed scheme, and decisions made in relation to it, the minister advised that the operation of the registry would be overseen by the Minister for Health and Aged Care with the support of senior departmental staff and the Commonwealth Chief Medical Officer, and that its ongoing operation would be supported by the establishment of a departmental operational advisory group taking into consideration feedback from key stakeholders. While this may provide important oversight of the scheme's operation, these do not appear to be independent oversight mechanisms, meaning their safeguard value is limited. In addition, there is no legislative requirement to conduct a review of the scheme within a specified time period and report to Parliament, which limits the capacity for parliamentary and public oversight.

Committee view

2.239 The committee thanks the minister for this response. The committee considers that establishing a National Occupational Respiratory Diseases Registry, to help identify risks of exposure to respiratory disease-causing agents, promotes the rights to health and to just and favourable conditions of work, but also engages and limits the right to privacy. In particular, the committee is concerned that the personal health information of patients, and their identifying details, will be mandatorily included on a national register without the patient's consent.

2.240 The committee considers that, as drafted, the bill is not sufficiently constrained, nor is it accompanied by sufficient safeguards or independent review mechanisms such that it would constitute a proportionate limit on the right to privacy. The committee considers that the proportionality of the measure may be assisted by some amendments, which would not frustrate the overall purpose of the measure, to better protect the right to privacy of patients.

Suggested action

2.241 The committee considers the proportionality of this measure may be assisted were the bill amended to:

(a) prescribe 'silicosis' as an occupational respiratory disease and define key terms in the bill, particularly the type of information to be included in the registry, in line with the detail set out in the statement of compatibility and explanatory memorandum;

(b) establish a mechanism by which the patient (and their relevant physician) may request, or otherwise elect, not to provide all or some information to the registry (including personal information);

(c) require that a review of the registry must be conducted within twelve months of its operation, including an evaluation of the privacy implications of the scheme in practice, and be tabled in Parliament.

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

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

Legislative instruments

Migration (Granting of contributory parent visas, parent visas and other family visas in financial year 2022/2023) Instrument (LIN 23/016) 2023[266]

FRL No.	F2023L00609
Purpose	This legislative instrument determines the maximum number of visas that may be granted for certain classes of visas in the financial year from 1 July 2022 to 30 June 2023.
Portfolio	Home Affairs
Authorising legislation	*Migration Act 1958*
Disallowance	Exempt from disallowance
Rights	Protection of the family; rights of the child

2.244 The committee requested a response from the minister in relation to the instrument in *Report 8 of 2023*.[267]

Capping numbers of parent visas

2.245 This legislative instrument determines the maximum number of visas that may be granted for certain classes of visas[268] between 1 July 2022 and 30 June 2023 (inclusive). In particular, the instrument specifies that a maximum of 6,700 contributory parent visas, 1,700 parent visas and 500 other family visas may be granted in the 2022–2023 financial year.[269]

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266 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Migration (Granting of contributory parent visas, parent visas and other family visas in financial year 2022/2023) Instrument (LIN 23/016) 2023, *Report 9 of 2023*; [2023] AUPJCHR 94.

267 Parliamentary Joint Committee on Human Rights, *Report 8 of 2023* (2 August 2023) pp. 97100.

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

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

Summary of initial assessment

Preliminary international human rights legal advice

Right to protection of the family and rights of the child

2.246 Capping the number of parent visas and other family visas, which may limit the ability of certain family members (including parents of children aged under 18) to join others in Australia, engages and may limit the right to protection of the family and the rights of the child.[270] An important element of protection of the family[271] is to ensure family members are not involuntarily separated from one another. Laws and measures which prevent family members from being together will therefore engage this right. While the state has a right to control immigration, the right to protection of the family requires Australia to create the conditions conducive to family formation and stability, including the interest of family reunification.[272] The term 'family' is to be understood broadly as to include all those comprising a family as understood in the society concerned,[273] and is not necessarily displaced by geographical separation if there is a family bond to protect.[274] This includes couples and the parent-child relationship, and may include parents and their

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

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

272 See *Ngambi and Nebol v France,* United Nations Human Rights Committee, Communication No. 1179/2003 (2004) [6.4]–[6.5].

273 See General Comment No. 16, *The right to respect of privacy, family, home and correspondence, and protection of honour and reputation (art. 17)*, 8 April 1988.

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

adult children[275] and other family members,[276] depending on the level of dependency, shared life and emotional ties. As such, in relation to those applicants who can demonstrate that there is a family bond with persons in Australia to protect, a failure to allow for their family reunification due to the visa caps set by this instrument limits the right to protection of the family.

2.247 Additionally, Australia is required to ensure that, in all actions concerning children, the best interests of the child are a primary consideration, and to treat applications by minors for family reunification in a positive, humane and expeditious manner.[277] As such, capping the number of parent visas for parents of children aged under 18, which may result in the separation, or continued separation, of children from their parent (such as where a child is in Australia with one parent but the other parent is in another country and is ineligible for any other type of visa), engages and limits the rights of the child.

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

Committee's initial view

2.249 The committee noted that capping the number of parent visas and other family visas for the 2022–2023 financial year engages and may limit the right to protection of the family and the rights of the child. The committee considered further information was required to assess the compatibility of this measure with these rights and sought the minister's advice in relation to six specific questions, as set out in the minister's response.

2.250 The full initial analysis is set out in *Report 8 of 2023*.

Minister's response[278]

2.251 The minister advised:

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

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

277 Convention on the Rights of the Child, articles 3(1) and 10.

278 The minister's response to the committee's inquiries was received on 28 August 2023. This is an extract of the response. The response is available in full on the committee's website.

(a) whether setting a cap on the number of parent and other family visas seeks to achieve a legitimate objective for the purposes of international human rights law

(b) whether the cap on the number of visas is a reasonable and proportionate measure to achieve the stated objective

Australia's Family Migration Program facilitates the reunification of family members (including Parents and Other Family) with Australian citizens, permanent residents or eligible New Zealand citizens. The requirement not to arbitrarily or unlawfully interfere with the family unit under Articles 17 and 23 of the *International Covenant on Civil and Political Rights* (ICCPR) does not amount to a right to enter Australia where there is no other right to do so. While there is no absolute right to family reunion at international law, the Australian Government recognises that it is an important principle and it is facilitated where possible.

It has been the long-standing practice of successive governments to manage the orderly delivery of the Migration Program against planning levels. This is a legitimate state objective. Each year, the Australian Government sets Migration Program planning levels following consultations with state and territory governments, business and community groups and the wider public.

The Department of Home Affairs (the Department) manages the allocation of resources to deliver the Family Program, including Parent and Other Family visas, in line with the planning levels and priorities set by the Government.

Furthermore, section 85 of the *Migration Act 1958* (the Act) allows the Minister to determine the maximum number of visas which may be granted in each financial year in certain visa categories, including Parent and Other Family visas. If a visa class has been 'capped' this means that if the number of visas granted within that financial year have reached the maximum number determined by the Minister, no more visas of that class may be granted in that financial year. Those visa applications will be 'queued' for further processing in the next financial year.

The 'cap and queue' power allows the annual Migration Program to be managed more efficiently by:

• limiting the number of visas that may be granted under a specific class, while queueing additional applications which satisfy the criteria for grant; and

• ensuring that applications which do not satisfy the criteria for a visa can be refused and do not remain in the queue for years before a decision is made on their application.

The number of Contributory Parent, Parent and Other Family visa application lodgements continue to exceed the visa places allocated each financial year by

the Australian Government. In order to facilitate the orderly and equitable processing of visa applications in these categories, Parent, Contributory Parent and Other Family visas are capped at their respective planning levels via a legislative instrument under annual Migration Program arrangements that have been in place for over ten years. The cap on the number of visas remains a reasonable and proportionate measure to manage the orderly delivery of the Migration Program.

(c) whether any children under 18 years would be likely to be separated from their parents as a result of caps imposed on the numbers of parent visas granted

(d) whether there is any discretion to ensure family members are not involuntarily separated as a result on the cap of the number of parent and other family visas

While the Australian Government recognises that family reunion is an important principle and will be facilitated where possible, as noted above, rights in relation to family reunion, including those under Articles 17 and 23 of the ICCPR, and Article 10 of the Convention on the Rights of the Child, are not absolute rights at international law and do not amount to a right to enter Australia where there is no other right to do so.

The capping of Parent and Other Family visas made under section 85 of the Act facilitates the orderly and equitable processing of all visa applications in these categories, including those involving children under 18 years of age.

In addition to Australia's permanent Family Migration Program, the Australian Government also facilitates short-term family reunification through temporary visas, which allow for a temporary stay in Australia. Family visa applicants, including those awaiting an outcome of their permanent Parent visa, may be able to reunite with family members in Australia, subject to meeting the visa eligibility criteria. Visa options include:

• Visitor visas are available for the purposes of a short-term stay in Australia, including family visits, and can be used by applicants to temporarily visit family members in Australia while awaiting the outcome of a permanent visa application, provided the requirement for a genuine temporary stay in the interim is met. Visitor visas include the Electronic Travel Authority (ETA) (subclass 601) and eVisitor visa (subclass 651), which are available to particular citizenships only for stays of up to three months at a time; and the Visitor visa (subclass 600), which is available for a stay of up to 12 months.

• The Visitor visa (subclass 600) includes the Sponsored Family stream, which enables Australian citizens and permanent residents, aged at least 18 years, to sponsor a relative for short-term stays in Australia. Visitor visa policy also allows for parents of Australian citizens or permanent residents to be granted Visitor

visas (subclass 600) with visa validity periods greater than the standard 12 months.

• The Sponsored Parent (Temporary) Visa (subclass 870) (SPTV), which opened to visa applications on 1 July 2019, provides an alternative pathway for parents to reunite with their adult children in Australia, and has been capped at 15,000 places per program year. The SPTV allows parents of Australian sponsors (who are at least 18 years of age) to visit Australia for up to three or five years at one time, for a combined maximum stay of up to 10 years.

(e) what is the average length of time for visas capped under this legislative instrument to be finally processed, and are these timeframes consistent with the right to protection of the family and the rights of the child

The average processing times for visas capped under the legislative instrument are impacted by a range of factors, including the number of places allocated to the program each year within the broader Migration Program and the level of demand for the visas. High volumes of visa application lodgements for some programs, including Parents, which for a number of years exceeded annual migration planning levels, have impacted on processing times and the number of on-hand applications within these categories.

The Home Affairs website provides information on processing times for visas capped under the legislative instrument, including key processing milestone dates.[279]

In addition to Australia's permanent Family Migration Program, the Australian Government also facilitates short-term family reunification through temporary visas as detailed above, which allow for a temporary stay in Australia and have significantly shorter processing times. Family visa applicants, including those awaiting an outcome of their permanent Parent visa, may be able to reunite with family members in Australia, subject to meeting the visa eligibility criteria.

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

When developing policies and drafting legislation related to the Family Program, the Department carefully considers compliance with Australia's international human rights obligations.

Concluding comments

International human rights legal advice

2.252 The minister has advised that it is the government's view that the right to protection of the family and the rights of the child do not amount to a right to enter

[279] See Parent visas queue release dates and Other family visas queue release dates.

Australia where there is no other right to do so, but that the government recognises that family reunion is an important principle that is facilitated where possible. The minister has advised the capping of the parent and other family visas would apply to all visa applications, including those involving children under 18 years of age. The minister has advised that in addition to the permanent family migration program, there is the possibility of short-term reunification through temporary visas, such as visitor visas – subject to applicants and sponsors meeting the visa eligibility requirements. In response to whether the right to the protection of the family and the rights of the child were considered when capping these numbers, the minister has advised that the department carefully considers compliance with Australia's international human rights obligations when developing policies and drafting legislation related to the family program. It is noted that this response is almost identical to that provided to the committee by the previous minister in 2021.[280]

2.253 The right to protection of the family is found in both the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. Those treaties state that the family 'is the natural and fundamental group unit of society and is entitled to protection by society and the State' and that the 'widest possible protection and assistance should be accorded to the family'.[281] While the state has a right to control immigration, this right does require Australia to create the conditions conducive to family formation and stability, including the interest of family reunification.[282] The term 'family' is to be understood broadly as to include all those comprising a family as understood in the society concerned,[283] and is not necessarily displaced by geographical separation if there is a family bond to protect.[284] This clearly includes couples and the parent-child relationship, and may include parents and their

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280 See Parliamentary Joint Committee on Human Rights, *Report 7 of 2021* (16 June 2021) pp. 125-134.

281 International Covenant on Civil and Political Rights, article 23 and the International Covenant on Economic, Social and Cultural Rights, article 10.

282 See *Ngambi and Nebol v France,* United Nations Human Rights Committee, Communication No. 1179/2003 (2004) [6.4]–[6.5].

283 See General Comment No. 16, *The right to respect of privacy, family, home and correspondence, and protection of honour and reputation (art. 17)*, 8 April 1988.

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

adult children[285] and other family members,[286] depending on the level of dependency, shared life and emotional ties. As such, if parents are separated from their children (including children aged under 18 years and adult children), where it can be demonstrated that there is a family bond to protect, a failure to allow for family reunification limits the right to protection of the family. This is not an absolute right and may be limited, so long as the limitation can be demonstrated to pursue a legitimate objective, and the measure is rationally connected to (that is, effective to achieve) the objective and is a proportionate way in which to achieve the stated objective.

2.254 In addition, the Convention on the Rights of the Child requires that the best interests of the child must be a primary consideration, and children should not be separated against their will from their parents (except if in their best interests), and states should respect the primary responsibility of parents or guardians for promoting the development of children.[287] In particular, article 10 of the Convention on the Rights of the Child requires that applications by a child or their parents for the purpose of family reunification must be dealt with in a positive, humane and expeditious manner. As such, capping the number of parent visas for parents of children aged under 18, which may result in the separation, or continued separation, of children from their parent (such as where a child is in Australia with one parent, but the other parent is in another country and is ineligible for any other type of visa) engages and limits the rights of the child. Similarly, to the right to protection of the family, many of the rights of the child may be permissibly limited, if necessary, reasonable and proportionate to do so.

2.255 As the minister does not recognise that the cap on the number of parent or other relative visas may limit the right to protection of the family or the rights of the child (despite the committee's advice to this effect in 2021),[288] the minister has not advised what the legitimate objective of the measure is, and whether the cap is a reasonable and proportionate measure to achieve the stated objective. The minister has stated that the cap on visas allows the annual migration program to be managed more efficiently and facilitates the orderly and equitable processing of visa applications. Any limitation on a right must be shown to be aimed at achieving a legitimate objective. A legitimate objective is one that is necessary and addresses an issue of public or social concern that

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

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

287 Convention on the Rights of the Child, articles 2, 3, 5, 8–10, 18 and 27.

288 See Parliamentary Joint Committee on Human Rights, *Report 7 of 2021* (16 June 2021) pp. 125-134.

is pressing and substantial enough to warrant limiting the right. It is not clear that managing the migration program efficiently and facilitating the processing of visa applications would constitute a legitimate objective for the purposes of international human rights law.

2.256 Further, a key aspect of whether a limitation on a right can be justified is whether the limitation is proportionate to the objective sought to be achieved. This includes considerations of whether the measure provides sufficient flexibility to treat different cases differently or whether it imposes a blanket policy without regard to the merits of an individual case, and whether it is accompanied by sufficient safeguards. The minister's response states that the minister determines the maximum number of visas which may be granted in relation to parent and other family visas, and when a visa class has been capped, no more visas of that class may be granted in that financial year. As such, it would appear there is no capacity for flexibility to grant any further visas, regardless of the individual merits of a case. So, for example, if the cap has been reached, the parent of an Australian child aged under 18 years of age would not be eligible to be granted a parent visa, regardless of whether to do so would be in the best interests of the child or promote the right to protection of the family. The only identified possible safeguard is if the parent were eligible for another type of visa, such as a temporary visa. However, if a person does not meet the eligibility requirements (which often include financial contributions by themselves or their sponsor) this cannot operate to safeguard these rights. In addition, it is noted that the minister's response states that many of these visa types would require sponsorship by a person aged over 18 years of age, so the child could not themselves sponsor their parent under these categories of visas. It is also noted that the Department of Home Affairs website, referenced by the minister, states that new visa applications for contributory parent visas (which require a contributory payment of close to $50,000) [289] are likely to take 12 years for final processing, and new parent and aged parent visa applications (which do not require the contributory payment) are likely to take approximately 29 years for final processing.[290] It therefore appears that the cap on the number of visas ensures there are significant delays in the processing of visa applications, making family reunification extremely difficult (particularly for those who cannot afford the contributory payment).

2.257 As such, in relation to those applicants who can demonstrate that there is a family bond with persons in Australia to protect, a failure to allow for their family reunification limits the right to protection of the family. In addition, where a child aged under 18 in Australia is separated from their parent or other close family member, this may also limit

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289 Department of Home Affairs website, 'Contributory parent Visa' which states the cost is $48,365.

290 Department of Home Affairs website, Visa processing times, Capping and Queuing of Parent visa applications.

the best interests of the child. As it is not clear that the measure seeks to achieve a legitimate objective for the purposes of international human rights law, and as there is no flexibility to consider the individual merits of an application once the cap is reached, there is a significant risk of this measure being incompatible with the right to protection of the family and the rights of the child.

Committee view

2.258 The committee thanks the minister for this response. The committee notes that capping the number of parent and other family member visas each year engages and limits the right to protection of the family. While States have a right to control their migration program, international human rights law requires Australia to create the conditions conducive to family formation and stability, and this includes the interest of family reunification. The committee also notes that such a cap limits the rights of the child, which requires that the best interests of the child must be a primary consideration, and applications by a child or their parents for the purpose of family reunification must be dealt with in a positive, humane and expeditious manner.

2.259 The committee considers there will be many cases of family reunification where capping the number of parent or other family member visas will not limit the right to protection of the family or the rights of the child under international human rights law (as the family member in question is not part of the core family). However, the committee is concerned that no consideration can be given to these rights once a cap is set, as no further visas can be granted in that year. The committee considers that the cap on such visas is contributing to the significant delay in the processing of visa applications and considers that an almost 30 year wait for a parent visa renders family reunification effectively impossible. As it is not clear that the measure seeks to achieve a legitimate objective for the purposes of international human rights law, and as there is no flexibility to consider the individual merits of an application once the cap is reached, the committee considers there is a significant risk of the measure being incompatible with the right to protection of the family and the rights of the child.

2.260 The committee notes with concern that it raised this same issue in 2021 and the response provided is almost identical to that provided by the previous minister, despite the department having the benefit of the committee's previous views.

Suggested action

2.261 The committee considers the compatibility with the right to protection of the family and the rights of the child of Australia's Family Migration Program would be assisted if the cap on the number of parent or other family member visas did not preclude flexibility being applied by the department to ensure visas may continue to be granted to:

(a) those family members where there is a clear family bond to protect; or

(b) at a minimum, to ensure that visas may be granted to ensure children under the age of 18 years do not remain separated from their parents.

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

Mr Josh Burns MP

Chair

Additional Comment from Senator Rennick[291]

1.1 In regards to the International Organisations (Privileges and Immunities) Amendment Bill I do not support giving the minister any unspecified regulatory powers that enable the minister to grant Privileges and Immunities to foreign bodies without the prior specific approval of the parliament.

Senator Gerard Rennick
Senator for Queensland

291 This section can be cited as Parliamentary Joint Committee on Human Rights, Additional Comment, *Report 9 of 2023;* [2023] AUPJCHR 95.