Parliamentary Joint Committee on Human Rights

Human rights scrutiny report

Report 7 of 2017

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Committee information

Under the *Human Rights (Parliamentary Scrutiny) Act 2011* (the Act), the committee is required to examine bills, Acts and legislative instruments for compatibility with human rights, and report its findings to both Houses of the Parliament. The committee may also inquire into and report on any human rights matters referred to it by the Attorney-General.

The committee assesses legislation against the human rights contained in the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR); as well as five other treaties relating to particular groups and subject matter.[1] **Appendix 2** contains brief descriptions of the rights most commonly arising in legislation examined by the committee.

The establishment of the committee builds on Parliament's established tradition of legislative scrutiny. The committee's scrutiny of legislation is undertaken as an assessment against Australia's international human rights obligations, to enhance understanding of and respect for human rights in Australia and ensure attention is given to human rights issues in legislative and policy development.

Some human rights obligations are absolute under international law. However, in relation to most human rights, prescribed limitations on the enjoyment of a right may be justified under international law if certain requirements are met. Accordingly, a focus of the committee's reports is to determine whether any limitation of a human right identified in proposed legislation is justifiable. A measure that limits a right must be **prescribed by law**; be in pursuit of a **legitimate objective**; be **rationally connected** to its stated objective; and be a **proportionate** way to achieve that objective (the **limitation criteria**). These four criteria provide the analytical framework for the committee.

A **statement of compatibility** for a measure limiting a right must provide a **detailed and evidence-based assessment** of the measure against the limitation criteria.

Where legislation raises human rights concerns, the committee's usual approach is to seek a response from the legislation proponent, or else draw the matter to the attention of the proponent on an advice-only basis.

More information on the committee's analytical framework and approach to human rights scrutiny of legislation is contained in Guidance Note 1 (see **Appendix 4**).

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1 These are the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD); the Convention on the Elimination of Discrimination against Women (CEDAW); the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT); the Convention on the Rights of the Child (CRC); and the Convention on the Rights of Persons with Disabilities (CRPD).

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Chapter 1

New and continuing matters

1.1 This chapter provides assessments of the human rights compatibility of:

- bills introduced into the Parliament between 19 and 22 June (consideration of 3 bills from this period has been deferred);[1]
- legislative instruments received between 26 May and 22 June (consideration of 5 legislative instruments from this period has been deferred);[2] and
- bills and legislative instruments previously deferred.

1.2 The chapter also includes reports on matters previously raised, in relation to which the committee seeks further information following consideration of a response from the legislation proponent.

1.3 The committee has concluded its consideration of 8 bills and instruments that were previously deferred.[3]

Instruments not raising human rights concerns

1.4 The committee has examined the legislative instruments received in the relevant period, as listed in the *Journals of the Senate*.[4] Instruments raising human rights concerns are identified in this chapter.

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1 See Appendix 1 for a list of legislation in respect of which the committee has deferred its consideration. The committee generally takes an exceptions based approach to its substantive examination of legislation.

2 The committee examines legislative instruments received in the relevant period, as listed in the *Journals of the Senate*. See Parliament of Australia website, *Journals of the Senate*, http://www.aph.gov.au/Parliamentary_Business/Chamber_documents/Senate_chamber_documents/Journals_of_the_Senate.

3 These are: the Law Enforcement Integrity Commissioner Regulations 2017 [F2017L00304] and the Telecommunications Integrated Public Number Database Scheme 2017 [F2017L00298] (first deferred in *Report 4 of 2017*); the Aviation Transport Security Amendment (Persons in Custody) Regulations 2017 [F2017L00440], the Imported Food Control Amendment Bill 2017, and the Specification of Occupations, a Person or Body, a Country or Countries Amendment Instrument 2017/040 - IMMI 17/040 [F2017L00450] (first deferred in *Report 5 of 2017*); the Long Service Leave (Commonwealth Employees) Amendment (2017 Measures No. 1) Regulations 2017 [F2017L00568], the Migration Legislation Amendment (2017 Measures No. 2) Regulations 2017 [F2017L00549], and the Norfolk Island Continued Laws Amendment (2017 Measures No. 1) Ordinance 2017 [F2017L00581] (deferred in *Report 6 of 2017*).

4 See Parliament of Australia website, *Journals of the Senate*, http://www.aph.gov.au/Parliamentary_Business/Chamber_documents/Senate_chamber_documents/Journals_of_the_Senate.

1.5 The committee has concluded that the remaining instruments do not raise human rights concerns, either because they do not engage human rights, they contain only justifiable (or marginal) limitations on human rights or because they promote human rights and do not require additional comment.

Response required

1.6 The committee seeks a response or further information from the relevant minister or legislation proponent with respect to the following bills and instruments.

Federal Financial Relations (National Partnership payments) Determination No. 116-119 (February 2017)-(May 2017)[5]

Purpose	Specifies the amounts to be paid to the states and territories to support the delivery of specified outputs or projects, facilitate reforms by the states or reward the states for nationally significant reforms
Portfolio	Treasury
Authorising legislation	*Federal Financial Relations Act 2009*
Last day to disallow	Exempt
Rights	Health; social security; adequate standard of living; children; education (see **Appendix 2**)
Status	Seeking additional information

Background

1.7 The committee has previously examined a number of related Federal Financial Relations (National Partnership payments) Determinations made under the *Federal Financial Relations Act 2009* and requested and received further information from the treasurer as to whether they were compatible with Australia's human rights obligations.[6]

5 Federal Financial Relations (National Partnership payments) Determination No. 116 (February 2017) [F2017L00198]; Federal Financial Relations (National Partnership payments) Determination No. 117 (March 2017) [F2017L00413]; Federal Financial Relations (National Partnership payments) Determination No. 118 (April 2017) [F2017L00540]; Federal Financial Relations (National Partnership Payments) Determination No. 119 (May 2017) [F2017L00707].

6 See Parliamentary Joint Committee on Human Rights, *Twenty-eighth report of the 44th Parliament* (17 September 2015) 10-14; *Thirtieth report of the 44th Parliament* (10 November 2015) 102-109; *Report 7 of 2016* (11 October 2016) 40-43; *Report 8 of 2016* (9 November 2016) 84-87; and *Report 3 of 2017* (28 March 2017) 13-16.

1.8 In its *Report 7 of 2016*, the committee sought further information from the treasurer as to the compatibility of a number of related Federal Financial Relations (National Partnership payments) Determinations with Australia's obligation to progressively realise economic, social and cultural (ESC) rights and to refrain from taking retrogressive measures, or backwards steps, in relation to the realisation of these rights.[7] Based on additional information provided by the Treasurer, the committee was able to conclude in its *Report 8 of 2016* that the determinations were unlikely to constitute a retrogressive measure for the purposes of international human rights law.[8] The committee also recommended at the time that the kind of additional information provided by the Treasurer be included in future statements of compatibility.

1.9 In its *Report 3 of 2017*, the committee also examined four related Federal Financial Relations (National Partnership payments) Determinations.[9] The committee reiterated its previous recommendation that the type of information previously provided by the treasurer to the committee be included in future statements of compatibility for such measures in order to assist the committee to fully assess the compatibility of these determinations with human rights.

1.10 This report considers four new Federal Financial Relations (National Partnership payments) Determinations (the determinations) for the periods February, March, April and May 2017.

Payments to the states and territories for the provision of health, education, employment, housing and community services

1.11 The Intergovernmental Agreement on Federal Financial Relations (the IGA) provides for a range of payments from the Commonwealth government to the states and territories. These include National Partnership payments (NPPs) which are financial contributions to support the delivery of specified projects, facilitate reforms or provide incentives to jurisdictions that deliver on nationally significant reforms. These NPPs are set out in National Partnership agreements made under the IGA, which specify mutually agreed objectives, outcomes, outputs and performance benchmarks.

1.12 The *Federal Financial Relations Act 2009* provides for the minister, by legislative instrument, to determine the total amounts payable in respect of each

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7 Parliamentary Joint Committee on Human Rights, *Report 7 of 2016* (11 October 2016) 40-43.

8 Parliamentary Joint Committee on Human Rights, *Report 8 of 2016* (9 November 2016) 84-87.

9 Federal Financial Relations (National Partnership payments) Determination No. 112 (October 2016) [F2016L01724]; Federal Financial Relations (National Partnership Payments) Determination No. 113 (November 2016) [F2016L01937]; Federal Financial Relations (National Partnership payments) Determination No. 114 (December 2016) [F2017L00049]; and Federal Financial Relations (National Partnership payments) Determination No. 115 (January 2017) [F2017L00050] 13-16.

NPP in line with the parameters established by the relevant National Partnership agreements. Schedule 1 to each of the determinations sets out the amounts payable under the NPPs to states and territories, contingent upon the attainment of specified benchmarks or outcomes, in areas including health, employment, education, community services and affordable housing.

Compatibility of the measure with multiple rights

1.13 In its previous analysis, the committee has noted that setting benchmarks for achieving certain standards, which may consequently result in fluctuations in funding allocations, has the capacity to both promote rights and, in some cases, limit rights, including the right to health; the right to social security; the right to an adequate standard of living, including housing; the right to education; and the rights of children.

1.14 Under international human rights law, Australia has obligations to progressively realise ESC rights using the maximum of resources available, and a corresponding duty to refrain from taking retrogressive measures, or backwards steps, in relation to the realisation of these rights.

1.15 Because realisation of these rights is reliant on government allocation of expenditure, a reduction in funding for services such as health and education may be considered a retrogressive measure in the attainment of ESC rights.[10] Any backward step regarding the progressive attainment of such rights therefore needs to be justified for the purposes of international human rights law.

1.16 The statement of compatibility for each of the determinations contains a standard paragraph, similar to information provided for past related determinations considered by the committee, which states:

> neither this determination nor the making of National Partnership payments more generally could be said to have a detrimental impact on any human right.[11]

1.17 The statements of compatibility for the determinations therefore do not provide an assessment of the extent to which fluctuations in funding, with reference to the achievement or failure to achieve specific benchmarks or outcomes, may promote human rights (where funding is increased) or may be regarded as retrogressive (where funding is reduced).

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10 The committee has previously considered similar issues in relation to the human rights compatibility of funding allocation measures through appropriation bills: See, Parliamentary Joint Committee on Human Rights, *Twenty-third report of the 44th Parliament* (18 June 2015) Appropriation Bill (No. 3) 2014-2015 and Appropriation Bill (No. 4) 2014-2015, 13-17; *Report 2 of 2017* (21 March 2017) Appropriation Bill (No. 3) 2016-2017 and Appropriation Bill (No. 4) 2016-2017, 44-46; *Report 5 of 2017* (14 June 2017) Appropriation Bill (No. 1) 2017-2018 and Appropriation Bill (No. 2) 2017-2018, 42-44.

11 Explanatory statement, statement of compatibility 2.

1.18 As noted above, the committee previously requested further advice from the treasurer as to whether the setting of benchmarks for the provision of funds under the previous NPPs is compatible with human rights (for example, how the benchmarks may or may not support the progressive realisation of human rights such as the rights to health and education); whether there are any retrogressive trends over time indicating reductions in payments which may impact on human rights (such as health, education or housing); and whether any retrogressive measures or trends pursue a legitimate objective, are rationally connected to their stated objective, and are a reasonable and proportionate measure for the achievement of that objective.

1.19 The response previously provided by the Treasurer in relation to similar measures provided a very useful assessment of the human rights compatibility of the NPPs in the context of ESC rights. The provision of such additional information by the treasurer allowed the committee to conclude that past determinations were likely to be compatible with Australia's international obligations.[12] While the committee has now recommended this type of information be included in future statements of compatibility going forward, this has not occurred to date.

1.20 Without this additional information included in the statements of compatibility, it is difficult for the committee to complete its assessment of the compatibility of NPPs. If such information were included in the statement of compatibility at the outset then the committee may not need to request further information from the Treasurer in relation to NPPs.

Committee comment

1.21 In relation to the determinations examined in this report, the committee therefore seeks the advice of the treasurer as to:

- **whether the setting of benchmarks for the provision of funds under the National Partnership payments is compatible with human rights (for example, how the benchmarks may or may not support the progressive realisation of human rights such as the rights to health and education);**
- **whether there are any retrogressive trends over time indicating reductions in payments which may impact on human rights (such as health, education or housing); and**
- **whether any retrogressive measures or trends pursue a legitimate objective; are rationally connected to their stated objective; and are a reasonable and proportionate measure for the achievement of that objective.**

12 Parliamentary Joint Committee on Human Rights, *Report 8 of 2016* (9 November 2016) 84-87.

1.22 Additionally, the committee seeks the advice of the treasurer as to whether this type of information, previously provided by the treasurer to the committee, could be included in future statements of compatibility for related National Partnership payment determinations to assist the committee to fully assess the compatibility of the measure with human rights in future.

Passports Legislation Amendment (Overseas Travel by Child Sex Offenders) Bill 2017

Purpose	Amends the *Australian Passports Act 2005* and *Foreign Passports (Law Enforcement and Security) Act 2005* to require the minister to deny a passport or demand the surrender of a foreign travel document when an Australian citizen is on a state or territory child sex offender register with reporting obligations; and the *Criminal Code Act 1995* to create an offence for a registered child sex offender with reporting obligations to travel, or attempt to travel, overseas without permission from a relevant authority
Portfolio	Foreign Affairs and Trade
Introduced	House of Representatives, 14 July 2017
Rights	Freedom of movement (see **Appendix 2**)
Status	Seeking additional information

Background

1.23 The Passports Legislation Amendment (Overseas Travel by Child Sex Offenders) Bill 2017 (the bill) finally passed both houses of parliament on 20 July 2017 and received royal assent on 26 July 2017.

1.24 As a result of the rapid passage of the bill, this is the first opportunity that the committee has had to report on this legislation.

Denial or cancelation of passport and criminal offence to travel overseas

1.25 Section 22AA of the bill provides that a passport must not be issued and must be cancelled where a 'competent authority' makes a refusal or cancellation request.

1.26 Such a request may be made in relation to a 'reportable offender', which means an Australian citizen whose name is entered on a child protection register of a state or territory and who has reporting obligations in connection with that entry on the register.

1.27 A 'competent authority' is defined in the *Australian Passports Act 2005* as a person with responsibility for, or powers, functions or duties in relation to, reportable offenders or a person specified in a minister's determination as a competent authority.[1]

1 *Australian Passports Act 2005* section 12(3).

1.28 Section 271A.1(1) further makes it an offence for an Australian citizen, if their name is entered on a child protection offender register and the person has reporting obligations in connection with that entry on the register, to leave Australia.

1.29 Section 271A.1(3) provides an exception (an offence-specific defence) to this offence, stating that the offence does not apply if a competent authority has given permission for the person to leave Australia or the reporting obligations of the person are suspended at the time the person leaves Australia. The offence carries a maximum penalty of five years imprisonment.

Compatibility of the measures with the right to freedom of movement

1.30 The right to freedom of movement includes the right to leave and return to Australia. As international travel requires the use of passports, the right to freedom of movement encompasses the right to obtain necessary travel documents, such as a passport.

1.31 By providing for the denial or cancelation of a reportable offender's passport and creating a criminal offence for a reportable offender to leave Australia, the measure engages and limits freedom of movement. The statement of compatibility acknowledges the limitation on the right but argues that this limitation is permissible.[2]

1.32 The right to freedom of movement may be permissibly limited where the limitation pursues a legitimate objective, is rationally connected to that objective and is a proportionate means of achieving that objective.

1.33 The explanatory memorandum states that the purpose of the measures are to ensure reportable offenders are prevented from travelling overseas 'to sexually exploit or sexually abuse vulnerable children in overseas countries where the law enforcement framework is weaker and their activities are not monitored'.[3] The statement of compatibility identifies the objective of the measures as protecting the rights and freedoms of others and particularly the rights of children to be protected from all forms of sexual exploitation and abuse.[4] The explanatory memorandum also provides evidence of the importance of this objective.[5] Preventing the abuse of children is clearly a legitimate objective for the purpose of international human rights law.

1.34 However, the statement of compatibility does not provide any specific information, or any evidence, about how the measure will be effective to achieve this objective (that is, rationally connected to the legitimate objective).

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2 Statement of Compatibility (SOC) 4, 5.

3 Explanatory Memorandum (EM) 2.

4 SOC 3.

5 EM 2.

1.35 In relation to the proportionality of the measures, the statement of compatibility argues that:

> The measure is proportionate and reasonable because it only captures those who have been convicted in a court of law for child sex offences and/or who have been placed by a court on a register with reporting obligations due to the seriousness of their offences and/or risk of reoffending. The passport measures will be legislated, are not arbitrary and will cease to take effect once the person's reporting obligations end.[6]

1.36 The statement of compatibility identifies one relevant safeguard in relation to the measures, stating:

> if there are good reasons for making an exception, a competent authority will be able to permit a reportable offender to travel on a case by case basis.[7]

1.37 The statement of compatibility provides no further information on the operation of safeguards. It is therefore not evident that the measures are sufficiently circumscribed so as to ensure they are the least rights restrictive way of achieving their objective.

1.38 It appears from the explanatory materials that it is not intended that a competent authority will make a case-by-case assessment of each reportable offender before requesting that their passport be cancelled or not issued. The explanatory memorandum notes that Commonwealth legislation already provides that a child sex offender's passport may be refused, cancelled or surrendered on the basis of a competent authority's assessment of the offender's likelihood to cause harm.[8] However, the explanatory memorandum states that:

> This process is resource intensive, being done on a case-by-case basis, and is subject to review by the Administrative Appeals Tribunal. As a result, States and Territories do not use these provisions at all. The measures in the Bill address these constraints to protect vulnerable overseas children.[9]

1.39 While the current process may be more resource intensive than the absence of a risk-based assessment, the statement of compatibility does not explain why better resourcing the current process would be insufficient to address the legitimate objective of protecting children. This would appear to be a more tailored approach, allowing for restriction of movement in those cases where an offender is likely to cause harm. The statement of compatibility does not identify any problems with the

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6 SOC 5.

7 SOC 5.

8 This would appear to be provided for in existing section 14 of the *Australian Passports Act 2005*.

9 EM 2.

current legal test for the refusal, cancellation or surrender of a passport in terms of targeting appropriate offenders.

1.40 It should be noted that reducing the administrative inconvenience of undertaking case-by-case assessments of offenders before depriving them of their freedom of movement after they have served their criminal sentence is not a legitimate objective for limiting a fundamental human right. Nor is reducing the administrative inconvenience of the availability of rights of review before the Administrative Appeals Tribunal (AAT).

1.41 The explanatory memorandum further states that following the changes introduced by the bill the number of competent authority requests 'will rise substantially to capture the existing 20,000 registered child sex offenders and additional 2,500 offenders added to the registers each year'.[10] Based on this information, it appears that the bill would permit competent authorities to make requests in relation to all reportable offenders without any consideration of the risk each individual poses or their individual circumstances or whether it is necessary to restrict travel entirely rather than to specific countries 'where the law enforcement framework is weaker'.[11] Further, the criminal offence of leaving Australia under section 271A.1(1) would apply to all those on a child protection offender register who have reporting obligations unless an exception applies.

1.42 The existence of effective safeguards and exemption is relevant to whether the measures are a proportionate limitation on human rights. A competent authority will be able to permit a reportable offender to travel overseas on a case by case basis where there are 'good reasons' (such as visiting a dying family member).[12] However, no information is provided as to the processes by which a person could apply to the competent authority to seek permission to be able to travel overseas or whether there is any process for merits review of any decision that the competent authority makes. It appears that the criminal offence of leaving Australia could apply unless a competent authority has given permission for the person to leave Australia or the reporting obligations of the person are suspended at the time the person leaves Australia. Permitting travel in particular circumstances also does not address the concern about the potential blanket application of the measures to all reportable offenders regardless of individually assessed risk.

1.43 In this respect, it is also unclear from the bill, the statement of compatibility and the explanatory memorandum which offenders will be included as subject to having their passport cancelled or not issued. The explanatory memorandum provides no detail of which offenders are put on a state or territory child protection

10 EM 12.

11 EM 2.

12 EM 9-10.

register, other than to say that the bill applies to 'registered child sex offenders'.[13] However, the bill provides that a reportable offender is one whose name is entered on a state or territory 'child protection offender register', however described. It appears that this may include those who have been convicted of harmful, but not sexual, offences against children and offences not involving children. For example, it appears that in the Northern Territory, Queensland, Tasmania and Victoria, a person convicted of incest (which could apply in relation to adults) could be included on a child protection register.[14] It therefore appears that the range of offences for which a person could be included on a child protection offender register may be broader than child sex offences. As such, the measures appear to be overly broad with respect to achieving the objective of preventing the abuse of children overseas. It is noted in this respect that the obligation to ensure that legislation operates in compatibility with Australia's international obligations rests with the commonwealth, irrespective of whether the relevant legislation or processes operate at the federal, state or territory level.[15]

Committee comment

1.44 The measures are stated to pursue the legitimate objective of preventing the exploitation and abuse of children overseas. However, the preceding analysis raises questions as to whether the limitation placed on the right to freedom of movement is proportionate and permissible.

1.45 The statement of compatibility has provided insufficient information to justify this limitation. The committee accordingly seeks the advice of the minister as to:

- **how the measures, in altering the existing system for the refusal of a travel document, are effective to achieve (that is, rationally connected to) its legitimate objective; and**
- **whether the limitation is reasonable and proportionate to achieve its stated objective, including:**
    - **why existing section 14 of the *Australian Passports Act 2005*, which provides that a travel document may be refused if a competent**

13 EM 2.

14 See *Child Protection (Offender Reporting and Registration) Act 2004* (Northern Territory); *Child Protection (Offender Reporting) Act 2004* (Queensland); *Community Protection (Offender Reporting) Act 2005* (Tasmania); *Sex Offenders Registration Act 2004* (Victoria). For a summary of offender registration legislation in each Australian state or territory, see also: https://aifs.gov.au/cfca/offender-registration-legislation-each-australian-state-and-territory (accessed 15 June 2017).

15 See, for example, Vienna Convention on the Law of Treaties, 1969, article 27; International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, articles 1 – 3, http://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf.

authority reasonably suspects a person would engage in harmful conduct, is not sufficient to address the legitimate objective of the measures;

- **whether other less rights restrictive approaches are reasonably available, including approaches which are tailored to the risk posed by an individual;**
- **how the measures are sufficiently circumscribed (including whether a person whose name is entered on a child protection offender register could include offenders who have not committed sexual offences against children and, if so, what is the justification for doing so; whether the competent authority will be required to consider individual risk factors before making a request); and**
- **whether there are adequate and effective safeguards (including the extent to which a reportable offender could seek review of a refusal/cancellation request or a decision to refuse a reportable offender's case-by-case request to travel 'for good reasons').**

Compatibility of the measure with the right to a fair hearing

1.46 The right to a fair trial and fair hearing is protected by article 14 of the International Covenant on Civil and Political Rights (ICCPR) and applies to both criminal and civil proceedings, including where rights and obligations are determined. The measures may engage and limit this right due to the restricted scope that is provided for review of the denial or cancellation of an individual's passport and other decisions in this process. The decision to deny or cancel an Australian passport will not be subject to merits review. The statement of compatibility argues that:

> The decision to cancel an Australian passport following a competent authority request on the grounds that a person is a reportable offender should not be subject to administrative review as the Minister's decision will be a mandatory decision. The Minister is required to deny a passport following a request by a competent authority, which has appropriate expertise and full understanding of the circumstances of the offender.[16]

1.47 It is acknowledged that, given the mandatory nature of the minister's decision to cancel or deny a passport, merits review of the exercise of this power would potentially provide substantively no further grounds of review than judicial review. It is noted in this respect that an individual would continue to have access to judicial review.

1.48 However, it is not addressed in the statement of compatibility whether the decision by the competent authority to make a refusal or cancellation request would

16 SOC 5.

be subject to merits review. Nor does the statement of compatibility address whether a decision by a competent authority in relation to whether a registrable offender is to be granted permission to travel overseas would be subject to merits review.

Committee comment

1.49 The preceding analysis raises questions about the compatibility of the measure with the right to a fair hearing.

1.50 Accordingly, the committee requests the advice of the minister as to whether decisions of the competent authority will be subject to merits review.

1.51 If not, the committee requests the advice of the minister as to whether the measure is compatible with the right to a fair hearing.

Compatibility of the measure with criminal process rights

1.52 Article 14(7) of the ICCPR protects the right not to be tried and punished twice (the prohibition against double jeopardy). Article 15 of the ICCPR provides that a heavier penalty shall not be imposed than the one which was applicable at the time a particular criminal offence was committed. These rights apply in relation to criminal offences. As set out in the committee's *Guidance Note 2*, even if a penalty is classified as civil under domestic law it may nevertheless be considered 'criminal' under international human rights law.[17]

1.53 The statement of compatibility acknowledges that the measures may engage these rights as they impose a new restriction on reportable offenders following their conviction.[18] However, the statement of compatibility argues that the measures are compatible with these rights as 'they are not penal in nature and support the existing requirements for reportable offenders to report their intention to travel' and 'attach a civil consequence…to individuals who have been proven to engage in particular criminal conduct.'[19]

1.54 Nonetheless, questions remain as to whether the measure operates as a form of additional or retroactive harsher penalty in relation to the criminal offence giving rise to a person's status as a 'reportable offender'.

Committee comment

1.55 The committee seeks the advice of the minister as to the compatibility of the measures with the right not to be tried and punished twice and the right not to be subject to retroactive harsher penalties (having regard to the committee's *Guidance Note 2*), addressing in particular:

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17 See, also, *Fardon v Australia*, UN Human Rights Committee (1629/2007) (18 March 2010).

18 SOC 7.

19 SOC 7.

- **whether the prohibition on travel may be considered a 'penalty';**
- **whether the nature and purpose of the measures is such that the prohibition on travel may be considered 'criminal';**
- **whether the severity of the prohibition on travel that may be imposed on individuals is such that the penalties may be considered 'criminal'; and**
- **if the prohibition on travel is considered 'criminal' for the purposes of international human rights law, whether the measure accords with criminal process rights (including right not to be tried and punished twice for an offence (article 14(7)) and a guarantee against retroactive application of harsher penalties (article 15).**

Compatibility of the measure with the right to be presumed innocent

1.56 Article 14(2) of the ICCPR protects the right to be presumed innocent until proven guilty according to law. Generally, consistency with the presumption of innocence requires the prosecution to prove each element of a criminal offence beyond reasonable doubt.

1.57 An offence provision which requires the defendant to carry an evidential or legal burden of proof (commonly referred to as 'a reverse burden') with regard to the existence of some fact engages and limits the presumption of innocence. Where a statutory exception, defence or excuse to an offence is provided in legislation, these defences or exceptions may also effectively reverse the burden of proof.

1.58 As set out above, section 271A.1(1) makes it an offence for an Australian citizen, if their name is entered on a child protection offender register and the person has reporting obligations in connection with that entry on the register, to leave Australia. Section 271A.1(3) provides an exception (an offence-specific defence) to this offence, stating that the offence does not apply if a competent authority has given permission for the person to leave Australia or the reporting obligations of the person are suspended at the time the person leaves Australia. Section 13.3(3) of the *Criminal Code Act 1995* provides that a defendant who wishes to rely on any exception, exemption, excuse, qualification or justification bears an evidential burden in relation to that matter.

1.59 Reverse burdens will not necessarily be inconsistent with the presumption of innocence provided that they are within reasonable limits which take into account the importance of the objective being sought and maintain the defendant's right to a defence. In other words, such provisions must pursue a legitimate objective, be rationally connected to that objective and be a proportionate means of achieving that objective.

1.60 The statement of compatibility states that any limitation on the right to be presumed innocent is justified on the basis that it is reasonable that the burden of proving relevant circumstances falls to the defendant as these 'will be particularly within the knowledge of the person concerned and easily evidenced by a reportable

offender'.[20] The statement of compatibility further states that 'it is clearly more practical for the defendant to prove that they satisfy the requirements of the defence'.[21]

1.61 However, in this case, it is unclear matters such as whether a competent authority has given permission for the person to leave Australia or the reporting obligations being suspended at the time the person leaves Australia, are matters particularly within the defendant's knowledge. Further, it is unclear why it is 'clearly more practical for the defendant to prove that they satisfy the requirements of the defence' or whether this provides a necessary justification for the reverse burden.

Committee comment

1.62 The committee draws to the attention of the minister its *Guidance Note 2* which sets out information specific to reverse burden offences.

1.63 The committee requests the minister to provide further information as to:

- **whether the reverse burden offence is aimed at achieving a legitimate objective for the purposes of international human rights law;**
- **how the reverse burden offence is effective to achieve (that is, rationally connected to) that objective;**
- **whether the limitation is a reasonable and proportionate measure to achieve the stated objective; and**
- **whether the offence provision may be modified such that the fact that a competent authority has not given permission for the person to leave Australia, or the reporting obligations of the person are not suspended at the time the person leaves Australia, is one of the elements of the offence, to be proved by the prosecution in the ordinary way.**

Compatibility of the measure with the right to protection of the family

1.64 The right to the protection of the family includes ensuring that family members are not involuntarily and unreasonably separated from one another. If the reportable offender has family members residing overseas the measures may engage and limit this right. The statement of compatibility acknowledges that this right is engaged but notes that a competent authority will be able to approve travel to visit family members.[22] As set out above, there are a number of questions about whether the measures are rationally connected to and a proportionate means of achieving their legitimate objective.

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20 SOC 6.

21 SOC 6.

22 SOC 7.

Committee comment

1.65 The measures pursue the legitimate objective of preventing the exploitation and abuse of children overseas.

1.66 The preceding analysis raises questions as to whether the measures permissibly limit the right to protection of the family.

1.67 The statement of compatibility provided insufficient information to justify this limitation.

1.68 The committee accordingly seeks the advice of the minister as to:

- **how the measures are effective to achieve (that is, rationally connected to) the legitimate objective; and**
- **whether the limitation is reasonable and proportionate to achieve the stated objective (including the existence of relevant safeguards in relation to the right to the protection of the family).**

Social Services Legislation Amendment (Payment Integrity) Bill 2017

Purpose	Seeks to amend the *Social Security Act 1991* to change the residency requirements for the age pension and the disability support pension by changing certain timeframes which need to be met before claims will be deemed payable to eligible recipients; increase the maximum liquid assets waiting period for Youth Allowance, Austudy, Newstart Allowance and Sickness Allowance from 13 weeks to 26 weeks; amend the *Social Security Act 1991* and the *Veterans' Entitlements Act 1986* to cease payment of the pension supplement after six weeks temporary absence overseas and immediately for permanent departures; and amend *A New Tax System (Family Assistance) Act 1999* to align the income test taper rates so that all income above the higher income free area is treated equally when calculating an individual's rate of family tax benefit Part A
Portfolio	Social Services
Introduced	House of Representatives, 21 June 2017
Rights	Social security; adequate standard of living; equality and non-discrimination (see **Appendix 2**)
Status	Seeking additional information

Residency requirement for disability support pension and age pensions

1.69 The age pension and the disability support pension have a 10-year qualifying residence requirement before a person can access these social security payments. Currently, under the residency requirements a person must either have been an Australian resident for a continuous period of at least 10 years or, alternatively, for an aggregate period (comprising separate periods of residency) in excess of 10 years but including a continuous period of at least 5 years within that aggregate.[1]

1.70 Schedule 1 of the bill proposes to amend the *Social Security Act 1991* to tighten the residency requirements in order to qualify for the age pension or the disability pension and will introduce a 'self-sufficiency' test. It is proposed that in order to meet residency requirements, at least 5 years of the 10 years of continuous Australian residency period must be during a person's working life.[2]

1 Explanatory memorandum (EM) 5.

2 See proposed sections 43A, 95A; Schedule 1, items 4, 10.

1.71 Alternatively, where that 5 years working life test is not met, a person must demonstrate 'self-sufficiency' by having 10 years continuous Australian residency with greater than 5 years (in aggregate) relating to periods in which a person has not been in receipt of an activity tested income support payment (currently Austudy, Newstart, Youth Allowance and Special Benefit).[3]

1.72 If a person does not meet the 10 years continuous Australian residency period, with 5 years during that person's working life, or has not demonstrated 'self-sufficiency', then at least 15 years of continuous Australian residency will be required to satisfy residency requirements.[4]

Compatibility of the measure with the right to social security and the right to an adequate standard of living

1.73 The right to social security recognises the importance of adequate social benefits in reducing the effects of poverty and plays an important role in realising many other rights. The right to an adequate standard of living requires state parties to take steps to ensure the availability, adequacy and accessibility of food, clothing, water and housing. Australia has obligations in relation to these rights for *all* people in Australia.

1.74 The proposed tightening of the residency waiting requirements in order to qualify for the age pension or disability support pension engages the right to social security and an adequate standing of living because it reduces access to social security and may impact on a person's ability to afford the necessities to maintain an adequate standard of living.

1.75 Under international human rights law, Australia has obligations to progressively realise the right to social security and the right to an adequate standard of living using the maximum of resources available. Australia has a corresponding duty to refrain from taking retrogressive measures, or backwards steps, in relation to the realisation of these rights. The tightening of the residency waiting requirements would appear to be a backwards step in the realisation of these rights and accordingly this limitation on the level of attainment needs to be justified. Such limitations may be permissible providing that they address a legitimate objective, are rationally connected to that objective and are a proportionate way to achieve that objective.

1.76 While acknowledging that the measure engages the right to social security, the statement of compatibility states that 'the schedule does not place limitations on human rights.'[5] As such, the short statement of compatibility provides no substantive assessment of whether the measure constitutes a justifiable limitation on the right to

3 See proposed sections 43A, 95A; Schedule 1, items 4, 10.

4 See proposed sections 43A, 95A; Schedule 1, items 4, 10.

5 Statement of compatibility, schedule 1.

social security and the right to an adequate standard of living for the purposes of international human rights law.

Committee comment

1.77 The preceding analysis explains why the measure constitutes a limitation on the right to social security and the right to an adequate standard of living. These limitations were not addressed in the statement of compatibility.

1.78 The committee therefore seeks the advice of the minister as to:

- **whether the measure is aimed at achieving a legitimate objective for the purposes of human rights law;**
- **how the measure is effective to achieve (that is, rationally connected to) that objective;**
- **whether the limitation is a reasonable and proportionate measure to achieve the stated objective;**
- **whether there are safeguards available (such as access to Special Benefit or exemptions);**
- **whether alternatives to reducing access to social security have been fully considered; and**
- **how the measure complies with Australia's obligation to use the maximum of its available resources to progressively realise the right to social security and the right to an adequate standard of living.**

Compatibility of the measure with the right to equality and non-discrimination

1.79 'Discrimination' under the International Covenant on Civil and Political Rights (ICCPR) encompasses both measures that have a discriminatory intent (direct discrimination) and measures which have a discriminatory effect on the enjoyment of rights (indirect discrimination).[6] The UN Human Rights Committee has explained indirect discrimination as 'a rule or measure that is neutral at face value or without intent to discriminate', which exclusively or disproportionately affects people with a particular personal attribute (for example race, national or social origin, age or disability).[7]

1.80 As the measure relates to social security payments for older people and people with a disability, the restrictions on access to such payments may have a

6 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'.

7 See, e.g., *Althammer v Austria*, Human Rights Committee (HRC) 998/01, 8 August 2003, [10.2].

disproportionate negative effect on some members of these groups on the basis of protected attributes (such as age, disability, national origin or race). In this case, it appears that the measure may have a disproportionate impact on, for example, persons with disabilities and older people from non-Australian national origins.

1.81 Where a measure impacts on particular groups disproportionately, it establishes *prima facie* that there may be indirect discrimination.[8] Differential treatment (including the differential effect of a measure that is neutral on its face)[9] will not constitute unlawful discrimination if the differential treatment is based on reasonable and objective criteria such that it serves a legitimate objective, is effective to achieve that legitimate objective and is a proportionate means of achieving that objective.

1.82 However, this right was not addressed in the statement of compatibility so no assessment was provided as to the compatibility of the measure with the right to equality and non-discrimination.

Committee comment

1.83 The preceding analysis raises questions about the compatibility of the measure with the right to equality and non-discrimination, noting that it appears the measure may have a disproportionate negative effect on particular groups. This right was not addressed in the statement of compatibility.

1.84 Accordingly, the committee seeks the advice of the minister as to whether the measure is compatible with the right to equality and non-discrimination.

8 See, *D.H. and Others v the Czech Republic* ECHR Application no. 57325/00 (13 November 2007) 49; *Hoogendijk v the Netherlands*, ECHR, Application no. 58641/00 (6 January 2005).

9 See, for example, *Althammer v Austria* HRC 998/01 [10.2].

Advice only

1.85 The committee draws the following bills and instruments to the attention of the relevant minister or legislation proponent on an advice only basis. The committee does not require a response to these comments.

Charter of the United Nations (Sanctions – Democratic People's Republic of Korea) (Documents) Instrument 2017 [F2017L00539]

Purpose	Lists documents specified by the Minister for Foreign Affairs that list goods prohibited for export to, or importation from, the Democratic People's Republic of Korea under the Charter of the United Nations (Sanctions - Democratic People's Republic of Korea) Regulations 2008
Portfolio	Foreign Affairs and Trade
Authorising legislation	Charter of the United Nations (Sanctions – Democratic People's Republic of Korea) Regulations 2008
Last day to disallow	15 sitting days after tabling (tabled in the Senate 13 June 2017)
Rights	Fair trial; quality of law; liberty (see **Appendix 2**)
Status	Advice only

Background

1.86 The committee considered the Charter of the United Nations (Sanctions—Iran) Document List Amendment 2016 [F2016L00116] (Iran list) in its *Thirty-sixth report of the 44th Parliament*.[1] The human rights assessment of the Iran list set out that a proposed criminal offence arising from the breach of certain regulations on the supply of 'export sanctioned goods' and the importation of 'import sanctioned goods' raised concerns in relation to the right to a fair trial. Specifically, the measure did not appear to meet the quality of law test, which provides that any measures which interfere with human rights must be sufficiently certain and accessible, such that people are able to understand when an interference with their rights will be justified. This was based on an assessment that the definition of 'export sanctioned goods' lacked a clear legal basis.

1.87 The committee sought the minister's advice as to whether the offences were drafted in a sufficiently precise manner to ensure a fair trial for the purposes of

1 See Parliamentary Joint Committee on Human Rights, *Thirty-sixth report of the 44th Parliament* (16 March 2016) 11; and *Report 9 of 2016* (22 November 2016) 56.

international human rights law, as well as advice as to the proportionality of the measures with the right to a fair trial.

1.88 The minister's response did not provide sufficient information to address these concerns, and the committee's concluding remarks noted that persons potentially subject to the relevant offence provisions may be unable to determine, with sufficient precision, particular items that are export sanctioned goods for the purposes of the relevant regulations.[2] Therefore the right to a fair trial was engaged, and there did not appear to be sufficient justification for the limitation imposed on this right.

1.89 The current Charter of the United Nations (Sanctions – Democratic People's Republic of Korea) (Documents) Instrument 2017 [F2017L00539] (the instrument) raises similar human rights concerns.

Offences of dealing with export and import sanctioned goods

1.90 The instrument lists documents specified by the Minister for Foreign Affairs determining goods to be prohibited for export to, or importation from, the Democratic People's Republic of Korea (DPRK). Goods mentioned in the listed documents are incorporated into the definition of export and import sanctioned goods for the purposes of the Charter of the United Nations (Sanctions - Democratic People's Republic of Korea) Regulations 2008 [F2016C01044] (DPRK sanctions regulations).[3]

1.91 The DPRK sanctions regulations define 'export sanctioned goods' as including goods that are mentioned in a document specified by the minister by legislative instrument.[4] The documents that are specified by the minister through this instrument take various forms, including letters and information circulars.

1.92 Sections 9 and 10 of the DPRK sanctions regulations, respectively, prohibit supply of export sanctioned goods to the DPRK, and importation of import sanctioned goods. The Charter of the United Nations (UN Sanction Enforcement Law) Declaration 2008 [F2017C00214] (the declaration), provides that contravention of regulations 9 and 10 of the DPRK Sanctions Regulations are contraventions of a 'UN sanction enforcement law'. The effect of this is to make breach of those provisions a criminal offence under the *Charter of the United Nations Act 1945* (the Act). Therefore, a person commits an offence under the Act by engaging in conduct (including doing an act or omitting to do an act) that contravenes the provisions in the DPRK Sanctions Regulations. This is then punishable by up to 10 years' imprisonment and/or a fine of up to 2,500 penalty units (or $525,000).

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2 Parliamentary Joint Committee on Human Rights, *Thirty-sixth Report of the 44th Parliament* (16 March 2016) 12.

3 See DPRK sanctions regulations section 5.

4 See DPRK sanctions regulations section 5(1)(c).

Compatibility of the measure with human rights

1.93 The right to a fair trial and fair hearing is protected by article 14 of the International Covenant on Civil and Political Rights (ICCPR). The right applies to both criminal and civil proceedings. Article 9 of the ICCPR protects the right to liberty – the procedural guarantee not to be arbitrarily and unlawfully deprived of liberty. The prohibition against arbitrary detention requires that the state should not deprive a person of their liberty except in accordance with law. The notion of 'arbitrariness' includes elements of inappropriateness, injustice and lack of predictability.

1.94 Human rights standards require that interferences with rights must have a clear basis in law. This principle includes the requirement that laws must satisfy the 'quality of law' test, which means that any measures which interfere with human rights must be sufficiently certain and accessible, such that people are able to understand when an interference with their rights will be justified.

1.95 As noted above, the instrument incorporates documents, including letters and information circulars, into the definition of export and import sanctioned goods for the purposes of offences in the DPRK sanctions regulations. As the definition of 'export sanctioned goods', which is an important element of the offences in the regulations, is determined by reference to goods 'mentioned' in the listed documents, it appears to lack a clear legal basis as the definition is vaguely drafted and imprecise. As such, the measure engages and may limit the right to a fair trial and the right to liberty.

1.96 In order to be sufficiently precise to satisfy the requirement that a measure limiting rights is prescribed by law, as set out in the human rights analysis of the Iran List in the *Thirty-sixth Report of the 44th Parliament*, measures limiting rights must be precise enough that persons potentially subject to the offence provisions are aware of the consequences of their actions.[5] In relation to the right to liberty, the UN Human Rights Committee has also noted that any substantive grounds for detention 'must be prescribed by law and should be defined with sufficient precision to avoid overly broad or arbitrary interpretation or application'.[6]

1.97 It is unclear whether the documents listed in the instrument contain sufficiently precise descriptions of goods, such as would meet appropriate drafting standards for the framing of an offence. For example, the first and second documents, INFCIRC/254/Rev.12/Part 1 and INFCIRC/254/Rev.9/Part 2, appear to provide guidelines for nuclear transfers and transfers of nuclear-related dual-use equipment, materials, software and related technology, as opposed to specific descriptions of particular goods that are prohibited. These documents were also

5 Parliamentary Joint Committee on Human Rights, *Thirty-sixth Report of the 44th Parliament* (16 March 2016) 12.

6 United Nations Human Rights Committee, *General Comment No. 35: Article 9 (Liberty and Security of persons)*, (16 December 2014) [22].

included in the Iran list, and raise the same concerns that persons potentially subject to the offence provisions in the DPRK sanctions regulations may not be able to determine with sufficient precision particular items that are export and import sanctioned goods for the purposes of those regulations.

1.98 As set out above, the instrument operates in a substantially similar way to the previously considered Iran list. The committee's usual expectation is that, where a human right is engaged, the statement of compatibility will provide a reasoned explanation of why the measure is compatible with that right.[7] The statement of compatibility to the instrument provides a brief description of the operation of the instrument, and states that the instrument is compatible with human rights. It does not provide any assessment on how the instrument engages the right to a fair trial, or the right to liberty, and does not acknowledge the committee's previous concerns in relation to the Iran list, which raised substantially similar issues. The statement of compatibility therefore does not meet the standards outlined in the committee's *Guidance Note 1*.

Committee comment

1.99 The committee notes that the statement of compatibility for the instrument provides no assessment of the compatibility of the instrument with the right to a fair trial, the right to liberty, and quality of law test.

1.100 Noting the human rights concerns identified in the preceding analysis in relation to the instrument, and the committee's previous assessment of the Charter of the United Nations (Sanctions—Iran) Document List Amendment 2016, the committee draws the human rights implications of the instrument to the attention of the Parliament.

7 See *Guidance Note 1*, Appendix 4. See also the Attorney-General's Department's guidance on the preparation of statements of compatibility: Attorney-General's Department, *Template 2: Statement of compatibility for a bill or legislative instrument that raises human rights issues* at https://www.ag.gov.au/RightsAndProtections/HumanRights/Human-rights-scrutiny/Pages/Statements-of-Compatibility-Templates.aspx.

Competition and Consumer Amendment (Safeguarding the Reputation of Australian Beef) Bill 2017

Purpose	To penalise cattle exporters for failing to take reasonable steps to ensure that Australian cattle that is slaughtered, or processed after slaughter, in a foreign country, is not marketed as Australian beef
Sponsor	Ms. Rebekha Sharkie MP
Introduced	House of Representatives, 19 June 2017
Right	Fair trial; right to be presumed innocent; not to be tried and punished twice; not to incriminate oneself (see **Appendix 2**)
Status	Advice only

Civil penalty provision

1.101 Proposed section 137A seeks to impose a pecuniary penalty on cattle exporters who fail to take reasonable steps to ensure that no product which results from the slaughter, or processing after slaughter, of Australian cattle in a foreign country, is marketed as Australian beef. The proposed penalty is $220,000 for individuals, and $1.1 million for a body corporate.

Compatibility of the measure with criminal process rights

1.102 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 a civil penalty provision is regarded as 'criminal' for the purposes of international human rights law, it will engage criminal process rights under articles 14 and 15 of the International Covenant on Civil and Political Rights (ICCPR).

1.103 It is settled that a penalty or sanction may be 'criminal' for the purposes of the ICCPR, even where it is classified as 'civil' under Australian domestic law. The committee's *Guidance Note 2* sets out some of the key human rights compatibility issues in relation to civil penalties.[1] The classification of a penalty as 'criminal' under human rights law does not mean that the penalty is illegitimate, but rather that criminal process rights, such as the right to be presumed innocent and the right not to be tried and punished twice, apply.

1.104 The statement of compatibility does not identify that any rights are engaged by this measure and has not addressed whether the civil penalty provision may be classified as 'criminal' for the purposes of international human rights law.

1 See Appendix 4.

1.105 Applying the tests set out in the committee's *Guidance Note 2*, the first step in determining whether a penalty is 'criminal' is to look to its classification under domestic law. In this instance, the penalty is classified as 'civil' in the bill, however as stated above, this is not determinative of its status under international human rights law.

1.106 The second step is to consider the nature and purpose of the penalty. The penalty is likely to be considered to be criminal if the purpose of the penalty is to punish or deter, and the penalty applies to the public in general (rather than being restricted to people in a specific regulatory or disciplinary context). In this instance, the purpose of the penalty is likely to punish and deter, however it appears to be restricted to the specific regulatory context of cattle export.

1.107 The third step is to consider the severity of the penalty. It is here that potential concerns arise. A penalty is likely to be considered 'criminal' where it carries a penalty of a substantial pecuniary sanction. However, this must be assessed with due regard to regulatory context, including the nature of the industry or sector being regulated and the relative size of the pecuniary penalties being imposed. The severity of penalties imposed within the cattle export context is unclear, due to the lack of information in the statement of compatibility.

Committee comment

1.108 Noting concerns regarding the potential classification of the penalty as 'criminal' for the purposes of international human rights law, the committee draws the human rights implications of the bill to the attention of the legislation proponent and the Parliament.

1.109 If the bill proceeds to further stages of debate, the committee may request further information from the legislation proponent.

National Disability Insurance Scheme Amendment (Quality and Safeguards Commission and Other Measures) Bill 2017

Purpose	Seeks to amend the *National Disability Insurance Scheme Act 2013* to establish the NDIS Quality and Safeguards Commission with national functions in relation to a range of quality assurance and oversight matters, including information sharing arrangements
Portfolio	Social Services
Introduced	House of Representatives, 31 May 2017
Right	Right to privacy (see **Appendix 2**)
Status	Advice only

Information sharing arrangements

1.110 The bill seeks to establish a National Disability Insurance Scheme (NDIS) Quality and Safeguards Commission and Commissioner. Proposed subsection 67E(1)(a) provides that the NDIS Quality and Safeguards Commissioner may, if he or she considers it in the public interest to do so, disclose information acquired pursuant to the Act 'to such persons and for such purposes as the Commissioner determines'.

1.111 Proposed subsection 67E(2) provides that in disclosing such information, the Commissioner must act in accordance with the National Disability Insurance Scheme rules made for the purposes of section 67F. Proposed section 67F provides that the rules may make provision for and in relation to the exercise of the Commissioner's power to disclose such information.

Compatibility of the measure with the right to privacy

1.112 The right to privacy includes the respect for private and confidential information, particularly the storing, use and sharing of such information, and the right to control the dissemination of information about one's private life.[1] Proposed subsection 67E(1) would appear to allow the disclosure of private information, including information relating to a person's disability. On this basis, as acknowledged by the statement of compatibility, the measure engages and limits the right to privacy. The right to privacy may be limited where the measure pursues a legitimate

1 See, article 17 of the International Covenant on Civil and Political Rights, article 22 of the Convention on the Rights of Persons with Disabilities (CRPD), and article 16 of the Convention on the Rights of the Child (CRC).

objective, and is effective to achieve (that is, rationally connected to) and proportionate to that objective.

1.113 The statement of compatibility states that the objective of the provision is: 'to ensure that the Commission can share information to enable the thorough investigation and co-ordinated response in relation to a reportable incident or allegation of abuse or neglect.'[2]

1.114 The statement of compatibility further explains the intended use of proposed subsection 67E(1) as follows:

> The Commission will receive information from a variety of sources about the potential abuse, neglect or exploitation of people with disability […] Recent inquiries into abuse have emphasised that system-level oversight is required to ensure reportable incidents are thoroughly investigated, responses are co-ordinated, and systemic issues are identified and addressed. The Commission will need to work with mainstream systems within States and Territories including child protection agencies and guardianship boards when it receives information about abuse, neglect or exploitation.[3]

1.115 It is accepted that this is a legitimate objective under human rights law and the measure is rationally connected to that objective.

1.116 Turning to the proportionality of the measure, in order to be a proportionate limitation on the right to privacy, powers of disclosure must be sufficiently circumscribed and be only as extensive as is strictly necessary to achieve the legitimate objective of the measure. The statement of compatibility indicates that the specific rules further constraining the disclosure of information under the measure will be contained in delegated legislation, rather than the bill itself, as '[t]he mainstream systems in the States and territories which are responsible for responding to allegations of neglect and abuse vary considerably and will further change with the establishment of the Commission'.[4]

1.117 The statement of compatibility reasons that the measure is also proportionate to that objective as i) the Commissioner must be 'satisfied on reasonable grounds' that disclosure is necessary in the public interest; ii) the rules to be made pursuant to section 67F will specify bodies and purposes for which the Commissioner may disclose information and limit the further use and disclosure of the information; and (iii) most providers in the NDIS are covered by the *Privacy Act*

2 Statement of compatibility (SOC) 13.

3 SOC 13.

4 SOC 13.

1988 (Cth) (Privacy Act) which constrains the collection, storage, disclosure and use of personal information.[5]

1.118 The prohibition of 'arbitrary interference with an individual's privacy' requires that any interference with privacy be reasonable in the particular circumstances. Despite the inclusion of the element of reasonableness in the measure, the breadth of discretion afforded to the Commissioner is, on the face of the legislation, extremely wide. While the statement of compatibility states that the Commissioner will not be able to disclose information without complying with rules issued under section 67F, the wording of section 67F does not seem to require that rules be made.[6] Further, it is unclear whether those rules will contain constraints such as requiring the consent of the affected individual, or providing for the review of that disclosure by an independent body. Finally, while 'most' providers may be constrained by the Privacy Act, it is not clear that all those to whom information is disclosed are similarly constrained. As such, there are questions as to whether the measure is the least rights-restrictive way of achieving its legitimate objective, and therefore a proportionate limitation on the right to privacy.

Committee comment

1.119 The preceding analysis indicates that the proposed subsection 67E(1) pursues a legitimate objective and is rationally connected to that objective, but raises questions regarding its proportionality in relation to the right to privacy.

1.120 The committee draws these matters to the attention of the minister and the Parliament, and will revisit them when reviewing the rules to be issued pursuant to proposed section 67F.

5 SOC 13.

6 Proposed section 67F states '[t]he National Disability Insurance Scheme rules *may* make provision for and in relation to the exercise of the Commissioner's power to disclose information for the purposes of paragraph 67E(1)(a) or subparagraph 67E(1)(b)(i), (iii) or (iv)' (emphasis added).

Telecommunications (Interception and Access - Law Enforcement Conduct Commission of New South Wales) Declaration 2017 [F2017L00533]

Purpose	Seeks to declare the Law Enforcement Conduct Commission of New South Wales an interception agency for the purposes of the *Telecommunications (Interception and Access) Act 1979*
Portfolio	Attorney-General
Authorising legislation	*Telecommunications (Interception and Access) Act 1979*
Last day to disallow	5 September 2017
Right	Privacy (see **Appendix 2**)
Status	Advice only

Background

1.121 The committee examined the Law Enforcement Legislation Amendment (State Bodies and Other Measures) Bill 2016 (the bill) in its *Report 9 of 2016* and *Report 1 of 2017.*[1]

1.122 The bill (which passed both Houses of Parliament on 24 November 2016) amended the *Telecommunications (Interception and Access) Act 1979* (TIA Act) to include the Law Enforcement Conduct Commission (LECC) of New South Wales in the definition of 'eligible authority', thereby permitting the Attorney-General to declare the LECC an 'interception agency' for the purposes of the Act.[2] Additionally, the LECC was included in the definition of 'criminal law-enforcement agency' in the TIA Act.

1.123 The effect of being declared an 'interception agency' and inclusion as a 'criminal law-enforcement agency' permits LECC officers to carry out a range of activities, including:

1 Parliamentary Joint Committee on Human Rights, Law Enforcement Legislation Amendment (State Bodies and Other Measures) Bill 2016, *Report 9 of 2017* (22 November 2016) 2-8; *Report 1 of 2017* (16 February 2017) 35-44.

2 Subject to the requirement that the respective state legislation meets the requirements in section 35 of the *Telecommunications (Interception and Access) Act 1979* (TIA Act).

- apply for interception warrants to access the content of private communications;[3]
- issue preservation notices requiring a telecommunications carrier to preserve all stored communications that relate to a named person or telecommunications service;[4]
- apply for a warrant to access stored communications content;[5] and
- seek access to telecommunications data (metadata).[6]

Declaration of the NSW Law Enforcement Conduct Commission as an 'interception agency'

1.124 The Telecommunications (Interception and Access - Law Enforcement Conduct Commission of New South Wales) Declaration 2017 [F2017L00533] (the declaration) declares the LECC to be an agency for the purposes of the TIA Act, under section 34 of the TIA Act, authorising the body to apply for warrants to intercept the content of communications.

Compatibility of the measure with the right to privacy

1.125 The previous human rights analysis noted that, as the TIA Act was legislated prior to the establishment of the committee, it has never been subject to a foundational human rights compatibility assessment in accordance with the *Human Rights (Parliamentary Scrutiny) Act 2011*. It was stated that the committee was therefore faced with the difficult task of assessing the human rights compatibility of permitting an agency to access powers under the TIA Act without the benefit of a foundational human rights assessment of the Act.

1.126 The TIA Act provides a legislative framework that criminalises the interception and accessing of telecommunications. However, the TIA Act sets out exceptions that enable prescribed agencies to apply for access to communications and telecommunications data. Chapters 2 and 3 of the TIA Act provide for warranted access by an agency to the content of communications, including both

3 'Communication' is defined in section 5 of the TIA Act as including: 'conversation and a message, and any part of a conversation or message, whether: (a) in the form of: (i) speech, music or other sounds; (ii) data; (iii) text; (iv) visual images, whether or not animated; or (v) signals; or (b) in any other form or in any combination of forms'. The declaration would enable the LECC to access the content of private communications via warrant under chapter 2 and chapter 3 of the TIA Act.

4 See section 107H of the TIA Act.

5 See section 109 of the TIA Act.

6 'Telecommunications data' refers to metadata rather than information that is the content or substance of a communication: see section 172 of the TIA Act.

communications passing across telecommunications services,[7] and stored communications content.

1.127 As noted in the previous analysis, declaring LECC to be an 'interception agency', and thereby permitting it to access the content of private communications via warrant, engages and limits the right to privacy.

1.128 The right to privacy includes the right to respect for private and confidential information, particularly the storing, use and sharing of such information and the right to control the dissemination of information about one's private life. A limitation on the right to privacy will be permissible under international human rights law where it addresses a legitimate objective, is rationally connected to that objective and is a proportionate means of achieving that objective.

1.129 The statement of compatibility identifies that the measure limits the right to privacy but that it pursues the legitimate objective of 'the investigation and prosecution of serious crime and corruption' and is a reasonable and proportionate means of achieving that end.[8]

1.130 In relation to the proportionality of the measure and the operation of warrants as a relevant safeguard, the statement of compatibility notes:

> Before an issuing authority [for example, an eligible judge or member of the Administrative Appeals Tribunal] may issue a warrant they must be satisfied that interception is appropriate in the circumstances. In coming to this conclusion the issuing authority must consider several factors, including the privacy impacts of the interception, the gravity of the offence, the likely usefulness of interception information to the relevant investigation and the extent to which other methods of investigating the offence have been used or are available […]
>
> Interception will only be available to the LECC in relation to the investigation of serious offences, which generally includes offences punishable by imprisonment for life or for a period or a maximum period of at least seven years.[9]

1.131 As noted in the previous human rights analysis, although access to private communications is via a warrant regime which itself may be sufficiently circumscribed, the use of warrants does not provide a complete answer as to whether chapters 2 and 3 of the TIA Act constitute a proportionate limit on the right to privacy. The committee's previous analysis noted that, as the committee had not previously considered chapters 2 and 3 of the TIA Act in detail, further information from the Attorney-General in relation to the human rights compatibility of the TIA

7 That is, the interception of live communications.

8 Explanatory memorandum (EM), statement of compatibility (SOC) 2.

9 SOC 2.

Act would assist a human rights assessment of proposed measures in the context of the Act.

Committee comment

1.132 Consistent with its previous report on the authorising legislation for this measure, the committee is unable to conclude that the measure, in extending access to the coercive powers in the *Telecommunications (Interception and Access) Act 1979* to an additional body, justifiably limits the right to privacy.

1.133 The committee considers that the *Telecommunications (Interception and Access) Act 1979* would benefit from a full review of its compatibility with the right to privacy, including the sufficiency of safeguards.

1.134 Noting the human rights concerns regarding the right to privacy identified in its *Report 9 of 2016* and *Report 1 of 2017*, the committee draws the human rights implications of the instrument to the attention of the parliament.

Vaporised Nicotine Products Bill 2017

Purpose	Seeks to amend the *Airports Act 1996* to provide that the regulation of smoking at airports does not apply to the use of e-cigarettes (vaping); *Therapeutic Goods Act 1989* to exclude e-cigarettes from regulation by the Therapeutic Goods Administration; and *Tobacco Advertising Prohibition Act 1992* to provide that the ban on the advertising of smoking does not apply to the advertising of vaping
Sponsors	Senators Leyonhjelm and Roberts
Introduced	Senate, 19 June 2017
Right	Health (see **Appendix 2**)
Status	Advice only

Removing barriers to sale of e-cigarettes, removing advertising bans and permitting the use of e-cigarettes at airports

1.135 The bill proposes to exclude nicotine electronic cigarettes (e-cigarettes) from regulation by the Therapeutic Goods Administration. This will have the effect of removing a commonwealth barrier to the sale of e-cigarettes in Australia.

1.136 The bill also proposes to provide that the regulation of smoking at airports does not affect the use of e-cigarettes and that the ban on the advertising of smoking does not apply to the advertising of e-cigarettes.

Compatibility of the measure with the right to health

1.137 The right to health is protected by article 12(1) of the International Covenant on Economic, Social and Cultural Rights (ICESCR). Specific obligations with respect to the right to health include that parties to ICESCR such as Australia should discourage the production, marketing and consumption of tobacco, narcotics and other harmful substances.[1]

1.138 E-cigarettes work by delivering nicotine and/or other chemicals to the user via an aerosol vapour. By removing barriers to the sale of nicotine e-cigarettes, removing advertising bans for these e-cigarettes and permitting their use at airports, the measure engages the right to health. In this respect, it is noted that it is unclear at this stage exactly what the health impacts of nicotine e-cigarettes are. However, it is well established that nicotine is a highly addictive drug, including one that may

1 UN Committee on Economic, Social and Cultural Rights, General Comment 14: the Right to the Highest Attainable Standard of Health, [51]

appeal to and be marketed to children.[2] As such there are questions about whether the right to health is limited by the measures.

1.139 However, the statement of compatibility does not acknowledge that the right to health is engaged and merely states that the bill 'does not engage any of the applicable rights or freedoms'.[3] Accordingly, the statement of compatibility does not provide an assessment of the compatibility of the measures with the right to health.

Committee comment

1.140 Noting the human rights concerns raised by the bill, the committee draws the human rights implications of the bill to the attention of the legislation proponents and the Parliament.

1.141 If the bill proceeds to further stages of debate, the committee may request further information from the legislation proponents.

2 See, for example, Quit Resource Centre, E-cigarettes, http://www.quit.org.au/resource-centre/policy-advocacy/policy/e-cigarettes1; Cancer Council NSW, Why we need to regulate e-cigarettes, https://www.cancercouncil.com.au/109406/cancer-prevention/smoking-reduce-risks/why-we-need-to-regulate-electronic-cigarettes/

3 Explanatory Memorandum, Statement of Compatibility 4.

Bills not raising human rights concerns

1.142 Of the bills introduced into the Parliament between 19 and 22 June, the following did not raise human rights concerns (this may be because the bill does not engage or promotes human rights, and/or permissibly limits human rights):

- Australian Nuclear Science and Technology Organisation Amendment Bill 2017;
- Competition and Consumer Amendment (Paper Bills and Statements) Bill 2017;
- Competition and Consumer Amendment (Truth in Labelling—Palm Oil) Bill 2017;
- Customs Tariff Amendment (Incorporation of Proposal and Other Measures) Bill 2017;
- Education and Training Legislation Repeal Bill 2017;
- Fair Work Amendment (Protecting Take Home Pay of All Workers) Bill 2017;
- Live Animal Export (Slaughter) Prohibition Bill 2017;
- Migration Agents Registration Application Charge Amendment (Rates of Charge) Bill 2017;
- Migration Amendment (Regulation of Migration Agents) Bill 2017;
- Public Governance and Resources Legislation Amendment Bill (No. 1) 2017;
- Statute Update (Smaller Government) Bill 2017;
- Telecommunications Legislation Amendment (Competition and Consumer) Bill 2017;
- Telecommunications (Regional Broadband Scheme) Charge Bill 2017; and
- Treasury Laws Amendment (2017 Measures No. 4) Bill 2017.[1]

1 The following three bills, introduced into the Parliament between 9 May and 1 June, should have been listed as not raising human rights concerns in the committee's *Report 5 of 2017*: the Industrial Chemicals (Consequential Amendments and Transitional Provisions) Bill 2017; the Industrial Chemicals (Notification and Assessment) Amendment Bill 2017; and the Industrial Chemicals Charges (General) Bill 2017.

Chapter 2

Concluded matters

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

2.2 Correspondence relating to these matters is included at **Appendix 3**.

Australian Public Service Commissioner's Directions 2016 [F2016L01430]

Purpose	Prescribes standards with which Agency Heads and Australian Public Service (APS) employees must comply to meet their obligations under the *Public Service Act 1999*
Portfolio	Prime Minister and Cabinet
Authorising legislation	*Public Service Act 1999*
Last day to disallow	30 November 2016
Right	Privacy (see **Appendix 2**)
Previous reports	8 of 2016 and 10 of 2016
Status	Concluded examination

Background

2.3 The committee first reported on the Australian Public Service Commissioner's Directions 2016 (the 2016 directions) in its *Report 8 of 2016*, and requested further information from the Australian Public Service Commissioner (the Commissioner).[1]

2.4 The Commissioner's response to the committee's inquiries was received on 22 November 2016 and discussed in the committee's *Report 10 of 2016*.[2]

2.5 A further response from the Commissioner was received on 23 June 2017. The response is discussed below and is reproduced in full at **Appendix 3**.

1 Parliamentary Joint Committee on Human Rights, *Report 8 of 2016* (9 November 2016) 12-15.

2 Parliamentary Joint Committee on Human Rights, *Report 10 of 2016* (30 November 2016) 13-16.

Publishing termination decision for breach of the Code of Conduct

2.6 Paragraph 34(1)(e) of the 2016 directions provides that decisions to terminate the employment of an ongoing APS employee for breach of the Code of Conduct must be published in the Public Service Gazette (the Gazette). The requirement to publish details of an APS employee when their employment has been terminated on the grounds of breach of the Code of Conduct in the Gazette engages and limits the right to privacy.

2.7 The committee reported on previous similar directions, the Australian Public Service Commissioner's Directions 2013 [F2013L00448] (the 2013 directions), in its *Sixth Report of 2013*, *Eighteenth Report of the 44th Parliament* and *Twenty-first Report of the 44th Parliament*.[3] It raised concerns about the human rights compatibility of measures relating to the notification in the Gazette of certain employment decisions, particularly in relation to the publication of decisions to terminate employment and the grounds for termination. These concerns arose in relation to the right to privacy and the rights under the Convention on the Rights of Persons with Disabilities (CRPD).

2.8 In response to these concerns, the Commissioner conducted a review of the 2013 directions. As a result, the 2013 directions were amended by the Australian Public Service Commissioner's Amendment (Notification of Decisions and Other Measures) Direction 2014 [F2014L01426] (the amendment direction) to remove most of the requirements to publish termination decisions. However, the requirement to notify termination on the grounds of the breach of the Code of Conduct in the Gazette was retained at that time.

2.9 In its *Twenty-first Report of the 44th Parliament*,[4] the committee acknowledged that the amendment direction addressed the committee's concerns in relation to the compatibility of the 2013 directions with the CRPD, and largely addressed the committee's concerns in relation to the measure's compatibility with the right to privacy. However, the committee considered that the retained measure to publish details of an APS employee when their employment has been terminated on Code of Conduct grounds limited the right to privacy.

2.10 The statement of compatibility to the 2016 directions states that the notification of certain employment decisions in the Gazette promotes APS

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3 See, Parliamentary Joint Committee on Human Rights, *Sixth Report of 2013* (15 May 2013) Australian Public Service Commissioner's Directions 2013 [F2013L00448] 133-134; *Eighteenth Report of the 44th Parliament* (10 February 2015) Australian Public Service Commissioner's Amendment (Notification of Decisions and Other Measures) Direction 2014 [F2014L01426] 65-67; and *Twenty-first Report of the 44th Parliament* (24 March 2015) Australian Public Service Commissioner's Amendment (Notification of Decisions and Other Measures) Direction 2014 [F2014L01426] 25-28.

4 Parliamentary Joint Committee on Human Rights, *Twenty-first Report of the 44th Parliament* (24 March 2015) 25-28.

employees' right to privacy insofar as there is an option for agency heads to decide that a name should not be included in the Gazette because of the person's work-related or personal circumstances.

2.11 The initial human rights analysis of the directions noted, however, that rather than promoting the right to privacy, the requirement arising from paragraph 34(1)(e) of the directions was a limit on the right to privacy.[5] However, the statement of compatibility provided no significant evidence or assessment of why the requirement arising from paragraph 34(1)(e) of the directions was a reasonable and proportionate limit on the right to privacy in pursuit of its apparent objective, that is, maintaining public confidence in the good management and integrity of the APS.

2.12 In relation to whether there were other, less restrictive, ways to achieve the same aim, the initial human rights analysis observed that there were other methods by which an employer could determine whether a person had been dismissed from the APS for breach of the Code of Conduct rather than publishing an employee's personal details in the Gazette. For example, it was noted that it would be possible for the APS to maintain a centralised, internal record of dismissed employees, or to use references to ensure that a previously dismissed APS employee was not rehired by the APS. Further, as the previous analysis stated, it would be possible to publish information in relation to the termination of employment for breaches of the Code of Conduct without the need to name the affected employee.

2.13 As these matters were not addressed by the statement of compatibility, the committee sought the advice of the Commissioner as to whether the limitation on the right to privacy was a reasonable and proportionate measure for the achievement of the apparent objective of the directions, and in particular, whether there were other less rights restrictive means available.

Australian Public Service Commissioner's initial response

2.14 The Commissioner's initial response, as discussed in *Report 10 of 2016,*[6] recognised that the requirement to publish details in the Gazette of an APS employee when their employment has been terminated on the grounds of breach of the Code of Conduct limited the right to privacy. The Commissioner stated that the committee had raised valid questions about whether the limitation was a reasonable or proportionate measure in upholding integrity in the APS, and agreed that further investigation into the requirement was warranted. The Commissioner stated that he would undertake a review into the necessity of publicly notifying information about termination decisions on the grounds of breach of the Code of Conduct, and that this

5 Parliamentary Joint Committee on Human Rights, *Report 8 of 2016* (9 November 2016) 12-15.

6 Parliamentary Joint Committee on Human Rights, *Report 10 of 2016* (30 November 2016) 13-16.

review would include appropriate consultation and examination of evidence regarding the deterrent effects and impact on public confidence in the good management and integrity of the APS. The Commissioner stated that he would notify the committee of his findings in this matter by June 2017.

The Commissioner's further response regarding the outcome of the review

2.15 On 22 June 2017, the Commissioner informed the committee that, after consultation with APS agencies, he had concluded that the current arrangements of publishing terminations of employment for breaching the Code of Conduct in the Gazette should not continue.

2.16 The Commissioner states that he intends to establish a new secure database of employment terminations for breaches of the Code of Conduct that will not be accessible to the general public. As outlined in the Commissioner's response, this approach would enable agencies to access the database and maintain the integrity of their respective workforces, while respecting the privacy of affected employees. Appropriate amendments to the directions will be made in this regard.

2.17 Accordingly, the Commissioner has adopted the suggestion outlined in the committee's previous report of adopting a less rights restrictive means of achieving the legitimate objective of the measure.

Committee response

2.18 The committee thanks the Commissioner for his response and has concluded its examination of this issue.

2.19 The committee welcomes the commitment by the Commissioner of establishing a new secure database of employment terminations for breaches of the Code of Conduct that will not be accessible to the general public.

2.20 The proposed approach would substantially address the right to privacy concerns in relation to the current measure, constituting a less rights restrictive means of achieving the objective of maintaining public confidence in the good management and integrity of the APS.

2.21 The committee looks forward to reviewing the amendments to the directions when they are made.

Higher Education Support Legislation Amendment (A More Sustainable, Responsive and Transparent Higher Education System) Bill 2017

Purpose	Seeks to introduce reforms to the funding, provision and administration of higher education in Australia
Portfolio	Education and Training
Introduced	House of Representatives, 11 May 2017
Rights	Education; equality and non-discrimination (see **Appendix 2**)
Previous report	5 of 2017
Status	Concluded examination

Background

2.22 The committee first reported on the Higher Education Support Legislation Amendment (A More Sustainable, Responsive and Transparent Higher Education System) Bill 2017 (the bill) in its *Report 5 of 2017*, and requested a response from the Minister for Education and Training by 30 June 2017.[1]

2.23 The committee has previously commented on proposed reforms to the funding of higher education in its *Twelfth Report of the 44th Parliament*, *Eighteenth Report of the 44th Parliament* and its *Twenty-second Report of the 44th Parliament*.[2]

2.24 The minister's response to the committee's inquiries was received on 7 July 2017. The response is discussed below and is reproduced in full at **Appendix 3**.

Decrease in funding for commonwealth supported students in higher education

2.25 Schedule 1 of the bill seeks to decrease the amount of commonwealth funding or subsidies for commonwealth supported students at universities and increase the amount of student contribution to higher education funding.[3] From 1

1 Parliamentary Joint Committee on Human Rights, *Report 5 of 2017* (14 June 2017) 22-30.

2 Parliamentary Joint Committee on Human Rights, *Twelfth Report of the 44th Parliament* (24 September 2014) 8-13; *Eighteenth Report of the 44th Parliament* (10 February 2015) 43-64; *Twenty-second Report of the 44th Parliament*.

3 A commonwealth supported student place is part subsidised by the Australian government through the government paying part of the fees for the place directly to the university. Students are also required to contribute towards the study and pay the remainder of the fee called the 'student contribution amount' for each unit they are enrolled in at the higher education institution.

January 2018, a 2.5 percent efficiency dividend will be applied to commonwealth contribution amounts in each of 2018 and 2019. Student contribution amounts for commonwealth supported students will increase by 1.8 percent from 2018 to 2021 (7.5 percent in total).

Compatibility of the measure with the right to education

2.26 Article 13 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) protects the right to education. It specifically requires, with a view to achieving the full realisation of the right to education, that:

> Higher education shall be made equally accessible to all, on the basis of capacity, by every appropriate means, and in particular by the progressive introduction of free education.

2.27 Australia has obligations to progressively introduce free higher education by every appropriate means but also has a corresponding duty to refrain from taking retrogressive measures, or backwards steps, in relation to the realisation of the right to education.[4]

2.28 As the initial human rights analysis noted, the statement of compatibility acknowledges that the decrease in commonwealth funding is counter to the progressive introduction of the right to free higher education;[5] that is, it constitutes a retrogressive measure.

2.29 Retrogressive measures may be permissible under international human rights law providing that they address a legitimate objective, are rationally connected to that objective and are a proportionate way to achieve that objective. In this context, the United Nations Committee on Economic, Social and Cultural Rights has noted that:

> There is a strong presumption of impermissibility of any retrogressive measures taken in relation to the right to education, as well as other rights enunciated in the Covenant. If any deliberately retrogressive measures are taken, the State party has the burden of proving that they have been introduced after the most careful consideration of all alternatives and that they are fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the State party's maximum available resources.[6]

4 See, UN Committee on Economic, Social and Cultural Rights, General Comment 13: the Right to education (8 December 1999).

5 SOC 3.

6 See, UN Committee on Economic, Social and Cultural Rights, General Comment 13: the Right to education (8 December 1999) [45].

2.30 The statement of compatibility argues that the reduction of funding is a permissible limitation on the right to education including the progressive introduction of free higher education:

> Recalibration of Commonwealth contribution and student contribution amounts in Schedule 1 will result in decreased Government funding and an increase in student contributions. This measure is counter to the goal of progressive introduction of free education however the savings measure is proportionate to the policy objective of ensuring long-term financial sustainability necessary to support opportunities in higher education. It also sits within student loan arrangements that ensure no domestic student need pay upfront fees for access to higher education. The savings as a result of this measure will be an important contribution towards Budget repair.[7]

2.31 The previous analysis stated that, in general terms, budgetary constraints and financial sustainability have been recognised as legitimate objectives for the purpose of justifying reductions in government support that impact on the progressive realisation of the right to education. However, limited information was provided to support the characterisation of financial sustainability or budgetary constraints as a pressing or substantial concern in these specific circumstances. Evidence explaining why a proposed cut in funding of this size is a proportionate reduction in terms of the right to education was not provided in the statement of compatibility. Further, no information was provided about the consideration of alternatives, in the context of Australia's use of its maximum available resources.

2.32 The committee therefore sought the advice of the minister as to:

- whether there is reasoning or evidence that establishes that the stated objective addresses a pressing or substantial concern in the specific circumstances of the proposed legislation;
- whether the limitation is a reasonable and proportionate measure to achieve its stated objective;
- whether alternatives to reducing higher education funding have been fully considered; and
- how the measure complies with Australia's obligation to use the maximum of its available resources to progressively introduce free higher education.

Minister's response

2.33 The minister's response re-states much of the information contained in the statement of compatibility including acknowledging that the reduction of commonwealth contribution is a retrogressive measure as regards Australia's

7 SOC 8.

obligation to progressively realise free higher education. In relation to the objective of the measure, the minister's response states:

> This measure is reasonable and proportionate to the policy objective of ensuring long-term financial sustainability of the higher education system. By ensuring that the demand driven funding system can be preserved for bachelor level studies and extended to approved sub-bachelor courses, the rebalancing of student and Commonwealth contribution amounts supports future opportunities for students to access higher education.

2.34 In relation to the particular budgetary context of the measures, the minister's response further states:

> Given the Budget context and the Government's commitment to a return to surplus, there is a need to reduce the overall levels of Government spending. The savings as a result of this measure will also be an important contribution towards budget repair, which is an important objective of this Government.

2.35 In this respect, it is acknowledged that budgetary constraints and concerns about financial sustainability in the context of extending commonwealth support to sub-bachelor degrees indicate that the measure may address a pressing and substantial concern.

2.36 In relation to the proportionality of the measure, the minister's response states at a general level that the measure is proportionate on the basis that:

> it creates a more sustainable higher education system and, by doing so, ensures future generations of Australians will remain able to access higher education and the substantial private benefits it confers.

2.37 It should be noted however that higher education confers not only private benefits, but significant public benefits, and the ICESCR requires that higher education be made equally accessible to all on the basis of capacity, not ability to pay.

2.38 The minister's response provides some specific information about the proportionality of the reduction in commonwealth funding and the application of the efficiency dividend:

> Students are well resourced through the CGS [Commonwealth Supported Places], expenditure through which totalled $7.1 billion in 2016. Average funding per student has increased by around 15 per cent over the five years from 2010 to 2015. In comparison the average cost of delivery per equivalent full time student has only grown at 9.5 per cent over the same period. The effect of an efficiency dividend on the CGS should have minimal effect on the ability of students to access higher education, or on providers to deliver high quality courses.
>
> Even after the efficiency dividend and rebalancing of Commonwealth and student contribution amounts is fully implemented by 2021, the

> Commonwealth will still fund on average 54 per cent of the cost of courses.
>
> The rebalancing of contributions also sits within the context of Australia's generous and highly regarded student loan scheme that ensures no domestic student need pay upfront fees for access to higher education. That is, despite the modest increase in student contribution amounts, access to higher education will be maintained through the continued availability of Higher Education Loan Program (HELP) loans.

2.39 It is acknowledged that Australian students will continue to be able to access the higher education system through HELP loans, such that payment is deferred until the student earns a threshold income.[8] The provision of HELP loans to all students is relevant to Australia meeting its obligations in relation to access to higher education. It is also relevant to the proportionality of the retrogressive step of reducing commonwealth funding to higher education.

2.40 However, Australia is required to take the least rights restrictive approach in pursuing its budgetary objectives, where reductions in funding constitute backward steps on social and economic rights. In this regard, the minister's response does not address the committee's specific questions about whether alternatives to reducing funding to higher education have been fully considered. Further, in the current matter there are some uncertainties about the extent and scope of the impact on higher education.[9]

Committee response

2.41 The committee thanks the minister for his response and has concluded its examination of this issue.

2.42 The preceding analysis indicates that, based on the information provided and depending on the extent and scope of the impact on higher education, the measure may be compatible with the right to education. However, it is noted that Australia has an obligation under international law to progressively introduce free

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8 However, it should be noted that the UN Committee on Economic, Social and Cultural Rights (UNESCR) has raised serious concerns about access to education in relation to the operation of the student loans scheme in the United Kingdom which shares similar elements to the Australian HELP scheme: UNESCR, Concluding observations on the United Kingdom of Great Britain and Northern Ireland, E/C.12/1/Add.79 (5 June 2002) [22]; UNESCR, Concluding observations on the United Kingdom of Great Britain and Northern Ireland, E/C.12/GBR/CO/5 (12 July 2009) [44]; UNESCR, Concluding observations on the United Kingdom of Great Britain and Northern Ireland, E/C.12/GBR/CO/6 (14 July 2016) [65]-[66].

9 See, for example, University of New South Wales, *Submission 32*; University of Sydney, *Submission 34*, to the Senate Education and Employment Legislation Committee inquiry into the Higher Education Support Legislation Amendment (A More Sustainable, Responsive and Transparent Higher Education System) Bill 2017, which argues that under the bill Australian students will pay more while universities will receive substantially less funding.

higher education and the minister's response did not address whether alternatives to reducing higher education funding had been fully considered.

Increase in student contributions for enabling courses

2.43 Currently, students undertaking enabling courses cannot be required to pay a student contribution amount.[10]

2.44 Schedule 2 of the bill seeks to introduce a student contribution amount fixed at a rate of $3,271 for a full time study load in 2018. Students will be able to borrow their contribution amount through HELP.

Compatibility of the measure with the right to education

2.45 As set out above, article 13 of the ICESCR protects the right to education including the progressive introduction of free higher education by every appropriate means. The initial analysis noted that by requiring students to make a financial contribution towards the costs of enabling courses, the measure engages and limits the right to education.

2.46 The statement of compatibility did not identify this measure as engaging and limiting the right to education and accordingly did not provide an assessment of whether the limitation is permissible.

2.47 Accordingly, the committee requested the further advice of the minister as to:

- whether the measure is aimed at achieving a legitimate objective for the purposes of human rights law;
- how the measure is effective to achieve (that is, rationally connected to) that objective;
- whether the limitation is a reasonable and proportionate measure to achieve the stated objective;
- whether alternatives to reducing higher education funding have been fully considered; and
- how the measure complies with Australia's obligation to use the maximum of its available resources to progressively introduce free higher education.

Minister's response

2.48 The minister's response acknowledges that the introduction of a student contribution amount for enabling courses 'may be considered a retrogressive measure in terms of the right to education, specifically the progressive introduction of free higher education'.

10 An enabling course is a course of instruction that enables a person to undertake a course leading to a higher education award (sometimes referred to as a bridging course).

2.49 In relation to the objective of the measure, the minister's response states:

> However, access to higher education is also an important aspect of this right, and these measures are aimed at improving the system of enabling places to assist underprepared learners to progress to undertaking higher education courses. Enabling courses are recognised as a preparation tool for students with social or educational disadvantages, and an important means of access to higher education.
>
> The Report of the Review of the Demand Driven System by Dr David Kemp and Andrew Norton found that the overall attrition rates for enabling courses can be as high as 40 or 50 per cent. The Report suggested that a contributory factor is the lack of investment from the student, including in a financial sense. By ensuring that students are making a modest financial commitment towards their education, the measure aims to improve progression to higher education for students enrolled in enabling places. This expands the right to education by ensuring that there are viable alternative entry pathways available to underprepared learners.

2.50 Improving the progression of students with social and educational disadvantages to higher education would appear to constitute a legitimate objective for the purposes of international human rights law.

2.51 The minister's response provides a range of information in relation to the proportionality of the measure as a retrogressive step in the progressive introduction of free higher education:

> Further, while providers may charge a student contribution amount for an enabling course of study, students will be able to defer these upfront costs via a HELP loan. This ensures that the student contribution amount does not present an upfront financial barrier for students.
>
> Additionally, under the current system of allocation of Commonwealth supported enabling places some providers under-utilise their allocation which is inefficient and effectively diminishes opportunities for individuals who may benefit from participation in an enabling course. The measure ensures that with cyclical competitive tender processes, enabling places will always be allocated to providers who have demonstrated a history of high standards of academic preparation and completion rates, among other criteria currently under consideration. The right to access higher education is being expanded by ensuring the efficiency of allocation of these places to providers who are most likely to fully utilise the places allocated to them, and to deliver high quality outcomes for students.
>
> The measure expands access to higher education by improving the enabling funding mechanism, and incentivising commitment to ensure higher completion rates.

2.52 The availability of HELP loans to students enrolling in enabling courses means that the student contribution amount will not necessarily be an upfront cost to students. However, under the HELP scheme as it currently operates, students who do

not successfully complete a course, after the census date, still incur a HELP debt. The prospect of such a debt may be a disincentive to disadvantaged students thinking of embarking on an enabling course. Given that enabling courses are a preparation tool for disadvantaged students, the significant attrition rate from enabling courses referred to by the minister may arise from legitimate reasons other than lack of financial investment by students, such as the financial pressures of full or part-time study or the challenges of the course or workload for the particular student. It may be that remission of fees for students who find themselves unable to complete an enabling course for such reasons is necessary to ensure that students with social or educational disadvantages feel able to take up the opportunity that an enabling course provides.

2.53 Based on the information provided including about expanding and incentivising access to higher education it appears that the measure may be capable of being a proportionate limit on the progressive realisation on the right to free higher education. However, this will in significant part depend on the operation of the measure in practice, including the application and remission of fees and effect on educational attainment. Monitoring of the availability, uptake and successful completion of enabling courses will assist in identifying whether the measure is effective in achieving its stated objective.

Committee response

2.54 The committee thanks the minister for his response and has concluded its examination of this issue.

2.55 The preceding analysis indicates that, based on the information provided, the measure may be compatible with the right to education. The operation of the measure in practice is significant, in particular, the balance between the incentive and disincentive effects of the application of fees, and the treatment of fee liability for those who are unable to successfully complete an enabling course.

2.56 Monitoring of the availability, uptake and successful completion of enabling courses will assist in identifying whether the measure is effective in achieving its stated objective of improving the progression of students with social and educational disadvantages to higher education.

Eligibility of Australian permanent residents and New Zealand citizens to a commonwealth supported university place

2.57 Schedule 3 of the bill seeks to provide that Australian permanent residents and New Zealand citizens will no longer be eligible for commonwealth supported higher education places.[11] Permanent humanitarian visa holders and New Zealand

11 Item 3, new section 36-10(2)(b); EM 45.

Special Category Visa holders who arrived in Australia as dependent children will remain eligible for commonwealth supported places.[12]

2.58 A commonwealth supported place is partly subsidised by the Australian government through the government paying part of the fees for the place directly to the university. Students are also required to contribute towards their study and they pay the remainder of the fee called 'student contribution amount' for each unit they are enrolled in.

Compatibility of the measure with the right to education

2.59 As set out above, article 13 of the ICESCR protects the right to education including ensuring it is equally accessible and through the progressive introduction of free higher education by every appropriate means.

2.60 The previous analysis stated that, by providing that Australian permanent residents and New Zealand citizens will no longer be eligible for commonwealth supported higher education places, the measure engages and limits the right to education and specifically the progressive introduction of free higher education. Australia's obligations with respect to the right to education apply, regardless of citizenship status, to persons within Australia.

2.61 The statement of compatibility did not identify this measure as engaging and limiting the right to education and accordingly did not provide an assessment of whether the limitation is permissible.

2.62 The committee therefore requested the further advice of the minister as to:

- whether the measure is aimed at achieving a legitimate objective for the purposes of human rights law;
- how the measure is effective to achieve (that is, rationally connected to) that objective;
- whether the limitation is a reasonable and proportionate measure to achieve the stated objective;
- whether alternatives to reducing higher education funding have been fully considered; and
- how the measure complies with Australia's obligation to use the maximum of its available resources to progressively introduce free higher education.

Compatibility of the measure with the right to equality and non-discrimination (direct discrimination)

2.63 The right to equality and non-discrimination is protected by articles 2 and 26 of the International Covenant on Civil and Political Rights (ICCPR). 'Discrimination' under the ICCPR encompasses a distinction based on a personal attribute (for

12 Item 3, new section 36-10(2)(b); EM 45.

example, race, sex or on the basis of disability),[13] which has either the purpose (called 'direct' discrimination), or the effect (called 'indirect' discrimination), of adversely affecting human rights.[14]

2.64 As stated in the previous analysis, the proposed measure, by providing that New Zealand citizens and Australian permanent residents are no longer eligible for commonwealth supported places, appears to directly discriminate against people on the basis of their nationality.

2.65 Differential treatment[15] will not constitute unlawful discrimination if the differential treatment is based on reasonable and objective criteria such that it serves a legitimate objective, is effective to achieve that legitimate objective and is a proportionate means of achieving that objective.

2.66 However, the statement of compatibility did not identify this measure as engaging the right to equality and non-discrimination and accordingly did not provide an assessment of whether the limitation is permissible or constitutes unlawful discrimination.

2.67 The committee therefore requested the further advice of the minister as to:

- whether the measure is aimed at achieving a legitimate objective for the purposes of human rights law;
- how the measure is effective to achieve (that is, rationally connected to) that objective; and
- whether the limitation is a reasonable and proportionate measure to achieve the stated objective.

Minister's response

Right to education

2.68 In relation to the right to education, the minister's response states:

> While this measure removes the Commonwealth subsidy that these groups currently receive, the measure expands access to tertiary education for New Zealand citizens and permanent residents of Australia by providing access to HELP loans.

13 The prohibited grounds 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: UN Human Rights Committee, *General Comment 18*, *Non-discrimination* (1989).

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

15 See, for example, *Althammer v Austria* HRC 998/01 [10.2].

> Currently, these students must pay for their education upfront, which may be a significant limitation on their capacity to access higher education. Under current arrangements, most Australian permanent residents and most New Zealand citizens have faced inequalities in access to higher education. They have had to pay upfront fees for tuition that their Australian peers have been able to defer to a HELP loan.
>
> While the Committee has specifically requested advice on the removal of the [Commonwealth Supported Places] CSP for permanent residents and New Zealand citizens, it cannot be considered without noting that this measure also expands access to HELP loans.

2.69 As such the minister's response asks that the measure removing the commonwealth subsidy be considered together with the measure granting access to HELP loans. It is acknowledged that granting access to HELP loans may pursue the legitimate objective of expanding access to higher education for New Zealand citizens and Australian permanent residents. In this respect, the minister's response provides some information about the likely impact of greater access to HELP loans:

> While it is not yet known how universities will respond in terms of tuition fees, access to a HELP loan is likely to be the most important factor for those New Zealand citizens and permanent residents who are unable to afford upfront payment to undertake tertiary education. There is evidence that tuition fees, when coupled with access to income contingent loans, do not act as a disincentive to study. In this way, the overall measure expands the right to access higher education.

2.70 However, it is unclear from the information provided whether or why expanding access to HELP loans necessarily needs to be accompanied by the removal of commonwealth subsidies for such students. While it is proposed to give Australian permanent residents and New Zealand citizens access to HELP loans, this group will have to pay fees (either upfront, or repaid over time) that are substantially higher than Australian citizens.[16] This aspect of the measure, which is a limitation on the rights of affected persons to education and equality and non-discrimination, still needs to be justified according to the criteria under international human rights law.

2.71 By treating the removal of the commonwealth subsidy together with the expansion of the HELP scheme, the minister's response does not clearly provide specific information about the objective of removing the commonwealth subsidy or whether the removal addresses a pressing or substantial concern. It can be accepted that expansion of the HELP scheme aims to expand access to higher education. It

16 As noted in the minister's response, the commonwealth will contribute a subsidy of on average 54 per cent of the cost of courses for an Australian commonwealth supported student. A non-commonwealth supported student will have to cover the full fees for the course. From this it can be inferred that New Zealand citizens and Australian permanent residents would be required to pay close to twice the amount of a commonwealth supported student.

appears from the minister's response that the objective of the removal of the subsidy is 'budget repair' and 'financial sustainability', and for this reason the choice was made to remove the subsidy and provide access to HELP loans.

2.72 In this respect, the response notes in a conclusory way that:

> This measure is reasonable and proportionate to both the policy objectives of expanding access for permanent residents and New Zealand citizens, and of creating a financially sustainable higher education system.

2.73 However, the response provides no detailed information about whether budget repair or financial sustainability would provide a basis for justifying the limitation on the right to progressively free higher education. The position appears to be that the measure is argued to be proportionate on the basis that affected students will not need to pay the substantially higher fees upfront, but will be able to repay a HELP loan over time.

2.74 The response states that:

> In formulating this measure, the Government considered policy alternatives.

2.75 Beyond this statement, the response provides no information on what alternatives were considered and whether maintaining both commonwealth subsides while permitting access to HELP loans was a feasible option, as was previously the case for Australian permanent residents and New Zealand citizens.[17]

2.76 Based on the information provided, it is not possible to conclude that a measure which removes commonwealth subsidies and requires New Zealand citizens and Australian permanent residents to pay substantially more for higher education than Australian citizens is a permissible limitation on the right to progressively free higher education.

Right to equality and non-discrimination

2.77 In relation to the right to equality and non-discrimination the minister's response acknowledges that the measure engages this right. In relation to this right the minister's response states:

> Under the current arrangements permanent residents and New Zealand citizens have different entitlements to citizens of Australia. Replacing subsidies with loans for most Australian permanent residents and New

17 Until 1996 HECS-HELP loans were available to New Zealand citizens studying in Australia who were permanent residents. The *Higher Education Funding Amendment Act (No. 2) 1995* restricted access to HECS loans to those New Zealanders who had been permanent residents before 1 January 1996 and who had commenced their courses before this date. From 1 January 2005 under the *Higher Education Support Act 2003* permanent residents were no longer able to access HECS-HELP loans and defer their fees. While such students had to pay their fees upfront they were still eligible for commonwealth supported university places.

> Zealand citizens, as proposed by this Bill, alters existing arrangements in order to expand access to higher education for these groups by removing financial barriers. Despite the loss of subsidised tuition fees, access to higher education for most Australian permanent residents and most New Zealand citizens will be improved through the availability of HELP loans.
>
> Furthermore, loan repayment arrangements do not discriminate between Australian citizens, New Zealand citizens and Australian permanent residents; they are identical.

2.78 While the proposed access to HELP loans will not discriminate between Australian citizens, New Zealand citizens and Australian permanent residents, this does not address the concern that the removal of the commonwealth subsidy for New Zealand citizens and Australian permeant residents directly discriminates against permanent residents and New Zealand citizens.

2.79 In relation to the right to equality and non-discrimination, the minister's response appears to identify the objective of the removal of the subsidy as 'savings' which are required:

> …in order to ensure the long-term sustainability of Australia's higher education system, and the policy objective of ensuring that most permanent residents and most New Zealand citizens are able to access higher education without the barrier of upfront fees.

2.80 However, no reasoning is provided as to how such savings are necessary to support sustainability or whether alternative approaches were reasonably available that did not discriminate in this manner.

2.81 The response does identify one relevant safeguard applying to certain New Zealand citizens:

> It is also important to note that a special cohort of New Zealand citizens (who arrived here as children and have been long term residents of Australia) will remain eligible for both Commonwealth subsidies and all HELP schemes (including VET Student Loans). This Government introduced this arrangement in 2016 and this measure preserves access for this cohort.

2.82 Despite this one safeguard, based on the information provided, it is not possible to conclude that the measure is a justified limitation on the right to equality and non-discrimination for the purposes of international human rights law.

Committee response

2.83 The committee thanks the minister for his response and has concluded its examination of this issue.

2.84 The preceding analysis indicates that, based on the above analysis and the information provided, it is not possible to conclude that the measure is compatible with the right to the progressive introduction of free higher education and the right to equality and non-discrimination.

Lowering repayment threshold for HELP debts

2.85 Schedule 3 of the bill lowers the current minimum repayment threshold for HELP loans to $41,999 per annum (currently, the repayment threshold is $55,000). It also introduces additional repayment thresholds and rates (1 percent at $42,000 and increasing to 10 percent on salaries over 119,882 per annum).[18]

2.86 From 1 July 2019 repayment thresholds including the minimum repayment amount will be indexed using the Consumer Price Index rather than Average Weekly Earnings.[19]

Compatibility of the measures with the right to education

2.87 As set out above, article 13 of the ICESCR protects the right to education including ensuring it is equally accessible and through the progressive introduction of free higher education by every appropriate means.

2.88 The Australian system of higher education allows students to defer the costs of their education under a HELP loan until they start earning a salary above a certain threshold. The previous analysis stated that the proposed lowering of the repayment threshold engages and may limit the right to education as it imposes payment obligations on those who earn lower incomes. This may be contrary to the requirement under article 13 to ensure that higher education is equally accessible and progressively free. Similarly, the proposed change to indexation also engages and may limit the right to education as it may increase the amount to be paid, relative to earnings, in the event that growth in the Consumer Price Index exceeds growth in Average Weekly Earnings.

2.89 The statement of compatibility did not identify this measure as engaging and limiting the right to education and accordingly did not provide an assessment of whether the limitation is permissible.

2.90 The committee therefore requested the further advice of the minister as to:

- whether the measure is aimed at achieving a legitimate objective for the purposes of human rights law;
- how the measure is effective to achieve (that is, rationally connected to) that objective; and
- whether the limitation is a reasonable and proportionate measure to achieve the stated objective.

18 EM 45.

19 EM 45.

Compatibility of the measure with the right to equality and non-discrimination (indirect discrimination)

2.91 As set out above, the right to equality and non-discrimination is protected by articles 2 and 26 of the ICCPR, and includes indirect discrimination.

2.92 The previous human rights analysis identified that the change in indexation may have a disproportionate negative effect on women. On average, women earn less over a lifetime of employment, are more likely to take time out of the workforce to care for children and are more likely to be engaged in part-time employment.[20] As the previous analysis stated, where a person takes longer to repay HELP debt, the change to indexation may result in increased levels of debt to be repaid relative to earnings. The longer period that women, on average, take to pay their HELP debt[21] leads, consequently, to higher education costs than their male counterparts.

2.93 Reducing the minimum repayment income threshold for HELP debts to $41,999 may also have a disproportionate impact on women, given that they are more likely to earn less than men, and therefore more likely to be affected by the reduction in the repayment threshold to cover those earning between $41,999 and $55,000.

2.94 The initial analysis noted that, where a measure impacts on particular groups disproportionately, it establishes *prima facie* that there may be indirect discrimination.[22] Differential treatment (including the differential effect of a measure that is neutral on its face)[23] will not constitute unlawful discrimination if the differential treatment is based on reasonable and objective criteria such that it serves a legitimate objective, is effective to achieve that legitimate objective and is a proportionate means of achieving that objective.

2.95 The statement of compatibility acknowledges that the measures engage the right to equality and non-discrimination due to their disproportionate impacts on women:

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20 See, Australian Bureau of Statistics (ABS), Employee Earnings and Hours (May 2016) http://www.abs.gov.au/ausstats/abs@.nsf/0/27641437D6780D1FCA2568A9001393DF?Opendocument; ABS, Gender indicators, Australia (August 2016) http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/by%20Subject/4125.0~August%202016~Main%20Features~Economic%20Security~6151; Workplace Gender Equality Agency, Gender pay gap statistics (March 2016) https://www.wgea.gov.au/sites/default/files/Gender_Pay_Gap_Factsheet.pdf (accessed 24 May 2017).

21 See, for example, Senate Standing Committee on Education and Employment, The Future of HECS (28 October 2014) 52.

22 See, *D.H. and Others v the Czech Republic* ECHR Application no. 57325/00 (13 November 2007) 49; *Hoogendijk v the Netherlands* ECHR, Application no. 58641/00 (6 January 2005).

23 See, for example, *Althammer v Austria* HRC 998/01 [10.2].

> introduction of new HELP repayment thresholds, may be seen as limiting the right to non-discrimination due to disproportionate impacts on women and other low income groups.
>
> The Government currently carries a higher deferral subsidy from demographic groups that tend to have lower incomes. This includes women, individuals in part-time work or individuals in low paid professions. As a result, many of these individuals, including many women, will be making repayments for the first time as a result of the introduction of the new, lower thresholds. Addressing this income inequality, however, is not the role of the higher education loans system.[24]

2.96 In this respect, it was noted that the statement of compatibility does not provide a substantive assessment of whether the measure amounts to indirect discrimination. To state that a negative impact on women results from income inequality is not a justification of the measure – which has the potential to exacerbate inequality – as a proportionate limitation on the right to equality and non-discrimination.

2.97 Accordingly, the committee requested the further advice of the minister as to:

- whether there is reasoning or evidence that establishes that the stated objective addresses a pressing or substantial concern or whether the proposed changes are otherwise aimed at achieving a legitimate objective;
- how the measure is effective to achieve (that is, rationally connected to) its stated objective; and
- whether the limitation is a reasonable and proportionate measure to achieve the stated objective.

Minister's response

Right to education

2.98 In relation to the right to education, the minister's response argues that the measure does not limit the right to education, including ensuring access to higher education and through the progressive introduction of free higher education in article 13 of the ICESCR. In relation to the lower repayment threshold, the minister's response states:

> In terms of access to education, there should be no effect on access based on the new repayment threshold. Eligible students will remain able to defer their student contribution amounts or tuition fees via a HELP loan. This includes individuals who earn more than the minimum repayment threshold.

24 SOC 10.

> Further, the new repayment threshold introduced by this Bill remains above the national minimum wage ($35,000 for full-time workers), and the lower repayment rate ensures that any impact is minimal.

2.99 In relation to the changes to the indexation of the repayment thresholds:

> Changes to the indexation of the repayment thresholds similarly do not limit the right to access higher education and are not retrogressive in terms of the introduction of free education. According to the Grattan Institute, the AWE figure is distorted by several factors including increasingly larger incomes due to a rise in professional occupations over low-skilled occupations, and an ageing population staying longer in the workforce with high salaries. As growth in CPI is slower than growth in AWE, this results in people commencing repayments towards their HELP debt sooner. This does not equate to people paying more for their education. As individuals may begin repaying their debts more quickly, it may reduce the amount they repay over the life of their HELP debt, as faster repayments means that there is less debt to index each year.
>
> Further, it should be noted that the growth in HELP repayments has not kept pace with the growth in HELP lending. The rate of spending on the HELP scheme is unsustainable and needs to be addressed. The amount of HECS-HELP loans accessed has increased by around 75 per cent from over $2.1 billion in 2008 to over $3.6 billion in 2013. Additionally, the expansion of HELP to the vocational education and training sector has led to VET FEE-HELP loans increasing from $0.03 billion [in] 2009 to over $1.7 billion in 2014. From 2008-09 to 2012-13 HELP repayments have only increased by 35 per cent (noting the inherent time lag between incurring the loan and commencing repayments).
>
> The savings arising from this measure will help reduce the unsustainable growth in the HELP scheme, and ensure that it remains available for future generations of students.
>
> Any perceived limitation on the right to education, including the progressive introduction of free higher education, is reasonable, necessary and proportionate to the objective of ensuring that the higher education loan scheme remains sustainable.

2.100 Based on the information provided, the measure may be compatible with the right to education, noting in particular that some evidence has been cited that the measures will not limit access to education or act as a disincentive to education, and noting the justification for the reliance on CPI indexation instead of Average Weekly Earnings.

Right to equality and non-discrimination

2.101 In relation to the right to equality and non-discrimination, the minster's response restates information provided in the statement of compatibility which acknowledges that the measures may have a disproportionate negative effect on women:

> Women, and other low-earning demographic groups, may represent a disproportionately large number of those required to make HELP repayments for the first time as a result of the introduction of the new, lower threshold. This may present an indirect limitation on the right to non-discrimination.

2.102 However, as occurred in the statement of compatibility, instead of assessing whether this disproportionate negative effect is permissible the minister's response merely states:

> Due to the income-contingent nature of the HELP scheme, those who earned less than the minimum repayment threshold have not previously been required to make repayment obligations. Any disproportionate impact on women as a result of this measure is the result of broader and complex social and economic factors that it is not within the scope of a student loan scheme to address or mitigate.

2.103 However, as noted in the initial human rights analysis, to state that a negative impact on women results from income inequality is not a justification of the measure, which has the potential to exacerbate inequality. Rather, where there is evidence that a measure may have a disproportionate negative effect on women it shows *prima facie* that the measure itself may be discriminatory. In these circumstances, the measure must serve a legitimate objective, be effective to achieve that legitimate objective and be a proportionate means of achieving that objective in order to be compatible with the right to equality and non-discrimination. International human rights law recognises that it is fundamentally the role of government to address existing inequalities and ensure that these are not exacerbated through particular measures.

2.104 The minister's response further argues that women make up the majority of higher education students, graduates and HELP debtors so that any change to the repayment amount would disproportionally affect them. While this may also be correct, it also does not directly address whether a measure which has a disproportionate negative effect on women, by virtue of its effect on those on lower incomes, is justifiable as a matter of international human rights law.

2.105 While not framed in these terms, the minister's response nevertheless provides some information that may go towards whether the limitation is permissible:

> …this measure directly contributes to improving the sustainability of HELP and ensuring it remains a viable option for students in the future. HELP expenses, which consist mainly of debt not expected to be repaid and the deferral subsidy from the concessional interest applied to HELP loans, are estimated to be $2.2 billion in 2017-18.
>
> This measure is expected to bring approximately 183,000 new individuals into the repayment stream, and is expected to increase HELP repayments and reduce the amount of outstanding debt not expected to be repaid.

> Any limitation on the right to non-discrimination as a result of the measures contained in Schedule 3 is reasonable, and proportionate to the policy objective of creating a sustainable higher education system, and to ensure that higher education remains accessible.

2.106 Aside from stating the objective of the measure, no further justification is provided as to whether the measure is proportionate. While acknowledging that the measure pursues the objective of improving the ongoing sustainability of HELP loans, the minister's response provides insufficient basis to conclude that the measure is compatible with the right to equality and non-discrimination.

Committee response

2.107 The committee thanks the minister for his response and has concluded its examination of this issue.

2.108 The preceding analysis indicates that the measure may be compatible with the right to education. However, based on the above analysis and the information provided, it is not possible to conclude that the measure is compatible with the right to equality and non-discrimination.

Mr Ian Goodenough MP

Chair

Appendix 1

Deferred legislation

3.1 The committee has deferred its consideration of the following legislation for the reporting period:

- Autonomous Sanctions (Designated Persons and Entities – Democratic People's Republic of Korea) Amendment List 2017 [F2017L00637];
- Autonomous Sanctions (Designated Persons and Entities and Declared Persons – Ukraine) Amendment List 2017 [F2017L00675];
- Foreign Evidence (Certificate to Adduce Foreign Government Material - Prescribed Form) 2015 [F2017L00643];
- Migration Amendment (Validation of Decisions) Bill 2017;
- Social Security (Tables for the Assessment of Work-related Impairment for Disability Support Pension) Amendment Determination 2017 [F2017L00659];
- Social Services Legislation Amendment (Better Targeting Student Payments) Bill 2017;
- Social Services Legislation Amendment (Welfare Reform) Bill 2017; and
- Treasury Laws Amendment (Agricultural Lending Data) Regulations 2017 [F2017L00706].

3.2 The committee continues to defer its consideration of the following legislation:

- Australian Citizenship Legislation Amendment (Strengthening the Requirements for Australian Citizenship and Other Measures) Bill 2017; and
- Broadcasting Legislation Amendment (Broadcasting Reform) Bill 2017.

Appendix 2

Short guide to human rights

4.1 The following guide contains short descriptions of human rights regularly considered by the committee. State parties to the seven principal human rights treaties are under a binding obligation to respect, protect and promote each of these rights. For more detailed descriptions please refer to the committee's *Guide to human rights*.[1]

4.2 Some human rights obligations are absolute under international law, that is, a state cannot lawfully limit the enjoyment of an absolute right in any circumstances. The prohibition on slavery is an example. However, in relation to most human rights, a necessary and proportionate limitation on the enjoyment of a right may be justified under international law. For further information regarding when limitations on rights are permissible, please refer to the committee's *Guidance Note 1* (see Appendix 4).[2]

Right to life

*Article 6 of the International Covenant on Civil and Political Rights (**ICCPR**); and article 1 of the Second Optional Protocol to the ICCPR*

4.3 The right to life has three core elements:

- it prohibits the state from arbitrarily killing a person;
- it imposes an obligation on the state to protect people from being killed by others or identified risks; and
- it imposes on the state a duty to undertake an effective and proper investigation into all deaths where the state is involved (discussed below, [4.5]).

4.4 Australia is also prohibited from imposing the death penalty.

Duty to investigate

Articles 2 and 6 of the ICCPR

4.5 The right to life requires there to be an effective official investigation into deaths resulting from state use of force and where the state has failed to protect life. Such an investigation must:

- be brought by the state in good faith and on its own initiative;
- be carried out promptly;

1 Parliamentary Joint Committee on Human Rights, Guide to Human Rights (June 2015).

2 Parliamentary Joint Committee on Human Rights, Guidance Note 1 (December 2014).

- be independent and impartial; and
- involve the family of the deceased, and allow the family access to all information relevant to the investigation.

Prohibition against torture, cruel, inhuman or degrading treatment

*Article 7 of the ICCPR; and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (**CAT**)*

4.6 The prohibition against torture, cruel, inhuman or degrading treatment or punishment is absolute. This means that torture or cruel, inhuman or degrading treatment or punishment is not permissible under any circumstances.

4.7 The prohibition contains a number of elements:

- it prohibits the state from subjecting a person to torture or cruel, inhuman or degrading practices, particularly in places of detention;
- it precludes the use of evidence obtained through torture;
- it prevents the deportation or extradition of a person to a place where there is a substantial risk they will be tortured or treated inhumanely (see also non-refoulement obligations, [4.9] to [4.11]); and
- it requires an effective investigation into any allegations of such treatment and steps to prevent such treatment occurring.

4.8 The aim of the prohibition against torture, cruel, inhuman or degrading treatment is to protect the dignity of the person and relates not only to acts causing physical pain but also acts causing mental suffering. The prohibition is also an aspect of the right to humane treatment in detention (see below, [4.18]).

Non-refoulement obligations

Article 3 of the CAT; articles 2, 6(1) and 7 of the ICCPR; and Second Optional Protocol to the ICCPR

4.9 Non-refoulement obligations are absolute and may not be subject to any limitations.

4.10 Australia has non-refoulement obligations under both the ICCPR and the CAT, as well as under the Convention Relating to the Status of Refugees and its Protocol (**Refugee Convention**). This means that Australia must not under any circumstances return a person (including a person who is not a refugee) to a country where there is a real risk that they would face persecution, torture or other serious forms of harm, such as the death penalty; arbitrary deprivation of life; or cruel, inhuman or degrading treatment or punishment.

4.11 Effective and impartial review by a court or tribunal of decisions to deport or remove a person, including merits review in the Australian context, is integral to complying with non-refoulement obligations.

Prohibition against slavery and forced labour

Article 8 of the ICCPR

4.12 The prohibition against slavery, servitude and forced labour is a fundamental and absolute human right. This means that slavery and forced labour are not permissible under any circumstances.

4.13 The prohibition on slavery and servitude is a prohibition on 'owning' another person or exploiting or dominating another person and subjecting them to 'slavery-like' conditions.

4.14 The right to be free from forced or compulsory labour prohibits requiring a person to undertake work that they have not voluntarily consented to, but which they do because of either physical or psychological threats. The prohibition does not include lawful work required of prisoners or those in the military; work required during an emergency; or work or service that is a part of normal civic obligations (for example, jury service).

4.15 The state must not subject anyone to slavery or forced labour, and ensure adequate laws and measures are in place to prevent individuals or companies from subjecting people to such treatment (for example, laws and measures to prevent trafficking).

Right to liberty and security of the person

Article 9 of the ICCPR

Right to liberty

4.16 The right to liberty of the person is a procedural guarantee not to be arbitrarily and unlawfully deprived of liberty. It applies to all forms of deprivation of liberty, including detention in criminal cases, immigration detention, forced detention in hospital, detention for military discipline and detention to control the spread of contagious diseases. Core elements of this right are:

- the prohibition against arbitrary detention, which requires that detention must be lawful, reasonable, necessary and proportionate in all the circumstances, and be subject to regular review;
- the right to reasons for arrest or other deprivation of liberty, and to be informed of criminal charge;
- the rights of people detained on a criminal charge, including being promptly brought before a judicial officer to decide if they should continue to be detained, and being tried within a reasonable time or otherwise released (these rights are linked to criminal process rights, discussed below);
- the right to challenge the lawfulness of any form of detention in a court that has the power to order the release of the person, including a right to have

access to legal representation, and to be informed of that right in order to effectively challenge the detention; and

- the right to compensation for unlawful arrest or detention.

Right to security of the person

4.17 The right to security of the person requires the state to take steps to protect people from others interfering with their personal integrity. This includes protecting people who may be subject to violence, death threats, assassination attempts, harassment and intimidation (for example, protecting people from domestic violence).

Right to humane treatment in detention

Article 10 of the ICCPR

4.18 The right to humane treatment in detention provides that all people deprived of their liberty, in any form of state detention, must be treated with humanity and dignity. The right complements the prohibition on torture and cruel, inhuman or degrading treatment or punishment (see above, [4.6] to [4.8]). The obligations on the state include:

- a prohibition on subjecting a person in detention to inhumane treatment (for example, lengthy solitary confinement or unreasonable restrictions on contact with family and friends);
- monitoring and supervision of places of detention to ensure detainees are treated appropriately;
- instruction and training for officers with authority over people deprived of their liberty;
- complaint and review mechanisms for people deprived of their liberty; and
- adequate medical facilities and health care for people deprived of their liberty, particularly people with disability and pregnant women.

Freedom of movement

Article 12 of the ICCPR

4.19 The right to freedom of movement provides that:

- people lawfully within any country have the right to move freely within that country;
- people have the right to leave any country, including the right to obtain travel documents without unreasonable delay; and
- no one can be arbitrarily denied the right to enter or remain in his or her own country.

Right to a fair trial and fair hearing

Articles 14(1) (fair trial and fair hearing), 14(2) (presumption of innocence) and 14(3)-(7) (minimum guarantees) of the ICCPR

4.20 The right to a fair hearing is a fundamental part of the rule of law, procedural fairness and the proper administration of justice. The right provides that all persons are:

- equal before courts and tribunals; and
- entitled to a fair and public hearing before an independent and impartial court or tribunal established by law.

4.21 The right to a fair hearing applies in both criminal and civil proceedings, including whenever rights and obligations are to be determined.

Presumption of innocence

Article 14(2) of the ICCPR

4.22 This specific guarantee protects the right to be presumed innocent until proven guilty of a criminal offence according to law. Generally, consistency with the presumption of innocence requires the prosecution to prove each element of a criminal offence beyond reasonable doubt (the committee's *Guidance Note* 2 provides further information on offence provisions (see Appendix 4)).

Minimum guarantees in criminal proceedings

Article 14(2)-(7) of the ICCPR

4.23 These specific guarantees apply when a person has been charged with a criminal offence or are otherwise subject to a penalty which may be considered criminal, and include:

- the presumption of innocence (see above, [4.22]);
- the right not to incriminate oneself (the ill-treatment of a person to obtain a confession may also breach the prohibition on torture, cruel, inhuman or degrading treatment (see above, [4.6] to [4.8]);
- the right not to be tried or punished twice (double jeopardy);
- the right to appeal a conviction or sentence and the right to compensation for wrongful conviction; and
- other specific guarantees, including the right to be promptly informed of any charge, to have adequate time and facilities to prepare a defence, to be tried in person without undue delay, to examine witnesses, to choose and meet with a lawyer and to have access to effective legal aid.

Prohibition against retrospective criminal laws

Article 15 of the ICCPR

4.24 The prohibition against retrospective criminal laws provides that:

- no-one can be found guilty of a crime that was not a crime under the law at the time the act was committed;
- anyone found guilty of a criminal offence cannot be given a heavier penalty than one that applied at the time the offence was committed; and
- if, after an offence is committed, a lighter penalty is introduced into the law, the lighter penalty should apply to the offender. This includes a right to benefit from the retrospective decriminalisation of an offence (if the person is yet to be penalised).

4.25 The prohibition against retrospective criminal laws does not apply to conduct which, at the time it was committed, was recognised under international law as being criminal even if it was not a crime under Australian law (for example, genocide, war crimes and crimes against humanity).

Right to privacy

Article 17 of the ICCPR

4.26 The right to privacy prohibits unlawful or arbitrary interference with a person's private, family, home life or correspondence. It requires the state:

- not to arbitrarily or unlawfully invade a person's privacy; and
- to adopt legislative and other measures to protect people from arbitrary interference with their privacy by others (including corporations).

4.27 The right to privacy contains the following elements:

- respect for private life, including information privacy (for example, respect for private and confidential information and the right to control the storing, use and sharing of personal information);
- the right to personal autonomy and physical and psychological integrity, including respect for reproductive autonomy and autonomy over one's own body (for example, in relation to medical testing);
- the right to respect for individual sexuality (prohibiting regulation of private consensual adult sexual activity);
- the prohibition on unlawful and arbitrary state surveillance;
- respect for the home (prohibiting arbitrary interference with a person's home and workplace including by unlawful surveillance, unlawful entry or arbitrary evictions);

- respect for family life (prohibiting interference with personal family relationships);
- respect for correspondence (prohibiting arbitrary interception or censoring of a person's mail, email and web access), including respect for professional duties of confidentiality; and
- the right to reputation.

Right to protection of the family

*Articles 17 and 23 of the ICCPR; and article 10 of the International Covenant on Economic, Social and Cultural Rights (**ICESCR**)*

4.28 Under human rights law the family is recognised as the natural and fundamental group unit of society and is therefore entitled to protection. The right requires the state:

- not to arbitrarily or unlawfully interfere in family life; and
- to adopt measures to protect the family, including by funding or supporting bodies that protect the family.

4.29 The right also encompasses:

- the right to marry (with full and free consent) and found a family;
- the right to equality in marriage (for example, laws protecting spouses equally) and protection of any children on divorce;
- protection for new mothers, including maternity leave; and
- family unification.

Right to freedom of thought and religion

Article 18 of the ICCPR

4.30 The right to hold a religious or other belief or opinion is absolute and may not be subject to any limitations.

4.31 However, the right to exercise one's belief may be subject to limitations given its potential impact on others.

4.32 The right to freedom of thought, conscience and religion includes:

- the freedom to choose and change religion or belief;
- the freedom to exercise religion or belief publicly or privately, alone or with others (including through wearing religious dress);
- the freedom to exercise religion or belief in worship, teaching, practice and observance; and
- the right to have no religion and to have non-religious beliefs protected (for example, philosophical beliefs such as pacifism or veganism).

4.33 The right to freedom of thought and religion also includes the right of a person not to be coerced in any way that might impair their ability to have or adopt a religion or belief of their own choice. The right to freedom of religion prohibits the state from impairing, through legislative or other measures, a person's freedom of religion; and requires it to take steps to prevent others from coercing persons into following a particular religion or changing their religion.

Right to freedom of opinion and expression

*Articles 19 and 20 of the ICCPR; and article 21 of the Convention on the Rights of Persons with Disabilities (**CRPD**)*

4.34 The right to freedom of opinion is the right to hold opinions without interference. This right is absolute and may not be subject to any limitations.

4.35 The right to freedom of expression relates to the communication of information or ideas through any medium, including written and oral communications, the media, public protest, broadcasting, artistic works and commercial advertising. It may be subject to permissible limitations.

Right to freedom of assembly

Article 21 of the ICCPR

4.36 The right to peaceful assembly is the right of people to gather as a group for a specific purpose. The right prevents the state from imposing unreasonable and disproportionate restrictions on assemblies, including:

- unreasonable requirements for advance notification of a peaceful demonstration (although reasonable prior notification requirements are likely to be permissible);
- preventing a peaceful demonstration from going ahead or preventing people from joining a peaceful demonstration;
- stopping or disrupting a peaceful demonstration;
- punishing people for their involvement in a peaceful demonstration or storing personal information on a person simply because of their involvement in a peaceful demonstration; and
- failing to protect participants in a peaceful demonstration from disruption by others.

Right to freedom of association

Article 22 of the ICCPR; and article 8 of the ICESCR

4.37 The right to freedom of association with others is the right to join with others in a group to pursue common interests. This includes the right to join political parties, trade unions, professional and sporting clubs and non-governmental organisations.

4.38 The right prevents the state from imposing unreasonable and disproportionate restrictions on the right to form associations and trade unions, including:

- preventing people from forming or joining an association;
- imposing procedures for the formal recognition of associations that effectively prevent or discourage people from forming an association;
- punishing people for their membership of a group; and
- protecting the right to strike and collectively bargain.

4.39 Limitations on the right are not permissible if they are inconsistent with the guarantees of freedom of association and the right to organise as contained in the International Labour Organisation Convention of 1948 concerning Freedom of Association and Protection of the Right to Organize (ILO Convention No. 87).

Right to take part in public affairs

Article 25 of the ICCPR

4.40 The right to take part in public affairs includes guarantees of the right of Australian citizens to stand for public office, to vote in elections and to have access to positions in public service. Given the importance of free speech and protest to the conduct of public affairs in a free and open democracy, the realisation of the right to take part in public affairs depends on the protection of other key rights, such as freedom of expression, association and assembly.

4.41 The right to take part in public affairs is an essential part of democratic government that is accountable to the people. It applies to all levels of government, including local government.

Right to equality and non-discrimination

*Articles 2, 3 and 26 of the ICCPR; articles 2 and 3 of the ICESCR; International Convention on the Elimination of All Forms of Racial Discrimination (**CERD**); Convention on the Elimination of all Forms of Discrimination Against Women (**CEDAW**); CRPD; and article 2 of the Convention on the Rights of the Child (**CRC**)*

4.42 The right to equality and non-discrimination is a fundamental human right that is essential to the protection and respect of all human rights. The human rights treaties provide that everyone is entitled to enjoy their rights without discrimination of any kind, and that all people are equal before the law and entitled to the equal and non-discriminatory protection of the law.

4.43 'Discrimination' under the ICCPR encompasses both measures that have a discriminatory intent (direct discrimination) and measures which have a

discriminatory effect on the enjoyment of rights (indirect discrimination).[3] The UN Human Rights Committee has explained indirect discrimination as 'a rule or measure that is neutral on its face or without intent to discriminate', which exclusively or disproportionately affects people with a particular personal attribute.[4]

4.44 The right to equality and non-discrimination requires that the state:

- ensure all laws are non-discriminatory and are enforced in a non-discriminatory way;
- ensure all laws are applied in a non-discriminatory and non-arbitrary manner (equality before the law);
- have laws and measures in place to ensure that people are not subjected to discrimination by others (for example, in areas such as employment, education and the provision of goods and services); and
- take non-legal measures to tackle discrimination, including through education.

Rights of the child

CRC

4.45 Children have special rights under human rights law taking into account their particular vulnerabilities. Children's rights are protected under a number of treaties, particularly the CRC. All children under the age of 18 years are guaranteed these rights, which include:

- the right to develop to the fullest;
- the right to protection from harmful influences, abuse and exploitation;
- family rights; and
- the right to access health care, education and services that meet their needs.

Obligation to consider the best interests of the child

Articles 3 and 10 of the CRC

4.46 Under the CRC, states are required to ensure that, in all actions concerning children, the best interests of the child are a primary consideration. This requires active measures to protect children's rights and promote their survival, growth and wellbeing, as well as measures to support and assist parents and others who have

3 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'.

4 Althammer v Austria HRC 998/01, [10.2]. See above, for a list of 'personal attributes'.

day-to-day responsibility for ensuring recognition of children's rights. It 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.

4.47 Australia is required to treat applications by minors for family reunification in a positive, humane and expeditious manner. This obligation is consistent with articles 17 and 23 of the ICCPR, which prohibit interference with the family and require family unity to be protected by society and the state (see above, [4.29]).

Right of the child to be heard in judicial and administrative proceedings

Article 12 of the CRC

4.48 The right of the child to be heard in judicial and administrative proceedings provides that states assure to a child capable of forming his or her own views the right to express those views freely in all matters affecting them. The views of the child must be given due weight in accordance with their age and maturity.

4.49 In particular, this right requires that the child is provided the opportunity to be heard in any judicial and administrative proceedings affecting them, either directly or through a representative or an appropriate body.

Right to nationality

Articles 7 and 8 of the CRC; and article 24(3) of the ICCPR

4.50 The right to nationality provides that every child has the right to acquire a nationality. Accordingly, Australia is required to adopt measures, both internally and in cooperation with other countries, to ensure that every child has a nationality when born. The CRC also provides that children have the right to preserve their identity, including their nationality, without unlawful interference.

4.51 This is consistent with Australia's obligations under the Convention on the Reduction of Statelessness 1961, which requires Australia to grant its nationality to a person born in its territory who would otherwise be stateless, and not to deprive a person of their nationality if it would render the person stateless.

Right to self-determination

Article 1 of the ICESCR; and article 1 of the ICCPR

4.52 The right to self-determination includes the entitlement of peoples to have control over their destiny and to be treated respectfully. The right is generally understood as accruing to 'peoples', and includes peoples being free to pursue their economic, social and cultural development. There are two aspects of the meaning of self-determination under international law:

- that the people of a country have the right not to be subjected to external domination and exploitation and have the right to determine their own political status (most commonly seen in relation to colonised states); and

- that groups within a country, such as those with a common racial or cultural identity, particularly Indigenous people, have the right to a level of internal self-determination.

4.53 Accordingly, it is important that individuals and groups, particularly Aboriginal and Torres Strait Islander peoples, should be consulted about decisions likely to affect them. This includes ensuring that they have the opportunity to participate in the making of such decisions through the processes of democratic government, and are able to exercise meaningful control over their affairs.

Rights to and at work

Articles 6(1), 7 and 8 of the ICESCR

Right to work

4.54 The right to work is the right of all people to have the opportunity to gain their living through decent work they freely choose, allowing them to live in dignity. It provides:

- that everyone must be able to freely accept or choose their work, including that a person must not be forced in any way to engage in employment;
- a right not to be unfairly deprived of work, including minimum due process rights if employment is to be terminated; and
- that there is a system of protection guaranteeing access to employment.

Right to just and favourable conditions of work

4.55 The right to just and favourable conditions of work provides that all workers have the right to just and favourable conditions of work, particularly adequate and fair remuneration, safe working conditions, and the right to join trade unions.

Right to social security

Article 9 of the ICESCR

4.56 The right to social security recognises the importance of adequate social benefits in reducing the effects of poverty and plays an important role in realising many other economic, social and cultural rights, in particular the right to an adequate standard of living and the right to health.

4.57 Access to social security is required when a person lacks access to other income and is left with insufficient means to access health care and support themselves and their dependents. Enjoyment of the right requires that sustainable social support schemes are:

- available to people in need;
- adequate to support an adequate standard of living and health care;

- accessible (providing universal coverage without discrimination; and qualifying and withdrawal conditions that are lawful, reasonable, proportionate and transparent); and
- affordable (where contributions are required).

Right to an adequate standard of living

Article 11 of the ICESCR

4.58 The right to an adequate standard of living requires that the state take steps to ensure the availability, adequacy and accessibility of food, clothing, water and housing for all people in its jurisdiction.

Right to health

Article 12 of the ICESCR

4.59 The right to health is the right to enjoy the highest attainable standard of physical and mental health. It is a right to have access to adequate health care (including reproductive and sexual healthcare) as well as to live in conditions that promote a healthy life (such as access to safe drinking water, housing, food and a healthy environment).

Right to education

Articles 13 and 14 of the ICESCR; and article 28 of the CRC

4.60 This right recognises the right of everyone to education. It recognises that education must be directed to the full development of the human personality and sense of dignity, and to strengthening respect for human rights and fundamental freedoms. It requires that primary education shall be compulsorily and freely available to all; and the progressive introduction of free secondary and higher education.

Right to culture

Article 15 of the ICESCR; and article 27 of the ICCPR

4.61 The right to culture provides that all people have the right to benefit from and take part in cultural life. The right also includes the right of everyone to benefit from scientific progress; and protection of the moral and material interests of the authors of scientific, literary or artistic productions.

4.62 Individuals belonging to minority groups have additional protections to enjoy their own culture, religion and language. The right applies to people who belong to minority groups in a state sharing a common culture, religion and/or language.

Right to an effective remedy

Article 2 of the ICCPR

4.63 The right to an effective remedy requires states to ensure access to an effective remedy for violations of human rights. States are required to establish

appropriate judicial and administrative mechanisms for addressing claims of human rights violations under domestic law. Where public officials have committed violations of rights, states may not relieve perpetrators from personal responsibility through amnesties or legal immunities and indemnities.

4.64 States are required to make reparation to individuals whose rights have been violated. Reparation can involve restitution, rehabilitation and measures of satisfaction—such as public apologies, public memorials, guarantees of non-repetition and changes in relevant laws and practices—as well as bringing to justice the perpetrators of human rights violations. Effective remedies should be appropriately adapted to take account of the special vulnerability of certain categories of persons including, and particularly, children.

Appendix 3

Correspondence

Australian Government

Australian Public Service Commission

Australian Public Service Commissioner

Mr Ian Goodenough MP
Chair
Parliamentary Joint Committee on Human Rights
S1.111
Parliament House
CANBERRA ACT 2600

Dear Mr Goodenough

I refer to your letter of 10 November 2016 seeking my advice on the compatibility of the Australian Public Service Commissioner's Directions 2016 (the Directions) with the right to privacy.

In my response of 22 November 2016 I undertook to review the necessity of publishing in the Public Service *Gazette* terminations of employment for breaching the Australian Public Service (APS) Code of Conduct, and notify you of my findings in June 2017.

After consultation with APS agencies, I have concluded that the current arrangements should not continue. I intend to establish a new, secure database of employment terminations for breaches of the Code of Conduct that will not be accessible to the general public. This approach would respect the privacy of affected employees. Agencies would be able to access the database and thereby maintain the integrity of their workforces.

Once the record is established, I will make appropriate amendments to the Directions.

Yours sincerely

John Lloyd PSM
June 2017

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Senator the Hon Simon Birmingham

Minister for Education and Training
Senator for South Australia

Our Ref MC17-003631

Mr Ian Goodenough MP
Chair
Parliamentary Joint Committee on Human Rights
S1.111
Parliament House
CANBERRA ACT 2600

05 JUL 2017

Dear Mr Goodenough Ian

Thank you for the opportunity to respond to the Committee's Human Rights Scrutiny Report 5 of 2017 concerning the Higher Education Support Legislation Amendment (A More Sustainable, Responsive and Transparent Higher Education System) Bill 2017 (the HESLA Bill).

I note the Committee's concerns about four measures: the increased student share of higher education funding and efficiency dividend; changed arrangements for enabling courses; replacing subsidies with loans for most Australian permanent residents and New Zealand citizens; and the new schedule of repayment arrangements and indexation for Higher Education Loan Program thresholds. The additional information requested by the Committee is attached.

In summary, the Australian Government does not consider that these measures will limit the right to education or the right to equality and non-discrimination. Funding support for Commonwealth supported students has risen rapidly in recent years. The HESLA Bill will increase student choice and greatly expand opportunity for many thousands of Australians and students will still, on average, pay only 46 per cent of the costs of higher education, with taxpayers continuing to provide the rest.

Access to, and affordability of, higher education will continue to be protected by the HESLA Bill which will allow students – including Australian permanent residents and all New Zealand citizens – to borrow the costs of their study thereby, removing upfront fees as a barrier to participation. The proposed new minimum repayment threshold of $42,000 commences at a very low, one per cent rate of repayment.

I thank the Committee for its consideration of the HESLA Bill.

Yours sincerely

Simon Birmingham
Encl. Response to the Parliamentary Joint Committee on Human Rights

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HIGHER EDUCATION SUPPORT LEGISLATION AMENDMENT (A MORE SUSTAINABLE, RESPONSIVE AND TRANSPARENT HIGHER EDUCATION SYSTEM) BILL 2017

Detailed response to the Joint Parliamentary Committee on Human Rights

The Parliamentary Joint Committee on Human Rights requested further information in relation to four measures in the Higher Education Support Legislation Amendment (A More Sustainable, Responsive and Transparent Higher Education System) Bill 2017 (the Bill).

The information requested by the Committee is provided below. The Minister believes that any limitations on human rights contained in these measures are reasonable, necessary, and proportionate to the broader policy objectives of ensuring financial sustainability for higher education and budget repair.

Increased student share of higher education funding and efficiency dividend

Schedule 1 of the Bill outlines a rebalancing of the student and Commonwealth contributions for Commonwealth supported places (CSPs). The increase in student contribution amounts of 1.8 per cent per year for four years will be phased in from 2018 to 2021, for a cumulative increase of 7.5 per cent by 2021.

An efficiency dividend of 2.5 per cent in both 2018 and 2019 will be applied to amounts under the Commonwealth Grant Scheme (CGS).

Right to education

This measure engages with Article 13(2)(c) of the *International Covenant on Economic, Social and Cultural Rights* (ICESCR) which states that "higher education shall be made equally accessible to all, on the basis of capacity, by every appropriate means, and in particular by the progressive introduction of free education".

Recalibration of Commonwealth contribution and student contribution amounts contained Schedule 1 of this Bill will result in decreased Government funding and an increase in student contributions and the introduction of an efficiency dividend will reduce the total resourcing available to universities for Commonwealth supported students. This outcome may be considered a retrogressive measure, as it is counter to the goal of progressive introduction of free education.

This measure is reasonable and proportionate to the policy objective of ensuring long-term financial sustainability of the higher education system. By ensuring that the demand driven funding system can be preserved for bachelor level studies and extended to approved sub-bachelor courses, the rebalancing of student and Commonwealth contribution amounts supports future opportunities for students to access higher education.

Students are well resourced through the CGS, expenditure through which totalled $7.1 billion in 2016. Average funding per student has increased by around 15 per cent over the five years from 2010 to 2015. In comparison the average cost of delivery per equivalent full time student has only

grown at 9.5 per cent over the same period[1]. The effect of an efficiency dividend on the CGS should have minimal effect on the ability of students to access higher education, or on providers to deliver high quality courses.

Even after the efficiency dividend and rebalancing of Commonwealth and student contribution amounts is fully implemented by 2021, the Commonwealth will still fund on average 54 per cent of the cost of courses.

The rebalancing of contributions also sits within the context of Australia's generous and highly regarded student loan scheme that ensures no domestic student need pay upfront fees for access to higher education. That is, despite the modest increase in student contribution amounts, access to higher education will be maintained through the continued availability of Higher Education Loan Program (HELP) loans.

While the progressive introduction of free higher education is one aspect of the right to education outlined in the ICESCR, maintaining equitable access to higher education for future Australians is vital for economic prosperity and social wellbeing. The measure is proportionate to this policy objective, as it creates a more sustainable higher education system and, by doing so, ensures future generations of Australians will remain able to access higher education and the substantial private benefits it confers.

Given the Budget context and the Government's commitment to a return to surplus, there is a need to reduce the overall levels of Government spending. The savings as a result of this measure will also be an important contribution towards budget repair, which is an important objective of this Government.

Changed arrangements for enabling courses

This measure, contained in Schedule 2 of the Bill, introduces a number of changes to enabling places. The enabling loading paid to providers in lieu of charging enabling students a student contribution amount is being removed. To ensure that enabling places continue to be adequately resourced, for the first time providers will be able to charge Commonwealth supported enabling students a capped student contribution amount up to the value of the rate of the enabling loading. In addition, the way Commonwealth supported enabling places are allocated will be overhauled – from 1 January 2019 a fixed number of places will be allocated on a cyclical basis through a competitive three year tender process.

Right to education

The introduction of student contribution amounts for Commonwealth supported enabling students may be considered a retrogressive measure in terms of the right to education, specifically the progressive introduction of free higher education.

However, access to higher education is also an important aspect of this right, and these measures are aimed at improving the system of enabling places to assist underprepared learners to progress to undertaking higher education courses. Enabling courses are recognised as a preparation tool for

[1] *Cost of delivery of higher education* (2016), Deloitte Access Economics

students with social or educational disadvantages[2], and an important means of access to higher education.

The *Report of the Review of the Demand Driven System* by Dr David Kemp and Andrew Norton found that the overall attrition rates for enabling courses can be as high as 40 or 50 per cent. The Report suggested that a contributory factor is the lack of investment from the student, including in a financial sense[3]. By ensuring that students are making a modest financial commitment towards their education, the measure aims to improve progression to higher education for students enrolled in enabling places. This expands the right to education by ensuring that there are viable alternative entry pathways available to underprepared learners.

Further, while providers may charge a student contribution amount for an enabling course of study, students will be able to defer these upfront costs via a HELP loan. This ensures that the student contribution amount does not present an upfront financial barrier for students.

Additionally, under the current system of allocation of Commonwealth supported enabling places some providers under-utilise their allocation which is inefficient and effectively diminishes opportunities for individuals who may benefit from participation in an enabling course. The measure ensures that with cyclical competitive tender processes, enabling places will always be allocated to providers who have demonstrated a history of high standards of academic preparation and completion rates, among other criteria currently under consideration. The right to access higher education is being expanded by ensuring the efficiency of allocation of these places to providers who are most likely to fully utilise the places allocated to them, and to deliver high quality outcomes for students.

The measure expands access to higher education by improving the enabling funding mechanism, and incentivising commitment to ensure higher completion rates.

Replacing subsidies with loans for most permanent residents and New Zealand citizens

This reform addresses the situation that forces permanent residents and most New Zealand citizens to pay upfront fees for higher education – a significant barrier to access for many students. This measure, contained in Schedule 3 of the Bill, extends HELP loans to permanent residents and New Zealand citizens. In order to ensure the affordability of this measure, access to CSPs was removed, effectively treating permanent residents and New Zealand citizens the same as domestic full fee-paying students.

Right to education

While this measure removes the Commonwealth subsidy that these groups currently receive, the measure expands access to tertiary education for New Zealand citizens and permanent residents of Australia by providing access to HELP loans.

Currently, these students must pay for their education upfront, which may be a significant limitation on their capacity to access higher education. Under current arrangements, most Australian

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[2] The Hon Dr Jane Lomax-Smith, Professor Louise Watson, Professor Beth Webster, *The Higher Education Base Funding Review* (2011)

[3] The Hon Dr David Kemp and Andrew Norton, *Report of the Review of the Demand Driven System* (2014)

permanent residents and most New Zealand citizens have faced inequalities in access to higher education. They have had to pay upfront fees for tuition that their Australian peers have been able to defer to a HELP loan.

While the Committee has specifically requested advice on the removal of the CSP for permanent residents and New Zealand citizens, it cannot be considered without noting that this measure also expands access to HELP loans.

While it is not yet known how universities will respond in terms of tuition fees, access to a HELP loan is likely to be the most important factor for those New Zealand citizens and permanent residents who are unable to afford upfront payment to undertake tertiary education. There is evidence that tuition fees, when coupled with access to income contingent loans, do not act as a disincentive to study[4]. In this way, the overall measure expands the right to access higher education.

In formulating this measure, the Government considered policy alternatives. Replacing subsidies with loans emerged as the best way to support Australian permanent residents and New Zealand citizens to access higher education while making a contribution to budget repair and the overall policy objective of ensuring the sustainability of higher education funding.

This measure is reasonable and proportionate to both the policy objectives of expanding access for permanent residents and New Zealand citizens, and of creating a financially sustainable higher education system.

Right to non-discrimination

This measure engages with Article 26 of the *International Covenant on Civil and Political Rights* (ICCPR) which states that "the law shall prohibit any discrimination and guarantee to all persons equal protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status".

Under the current arrangements permanent residents and New Zealand citizens have different entitlements to citizens of Australia. Replacing subsidies with loans for most Australian permanent residents and New Zealand citizens, as proposed by this Bill, alters existing arrangements in order to expand access to higher education for these groups by removing financial barriers. Despite the loss of subsidised tuition fees, access to higher education for most Australian permanent residents and most New Zealand citizens will be improved through the availability of HELP loans.

Furthermore, loan repayment arrangements do not discriminate between Australian citizens, New Zealand citizens and Australian permanent residents; they are identical.

It is also important to note that a special cohort of New Zealand citizens (who arrived here as children and have been long term residents of Australia) will remain eligible for both Commonwealth subsidies and all HELP schemes (including VET Student Loans). This Government introduced this arrangement in 2016 and this measure preserves access for this cohort.

Any savings as a result of this measure are required in order to ensure the long-term sustainability of Australia's higher education system, and the policy objective of ensuring that most permanent

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[4] Bruce Chapman, *Income Contingent Loans for Higher Education: International Reform* (2005), the Australian National University Centre for Economic Policy Research

residents and most New Zealand citizens are able to access higher education without the barrier of upfront fees.

Any perceived limitation on the right to non-discrimination is reasonable, and proportionate to the policy objectives.

New schedule of repayment thresholds and indexation arrangements for HELP

Schedule 3 of the Bill creates new repayment thresholds and repayment rates for HELP loans. The Bill introduces a new, lower repayment threshold of $42,000 with a repayment rate of one per cent, and a new upper repayment threshold of $119,882 with a repayment rate of 10 per cent.

This Schedule also amends the *Higher Education Support Act 2003* so that from 1 July 2019 the HELP repayment thresholds will be indexed using the Consumer Price Index (CPI) rather than Average Weekly Earnings (AWE).

Right to education

The measures in Schedule 3 do not limit the right to education, including ensuring access to higher education and through the progressive introduction of free higher education in Article 13 of the ICESCR.

In terms of access to education, there should be no effect on access based on the new repayment threshold. Eligible students will remain able to defer their student contribution amounts or tuition fees via a HELP loan. This includes individuals who earn more than the minimum repayment threshold.

Further, the new repayment threshold introduced by this Bill remains above the national minimum wage ($35,000 for full-time workers), and the lower repayment rate ensures that any impact is minimal.

Changes to the indexation of the repayment thresholds similarly do not limit the right to access higher education and are not retrogressive in terms of the introduction of free education. According to the Grattan Institute, the AWE figure is distorted by several factors including increasingly larger incomes due to a rise in professional occupations over low-skilled occupations, and an ageing population staying longer in the workforce with high salaries. As growth in CPI is slower than growth in AWE, this results in people commencing repayments towards their HELP debt sooner. This does not equate to people paying more for their education. As individuals may begin repaying their debts more quickly, it may reduce the amount they repay over the life of their HELP debt, as faster repayments means that there is less debt to index each year.

Further, it should be noted that the growth in HELP repayments has not kept pace with the growth in HELP lending. The rate of spending on the HELP scheme is unsustainable and needs to be addressed. The amount of HECS-HELP loans accessed has increased by around 75 per cent from over $2.1 billion in 2008 to over $3.6 billion in 2013[5]. Additionally, the expansion of HELP to the vocational education and training sector has led to VET FEE-HELP loans increasing from $0.03 billion

[5] 2011-2013 Higher Education Report

on 2009 to over $1.7 billion in 2014[6]. From 2008-09 to 2012-13 HELP repayments have only increased by 35 per cent (noting the inherent time lag between incurring the loan and commencing repayments)[7].

The savings arising from this measure will help reduce the unsustainable growth in the HELP scheme, and ensure that it remains available for future generations of students.

Any perceived limitation on the right to education, including the progressive introduction of free higher education, is reasonable, necessary and proportionate to the objective of ensuring that the higher education loan scheme remains sustainable.

Right to non-discrimination

As acknowledged in the original statement of compatibility with human rights in the Explanatory Memorandum, there may be a disproportionate effect on women as a result of the measures contained in this Schedule. Women, and other low-earning demographic groups, may represent a disproportionately large number of those required to make HELP repayments for the first time as a result of the introduction of the new, lower threshold. This may present an indirect limitation on the right to non-discrimination.

Due to the income-contingent nature of the HELP scheme, those who earned less than the minimum repayment threshold have not previously been required to make repayment obligations. Any disproportionate impact on women as a result of this measure is the result of broader and complex social and economic factors that it is not within the scope of a student loan scheme to address or mitigate.

It should be noted however, that women make up the majority of higher education students, graduates and HELP debtors. Women made up 58 per cent of domestic students in 2015[8], and between 2006 and 2014 had a completion rate of 75 per cent, compared with 70 per cent for men over the same period for bachelor level study at public universities[9]. These figures are not reflective of a recent trend only; women have historically achieved higher rates of enrolment and completion than men. Given that women make up a larger proportion of HELP debtors due to their proportionally greater enrolments, any measure that affected repayment would therefore disproportionately affect women.

As outlined above, this measure directly contributes to improving the sustainability of HELP and ensuring it remains a viable option for students in the future. HELP expenses, which consist mainly of debt not expected to be repaid and the deferral subsidy from the concessional interest applied to HELP loans, are estimated to be $2.2 billion in 2017-18[10].

This measure is expected to bring approximately 183,000 new individuals into the repayment stream, and is expected to increase HELP repayments and reduce the amount of outstanding debt not expected to be repaid.

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[6] 2015 VET FEE-HELP Statistical Report
[7] 2011-2013 Higher Education Report
[8] Department of Education and Training data
[9] Completion Rates of Higher Education Students – Cohort Analysis, 2005-2014
[10] 2017-18 Education Portfolio Budget Statement

Any limitation on the right to non-discrimination as a result of the measures contained in Schedule 3 is reasonable, and proportionate to the policy objective of creating a sustainable higher education system, and to ensure that higher education remains accessible.

Appendix 4

Guidance Note 1 and Guidance Note 2

PARLIAMENTARY JOINT COMMITTEE ON HUMAN RIGHTS

GUIDANCE NOTE 1: Drafting statements of compatibility

December 2014

This note sets out the committee's approach to human rights assessments and its requirements for statements of compatibility. It is designed to assist legislation proponents in the preparation of statements of compatibility.

Background

Australia's human rights obligations

Human rights are defined in the *Human Rights (Parliamentary Scrutiny) Act 2011* as the rights and freedoms contained in the seven core human rights treaties to which Australia is a party. These treaties are:

- International Covenant on Civil and Political Rights
- International Covenant on Economic, Social and Cultural Rights
- International Convention on the Elimination of All Forms of Racial Discrimination
- Convention on the Elimination of All Forms of Discrimination against Women
- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
- Convention on the Rights of the Child
- Convention on the Rights of Persons with Disabilities

Australia has voluntarily accepted obligations under these seven core UN human rights treaties. Under international law it is the state that has an obligation to ensure that all persons enjoy human rights. Australia's obligations under international human rights law are threefold:

- **to respect** – requiring government not to interfere with or limit human rights;
- **to protect** – requiring government to take measures to prevent others (for example individuals or corporations) from interfering with human rights;
- **to fulfil** – requiring government to take positive measures to fully realise human rights.

Where a person's rights have been breached, there is an obligation to ensure accessible and effective remedies are available to that person.

Australia's human rights obligations apply to all people subject to Australia's jurisdiction, regardless of whether they are Australian citizens. This means Australia owes human rights obligations to everyone in Australia, as well as to persons outside Australia where Australia is exercising effective control over them, or they are otherwise under Australia’s jurisdiction.

The treaties confer rights on individuals and groups of individuals and not companies or other incorporated bodies.

Civil and political rights

Australia is under an obligation to respect, protect and fulfil its obligations in relation to all civil and political rights. It is generally accepted that most civil and political rights are capable of immediate realisation.

Economic, social and cultural rights

Australia is also under an obligation to respect, protect and fulfil economic, social and cultural rights. However, there is some flexibility allowed in the implementation of these rights. This is the obligation of progressive realisation, which recognises that the full realisation of economic, social and cultural rights may be achieved progressively. Nevertheless, there are some obligations in relation to economic, social and cultural rights which have immediate effect. These include the obligation to ensure that people enjoy economic, social and cultural rights without discrimination.

Limiting a human right

It is a general principle of international human rights law that the rights protected by the human rights treaties are to be interpreted generously and limitations narrowly. Nevertheless, international human rights law recognises that reasonable limits may be placed on most rights and freedoms – there are very few absolute rights which can never be legitimately limited.[1] For all other rights, rights may be limited as long as the limitation meets certain standards. In general, any measure that limits a human right has to comply with the following criteria (*The limitation criteria*) in order for the limitation to be considered justifiable.

Prescribed by law

Any limitation on a right must have a clear legal basis. This requires not only that the measure limiting the right be set out in legislation (or be permitted under an established rule of the common law); it must also be accessible and precise enough so that people know the legal consequences of their actions or the circumstances under which authorities may restrict the exercise of their rights.

Legitimate objective

Any limitation on a right must be shown to be necessary in pursuit of a legitimate objective. To demonstrate that a limitation is permissible, proponents of legislation must provide reasoned and evidence-based explanations of the legitimate objective being pursued. To be capable of justifying a proposed limitation on human rights, a legitimate objective must address a pressing or substantial concern, and not simply seek an outcome regarded as desirable or convenient. In addition, there are a number of rights that may only be limited for a number of prescribed purposes.[2]

Rational connection

It must also be demonstrated that any limitation on a right has a rational connection to the objective to be achieved. To demonstrate that a limitation is permissible, proponents of legislation must provide reasoned and evidence-based explanations as to how the measures are likely to be effective in achieving the objective being sought.

Proportionality

To demonstrate that a limitation is permissible, the limitation must be proportionate to the objective being sought. In considering whether a limitation on a right might be proportionate, key factors include:

- whether there are other less restrictive ways to achieve the same aim;
- whether there are effective safeguards or controls over the measures, including the possibility of monitoring and access to review;

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1 Absolute rights are: the right not to be subjected to torture, cruel, inhuman or degrading treatment; the right not to be subjected to slavery; the right not to be imprisoned for inability to fulfil a contract; the right not to be subject to retrospective criminal laws; the right to recognition as a person before the law.

2 For example, the right to association. For more detailed information on individual rights see Parliamentary Joint Committee on Human Rights, Guide to Human Rights (March 2014), available at http://www.aph.gov.au/~/media/Committees/Joint/PJCHR/Guide%20to%20Human%20Rights.pdf.

- the extent of any interference with human rights – the greater the interference the less likely it is to be considered proportionate;
- whether affected groups are particularly vulnerable; and
- 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.

Retrogressive measures

In respect of economic, social and cultural rights, as there is a duty to realise rights progressively there is also a corresponding duty to refrain from taking retrogressive measures. This means that the state cannot unjustifiably take deliberate steps backwards which negatively affect the enjoyment of economic, social and cultural rights. In assessing whether a retrogressive measure is justified the limitation criteria are a useful starting point.

The committee's approach to human rights scrutiny

The committee's mandate to examine all existing and proposed Commonwealth legislation for compatibility with Australia's human rights obligations, seeks to ensure that human rights are taken into account in the legislative process.

The committee views its human rights scrutiny tasks as primarily preventive in nature and directed at minimising risks of new legislation giving rise to breaches of human rights in practice. The committee also considers it has an educative role, which includes raising awareness of legislation that promotes human rights.

The committee considers that, where relevant and appropriate, the views of human rights treaty bodies and international and comparative human rights jurisprudence can be useful sources for understanding the nature and scope of the human rights referred to in the Human Rights (Parliamentary Scrutiny) Act 2011. Similarly, there are a number of other treaties and instruments to which Australia is a party, such as the International Labour Organization (ILO) Conventions and the Refugee Convention which, although not listed in the *Human Rights (Parliamentary Scrutiny) Act 2011,* may nonetheless be relevant to the interpretation of the human rights protected by the seven core human rights treaties. The committee has also referred to other non-treaty instruments, such as the United Nations Declaration on the Rights of Indigenous Peoples, where it considers that these are relevant to the interpretation of the human rights in the seven treaties that fall within its mandate. When the committee relies on regional or comparative jurisprudence to support its analysis of the rights in the treaties, it will acknowledge this where necessary.

The committee's expectations for statements of compatibility

The committee considers statements of compatibility as essential to the examination of human rights in the legislative process. The committee expects statements to read as stand-alone documents. The committee relies on the statement as the primary document that sets out the legislation proponent's analysis of the compatibility of the bill or instrument with Australia's international human rights obligations.

While there is no prescribed form for statements under the *Human Rights (Parliamentary Scrutiny) Act 2011*, the committee strongly recommends legislation proponents use the current templates provided by the Attorney-General's Department. [3]

The statement of compatibility should identify the rights engaged by the legislation. Not every possible right engaged needs to be identified in the statement of compatibility, only those that are substantially engaged. The committee does not expect analysis of rights consequentially or tangentially engaged in a minor way.

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[3] The Attorney-General's Department guidance may be found at https://www.ag.gov.au/RightsAndProtections/HumanRights/Human-rights-scrutiny/Pages/Statements-of-Compatibility.aspx.

Consistent with the approach set out in the guidance materials developed by the Attorney-General's department, where a bill or instrument limits a human right, the committee requires that the statement of compatibility provide a detailed and evidence-based assessment of the measures against the limitation criteria set out in this note. Statements of compatibility should provide analysis of the impact of the bill or instrument on vulnerable groups.

Where the committee's analysis suggests that a bill limits a right and the statement of compatibility does not include a reasoned and evidence-based assessment, the committee may seek additional/further information from the proponent of the legislation. Where further information is not provided and/or is inadequate, the committee will conclude its assessment based on its original analysis. This may include a conclusion that the bill or instrument (or specific measures within a bill or instrument) are incompatible with Australia's international human rights obligations.

This approach is consistent with international human rights law which requires that any limitation on a human right be justified as reasonable, necessary and proportionate in pursuit of a legitimate objective.

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PARLIAMENTARY JOINT COMMITTEE ON HUMAN RIGHTS

GUIDANCE NOTE 2: Offence provisions, civil penalties and human rights

December 2014

This guidance note sets out some of the key human rights compatibility issues in relation to provisions that create offences and civil penalties. It is not intended to be exhaustive but to provide guidance on the committee's approach and expectations in relation to assessing the human rights compatibility of such provisions.

Introduction

The right to a fair trial and fair hearing are protected by article 14(1) of the International Covenant on Civil and Political Rights (ICCPR). The right to a fair trial and fair hearing applies to both criminal and civil proceedings.

A range of protections are afforded to persons accused and convicted of criminal offences under article 14. These include the presumption of innocence (article 14(2)), the right to not incriminate oneself (article 14(3)(g)), the right to have a sentence reviewed by a higher tribunal (article 14(5)), the right not to be tried or punished twice for the same offence (article 14(7)), a guarantee against retrospective criminal laws (article 15(1)) and the right not to be arbitrarily detained (article 9(1)).[1]

Offence provisions need to be considered and assessed in the context of these standards. Where a criminal offence provision is introduced or amended, the statement of compatibility for the legislation will usually need to provide an assessment of whether human rights are engaged and limited.[2]

The *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* provides a range of guidance in relation to the framing of offence provisions.[3] However, legislation proponents should note that this government guide is neither binding nor conclusive of issues of human rights compatibility. The discussion below is intended to assist legislation proponents to identify matters that are likely to be relevant to the framing of offence provisions and the assessment of their human rights compatibility.

Reverse burden offences

Article 14(2) of the ICCPR protects the right to be presumed innocent until proven guilty according to law. Generally, consistency with the presumption of innocence requires the prosecution to prove each element of a criminal offence beyond reasonable doubt.

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1 For a more comprehensive description of these rights see Parliamentary Joint Committee on Human Rights, *Guide to Human Rights* (March 2014), available at http://www.aph.gov.au/~/media/Committees/Joint/PJCHR/Guide%20to%20Human%20Rights.pdf.

2 The requirements for assessing limitations on human rights are set out in *Guidance Note 1: Drafting statements of compatibility* (December 2014).

3 See *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers,* September 2011 edition, available at http://www.ag.gov.au/Publications/Documents/GuidetoFramingCommonwealthOffencesInfringementNoticesandEnforcementPowers/A%20Guide%20to%20Framing%20Cth%20Offences.pdf.

An offence provision which requires the defendant to carry an evidential or legal burden of proof, commonly referred to as 'a reverse burden', with regard to the existence of some fact engages and limits the presumption of innocence. This is because a defendant's failure to discharge the burden of proof may permit their conviction despite reasonable doubt as to their guilt. Where a statutory exception, defence or excuse to an offence is provided in proposed legislation, these defences or exceptions must be considered as part of a contextual and substantive assessment of potential limitations on the right to be presumed innocent in the context of an offence provision.

Reverse burden offences will be likely to be compatible with the presumption of innocence where they are shown by legislation proponents to be reasonable, necessary and proportionate in pursuit of a legitimate objective. Claims of greater convenience or ease for the prosecution in proving a case will be insufficient, in and of themselves, to justify a limitation on the defendant's right to be presumed innocent.

It is the committee's usual expectation that, where a reverse burden offence is introduced, legislation proponents provide a human rights assessment in the statement of compatibility, in accordance with Guidance Note 1.

Strict liability and absolute liability offences

Strict liability and absolute liability offences engage and limit the presumption of innocence. This is because they allow for the imposition of criminal liability without the need to prove fault.

The effect of applying strict liability to an element or elements of an offence therefore means that the prosecution does not need to prove fault. However, the defence of mistake of fact is available to the defendant. Similarly, the effect of applying absolute liability to an element or elements of an offence means that no fault element needs to be proved, but the defence of mistake of fact is not available.

Strict liability and absolute liability offences will not necessarily be inconsistent with the presumption of innocence where they are reasonable, necessary and proportionate in pursuit of a legitimate objective.

The committee notes that strict liability and absolute liability may apply to whole offences or to elements of offences. It is the committee's usual expectation that, where strict liability and absolute liability criminal offences or elements are introduced, legislation proponents should provide a human rights assessment of their compatibility with the presumption of innocence, in accordance with Guidance Note 1.

Mandatory minimum sentencing

Article 9 of the ICCPR protects the right to security of the person and freedom from arbitrary detention. An offence provision which requires mandatory minimum sentencing will engage and limit the right to be free from arbitrary detention. The notion of 'arbitrariness' under international human rights law includes elements of inappropriateness, injustice and lack of predictability. Detention may be considered arbitrary where it is disproportionate to the crime that has been committed (for example, as a result of a blanket policy).[4] Mandatory sentencing may lead to disproportionate or unduly harsh outcomes as it removes judicial discretion to take into account all of the relevant circumstances of a particular case in sentencing.

Mandatory sentencing is also likely to engage and limit article 14(5) of the ICCPR, which protects the right to have a sentence reviewed by a higher tribunal. This is because mandatory sentencing prevents judicial review of the severity or correctness of a minimum sentence.

The committee considers that mandatory minimum sentencing will be difficult to justify as compatible with human rights, given the substantial limitations it places on the right to freedom

[4] See, for example, A v Australia (1997) 560/1993, UN Doc. CCPR/C/59/D/560/1993, [9.4]; Concluding Observations on Australia in 2000 (2000) UN doc A/55/40, volume 1, [522] (in relation to mandatory sentencing in the Northern Territory and Western Australia).

from arbitrary detention and the right to have a sentence reviewed by a higher tribunal (due to the blanket nature of the measure). Where mandatory minimum sentencing does not require a minimum non-parole period, this will generally be insufficient, in and of itself, to preserve the requisite judicial discretion under international human rights law to take into account the particular circumstances of the offence and the offender.[5]

Civil penalty provisions

Many bills and existing statutes contain civil penalty provisions. These are generally prohibitions on particular forms of conduct that give rise to liability for a 'civil penalty' enforceable by a court. As these penalties are pecuniary and do not include the possibility of imprisonment, they are said to be 'civil' in nature and do not constitute criminal offences under Australian law.

Given their 'civil' character, applications for a civil penalty order are dealt with in accordance with the rules and procedures that apply in relation to civil matters. These rules and procedures often form part of a regulatory regime which provides for a graduated series of sanctions, including infringement notices, injunctions, enforceable undertakings, civil penalties and criminal offences.

However, civil penalty provisions may engage the criminal process rights under articles 14 and 15 of the ICCPR where the penalty may be regarded as 'criminal' for the purpose of international human rights law. The term 'criminal' has an 'autonomous' meaning in human rights law. In other words, a penalty or other sanction may be 'criminal' for the purposes of the ICCPR even though it is considered to be 'civil' under Australian domestic law.

There is a range of international and comparative jurisprudence on whether a 'civil' penalty is likely to be 'criminal' for the purpose of human rights law.[6] This criteria for assessing whether a penalty is 'criminal' for the purposes of human rights law is set out in further detail on page 4. The following steps (one to three) may assist legislation proponents in understanding whether a provision may be characterised as 'criminal' under international human rights law.

- **Step one:** *Is the penalty classified as criminal under Australian Law?*

  If so, the penalty will be considered 'criminal' for the purpose of human rights law. If not, proceed to step two.

- **Step two:** *What is the nature and purpose of the penalty?*

  The penalty is likely to be considered criminal for the purposes of human rights law if:

  a) the purpose of the penalty is to punish or deter; **and**

  b) the penalty applies to the public in general (rather than being restricted to people in a specific regulatory or disciplinary context.)

  If the penalty does not satisfy this test, proceed to step three.

- **Step three:** *What is the severity of the penalty?*

  The penalty is likely to be considered criminal for the purposes of human rights law if the civil penalty provision carries a penalty of imprisonment or a substantial pecuniary sanction.

Note: even if a penalty is not considered 'criminal' separately under steps two or three, it may still be considered 'criminal' where the nature and severity of the penalty are cumulatively considered.

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5 This is because the mandatory minimum sentence may be seen by courts as a 'sentencing guidepost' which specifies the appropriate penalty for the least serious case. Judges may feel constrained to impose, for example, what is considered the usual proportion for a non-parole period (approximately 2/3 of the head sentence).

6 The UN Human Rights Committee, while not providing further guidance, has determined that 'civil; penalties may be 'criminal' for the purpose of human rights law, see, for example, *Osiyuk v Belarus* (1311/04); Sayadi and *Vinck v Belgium* (1472/06).

When a civil penalty provision is 'criminal'

In light of the criteria described at pages 3-4 above, the committee will have regard to the following matters when assessing whether a particular civil penalty provision is 'criminal' for the purposes of human rights law.

a) Classification of the penalty under domestic law

The committee considers that in accordance with international human rights law, the classification of the penalty as 'civil' under domestic law will not be determinative. However, if the penalty is 'criminal' under domestic law it will also be 'criminal' under international law.

b) The nature of the penalty

The committee considers that a civil penalty provision is more likely to be considered 'criminal' in nature if it contains the following features:

- the penalty is intended to be punitive or deterrent in nature, irrespective of its severity;
- the proceedings are instituted by a public authority with statutory powers of enforcement;
- a finding of culpability precedes the imposition of a penalty; and
- the penalty applies to the public in general instead of being directed at people in a specific regulatory or disciplinary context (the latter being more likely to be viewed as 'disciplinary' or regulatory rather than as 'criminal').

c) The severity of the penalty

In assessing whether a pecuniary penalty is sufficiently severe to amount to a 'criminal' penalty, the committee will have regard to:

- the amount of the pecuniary penalty that may be imposed under the relevant legislation with reference to the regulatory context;
- the nature of the industry or sector being regulated and relative size of the pecuniary penalties and the fines that may be imposed (for example, large penalties may be less likely to be criminal in the corporate context);
- the maximum amount of the pecuniary penalty that may be imposed under the civil penalty provision relative to the penalty that may be imposed for a corresponding criminal offence; and
- whether the pecuniary penalty imposed by the civil penalty provision carries a sanction of imprisonment for non-payment, or other very serious implications for the individual in question.

The consequences of a conclusion that a civil penalty is 'criminal'

If a civil penalty is assessed to be 'criminal' for the purposes of human rights law, this does not mean that it must be turned into a criminal offence in domestic law. Human rights law does not stand in the way of decriminalisation. Instead, it simply means that the civil penalty provision in question must be shown to be consistent with the criminal process guarantees set out the articles 14 and 15 of the ICCPR.

By contrast, if a civil penalty is characterised as not being 'criminal', the specific criminal process guarantees in articles 14 and 15 will not apply. However, such provisions must still comply with the right to a fair hearing before a competent, independent and impartial tribunal contained in article 14(1) of the ICCPR. The Senate Standing Committee for the Scrutiny of Bills may also comment on whether such provisions comply with accountability standards.

As set out in Guidance Note 1, sufficiently detailed statements of compatibility are essential for the effective consideration of the human rights compatibility of bills and legislative instruments. Where

a civil penalty provision could potentially be considered 'criminal' the statement of compatibility should:

- explain whether the civil penalty provisions should be considered to be 'criminal' for the purposes of human rights law, taking into account the criteria set out above; and
- if so, explain whether the provisions are consistent with the criminal process rights in articles 14 and 15 of the ICCPR, including providing justifications for any limitations of these rights.

It will not be necessary to provide such an assessment in the statement of compatibility on every occasion where proposed legislation includes civil penalty provisions or draws on existing civil penalty regimes. For example, it will generally not be necessary to provide such an assessment where the civil penalty provision is in a corporate or consumer protection context and the penalties are small.

Criminal process rights and civil penalty provisions

The key criminal process rights that have arisen in the committee's scrutiny of civil penalty provisions include the right to be presumed innocent (article 14(2)) and the right not to be tried twice for the same offence (article 14 (7)). For example:

- article 14(2) of the International Covenant on Civil and Political Rights (ICCPR) protects the right to be presumed innocent until proven guilty according to law. This requires that the case against the person be demonstrated on the criminal standard of proof, that is, it must be proven beyond reasonable doubt. The standard of proof applicable in civil penalty proceedings is the civil standard of proof, requiring proof on the balance of probabilities. In cases where a civil penalty is considered 'criminal', the statement of compatibility should explain how the application of the civil standard of proof for such proceedings is compatible with article 14(2) of the ICCPR.
- article 14(7) of the ICCPR provides that no-one is to be liable to be tried or punished again for an offence of which she or he has already been finally convicted or acquitted. If a civil penalty provision is considered to be 'criminal' and the related legislative scheme permits criminal proceedings to be brought against the person for substantially the same conduct, the statement of compatibility should explain how this is consistent with article 14(7) of the ICCPR.

Other criminal process guarantees in articles 14 and 15 may also be relevant to civil penalties that are viewed as 'criminal', and should be addressed in the statement of compatibility where appropriate.

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