Chapter 1

New and continuing matters

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

- bills introduced into the Parliament between 13 and 16 February 2017 (consideration of seven bills from this period has been deferred);[1]
- legislative instruments received between 16 December 2016 and 16 February 2017 (consideration of three legislative instruments from this period has been deferred);[2] and
- bills and legislative instruments previously deferred.

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

1.3 The committee previously deferred its consideration of the Racial Discrimination Amendment Bill 2016, Racial Discrimination Law Amendment (Free Speech) Bill 2016 and Australian Human Rights Commission Amendment (Preliminary Assessment Process) Bill 2017 until it completed its inquiry into freedom of speech in Australia.[3] This inquiry has now been completed and the committee refers to its comments in the inquiry report in relation to these bills. The committee may choose to make further comments on these bills and an assessment of their human rights compatibility should they proceed to further stages of debate.

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

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

3 See Parliamentary Joint Committee on Human Rights, *Report 7 of 2016* (11 October 2016) 113; and *Report 1 of 2017* (16 February 2017) 53. See also the final report, *Freedom of speech in Australia: Inquiry into the operation of Part IIA of the* Racial Discrimination Act 1975 *(Cth) and related procedures under the* Australian Human Rights Commission Act 1986 *(Cth)* (28 February 2017).
For more information on this inquiry, see the inquiry website at: http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights_inquiries/FreedomspeechAustralia.

Instruments not raising human rights concerns

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

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.

1.6 The committee has also concluded its examination of the previously deferred Federal Financial Relations (General purpose financial assistance) Determination No. 91 (October 2016) [F2016L01725] and Federal Financial Relations (General purpose financial assistance) Determination No. 92 (November 2016) [F2016L01938] and makes no further comment on the instruments.[5]

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

5 See Parliamentary Joint Committee on Human Rights, *Report 10 of 2016* (30 November 2016) 17; and *Report 1 of 2017* (16 February 2017) 53.

Response required

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

Crimes Legislation Amendment (International Crime Cooperation and Other Measures) Bill 2016

Purpose	Seeks to amend a number of Acts relating to the criminal law, law enforcement and background checking to: • ensure Australia can respond to requests from the International Criminal Court and international war crimes tribunals; • amend the provisions on proceeds of crime search warrants, clarify which foreign proceeds of crime orders can be registered in Australia and clarify the roles of judicial officers in domestic proceedings to produce documents or articles for a foreign country, and others of a minor or technical nature; • ensure magistrates, judges and relevant courts have sufficient powers to make orders necessary for the conduct of extradition proceedings; • ensure foreign evidence can be appropriately certified and extend the application of foreign evidence rules to proceedings in the external territories and the Jervis Bay Territory; • amend the vulnerable witness protections in the *Crimes Act 1914*; • clarify the operation of the human trafficking, slavery and slavery-like offences in the *Criminal Code Act 1995*; • amend the reporting arrangements under the *War Crimes Act 1945*; • ensure the Australian Federal Police's alcohol and drug testing program and integrity framework is applied to the entire workforce and clarify processes for resignation in cases of serious misconduct or corruption; • provide additional flexibility regarding the method and timing of reports about outgoing movements of physical currency, allowing travellers departing Australia to report cross-border movements of physical currency electronically;

	• include the Australian Charities and Not-for-profits Commission in the existing list of designated agencies which have direct access to financial intelligence collected and analysed by AUSTRAC enabling it to access AUSTRAC information; • clarify use of the Australian Crime Commission's prescribed alternative name; and • permit the AusCheck scheme to provide for the conduct and coordination of background checks in relation to major national events
Portfolio	Justice
Introduced	House of Representatives, 23 November 2016
Rights	Privacy; fair trial and fair hearing (see **Appendix 2**)
Status	Seeking additional information

Proceeds of crime

1.8 Part 8 of Schedule 1 of the Crimes Legislation Amendment (International Crime Cooperation and Other Measures) Bill 2016 (the bill) seeks to amend the *International Criminal Court Act 2002* and the *International War Crimes Tribunals Act 1995* in relation to existing proceeds of crime provisions. This includes amendments to the authorisation process for proceeds of crime tools and the availability of a range of investigative and restraint tools in respect of an investigation or prosecution at the International Criminal Court (ICC), an International War Crimes Tribunal (IWCT) and to apply in the foreign context. It also seeks to enhance the process for seeking restraining orders and giving effect to forfeiture orders. The proceeds of crime provisions referred to in these Acts make use of the proceeds of crime framework established by the *Proceeds of Crime Act 2002* (POC Act).

1.9 Schedule 2 of the bill seeks to ensure that the provisions of the proceeds of crime investigative tools in the *Mutual Assistance in Criminal Matters Act 1987* (MA Act) align with and are consistent with the POC Act or are modified appropriately for the foreign context. It also seeks to clarify the types of foreign proceeds of crime orders to which the MA Act applies. It also provides that the MA Act applies to interim foreign proceeds of crime orders issued by non-judicial government bodies. The explanatory memorandum states that proposed item 33 of the bill will confirm the existing provision that the definition of 'foreign restraining order' is not limited to orders made by a court, which 'reflects the fact that in some

countries restraining orders may be issued by bodies other than courts, such as investigative or prosecutorial agencies'.[1]

Compatibility of the measure with fair trial and fair hearing rights

1.10 The statement of compatibility states that the amendments in Schedule 2 engage the right to a presumption of innocence, as the MA Act permits the Attorney-General to authorise a proceeds of crime authority to apply to register foreign restraining orders, which could allow a person's property to be restrained, frozen, seized or taken into official custody before a finding of guilt has been made. However, the statement of compatibility states that the proposed amendments will not limit a person's right to a presumption of innocence.[2] The statement of compatibility does not examine the compatibility of the measures in Schedule 1 with the right to a fair trial and fair hearing.

1.11 The statement of compatibility explains that the amendments are intended to ensure 'Australia can provide the fullest assistance to the ICC and IWCT in investigating and prosecuting the most serious of crimes and taking proceeds of crime action'.[3] This would appear to be a legitimate objective for the purposes of international human rights law, and the measures would appear to be rationally connected to achieving that objective.

1.12 The statement of compatibility states that, in relation to the proposed amendment to the MA Act in Schedule 2, the Attorney-General's decision to assist a foreign country with registering a foreign restraining order 'will be subject to the safeguards in the MA Act, including all of the mandatory and discretionary grounds for refusal in section 8 of the MA Act' and 'the courts will retain the discretion to refuse to register the order if it is satisfied that it would be contrary to the interests of justice to do so'.[4]

1.13 It is noted that the committee has previously stated that the MA Act raises serious human rights concerns and that it would benefit from a full review of the human rights compatibility of the legislation.[5] The committee has also raised concerns regarding the POC Act. In particular, the committee has previously raised concerns about the right to a fair hearing and noted that asset confiscation may be

1 Explanatory memorandum (EM) 160.

2 EM, statement of compatibility (SOC) 21. Note the SOC also identifies that the right to privacy is engaged and justifiably limited. No comment is made in respect of this right as, based on the information provided in the SOC and the safeguards in the relevant legislation, no concerns are raised in respect of this right.

3 EM, SOC 5.

4 EM, SOC 21-22.

5 Parliamentary Joint Committee on Human Rights, *Tenth Report of 2013* (26 June 2013) 56-61 at 61.

considered criminal for the purposes of international human rights law, and in particular the right to a fair trial. As the committee has previously noted:

> …the POC Act was introduced prior to the establishment of the committee and therefore before the requirement for bills to contain a statement of compatibility with human rights. It is clear that the POC Act provides law enforcement agencies [with] important and necessary tools in the fight against crime in Australia. Assessing the forfeiture orders under the POC Act as involving the determination of a criminal charge does not suggest that such measures cannot be taken – rather, it requires that such measures are demonstrated to be consistent with the criminal process rights under articles 14 and 15 of the [*International Covenant on Civil and Political Rights*].[6]

1.14 The committee previously recommended that the Minister for Justice undertake a detailed assessment of the POC Act to determine its compatibility with the right to a fair trial and right to a fair hearing. In his recent response to the committee in respect of the Law Enforcement Legislation Amendment (State Bodies and Other Measures) Bill 2016, the minister stated he did not consider it necessary to conduct an assessment of the POC Act to determine its compatibility with the right to a fair trial and fair hearing as legislation enacted prior to the enactment of the *Human Rights (Parliamentary Scrutiny) Act 2011* is not required to be subject to a human rights compatibility assessment, and the government continually reviews the POC Act as it is amended.

1.15 Despite this, the existing human rights concerns with the POC Act and the MA Act mean that any extension of the provisions in those Acts by this bill raise similar concerns. It would therefore be of considerable assistance if these Acts were subject to a foundational human rights assessment.

1.16 In addition, the amendments in item 33 of Schedule 2 provide that an order made under the law of a foreign country—whether made by a court or not—restraining, freezing or directing the seizure or control of property is enforceable in Australia. This is so regardless of whether the person whose property is to be restrained, frozen or seized has been accorded a fair hearing before the order was made. The explanatory memorandum states that this amendment confirms the existing position that the registration of a foreign restraining order is not limited to orders made by a court, which reflects 'the fact that in some countries restraining orders may be issued by bodies other than courts, such as investigative or prosecutorial agencies'.[7] The explanatory memorandum states that the Attorney-General has a discretion whether to authorise the registration of orders

6 Parliamentary Joint Committee on Human Rights, *Thirty-first report of the 44th Parliament* (24 November 2015) 37-44 at 43-44.

7 EM 160 in relation to item 33 of Schedule 2 of the bill.

and may consider 'the nature of the body issuing the order' in exercising that discretion.[8]

1.17 The registration and enforcement of foreign restraining orders and foreign forfeiture orders under Australian law, without any oversight of the process by which such orders were made, raises questions about the compatibility of the measures with the right to a fair hearing and fair trial. This is particularly acute in relation to the registration of foreign restraining orders made by non-judicial bodies. While the Attorney-General retains a broad discretion to refuse to grant assistance under the MA Act, the existence of a ministerial discretion is not in itself a human rights safeguard. As the committee has previously noted, while the government may have an obligation to ensure that the law is applied in a manner that respects human rights, the law itself must also be consistent with human rights.[9] As the UN Human Rights Committee has explained:

> [t]he laws authorizing the application of restrictions should use precise criteria and may not confer unfettered discretion on those charged with their execution.[10]

1.18 While this bill does not substantially amend the provisions of the POC Act or the MA Act or the application process, human rights concerns remain in relation to these existing Acts. In addition, specifically providing in the bill that a foreign restraining order does not need to be made by a court raises serious concerns about the right to a fair hearing before a person's private property is frozen, seized or subject to restraint.

Committee comment

1.19 **The bill seeks to amend or expand the operation of a number of Acts in relation to the proceeds of crime. The committee reiterates its earlier comments that the proceeds of crime legislation provides law enforcement agencies with important and necessary tools in the fight against crime. However, it also raises concerns regarding the right to a fair hearing and the right to a fair trial. The committee reiterates its previous view that both the *Mutual Assistance in Criminal Matters Act 1987* and the *Proceeds of Crime Act 2002* would benefit from a full review of the human rights compatibility of the legislation. The committee draws these matters to the attention of the Parliament.**

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8 EM 160. This is based on section 8(2)(g) of the MA Act which provides that the Attorney-General may refuse a request by a foreign country for assistance if in the opinion of the Attorney-General it is appropriate in all the circumstances of the case that the assistance should not be granted.

9 See Parliamentary Joint Committee on Human Rights, *Tenth report of 2013* (27 June 2013) 56-61 at 59.

10 Human Rights Committee, *General Comment 27, Freedom of movement* (Art.12), U.N. Doc CCPR/C/21/Rev.1/Add.9 (1999), para 13.

Person awaiting surrender under extradition warrant must be committed to prison

1.20 Schedule 3 of the bill seeks to amend the *Extradition Act 1988* (Extradition Act) to provide that where a person has been released on bail and a surrender or temporary surrender warrant for the extradition of the person has been issued, the magistrate, judge or relevant court *must* order that the person be committed to prison to await surrender under the warrant.

Compatibility of the measure with the right to liberty

1.21 The right to liberty is a procedural guarantee not to be arbitrarily and unlawfully deprived of liberty, which requires that detention must be lawful, reasonable, necessary and proportionate in all the circumstances. An obligation on courts to order that a person be committed to prison to await surrender under an extradition warrant engages and limits the right to liberty.

1.22 The statement of compatibility acknowledges that the right to liberty is engaged by this measure but states that the limitation on the right is reasonable and necessary 'given the serious flight risk posed in extradition matters and Australia's obligations to secure the return of alleged offenders to face justice'.[11] It also states that the power to remand a person pending extradition proceedings is necessary as reporting and other bail conditions 'are not always sufficient to prevent individuals who wish to evade extradition by absconding'.[12]

1.23 Measures to ensure a person does not evade extradition are likely to be a legitimate objective for the purposes of international human rights law, and the measures appear to be rationally connected to that objective. However, in relation to whether the limitation on the right to liberty is proportionate to the objective sought to be achieved, the question arises as to why the power of the court to commit a person to prison is phrased as an *obligation* to commit the person to prison, without any discretion as to whether this is appropriate in all the circumstances.

1.24 The statement of compatibility states that it is appropriate that the person be committed to prison to await surrender as an extradition country has a period of two months in which to effect surrender and '[c]orrectional facilities are the only viable option for periods of custody of this duration'.[13] It states that without this provision the police may need to place the person in a remand centre, for a period of up to two months, yet remand centres 'do not have adequate facilities to hold a person for longer than a few days.'[14] It also goes on to provide that the Extradition Act makes bail available in special circumstances which ensures that 'where

11 EM, SOC 24.

12 EM, SOC 24.

13 EM, SOC 24.

14 EM, SOC 24.

circumstances justifying bail exist, the person will not be kept in prison during the extradition process'.[15] However, it is unclear how these existing bail provisions fit with the proposed amendments which *require* the magistrate, judge or court to commit a person, already on bail, to prison to await surrender under the warrant.

Committee comment

1.25 **The committee notes that a requirement on a magistrate, judge or court to commit a person to prison to await surrender under an extradition warrant engages and limits the right to liberty**.

1.26 **The preceding analysis raises the question of whether the obligation to commit to prison, without providing the court with any discretion not to order commitment to prison in individual cases, is proportionate to the objective of preventing suspects from absconding.**

1.27 **The committee therefore seeks the Minister for Justice's advice as to why the provisions enabling a magistrate, judge or court to commit a person to prison to await surrender under an extradition warrant are framed as an obligation on the court rather than a discretion and how the existing bail process under the *Extradition Act 1988* fits with the amendments proposed by this bill.**

15 EM, SOC 24.

Migration Legislation Amendment (Code of Procedure Harmonisation) Bill 2016

Purpose	Seeks to amend the *Migration Act 1958* to: harmonise and streamline Part 5 and Part 7 of the Act relating to merits review of certain decisions; make amendments to certain provisions in Part 5 of the Act to clarify the operation of those provisions; clarify the requirements relating to notification of oral review decisions; and make technical amendments to Part 7AA of the Act
Portfolio	Immigration and Border Protection
Introduced	House of Representatives, 30 November 2016
Rights	Non-refoulement; fair hearing; effective remedy (see **Appendix 2**)
Status	Seeking additional information

Background

1.28 The Migration Legislation Amendment (Code of Procedure Harmonisation) Bill 2016 (the bill) compliments the schedules to the *Tribunals Amalgamation Act 2015*,[1] which commenced on 1 July 2015. That Act merged key commonwealth merits review tribunals, including the former Migration Review Tribunal and Refugee Review Tribunal (RRT), into the Administrative Appeals Tribunal (AAT).

1.29 The bill consolidates Parts 5 and 7 of the *Migration Act 1958* (Migration Act) into an updated Part 5 of the Migration Act in respect of reviewable decisions by the Migration and Refugee Division (MRD) of the AAT.

1.30 Certain parts of the bill therefore reintroduce existing measures, some of which have previously been considered by the committee.

Limited review of decisions in respect of grant or cancellation of protection visas

1.31 Proposed section 338A, which defines a 'reviewable refugee decision', is proposed to be inserted into the Migration Act by Schedule 4, Part 1, item 34 of the bill. This new section largely mirrors the provisions contained in existing section 411 of the Act.

1.32 Proposed subsection 338A(2) defines what is a 'reviewable refugee decision', which includes a decision to refuse to grant or to cancel a protection visa. However, a

1 The committee considered the Tribunals Amalgamation Bill 2014 in its *Eighteenth Report of the 44th Parliament* (10 February 2015), and found that the bill did not raise human rights concerns.

decision to refuse to grant or to cancel a protection visa is not classified as a reviewable decision if it was made on a number of specified grounds, relating to criminal convictions or security risk assessments.[2] As such, decisions made on such grounds are not reviewable by the MRD. In addition, subsection 338A(1) provides that a number of reviewable refugee decisions are excluded from review on specified grounds, including:

- that the minister has issued a conclusive certificate in relation to the decision, on the basis that the minister believes it would be contrary to the national interest to change or review the decision;
- that the decision to cancel a protection visa was made by the minister personally;
- that the decision is a fast track decision. A 'fast track decision' is a decision to refuse to grant a protection visa to certain applicants,[3] for which a very limited form of review is available under Part 7AA of the Act.[4]

1.33 As such, there are a wide number of decisions relating to the grant or cancellation of protection visas that are either not subject to any merits review (in relation to ministerial decisions to refuse to grant or to cancel protection visas on certain grounds) or which are subject to very limited review (in the case of fast track decisions).

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2 Schedule 1, Part 1, item 34, new paragraph 338A(2)(c) applies in relation to a decision to refuse to grant a protection visa. The relevant grounds for exclusion are decisions made relying on: subsection 5H(2), which corresponds to the exclusion grounds for refugee status under article 1F of the 1951 Convention relating to the Status of Refugees and its 1967 Protocol (Refugee Convention); subsection 36(1B), which sets out that a person cannot receive a protection visa if determined by the Australian Security Intelligence Organisation (ASIO) to be a risk to security; subsection 36(1C), which sets out that the person is excluded from the grant of a protection visa if the minister considers the person is a danger or threat to Australia's security, or is a danger to the Australian community having been convicted by final judgement of a particularly serious crime; paragraph 36(2C)(a), which excludes people from complementary protection on the basis of the exclusion grounds for refugee status under article 1F of the Refugee Convention; or paragraph 36(2C)(b) which also excludes people from complementary protection if the minister considers the person to be a danger or threat to Australia's security, or a danger to the Australian community, having been convicted by final judgment of a particularly serious crime. New paragraph 338A(2)(d) applies in relation to a decision to cancel a protection visa. The relevant grounds for exclusion are the same as those under paragraph 338(2)(c), with the addition of a further ground: that a person has been assessed by ASIO as a risk to security.

3 These include unauthorised maritime arrivals who entered Australia on or after 13 August 2012 but before 1 January 2014 and who have not been taken to a regional processing country.

4 See the committee's comments on the human rights compatibility of the fast-track review process in Parliamentary Joint Committee on Human Rights, *Thirty-sixth report of the 44th Parliament* (16 March 2016) 174-187.

Compatibility of the measure with the right to non-refoulement and the right to an effective remedy

1.34 The right to non-refoulement requires that Australia must not return any person to a country where there is a real risk that they would face persecution, torture or other serious forms of harm, such as the death penalty; arbitrary deprivation of life; or cruel, inhuman or degrading treatment or punishment (see Appendix 2).[5] Non-refoulement obligations are absolute and may not be subject to any limitations.

1.35 Effective and impartial review by a court or tribunal of decisions to deport or remove a person, including merits review in the Australian context, is integral to giving effect to non-refoulement obligations.[6]

1.36 The measure engages the right to non-refoulement and the right to an effective remedy, as it fails to ensure sufficient procedural and substantive safeguards apply to ensure a person is not removed in contravention of the obligation of non-refoulement.[7] The right to non-refoulement is an absolute right, it cannot be subject to any permissible limitations.

1.37 The statement of compatibility identifies that the right to non-refoulement:

> [is] arguably engaged as the amendments go to the review of decisions made under the Migration Act, including review of decisions in relation to protection visa applicants or former protection visa holders, and may impact on whether such applicants or former visa holders, depending on the outcome of the review, may become liable for removal from Australia.[8]

1.38 The statement of compatibility provides that the amendments proposed by the bill 'preserve the existing merits review framework without removing or

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5 Australia's obligations arise under the article 33 of the Refugee Convention in respect of refugees, and also under articles 6(1) and 7 of International Covenant on Civil and Political Rights (ICCPR), article 3(1) of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) and the Second Optional Protocol to the International Covenant on Civil and Political Rights Aiming at the Abolition of the Death Penalty. The non-refoulement obligations under the ICCPR and CAT are known as 'complementary protection' as they are protection obligations available both to refugees and to people who are not covered by the Refugee Convention, and so are 'complementary' to the Refugee Convention.

6 ICCPR, article 2. See Parliamentary Joint Committee on Human Rights, *Second Report of the 44th Parliament* (11 February 2014) 45; and *Fourth Report of the 44th Parliament* (18 March 2014) 51.

7 See: Parliamentary Joint Committee on Human Rights, *Thirty-sixth report of the 44th Parliament* (16 March 2016) 179-180, 182-183. Treaty monitoring bodies have found that the provision of effective and impartial review of non-refoulement decisions by a court or tribunal is integral to complying with the obligation of non-refoulement under the ICCPR and CAT.

8 Explanatory memorandum (EM), statement of compatibility (SOC) 45.

otherwise diminishing a visa applicant or former visa holder's access to merits review of a refusal or cancellation decision in relation to them.'[9] However, the committee's role is to examine all bills introduced into Parliament for compatibility with human rights,[10] an assessment which must take place regardless of whether the bill reflects the existing law (which may or may not have been subject to a human rights compatibility assessment when introduced).

1.39 In respect of the right to an effective remedy, the statement of compatibility states that as there is no general right or entitlement to hold a visa to enter or remain in Australia, a decision to refuse or cancel a visa is not a violation of a person's rights or freedoms. However, the statement of compatibility goes on to note that if it is considered to be a violation of rights or freedoms, judicial review is available to an aggrieved person, and as such, the measure is compatible with this right.[11]

1.40 Despite this reasoning, the committee has previously expressed its view that judicial review is not sufficient to fulfil the international standard required of 'effective review' in the context of non-refoulement decisions and, in the Australian context, the requirement for independent, effective and impartial review of non-refoulement decisions is not met when effective merits review of the decision to grant or cancel a protection visa is not available.[12]

Committee comment

1.41 **The committee notes that the obligation of non-refoulement is absolute and may not be subject to any limitations.**

1.42 **The committee notes that the measure does not provide for merits review of decisions relating to the grant or cancellation of protection visas, and therefore may be incompatible with Australia's obligations under the International Covenant on Civil and Political Rights and the Convention Against Torture of ensuring independent, effective and impartial review, including merits review, of non-refoulement decisions. The committee therefore seeks the advice of the Minister for Immigration and Border Protection as to the compatibility of this measure with the obligation of non-refoulement.**

9 EM, SOC 45.

10 See section 7 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

11 EM, SOC 46.

12 For the reasoning in support of this view, see Parliamentary Joint Committee on Human Rights, *Thirty-sixth report of the 44th Parliament* (16 March 2016) 184.

Unfavourable inferences to be drawn by the Tribunal

1.43 Schedule 1, Part 1, item 53 of the bill proposes to insert into the Migration Act new section 358A, which sets out how the MRD is to deal with new claims or evidence in respect of refugee review decisions in relation to a protection visa. This section mirrors current section 423A of the Migration Act.

1.44 Pursuant to this proposed amendment, the MRD must draw an inference unfavourable to the credibility of the claim or evidence if the MRD is satisfied that the applicant does not have a reasonable explanation for why the claim was not raised, or evidence presented, before the reviewable refugee decision was made.

Compatibility of the measure with the right to non-refoulement and the right to an effective remedy

1.45 The right to non-refoulement and the right to an effective remedy have been described in detail above (see also Appendix 2).

1.46 As with the measures discussed above, the right to non-refoulement and the right to an effective remedy are engaged by this measure as it fails to introduce sufficient procedural and substantive safeguards to ensure a person is not removed in contravention of the obligation of non-refoulement. The right to non-refoulement is an absolute right, it cannot be subject to any permissible limitations.

1.47 The discussion of the right to non-refoulement in the statement of compatibility includes reference to the requirements of the MRD to conduct a review of the refusal or cancellation decision in accordance with the procedures in amended Part 5 of the Migration Act.[13]

1.48 The committee previously considered the requirement on the then RRT to draw an inference unfavourable to the credibility of the claim or evidence, which mirrors proposed section 358A.[14] In its consideration of then proposed section 423A, the committee found that the section was incompatible with Australia's non-refoulement obligations. The committee expressed its concern that:

> …there are insufficient procedural and substantive safeguards to ensure that this proposed provision does not result in a person being removed in contravention of non-refoulement obligations. For example, people who are fleeing persecution or have experienced physical or psychological trauma may not recount their full story initially (often due to recognised medical conditions such as post-traumatic stress disorder), or else may

13 EM, SOC 45.

14 Parliamentary Joint Committee on Human Rights, *Ninth report of the 44th Parliament* (15 July 2014) 43-44. The committee also considered the 'quality of law test' in respect of the requirement on applicants to provide a 'reasonable explanation', and on the basis of information provided by the minister, subsequently found this measure to be compatible with the quality of law test for human rights purposes: Parliamentary Joint Committee on Human Rights, *Twelfth report of the 44th Parliament* (24 September 2014) 30-32.

> simply fail to understand what information might be important for their claim.[15]

1.49 The committee was also concerned that:

> …the proposed provision appears to be inconsistent with the fundamental nature of independent merits review and, to that end, would seem to depart from the typical character of merits review tribunals in Australia. In particular, the committee notes that the function of the RRT as a merits review tribunal is to make the 'correct and preferable' decision in a supporting context where applicants are entitled to introduce new evidence to support their applications. However, proposed section 423A would limit the RRT to facts and claims provided in the original application, and require (rather than permit) the drawing of an adverse inference as to credibility in the absence of a 'reasonable explanation' for not including those facts or claims in the original application.[16]

1.50 The requirement to draw an unfavourable inference in relation to the credibility of a claim or evidence raised at the review stage is inconsistent with the effectiveness of the tribunal in seeking to arrive at the 'correct and preferable' decision.

Committee comment

1.51 **The committee notes that the obligation of non-refoulement is absolute and may not be subject to any limitations.**

1.52 **The committee notes that the measure limits the ability of the Administrative Appeals Tribunal to provide effective merits review of decisions relating to the grant of protection visas, and therefore may be incompatible with Australia's obligations under the International Covenant on Civil and Political Rights and the Convention Against Torture of ensuring independent, effective and impartial review, including merits review, of non-refoulement decisions. The committee therefore seeks the advice of the minister as to the compatibility of this measure with the obligation of non-refoulement.**

15 Parliamentary Joint Committee on Human Rights, *Ninth report of the 44th Parliament* (15 July 2014) 43.

16 Parliamentary Joint Committee on Human Rights, *Ninth report of the 44th Parliament* (15 July 2014) 43-44.

New procedures for the Immigration Assessment Authority

1.53 Schedule 2, Part 3 proposes to amend the Migration Act such that the minister may refer fast track reviewable decisions in relation to members of the same family unit to the Immigration Assessment Authority (IAA) for review together.[17] The amendments also enable the IAA to review two or more fast track reviewable decisions together, whether or not they were referred together.[18] Further, where fast track reviewable decisions have been referred and reviewed together, documents given by the IAA to any of the applicants will be taken to be given to each applicant.[19] The explanatory memorandum provides that this would make the IAA provisions consistent with the giving of documents provisions that currently apply to family groups in the MRD.[20]

Compatibility of the measure with the right to non-refoulement and the right to an effective remedy

1.54 The right to non-refoulement is engaged by the measure, as allowing for two or more fast-track decisions to be considered together may not provide effective review for the individual applicants. This concern is particularly relevant in the context of fast track review decisions by the IAA, as the committee has previously raised concerns about procedural fairness in relation to this process. These measures in that context may fail to provide sufficient procedural and substantive safeguards to ensure a person is not removed in contravention of the obligation of non-refoulement.

1.55 The statement of compatibility sets out that the stated objective of the measure is to 'promote administrative efficiency'.[21] However, the right to non-refoulement, including the obligation to ensure independent, effective and impartial review, is absolute, and cannot be justifiably limited.

1.56 In this regard, in the initial assessment of the introduction of the IAA in a previous committee report, it was noted that the (then proposed) system, an internal departmental review system, lacks the requisite degree of independence to ensure 'independent, effective and impartial' review under international law.[22] It was identified that this concern is most pronounced in respect of the fact that any such internal reviews by the department would be performed by the department itself,

17 Schedule 2, Part 3, item 27 inserts new subsection 473CA(2).

18 Schedule 2, Part 3, item 28 inserts new section 473DG.

19 Schedule 2, Part 3, item 33 inserts new section 473HE.

20 EM 38.

21 EM, SOC 45.

22 Parliamentary Joint Committee on Human Rights, *Fourteenth report of the 44th Parliament* (28 October 2014) 88.

which, being the executive arm of government, would amount to executive review of executive decision making.[23]

1.57 This was subsequently reiterated in the final assessment of the introduction of the IAA. [24] It was also noted that, while judicial review is still available, it is limited to review of decisions as to whether the decision was lawful and does not consider the merits of a decision.[25] This report also discussed how the right to a fair hearing was engaged and limited by the introduction of the IAA.[26]

1.58 These concerns with the IAA process are relevant to the consideration of the proposed amendments, as the possibility that the individual merits of an applicant's claim will not be treated or considered separately further increases the existing risk of refoulement and further limits the existing limitations on the right to an effective remedy.

Committee comment

1.59 **The committee notes that the obligation of non-refoulement is absolute and may not be subject to any limitations.**

1.60 **The committee also notes that the right to an effective remedy, which includes the right to independent, effective and impartial review, is further limited by the proposed amendments to the Immigration Assessment Authority process, which provide that individual applications need not be treated separately.**

1.61 **Accordingly, the committee seeks the advice of the Minister for Immigration and Border Protection as to whether hearing family applications together (without the consent of the applicants) will ensure the review process under the Immigration Assessment Authority provides for effective review of such claims so as to comply with Australia's non-refoulement obligations.**

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23 Parliamentary Joint Committee on Human Rights, *Fourteenth report of the 44th Parliament* (28 October 2014) 88.

24 Parliamentary Joint Committee on Human Rights, *Thirty-sixth report of the 44th Parliament* (16 March 2016) 178. It was noted that the fact that the reviewers are employees under the *Public Service Act 1999* affects the independence of such a review and therefore the impartiality of such a review.

25 Parliamentary Joint Committee on Human Rights, *Thirty-sixth report of the 44th Parliament* (16 March 2016) 178.

26 Parliamentary Joint Committee on Human Rights, *Thirty-sixth report of the 44th Parliament* (16 March 2016) 178. Specifically, it was noted that: '… nothing in Part 7AA requires the IAA to give a referred applicant any material that was before the primary decision maker. There is also no right for an applicant to comment on the material before the IAA. These provisions therefore diminish procedural fairness and the applicant's prospects of correcting factual errors or wrong assumptions in the primary decision at the review stage.'

Native Title Amendment (Indigenous Land Use Agreements) Bill 2017

Purpose	Seeks to amend the *Native Title Act 1993* to respond to the Federal Court's decision in *McGlade v Native Title Registrar* [2017] FCAFC 10 by: confirming the legal status and enforceability of agreements which have been registered by the Native Title Registrar on the Register of Indigenous Land Use Agreements without the signature of all members of a registered native title claimant (RNTC); enable the registration of agreements which have been made but have not yet been registered; and ensure that area Indigenous Land Use Agreements can be registered without requiring every member of the RNTC to be a party to the agreement
Portfolio	Attorney-General
Introduced	House of Representatives, 15 February 2017
Rights	Culture; self-determination (see **Appendix 2**)
Status	Seeking additional information

Area Indigenous Land Use Agreements and the Native Title Act

1.62 The *Native Title Act 1993* (NTA) provides a legislative process by which native title groups can negotiate with other parties to form voluntary agreements in relation to the use of land and waters called Indigenous Land Use Agreements (ILUAs). Under the NTA ILUAs may be:

- over areas or land where native title has, or has not yet, been determined;
- entered into regardless of whether there is a native title claim over the area or not; or
- part of a native title determination or settled separately from a native title claim.[1]

1.63 There are a number of matters which ILUAs may cover including:

- how native title rights coexist with the rights of other people;
- who may have access to an area;
- native title holders agreeing to a future development or future acts;
- extinguishment of native title;
- compensation for any past or future act;

1 See, *Native Title Act 1993* (NTA) section 34CD.

- employment and economic opportunities for native title groups;
- issues of cultural heritage; and
- mining.[2]

1.64 When registered, ILUAs bind all parties and all native title holders to the terms of the agreement including people that have not been born at the time an ILUA was registered.[3]

1.65 Under the NTA there are three types of ILUAs:

- body corporate ILUAs are made in relation to land or waters where a registered native title body corporate exists;
- 'Area ILUAs' are made in relation to land or waters for which no registered native title body corporate exists; and
- alternative procedure ILUAs.[4]

1.66 The NTA specifies requirements which must be met in order for an agreement to be an 'Area ILUA'. Section 24CD of the NTA provides that all persons in the 'native title group', as defined in the section, must be parties to an Area ILUA. Under section 24CD the native title group consists of all 'registered native title claimants' (RNTC) in relation to land or waters in the area. Section 253 of the NTA defines RNTC as 'a person or persons whose name or names appear in an entry to the Register of Native Title Claims'. The RNTC is often a subset of the larger group native title claim group that may hold native title over the area.[5] Section 251A of the NTA provides for a process for authorising the making of ILUAs by the native title claim group.

1.67 The recent full bench of the Federal Court decision in *McGlade v Native Title Registrar & Ors*,[6] dealt with three main issues relating to the process of Area ILUAs:

- whether each individual member of the RNTC must be party to an area ILUA;
- whether a deceased individual member of the RNTC must be party to an Area ILUA; and
- whether an individual member of the RNTC must sign an area ILUA prior to the application for registration being made.

1.68 The court in *McGlade* held in relation to any proposed Area ILUA, if one of the persons who, jointly with others, has been authorised by the native title claim

2 See, NTA section 24CB.

3 See, NTA section 24AA(3).

4 Explanatory memorandum (EM) 2.

5 EM 2.

6 [2017] FCAFC 10 (*McGlade*).

group to be the applicant, refuses, fails or neglects, or is unable to sign a negotiated, proposed written indigenous land use agreement, for whatever reason, then the document will lack the quality of being an agreement recognised for the purposes of the NTA and will be unable to be registered.[7] Following this decision all individuals comprising the RNTC must sign the agreement otherwise it cannot be registered as an Area ILUA.

Amendments to process for Area ILUAs and validation of existing ILUAs

1.69 The Native Title Amendment (Indigenous Land Use Agreements) Bill 2017 (the bill) seeks to amend the NTA to overturn aspects of the full bench of the Federal Court decision in *McGlade*[8] regarding Area ILUAs. The bill seeks to amend the process for authorising ILUAs as follows:

(a) a native title claim group authorising an ILUA under section 251A of the NTA will be able to:

  (i) nominate one or more of the members of the RNTC for the group to be party to the ILUA; or

  (ii) specify a process for determining which of the members of the RNTC for the group is, or are, to be party to the ILUA.[9]

(b) under section 251A a native title claim group will be able to choose to utilise a traditional decision-making process for authorising such matters or agree and adopt an alternative decision-making process;[10]

(c) in place of the current requirement for all members of the RNTC to be party to the agreement under section 24CD of the NTA, the mandatory parties to an ILUA would include:

  (i) the member or members of the RNTC who is or are nominated by the native title claim group, or determined using a process specified by the native title claim group, to be party to the ILUA; or

  (ii) if no such members are nominated or determined to be party to the ILUA, a majority of the members of the RNTC.[11]

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7 The decision of the full bench of the Federal Court in *McGlade* reversed the decision of Reeves J in *QGC Pty Ltd v Bygrave* (No 2) (2010) 189 FCR 412 *(Bygrave)* who held the authorisation of the ILUA by the claimant group was of paramount importance, not the signature of all of the persons comprising the applicant. Once authorised, the claimant group could decide who they wanted to sign the Area ILUA. Prior to *Bygrave* an Area ILUA would not be registered unless it was signed by all of the RNTCs.

8 [2017] FCAFC 10 (*McGlade*).

9 See proposed section 251A(2).

10 See proposed section 251A(2).

11 See proposed section 24CD(2)(a).

1.70 The bill also seeks to amend the NTA to:

(a) provide that existing Area ILUAs which have been registered on or before 2 February 2017, but do not comply with *McGlade* as they were not signed by all members of the RNTC, are valid; and

(b) enable the registration of agreements which have been made and lodged for registration on or before 2 February 2017 but do not comply with *McGlade* as they have not been signed by all members of the RNTCs.[12]

Compatibility of the measures with the right to culture

1.71 The right to culture is contained in article 15 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) and article 27 of the International Covenant on Civil and Political Rights (ICCPR).

1.72 Individuals belonging to minority groups have additional protections to enjoy their own culture, religion and language. This right is separate from the right to self-determination as it is conferred on individuals (whereas the right to self-determination belongs to groups). This right has been identified as particularly applying to Indigenous communities, and includes the right for Indigenous people to use land resources, including traditional activities such as hunting and fishing and to live on their traditional lands. The state is prohibited from denying individuals the right to enjoy their culture, and may be required to take positive steps to protect the identity of a minority and the rights of its members to enjoy and develop their culture.[13]

1.73 The proposed amendments to the process for authorising the making of Area ILUAs engage the right to culture. This is because the types of matters which may be the subject of an Area ILUA are significant and include such matters as authorisation of any future act and the extinguishment of native title rights and interests. Given that such agreements continue to operate into the future, the process by which ILUAs are authorised by native title claim groups is of great significance for the right to culture.

1.74 Under proposed section 24CD(2)(a)(ii) where no members of the RNTC are nominated or determined to be party to the ILUA, the default position is that agreement from a majority of the members of the RNTC will be sufficient for an Area ILUA to be valid. Noting that the right to culture is an individual rather than collective right, this may have the effect of limiting the right to culture of individuals who do not agree with the ILUA. Similarly, the validation of Area ILUAs that have previously been registered or are lodged for registration which have not been signed by all

12 EM 6.

13 See, UN Human Rights Committee, General Comment No. 23: The rights of minorities (1994); UN Human Rights Committee, Concluding Observations of the Human Rights Committee: Australia, A/55/40 (2000) and Human Rights Committee, Concluding observations on the fifth periodic report of Australia, CCPR/C/AUS/CO/5 (2009).

RNTC members could potentially limit the right to culture for individuals that do not agree to an Area ILUA.

1.75 A limitation on the right to culture will be permissible where it pursues a legitimate objective, is rationally connected to this objective and a proportionate means of achieving this objective.

1.76 The statement of compatibility identifies that the measures engage the right to culture but notes that the NTA 'as a whole':

> …promotes the right to enjoy and benefit from culture, by establishing processes through which native title can be recognised, and providing protection for native title rights and interests. The amendments in this Bill continue to promote these rights, by providing certainty to native title claimants and holders, and third parties on the use of native title land and waters through voluntary agreements.[14]

1.77 However, the statement of compatibility does not provide an assessment of the potential limitation on the right to culture for some individuals. Nevertheless, it explains that the amendments are needed to ensure the views of the broader native title claim group are not frustrated noting that the position following *McGlade* means that if a single member of the RNTC withholds consent to be a party to the Area ILUA the ILUA cannot be registered:

> The amendments will…assist area ILUAs to be made more efficiently in cases where an agreement has been validly authorised by a group which holds or may hold native title, but one or more members of the RNTC are unable or unwilling to sign the area ILUA. This may be for a variety of reasons- an elderly member may have passed away before being able to sign, or a member may not wish to sign the agreement for personal reasons or the ILUA does not affect their country.
>
> These amendments also aim to address concerns that agreements which have been validly authorised by the broader native title group can be frustrated in circumstances when RNTC members disagree and refuse to sign. Disputes between RNTC members and the broader claim group can lead to delays and burdensome costs.[15]

1.78 The explanatory memorandum to the bill further notes that while a native title claim group may make an application under section 66B of the NTA removing a member or members of the RNTC who refuse to sign or are unable to sign 'this process can impose high costs on claim groups.'[16] These factors collectively indicate that, to the extent that the measures limit the right to culture, the measure would

14 EM 7.

15 EM 7.

16 EM 4.

appear to pursue a legitimate objective for the purposes of international human rights law.

1.79 However, while acknowledging difficulties with the current authorisation process for ILUAs, there are some questions about whether the measures are proportionate particularly noting the serious matters that ILUAs may cover (including future projects and extinguishment of native title) and the ongoing binding nature of such ILUAs into the future. The proposed amendments would allow an ILUA to be registered even where a significant minority of RNTC members disagree or refuse to sign and may have strong reasons for doing so.

1.80 Aspects of the test of proportionality are concerned with the extent of the impact on the individual by the measure but also whether there are less rights restrictive ways of achieving a legitimate objective. This may include whether reasonable scope could be given to minority views. The statement of compatibility does not address this issue.

Committee comment

1.81 **The preceding analysis raises questions about whether the measures limit the right to culture for individuals who object to the making of an Area Indigenous Land Use Agreement under the *Native Title Act 1993*. This was not addressed in the statement of compatibility.**

1.82 **The committee requests the advice of the Attorney-General as to whether the measure is a reasonable and proportionate measure for the achievement of its apparent objective and in particular:**

- **whether less rights restrictive measures would be workable;**
- **whether reasonable scope could be given for minority views; and**
- **any procedural or other safeguards to protect the right to culture for individuals.**

Compatibility of the measure with the right to self-determination

1.83 The right to self-determination is protected by article 1 of the ICCPR and article 1 of the ICESCR. The right to self-determination includes the entitlement of peoples to have control over their destiny and to be treated respectfully. This includes peoples being free to pursue their economic, social and cultural development. It is generally understood that the right to self-determination accrues to 'peoples'.

1.84 The UN Committee on the Elimination of Racial Discrimination has stated that the right to self-determination involves 'the rights of all peoples to pursue freely their economic, social and cultural development without outside interference'.[17]

17 See, UN Committee on the Elimination of Racial Discrimination, General Recommendation 21, The right to self-determination (1996).

Accordingly, it is important that individuals and groups, particularly Aboriginal and Torres Strait Islander peoples, should be consulted about decisions likely to impact on them.

1.85 As acknowledged in the statement of compatibility, the principles contained in the UN Declaration on the Rights of Indigenous Peoples (the Declaration) are also relevant to the amendments in this bill. While the Declaration is not included in the definition of 'human rights' under the *Human Rights (Parliamentary Scrutiny) Act 2011*, it provides some useful context as to how human rights standards under international law apply to the particular situation of Indigenous peoples.[18] The Declaration affirms the rights of Indigenous peoples to self-determination.[19]

1.86 The proposed amendments to the authorisation process of Area ILUAs engage and appear likely to promote the collective right to self-determination, noting that a minority of members of the RNTC would be unable to frustrate the making of a ILUA which has been authorised by the native title claim group. The statement of compatibility states that the measures engage and promote the rights contained in the Declaration and the right to self-determination:

> By providing native title holders with greater discretion to determine who can be party to an agreement, these amendments emphasise the fundamental importance of authorisation to the integrity of the native title system. Authorisation processes recognise the communal character of Indigenous traditional law and custom, and ensure that decisions regarding the rights and interest of Indigenous Australians are made with traditional owners.
>
> As outlined above, these amendments also aim to promote efficient negotiation and settlement of area ILUAs, to continue to assist Indigenous Australians to access the potential social and economic benefits of native title.[20]

1.87 Acknowledging that the measures, in general, appear to promote the collective right to self-determination there are some remaining questions about whether the measures will promote the right to self-determination in all circumstances. As indicated above at [1.79], it may be considered to be important to give some scope to the reasonable expression of minority views as part of ensuring genuine agreement is reached. It this respect, it is noted that adequately consulting those most likely to be affected by such changes in accordance with the Declaration may be of particular importance.

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18 EM 8.

19 UN Declaration on the Rights of Indigenous Peoples, article 3.

20 EM 8.

Committee comment

1.88 **The preceding legal analysis indicates that the measure appears to promote the collective right to self-determination. However, the preceding legal analysis raises questions about whether the proposed amendments will promote the right to self-determination in all circumstances.**

1.89 **In relation to the compatibility of the measure with the right to self-determination, the committee requests the advice of the Attorney-General:**

- **about the extent to which the measures promote the right to self-determination in a range of circumstances;**
- **as to whether reasonable scope could be given for minority views; and**
- **as to whether there has been sufficient and adequate consultation with Aboriginal and Torres Strait Islander peoples about the proposed changes.**

Therapeutic Goods Amendment (2016 Measures No. 1) Bill 2016

Purpose	Proposes to make a number of amendments to the *Therapeutic Goods Act 1989*, including to: enable the making of regulations to establish new priority pathways for faster approval of certain products, designate bodies to appraise the suitability of the manufacturing process for medical devices manufactured in Australia, and to consider whether such medical devices meet relevant minimum standards for safety and performance; allow certain unapproved therapeutic goods that are currently accessed by healthcare practitioners through applying to the secretary for approval to be more easily obtained; provide review and appeal rights for persons who apply to add new ingredients for use in listed complementary medicines; and make a number of other measures to ensure consistency across the regulation of different goods under the Act
Portfolio	Health and Aged Care
Introduced	House of Representatives, 1 December 2016
Right	Fair trial (see **Appendix 2**)
Status	Seeking additional information

Civil penalty provisions

1.90 Proposed section 41AF of the Therapeutic Goods Amendment (2016 Measures No. 1) Bill 2016 (the bill) seeks to introduce a new civil penalty provision that applies if a licence holder carrying out one or more steps in the manufacture of therapeutic goods, provides false or misleading information or documents to the secretary.

1.91 A maximum of 5 000 civil penalty units will apply to an individual who is found to contravene proposed section 41AF. Based on the rate for penalty units as it currently stands this equates to a monetary penalty of up to $900 000.[1] With changes to the rate of penalty units scheduled to increase from July 2017, the maximum penalty will be over $1 million.[2]

1 The current penalty unit rate is $180 per unit, see section 4AA of the *Crimes Act 1914*.

2 See Mid-Year Economic and Fiscal Outlook 2016-17, December 2016, Appendix A. See also Crimes Amendment (Penalty Unit) Bill 2017, which seeks to increase the amount of the Commonwealth penalty unit from $180 to $210, with effect from 1 July 2017. This bill was introduced into the House of Representatives on 16 February 2017 and considered at page 58 of this report.

Compatibility of the measure with the right to a fair trial

1.92 Many bills and existing statutes contain civil penalty provisions. These are generally prohibitions on particular forms of conduct that give rise to liability for a 'civil penalty' enforceable by a court. As these penalties are pecuniary and do not include the possibility of imprisonment, they are said to be 'civil' in nature and do not constitute criminal offences under Australian law. Given their 'civil' character, applications for a civil penalty order are dealt with in accordance with the rules and procedures that apply in relation to civil matters; that is, proof is on the balance of probabilities.

1.93 However, civil penalty provisions may engage the criminal process rights under articles 14 and 15 of the ICCPR where the penalty may be regarded as 'criminal' for the purposes of international human rights law. The term 'criminal' has an 'autonomous' meaning in human rights law (see Appendix 2). In other words, a penalty or other sanction may be 'criminal' for the purposes of the ICCPR even though it is considered to be 'civil' under Australian domestic law.

1.94 There is a range of international and comparative jurisprudence on whether a 'civil' penalty is likely to be considered 'criminal' for the purposes of human rights law. The committee's *Guidance Note 2* sets out some of the key human rights compatibility issues in relation to provisions that create offences and civil penalties.

1.95 As noted at paragraph [1.91], a civil penalty of up to 5 000 penalty units is a substantial penalty which could result in an individual having a penalty imposed of up to $900 000. The maximum civil penalty is also substantially more than the financial penalty available under the related criminal offence provisions, which are restricted to 1 000 penalty units (or $180 000) (and/or 12 months' imprisonment).[3]

1.96 However, the statement of compatibility does not discuss the civil penalty provisions or how they engage and may limit the right to a fair trial. The committee's expectations in relation to the preparation of statements of compatibility are set out in its *Guidance Note 1*.

1.97 When assessing the severity of a pecuniary penalty, regard must be had to the amount of the penalty, the nature of the industry or sector being regulated and the maximum amount of the civil penalty that may be imposed relative to the penalty that may be imposed for a corresponding criminal offence.

1.98 Having regard to these matters, the civil penalty provisions imposing a maximum of 5,000 penalty units appear to impose a particularly severe penalty and

3 Offences under proposed sections 41AD relating to false or misleading documents, or 41AE relating to misleading documents, carry a penalty of 1 000 penalty units and/or 12 months' imprisonment. Note also that an offence under proposed section 41AC carries a penalty of 400 penalty units. A person commits an offence under this section if the person has been given a notice under section 41AB; and the person omits to do an act; and the omission contravenes a requirement of the notice.

may be considered to be 'criminal' for the purposes of international human rights law.

1.99 The consequence of this would be that the civil penalty provisions in the bill must be shown to be consistent with the criminal process guarantees set out in articles 14 and 15 of the ICCPR.

Committee comment

1.100 **The preceding legal analysis raises questions as to the compatibility of the measure with the right to a fair trial.**

1.101 **The committee notes that the statement of compatibility does not address the engagement of this right by the measure. The committee therefore seeks further information from the Minister for Health as to whether the civil penalty provision may be considered to be criminal in nature for the purposes of international human rights law (having regard to the committee's *Guidance Note 2*) and, if so, whether the measure accords with the right to a fair trial.**

Veterans' Affairs Legislation Amendment (Digital Readiness and Other Measures) Bill 2016

Purpose	Seeks to enable the Secretary of the Department of Veterans' Affairs to authorise the use of computer programmes to: make decisions and determinations; exercise powers or comply with obligations; and do anything else related to making decisions and determinations or exercising powers or complying with obligations. The bill also empowers the secretary to disclose information about a particular case or class of persons to whomever the secretary determines, if it is in the public interest
Portfolio	Veterans' Affairs
Introduced	House of Representatives, 24 November 2016
Right	Privacy (see **Appendix 2**)
Status	Seeking additional information

Broad public interest disclosure powers

1.102 Schedule 2 of the Veterans' Affairs Legislation Amendment (Digital Readiness and Other Measures) Bill 2016 (the bill) inserts a provision into each of the *Military, Rehabilitation and Compensation Act 2004* (MRCA), *Safety, Rehabilitation and Compensation (Defence-related Claims) Act 1988* (DRCA) and *Veterans' Entitlements Act 1986* to enable the Secretary of the Department of Veterans' Affairs (DVA) to disclose information obtained by any person in the performance of their duties under those Acts, in a particular case or class of case, to such persons and for such purposes as the secretary determines, if the secretary certifies it is necessary in the public interest to do so.[1]

1.103 If the information to be disclosed is personal information, the secretary is required to notify the affected person in writing of the intention to disclose this personal information, and give the person a reasonable opportunity to provide a

1 Proposed section 409A of the *Military, Rehabilitation and Compensation Act 2004*, proposed section 151B of the *Safety, Rehabilitation and Compensation (Defence-related Claims) Act 1988* and proposed section 131A of the *Veterans' Entitlements Act 1986.*

response and consider that response.[2] The secretary will commit an offence if information is disclosed without engaging with the affected person.[3]

Compatibility of the measure with the right to privacy

1.104 The right to privacy encompasses respect for informational privacy, including the right to respect private information and private life, particularly the storing, use and sharing of personal information (see Appendix 2).

1.105 Schedule 2 of the bill engages and limits the right to privacy by bestowing upon the secretary of the DVA a broad discretionary power to 'disclose any information obtained by any person in the performance in that persons duties' under the relevant act[4] 'to such persons and for such purposes as the secretary determines'.[5]

1.106 The statement of compatibility for the bill acknowledges that the right to privacy is engaged and limited by this measure, but states that to the extent that it may limit rights those limitations are reasonable, necessary and proportionate.

1.107 The explanatory memorandum sets out the objective for the proposed amendment:

> [t]he information sharing provisions, and related consequential amendments, are necessary because, with the creation of a stand-alone version of the [*Safety, Rehabilitation and Compensation Act 1988*] with application to Defence Force members, the ability of the [Military Rehabilitation and Compensation Commission] to share claims information about current serving members with either the Secretary of the Department of Defence or the Chief of the Defence Force is more limited than it is under the MRCA. These amendments will align information sharing under the DRCA with arrangements under the MRCA.[6]

1.108 The statement of compatibility also sets out the following examples of when it may be appropriate for the secretary to disclose personal information:

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2 At proposed subsection 409A(6) of the *Military, Rehabilitation and Compensation Act 2004*, proposed subsection 151B(6) of the *Safety, Rehabilitation and Compensation (Defence-related Claims) Act 1988* and proposed subsection 131A(6) of the *Veterans' Entitlements Act 1986.*

3 At proposed subsection 409A(7) of the *Military, Rehabilitation and Compensation Act 2004*, proposed subsection 151B(7) of the *Safety, Rehabilitation and Compensation (Defence-relatedClaims) Act 1988* and proposed subsection 131A(7) of the *Veterans' Entitlements Act 1986.*

4 Namely, the *Military, Rehabilitation and Compensation Act 2004*, *Safety, Rehabilitation and Compensation (Defence-related Claims) Act 1988* or the *Veterans' Entitlements Act 1986*.

5 Lawful interferences with privacy must be sufficiently circumscribed in order to accord with article 17 of the International Covenant on Civil and Political Rights: UN Human Rights Committee, General Comment 16: Article 17 (Right to Privacy) (1988) paragraph [8].

6 Explanatory memorandum (EM) 11.

> …where there is a threat to life, health or welfare, for the enforcement of laws, in relation to proceeds of crime orders, mistakes of fact, research and statistical analysis, APS code of conduct investigations, misinformation in the community and provider inappropriate practices.[7]

1.109 The objective of ensuring claims information about current serving members can be shared with either the Secretary of the Department of Defence or the Chief of the Defence Force would appear to seek to achieve a legitimate objective for the purposes of international human rights law.

1.110 In allowing for disclosure in this way, the measure also appears to be rationally connected to this objective.

1.111 The statement of compatibility sets out that several statutory safeguards will ensure that the secretary's powers will be exercised appropriately, including that:

- the secretary must act in accordance with rules that the minister makes about how the power is to be exercised;
- the minister cannot delegate his or her power to make rules about how the power is to be exercised to anyone;
- the secretary cannot delegate the public interest disclosure power to anyone;
- before disclosing personal information about a person, the secretary must notify the person in writing about his or her intention to disclose the information, give the person a reasonable opportunity to make written comments on the proposed disclosure of the information and consider any written comments made by the person; and
- unless the secretary complies with the above requirements before disclosing personal information, he or she will commit an offence, punishable by a fine of 60 penalty units.[8]

1.112 However, these safeguards are not sufficient to demonstrate that the limitation on the right to privacy is proportionate to the objective sought to be achieved. For example, although the secretary must act in accordance with rules made by the minister, there is no requirement on the minister to make such rules. Under the legislation as drafted, the secretary is empowered to disclose any personal information to any person with the sole criteria for the exercise of this power being that the secretary considers it to be in 'the public interest' to do so.

1.113 The absence in the primary legislation of any substantive detail as to the circumstances in which personal information can be disclosed and to whom and the absence of any obligation to make rules confining this power, together raises

7 EM, statement of compatibility (SOC) 3.

8 EM, SOC 4.

concerns as to whether the limitation on the right to privacy is proportionate to the objective being sought to be achieved.

Committee comment

1.114 **The committee notes that the measure gives the secretary the power to disclose personal information to any person on any basis so long as the secretary considers that disclosure to be in the 'public interest'. The statement of compatibility refers to rules that will govern the exercise of the secretary's broad discretionary power to disclose information. However, there is no obligation to make such rules, and their proposed content is not available to the committee. This broad discretionary power to disclose personal information raises potential concerns in relation to the right to privacy.**

1.115 **The committee therefore seeks the Minister for Veterans' Affairs' advice as to whether:**

- **there are safeguards in place to demonstrate that the limitation on the right to privacy is proportionate to the objective sought to be achieved; and**
- **there are less restrictive ways to achieve the objective of the measure (including whether the primary legislation could set limits on the breadth of the secretary's discretionary power or, at a minimum, it could require the making of rules that set out how the power is to be exercised).**

Australian Citizenship Regulation 2016 [F2016L01916]

Purpose	Remakes existing regulations (which are sunsetting) to prescribe a number of matters in relation to citizenship
Portfolio	Immigration and Border Protection
Authorising legislation	*Australian Citizenship Act 2007*
Last day to disallow	9 May 2017
Rights	Privacy; equality and non-discrimination (see **Appendix 2**)
Status	Seeking additional information

Background

1.116 In 2014 the committee considered the Migration Legislation Amendment (2014 Measures No. 1) Regulation 2014.[1] This regulation relates to the form of notice of evidence of Australian citizenship (citizenship notice), which is a document that may be provided by the minister as evidence of a person's Australian citizenship.

1.117 Section 37 of the *Australian Citizenship Act 2007* provides that a person may make an application for evidence of their Australian citizenship (citizenship notice). When given, that citizenship notice must be in a form prescribed by the Australian Citizenship Regulations and contain any other matter prescribed by the regulations. The Australian Citizenship Regulation 2007 (as amended in 2014) provided that the following information, among other matters, may be included on the back of a notice of evidence of citizenship:

- the applicant's legal name at time of acquisition of Australian citizenship, if different to the applicant's current legal name; and
- any other name in which a notice of evidence has previously been given.

1.118 The Australian Citizenship Regulation 2016 remakes existing regulations (which are sunsetting). It is in the same form as the amended 2007 regulation.

1.119 The committee previously concluded that the measure was incompatible with the right to privacy and the right to equality and non-discrimination. At the time, the committee noted that the measure engaged and limited the right to privacy and the right to equality and non-discrimination on the basis that listing previous names on the back of a citizenship notice may identify a transgender person who has changed their gender. As the statement of compatibility had not addressed this issue, the committee corresponded with the minister about whether the limitation

1 See Parliamentary Joint Committee on Human Rights, *Ninth report of the 44th Parliament* (15 July 2014) 118-120; *Twelfth report of the 44th Parliament* (24 September 2014) 50-54; and *Sixteenth report of the 44th Parliament* (25 November 2014) 29-32.

was permissible and in particular whether there was a less rights restrictive way of achieving the objectives of the measure (that is, whether the limitation was proportionate). In finding that the measure was incompatible with human rights the committee noted that other identity documents, such as passports, do not include such information so the measure did not appear to be the least rights restrictive approach as required to be a permissible limit on human rights. The committee also concluded that the fact that an individual did not have control over the recording of their previous name also affected the proportionality of the measure noting that the right to privacy includes the right to control the dissemination of information about one's private life.[2]

Releasing information concerning a person's change of name

1.120 As noted above, the Australian Citizenship Regulation 2016 is in the same form as the amended 2007 regulation, which is sunsetting, and provides that previous names may be listed on the back of a citizenship notice.

Compatibility of the current measure with the right to privacy

1.121 The right to privacy includes the right to respect for private and confidential information, particularly the storing, use and sharing of such information as well as the right to control the dissemination of information about one's private life.[3] By disclosing personal information through the listing of previous names on the back of a citizenship notice, the measure engages and limits the right to privacy. The current statement of compatibility recognises that this regulation engages the right to privacy; and in particular in relation to transgender people who may have changed their name, and having evidence of a previous male or female name may reveal that they have now changed their sex or gender.[4]

1.122 It is noted that proof of Australian citizenship may be required to be provided in range of situations including in the context of employment or access to services. Indirectly revealing that a person has undergone a change of sex or gender accordingly could have significant implications for that individual and could expose them to risks.

1.123 However, limitations on the right to privacy will be permissible where they are not arbitrary, they pursue a legitimate objective, are rationally connected to that

2 See Parliamentary Joint Committee on Human Rights, *Sixteenth report of the 44th Parliament* (25 November 2014) 29. Three members of the committee issued a dissenting report in relation to the conclusion that the measure was incompatible with human rights: see *Sixteenth report of the 44th Parliament* (25 November 2014) 61: Dissenting report by Senator Matthew Canavan, Mr David Gillespie MP and Mr Ken Wyatt MP.

3 See International Covenant on Civil and Political Rights (ICCPR) article 17; UN Human Rights Committee, General Comment No. 16: Article 17 (Right to Privacy) The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation, 8 April 1988.

4 Explanatory statement (ES) 5-6.

objective and are a proportionate means of achieving that objective. The statement of compatibility identifies the objective of the current measure as assisting in verifying identity and preventing identity fraud:

> The provision of details of a previous notice of evidence of citizenship on the back of a notice of evidence of citizenship assists in maintaining the integrity of Australia's identity framework. Identity integrity is essential in maintaining Australia's national security, law enforcement and economic interests. It is essential that the identities of persons accessing government or commercial services, benefits, official documents and positions of trust can be verified. False or multiple identities can and do undermine the integrity of border controls and the citizenship programme; underpin terrorist activities; finance crimes; and facilitate fraud.[5]

1.124 The statement of compatibility sets out a detailed explanation of why being able to accurately verify identity information is important including in the context of national police checks, security vetting for government positions, access to social security and credit checks by businesses.[6]

1.125 The information provided in the statement of compatibility establishes that the measure addresses a substantial and pressing concern and may be regarded as a legitimate objective for the purposes of international human rights law. Providing details of previous names on the back of a citizenship notice appears to be rationally connected to the legitimate objective of the measure.

1.126 However, some questions arise as to the proportionality of the measure. To be a proportionate limitation, a measure must be the least rights restrictive way of achieving the objective of the measure. However, it appears there could be other, less rights restrictive, ways of achieving the legitimate objective.

1.127 For example, Australian citizens by birth, Australian citizens by conferral and other categories of Australian citizens may all apply for evidence of Australian Citizenship. However, in practice, Australian citizens by birth can choose to rely on their birth certificate or the birth certificate of their parents as proof of Australian citizenship (rather than a citizenship notice).[7]

1.128 A number of state and territory jurisdictions now have provisions for individuals to change their sex and names on their birth certificates (if they meet particular criteria). For example, in New South Wales if an individual met the required criteria under Part 5A of the *Birth, Deaths and Marriages Act 1995* (NSW) they may apply to have their sex changed on their birth certificate. The new birth

5 ES 6.

6 ES 7.

7 See, for example, Department of Foreign Affairs and Trade, Confirming your Australian Citizenship at: https://www.passports.gov.au/passportsexplained/theapplicationprocess/eligibilityoverview/Pages/confirmingcitizenship.aspx.

certificate is not marked in any way to indicate the person's sex has been changed. If a person has changed their name since their birth was first registered, a notation stating that the birth was 'previously registered in another name' will appear on the new certificate. Access to a person's old birth certificate is restricted by legislation once the change of sex is recorded.[8]

1.129 What this means is that an Australian citizen by birth from NSW could provide proof of citizenship without having to directly reveal a change of gender, though if the person has changed their name that fact (but not the name itself) will be recorded on the birth certificate.

1.130 By contrast, an Australian citizen by conferral relying on a citizenship notice to provide proof of citizenship could not avoid any change in gender identity being disclosed. These laws operate in different jurisdictions (one is state and one is federal), but the NSW mechanism for ensuring continuity of information, without directly disclosing personal details on the face of birth certificate, indicates that there may be a less rights restrictive approach to achieving the legitimate objective of the current legislation. For example, a notation on a citizenship notice that the individual has undergone a change of name since acquiring Australian citizenship rather than including previous names would appear to be a potentially less rights restrictive approach to achieving the legitimate objective of the measure.

1.131 There is a related example in the federal sphere: Australian citizens who have an Australian passport will usually be able to rely on their passport as proof of Australian citizenship. A person who has undergone a change in name and change in gender identity is able to apply to have these changed on their passport without any notation appearing.[9] This could also indicate that there may be less rights restrictive ways of achieving the legitimate objective of the measure in respect of persons who have undergone a change of gender identity.

1.132 The statement of compatibility does not address whether having internal government records about previous names rather than having such information included on an outward facing document would be a suitable way of achieving the legitimate objective of the measure.

1.133 The Australian Government Guidelines on the recognition of Sex and Gender (guidelines) may also be relevant to assessing whether the measure is the least rights

8 NSW Registry of Births Deaths and Marriages, Information to apply to alter the register to record a change of sex at: http://www.bdm.nsw.gov.au/Documents/apply-for-record-a-change-of-sex.pdf.

9 See, for example, Department of Foreign Affairs and Trade, Sex and Gender Diverse Passport Applicants at: https://www.passports.gov.au/passportsexplained/theapplicationprocess/eligibilityoverview/Pages/changeofsexdoborpob.aspx.

restrictive way of achieving its legitimate objective.[10] The statement of compatibility argues that the regulation complies with these guidelines and states:

> The Guidelines recognise the importance of departments ensuring the continuity of the record of an individual's identity. The Guidelines state that "only one record should be made or maintained for an individual, regardless of a change in gender or other change of personal identity" (paragraph 33 "Privacy and Retaining Records of Previous Sex and/or Gender"). Printing the previous names and dates of birth of applicants on the back of an evidence of Australian citizenship complies with this requirement to ensure the continuity of record and to maintain one record for each client.[11]

1.134 However, the guidelines also specifically direct government departments and agencies to 'ensure an individual's history of changes of sex, gender or name...is recorded and accessed only when the person's history is relevant to a decision being made.'[12] Therefore, while the guidelines provide that there should be a continuity of record of an individual's identity, this appears to be aimed at consistent internal government records rather than requiring such information to be included on an outward facing document.

1.135 In fact, this aspect of the guidelines appears to be designed to prevent unnecessary disclosures of a change in gender identity and appears potentially to be in conflict with having previous names recorded on citizenship notices. Accordingly, there is a question about whether the measure fully complies with these guidelines and, if it does not, whether this further indicates that there may be less rights restrictive ways (such as internal records) of achieving the legitimate objective of the measure.

Committee comment

1.136 **The preceding analysis raises questions about whether the measure is the least rights restrictive way of achieving its legitimate objective and the potential**

10 Attorney General's Department, *Australian Government Guidelines on the Recognition of Sex and Gender* (July 2013) at: https://www.ag.gov.au/Publications/Documents/AustralianGovernmentGuidelinesontheRecognitionofSexandGender/AustralianGovernmentGuidelinesontheRecognitionofSexandGender.pdf.

11 ES 8.

12 Attorney General's Department, *Australian Government Guidelines on the Recognition of Sex and Gender* (July 2013) at: https://www.ag.gov.au/Publications/Documents/AustralianGovernmentGuidelinesontheRecognitionofSexandGender/AustralianGovernmentGuidelinesontheRecognitionofSexandGender.pdf 7.

impact of the measure on vulnerable groups (that is, whether the measure is a proportionate limit on the right to privacy).

1.137 **Accordingly, the committee requests the advice of the Minister for Immigration and Border Protection as to whether the limitation on the right to privacy is a reasonable and proportionate measure for the achievement of its legitimate objective including:**

- **whether a less rights restrictive approach such as notation on a citizenship notice that a person 'previously had another name' rather than listing previous names would be feasible;**
- **whether a less rights restrictive approach such as having internal government records regarding previous names would be feasible;**
- **whether the details listed on a passport (which do not list previous names) would be sufficient;**
- **whether there are or could be safeguards incorporated into the measure for people with specific concerns about having previous names listed (such as exceptions);**
- **whether the measure complies with relevant guidelines; and**
- **whether the measure provides sufficient flexibility to treat different cases differently and whether affected groups are particularly vulnerable.**

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

1.138 The right to equality and non-discrimination provides that everyone is entitled to enjoy their rights without discrimination of any kind, and that all people are equal before the law and entitled without discrimination to the equal and non-discriminatory protection of the law.

1.139 'Discrimination' under articles 2 and 26 of the International Covenant on Civil and Political Rights (ICCPR) encompasses both measures that have a discriminatory intent (direct discrimination) and measures which have a discriminatory effect on the enjoyment of rights (indirect discrimination).[13] 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.[14]

13 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'.

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

1.140 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 that legitimate objective and is a proportionate means of achieving that objective.[15]

1.141 The disclosure of a person's previous name may operate to have a disproportionate effect on, and therefore indirectly discriminate against, persons who have undergone sex or gender reassignment procedures, to the extent that disclosure could potentially reveal or indicate that history. Indirect discrimination arising in this way would amount to discrimination against individuals on the prohibited grounds of 'other status'. Further, the fact that some Australian citizens by birth may be able to rely on identity documents which do not reveal a change of change of gender indicates that the measure could potentially also have a disproportionate negative effect on the grounds of national origin.

1.142 The statement of compatibility acknowledges that the right to equality and non-discrimination is engaged by the measure but argues that the effect on individuals who have undergone a change of gender does not amount to unlawful discrimination:

> Although an individual's sex or gender reassignment may be inferred from information on the back of a notice of evidence of Australian citizenship, an individual may choose to whom this notice is disclosed. The fact of the inclusion of this inferred information is not inconsistent with Articles 2 or 26 of the ICCPR; individuals who have undergone sex or gender reassignment are not being treated differently than other individuals. Although an individual's sex or gender reassignment may be inferred from information on the back of a notice of evidence of Australian citizenship, an individual may choose to whom this notice is disclosed. The fact of the inclusion of this inferred information is not inconsistent with Articles 2 or 26 of the ICCPR; individuals who have undergone sex or gender reassignment are not being treated differently than other individuals… Although an individual's sex or gender reassignment may be inferred from information on the back of a notice of evidence of Australian citizenship, an individual may choose to whom this notice is disclosed. The fact of the inclusion of this inferred information is not inconsistent with Articles 2 or 26 of the ICCPR; individuals who have undergone sex or gender reassignment are not being treated differently than other individuals.

1.143 However, this does not fully acknowledge that there may be circumstances where a person may be required to show proof of Australian citizenship including in circumstances such as employment (such that it is not really their choice to reveal such information). Further, while the *Sex Discrimination Act 1984* provides important

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

protection against discrimination on the basis of gender identity it is not a complete answer to such issues.

1.144 It is acknowledged that individuals who have undergone sex or gender reassignment are not being treated differently than other individuals; however, the issue is that the measure appears to have a disproportionate negative effect on these individuals such that it could amount to indirect discrimination. Where a measure impacts on particular groups disproportionately it establishes *prima facie* that there may be indirect discrimination.[16] The proportionality of this effect was not fully addressed in the statement of compatibility. While the measure pursues a legitimate objective for the purposes of international human rights law as explained above, questions arise as to whether the measure is the least rights restrictive as required to be a proportionate limit on human rights. There may also be questions about the proportionality of a measure where it impacts upon particularly vulnerable groups.

Committee comment

1.145 **This measure would appear to have a disproportionate negative effect on particular vulnerable individuals, raising questions about whether this disproportionate negative effect (which indicates *prima facie* indirect discrimination) amounts to unlawful discrimination.**

1.146 **Accordingly, in relation to the compatibility of the measure with the right to equality and non-discrimination, the committee requests the further advice of the Minister for Immigration and Border Protection as to whether the measure is reasonable and proportionate for the achievement of its objective and in particular the matters set out at [1.137] above.**

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

Social Security (Class of Visas – Qualifying Residence Exemption) Determination 2016[F2016L01858]

Purpose	Determines classes of visas for qualifying residence exemptions pursuant to the *Social Security Act 1991*, such that a waiting period does not apply to a person who holds or was the former holder of a visa in a determined class in respect of a social security benefit (other than a special benefit), a pension Parenting Payment (single), carer payment, a mobility allowance, a seniors health card or a health care card
Portfolio	Social Services
Authorising legislation	*Social Security Act 1991*
Last day to disallow	9 May 2016
Rights	Social security; adequate standard of living (see **Appendix 2**)
Status	Seeking additional information

Background

1.147 The committee first reported on the Budget Savings (Omnibus) Bill 2016 (the bill)[1] in its *Report 7 of 2016*,[2] and, following a response from the Treasurer in respect of the bill, concluded its consideration of the bill in its *Report 8 of 2016*.[3]

1.148 Schedule 10 of the bill removed the exemption from the 104-week waiting period for certain welfare payments[4] for new migrants who are family members of Australian citizens or long-term residents with the exception of permanent humanitarian entrants. The committee found that this measure could not be assessed as a proportionate limitation on the rights to social security and an adequate standard of living.[5] The Social Security (Class of Visas – Qualifying Residence Exemption) Determination 2016 [F2016L01858] (the 2016 Determination) gives effect to the changes introduced by the bill.

1 The bill passed both Houses of Parliament with amendments on 15 September 2016, and received Royal Assent on 16 September 2016.

2 Parliamentary Joint Committee on Human Rights, *Report 7 of 2016* (11 October 2016) 2-11.

3 Parliamentary Joint Committee on Human Rights, *Report 8 of 2016* (9 November 2016) 57-61.

4 Namely, a social security benefit (other than a special benefit), a pension Parenting Payment (single), carer payment, a mobility allowance, a seniors health card or a health care card.

5 Parliamentary Joint Committee on Human Rights, *Report 8 of 2016* (9 November 2016) 59.

Newly arrived residents waiting period

1.149 Section 4 of the 2016 Determination revokes the Social Security (Class of Visas – Qualifying Residence Exemption) Determination 2015 (2015 Determination), which currently determines visas for the purposes of paragraph 7(6AA)(f) of the *Social Security Act 1991* (the Act). Together with the 2015 Determination, that paragraph exempts from the waiting period certain visa holders[6] in respect of a social security benefit (other than a special benefit), a pension Parenting Payment (single), carer payment, a mobility allowance, a seniors health card or a health care card.

1.150 The 2016 Determination puts into effect the amendments in the bill and provides that from 1 January 2017,[7] only Referred Stay (Permanent)[8] visas will be exempted from the waiting period, as prescribed in paragraph 7(6AA)(f) of the Act.

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

1.151 This right to social security recognises the importance of adequate social benefits in reducing the effects of poverty and plays an important role in realising many other economic, social and cultural rights, particularly the right to an adequate standard of living and the right to health. The right to an adequate standard of living requires state parties to take steps to ensure the availability, adequacy and accessibility of food, clothing, water and housing for all people in Australia, and also imposes on Australia the obligations listed above in relation to the right to social security (see Appendix 2).

1.152 As noted in the previous legal analysis in respect of the bill,[9] the right to social security and the right to an adequate standard of living are engaged and limited by this measure.

1.153 The statement of compatibility provides that the measure 'engages or gives effect' to the right to social security and the right to an adequate standard of living, and that:

> [a]ccess to Special Benefit will still be available for a newly arrived permanent resident who has suffered a substantial change in their circumstances, beyond their control, and are in financial hardship, after arrival. There remains no waiting period for family assistance payments for families with children, such as Family Tax Benefit.[10]

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6 See section 4 of the Social Security (Class of Visas —Qualifying Residence Exemption) Determination 2015: Subclass 100 (Partner); Subclass 110 (Interdependency); Subclass 801 (Partner); Subclass 814 (Interdependency); and Subclass 852 (Referred Stay (Permanent)).

7 At subsection 2(1).

8 At section 5.

9 Parliamentary Joint Committee on Human Rights, *Report 8 of 2016* (9 November 2016) 57-61.

10 Explanatory statement, statement of compatibility 3.

1.154 The committee's previous findings in respect of the bill noted in particular that information had not been provided as to how the family members will be able to meet basic living expenses during the 104-week waiting period and what specific arrangements, if any, are open to them in situations of crisis.

1.155 The statement of compatibility in relation to the 2016 Determination states that access to Special Benefit is available for a newly arrived permanent resident where there has been a substantial change in their circumstances.

1.156 In light of the information provided in the statement of compatibility, it appears that newly arrived permanent residents would have available to them Special Benefit payments, which may serve to provide a safeguard such that these individuals could afford the necessities to maintain an adequate standard of living. This may support an assessment that the measure is a proportionate limitation on the right to social security and the right to an adequate standard of living. However, the statement of compatibility does not detail whether such safeguards are in place for other newly arrived residents who are not permanent residents. It is also not clear what level of support Special Benefit provides or how long it would apply for.

Committee comment

1.157 **The committee notes that this instrument puts into effect amendments made by the *Budget Savings (Omnibus) Act 2016*. This Act removed the exemption from the 104-week waiting period for certain welfare payments for new migrants who are family members of Australian citizens or long-term residents (with the exception of permanent humanitarian entrants).**

1.158 **In light of the information provided in the statement of compatibility, the committee seeks advice from the Minister for Social Services as to the extent to which the Special Benefit is available to newly arrived residents who are not permanent residents and are in financial hardship and what is the level of support provided for by Special Benefit and how long they could be eligible for Special Benefit.**

Advice only

1.159 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.

Appropriation Bill (No. 3) 2016-2017
Appropriation Bill (No. 4) 2016-2017

Purpose	Appropriation Bill (No. 3) 2016-2017 seeks to appropriate money from the Consolidated Revenue Fund for the ordinary annual services of the Government in addition to amounts appropriated through the *Appropriation Act (No. 1) 2016-2017* and *Supply Act (No. 1) 2016-2017*; and Appropriation Bill (No. 4) 2016-2017 seeks to do so for services that are not ordinary annual services of the Government in addition to amounts appropriated through the *Appropriation Act (No. 2) 2016-2017* and *Supply Act (No. 2) 2016-2017*
Portfolio	Finance
Introduced	House of Representatives, 9 February 2017
Rights	Multiple rights (see **Appendix 2**)
Status	Advice only

Background

1.160 The committee has previously considered the human rights implications of appropriations bills in a number of reports,[1] and they have been the subject of correspondence with the Department of Finance.[2]

1.161 The committee previously reported on Appropriation Bill (No. 1) 2016-2017 and Appropriation Bill (No. 2) 2016-2017 (the earlier 2016-2017 bills) in its *Report 9 of 2016*.[3]

1 See Parliamentary Joint Committee on Human Rights, *Third report of 2013* (13 March 2013) 65; *Seventh report of 2013* (5 June 2013) 21; *Third report of the 44th Parliament* (4 March 2014) 3; *Eighth report of the 44th Parliament* (24 June 2014) 5, 31; *Twentieth report of the 44th Parliament* (18 March 2015) 5; *Twenty-third report of the 44th Parliament* (18 June 2015) 13; and *Thirty-fourth report of the 44th Parliament* (23 February 2016) 2.

2 Parliamentary Joint Committee on Human Rights, *Seventh report of 2013* (5 June 2013) 21; and *Eighth report of the 44th Parliament* (18 June 2014) 32.

3 Parliamentary Joint Committee on Human Rights, *Report 9 of 2016* (22 November 2016) 30-33.

Potential engagement and limitation of human rights by appropriations Acts

1.162 As previously restated in respect of the earlier 2016-2017 bills, proposed government expenditure to give effect to particular policies may engage and limit and/or promote a range of human rights. This includes rights under the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR).[4]

1.163 The committee has previously noted that:

> …the allocation of funds via appropriations bills is susceptible to a human rights assessment that is directed at broader questions of compatibility—namely, their impact on progressive realisation obligations and on vulnerable minorities or specific groups. In particular, the committee considers there may be specific appropriations bills or specific appropriations where there is an evident and substantial link to the carrying out of a policy or program under legislation that gives rise to human rights concerns.[5]

Compatibility of the bills with multiple rights

1.164 Like the earlier 2016-2017 bills, and previous appropriations bills, the current bills are accompanied by a brief statement of compatibility, which notes that the High Court has stated that, beyond authorising the withdrawal of money for broadly identified purposes, appropriations Acts 'do not create rights and nor do they, importantly, impose any duties'.[6] The statements of compatibility conclude that, as their legal effect is limited in this way, the bills do not engage, or otherwise affect, human rights.[7] They also state that '[d]etailed information on the relevant appropriations…is contained in the portfolio [Budget] statements'.[8] No further assessment of the human rights compatibility of the bills is provided.

1.165 The full human rights analysis in respect of such statements of compatibility can be found in the committee's *Report 9 of 2016*.[9]

1.166 As previously stated, while such bills present particular difficulties for human rights assessment because they generally include high-level appropriations for a wide

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

5 Parliamentary Joint Committee on Human Rights, *Twenty-third report of the 44th Parliament* (18 June 2015) 17.

6 Appropriation Bill (No. 3) 2016-2017 (Bill No. 3): explanatory statement (ES), statement of compatibility (SOC) 3. Appropriation Bill (No. 4) 2016-2017 (Bill No. 4): ES, SOC 4.

7 Bill No. 3, ES, SOC 3; Bill No. 4, ES, SOC 4.

8 Bill No. 3, ES, SOC 3; Bill No. 4, ES, SOC 4.

9 Parliamentary Joint Committee on Human Rights, *Report 9 of 2016* (22 November 2016) 30-33.

range of outcomes and activities across many portfolios, the allocation of funds via appropriations bills is susceptible to a human rights assessment directed at broader questions of compatibility.

Committee comment

1.167 **The committee notes that the statements of compatibility for the bills provide no assessment of their compatibility with human rights on the basis that they do not engage or otherwise create or impact on human rights. However, while the committee acknowledges that appropriations bills present particular challenges in terms of human rights assessments, the appropriation of funds may engage and potentially limit or promote a range of human rights that fall under the committee's mandate.**

1.168 **Given the difficulty of conducting measure-level assessments of appropriations bills, the committee recommends that consideration be given to developing alternative templates for assessing their human rights compatibility, drawing upon existing domestic and international precedents. Relevant factors in such an approach could include consideration of:**

- **whether the bills are compatible with Australia's obligations of progressive realisation with respect to economic, social and cultural rights; and**
- **whether any reductions in the allocation of funding are compatible with Australia's obligations not to unjustifiably take retrogressive or backward steps in the realisation of economic, social and cultural rights.**

Migration Amendment (Putting Local Workers First) Bill 2016

Purpose	Seeks to amend the *Migration Act 1958* and Migration Regulations 1994 to introduce safeguards into Australia's temporary skilled migration program to improve employment opportunities for Australian citizens and permanent residents, promote the welfare of temporary migrant workers, and to facilitate compliance with occupational licensing and workplace safety regulation
Sponsor	Mr Bill Shorten MP
Introduced	House of Representatives, 28 November 2016
Rights	Privacy; equality and non-discrimination (see **Appendix 2**)
Status	Advice only

Register of work agreements

1.169 Schedule 1, item 11 of the Migration Amendment (Putting Local Workers First) Bill 2016 (the bill) proposes to insert new section 140ZL to the *Migration Act 1958* (Migration Act), to impose on the Minister for Immigration and Border Protection (the minister) an obligation to keep and publish on the Department of Immigration and Border Protection's (the department) website a register of work agreements, which includes the name of the sponsor party.

1.170 The definition of the term 'sponsor party' is proposed to be inserted into subsection 5(1) of the Migration Act by Schedule 1, item 3 of the bill, as 'a person, an unincorporated association or partnership in Australia that is a party to the work agreement (other than the Minister)'.

Compatibility of the measure with the right to privacy

1.171 The right to privacy encompasses respect for informational privacy, including the right to respect private information and private life, particularly the storing, use and sharing of personal information (see Appendix 2).

1.172 Schedule 1, item 11 of the bill engages and limits the right to privacy by requiring the minister to publish on the department's website the names of natural persons who are a sponsor party to a work agreement.

1.173 The statement of compatibility does not identify that the right to privacy is engaged and limited by this measure.

1.174 A measure may justifiably limit the right to privacy if it can be shown that the measure addresses a legitimate objective, is rationally connected to that objective, and is a proportionate way to achieve that objective. The committee's expectations

in relation to the preparation of statements of compatibility are set out in its *Guidance Note 1*.

Committee comment

1.175 **The committee draws the human rights implications of the bill in respect of the right to privacy to the attention of the legislation proponent and the Parliament.**

1.176 **If the bill proceeds to further stages of debate, the committee may request further information from the legislation proponent with respect to the right to privacy.**

Exclusion of 457 visa holders residing in Australia

1.177 A number of proposed amendments to the Migration Act seek to improve employment opportunities for Australian citizens and permanent residents to the exclusion of foreign workers, including foreign workers already in Australia.

1.178 For example, Schedule 1, item 11 proposes to introduce new section 140GC to require the minister to enter a work agreement on behalf of the Commonwealth only if the minister has had regard to the extent to which the work agreement will support existing jobs for Australian citizens or permanent residents or create jobs for such individuals (new paragraph 140GC(2)(a)). This proposed new section would also require the minister to have regard to an exhaustive list of factors when entering into an agreement, such as the proportion of jobs that are likely to be offered to Australian citizens or permanent residents and 457 visa holders (new subsection 140GC(4)).

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

1.179 The right to equality and non-discrimination includes a requirement that all laws are non-discriminatory and are enforced in a non-discriminatory way (see Appendix 2). This right applies to any form of distinction, exclusion, restriction or preference which has the effect of nullifying or restricting the enjoyment of human rights or freedoms on a prohibited ground, such as national or social origin. It applies to all people within Australia's jurisdiction.

1.180 The measure engages and limits the right to equality and non-discrimination by requiring an approved sponsor to favour Australian citizens and permanent residents over foreign 457 visa holders who are in Australia and therefore within Australia's jurisdiction.

1.181 The statement of compatibility does not identify that the right to equality and non-discrimination is engaged and limited by this measure.

1.182 A measure may justifiably limit the right to equality and non-discrimination if it can be shown that the measure addresses a legitimate objective, is rationally connected to that objective, and is a proportionate way to achieve that objective.

The committee's expectations in relation to the preparation of statements of compatibility are set out in its *Guidance Note 1*.

Committee comment

1.183 **The committee draws the human rights implications of the bill in respect of the right to equality and non-discrimination to the attention of the legislation proponent and the Parliament.**

1.184 **If the bill proceeds to further stages of debate, the committee may request further information from the legislation proponent with respect to the right to equality and non-discrimination.**

Social Services Legislation Amendment (Omnibus Savings and Child Care Reform) Bill 2017

Purpose	The bill reintroduces the Jobs for Families Child Care Package from the Education and Training portfolio, and a range of new and previously introduced social services measures
Portfolio	Social Services
Introduced	House of Representatives, 8 February 2017
Rights	Social security; adequate standard of living; freedom of movement (see **Appendix 2**)
Status	Advice only

Background

1.185 The Social Services Legislation Amendment (Omnibus Savings and Child Care Reform) Bill 2017 (the bill) contains a number of reintroduced measures which have previously been examined by the committee. The following schedules to the bill have previously been found to be compatible with human rights:

- Schedule 1—Payment rates;[1]
- Schedule 2—Family tax benefit Part B rate;[2]
- Schedule 3—Family tax benefit supplements;[3]
- Schedule 4—Jobs for families child care package;[4]
- Schedule 5—Proportional payment of pensions outside Australia;[5]

1 Previously contained within the Social Services Legislation Amendment (Family Payments Structural Reform and Participation Measures) Bill 2016. See Parliamentary Joint Committee on Human Rights, *Report 7 of 2016* (11 October 2016) 99-101.

2 Previously contained within the Social Services Legislation Amendment (Family Payments Structural Reform and Participation Measures) Bill 2016. See Parliamentary Joint Committee on Human Rights, *Report 7 of 2016* (11 October 2016) 99-101.

3 Previously contained within the Social Services Legislation Amendment (Family Payments Structural Reform and Participation Measures) Bill 2016. See Parliamentary Joint Committee on Human Rights, *Report 7 of 2016* (11 October 2016) 99-101.

4 Previously contained within the Family Assistance Legislation Amendment (Jobs for Families Child Care Package) Bill 2016. See Parliamentary Joint Committee on Human Rights, *Report 7 of 2016* (11 October 2016) 99-101.

5 Previously contained within the Social Services Legislation Amendment (Budget Repair) Bill 2016. See Parliamentary Joint Committee on Human Rights, *Report 7 of 2016* (11 October 2016) 99-101.

- Schedule 6—Pensioner education supplement;[6]
- Schedule 7—Education entry payment;[7]
- Schedule 8—Indexation;[8]
- Schedule 9—Closing energy supplement to new welfare recipients;[9]
- Schedule 10—Stopping the payment of the pension supplement after six weeks overseas;[10]
- Schedule 13—Ordinary Waiting Periods;[11]
- Schedule 14—Age requirements for various Commonwealth payments;[12]
- Schedule 15—Income support waiting periods;[13] and
- Schedule 16—Other waiting period amendments.[14]

1.186 The bill also seeks to introduce the following new measures, which are also compatible with Australia's international human rights obligations:

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6 Previously contained within the Social Services Legislation Amendment (Budget Repair) Bill 2016. See Parliamentary Joint Committee on Human Rights, *Report 7 of 2016* (11 October 2016) 99-101.

7 Previously contained within the Social Services Legislation Amendment (Budget Repair) Bill 2016. See Parliamentary Joint Committee on Human Rights, *Report 7 of 2016* (11 October 2016) 99-101.

8 Previously contained within the Social Services Legislation Amendment (Budget Repair) Bill 2016. See Parliamentary Joint Committee on Human Rights, *Report 7 of 2016* (11 October 2016) 99-101.

9 Previously contained within Budget Savings (Omnibus) Bill 2016. See Parliamentary Joint Committee on Human Rights, *Report 7 of 2016* (11 October 2016) 2-11.

10 Previously contained within the Social Services Legislation Amendment (Budget Repair) Bill 2016. See Parliamentary Joint Committee on Human Rights, *Report 7 of 2016* (11 October 2016) 99-101.

11 Previously contained within the Social Services Legislation Amendment (Youth Employment) Bill 2016. See Parliamentary Joint Committee on Human Rights, *Report 7 of 2016* (11 October2016) 99-101.

12 Previously contained within the Social Services Legislation Amendment (Youth Employment) Bill 2016. See Parliamentary Joint Committee on Human Rights, *Report 7 of 2016* (11 October 2016) 99-101.

13 Previously contained within the Social Services Legislation Amendment (Youth Employment) Bill 2016. See Parliamentary Joint Committee on Human Rights, *Report 7 of 2016* (11 October 2016) 99-101.

14 Previously contained within the Social Services Legislation Amendment (Youth Employment) Bill 2016. See Parliamentary Joint Committee on Human Rights, *Report 7 of 2016* (11 October 2016) 99-101.

- Schedule 11—Automation of income stream review processes; and
- Schedule 12—Seasonal horticultural work income exemption.

Paid parental leave

1.187 The bill also contains the following schedules in respect of paid parental leave (PPL):

- Schedule 17—Adjustment for primary carer pay and other amendments;[15] and
- Schedule 18— Removal of parental leave pay mandatory employer role.[16]

1.188 The measures in Schedule 17 of this bill seek to amend the PPL Act to provide that primary caregivers of newborn children will no longer receive both employer-provided primary carer leave payments and the full amount of parental leave pay under the government-provided PPL scheme. However, the proposed changes will commence from the first 1 January, 1 April, 1 July or 1 October that is nine months after the date the Act receives Royal Assent, with an earliest commencement date of 1 January 2018.[17]

Compatibility of the measure with human rights

1.189 The committee examined such measures most recently in its consideration of the Fairer Paid Parental Leave Bill 2016 (2016 bill).[18]

1.190 The previous human rights assessments of the measures contained in the 2016 bill considered that the measures engage the right to social security, work and maternity leave, and equality and non-discrimination. However, the human rights assessment of the 2016 bill noted that there were questions as to the proportionality of the reintroduced measures on the basis that it had the potential to reduce the amount of payments for expectant parents, or recent parents, who may have been anticipating both employer-provided and government-provided payments.[19]

1.191 As the current bill will no longer reduce or remove payments to parents who are already pregnant at the time of passage of the bill, they address concerns

15 Previously contained within the Fairer Paid Parental Leave Bill 2016. See Parliamentary Joint Committee on Human Rights, *Report 8 of 2016* (9 November 2016) 2-5.

16 Previously contained within the Fairer Paid Parental Leave Bill 2016. See Parliamentary Joint Committee on Human Rights, *Report 8 of 2016* (9 November 2016) 2-5.

17 Explanatory memorandum (EM) 173.

18 See Parliamentary Joint Committee on Human Rights, *Report 8 of 2016* (9 November 2016). The committee previously examined the measures contained in the Paid Parental Leave Amendment Bill 2014 (2014 bill) and Fairer Paid Parental Leave Bill 2015 (2015 bill) in its *Fifth report of the 44th Parliament* (25 March 2014) 13-16; *Eighth report of the 44th Parliament* (24 June 2014) 54-57; *Twenty-fifth report of the 44th Parliament* (11 August 2015) 47-55; and *Thirty-seventh report of the 44th Parliament* (2 May 2016) 36-44.

19 Parliamentary Joint Committee on Human Rights, *Report 8 of 2016* (9 November 2016) 2-5.

regarding the proportionality of the measures. The committee has concluded its observations on the 2016 bill at chapter 2.

Committee comment

1.192 **The committee draws the above analysis to the attention of the Parliament.**

Autonomous Sanctions (Designated Persons and Entities – Democratic People's Republic of Korea) Amendment List 2016 (No 2) [F2016L01861]

Autonomous Sanctions (Designated Persons and Entities – Democratic People's Republic of Korea) Amendment List 2016 (No 3) [F2016L01862]

Charter of the United Nations (Sanctions-Democratic People's Republic of Korea) Amendment Regulation 2016 [2016L01829]

Purpose	To apply the operation of the sanctions regime under the Autonomous Sanctions Regulations 2011 and the *Charter of the United Nations Act 1945* by designating or declaring that a person is subject to the sanctions regime and by giving effect to decisions of the United Nations Security Council
Portfolio	Foreign Affairs
Authorising legislation	*Autonomous Sanctions Act 2011* and the *Charter of the United Nations Act 1945*
Last day to disallow	9 May 2017
Rights	Privacy; fair hearing; protection of the family; equality and non-discrimination; adequate standard of living; freedom of movement; non-refoulement (see **Appendix 2**)
Status	Advice only

Background

1.193 The Autonomous Sanctions (Designated Persons and Entities – Democratic People's Republic of Korea) Amendment List 2016 (No 2) and (No 3) are made under the *Autonomous Sanctions Act 2011*. This Act (in conjunction with the Autonomous Sanctions Regulations 2011 and various instruments made under those regulations) provides the power for the government to impose broad sanctions to facilitate the conduct of Australia's external affairs (the autonomous sanctions regime). The Charter of the United Nations (Sanctions-Democratic People's Republic of Korea) Amendment Regulation 2016 is made under the *Charter of the United Nations Act 1945*. This Act (in conjunction with various instruments made under that Act)[1] gives

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

the Australian government the power to apply sanctions to give effect to decisions of the United Nations Security Council by Australia (the UN Charter sanctions regime).[2]

1.194 An initial human rights analysis of various instruments made under both sanctions regime is contained in the *Sixth report of 2013* and *Tenth report of 2013*.[3] A further detailed analysis of various instruments made under both sanctions regime is contained in the *Twenty-eighth report of the 44th Parliament* and *Thirty-third report of the 44th Parliament.*[4] This analysis stated that, as the instruments under consideration expanded or applied the operation of the sanctions regime by designating or declaring that a person is subject to the sanctions regime, or by amending the regime itself, it was necessary to assess the human rights compatibility of the autonomous sanctions regime and aspects of the UN Charter sanctions regime as a whole when considering instruments which expand the operation of the sanctions regime. A further response was therefore sought from the minister, which was considered in the committee's *Report 9 of 2016*.[5] The committee concluded its examination of various instruments and made a number of recommendations to ensure the compatibility of the sanctions regimes with human rights.[6]

'Freezing' of designated person's assets and prohibition on travel

1.195 On the basis that the minister is satisfied that a person or entity is associated with the Democratic People's Republic of Korea's weapons of mass-destruction program or missiles program, the instruments designate persons and entities for the purposes of the Autonomous Sanctions Regulations 2011, such that this person or entity is subject to financial sanctions, and cannot travel to, enter, or remain in Australia[7] (or their designation or declaration is continued).[8] In addition, the Charter

2 Note, together the autonomous sanctions regime and the UN Charter sanctions regime are referred to as the 'sanctions regimes'.

3 See Parliamentary Joint Committee on Human Rights, *Sixth report of 2013* (15 May 2013) 135-137; and *Tenth report of 2013* (26 June 2013) 13-19 and 20-22.

4 See Parliamentary Joint Committee on Human Rights, *Twenty-eighth report of the 44th Parliament* (17 September 2015) 15-38; and *Thirty-third report of the 44th Parliament* (2 February 2016) 17-25.

5 Parliamentary Joint Committee on Human Rights, *Report 9 of 2016* (22 November 2016) 41-55.

6 Parliamentary Joint Committee on Human Rights, *Report 9 of 2016* (22 November 2016) 41-55 at 53.

7 See Autonomous Sanctions (Designated Persons and Entities – Democratic People's Republic of Korea) Amendment List 2016 (No 3). Section 6(1) of the Autonomous Sanctions Regulations 2011 provides that for the purposes of paragraph 10(1)(a) of the *Autonomous Sanctions Act 2011*, which empowers the minister to make regulations for the purpose of imposing sanctions, the minister may, by legislative instrument: (a) designate a person or entity mentioned in an item of the table as a designated person or entity for the country mentioned in the item; (b) declare a person mentioned in an item of the table for the purpose of preventing the person from travelling to, entering or remaining in Australia.

of the United Nations (Sanctions-Democratic People's Republic of Korea) Amendment Regulation 2016 expands the basis on which the Minister can designate a person as subject to the UN Charter sanctions regime.[9]

Compatibility of the measure with multiple human rights

1.196 As set out in the committee's previous consideration of the sanctions regimes, the measures in these instruments engage and limit multiple human rights. The statements of compatibility for these instruments do not identify the relevant human rights engaged or provide any analysis in relation to the issues identified in the committee's previous reports.

1.197 The committee has previously recognised that applying pressure to regimes and individuals with a view to ending the repression of human rights internationally is a legitimate objective that may support limitations on human rights. However, in relation to the decision to designate or declare a person under the sanctions regimes, the committee's *Report 9 of 2016* set out in detail how each of the identified safeguards in the sanctions regimes are insufficient, and why the sanctions regimes are thereby not proportionate limitations on human rights.[10]

1.198 The committee therefore made a number of recommendations to the minister in respect of the sanctions regimes.[11]

Committee comment

1.199 **The committee refers to its previous consideration of the sanctions regimes, and in particular, the recommendations made by the committee in its *Report 9 of 2016.***

1.200 **The committee notes its disappointment that the statements of compatibility for instruments expanding the operation of the sanctions regimes, in relation to the designation or declaration of a person as subject to the sanctions regime, do not address the human rights issues consistently raised by the committee in its reports since 2013.**

1.201 **The committee draws the human rights implications of the sanctions regimes, and the expansion of these regimes by the instruments under consideration, to the attention of the Parliament.**

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8 See Autonomous Sanctions (Designated Persons and Entities – Democratic People's Republic of Korea) Amendment List 2016 (No 2).

9 See item 11, section 4A of the Charter of the United Nations (Sanctions-Democratic People's Republic of Korea) Amendment Regulation 2016.

10 See Parliamentary Joint Committee on Human Rights, *Twenty-eighth report of the 44th Parliament* (17 September 2015) 15-38, 21.

11 Parliamentary Joint Committee on Human Rights, *Report 9 of 2016* (22 November 2016) 53.

Bills not raising human rights concerns

1.202 Of the bills introduced into the Parliament between 13 and 16 February 2017, the following did not raise human rights concerns (this may be because the bill does not engage or promotes human rights, and/or permissibly limits human rights):

- Australian Broadcasting Corporation Amendment (Restoring Shortwave Radio) Bill 2017;
- Commonwealth Electoral Amendment (Donation Reform and Transparency) Bill 2017;
- Crimes Amendment (Penalty Unit) Bill 2017;
- Disability Services Amendment (Linking Upper Age Limits for Disability Employment Services to Pension Age) Bill 2017;
- Education and Other Legislation Amendment Bill (No. 1) 2017;
- Fair Work Amendment (Repeal of 4 Yearly Reviews and Other Measures) Bill 2017;
- Infrastructure Australia Amendment (Social Sustainability) Bill 2017;
- Parliamentary Entitlements Amendment (Ending the Rorts) Bill 2017;
- Personal Property Securities Amendment (PPS Leases) Bill 2017;
- Social Security Legislation Amendment (Fair Debt Recovery) Bill 2017;
- Treasury Laws Amendment (GST Low Value Goods) Bill 2017; and
- Treasury Laws Amendment (Working Holiday Maker Employer Register) Bill 2017.