

Chapter 1

New and continuing matters

1.1 This report provides the Parliamentary Joint Committee on Human Rights' view on the compatibility with human rights of bills introduced into the Parliament from 7 to 10 September, legislative instruments received from 14 to 27 August 2015, and legislation previously deferred by the committee.

1.2 The report also includes the committee's consideration of responses arising from previous reports.

1.3 The committee generally takes an exceptions based approach to its examination of legislation. The committee therefore comments on legislation where it considers the legislation raises human rights concerns, having regard to the information provided by the legislation proponent in the explanatory memorandum (EM) and statement of compatibility.

1.4 In such cases, the committee usually seeks further information from the proponent of the legislation. In other cases, the committee may draw matters to the attention of the relevant legislation proponent on an advice-only basis. Such matters do not generally require a formal response from the legislation proponent.

1.5 This chapter includes the committee's examination of new legislation, and continuing matters in relation to which the committee has received a response to matters raised in previous reports.

Bills not raising human rights concerns

1.6 The committee has examined the following bill and concluded that it does not raise human rights concerns. The committee considers that it does not require additional comment as it either does not engage human rights or engages rights (but does not promote or limit rights):

- Maritime Legislation Amendment Bill 2015.

Instruments not raising human rights concerns

1.7 The committee has examined the legislative instruments received in the relevant period, as listed in the *Journals of the Senate*.¹ Instruments raising human rights concerns are identified in this chapter.

1.8 The committee has concluded that the remaining instruments do not raise human rights concerns, either because they do not engage human rights, they

1 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.

contain only justifiable (or marginal) limitations on human rights or because they promote human rights and do not require additional comment.

Deferred bills and instruments

1.9 The committee has deferred its consideration of the following bills:

- Australian Immunisation Register (Consequential and Transitional Provisions) Bill 2015;
- Australian Immunisation Register Bill 2015;
- Social Security Legislation Amendment (Further Strengthening Job Seeker Compliance) Bill 2015; and
- Social Services Legislation Amendment (More Generous Means Testing for Youth Payments) Bill 2015.

1.10 The committee continues to defer its consideration of the Marriage Legislation Amendment Bill 2015 (deferred 8 September 2015) and the Migration Amendment (Protection and Other Measures) Regulation 2015 [F2015L00542] (deferred 23 June 2015).

1.11 As previously noted, the committee continues to defer one bill and a number of instruments in connection with the committee's current review of the *Stronger Futures in the Northern Territory Act 2012* and related legislation.²

2 See Parliamentary Joint Committee on Human Rights, *Twenty-first Report of the 44th Parliament* (24 March 2015); and Parliamentary Joint Committee on Human Rights, *Twenty-third Report of the 44th Parliament* (18 June 2015).

Response required

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

Family Assistance (Public Interest Certificate Guidelines) Determination 2015 [F2015L01269]

Paid Parental Leave Amendment Rules 2015 [F2015L01266]

Social Security (Public Interest Certificate Guidelines) (DSS) Determination 2015 [F2015L01267]

Student Assistance (Public Interest Certificate Guidelines) Determination 2015 [F2015L01268]

Portfolio: Social Services

Authorising legislation: A New Tax System (Family Assistance) (Administration) Act 1999; Paid Parental Leave Act 2010; Social Security (Administration) Act 1999; and Student Assistance Act 1973

Last day to disallow: 15 October 2015 (House and Senate)

Purpose

1.13 The Family Assistance (Public Interest Certificate Guidelines) Determination 2015; the Paid Parental Leave Amendment Rules 2015; the Social Security (Public Interest Certificate Guidelines) (DSS) Determination 2015; and the Student Assistance (Public Interest Certificate Guidelines) Determination 2015 (the determinations) either amend or remake existing instruments relating to the issuing of public interest certificates.

1.14 Under legislation relating to payments for family assistance, social security, student assistance and paid parental leave it is an offence to make an unauthorised use of personal information obtained under the legislation; and officers are not required to disclose information or documents to any person, except for the purposes of the relevant law they are administering.¹

1.15 However, the Secretary (or delegate) of the Department of Social Services or the Department of Human Services may certify that it is necessary in the public interest to disclose such information in a particular case or class of case. In doing so,

1 See sections 164 and 167 of the *A New Tax System (Family Assistance) (Administration) Act 1999*; sections 204 and 207 of the *Social Security (Administration) Act 1999*; sections 353 and 354 of the *Student Assistance Act 1973*; and sections 129 to 132 of the *Paid Parental Leave Act 2010*.

the secretary must act in accordance with guidelines made under the relevant Act.² These determinations set out the guidelines for the exercise of this power.

1.16 Measures raising human rights concerns or issues are set out below.

Disclosure of personal information

1.17 As set out above, the determinations prescribe particular circumstances when a public interest certificate may be issued. They provide that the secretary may issue the certificate if:

- the information cannot reasonably be obtained from a source other than a department;
- the person to whom the information will be disclosed has a sufficient interest in the information (being a genuine and legitimate interest); and
- the secretary is satisfied that the disclosure is for at least one of a number of specified purposes.³

1.18 The purposes for which personal protected information can be disclosed include:

- for the enforcement of laws;
- if necessary for the making of (or supporting or enforcing) a proceeds of crime order;
- to brief a minister;
- to assist with locating a missing person or in relation to a deceased person;
- for research, statistical analysis and policy development;
- to facilitate the progress or resolution of matters of relevance within departmental portfolio responsibilities;
- to a department or other authority of a state or territory, or an agent or contracted service provider of a department or authority, if the information is about a public housing tenant (or applicant), or is necessary to facilitate income management measures; and
- to ensure a child is enrolled in or attending school, or to meet or monitor infrastructures and resource needs in a school.⁴

2 Section 168 of the *A New Tax System (Family Assistance) (Administration) Act 1999*; section 208 of the *Social Security (Administration) Act 1999*; section 355 of the *Student Assistance Act 1973* and section 128 of the *Paid Parental Leave Act 2010*.

3 See section 7 of the *Family Assistance (Public Interest Certificate Guidelines) Determination 2015*; section 7 of the *Social Security (Public Interest Certificate Guidelines) (DSS) Determination 2015*; section 7 of the *Student Assistance (Public Interest Certificate Guidelines) Determination 2015*; and section 4 of the *Paid Parental Leave Rules 2010*.

1.19 The issuing of public interest certificates to allow for the disclosure of personal protected information engages and limits the right to privacy.

Right to privacy

1.20 Article 17 of the International Covenant on Civil and Political Rights (ICCPR) prohibits arbitrary or unlawful interferences with an individual's privacy, family, correspondence or home. The right to privacy includes respect for informational privacy, including:

- the right to respect for private and confidential information, particularly the storing, use and sharing of such information;
- the right to control the dissemination of information about one's private life.

1.21 However, this right may be subject to permissible limitations which are provided by law and are not arbitrary. In order for limitations not to be arbitrary, they must seek to achieve a legitimate objective and be reasonable, necessary and proportionate to achieving that objective.

Compatibility of the measure with the right to privacy

1.22 The statements of compatibility for the determinations acknowledge that the instruments engage and limit the right to privacy.

1.23 However, the statements of compatibility provide assessments of only three of the numerous purposes for which personal protected information can be disclosed.

1.24 This is despite the fact that three of the four Determinations⁵ are remaking the guidelines, including all the specified purposes for which a public interest certificate can be made. The committee's usual expectation is that each limitation on human rights is assessed on the basis of a reasoned and evidence-based explanation of how the measure supports a legitimate objective for the purposes of international human rights law. To be capable of justifying a proposed limitation of human rights, a legitimate objective must address a pressing or substantial concern and not simply seek an outcome regarded as desirable or convenient. Additionally, a limitation must be rationally connected to, and a proportionate way to achieve, its legitimate objective in order to be justifiable in international human rights law.

4 Note, there are more purposes in the individual Determinations, and not all purposes are included in each Determination. See Part 2 of the Family Assistance (Public Interest Certificate Guidelines) Determination 2015; Part 2 of the Social Security (Public Interest Certificate Guidelines) (DSS) Determination 2015; Part 2 of the Student Assistance (Public Interest Certificate Guidelines) Determination 2015; and Division 4.1.2 of Part 4-1 of the Paid Parental Leave Rules 2010 as amended by the Paid Parental Leave Amendment Rules 2015.

5 The Family Assistance (Public Interest Certificate Guidelines) Determination 2015, the Social Security (Public Interest Certificate Guidelines) (DSS) Determination 2015 and the Student Assistance (Public Interest Certificate Guidelines) Determination 2015, but not the Paid Parental Leave Amendment Rules 2015.

1.25 The committee notes that the stated objective of the three purposes that are assessed—to allow information to be disclosed for proceeds of crimes orders; research, analysis and policy development; the administration of the National Law; and public housing administration—appear to be legitimate objectives for the purposes of international human rights law. The disclosure of such information also appears to be rationally connected to the stated objectives.

1.26 However, it is unclear whether the disclosure of personal protected information in the circumstances set out in the determinations is proportionate to the stated objectives.

1.27 First, while the statements of compatibility state that the *Privacy Act 1988* (the Privacy Act) will continue to apply to the management of disclosed information, it is not clear that all recipients of the information would be subject to the provisions of that Act. In particular, the determinations allow personal protected information to be shared with the 'agent or contracted service provider' of a state or territory department or authority and with universities. However, no information is given as to who such agents or contractors might be and whether they would be bound by the provisions of the Privacy Act (which does not apply to most state or territory government agencies, to small business operators or to most universities).

1.28 Second, the manner in which the information can be disclosed may not, in all instances, be the least rights restrictive approach. In particular, it is unclear why it is necessary to enable the disclosure of protected personal information in a form that identifies individuals when the information is being disclosed for purposes such as research, statistical analysis, policy development, briefing the minister and meeting or monitoring infrastructure and resource needs. In such cases it would appear that the information could be disclosed in a de-identified form, thus avoiding any privacy concerns.

1.29 Third, the determinations provide that in appropriate circumstances the disclosure of information may be accompanied by additional measures to protect the information—for example, deeds of confidentiality or memoranda of understanding may be required for recipients of the information. It is not clear why the requirement to further protect the information in such cases is not set out in the determinations themselves.

1.30 The committee's assessment against article 17 of the International Covenant on Civil and Political Rights (right to privacy) of the power to disclose personal information raises questions as to whether the limitation on these rights is proportionate to the objective sought to be achieved.

1.31 As set out above, the disclosure of personal information engages and limits the right to privacy. The statement of compatibility does not sufficiently justify that limitation for the purposes of international human rights law. The committee therefore seeks the advice of the Minister for Social Services as to:

- **whether each of the proposed purposes for which information can be shared are aimed at achieving a legitimate objective;**
- **whether there is a rational connection between the limitation and each objective; and**
- **whether the limitation is a reasonable and proportionate measure for the achievement of each objective, particularly whether there are adequate safeguards in place to protect personal information and that the sharing of protected personal information takes the least rights restrictive approach.**

Disclosure of personal information relating to homeless children

1.32 Three of the determinations provide for the disclosure of information relating to a child who is homeless.⁶ These provide that a public interest certificate can be provided in a number of circumstances if the information cannot reasonably be obtained otherwise, the secretary is satisfied that the disclosure will not result in harm to the young person and the disclosure is for purposes set out in the guidelines, or will be made to a welfare authority where the child is in their care and is under 15 years old.

1.33 The circumstances when the information can be disclosed include:

- if the information is about the child's family member and the secretary is satisfied that the child, or the child's family member, has been subjected to abuse or violence;
- if the disclosure is necessary to verify qualifications for payments;
- if the disclosure will facilitate reconciliation between the child and his or her parents; and
- if necessary to inform the parents of the child as to whether the child has been in contact with the respective department.

1.34 These measures engage and limit the child's right to privacy and may limit the obligation to consider the best interests of the child in all decision-making.

Rights of the child (including obligation to consider the best interests of the child)

1.35 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 Convention on the Rights of the Child (CRC). All children under the age of 18 years are guaranteed these rights. The rights of children include the right to

6 The Family Assistance (Public Interest Certificate Guidelines) Determination 2015, the Social Security (Public Interest Certificate Guidelines) (DSS) Determination 2015 and the Student Assistance (Public Interest Certificate Guidelines) Determination 2015, but not the Paid Parental Leave Amendment Rules 2015.

privacy, which includes the same contents as the general right to privacy set out above at paragraphs [1.20] to [1.21].⁷

1.36 In addition, under the CRC, state parties are required to ensure that, in all actions concerning children, the best interests of the child is a primary consideration.⁸

1.37 This principle 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 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.

Compatibility of the measure with the rights of the child

1.38 The statements of compatibility for each of the three relevant determinations do not consider whether the measures engage and limit the rights of the child.⁹

1.39 The committee's usual expectation where a measure may limit a human right is that the accompanying statement of compatibility provide a reasoned and evidence-based explanation of how the measure supports a legitimate objective for the purposes of international human rights law. This conforms with the committee's Guidance Note 1,¹⁰ and the Attorney-General's Department's guidance on the preparation of statements of compatibility, which states that the 'existence of a legitimate objective must be identified clearly with supporting reasons and, generally, empirical data to demonstrate that [it is] important'.¹¹ To be capable of justifying a proposed limitation of human rights, a legitimate objective must address a pressing or substantial concern and not simply seek an outcome regarded as desirable or convenient. Additionally, a limitation must be rationally connected to, and a proportionate way to achieve, its legitimate objective in order to be justifiable in international human rights law.

7 Article 16 of the CRC.

8 Article 3(1).

9 The Family Assistance (Public Interest Certificate Guidelines) Determination 2015, the Social Security (Public Interest Certificate Guidelines) (DSS) Determination 2015 and the Student Assistance (Public Interest Certificate Guidelines) Determination 2015.

10 Appendix II; See Parliamentary Joint Committee on Human Rights, *Guidance Note 1 - Drafting Statements of Compatibility* (December 2014) http://www.aph.gov.au/~media/Committees/Senate/committee/humanrights_ctte/guidance_notes/guidance_note_1/guidance_note_1.pdf.

11 See Attorney-General's Department, Template 2: Statement of compatibility for a bill or legislative instrument that raises human rights issues at <http://www.ag.gov.au/RightsAndProtections/HumanRights/PublicSector/Pages/Statementofcompatibilitytemplates.aspx>.

1.40 In respect of this obligation the committee notes that the determinations provide that the secretary can issue public interest certificates only if satisfied that the disclosure 'will not result in harm to the homeless young person'.¹²

1.41 However, while considerations of harm to the child are relevant to the question of what is in the best interests of the child, this question is a broader one under international law. In particular, the child's best interests must be assessed from the child's perspective rather than that of their parents or the state, and include the enjoyment of the rights set out in the CRC, including the right to privacy.

1.42 On this basis, a less rights restrictive approach to the sharing of this personal information in such cases would be to require the decision-maker to be satisfied that the disclosure would be in the best interests of the child, rather than that the disclosure will not result in harm to the child.

1.43 The committee's assessment of the power to disclose information relating to homeless children against the Convention on the Rights of the Child (particularly the right to privacy and the obligation to consider the best interests of the child) raises questions as to whether the limitation on these rights is justifiable.

1.44 As set out above, the power to disclose information relating to homeless children engages and limits the rights of the child. The statement of compatibility does not justify that limitation for the purposes of international human rights law. The committee therefore seeks the advice of the Minister for Social Services as to:

- **whether the proposed changes are aimed at achieving a legitimate objective;**
- **whether there is a rational connection between the limitation and that objective; and**
- **whether the limitation is a reasonable and proportionate measure for the achievement of that objective.**

12 See paragraphs 18(1)(b) and (2)(d) of the Family Assistance (Public Interest Certificate Guidelines) Determination 2015; paragraphs 20(1)(b) and 20(2)(d) of the Social Security (Public Interest Certificate Guidelines) (DSS) Determination 2015 and paragraphs 21(1)(b) and 21(2)(d) of the Student Assistance (Public Interest Certificate Guidelines) Determination 2015.

Federal Financial Relations (National Specific Purpose Payments) Determination 2013-14 No. 1 [F2015L00877]

Federal Financial Relations (National Specific Purpose Payments) Determination 2013-14 No. 2 [F2015L00878]

Federal Financial Relations (National Partnership payments) Determination No. 87 (December 2014) [F2015L01093]

Federal Financial Relations (National Partnership payments) Determination No. 88 (January 2015) [F2015L01094]

Federal Financial Relations (National Partnership payments) Determination No. 89 (February 2015) [F2015L01095]

Federal Financial Relations (National Partnership payments) Determination No. 90 (March 2015) [F2015L01096]

Federal Financial Relations (National Partnership payments) Determination No. 91 (April 2015) [F2015L01097]

Federal Financial Relations (National Partnership payments) Determination No. 92 (May 2015) [F2015L01098]

Federal Financial Relations (National Partnership payments) Determination No. 93 (June 2015) [F2015L01099]

Portfolio: Treasury

Authorising legislation: Federal Financial Relations Act 2009

Last day to disallow: 16 September 2015 (Senate) (but only in relation to Federal Financial Relations (National Specific Purpose Payments) Determination 2013-14 No. 1 [F2015L00877] and Federal Financial Relations (National Specific Purpose Payments) Determination 2013-14 No. 2 [F2015L00878])

Purpose

1.45 The Federal Financial Relations (National Specific Purpose Payments) Determination 2013-14 No. 1 (Determination 1) specifies the amounts payable for the schools, skills and workforce development, and housing National Specific Purpose Payments (National SPPs) for 2013-14. The Federal Financial Relations (National Specific Purpose Payments) Determination 2013-14 No. 2 (Determination 2) specifies the amount payable for the Disability National SPP for 2013-14.

1.46 The remaining instruments¹ specify 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. Schedule 1 to these instruments sets out the amounts of payments by reference to certain outcomes, including healthcare, education, community services and affordable housing.

1.47 Together these instruments are referred to as 'the Determinations'.

1.48 Measures raising human rights concerns or issues are set out below.

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

1.49 Under the Intergovernmental Agreement on Federal Financial Relations (the IGA), the Commonwealth provides National SPPs to the states and territories as a financial contribution to support state and territory service delivery in the areas of schools, skills and workforce development, disability and housing.

1.50 The *Federal Financial Relations Act 2009* provides for the minister, by legislative instrument, to determine the total amounts payable in respect of each National SPP, the manner in which these total amounts are indexed, and the manner in which these amounts are divided between the states and territories. The Determinations have been made in accordance with these provisions.

1.51 Payments under the Determinations assist in the delivery of services by the states and territories in the areas of health, education, employment, disability and housing. Accordingly, the Determinations engage a number of human rights. Whether those rights are promoted or limited will be determined by the amounts of the payments in absolute terms and in terms of whether the amounts represent an increase or decrease on previous years.

1.52 The committee has previously noted, in its assessment of appropriations bills, that proposed government expenditure to give effect to particular policies may engage and limit and/or promote a range of human rights. This includes rights under

1 Federal Financial Relations (National Partnership payments) Determination No. 87 (December 2014); Federal Financial Relations (National Partnership payments) Determination No. 88 (January 2015); Federal Financial Relations (National Partnership payments) Determination No. 89 (February 2015); Federal Financial Relations (National Partnership payments) Determination No. 90 (March 2015); Federal Financial Relations (National Partnership payments) Determination No. 91 (April 2015); Federal Financial Relations (National Partnership payments) Determination No. 92 (May 2015); Federal Financial Relations (National Partnership payments) Determination No. 93 (June 2015).

the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR).²

Multiple rights

1.53 The Determinations engage and may promote or limit the following human rights:

- right to equality and non-discrimination (particularly in relation to persons with disabilities);³
- rights of children;⁴
- right to work;⁵
- right to social security;⁶
- right to an adequate standard of living;⁷
- right to health;⁸ and
- right to education.⁹

Compatibility of the Determinations with multiple rights

1.54 The statement of compatibility for the Federal Financial Relations (National Specific Purpose Payments) Determination 2013-14 No. 1 and the Federal Financial Relations (National Specific Purpose Payments) Determination 2013-14 No. 2 each simply states that:

This Legislative Instrument does not engage any of the applicable rights or freedoms.¹⁰

1.55 However, in making payments to the states and territories to fund a range of services, the Determinations have the capacity to both promote rights and, in some cases, limit rights.

2 See Parliamentary Joint Committee on Human Rights, *Third Report of 2013* (13 March 2013); Parliamentary Joint Committee on Human Rights, *Seventh Report of 2013* (5 June 2013); Parliamentary Joint Committee on Human Rights, *Third Report of the 44th Parliament* (4 March 2014); and Parliamentary Joint Committee on Human Rights, *Eighth Report of the 44th Parliament* (24 June 2014).

3 Article 26 of the ICCPR and the Convention on the Rights of Persons with Disabilities.

4 Convention on the Rights of the Child (CRC).

5 Articles 6, 7 and 8 of the ICESCR.

6 Article 9 of the ICESCR.

7 Article 11 of the ICESCR.

8 Article 12 of the ICESCR.

9 Article 13 and 14 of the ICESCR and article 28 of the CRC.

10 Determination 1, EM 2 and Determination 2, EM 2.

1.56 The remaining instruments are not accompanied by statements of compatibility as the instruments are not specifically required to have such statements under section 9 of the *Human Rights (Parliamentary Scrutiny) Act 2011*. However, the committee's role under section 7 of that Act is to examine all instruments for compatibility with human rights (including instruments that are not required to have statements of compatibility).

1.57 Australia has obligations to progressively realise economic, social and cultural rights using the maximum of resources available and this is reliant on government allocation of budget expenditure. The states and territories have limited revenue capacity and rely heavily on payments and cash transfers from the Commonwealth. The National SPPs provide funds to the states and territories which enable the provision of a range of government services which facilitate and support the implementation of multiple human rights. The obligations under international human rights law are on Australia as a nation state - it is therefore incumbent on the Commonwealth to ensure that sufficient funding is provided to the states and territories to ensure that Australia's international human rights obligations are met.

1.58 Where the Commonwealth seeks to reduce the amount of funding pursuant to National SPPs, such reductions in expenditure may amount to retrogression or limitations on rights.

1.59 Accordingly the National SPPs facilitate the taking of actions which may both effect the progressive realisation of, and the failure to fulfil, Australia's obligations under the treaties listed in the *Human Rights (Parliamentary Scrutiny) Act 2011*.

1.60 Accordingly, the committee considers that there is a sufficiently close connection between the National SPPs provided for under the Determinations and the implementation of new legislation, policy or programs, or the discontinuation or reduction in support of a particular policy or program that may engage human rights. As a result, the statement of compatibility for these Determinations should provide an assessment of any limitations of human rights that may arise from that engagement. This would include information that provides a detailed comparison for the amounts provided in the Determinations with the amounts provided in previous years.

1.61 The committee's assessment of the Determinations against the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights raises questions as to whether the Determinations promote or limit multiple human rights.

1.62 As the Determinations set out the final amount payable by the Commonwealth to the states and territories under National SPPs for education, employment, disability and housing they may engage and potentially limit or promote a range of human rights that fall under the committee's mandate. As set out above, the statement of compatibility for the bills provides no assessment of their human rights compatibility. The committee therefore seeks the advice of the

Treasurer as to whether the Determinations are compatible with Australia's human rights obligations, and particularly:

- **whether the Determinations are compatible with Australia's obligations of progressive realisation with respect to economic, social and cultural rights;**
- **whether a failure to adopt these Determinations would have a regressive impact on other economic, social and cultural rights;**
- **whether any reduction in the allocation of funding (if applicable) is compatible with Australia's obligations not to unjustifiably take backward steps (a retrogressive measure) in the realisation of economic, social and cultural rights; and**
- **whether the allocations are compatible with the rights of vulnerable groups (such as children; women; Aboriginal and Torres Strait Islander Peoples; persons with disabilities; and ethnic minorities).**

Further response required

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

Instruments made under the *Autonomous Sanctions Act 2011* and the *Charter of the United Nations Act 1945*

Portfolio: Foreign Affairs

Authorising legislation: Autonomous Sanctions Act 2011 and the Charter of the United Nations Act 1945

Purpose

1.64 A number of instruments have been made under the *Autonomous Sanctions Act 2011* and the *Charter of the United Nations Act 1945* to which this report relates, namely:

- Autonomous Sanctions (Designated Persons and Entities and Declared Persons – Zimbabwe) Amendment List 2013 [F2013L00477];
- Charter of the United Nations Legislation Amendment Regulation 2013 (No. 1) [F2013L00791];
- Charter of the United Nations (UN Sanction Enforcement Law) Amendment Declaration 2013 (No. 1) [F2013L00789];
- Charter of the United Nations (Sanctions – the Taliban) Regulation 2013 [F2013L00787];
- Autonomous Sanctions (Designated Persons and Entities and Declared Persons – Zimbabwe) Amendment List 2013 (No. 2) [F2013L00857];
- Autonomous Sanctions (Designated Persons and Entities and Declared Persons – Syria) Amendment List 2013 [F2013L00884];
- Autonomous Sanctions (Designated Persons and Entities and Declared Persons – Iran) Amendment List 2013 (No. 1) [F2013L01312];
- Autonomous Sanctions Amendment Regulation 2013 (No. 1) [F2013L01447];
- Charter of the United Nations (Sanctions – Democratic People's Republic of Korea) Amendment Regulation 2013 (No. 1) [F2013L01384];
- Autonomous Sanctions (Designated Persons and Entities and Declared Persons – Democratic People's Republic of Korea) Amendment List 2013 [F2013L02049];
- Autonomous Sanctions (Designated and Declared Persons – Former Federal Republic of Yugoslavia) Amendment List 2014 (No.2) [F2014L00970];

- Autonomous Sanctions (Designated Persons and Entities and Declared Persons – Ukraine) Amendment List 2014 [F2014L01184];
- Autonomous Sanctions (Designated Persons and Entities and Declared Persons – Zimbabwe 2014 [F2014L00411];
- Autonomous Sanctions (Designated and Declared Persons Former Federal Republic of Yugoslavia) Amendment List 2014 [F2014L00694];
- Autonomous Sanctions Amendment (Ukraine) Regulation 2014 [F2014L00720];
- Autonomous Sanctions (Designated Persons and Entities and Declared Persons – Ukraine) List 2014 [F2014L00745];
- Charter of the United Nations Legislation Amendment (Central African Republic and Yemen) Regulation 2014 [F2014L00539];
- Charter of the United Nations (Sanctions – Yemen) Regulation 2014 [F2014L00551];
- Charter of the United Nations (UN Sanction Enforcement Law) Amendment Declaration 2014 (No. 2) [F2014L00568];
- Charter of the United Nations Legislation Amendment (Sanctions 2014 Measures No. 1) Regulations 2014 [F2014L01131];
- Charter of the United Nations Legislation Amendment (Sanctions 2014 – Measures No. 2) Regulation 2014 [F2014L01701];
- Autonomous Sanctions (Designated Persons and Entities and Declared Persons – Democratic People's Republic of Korea) Amendment List 2015 [F2015L00061];
- Autonomous Sanctions (Designated and Declared Persons – Former Federal Republic of Yugoslavia) Amendment List 2015 (No. 1) [F2015L00224];
- Autonomous Sanctions (Designated Persons and Entities – Democratic People's Republic of Korea) Amendment List 2015 (No. 2) [F2015L00216];
- Autonomous Sanctions (Designated Persons and Entities and Declared Persons – Iran) Amendment List 2015 (No. 1) [F2015L00227];
- Autonomous Sanctions (Designated Persons and Entities and Declared Persons – Libya) Amendment List 2015 (No. 1) [F2015L00215];
- Autonomous Sanctions (Designated Persons and Entities and Declared Persons – Syria) Amendment List 2015 (No. 1) [F2015L00217];
- Autonomous Sanctions (Designated Persons and Entities and Declared Persons – Zimbabwe) Amendment List 2015 (No. 1) [F2015L00218];
- Charter of the United Nations (Sanctions – South Sudan) Regulation 2015 [F2015L01299]; and

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- Charter of the United Nations (Dealing with Assets) Amendment (South Sudan) Regulation 2015 [F2015L01300].

1.65 These instruments either:

- designate and declare individuals subject to the autonomous sanctions regime under the *Autonomous Sanctions Act 2011* and the *Autonomous Sanctions Regulations 2011*;
- designate individuals subject to the powers under the *Charter of the United Nations Act 1945* by reference to a UN Security Council resolution or decision;
- expand the basis on which the Minister for Foreign Affairs can designate an individual under the *Autonomous Sanctions Regulations 2011*;
- amend the basis on which a person is prohibited from making assets available to designated persons or expand the basis on which a person will commit an offence if they make an asset available to a designated person; or
- expand the definition of 'controlled asset' to enable the assets of a person acting on behalf of a designated person to be frozen.

1.66 In order to understand the effect of the instruments under review it is necessary to understand how the designation and declaration powers work under the *Autonomous Sanctions Act 2011* and the *Charter of the United Nations Act 1945*.

1.67 Firstly, the *Autonomous Sanctions Act 2011* (in conjunction with the *Autonomous Sanctions Regulations 2011* and various instruments made under those regulations) provides the power for the government to impose broad sanctions to facilitate the conduct of Australia's external affairs (the autonomous sanctions regime).

1.68 Sanctions can be imposed under the autonomous sanctions regime if the Minister for Foreign Affairs is satisfied that doing so will facilitate the conduct of Australia's relations with other countries or with entities or persons outside Australia, or will otherwise deal with matters, things or relationships outside Australia.¹ The *Autonomous Sanctions Regulations 2011* sets out the countries and activities for which a person or entity can be designated.²

1.69 Secondly, the *Charter of the United Nations Act 1945* (in conjunction with various instruments made under that Act)³ gives the Australian government the

1 See subsection 10(2) of the *Autonomous Sanctions Act 2011*.

2 As at 2 September 2015, the countries listed were the Democratic People's Republic of Korea; the former Federal Republic of Yugoslavia; Iran; Libya; Myanmar; Syria; Zimbabwe; and Ukraine (see section 6 of the *Autonomous Sanctions Regulations 2011*).

3 See in particular the *Charter of the United Nations (Dealing with Assets) Regulations 2008* [F2014C00689].

power to apply sanctions to give effect to decisions of the United Nations Security Council by Australia (the UN Charter sanctions regime).

1.70 Sanctions can be imposed under the UN Charter sanctions regime if the UN Security Council has made a decision under Chapter VII of the *Charter of the United Nations 1945* (UN Charter), not involving the use of armed force, that there exists 'any threat to the peace, breach of the peace or act of aggression' and Australia is obliged under the UN Charter to carry out that decision as a matter of international law.⁴ The Charter of the United Nations (Dealing with Assets) Regulations 2008 and a number of other instruments made under the UN Charter sanctions regime sets out the criteria for designating a person.⁵

1.71 Sanctions under both the autonomous sanctions regime and the UN Charter sanctions regime (together referred to as the sanctions regimes) can:

- designate or list persons or entities for a particular country with the effect that the assets of the designated person or entity are frozen, and declare that a person is prevented from travelling to, entering or remaining in Australia; and
- restrict or prevent the supply, sale or transfer or procurement of goods or services.

1.72 As at 2 September 2015, 1110 individuals and 854 entities were subject to targeted financial sanctions or travel bans under both sanctions regimes (449 individuals under the autonomous sanctions regime and 661 under the UN Charter regime). The Consolidated List of all persons and entities subject to targeted financial sanctions or travel bans under both sanctions regimes includes the listed individual's name (and any aliases), date of birth, place of birth and date of listing. In some cases their address, citizenship details, passport number and licence number, as well as information about their activities and physical description, is also included.

1.73 The Consolidated List currently includes the names of three Australian citizens.⁶

4 See section 6 of the *Charter of the United Nations Act 1945*.

5 These criteria rely on a designation being made by the UN Security Council. As at 2 September 2015, the list of countries from which people have been designated by the UN Security Council are the Central African Republic; Côte d'Ivoire; Democratic People's Republic of Korea; Democratic Republic of the Congo; Eritrea; Iran; Iraq; Lebanon; Liberia; Somalia; South Sudan; Sudan; and Yemen. Also listed are individuals said to be involved with Al-Qaida; the Taliban; and Libyan Arab Jamahiriya, as well as anyone the UN Security Council lists under Resolution 1373. As such these instruments implement Australia's international obligations under the UN Charter with respect to decisions by the UN Security Council.

6 See Department of Foreign Affairs and Trade, 'Consolidated List', accessed 2 September 2015, available at: <http://dfat.gov.au/international-relations/security/sanctions/pages/consolidated-list.aspx>.

Background

1.74 As set out below, a number of instruments dealing with the sanctions regimes have previously been examined by the committee, while the committee has deferred its examination of a number of other instruments (see paragraph [1.64] above). To date, the statements of compatibility accompanying these instruments have generally failed to identify any human rights as being engaged and, therefore, have provided no further human rights assessment.

1.75 The instruments under consideration expand or apply the operation of the sanctions regime by designating or declaring that a person is subject to the sanctions regime, or by amending the regime itself. To assess whether these instruments are compatible with human rights, it is necessary to assess whether the sanctions regime itself is compatible with human rights.

1.76 The committee's previous examination of some of these instruments is set out in its *Sixth Report of 2013*, *Seventh Report of 2013* and *Tenth Report of 2013*.⁷ The committee previously sought information from the Minister for Foreign Affairs as to whether the instruments were compatible with a number of human rights. The committee noted that this was a complex area that required careful consideration of human rights and various competing interests and ultimately asked if the minister could comprehensively review the sanctions regime with respect to Australia's international human rights obligations.

1.77 The former minister responded stating that he had instructed the Department of Foreign Affairs and Trade to carefully consider the committee's recommendation that it conduct a review. On 10 December 2013 the committee wrote to the current Minister for Foreign Affairs to draw her attention to the committee's consideration of these matters and to reiterate its request for a review in relation to both sanctions regimes.

1.78 The committee subsequently deferred its consideration of a number of instruments relating to both sanctions regimes pending receipt and consideration of the minister's response. All of the instruments listed above at paragraph [1.64] are now considered as part of the following analysis.

1.79 On 16 February 2015 the minister provided her response, as set out below.

Minister's response

As you are aware, sanctions regimes are imposed only in situations of international concern, including the grave repression of human rights, the proliferation of weapons of mass destruction or their means of delivery, or armed conflict. Modern sanctions regimes impose highly targeted measures designed to limit the adverse consequences of the situation, to

7 See Parliamentary Joint Committee on Human Rights, *Sixth Report of 2013* (15 May 2013); *Seventh Report of 2013* (5 June 2013) and *Tenth Report of 2013* (26 June 2013).

seek to influence those responsible for it to modify their behaviour, and to penalise those responsible.

As the former Committee noted, the implementation of sanctions is a complex issue that requires careful consideration of the various competing interests involved, including human rights. Sanctions measures that are targeted against designated or declared persons necessarily involve the balancing of the human rights of those persons, with the necessity of preventing broader, and often egregious, human rights abuses arising from a situation of international concern. As the process of considering the various competing interests is undertaken in the process of implementation, I see no need for a further review by the Department.⁸

Compatibility of the sanctions regimes with human rights

1.80 The committee notes that aspects of both of the sanctions regimes may operate variously to both limit and promote human rights. For example, sanctions prohibiting the proliferation of weapons of mass destruction will promote the right to life. However, the committee's current and previous examination of Australia's sanctions regimes has been, and is, focused solely on measures that impose restrictions on individuals.

1.81 The committee notes that the focus of the analysis below is in relation to the human rights obligations owed to individuals located in Australia. However, the committee is unaware whether any of the designations or declarations made under the sanctions regime has affected individuals living in Australia (although three current designations apply to Australian citizens).

1.82 In this regard, it is important to note that the committee's mandate is to examine Acts and legislative instruments for compatibility with human rights, and that the application of the committee's analytical framework provides an assessment of whether legislation could be applied in a way that would breach human rights.

1.83 The analysis below therefore provides an assessment of whether both sanctions regimes could breach the human rights of persons to whom Australia owes such obligations, irrespective of whether there have already been instances of individuals living in Australia affected by these measures.

Multiple rights

1.84 The committee considers that the autonomous sanctions regime and the UN Charter regime engage and may limit multiple human rights, including:

- right to privacy;⁹
- right to a fair hearing;¹⁰

8 See Appendix 1, Letter from the Hon Julie Bishop MP, Minister for Foreign Affairs, to Senator Dean Smith (dated 16 February 2015) 1.

9 Article 17 of the International Covenant on Civil and Political Rights (ICCPR).

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- right to protection of the family;¹¹
 - right to equality and non-discrimination;¹²
 - right to an adequate standard of living;¹³
 - right to freedom of movement (in relation to the cancellation of a visa of a person declared under the autonomous sanctions regime);¹⁴ and
 - prohibition against non-refoulement (in relation to the cancellation of a visa of a person declared under the autonomous sanctions regime).¹⁵

1.85 The committee's analysis of the compatibility of the sanctions regimes with a number of these rights is set out below.¹⁶

1.86 The committee acknowledges that sanctions regimes operate as mechanisms for applying pressure to regimes and individuals with a view to ending the repression of human rights internationally.¹⁷ The committee notes the importance of Australia acting in concert with the international community to prevent egregious human rights abuses arising from situations of international concern. The committee considers that laws to facilitate this effort pursue a legitimate objective for the purposes of international human rights law.

1.87 However, in respect of the minister's advice that the sanctions regimes seek 'to penalise those responsible' for the repression of human rights, the committee regards it as important to recognise that the sanctions regimes operate independently of the criminal justice system, and are used regardless of whether a designated person has been charged with or convicted of a criminal offence. While the punishing of those responsible for human rights abuses is a legitimate objective in cases where there has been a judicial determination of guilt, it may not be regarded as such in cases where punishment is imposed on an individual by the executive without any right to judicial review.

1.88 Further, the committee notes that the evidence as to whether sanctions regimes are effective in achieving the aims set out by the minister appears to be

10 Article 14 of the ICCPR.

11 Article 17 and 23 of the ICCPR and article 10 of the International Covenant on Economic, Social and Cultural Rights (ICESCR).

12 Article 26 of the ICCPR.

13 Article 11 of the ICESCR.

14 Article 12 of the ICCPR.

15 Article 6 and 7 of the ICCPR, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and the Refugee Convention.

16 There may be issues relating to the compatibility of the sanctions regimes with the human rights listed at paragraph [1.84] which have not been examined in the analysis that follows.

17 See Parliamentary Joint Committee on Human Rights, *Tenth Report of 2013* (26 June 2013) 15.

inconclusive;¹⁸ and there are concerns that unilaterally imposed sanctions may in practice impact adversely on the human rights of civilian populations in countries targeted by sanctions.¹⁹ The committee also notes the difficulty in establishing a rational connection between each designation or declaration of an individual and the objective of ending the repression of human rights internationally. Such concerns raise significant questions as to whether sanctions regimes are rationally connected to the objectives which they seek. However, as such questions may ultimately turn on the particular degree and mix of political strategies aimed at ending international human rights abuses, for the purpose of the analysis below, the committee accepts that the sanctions regimes are rationally connected to their objective. The committee therefore has focused on the question of whether any identifiable limitations of human rights arising from the sanctions regimes are proportionate to their stated objective.

1.89 Noting that the minister has declined to undertake a broader review of the sanctions regimes, the analysis below sets out a number of specific human rights concerns in relation to which the minister's advice is sought.

'Freezing' of designated person's assets

1.90 Under both sanctions regimes, the effect of a designation is that it is an offence for a person to make an asset directly or indirectly available to, or for the benefit of, a designated person.²⁰ A person's assets are therefore effectively 'frozen' as a result of being designated. For example, a financial institution is prohibited from allowing a designated person to access their bank account. The sanctions regimes can apply to persons living in Australia or could apply to persons outside Australia.

1.91 The scheme provides that the minister may grant a permit authorising the making available of certain assets to a designated person.²¹ An application for a permit can only be made for basic expenses, to satisfy a legal judgment or where a payment is contractually required.²² A basic expense includes foodstuffs; rent or

18 A number of academic studies and the European Parliament have said that it is difficult to gauge whether sanctions are effective. See, for example, European Parliament, *Resolution of 4 September 2008 on the Evaluation of EU Sanctions as Part of the EU's Actions and Policies in the Area of Human Rights* (2008/2031(INI)) and Stefan Lehne, *The Role of Sanctions in EU Foreign Policy*, December 2012 available at <http://carnegieendowment.org/2012/12/14/role-of-sanctions-in-eu-foreign-policy/etnv>.

19 See UN Human Rights Council, 28th session, agenda items 3 and 5, *Research-based progress report of the Human Rights Advisory Committee containing recommendations on mechanisms to assess the negative impact of unilateral coercive measures on the enjoyment of human rights and to promote accountability*, 10 February 2015.

20 Section 14 of the Autonomous Sanctions Regulations 2011 and section 21 of the *Charter of the United Nations Act 1945*.

21 See section 18 of the Autonomous Sanctions Regulations 2011 and section 22 of the *Charter of the United Nations Act 1945*.

22 See section 20 of the Autonomous Sanctions Regulations 2011.

mortgage; medicines or medical treatment; public utility charges; insurance; taxes; legal fees and reasonable professional fees.²³

1.92 The committee considers that the designation of a person under the sanctions regimes therefore limits a person's right to privacy, and particularly the aspect of the right relating to personal autonomy in one's private life.

1.93 The committee notes that its discussion in relation to the right to privacy applies to the autonomous sanctions regime and to the designation of a person by the minister under the UN Charter sanctions regime. It does not apply in relation to the automatic designation of a person by the UN Security Council, noting that under international law, Australia is bound by the UN Charter to implement UN Security Council decisions.²⁴ Accordingly, obligations under the UN Charter override Australia's obligations under international human rights law.²⁵ For further discussion in relation to the automatic designation process under the UN Charter sanctions regime see paragraphs [1.131] to [1.132] below.

Right to privacy

1.94 Article 17 of the International Covenant on Civil and Political Rights (ICCPR) prohibits arbitrary or unlawful interferences with an individual's privacy, family, correspondence or home.

1.95 Privacy is linked to notions of personal autonomy and human dignity: it includes the idea that individuals should have an area of autonomous development; a 'private sphere' free from government intervention and excessive unsolicited intervention by others. The right to privacy requires that the state does not arbitrarily interfere with a person's private and home life.

1.96 However, this right may be subject to permissible limitations which are provided by law and are not arbitrary. In order for limitations not to be arbitrary, they must seek to achieve a legitimate objective and be reasonable, necessary and proportionate to achieving that objective.

Compatibility with the right to privacy

1.97 As noted above, the freezing of a person's assets and the requirement for a designated person to seek the permission of the minister to access their funds for basic expenses imposes a limit on that person's right to a private life, free from interference by the state.

23 See paragraph 20(3)(b) of the Autonomous Sanctions Regulations 2011.

24 See article 2(2) and article 41 of the *Charter of the United Nations 1945*.

25 See section 103 of the UN Charter which provides: 'In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail'.

1.98 The committee notes that, for example, in relation to a similar regime in the United Kingdom, the House of Lords held that the regime 'strike[s] at the very heart of the individual's basic right to live his own life as he chooses'.²⁶ Lord Brown concluded:

The draconian nature of the regime imposed under these asset-freezing Orders can hardly be over-stated. Construe and apply them how one will...they are scarcely less restrictive of the day to day life of those designated (and in some cases their families) than are control orders. In certain respects, indeed, they could be thought even more paralysing. Undoubtedly, therefore, these Orders provide for a regime which considerably interferes with the [right to privacy]...²⁷

1.99 The need to get permission from the minister to access money for basic expenses could, in practice, impact greatly on a person's private and family life. For example, it could, mean that a person whose assets are frozen would need to apply to the minister whenever they require funds to purchase medicines, travel or meet other basic expenses. The permit may also include a number of conditions. These conditions are not specified in the legislation and accordingly, there is wide discretion available to the minister when imposing conditions on the granting of a permit. In the UK, under the permit system conditions imposed include requiring a designated person to provide receipts for every item of expenditure, and, if receipts are not available (for example, for purchases bought from a market stall), details must be provided of the amount spent, where the money was spent and a description of what was purchased.

1.100 The committee notes that this limitation is not identified as being engaged or otherwise considered in any of the statements of compatibility accompanying the instruments examined by the committee to date. The statements of compatibility therefore provide no justification for limiting this right. Notwithstanding this, the committee notes that the former Minister for Foreign Affairs briefly addressed this in correspondence to the committee in 2013, stating:

To the extent that such measures limit these individuals' right to privacy, it is the Government's view that this is an acceptable restriction given their involvement in [activities that seriously undermine democracy, respect for human rights and the rule of law in Zimbabwe] and the need to protect those suffering from such abuses.²⁸

1.101 The committee's usual expectation where a measure may limit a human right is that the accompanying statement of compatibility provide a reasoned and

26 *HM Treasury v Ahmed* [2010] UKSC2 at [60] (*Ahmed*).

27 *Ahmed* at [192] per Lord Brown.

28 Letter from Senator the Hon Bob Carr, Minister for Foreign Affairs to Mr Harry Jenkins MP, Chair, Parliamentary Joint Committee on Human Rights (dated 5 June 2013), published in the Parliamentary Joint Committee on Human Rights, *Tenth Report of 2013* (26 June 2013) 18.

evidence-based explanation of how the measure supports a legitimate objective, is rationally connected to and proportionate to that objective for the purposes of international human rights law. This conforms with the committee's Guidance Note 1,²⁹ and the Attorney-General's Department's guidance on the preparation of statements of compatibility.³⁰

1.102 As noted above at [1.86], for the purposes of this analysis the committee accepts that the use of international sanctions regimes to apply pressure to regimes and individuals in order to end the repression of human rights may be regarded as a legitimate objective for the purposes of international human rights law. The committee also has accepted, for the purposes of this analysis, that the measures are rationally connected to the legitimate objective. However, the committee considers that the sanctions regimes may not be regarded as proportionate to the stated objective. In particular, the committee is concerned that there may not be effective safeguards or controls over the sanctions regimes, including that:

- the designation or declaration under the autonomous sanctions regime can be based solely on the basis that the minister is 'satisfied' of a number of broadly defined matters;³¹
- the minister can make the designation or declaration without hearing from the affected person before the decision is made;
- there is no requirement that reasons be made available to the affected person as to why they have been designated or declared;
- no guidance is available under the Act or regulations or any other publicly available document setting out the basis on which the minister decides to designate or declare a person;
- there is no report to Parliament setting out the basis on which persons have been declared or designated and what assets, or the amount of assets that have been frozen;
- once the decision is made to designate or declare a person, the designation or declaration remains in force for three years and may be continued after that time. There is no requirement that if circumstances change or new

29 Appendix 2; See Parliamentary Joint Committee on Human Rights, Guidance Note 1 - Drafting Statements of Compatibility (December 2014) http://www.aph.gov.au/~media/Committees/Senate/committee/humanrights_ctte/guidance_notes/guidance_note_1/guidance_note_1.pdf.

30 See Attorney-General's Department, Template 2: Statement of compatibility for a bill or legislative instrument that raises human rights issues at <http://www.ag.gov.au/RightsAndProtections/HumanRights/PublicSector/Pages/Statementofcompatibilitytemplates.aspx>.

31 See examples below at paragraph [1.114] and s 6 of the Autonomous Sanctions Regulations 2011.

evidence comes to light that the designation or declaration will be reviewed before the three year period ends;

- a designated or declared person will only have their application for revocation considered once a year—if an application for review has been made within the year, the minister is not required to consider it;
- there is no provision for merits review before a court or tribunal of the minister's decision;
- there is no requirement to consider whether applying the ordinary criminal law to a person would be more appropriate than freezing the person's assets on the decision of the minister;
- the minister has unrestricted power to impose conditions on a permit to allowing access to funds to meet basic expenses; and
- there is no requirement that in making a designation or declaration the minister needs to take into account whether in doing so, it would be proportionate to the anticipated effect on an individual's private and family life.

1.103 The committee notes that a number of other countries have legislated to implement UN Security Council resolutions to freeze the assets of individuals. The committee notes that the process of designation by the UN Security Council has been subject to criticism internationally.³² The United Kingdom has terrorist asset freezing powers which are similar to Australia's UN Charter sanctions regime in that it allows the executive to freeze the assets of individuals.³³ The committee considers it useful to look to comparative jurisdictions to see how such jurisdictions implement their UN obligations. This is valuable in determining whether there are less rights restrictive methods of achieving the same objective. The committee notes that the United Kingdom has implemented its obligations in a manner that incorporates a number of safeguards not present in the Australian sanctions regimes, including:

- challenges to designations made by the executive can be made by way of full merits appeal rather than solely by way of judicial review;³⁴
- the prohibition on making funds available does not apply to social security benefits paid to family members of a designated person (even if the payment is made in respect of a designated person);³⁵

32 See, for example, *Kadi v Council of the European Union* (Joined Cases C-402/05P and C-415/05P) and *Abdelrazik v The Minister of Foreign Affairs* [2009] FC 582, [51] (Canada).

33 It has broader asset freezing powers not restricted to terrorism but these cannot be applied to UK residents, see Part II of the *Anti-terrorism, Crime and Security Act 2001* (UK).

34 See s 26 of TAFE 2010.

35 See subs 16(3) of TAFE 2010.

- quarterly reports must be made by the executive on the operation of the regime;³⁶
- an Independent Reviewer of Terrorism Legislation reviews each designation and has unrestricted access to relevant documents, government personnel, the police and intelligence agencies;³⁷
- the executive provides a 'Designation Policy Statement' to Parliament setting out the factors used when deciding whether to designate a person;
- an Asset-Freezing Review sub-group annually reviews all existing designations, or earlier if new evidence comes to light or there is a significant change in circumstances, and the executive invites each designated person to respond to whether they should remain designated;³⁸ and
- when the executive is considering designating a person, operational partners are consulted, including the police, to determine whether there are options available other than designation, for example, prosecution or forfeiture of assets (that is, to assist to ensure that there is not a less rights restrictive alternative to achieve the objective).³⁹

1.104 These kinds of safeguards in the United Kingdom asset-freezing regime indicate that there may be less rights restrictive methods of achieving the stated objective of the Australian sanctions regimes. The committee notes that measures which limit human rights must be the least rights restrictive alternative to achieve their legitimate objective in order to be considered a proportionate limitation on human rights. The United Kingdom Independent Reviewer of Terrorism Legislation (IRTL) has said in relation to the United Kingdom asset-freezing powers, that '[e]xceptional powers require exceptional safeguards'.⁴⁰ The IRTL has comprehensively reviewed the United Kingdom's asset-freezing regime, and

36 See s 30 of TAFE 2010.

37 See *Third Report on the Operation of the Terrorist Asset-Freezing etc. Act 2010 (Review Period: Year to 16 September 2013)*, David Anderson QC, Independent Reviewer of Terrorism Legislation, December 2013 para 1.3.

38 See s 4 of TAFE 2010; *First Report on the Operation of the Terrorist Asset-Freezing etc. Act 2010 (Review Period: December 2010 to September 2011)*, David Anderson QC, Independent Reviewer of Terrorism Legislation, December 2011, para 6.5; and *Third Report on the Operation of the Terrorist Asset-Freezing etc. Act 2010 (Review Period: Year to 16 September 2013)*, David Anderson QC, Independent Reviewer of Terrorism Legislation, December 2013 para 3.4.

39 *Third Report on the Operation of the Terrorist Asset-Freezing etc. Act 2010 (Review Period: Year to 16 September 2013)*, David Anderson QC, Independent Reviewer of Terrorism Legislation, December 2013 para 3.2.

40 *First Report on the Operation of the Terrorist Asset-Freezing etc. Act 2010 (Review Period: December 2010 to September 2011)*, David Anderson QC, Independent Reviewer of Terrorism Legislation, December 2011 para 1.2.

individually considered all designations made under the relevant Act. Following the IRTL's first report the United Kingdom government adopted his recommendations to incorporate further safeguards when designating a person.⁴¹ No such comprehensive review has been conducted in Australia.

1.105 The committee notes that Australia's Independent National Security Legislation Monitor (INSLM) has the power to review the operation, effectiveness and implications of designations under the UN Charter sanctions regime relating to terrorism and dealings with assets.⁴² The INSLM's reports have made clear that the INSLM's ability to adequately review designations of individuals is extremely hampered by the fact that effective record keeping in relation to the designation process and the assets frozen under the sanction regime is limited.⁴³

1.106 The committee therefore considers that the freezing of a designated person's assets limits a person's right to a private life. As set out above, while the committee accepts that the sanctions regimes pursue a legitimate objective, sufficient information has not been provided to establish that the limitation is proportionate to achieve that objective. The committee therefore seeks the advice of the Minister for Foreign Affairs as to how the designation of a person under the autonomous sanctions regime and the ministerial designation process under the UN Charter sanctions regime is a proportionate limitation on the right to privacy, having regard to the matters set out at paragraph [1.102] and whether there are adequate safeguards to protect the right to a private life.

1.107 In addition, the committee is of the view that the designation process under the sanctions regimes limits the right to privacy of close family members of a designated person. Once a person is designated under either sanctions regime, the effect of designation is that it is an offence for a person to directly or indirectly make any asset available to, or for the benefit of, a designated person (unless it is

41 See *Third Report on the Operation of the Terrorist Asset-Freezing etc. Act 2010 (Review Period: Year to 16 September 2013)*, David Anderson QC, Independent Reviewer of Terrorism Legislation, December 2013 paras 3.2-3.7.

42 See section 6 and the definition of 'counter-terrorism and national security legislation' in section 4 of the *Independent National Security Legislation Monitor Act 2010*. The INSLM briefly considered the UN Charter sanctions regime in its *First Annual Report* (Independent National Security Legislation Monitor, *Annual Report* (16 December 2011) 37-41) and considered it, together with the autonomous sanctions regime, in his *Third Annual Report* (Independent National Security Legislation Monitor, *Annual Report* (7 November 2013) 15-57). The INSLM's report mainly focused on the inadequacies of the listing process by the UN Security Council, and the disparity between the UN Charter sanctions regime and terrorism financing offences, and made recommendations in relation to this. None of the recommendations made by the INSLM have been responded to by the government (see Independent National Security Legislation Monitor, *Annual Report* (28 March 2014) 2).

43 See Independent National Security Legislation Monitor, *Annual Report* (7 November 2013) 30-31 and Independent National Security Legislation Monitor, *Annual Report* (7 November 2013) 52.

authorised under a permit to do so). This could mean that close family members who live with a designated person will not be able to access their own funds without needing to account for all expenditure, on the basis that any of their funds may indirectly benefit a designated person (for example, if a wife's funds are used to buy food for the household that the designated person lives in).

1.108 This issue was considered by the House of Lords in relation to the UK's terrorist asset freezing powers, which stated:

...the way the system is administered affects not just those who have been designated. It affects third parties too, including the spouses and other family members of those who have been designated. For them too it is intrusive to a high degree.⁴⁴

1.109 Similarly, the UK courts have described the effect of the asset freezing regime on the spouses of those designated as 'disproportionate' and 'oppressive', and the invasion of the privacy of non-designated persons as 'extraordinary'.⁴⁵

1.110 However, the statements of compatibility accompanying the relevant instruments do not consider the effect of designation on a designated person's family members.

1.111 The committee's usual expectation where a measure may limit a human right is that the accompanying statement of compatibility provide a reasoned and evidence-based explanation of how the measure supports a legitimate objective, is rationally connected to and proportionate to that objective for the purposes of international human rights law. This conforms with the committee's Guidance Note 1,⁴⁶ and the Attorney-General's Department's guidance on the preparation of statements of compatibility.⁴⁷

1.112 As noted above at [1.86], the committee accepts that the objective of the sanctions regimes, which is to apply pressure on regimes and individuals to help end the repression of human rights internationally, may be regarded as a legitimate objective for the purposes of international human rights law. The committee also has accepted, for the purposes of this analysis that the measures are rationally

44 *Ahmed* at [4].

45 *R v HM Treasury, ex p M* [2008] UKHL 26 at [15].

46 Appendix 2; See Parliamentary Joint Committee on Human Rights, Guidance Note 1 - Drafting Statements of Compatibility (December 2014)
http://www.aph.gov.au/~media/Committees/Senate/committee/humanrights_ctte/guidance_notes/guidance_note_1/guidance_note_1.pdf

47 See Attorney-General's Department, Template 2: Statement of compatibility for a bill or legislative instrument that raises human rights issues at
<http://www.ag.gov.au/RightsAndProtections/HumanRights/PublicSector/Pages/Statementofcompatibilitytemplates.aspx>

connected to the legitimate objective. However, the committee considers that the sanctions regimes may not be regarded as proportionate to its stated objective.

1.113 The committee therefore considers that the freezing of a designated person's assets limits the right to privacy for close family members of designated persons. As set out above, while the committee accepts that the sanctions regimes pursue a legitimate objective, sufficient information has not been provided to establish that the limitation is proportionate to achieve that objective. The committee therefore seeks the advice of the Minister for Foreign Affairs as to how the designation of a person under the autonomous sanctions regime and the ministerial designation process under the UN Charter sanctions regime is a proportionate limitation on the right to privacy, in particular having regard to the matters set out at paragraph [1.102] and whether there are adequate safeguards to protect the rights of close family members to a private life.

Lack of effective access to an independent and impartial court or tribunal (autonomous sanctions regime)

1.114 Under the autonomous sanctions regime a person can be designated or declared by the minister on a number of grounds relating to whether the minister is satisfied the person is or has been involved in certain activities. These include, for example, that a person:

- is a supporter of the former regime of Slobodan Milosevic;
- is a close associate of the former Qadhafi regime in Libya (or an immediate family member);
- is providing support to the Syrian regime;
- is responsible for human rights abuses in Syria;
- has engaged in activities that seriously undermine democracy, respect for human rights and the rule of law in Zimbabwe; or
- is responsible for, or complicit in, the threat to the sovereignty and territorial integrity of Ukraine.

1.115 The committee considers that the process for the making of designations limits the right to a fair hearing.

Right to a fair hearing

1.116 The right to a fair hearing is protected by article 14 of the ICCPR. The right applies to both criminal and civil proceedings, to cases before both courts and tribunals and to military disciplinary hearings.

1.117 The right is concerned with procedural fairness, and encompasses notions of equality in proceedings, the right to a public hearing and the requirement that hearings are conducted by an independent and impartial body.

1.118 The right of access to the courts in civil proceedings may be limited if it can be shown to seek to achieve a legitimate objective and the limitation is rationally connected to, and a proportionate way to achieve, its legitimate objective. The limitation as applied must also not restrict or reduce access to the court or tribunal in such a way or to such an extent that the very essence of the right is impaired.

Compatibility with the right to a fair hearing

1.119 As noted above at [1.86], for the purposes of this analysis the committee accepts that the objective of the autonomous sanctions regime, which is to apply pressure on regimes and individuals to help end the repression of human rights internationally, may be regarded as a legitimate objective for the purposes of international human rights law. The committee also has accepted, for the purposes of this analysis, that the measures are rationally connected to the legitimate objective.

1.120 However, the committee considers that the scheme may not be regarded as a proportionate means of achieving that objective. In particular, the right to a fair hearing requires that a person whose rights and obligations are to be determined is entitled to a fair and public hearing before an independent and impartial court or tribunal established by law.

1.121 In particular, the autonomous sanctions regime enables a person to be designated or declared by the minister on the basis of the minister's subjective belief of a number of broadly-defined matters (examples set out above at paragraph [1.114]). No further guidance is given in the *Autonomous Sanctions Act 2011* or the *Autonomous Sanctions Regulations 2011* as to how the minister is to make that decision. A designation or declaration may be revoked on the minister's own initiative or on an application by the affected person.⁴⁸ A designated or declared person will only have their application for revocation considered once a year – if an application for review has been made within the year, the minister is not required to consider it.⁴⁹ There is nothing in the *Autonomous Sanctions Act 2011* or *Autonomous Sanctions Regulations 2011* that sets out what the minister is required to consider on an application for revocation.

1.122 The committee notes that there is no provision for merits review of a decision to designate or declare a person by the minister or of a decision not to revoke a designation or declaration. While judicial review of such a decision is available, judicial review is generally limited to the review of the legality of a decision and not to its substantive merits and, as such, may not be sufficient to satisfy the right to a fair hearing where issues of fact are being disputed.

1.123 The effectiveness of judicial review of designations or declarations in this case is reduced because there is no requirement that the minister must be

48 See section 10 of the *Autonomous Sanctions Regulations 2011*.

49 See section 11 of the *Autonomous Sanctions Regulations 2011*.

'reasonably' satisfied of sufficiently precise matters on which the designation is based. Rather, the minister must only be 'satisfied' of a number of imprecise matters (for example, that the person is a 'supporter' or 'close associate' of particular regimes).⁵⁰ In addition, the absence of a requirement for the minister to provide reasons as to why a designation or declaration has been made (or will not be revoked in the case of an application) means that it is unlikely that judicial review of the minister's decision would succeed, because it could not scrutinise the factual basis for the decision. In light of these factors, the committee considers that designation decisions may in practice be effectively unreviewable.

1.124 The committee therefore considers that the designation and declaration process under the autonomous sanctions regime, in not providing effective access to an independent and impartial court or tribunal, limits the right to a fair hearing. As set out above, while the committee accepts that the autonomous sanctions regime pursues a legitimate objective, sufficient information has not been provided to establish that the limitation is proportionate to achieve that objective. The committee therefore seeks the advice of the Minister for Foreign Affairs as to how the designation and declaration of a person under the autonomous sanctions regime is a proportionate limitation on the right to a fair hearing, in particular how, in the absence of merits review, there are adequate safeguards to protect the right to a fair hearing.

Lack of effective access to an independent and impartial court or tribunal (automatic designations under the UN Charter sanctions regime)

1.125 Under the UN Charter sanctions regime, as established under Australian law, there are two methods by which a person can be designated:

- automatic designation by the UN Security Council Committee; and
- listing by the minister if he or she is satisfied on reasonable grounds that the person is a person mentioned in UN Security Council resolution 1373.

1.126 In relation to automatic designation, the committee notes that there is no process under Australian law for review of such a designation. However, a person designated by the UN Security Council, other than those listed under the Al Qaida sanctions regime, may submit a request for de-listing to the UN Focal Point for Delisting. The Focal Point must facilitate consultations between the governments of various states, which may lead to the person being delisted. A person listed under the Al Qaida sanctions regime may submit a request for delisting to the UN Ombudsperson, who can make a recommendation to the UN Security Council on whether the person should be de-listed (although the Council can, by consensus,

50 See also examples set out above at paragraph [1.114].

decide to continue listing of a person in spite of the Ombudsperson's recommendations).⁵¹

1.127 The committee considers that the automatic designation process by the UN Security Council and consequently under the UN Charter sanctions regime limits the right to a fair hearing.

Right to a fair hearing

1.128 The content of the right to a fair hearing is described above at paragraphs [1.116] to [1.118].

Compatibility of the measure with the right to a fair hearing

1.129 As previously stated,⁵² the committee considers that the automatic designation procedures by the UN Security Council and consequentially under the UN Charter sanctions regime may limit the right to a fair hearing because they do not satisfy the requirement for a full hearing before an independent and impartial court or tribunal.

1.130 In particular, the committee notes that the Special Rapporteur on human rights and counter-terrorism has stated that the UN procedures 'do not meet international human rights standards concerning due process or fair trial'.⁵³ In a 2010 House of Lords decision relating to the UK asset freezing regime, it was observed that:

The Security Council is a political, not a judicial, body...And it may be that the Committee's procedures are the best that can be devised if it is to be effective in combating terrorism. But, again, the harsh reality is that mistakes in designating will inevitably occur and, when they do, the individuals who are wrongly designated will find their funds and assets frozen and their lives disrupted, without their having any realistic prospect of putting matters right.⁵⁴

1.131 The committee notes that there is no further process for review under Australian law once a person has been designated by the UN Security Council. As noted above at [1.86], for the purposes of this analysis the committee accepts that the use of international sanctions regimes to apply pressure to regimes and individuals in order to end the repression of human rights may be regarded as a

51 For further details see letter from Senator the Hon Bob Carr, Minister for Foreign Affairs to Mr Harry Jenkins MP, Chair, Parliamentary Joint Committee on Human Rights (dated 19 June 2013), published in the Parliamentary Joint Committee on Human Rights, *Tenth Report of 2013* (26 June 2013) 23.

52 Parliamentary Joint Committee on Human Rights, *Tenth Report of 2013* (26 June 2013) 21-22.

53 *Counter terrorism: the new UN listing regimes for the Taliban and Al-Qaida - Statement by the Special Rapporteur on human rights and counter terrorism, Martin Scheinin*, 29 June 2011 at <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=11191&LangID=E>.

54 *Ahmed v HM Treasury* [2010] UKSC 2 (Ahmed) at [182].

legitimate objective for the purposes of international human rights law. The committee also appreciates that, under international law, Australia is bound by the UN Charter to implement UN Security Council decisions;⁵⁵ and that obligations under the UN Charter override Australia's obligations under international human rights law.⁵⁶

1.132 Therefore, the committee considers that the automatic designation of a person in the event that the UN Security Council Committee has designated that person, limits the right to a fair hearing as there is no provision for a fair and public hearing before an independent and impartial court or tribunal. As set out above, the committee considers that the review processes available under the UN system may not contain sufficient human rights safeguards. Nevertheless, the committee considers that Australia, in automatically designating a person once a UN Security Council Committee designates that person, is acting in accordance with its obligations under international law.

Lack of effective access to an independent and impartial court or tribunal (ministerial designations under the UN Charter sanctions regime)

1.133 As noted above, the second method for the designation of persons under the UN Charter sanctions regime is listing by the minister if he or she is satisfied on reasonable grounds that the person is a person mentioned in UN Security Council resolution 1373. UN Security Council resolution 1373 does not list individuals, rather, it requires states to freeze the funds or assets of anyone who commits, or attempts to commit, terrorist acts or participates in or facilitates the commission of terrorist acts, or anyone who acts on behalf of, or at the direction of, such a person.⁵⁷

1.134 The committee considers that the ministerial listing procedures limit the right to a fair hearing because they do not provide for merits review or contain sufficient safeguards or procedural fairness to satisfy the requirement for a full hearing before an independent and impartial court or tribunal.

1.135 A listing decision by the minister is not subject to merits review. While such a decision is subject to judicial review, as set out above, judicial review of a decision is generally limited to reviewing the legality rather than the substantive merits of a decision and, as such, may not be sufficient to satisfy the right to a fair hearing under article 14(1) if there are issues of fact being disputed. In particular, there is no

55 See article 2(2) and article 41 of the *Charter of the United Nations 1945*.

56 See section 103 of the UN Charter which provides: 'In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail'.

57 See section 15 of the *Charter of the United Nations Act 1945*, s 20 of the Charter of the United Nations (Dealing with Assets) Regulations 2008 [F2014C00689] and resolution 1373 of the UN Security Council.

requirement that an affected person be given reasons for why a decision to designate a person has been made. In this respect the committee notes that the Independent National Security Legislation Monitor (INSLM),⁵⁸ in his review of the UN Charter sanctions regime, found that in relation to the only file available to it for review, the minister had refused to provide the applicant with the reasons for the decision not to delist the person.⁵⁹ The committee is concerned that failing to provide the applicant with any information at all as to why a designation decision was made provides the affected person with no opportunity to challenge the making of that decision.

1.136 The committee therefore considers that the designation process by the minister under the UN Charter sanctions regime, in not providing effective access to an independent and impartial court or tribunal, limits the right to a fair hearing. As set out above, while the committee accepts that the UN Charter sanctions regime pursues a legitimate objective, sufficient information has not been provided to establish that the limitation is proportionate to achieve that objective. The committee therefore seeks the advice of the Minister for Foreign Affairs as to how the process of ministerial designation under the UN Charter sanctions regime is a proportionate limitation on the right to a fair hearing, in particular how, in the absence of merits review, there are adequate safeguards to protect the right to a fair hearing.

Declarations under the autonomous sanctions regime—effect on families

1.137 The autonomous sanctions regime includes a power to declare a person for the purpose of preventing that person from travelling to, entering or remaining in Australia.⁶⁰ Under the Migration Regulations 1994, a person declared in this way under the autonomous sanctions regime will have their visa cancelled or will not be granted a visa.⁶¹

1.138 The committee considers that the declaration process under the autonomous sanctions regime engages and limits the right to protection of the family.

Right to protection of the family

1.139 The right to respect for the family is protected by articles 17 and 23 of the ICCPR and article 10 of the International Covenant on Economic, Social and Cultural Rights (ICESCR). Under these articles, the family is recognised as the natural and fundamental group unit of society and, as such, is entitled to protection.

58 See section 6 and the definition of 'counter-terrorism and national security legislation' in section 4 of the *Independent National Security Legislation Monitor Act 2010*.

59 Independent National Security Legislation Monitor, *Annual Report* (7 November 2013) 30-32.

60 See section 6 of the Autonomous Sanctions Regulations 2011.

61 See Migration Regulations 1994, section 2.43(1)(aa) and Public Interest Criterion 4003(c).

1.140 An important element of protection of the family, arising from the prohibition under article 17 of the ICCPR against unlawful or arbitrary interference with family, is to ensure family members are not involuntarily separated from one another. Laws and measures which prevent family members from being together, impose long periods of separation or forcibly remove children from their parents, will therefore engage this right.

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

1.141 The committee notes that the declaration of a person living in Australia under the autonomous sanctions regime would mean that that person may have their visa cancelled, requiring them to leave Australia. This could result in family members of a declared person also being required to leave Australia (if their visas are dependent or linked to the declared person's visa), or result in the separation of the family. In addition, immediate family members of certain types of people may themselves be subject to designation or declaration, even if there is no suspicion that the family members themselves have been involved in any of the listed activities.⁶²

1.142 The committee notes that section 19 of the Autonomous Sanctions Regulations 2011 provides the minister with a discretion to waive the operation of a declaration to the extent that it would have the effect of preventing a person from travelling to, entering or remaining in Australia under a visa, on the grounds that it would be in the national interest to do so or on humanitarian grounds (what constitutes 'humanitarian grounds' is not defined). The committee reiterates its longstanding view that, where a measure limits human rights, discretionary or administrative safeguards alone are unlikely to be sufficient to protect human rights.

1.143 The committee notes that none of the statements of compatibility accompanying any of the instruments under consideration assess the effect of a declaration on the right to protection of the family or the human rights of family members of declared persons.

1.144 As noted above at [1.86], for the purposes of this analysis the committee accepts that the objective of the autonomous sanctions regime, which is to apply pressure on regimes and individuals to help end the repression of human rights internationally, may be regarded as a legitimate objective for the purposes of international human rights law. The committee also has accepted, for the purposes of this analysis, that the measures are rationally connected to the legitimate objective. However, the committee is concerned that, in relation to the right to protection of the family of designated persons, the autonomous sanctions regime may not be regarded as proportionate to its stated objective.

1.145 The committee therefore considers that the declaration by the minister under the autonomous sanctions regime limits the right to protection of the family.

62 See section 6 of the Autonomous Sanctions Regulations 2011 in relation to Libya and Myanmar.

As set out above, while the committee accepts that the autonomous sanctions regime pursues a legitimate objective, sufficient information has not been provided to establish that the limitation is proportionate to achieve that objective. The committee therefore seeks the advice of the Minister for Foreign Affairs as to how the declaration process is a proportionate limitation on the right to protection of the family, and in particular, whether there are adequate safeguards in place to protect this right.

Designations or declarations in relation to specified countries

1.146 The autonomous sanctions regime allows the minister to make a designation or declaration in relation to persons involved in some way with currently eight specified countries. The automatic designation under the UN Charter sanctions regime currently lists 13 countries from which people have been designated. Two of the countries listed overlap between both sanctions regimes.

1.147 As at 2 September 2015, there were 19 countries for which association with aspects of the governments of those countries could lead to a person being designated or declared under the sanctions regimes.

1.148 The committee considers that the designation of persons in relation to specified countries limits the right to equality and non-discrimination.

Right to equality and non-discrimination

1.149 The rights to equality and non-discrimination are protected by articles 2 and 26 of the ICCPR. These are fundamental human rights that are essential to the protection and respect of all human rights. They 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 without discrimination to the equal and non-discriminatory protection of the law.

1.150 The ICCPR defines 'discrimination' as a distinction based on a personal attribute (for example, race, sex or religion),⁶³ which has either the purpose (called 'direct' discrimination), or the effect (called 'indirect' discrimination), of adversely affecting human rights. Indirect discrimination is 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.

Compatibility with the right to equality and non-discrimination

1.151 The committee notes that the designation or declaration of a person linked to regimes in any of the 19 specified countries does not require the person to be a national of any of those countries. Therefore, the committee does not consider that

63 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.

the sanctions regimes directly discriminate against a person on the basis of their nationality.

1.152 However, the committee notes that it appears likely that nationals of the 19 listed countries are more likely to be considered to be 'associated with' or work for a specified government or regime than those from other nationalities. Where a measure impacts on particular groups disproportionately it establishes *prima facie* that there may be indirect discrimination. However, such a disproportionate effect may be justifiable.

1.153 The statement of compatibility for one of the instruments considered in this report acknowledges that the right to equality and non-discrimination is engaged, but concludes the differential treatment is justifiable:

In terms of non-discrimination, persons who are declared by the Minister will be treated differently to persons who are not. This differentiation in treatment does not constitute unlawful discrimination as it is a reasonable and proportionate response aimed at punishing persons closely associated with regimes which are involved in grave human rights breaches and unlawful armed conflict.⁶⁴

1.154 The committee accepts, as set out above at [1.86], that the overall objective of the sanctions regimes is a legitimate objective for the purposes of international human rights law. The committee also has accepted, for the purposes of this analysis, that the measures are rationally connected to the legitimate objective. However, the committee considers that the process to designate or declare a person may not be proportionate to the objective sought to be achieved. As set out in the analysis above, the process by which a person is made subject to a designation or declaration does not appear to contain effective safeguards, including access to review the decision. The committee notes that the one statement of compatibility that addressed this issue stated what the legitimate objective of the measure was, without providing any analysis as to how the measure is proportionate to achieving the stated objective.

1.155 The committee therefore considers that the designation and declaration by the Minister for Foreign Affairs under the sanctions regimes limits the right to equality and non-discrimination. As set out above, while the committee accepts that the sanctions regime pursues a legitimate objective, sufficient information has not been provided to establish that the limitation is proportionate to achieve that objective. The committee therefore seeks the advice of the Minister for Foreign Affairs as to how the designation or declaration of a person under the autonomous sanctions regime is a proportionate limitation on the right to equality and non-discrimination, and in particular, whether there are adequate safeguards in place to protect this right.

64 See the explanatory statement to the Autonomous Sanctions Amendment (Ukraine) Regulation 2014 [F2014L00720].