

Chapter 1

New and continuing matters

- 1.1 This chapter provides assessments of the human rights compatibility of:
- legislative instruments received between 13 October and 2 November (consideration of 2 legislative instruments from this period has been deferred);¹ and
 - bills and legislative instruments previously deferred.
- 1.2 The chapter also includes reports on matters previously raised, in relation to which the committee seeks further information following consideration of a response from the legislation proponent.
- 1.3 The committee has concluded its consideration of five legislative instruments that were previously deferred.²

Instruments not raising human rights concerns

- 1.4 The committee has examined the legislative instruments received in the relevant period, as listed in the *Journals of the Senate*.³ Instruments raising human rights concerns are identified in this chapter.
- 1.5 The committee has concluded that the remaining instruments do not raise human rights concerns, either because they do not engage human rights, they contain only justifiable (or marginal) limitations on human rights or because they promote human rights and do not require additional comment.

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

2 These are: the Appeals Rule 2017 [F2017L01197]; the ASIC Client Money Reporting Rules 2017 [F2017L01333]; the Discipline Rule 2017 [F2017L01196]; Health Insurance (Approved Pathology Undertakings) Approval 2017 [F2017L01293]; and the Torres Strait Regional Authority Election Rules 2017 [F2017L01279].

3 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.

Response required

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

Commonwealth Redress Scheme for Institutional Child Sexual Abuse Bill 2017; and

Commonwealth Redress Scheme for Institutional Child Sexual Abuse (Consequential Amendments) Bill 2017

Purpose	Seeks to establish a Commonwealth Redress Scheme for Survivors of Institutional Child Sexual Abuse
Portfolio	Social Services
Introduced	House of Representatives, 26 October 2017
Rights	Right to an effective remedy, privacy, equality and non-discrimination (see Appendix 2)
Status	Seeking additional information

Eligibility to receive redress under the Commonwealth Redress Scheme

1.7 The Commonwealth Redress Scheme for Institutional Child Sexual Abuse Bill 2017 (the bill) seeks to establish a redress scheme (the scheme) for survivors of institutional child sexual abuse.

1.8 A person is eligible for redress under the scheme if the person was sexually abused, that sexual abuse is within the scope of the scheme, and the person is an Australian citizen or permanent resident.⁴ Proposed subsections 16(2) and (3) of the bill provide that the proposed Commonwealth Redress Scheme Rules (the rules) may also prescribe that a person is eligible or not eligible for redress under the scheme.⁵

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

1.9 The right to equality and non-discrimination in the International Covenant on Civil and Political Rights (ICCPR) provides that everyone is entitled to enjoy their rights without discrimination of any kind, and that all people are equal before the law and entitled without discrimination to the equal and non-discriminatory protection of the law. Article 2 of the Convention on the Rights of the Child (CRC)

⁴ See proposed section 16 of the bill.

⁵ Proposed section 117(1) of the bill provides that the minister may, by legislative instrument, make rules prescribing matters required or permitted by the bill to be prescribed by the rules, or necessary or convenient to be prescribed for carrying out or giving effect to the bill.

further provides that states parties to the CRC must respect and ensure the right to equality and non-discrimination specifically in relation to children.

1.10 The prohibited grounds of discrimination are race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Under 'other status' the following have been held to qualify as prohibited grounds: age, nationality, marital status, disability, place of residence within a country and sexual orientation. The prohibited grounds of discrimination are often described as 'personal attributes'.

1.11 'Discrimination' encompasses both measures that have a discriminatory intent (direct discrimination) and measures which have a discriminatory effect on the enjoyment of rights (indirect discrimination). The UN Human Rights Committee has explained indirect discrimination as 'a rule or measure that is neutral on its face or without intent to discriminate', which exclusively or disproportionately affects people with a particular personal attribute.⁶

1.12 As acknowledged in the statement of compatibility, by precluding persons who are not Australian citizens or permanent residents from being eligible for the scheme, the restrictions on eligibility for the scheme discriminate on the basis of nationality or national origin.

1.13 Persons who are the victim of violations of human rights within Australia's jurisdiction are entitled to a remedy for breaches of those rights irrespective of their residency or citizenship status.⁷ However, differential treatment (including the differential effect of a measure that is neutral on its face) will not constitute unlawful discrimination if the differential treatment is based on reasonable and objective criteria such that it serves a legitimate objective, is rationally connected to that legitimate objective and is a proportionate means of achieving that objective.

1.14 The statement of compatibility explains that the restrictions on eligibility of non-citizens and non-permanent residents are necessary to achieving legitimate aims of ensuring the scheme receives public support and protecting against large scale fraud. In relation to the latter, the minister explains:

Non-citizens and non-permanent residents...will be ineligible to ensure the integrity of the Scheme. Verification of identity documents for non-citizens and non-permanent residents would be very difficult. Opening the Scheme to all people overseas could result in organised overseas groups lodging large scale volumes of false claims in attempts to defraud the Scheme, which could overwhelm the Scheme's resources and delay the processing of legitimate applications.⁸

6 *Althammer v Austria*, HRC 998/01, [10.2]

7 For a further discussion of the right to an effective remedy, see further below.

8 Statement of Compatibility (SOC) 70.

1.15 The objective of ensuring the integrity of a scheme to provide redress for victims of sexual abuse (such as protection against fraudulent claims) may be capable of being a legitimate objective for the purposes of human rights law, but the statement of compatibility does not provide sufficient information about the importance of this objective in the specific context of the measures. In order to show that the measure constitutes a legitimate objective for the purposes of international human rights law, a reasoned and evidence-based explanation of why the measure addresses a substantial and pressing concern is required. In relation to the explanation in the statement of compatibility as to the difficulty in verifying documents for non-citizens and non-permanent residents, it is noted that reducing administrative burdens or administrative inconvenience alone will generally be insufficient for the purposes of permissibly limiting human rights under international human rights law. It is also not clear whether there is evidence to suggest that large scale volumes of attempted fraud of the scheme may arise from precluding non-citizens from the scheme, noting that the Royal Commission into Institutional Responses to Child Sexual Abuse concluded that it saw 'no need for any citizenship, residency or other requirements, whether at the time of the abuse or at the time of the application for redress'.⁹

1.16 In relation to the proportionality of the measure, a relevant factor in determining whether a limitation on human rights is proportionate is whether it is the least rights restrictive means of achieving the stated objective of the measure. In this respect, the statement of compatibility notes that it will be possible to deem additional classes of people eligible for redress under the rules. The statement of compatibility explains that:

This rulemaking power may be used to deem the following groups of non-citizen, non-permanent residents eligible: those currently living in Australia, those who were child migrants, and those who were formerly Australian citizens or permanent residents.¹⁰

1.17 It is not clear from the information provided why it is necessary to include these classes of eligibility in a separate legislative instrument,¹¹ rather than in the primary legislation. Inclusion in the primary legislation of the classes of non-nationals foreshadowed in the statement of compatibility as being likely to be ruled eligible by the minister may be a less rights-restrictive means of achieving the stated objective of the measure.

9 Royal Commission into Institutional Responses to Child Sexual Abuse, *Redress and Civil Litigation Report* (2015) 347.

10 SOC 69-70.

11 The power to determine eligibility by way of legislative instrument will be discussed further below in relation to the right to an effective remedy.

Committee comment

1.18 The preceding analysis indicates that the right to equality and non-discrimination on the basis of nationality or national origin is engaged and limited by the bill. This is because a person will only be eligible for the scheme if they are an Australian citizen or Australian permanent resident notwithstanding that the right to an effective remedy for a violation of human rights applies regardless of citizenship or residency status.

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

- whether the restriction on non-citizens' and non-permanent residents' eligibility for redress under the scheme is aimed at achieving a legitimate objective for the purposes of human rights law (including any information or evidence to explain why the measure addresses a pressing and substantial concern);
- how the measure is effective to achieve (that is, rationally connected to) that objective; and
- whether the restriction on non-citizens' and non-permanent residents' eligibility for the scheme is proportionate to achieve the stated objective (including whether there are less rights restrictive means available to achieve the stated objective).

Compatibility of the measure with the right to an effective remedy for breaches of human rights

1.20 Article 2(3) of the ICCPR requires State parties to ensure that persons whose human rights have been violated have access to an effective remedy. States parties are required to establish appropriate judicial and administrative mechanisms for addressing claims of human rights violations under domestic law, and to make reparation to individuals whose rights have been violated. Effective remedies can involve restitution, rehabilitation and measures of satisfaction – such as public apologies, public memorials, guarantees of non-repetition and changes in relevant laws and practices – as well as bringing to justice the perpetrators of human rights violations. Such remedies should be appropriately adapted to take account of the special vulnerabilities of certain categories of persons, including, and particularly, children.

1.21 The redress scheme seeks to provide remedies in response to historical failures of the Commonwealth and other government and non-government organisations to uphold human rights, including the right of every child to protection by society and the state,¹² and the right of every child to protection from all forms of

12 Article 24 of the International Covenant on Civil and Political Rights: see Statement of Compatibility (SOC) 70.

physical and mental violence, injury or abuse (including sexual exploitation and abuse).¹³ As acknowledged in the statement of compatibility, by implementing a redress scheme for victims who were sexually abused as children, the scheme promotes the right to state-supported recovery for child victims of neglect, exploitation and abuse under article 39 of the CRC.¹⁴

1.22 The power in proposed subsections 16(2) and (3) to determine eligibility by way of the proposed rules is broad and, in particular, the minister has a very broad power to determine persons to be ineligible for the scheme. It is noted that in media reports concerning the introduction of the bill, the minister foreshadowed that he proposes to exclude persons from being eligible if they have been convicted of sex offences, or sentenced to prison terms of five years or more for crimes such as serious drug, homicide or fraud offences.¹⁵

1.23 International human rights law jurisprudence states that laws conferring discretion or rule-making powers on the executive must indicate with sufficient clarity the scope of any such power or discretion conferred on competent authorities and the manner of its exercise.¹⁶ This is because, without sufficient safeguards, broad powers may be exercised in such a way as to be incompatible with human rights. The breadth of the power to determine eligibility or ineligibility contained in the bill may therefore engage and limit the right of survivors of sexual abuse to an effective remedy. The statement of compatibility does not acknowledge that the right to an effective remedy is engaged by this aspect of the bill.¹⁷

1.24 Limitations on the right to an effective remedy may be permissible if it is demonstrated that the limitation addresses a legitimate objective, is rationally connected to that objective and is a proportionate means of achieving that objective.

1.25 While the statement of compatibility discusses limiting eligibility of persons on the basis of survivors' nationality and residency status,¹⁸ no information is provided in the statement of compatibility as to the rationale for a broad power to

13 Articles 19 and 34 of the Convention on the Rights of the Child: see SOC, 69.

14 See also Committee on the Rights of the Child, *General Comment No.13: Article 19: The right of the child to freedom from all forms of violence*, CRC/C/GC/13 (2011) 14-15.

15 See 'Child sex abuse redress scheme to cap payments at \$150,000 and exclude some criminals' (26 October 2017): <http://www.abc.net.au/news/2017-10-26/sex-offenders-to-be-excluded-from-child-abuse-redress-scheme/9087256>.

16 See the discussion of the human rights implications of expressing legal discretion of the executive in overly broad terms in *Hasan and Chaush v Bulgaria* ECHR 30985/96 (26 October 2000) [84].

17 The statement of compatibility does acknowledge this right is engaged in relation to other aspects of the bill, discussed further below.

18 See pages 69-70. This aspect of the bill is discussed above in relation to the right to equality and non-discrimination.

determine eligibility or ineligibility by way of the proposed rules. As limited information has been provided in the statement of compatibility on this point, it is not possible to determine the extent to which the right to an effective remedy may be engaged and limited by this aspect of the bill, and whether such a limitation is permissible.

Committee comment

1.26 The preceding analysis indicates that the right to an effective remedy may be engaged by the powers under the bill to determine eligibility and ineligibility for the scheme by way of the proposed Commonwealth Redress Scheme Rules. This is because the broad rule-making power to determine eligibility or ineligibility may be exercised in a way that is compatible with this right.

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

- whether the power to determine eligibility or ineligibility in the proposed rules is aimed at achieving a legitimate objective for the purposes of human rights law;
- how the measure is effective to achieve (that is, rationally connected to) that objective; and
- whether the limitation is proportionate to achieve the stated objective (including whether there are less rights restrictive means available to achieve the stated objective).

Power to determine when a participating institution is not responsible for sexual or non-sexual abuse

1.28 Proposed section 21 of the bill sets out when a participating institution is responsible for abuse. Subsection 21(7) provides that a participating institution is not responsible for sexual or non-sexual abuse of a person if it occurs in circumstances prescribed by the rules as being circumstances in which a participating institution is not, or should not be treated as being, responsible for the abuse of a person.

Compatibility of the measure with the right to an effective remedy for breaches of human rights

1.29 The statement of compatibility does not acknowledge that the right to an effective remedy is engaged by the power to determine by way of rules when a participating institution is not responsible for sexual or non-sexual abuse. However, as noted earlier, broad rule-making powers conferred on the executive may be incompatible with the right to an effective remedy where those powers are exercised in a manner that is incompatible with the right. Further, where public officials or state agents have committed violations of human rights, states parties concerned

may not relieve perpetrators from personal responsibility through the granting of amnesties, legal immunities and indemnities.¹⁹

1.30 The explanatory memorandum provides that proposed subsection 21(7) is intended to ensure that institutions are not found responsible for abuse that occurred in circumstances where it would be unreasonable to hold the institution responsible. The explanatory memorandum states by way of example that such circumstances may include where child sexual abuse was perpetrated by another child and the institution could not have foreseen this abuse occurring and could not be considered to have mismanaged the situation.²⁰

1.31 As limited information has been provided in the statement of compatibility on this point, it is not possible to determine the extent to which the right to an effective remedy may be engaged and limited by this aspect of the bill, and whether such a limitation is permissible. It is not clear from the available information whether there may be less rights-restrictive measures available, including setting out the grounds for when it may be 'unreasonable' for an institution to be responsible for abuse, in the primary legislation.

Committee comment

1.32 The preceding analysis indicates that the right to an effective remedy may be engaged by the powers under the bill to determine by way of the proposed Commonwealth Redress Scheme Rules when a participating institution is not responsible for sexual abuse or non-sexual abuse.

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

- **whether the measure is aimed at achieving a legitimate objective for the purposes of human rights law;**
- **how the measure is effective to achieve (that is, rationally connected to) that objective; and**
- **whether the limitation is proportionate to achieve the stated objective (including whether there are less rights restrictive means available to achieve the stated objective).**

Bar on future civil liability of participating institutions

1.34 Proposed sections 39 and 40 of the bill provide that where an eligible person receives an offer of redress and chooses to accept that offer, the person releases and

19 UN Human Rights Committee, *General Comment 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, UN Doc CCPR/C/21/Rev.1/Add.1326 (2004) [18]; see also UN General Assembly, *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, UNGA Res 60/147 (2006) 8-9.

20 Explanatory memorandum 16-17.

forever discharges all institutions participating in the scheme from all civil liability for abuse of the person that is within the scope of the scheme, and the eligible person cannot (whether as an individual, a representative party or a member of a group) bring or continue any civil claim against those participating institutions in relation to that abuse.

Compatibility of the measure with the right to an effective remedy for breaches of human rights

1.35 As noted earlier, the right to an effective remedy requires State parties to the ICCPR to establish appropriate judicial and administrative mechanisms for addressing claims of human rights violations, and further requires that State parties may not relieve perpetrators from personal responsibility for breaches of human rights.

1.36 Insofar as the bill requires persons who accept an offer of redress under the scheme to relinquish their right to seek further civil remedies from responsible institutions for sexual abuse and related non-sexual abuse, the bill may engage and limit the right to an effective remedy. Such limitations will be permissible under international human rights law where the measure pursues a legitimate objective and is rationally connected to and proportionate to that objective.

1.37 The statement of compatibility acknowledges that the right to an effective remedy may be engaged and limited by this aspect of the bill, but considers that any limitation is reasonable, necessary and proportionate to ensuring the scheme's integrity and proper functioning.²¹ In particular, the statement of compatibility explains:

Due to its non-legalistic nature, redress through the Scheme will be a more accessible remedy for eligible survivors than civil litigation. Entitlement to redress is determined based on a standard of 'reasonable likelihood', which is lower than the standard for determining the outcome of civil litigation, which is the balance of probabilities. The availability of redress is dependent on the extent to which Territory government and non-government institutions opt-in to the Scheme. Consultation has shown that institutions are not likely to opt-in to the Scheme if they remained exposed to paying compensation through civil litigation in addition to paying monetary redress. Attaching the release to entitlement to all elements of redress is necessary to encourage institutions to opt-in and to make redress available to the maximum number of survivors.²²

1.38 Maximising the amount of redress available to survivors of childhood sexual abuse is likely to be a legitimate objective for the purposes of international human

21 SOC, 70, 73.

22 SOC, 70.

rights law. Releasing institutions from further liability so as to increase the likelihood of opting into the scheme appears to be rationally connected to this objective.

1.39 Questions arise, however, in relation to the proportionality of the measure, and in particular whether there are adequate safeguards in place. Relinquishing a person's opportunity to pursue civil litigation and possible common law damages is a significant decision for a victim of abuse to make, particularly as the amount to be provided under the redress scheme is capped at \$150,000.²³ The minister explains that, in order to acknowledge the limitation on the right to an effective remedy that arises from this aspect of the bill:

...the Scheme will deliver free, trauma informed, culturally appropriate and expert Legal Support Services. These services will be available to survivors for the lifetime of the Scheme at relevant points of the application process, and will assist survivors to understand the implications of releasing responsible institutions from further liability. This means that survivors will be able to make an informed choice as to whether they wish to accept their offer and in doing so release the institution from civil liability for abuse within the scope of the Scheme or seek remedy through other avenues.²⁴

1.40 Notwithstanding the description of the proposed legal support services described in the statement of compatibility, the bill itself includes limited detail as to the provision of legal advice to survivors of sexual abuse. Proposed section 37(1)(g) of the bill requires that a written offer of redress to an eligible person 'gives information about the opportunity for the person to access legal services under the scheme for the purposes of obtaining legal advice about whether to accept the offer'. The provision of legal services under the scheme is to be determined by legislative instrument.²⁵ Further information as to the content of the proposed rules relating to the provision of legal services would assist in determining whether this will serve as a sufficient safeguard so as to support the proportionality of the measure.²⁶

23 See SOC, 66.

24 SOC 70-71.

25 See proposed section 117(2)(a) of the bill.

26 It is noted that the recommendation as to the provision of legal services of the Royal Commission into Institutional Responses to Child Sexual Abuse was that 'a redress scheme should fund, at a fixed price, a legal consultation for an applicant before the applicant decides whether or not to accept the offer of redress and grant the required releases': Royal Commission into Institutional Responses to Child Sexual Abuse, *Redress and Civil Litigation Report* (2015) Recommendation 64, 390

Committee comment

1.41 The preceding analysis raises questions as to whether requiring persons who are eligible for redress to release and discharge institutions participating in the scheme from future civil liability for abuse of the person is a proportionate limitation on the right to an effective remedy.

1.42 The committee therefore seeks the advice of the minister as to the proportionality of the measure, in particular the content of the proposed rules relating to the provision of legal services under the scheme.

Information Sharing Provisions

1.43 Proposed section 77 of the bill sets out the circumstances in which the Commonwealth Redress Scheme Operator²⁷ (the Operator) may disclose protected information. 'Protected information' is defined in proposed section 75 of the bill as information about a person obtained by an officer for the purposes of the scheme that is or was held by the department. The Operator can disclose such protected information if it was acquired by an officer in the performance of their duties or in the exercise of their powers under the bill if the Operator certifies that the disclosure is necessary in the public interest to do so in a particular case or class of case, and the disclosure is to such persons and for such purposes as the Operator determines.²⁸ Disclosure may also be made by the Operator to certain persons set out in the bill, including the secretary of a department, the chief executive of Centrelink and the chief executive of Medicare.²⁹

Compatibility of the measure with the right to privacy

1.44 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; and the right to control the dissemination of information about one's private life.

1.45 The information sharing powers of the Operator in proposed section 77 of the bill engage and limit the right to privacy by providing for the disclosure of protected information. As acknowledged in the statement of compatibility, this protected information may include highly sensitive information about child sexual abuse the person has experienced.³⁰

27 The Commonwealth Redress Scheme Operator is the Secretary to the Human Services Department (or the Department administered by the Minister administering the *Human Services (Centrelink) Act 1997*), and is responsible for operating the scheme, including making offers of redress to the person.

28 Proposed section 77(1)(a) of the bill.

29 Proposed section 77(1)(b) of the bill.

30 SOC 71.

1.46 The right to privacy may be subject to permissible limitations which are provided by law and are not arbitrary. In order for limitations not to be arbitrary, the measure must pursue a legitimate objective and be rationally connected and proportionate to achieving that objective.

1.47 The statement of compatibility acknowledges that the right to privacy is engaged by the information sharing provisions in the bill, which includes proposed section 77. However, the statement of compatibility explains any limitation by the information sharing provisions on the right to privacy is permissible, as the provisions are 'necessary to achieve the legitimate aims of assessing eligibility under the Scheme and protecting children from abuse, and are appropriately limited to ensure that they are a proportionate means to achieve those aims'.³¹

1.48 The stated objective of protecting children from abuse is a legitimate objective under international human rights law. Collecting, using and disclosing this information to relevant bodies so as to prevent abuse and provide redress is likely to be rationally connected to this objective.

1.49 As to the proportionality of the measure, limitations on the right to privacy must be no more extensive than what is strictly necessary to achieve the legitimate objective of the measure. The statement of compatibility explains the broad rationale for allowing persons to obtain and disclose protected information for the purposes of the scheme as follows:

To establish eligibility, survivors will be required to supply the Scheme with personal information including highly sensitive information about the child sexual abuse they experienced. To progress the application to assessment, limited survivor and alleged perpetrator details will be provided, with the survivor's consent, to the participating institutions identified in their application. Participating institutions will be able to use this information in a limited way to facilitate making insurance claims and to institute internal disciplinary procedures where an alleged perpetrator or person with knowledge of abuse is still associated with the institution. Participating institutions will be required to provide the Scheme with specific information pertaining to survivors and alleged perpetrators, including survivor and the alleged perpetrator's involvement with the institution, any related complaints of abuse made to the institution and details of any prior payments made to the survivor. This collection and exchange of information is necessary for the eligibility assessment process and information under the Scheme will be subject to confidentiality. Outside of Scheme representatives, only survivors and those they nominate will have access to records relating to their application. Strict offence provisions will be put in place to mitigate risks of unlawful access,

31 SOC 72.

disclosure, recording, use, soliciting or offering to supply Scheme information.³²

1.50 However, the statement of compatibility does not appear to address the proportionality of the bill insofar as it relates to the Operator's disclosure powers in proposed section 77. The power in proposed section 77 for the Operator to disclose information is very broad: the Operator can disclose protected information to 'such persons and for such purposes as the Operator determines', provided the Operator considers it necessary in the public interest to do so.³³ It is not clear from the statement of compatibility whether it is strictly necessary to include such a broad category of persons to whom disclosure may be made by the Operator under the Act, and what circumstances will constitute a 'public interest', which raises concerns that these information sharing provisions may not be sufficiently circumscribed.

1.51 Another relevant factor in assessing proportionality is whether there are adequate safeguards in place to protect the right to privacy. It is noted that there are penalties in place for persons who engage in unauthorised recording, disclosure or use of protected information.³⁴ However, the powers of the Operator to disclose information in the public interest in proposed section 77 do not appear to be accompanied by safeguards present in other information sharing provisions in the bill, such as a requirement that the Operator consider the impact disclosure may have on a person to whom the information relates. By way of contrast, it is noted that there is a separate provision in section 78 of the bill addressing disclosure of protected information to certain agencies (such as the Australian Federal Police or state and territory police forces) for the purposes of law enforcement or child protection, where there is a safeguard in place that requires the Operator to have regard to the impact the disclosure might have on the person,³⁵ as well as a requirement that the Operator is satisfied that disclosure of the information is reasonably necessary for the enforcement of the criminal law or for the purposes of child protection.³⁶ Further, disclosure for other purposes such as for the purpose of the participating institution facilitating a claim under an insurance policy must only occur if there has been consideration to the impact that disclosure might have on the person who has applied for redress.³⁷ It is not clear from the statement of compatibility why such safeguards are available in relation to some information sharing provisions in the bill, but not in relation to the Operator's disclosure powers in proposed section 77.

32 SOC 71.

33 Proposed section 77(1(a) of the bill.

34 Proposed sections 81-84 of the bill.

35 See proposed section 78(3) of the bill.

36 See proposed section 78(1) of the bill.

37 Proposed section 79(3) of the bill.

Committee comment

1.52 The preceding analysis raises questions as to whether the compatibility of the proposed disclosure powers of the Operator in proposed section 77 of the bill is a proportionate limitation on the right to privacy.

1.53 The committee therefore seeks the advice of the minister as to whether the limitation on the right to privacy is proportionate to the stated objective of the measure (including whether there are adequate safeguards in place in relation to disclosure by the Operator of protected information).

Absence of external merits review and removal of judicial review

1.54 The bill establishes a system of internal review of determinations made under the scheme.³⁸ No provision is provided for in the bill for determinations to be able to be subject to external merits review. Pursuant to the internal review procedure, a person may apply to the Operator to review a determination made in relation to redress and the Operator must cause that determination to be reviewed by an independent decision-maker to whom the Operator's power under this section is delegated, and who was not involved in the making of the determination.³⁹ A person reviewing the original determination must reconsider the determination and either affirm, vary, or set aside the determination and make a new determination.⁴⁰ When reviewing the original determination, the person may only have regard to the information and documents that were available to the person who made the original determination.⁴¹

1.55 The Commonwealth Redress Scheme for Institutional Child Sexual Abuse (Consequential Amendments) Bill 2017 (the consequential amendments bill) exempts decisions made under the scheme from judicial review under the *Administrative Decisions (Judicial Review) Act 1977* (ADJR Act).⁴²

Compatibility of the measure with the right to a fair hearing

1.56 Article 14(1) of the ICCPR requires that in the determination of a person's rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. A determination of a person's entitlement to redress as a result of sexual abuse, and a finding of responsibility on the part of institutions for such abuse, involves the

38 Proposed Part 4-3 of the bill.

39 Proposed sections 87 and 88 of the bill.

40 Proposed section 88(2) of the bill.

41 Proposed section 88(3) of the bill.

42 Schedule 3 of the consequential amendments bill.

determination of rights and obligations and therefore is likely to constitute a suit at law.⁴³

1.57 The absence of external merits review and the removal of a form of judicial review may engage and limit the right to a fair hearing, as it limits survivors' opportunities to have their rights and obligations determined by an independent and impartial tribunal. However, the statement of compatibility does not acknowledge that the right to a fair hearing is engaged by the measures.

1.58 A limitation on the right to a fair hearing may be permissible if it pursues a legitimate objective, is rationally connected to that legitimate objective and is a proportionate means of achieving that objective.

1.59 The explanatory memorandum to the consequential amendments bill explains the rationale for limiting the scheme to internal review and the removal of judicial review. In particular, the explanatory memorandum explains that judicial review may cause undue administrative delays under the scheme, and the internal review mechanism is intended to prevent re-traumatising victims through having to re-tell their story of past institutional child sexual abuse.

1.60 Preventing re-traumatisation of victims of sexual abuse is likely to be a legitimate objective under international human rights law. However, in circumstances where the victim themselves may choose to pursue external review (by way of merits review or judicial review) if they are unsatisfied with the decision, it is not clear based on the information provided that preventing victims from pursuing external review if dissatisfied with the internal decision would be an effective means of achieving this objective.

1.61 Further, the explanatory memorandum explains that, when internally reviewing the decision, the Operator or independent decision-makers are not permitted to have been involved in making the original decision under review. However, it is unclear whether the internal review mechanism provides greater or lesser scope for independent and impartial review than that which would be provided by the (external) Administrative Appeals Tribunal. It is not clear, therefore, whether the internal review mechanism is an effective substitute for external review.

Committee comment

1.62 The preceding analysis indicates that the right to a fair hearing may be engaged by the absence of external merits review of determinations made under the scheme, and the removal of judicial review.

1.63 The committee therefore seeks the advice of the minister as to the compatibility of the measure with the right to a fair hearing, including:

43 See UN Human Rights Committee, *General Comment 32: Article 14, Right to Equality before Courts and Tribunals and to Fair Trial* (2007) [16].

- **whether the absence of external merits review and removal of judicial review pursues a legitimate objective;**
- **whether the measures are rationally connected to (that is, effective to achieve) that objective;**
- **whether the measures are a proportionate means of achieving the stated objective.**

Corporations (Aboriginal and Torres Strait Islander) Regulations 2017 [F2017L01311]

Purpose	Provides for matters necessary for the effective operation and administration of the <i>Corporations (Aboriginal and Torres Strait Islander) Act 2006</i>
Portfolio	Prime Minister and Cabinet
Authorising legislation	<i>Corporations (Aboriginal and Torres Strait Islander) Act 2006</i>
Last day to disallow	15 sitting days after tabling (tabled House of Representatives and Senate 16 October 2017). Notice of motion to disallow currently must be given by 7 December 2017
Right	Privacy (see Appendix 2)
Status	Seeking additional information

Disclosure of certain documents and information to the public by the Registrar of Aboriginal and Torres Strait Islander Corporations

1.64 Subregulation 55(1) of the *Corporations (Aboriginal and Torres Strait Islander) Regulations 2017* (the regulations) provides that, for the purposes of paragraph 658-1(1)(k) of the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (CATSI Act), the Registrar of Aboriginal and Torres Strait Islander Corporations (registrar) has the function of making certain documents, and information in those documents, available to the public. Subregulation 55(3) provides that these documents may include documents containing personal information within the meaning given by subsection 6(1) of the *Privacy Act 1988* (Privacy Act).¹

Compatibility of the measure with the right to privacy

1.65 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; and the right to control the dissemination of information about one's private life.

1.66 The statement of compatibility states that the regulations are operative in nature and therefore do not raise any human rights issues. However, in allowing for a person's personal information to be made available to the public, the measure may engage and limit the right to privacy.

1 'Personal Information' is defined in section 6(1) of the Privacy Act means information or an opinion about an identified individual, or an individual who is reasonably identifiable: (a) whether the information or opinion is true or not; and (b) whether the information or opinion is recorded in a material form or not.

1.67 The right to privacy may be subject to permissible limitations which are provided by law and are not arbitrary. In order for limitations not to be arbitrary, the measure must pursue a legitimate objective and be rationally connected and proportionate to achieving that objective.

1.68 In the absence of further information in the explanatory statement or statement of compatibility, it is not possible to determine whether the power given to the registrar to make information (including personal information) available to the public is in pursuit of a legitimate objective and is rationally connected to that objective.

1.69 Questions also arise as to whether the measure is proportionate. In order to be proportionate, limitations on the right to privacy must be no more extensive than what is strictly necessary to achieve the legitimate objective of the measure, and be accompanied by adequate safeguards to protect the right to privacy. It is noted that the Registrar may make documents available to the public that (relevantly) the registrar 'considers appropriate to make available to the public'.² It is not clear from the explanatory statement or statement of compatibility as to how, and under what circumstances, the registrar may consider it appropriate that documents (which may contain personal information) should be disclosed to the public. For example, it is not clear whether the registrar's state of satisfaction is subject to any objective criteria, such as a requirement that the registrar's consideration of appropriateness is reasonable.

Committee comment

1.70 The preceding analysis raises questions as to whether the power of the registrar to make documents (which may include personal information) available to the public is compatible with the right to privacy.

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

- **whether the measure pursues a legitimate objective;**
- **whether the measure is effective to achieve (that is, rationally connected to) that objective; and**
- **whether the measure is a proportionate means of achieving the objective (including whether any limitation on the right to privacy is the least rights-restrictive measure available, and whether there are adequate safeguards in place to protect the right to privacy).**

2 Clause 55(1)(b) of the instrument.

Advice only

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

Marriage Amendment (Definition and Religious Freedoms) Bill 2017

Purpose	Proposes to amend the <i>Marriage Act 1961</i> to define marriage as a union of two people
Sponsor	Senator Dean Smith
Introduced	Senate, 15 November 2017
Rights	Equality and non-discrimination; freedom of religion; respect for the family (see Appendix 2)
Status	Advice only

Background

1.73 On a number of occasions the committee has previously considered private member and senator's bills that have sought to amend the *Marriage Act 1961* (Marriage Act) to permit same sex marriage.¹ To the extent relevant, the committee's previous reports and human rights assessments are referred to below.

Changes to the Marriage Act to permit same-sex marriage

1.74 Under the Marriage Act 'marriage' is defined as 'the union of a man and a woman to the exclusion of all others, voluntarily entered into for life.'² This current definition of marriage means only marriages between a man and a woman can be solemnised in Australia or recognised from overseas.³

1.75 The Marriage Amendment (Definition and Religious Freedoms) Bill 2017 (the bill) seeks to make a number of changes to the Marriage Act in order to permit same-sex couples and people who are legally recognised as neither male nor female to marry.⁴ Proposed section 5(1) would amend the definition of marriage to 'the union

1 Parliamentary Joint Committee on Human Rights, Marriage Legislation Amendment Bill 2016; Marriage Legislation Amendment Bill 2016 [No.2], Freedom to Marry Bill, *Report 8 of 2016* (9 November 2016) 33-44; Marriage Legislation Amendment Bill 2015, *Thirtieth Report of the 44th Parliament* (10 November 2015) 112-124.

2 Marriage Act section 5(1).

3 See, Explanatory Memorandum (EM) 5.

4 See, EM 5.

of two people to the exclusion of all others'.⁵ This definition of marriage would apply across the Marriage Act so that in addition to allowing two people of any gender to marry it also provides for the recognition of same-sex marriages which have been solemnised overseas.⁶

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

1.76 The statement of compatibility explains that by allowing same-sex marriage, the right to equality and non-discrimination is engaged and promoted:

By defining marriage as the union of '2 people' rather than 'a man and a woman', the Bill allows couples to marry regardless of their sex or gender. The Bill also allows for recognition of foreign marriages between two adults under Australian law, regardless of sex or gender. The Bill provides all people in Australia with equal rights with respect to marriage, removing discrimination on the basis of sexual orientation, gender identity, or intersex status.⁷

1.77 Under article 26 of the International Covenant on Civil and Political Rights (ICCPR), state parties are required to prohibit any discrimination and guarantee to all people equal and effective protection against discrimination on any ground. Article 26 lists a number of grounds as examples as to when discrimination is prohibited, which includes sex and 'any other status'. While sexual orientation is not specifically listed as a protected ground, the United Nations Human Rights Committee (the UNHRC) has specifically recognised that the treaty includes an obligation to prevent discrimination on the basis of sexual orientation.⁸

1.78 By restricting marriage to between a man and a woman, the current Marriage Act directly discriminates against same-sex couples on the basis of sexual orientation. The bill proposes to remove this restriction.

1.79 The committee's previous reports noted that in *Joslin v New Zealand* (2002) the UNHRC determined that the right to marry in article 23 of the ICCPR is confined to a right of opposite-sex couples to marry. As set out below, international

5 Item 3, proposed section 5(1).

6 Under the Marriage Act, a foreign marriage will be recognised in Australia if it was a valid marriage in the foreign country and would be recognised as valid under Australian law if it had taken place in Australia.

7 Statement of compatibility (SOC) 19.

8 See UN Human Rights Committee, *Toonen v Australia*, Communication No. 488/1992 (1992) and UN Human Rights Committee, *Young v Australia*, Communication No. 941/2000 (2003).

jurisprudence has evolved since that time.⁹ The statement of compatibility explains, in relation to *Joslin*, that while the right to marry under article 23 does not oblige states to legislate to allow same-sex couples to marry, 'it is clear that there are no legal impediments to Australia taking this step.'¹⁰ Moreover, international jurisprudence has recognised that same-sex couples are equally as capable as opposite-sex couples of entering into stable, committed relationships and are in need of legal recognition and protection of their relationship.¹¹

1.80 Since *Joslin v New Zealand* was decided in 2002, there has been a significant evolution of the legal treatment of same-sex couples internationally. The ICCPR is a living document and is to be interpreted in accordance with contemporary understanding. The UNHRC has emphasised that the ICCPR should be 'applied in context and in the light of present-day conditions'.¹² Since the committee last reported on proposed amendments to permit same sex couples to marry, in November 2016 the UNHRC has provided further views on the Australian Marriage

9 See *Joslin v New Zealand*, UN Human Rights Committee, Communication No. 902/1999 (2002) at [8.3]: 'In light of the scope of the right to marry under article 23, paragraph 2, of the Covenant, the Committee cannot find that by mere refusal to provide for marriage between homosexual couples, the State party has violated the rights of the authors under articles 16, 17, 23, paragraphs 1 and 2, or 26 of the Covenant'. For further analysis of this case in light of the right to equality and non-discrimination in the context of the proposed measures see, Parliamentary Joint Committee on Human Rights, *Thirtieth Report of the 44th Parliament* (10 November 2015) 114 at [1.494]. Compare, UNHRC, Concluding Observations on the Six Periodic Report of Australia, CCPR/C/AUS/CO/6 (9 November 2017); *G v Australia*, UNHRC, communication No. 2172/2012, CCPR/C/119/D/2172/2012 (15 June 2017); ; *C v Australia*, UNHRC, communication No 2216/2012, CCPR/C/119/D/2216/2012 (3 August 2017).

10 SOC 19.

11 See European Court of Human Rights, *Schalk and Kopf v Austria*, Application No 30141/04 (2010) [99]; European Court of Human Rights, *Oliari v Italy*, Application Nos 18766/11 and 36030/11 (2015) [165]; *C v Australia*, UNHRC, communication No 2216/2012, CCPR/C/119/D/2216/2012 (3 August 2017).

12 UN Human Rights Committee, *Roger Judge v Canada*, Communication No 829/1998 (5 August 2002) [10.3]. See also European Court of Human Rights, *Oliari v Italy*, Application Nos 18766/11 and 36030/11 (2015).

Act, same-sex marriage and issues of discrimination.¹³ Accordingly, it is arguable that the definition of marriage under the ICCPR is in the process of evolving to include same-sex marriage.

1.81 Additionally, while international jurisprudence has not recognised a right to same-sex marriage under article 23 of the ICCPR, such that state parties are required to remove any prohibition on same-sex marriage, it is clear that a law which prohibits marriage on the grounds of sexual orientation engages the right to equality and non-discrimination. By removing the current prohibition on same-sex couples marrying, the bill promotes the right to equality and non-discrimination. In this respect, the UNHRC in its recent Concluding Observations called on Australia to amend the Marriage Act:

[The UNHRC] is concerned about the explicit ban on same-sex marriage in the Marriage Act 1961 (Cth) that results in discriminatory treatment of same-sex couples, including in matters related to divorce of couples who married overseas...

...The State party should revise its laws, including the Marriage Act, to ensure, irrespective of the results of the Australian Marriage Law Postal Survey, that all its laws and policies afford equal protection to LGBTI [lesbian, gay, bisexual, trans and/or intersex] persons, couples and families, taking also into account the Committee's Views in communications No. 2172/2012, *G v. Australia*, and 2216/2012, *C. v Australia*.¹⁴

1.82 This statement and the decisions referred to indicate that current Australian law is incompatible with the right to equality and non-discrimination. By extending

13 See, *G v Australia*, UNHRC, communication No. 2172/2012, CCPR/C/119/D/2172/2012 (15 June 2017): which concerned a refusal in NSW to change the sex on the birth certificate of a married, female transgender person unless she divorced her female spouse. Australia argued that this requirement was reasonable and proportionate to the legitimate aim of consistency with the Marriage Act which defines marriage as being between a man and a woman. The UNHRC stated that, irrespective of whether the aim was legitimate, the interference with the right to privacy and family life was not necessary and proportionate. In relation to the right to equality and non-discrimination, the UNHRC did not consider that the differential treatment between married and unmarried persons who have undergone a sex affirmation procedure and request to amend their sex on their birth certificate was based on reasonable and objective criteria, and therefore constituted discrimination on the basis of marital and transgender status. Accordingly, the UNHRC determined Australia had breached the right to equality and non-discrimination and the right to privacy and family life; *C v Australia*, UNHRC, communication No 2216/2012, CCPR/C/119/D/2216/2012 (3 August 2017): the UNHRC found that Australia's denial of access to divorce proceedings to a same-sex couple who married overseas breached the right to equality and non-discrimination. See, also, UNHRC, Concluding Observations on the Sixth Periodic Report of Australia, CCPR/C/AUS/CO/6 (9 November 2017).

14 UNHRC, Concluding Observations on the Sixth Periodic Report of Australia, CCPR/C/AUS/CO/6 (9 November 2017).

the definition of marriage to include a union between two persons, the measure addresses key aspects of the UNHRC's determination that Australia should revise its laws, as the effect of amending the definition of marriage would be to permit same-sex and gender diverse couples to marry as well as recognising foreign same-sex marriages. As noted in the statement of compatibility, by enabling the recognition of foreign same-sex marriages, the rights and responsibilities pertaining to the dissolution of those foreign marriages will also apply equally to all lawful marriages.¹⁵

1.83 Given that discrimination on the grounds of sexual orientation is recognised as a ground against which state parties are required to guarantee all persons equal and effective protection, the committee has previously concluded that extending the definition of marriage to include a union between two people (rather than only for opposite-sex couples) promotes the right to equality and non-discrimination.

Committee comment

1.84 The committee notes that the UN Committee on Human Rights has stated that Australia should revise its laws including the Marriage Act to ensure equal protection of LGBTI persons, couples and families.

1.85 The committee has previously concluded that expanding the definition of marriage to include same-sex couples promotes the right to equality and non-discrimination.

1.86 Noting these previous conclusions regarding the right to equality and non-discrimination, the committee draws the human rights implications of this measure to the attention of the parliament.

Compatibility of the measure with the right to respect for the family

1.87 To the extent that the bill would expand the protections afforded to married couples under Australian domestic law to same-sex couples, they may engage the right to respect for the family. The statement of compatibility states that by 'providing the ability to lawfully marry to all couples, the Bill more accurately recognises the diversity of relationships and families in the Australian community, and ensures their equal status under Commonwealth law.'¹⁶

1.88 As noted in the committee's previous reports, the right to respect for the family under international human rights law applies to a diverse range of family structures, including same-sex couples, and the bill is consistent with this right. For example, recognising the diversity of family structures worldwide, the UNHRC has adopted a broad conception of what constitutes a family, noting that families 'may

15 SOC 20. This would address the violation that the UNHRC found against Australia in respect of the right to equality and non-discrimination for Australia's denial of access to divorce proceedings to a same-sex couple who married overseas *C v Australia*, UNHRC, communication No 2216/2012, CCPR/C/119/D/2216/2012 (3 August 2017).

16 EM, SOC 19.

differ in some respects from State to State... and it is therefore not possible to give the concept a standard definition'.¹⁷ Consistent with this approach, the European Court of Human Rights noted in 2010 that same-sex couples without children fall within the notion of family, 'just as the relationship of a different-sex couple in the same situation would'.¹⁸

1.89 Similarly, the UN Committee on the Rights of the Child noted in 1994 that the concept of family includes diverse family structures 'arising from various cultural patterns and emerging familial relationships', and stated:

...[the Convention on the Rights of the Child (CRC)] is relevant to 'the extended family and the community and applies in situations of nuclear family, separated parents, single-parent family, common-law family and adoptive family'.¹⁹

1.90 The committee's previous reports considered that this statement on family diversity, along with the UNHRC's inclusion of sexual orientation as a prohibited ground of discrimination against a child and a child's parents, is consistent with the view that the CRC extends protection of the family to same-sex families.²⁰ It further considered that the UNHRC has recognised that 'the human rights of children cannot be realized independently from the human rights of their parents, or in isolation from society at large'.²¹ Moreover, as noted above, the UNHRC's recent Concluding Observation called on Australia to:

revise its laws, including the Marriage Act, to ensure, irrespective of the results of the Australian Marriage Law Postal Survey, that all its laws and policies afford *equal protection to LGBTI persons, couples and families* (emphasis added).²²

17 UN Committee on Economic, Social and Cultural Rights, *General Comment No 19: The Right to Social Security* (2008).

18 European Court of Human Rights, *Schalk and Kopf v Austria*, Application No 30141/04, (2010) [93]-[94].

19 UN Committee on the Rights of the Child, *Report on the Fifth Session*, 5th session, UN Doc CRC/C/24 (8 March 1994) Annex 5 ('Role of the Family in the Promotion of the Rights of the Child'). See also UN Committee on the Rights of the Child, *General Comment No 4: Adolescent Health and Development in the Context of the Convention on the Rights of the Child* (2003).

20 UN Committee on the Rights of the Child, *General Comment No 4: Adolescent Health and Development in the Context of the Convention on the Rights of the Child* (2003). Privacy, family life and home life are protected by article 16 of the CRC, as well as by article 17(1) of the ICCPR, which states that: 'No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation'.

21 UN Committee on the Rights of the Child, *Report on the Twenty-eighth Session*, 28th session, UN Doc CRC/C/111 (28 November 2001) [558].

22 UNHRC, Concluding Observations on the Sixth Periodic Report of Australia, CCPR/C/AUS/CO/6 (9 November 2017).

1.91 Accordingly, amending the definition of marriage to a union of two people would promote the right to the protection of the family as recognised as a matter of international human rights law.

Committee comment

1.92 The committee notes that the UN Committee on Human Rights has stated that Australia should revise its laws including the Marriage Act to ensure equal protection of LGBTI persons, couples and families.

1.93 The previous human rights assessments concluded that expanding the definition of marriage promotes the right to respect for the family as recognised as a matter of international human rights law.

1.94 Noting these previous conclusions regarding the right to respect for the family, the committee draws the human rights implications of this measure to the attention of the parliament.

Compatibility of the measure with rights of the child

1.95 As the bill relates strictly to marriage it does not directly engage the rights of the child.²³ As noted in the statement of compatibility the bill 'retains the existing consent, marriageable age and prohibited relationship requirements under the Marriage Act.'²⁴ The regulation of marriage provides legal recognition for a relationship between two people, which in and of itself has no impact on whether the persons in that relationship have children—there are many married couples who do not have children and many unmarried couples that do have children.

1.96 Further, the bills would not amend any laws regulating adoption, surrogacy or in vitro fertilisation (IVF), including existing laws that allow same-sex couples to have children. Previous reports considered that such laws therefore fall outside the scope of the committee's examination of the bill for compatibility with human rights.

1.97 In addition, the committee's previous reports noted that whether or not a child's parents or guardians are married has no legal effect on the child. In compliance with the requirements of international human rights law, there are no laws in Australia that discriminate against someone on the basis of their parents'

23 There is one amendment which would engage the rights of the child, namely a consequential amendment to Part III of the Schedule to the Marriage Act, which would recognise that when a minor is an adopted child and wishes to get married, consent to the marriage is in relation to two adopted parents (removing a reference to 'husband and wife'). This marginally engages, but does not promote or limit, the rights of the child: see item 65.

24 EM, SOC 19.

marital status.²⁵ Therefore, amending the definition of marriage in the Marriage Act will not affect the legal status of the children of married or unmarried couples.

1.98 The committee's previous reports noted that the CRC refers to 'parents' and 'legal guardians' interchangeably and refers to 'family' without referencing mothers or fathers.²⁶ The preamble notes that a child 'should grow up in a family environment, in an atmosphere of happiness, love and understanding'.²⁷ There is no reference to marriage in the CRC. Provisions in the CRC relating to a child's right to know its parents and a right to remain with its parents,²⁸ are not engaged by the bill, which is limited to the legal recognition of relationships.

1.99 There is an obligation in the CRC to take into account the best interests of the child 'in all actions concerning children', and this legal duty applies to all decisions and actions that directly or indirectly affect children. The UN Committee on the Rights of the Child has said that this obligation applies to 'measures that have an effect on an individual child, children as a group or children in general, even if they are not the direct targets of the measure'.²⁹ This applies to the legislature in enacting or maintaining existing laws, and the UN Committee on the Rights of the Child has given the following guidance as to when a child's interests may be affected:

Indeed, all actions taken by a State affect children in one way or another. This does not mean that every action taken by the State needs to incorporate a full and formal process of assessing and determining the best interests of the child. However, where a decision will have a major impact on a child or children, a greater level of protection and detailed procedures to consider their best interests is appropriate.³⁰

1.100 In this regard, the committee's previous reports considered that it is not certain whether the legal recognition of a parent's relationship would have a major impact on a child. If it were considered to have a major impact on a child, then it is necessary to assess whether legislating to allow same-sex marriage would promote

25 See article 2 of the CRC which states that all rights should be ensured to children without discrimination of any kind, irrespective of the child's or parent's social origin or birth. See also article 26 of the ICCPR which requires state parties to guarantee equal protection against discrimination on any ground, including social origin, birth or other status.

26 Fathers are not mentioned in the CRC and mothers are only referred to in the context of pre and postnatal care.

27 See the Preamble to the CRC.

28 See articles 7 and 9 of the CRC.

29 UN Committee on the Rights of the Child, *General comment No. 14: on the right of the child to have his or her best interests taken as a primary consideration* (art. 3, para. 1) (2013) [19].

30 UN Committee on the Rights of the Child, *General comment No. 14: on the right of the child to have his or her best interests taken as a primary consideration* (art. 3, para. 1) (2013) [20].

or limit the rights of the child to have his or her best interests assessed and taken into account as a primary consideration.

1.101 There is some evidence to suggest that legal recognition of same-sex couples would promote the best interests of children of those couples. The previous human rights assessment identified some evidence suggesting that children living with cohabiting, but unmarried, parents may do less well than those with married parents.³¹ That analysis also noted that there is also some evidence that children of same-sex parents 'felt more secure and protected' when their parents were married.³²

1.102 Further, to the extent that any existing laws provide greater protection for married couples compared to non-married couples, the previous human rights assessment of the measures considered that extending the protection of marriage to same-sex couples may indirectly promote the best interests of the child.

Committee comment

1.103 The committee notes that the previous human rights assessments of the measures concluded that, as they are limited to the legal recognition of a relationship between two people, and do not regulate procreation or adoption, the rights of the child are not engaged by the bills.

1.104 The committee further notes that the previous human rights assessments concluded that, to the extent that the obligation to consider the best interests of the child is engaged, the measures do not limit, and may promote, the obligation to consider the best interests of the child.

Solemnising marriages - exceptions for ministers of religion and religious marriage celebrants

1.105 The Marriage Act currently grants a minister of religion³³ of a recognised denomination discretion as to whether or not to solemnise a marriage³⁴ and this bill

31 See, Lixia Qu and Ruth Weston, Australian Institute of Family Studies, *Occasional Paper No. 46: Parental marital status and children's wellbeing* (2012).

32 Christopher Ramos, Naomi G Goldberg and M V Lee Badgett, Williams Institute, *The Effects of Marriage Equality in Massachusetts: A Survey of the Experience and Impact of Marriage on Same-sex Couples* (2009) 10.

33 Under section 5 of the Marriage Act a 'minister of religion' is defined as '(a) a person recognised by a religious body or a religious organisation as having authority to solemnise marriages in accordance with the rites or customs of the body or organisation; or (b) in relation to a religious body or a religious organisation in respect of which paragraph (a) is not applicable, a person nominated by: (i) the head, or the governing authority, in a State or Territory, of that body or organisation; or (ii) such other person or authority acting on behalf of that body or organisation as is prescribed; to be an authorised celebrant for the purposes of this Act."

proposes to continue this approach. Under the bill, provided that a minister of religion is authorised by their religion to solemnise marriages, they will continue to be able to refuse to solemnise marriages on religious grounds where this is in accordance with their religious doctrines, tenets and beliefs; where necessary to avoid injury to the religious susceptibilities of adherents of that religion; or where the minister's religious beliefs do not allow the minister to solemnise the marriage.³⁵

1.106 The bill would also extend this discretion to existing marriage celebrants if they elect to register as religious marriage celebrants.³⁶ New marriage celebrants registered after the bill commences will not be able to be identified as a religious marriage celebrant unless they are a minister of religion.³⁷

1.107 In relation to solemnising marriages of defence force personnel overseas, the bill would provide similar discretion to chaplains, who are ministers of religion, to refuse to solemnise marriages under the Marriage Act.³⁸ However, the bill also provides that the Chief of Defence force may authorise an officer to be an authorised celebrant to solemnise marriages of defence force members overseas.³⁹

1.108 The bill would amend the *Sex Discrimination Act 1984* (Sex Discrimination Act) to give effect to these religious exemptions under the bill. However, civil marriage celebrants or authorised celebrants (who are not ministers of religion, religious marriage celebrants or chaplains) would be required to perform the function of solemnising marriages (including marriages of same-sex couples) regardless of their individual beliefs.⁴⁰

Compatibility of the measure with the right to freedom of religion and conscience

1.109 Article 18 of the ICCPR protects the rights of all persons to think freely, and to entertain ideas and hold positions based on conscientious or religious or other beliefs. Subject to certain limitations, persons also have the right to demonstrate or manifest religious or other beliefs, by way of worship, observance, practice and teaching. As set out above, considerable scope is provided under the bill to permit ministers of religion, chaplains and current marriage celebrants who elect to be

34 See, Marriage Act section 47. 'Recognised denominations' are defined under section 26 of the Marriage Act as those religious bodies or religious organisations that are declared by the Governor-General for the purposes of the Marriage Act. The Marriage (Recognised Denominations) Proclamation 2007 lists over 140 religious organisations as 'recognised denominations' for the purposes of section 26 the Marriage Act.

35 See, item 20, proposed section 47.

36 See, item 21, proposed section 47A.

37 EM 7.

38 EM 5.

39 EM 5.

40 SOC 21.

registered as religious celebrants to decline to perform same-sex marriages on the basis of their religious beliefs. This individual discretion exists notwithstanding the particular view of same-sex marriage that a denomination of religion has adopted.

1.110 In contrast to religious celebrants, under the Marriage Act registered civil celebrants are required to abide by existing anti-discrimination laws. The amendments in the bill would mean that civil marriage celebrants (who are not ministers of religion, chaplains or religious celebrants) would be prohibited from refusing to solemnise same-sex marriages on the ground that the couple are of the same sex. These provisions will also apply to military officers who are authorised to perform marriages overseas (except chaplains).⁴¹ It would apply even if the civil celebrant or authorised celebrant (who is not a minister of religion or religious celebrant) had a religious or personal objection to the marriage of same-sex couples. New civil marriage celebrants will be unable to register as religious marriage celebrants unless they are a minister of religion. It is noted that civil marriage celebrants are not necessarily secular and may hold strong religious or personal views in relation to solemnising marriages.⁴²

1.111 The proposed measure therefore engages and limits the right to freedom of religion and belief under article 18 of the ICCPR. Article 18 distinguishes the right to freedom of thought, conscience, religion or belief, which is protected unconditionally, from the freedom to manifest religion or conscientious beliefs. Article 18(3) of the ICCPR permits limitations on the freedom to manifest one's religion, conscientious belief or conscientious objection that are necessary to protect public safety, order, health or morals, or the fundamental rights and freedoms of others.⁴³ The right can be permissibly limited as long as it can be demonstrated that the limitation pursues a legitimate objective, is rationally connected to (that is, effective to achieve) that objective, and a proportionate means of achieving that objective.

1.112 The statement of compatibility explains that the measure pursues a legitimate objective by extending the operation of the Marriage Act to same-sex couples and ensuring that the operation of the Marriage Act is non-discriminatory. The statement of compatibility provides a range of evidence that indicates that addressing issues of discrimination on the grounds of sexual orientation is a pressing and substantial concern.⁴⁴ Accordingly, consistent with the committee's previous

41 SOC 21.

42 See, for example, House of Representatives Standing Committee on Social Policy and Legal Affairs, *Advisory Report: Marriage Equality Amendment Bill 2012 and Marriage Amendment Bill 2012* (June 2012) 45-46; Senate Select Committee on the Exposure Draft of the Marriage Amendment (Same-Sex Marriage) Bill (February 2017) xiii-xiv, 18.

43 United Nations Human Rights Committee, *General Comment No 22: Article 18 of the ICCPR on the Right to Freedom of Thought, Conscience and Religion* (1993) [8].

44 SOC 21.

reports, the measure pursues a legitimate objective for the purposes of international human rights law of promoting equality and non-discrimination. The committee's previous reports also considered that the measure is rationally connected to this objective.⁴⁵ That is, providing that civil celebrants cannot decline to solemnise a marriage on the basis of sexual orientation, would appear to be effective to achieve the objective of promoting non-discrimination.

1.113 The UNHRC has also concluded that the right to exercise one's freedom of religion may be limited to protect equality and non-discrimination.⁴⁶ As set out above, the right to equality and non-discrimination has been extended to sexual orientation. The committee's previous reports considered that it is therefore permissible to limit the right to exercise one's freedom of religion or belief in order to protect the equal and non-discriminatory treatment of individuals on the grounds of sexual orientation, provided that limitation is proportionate.

1.114 The question is therefore whether, by providing an exemption from anti-discrimination laws for ministers of religion, chaplains and religious celebrants and not for civil marriage celebrants on an ongoing basis, the measure is proportionate to the objective of promoting equality and non-discrimination.

1.115 In assessing the proportionality of the limitation, it is relevant that civil celebrants, acting under the Marriage Act, are performing the role of the state in solemnising marriages.⁴⁷ The statement of compatibility argues in this respect that:

...the performance of marriage ceremonies by marriage celebrants on behalf of the state is not sufficiently closely connected to the observance, practice, worship or teaching of religion or belief in order to justify the limitation on the right to non-discrimination. A personal moral objection to same-sex marriage is also not a sufficient basis to permit discrimination in marriage ceremonies or marriage related services.⁴⁸

1.116 There is support for this view in international jurisprudence. In *Eweida and Ors v United Kingdom*,⁴⁹ the European Court of Human Rights dismissed Ms Ladele's complaint that she was dismissed by a UK local authority from her job as a register

45 Parliamentary Joint Committee on Human Rights, Marriage Legislation Amendment Bill 2016; Marriage Legislation Amendment Bill 2016 [No.2], *Report 8 of 2016* (9 November 2016) 33-44; Marriage Legislation Amendment Bill 2015, *Thirtieth Report of the 44th Parliament* (10 November 2015) 112 124.

46 See, *Eweida & Ors v United Kingdom* [2013] ECHR 37.

47 On this point, in the context of civil marriage celebrants in South Africa and Canada, see *Minister of Home Affairs v Fourie*; *Lesbian and Gay Equality Project v Minister of Home Affairs*, CCT60/04; CCT10/05 [2005] ZACC 19 [97]; *Barbeau v British Columbia (A-G)* 2003 BCCA 251; *Halpern v Canada (A-G)* [2003] 65 OR (3d) 161 (CA) [53].

48 SOC 22.

49 *Eweida & Ors v United Kingdom* [2013] ECHR 37.

of births, death and marriages because she refused on religious grounds to have civil partnership duties of same-sex couples assigned to her. The court upheld the finding of the UK courts that the right to freedom of religion (under article 9 of the European Human Rights Convention) did not require that Ms Ladele's desire to have her religious views respected should 'override [the local authority's] concern to ensure that all its registrars manifest equal respect for the homosexual community as for the heterosexual community'.⁵⁰

1.117 The statement of compatibility further explains that the intention behind introducing the category of a military officer who is an authorised celebrant is to ensure that members of the Australian defence force overseas will have a non-religious option to marry available to them.⁵¹ Noting that military chaplains would be able to refuse to perform marriages on religious grounds, providing that officers would not be able to refuse to solemnise marriages because of sexual orientation or that the couple is of the same sex would appear to be a least rights restrictive approach. There could otherwise be a risk that members of the Defence Force overseas who are in a same sex-couple relationship would not be able to access the services of a marriage celebrant to solemnise a marriage on an equal and non-discriminatory basis.

1.118 The measures more generally appear to constitute a proportionate limitation on the right to freedom of religion because they maintain the exception for ministers of religion as well as introducing exceptions for current marriage celebrants who register as religious marriage celebrants. A concern has been raised that currently there are some civil marriage celebrants who solemnise marriages on a religious basis, however, because their organisation is not a 'recognised denomination' or because they are not recognised by a religious body as being authorised to solemnise marriages, they do not qualify as ministers of religion.

1.119 By allowing existing celebrants to register as religious celebrants without requiring that they qualify as ministers of religion the bill provides substantial protection for the freedom of religion or belief of individuals who may have made a decision to become civil celebrants on the basis that the current law only allows opposite-sex couples to marry. Such arrangements serve as a significant protection for these individuals in relation to their freedom of religion or belief, as they provide the option to all existing civil celebrants to be able to decline to solemnise marriages on the basis of their religious beliefs. The scope afforded to freedom of religion or

50 *London Borough Council v Ladele* [2009] EWCA Civ 1357; [2010] ICR 532.

51 SOC 21.

belief is greater under this bill than some of the previous bills the committee has considered which sought to allow same-sex couples to marry.⁵²

1.120 The absence of an exception from anti-discrimination laws for new civil celebrants and existing civil celebrants (who chose not to register as religious celebrants) that officiate a civil marriage ceremony generally aligns with the existing distinction in the position of religious and civil marriage celebrants. For those who solemnise marriages on a religious basis, the exemption from anti-discrimination law applies if they satisfy the definition of 'ministers of religion' in section 5 of the Marriage Act, which is broadly drafted to cover a person who has authority to solemnise marriages in accordance with the rites or customs of a religious body or organisation.⁵³ By contrast, civil celebrants have authority conferred under the Marriage Act as they are performing the secular role of the *state*, not of any religious group. Accordingly, consistent with the committee's previous reports, not granting new civil celebrants the discretion to refuse to solemnise same-sex marriages on the ground that the couple are of the same sex, regardless of their personal religious views, is very likely to be a proportionate limitation on the right to freedom of religion or belief as a matter of international human rights law to ensure the right of same-sex couples to equality and non-discrimination.

Committee comment

1.121 Under the Marriage Act registered civil celebrants are required to abide by existing anti-discrimination laws.

1.122 Under the bill, ministers of religion, chaplains and existing civil celebrants who register as religious celebrants would be able to decline to marry a same-sex couple on religious grounds.

52 See, Parliamentary Joint Committee on Human Rights, Marriage Legislation Amendment Bill 2016; Marriage Legislation Amendment Bill 2016 [No.2], *Report 8 of 2016* (9 November 2016) 34-44; Marriage Legislation Amendment Bill 2015, *Thirtieth Report of the 44th Parliament* (10 November 2015) 112-124.

53 'Recognised denominations' are defined under section 26 of the Marriage Act as those religious bodies or religious organisations that are declared by the Governor-General for the purposes of the Marriage Act. The Marriage (Recognised Denominations) Proclamation 2007 lists over 140 religious organisations as 'recognised denominations' for the purposes of section 26 the Marriage Act; Under section 5 of the Marriage Act a 'minister of religion' is defined as '(a) a person recognised by a religious body or a religious organisation as having authority to solemnise marriages in accordance with the rites or customs of the body or organisation; or (b) in relation to a religious body or a religious organisation in respect of which paragraph (a) is not applicable, a person nominated by: (i) the head, or the governing authority, in a State or Territory, of that body or organisation; or (ii) such other person or authority acting on behalf of that body or organisation as is prescribed; to be an authorised celebrant for the purposes of this Act.'

1.123 However, existing civil celebrants who do not opt to be registered as religious celebrants; new civil celebrants; and other authorised marriage celebrants (who are not ministers of religion or chaplains) would be prohibited from refusing to solemnise same-sex marriages on the ground that the couple are of the same sex.

1.124 Civil marriage celebrants may hold strong personal religious beliefs and the committee notes the discussion of these celebrants who are not ministers of religion in the House of Representatives Standing Committee on Social Policy and Legal Affairs, *Advisory Report: Marriage Equality Amendment Bill 2012 and Marriage Amendment Bill 2012* and the Senate Select Committee on the Exposure Draft of the Marriage Amendment (Same-Sex Marriage) Bill, *Report on the Commonwealth Government's Exposure Draft of the Marriage Amendment (Same-Sex Marriage) Bill*.⁵⁴

1.125 Prohibiting new civil celebrants from refusing to solemnise same-sex marriages on the ground that the couple are of the same sex may engage and limit the right to freedom of religion under article 18 of the ICCPR, insofar as a civil celebrant has a religious objection to the marriage of same-sex couples.

1.126 Consistent with the committee's previous conclusions, the preceding analysis indicates that in the circumstances this limitation is proportionate and permissible under international human rights law.

1.127 However, it is also noted that there is some scope for Australia to determine exactly how to formulate the appropriate balance between the right to equality and non-discrimination, on the one hand, and the protection of the right to freedom of religion or belief, on the other hand.

1.128 Noting the preceding human rights assessment, the committee draws the human rights implications of this measure to the attention of the parliament.

Bodies established for religious purposes may refuse to provide facilities, goods or services

1.129 The Sex Discrimination Act provides that it is unlawful to discriminate against a person in the provision of goods, services or facilities, on the grounds of sex, sexual orientation, gender identity, intersex status, marital or relationship status, pregnancy or potential pregnancy, or breastfeeding.⁵⁵ However, section 37 the Sex Discrimination Act provides an exemption to a body established for religious

54 House of Representatives Standing Committee on Social Policy and Legal Affairs, *Advisory Report: Marriage Equality Amendment Bill 2012 and Marriage Amendment Bill 2012* (June 2012) 45-46; Senate Select Committee on the Exposure Draft of the Marriage Amendment (Same-Sex Marriage) Bill, *Report on the Commonwealth Government's Exposure Draft of the Marriage Amendment (Same-Sex Marriage) Bill* (February 2017) xiii-xiv, 18

55 Sex Discrimination Act, section 22.

purposes, for any other act or practice, being an act or practice that conforms to the doctrines, tenets or beliefs of that religion or is necessary to avoid injury to the religious susceptibilities of adherents of that religion.

1.130 Proposed new section 47B of the Marriage Act would similarly provide that a body established for religious purposes will be able to refuse to provide facilities, goods or services provided on a commercial or non-commercial basis provided that:

- the facility, goods or service to be provided relates to the solemnisation of a marriage; and
- the refusal conforms to the doctrines, tenets or beliefs, or is necessary to avoid injury to the susceptibilities of adherents of that religion.⁵⁶

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

1.131 Permitting bodies established for religious purposes to refuse to provide facilities, goods or services related to the solemnisation of a marriage on religious grounds, engages the right to equality and non-discrimination. This is because it would permit discrimination in access to these facilities, goods and services. More specifically, it would allow a religious body to refuse to provide goods, services or facilities for the marriage of a same-sex couple on religious grounds. The measure reflects aspects of the current exemption from compliance with substantive protections under anti-discrimination law for bodies established for religious purposes.⁵⁷

1.132 Differential treatment will not constitute unlawful discrimination if the differential treatment is based on reasonable and objective criteria such that it serves a legitimate objective, is rationally connected (that is, effective to achieve) and proportionate to, that objective.⁵⁸

1.133 In this respect, the measure appears to pursue the objective of promoting the right to freedom of religion. Permitting religious bodies to refuse to provide facilities, goods and services related to the solemnisation of a marriage on religious grounds would appear to be rationally connected to this objective. While the statement of compatibility does not directly address whether the measure is proportionate in respect of the right to equality and non-discrimination, it does indicate that the measure is sufficiently circumscribed with respect to promoting the right to freedom of religion.⁵⁹ The statement of compatibility explains that the scope

56 EM 10-11; proposed section 47B.

57 Sex Discrimination Act, section 36.

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

59 SOC 22.

of exemptions from anti-discrimination laws under the bill for religious bodies are consistent with existing definitions:

The Bill uses the same definition as the Sex Discrimination Act to ensure that bodies established for religious purposes can lawfully refuse to provide facilities, goods or services for a marriage on religious grounds. In contrast, service providers and commercial businesses that are not established for religious purposes cannot lawfully refuse to provide facilities, goods or services to a couple where this would amount to unlawful discrimination.⁶⁰

1.134 Additionally, as set out above, significant exemptions are already provided from existing anti-discrimination laws for bodies established for a religious purpose on the basis of religion.⁶¹ The statement of compatibility further explains why the exemption is restricted to religious bodies rather than applying more broadly:

It is reasonable that this exemption is restricted to religious organisations rather than commercial businesses or individuals, because the hiring of facilities and delivery of goods and services is connected to marriage but one step removed from the solemnisation of the marriage itself.⁶²

1.135 Restricting the exemption to religious bodies is a less extensive limitation on the right to non-discrimination than if this exemption were to apply more broadly to commercial businesses or individuals. The measure would appear to be broadly consistent with current Australian anti-discrimination law, although this is not determinative of the question of proportionality. The scope of exceptions to anti-discrimination laws has never been subject to a foundational review by the committee for human rights compatibility.

Committee comment

1.136 Existing anti-discrimination laws provide exemptions to bodies established for religious purposes where an act or practice conforms to the doctrines, tenets or beliefs of that religion or is necessary to avoid injury to the religious susceptibilities of adherents of that religion.

1.137 Proposed section 47B of the Marriage Act would provide that a body established for religious purposes will be able to refuse to provide facilities, goods or services related to the solemnisation of a marriage where the refusal conforms to the doctrines, tenets or beliefs, or is necessary to avoid injury to the susceptibilities of adherents of that religion.

60 SOC 21.

61 See, Sex Discrimination Act, section 37.

62 SOC 21-22.

1.138 The preceding analysis indicates that this measure promotes the right to freedom of religion. The committee draws the human rights implications of this measure to the attention of the parliament.