

## Chapter 2

### Concluded matters

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

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

### **Australian Broadcasting Corporation Amendment (Fair and Balanced) Bill 2017**

|                        |  |
|------------------------|--|
| <b>Purpose</b>         | Amends the <i>Australian Broadcasting Corporation Act 1983</i> to introduce a requirement in the Australian Broadcasting Corporation's (ABC) Charter that the ABC's news services be 'fair' and 'balanced' |
| <b>Portfolio</b>       | Communications   |
| <b>Introduced</b>      | Senate, 18 October 2017  |
| <b>Right</b>           | Freedom of Expression (see <b>Appendix 2</b> )   |
| <b>Previous report</b> | 12 of 2017   |
| <b>Status</b>          | Concluded examination  |

#### **Background**

2.3 The committee first reported on the Australian Broadcasting Corporation Amendment (Fair and Balanced) Bill 2017 (the bill) in its *Report 12 of 2017*, and requested a response from the Minister for Communications by 13 December 2017.<sup>1</sup>

2.4 The minister's response to the committee's inquiries was received on 14 December 2017. The response is discussed below and is reproduced in full at **Appendix 3**.

#### **Addition of the words 'fair' and 'balanced' to the ABC Charter**

2.5 The bill seeks to insert the words 'fair, balanced' into the existing section 8(1)(c) of the *Australian Broadcasting Corporation Act 1983* (the ABC Act) requirement that news and information is 'accurate and impartial'. The effect of the amendment would therefore be to broaden the duties of the Board of the Australian Broadcasting Corporation (ABC) such that the Board has a duty 'to ensure that the

1 Parliamentary Joint Committee on Human Rights, *Report 12 of 2017* (28 November 2017) pp. 6-9.

gathering and presentation by the Corporation of news and information is fair, balanced, accurate and impartial according to the recognized standards of objective journalism'.<sup>2</sup> Neither of these terms is defined in the bill.

### ***Compatibility of the measure with the right to freedom of expression***

2.6 The right to freedom of expression requires states parties to the International Covenant on Civil and Political Rights (ICCPR) to ensure that broadcasting services operate in an independent manner and should guarantee their editorial freedom.<sup>3</sup> By introducing new duties on the ABC Board relating to the gathering and presentation of news and information, the bill engages and limits editorial freedom, and therefore may limit the freedom of expression.

2.7 The right to freedom of expression may be subject to limitations that are necessary to protect the rights or reputations of others, national security, public order, or public health or morals. In order for a limitation to be permissible under international human rights law, limitations must be prescribed by law, pursue a legitimate objective, be rationally connected to the achievement of that objective and be a proportionate means of achieving that objective.<sup>4</sup>

2.8 As set out in the initial human rights analysis, the statement of compatibility acknowledges that the right to freedom of expression is engaged, however, it further notes that to the extent the bill limits or restricts this freedom, it does so for a legitimate objective and is reasonable, necessary and proportionate.<sup>5</sup>

2.9 In relation to the objective of the measure, the statement of compatibility states:

[Requiring] [t]he ABC to be fair and balanced according to the recognised standards of objective journalism is a necessary and legitimate objective. The Australian people expect a publicly funded broadcaster to canvass a broad range of issues, and report on those issues in a fair and balanced manner. There is also a strong public interest in ensuring that Australians have confidence that they can rely on the ABC as a source of information to inform their views on significant issues. A statutory requirement for fair and balanced reporting will promote such confidence by the Australian people.

The fair and balanced requirement is also necessary to protect the rights and reputations of those who are the subject of ABC reporting. The Bill will require the ABC Board to ensure that any news or information relating to, for example, a particular person or group, is presented to the public in a

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2 Section 8(1)(c) of the ABC Act.

3 See Human Rights Committee, *General comment No 34 (Article 19: Freedoms of opinion and expression)*, CCPR/C/GC/34, [16] (2011).

4 See, generally, Human Rights Committee, *General comment No 34 (Article 19: Freedoms of opinion and expression)*, CCPR/C/GC/34 (2011) [21-36].

5 Statement of Compatibility (SOC), p. 5.

fair and balanced manner, thereby ensuring that an impartial view, supported by evidence, is put forward in relation to that person or group. The fair and balanced requirement would not require every perspective of an issue to receive equal time, nor every facet of an argument to be explored. However, it will require openness and impartiality in relation to the pertinent issues.<sup>6</sup>

2.10 The initial analysis stated that these objectives are capable of constituting legitimate objectives for the purposes of international human rights law. However, the statement of compatibility provides limited information as to the importance of these objectives in the context of the particular measure. To be capable of justifying a proposed limitation on human rights, a legitimate objective must address a pressing or substantial concern and not simply seek an outcome regarded as desirable or convenient.

2.11 A relevant factor in determining whether a limitation on the freedom of expression is proportionate is whether the law specifies the precise circumstances in which interferences may be permitted. The words 'fair' and 'balanced' are not defined in the bill and it is not clear from the explanatory memorandum the intended meaning of the proposed amendments, and how the words 'fair' and 'balanced' differ from the existing requirement that ABC reporting be 'accurate and impartial'.

2.12 It was noted that the ABC's editorial policy on impartiality states that the concept of 'impartiality' includes the principles of 'fair treatment' and 'balance that follows the weight of the evidence'.<sup>7</sup> The editorial policy notes that requiring 'balance that follows the weight of the evidence' prevents 'false balance' that may occur if the ABC was required to provide equal time to every facet of every argument regardless of the weight of evidence attached to each argument.<sup>8</sup> The principle of 'fair treatment' under the editorial policy requires the ABC to be fair-minded in its treatment of people and ideas, including for example refraining from taking unfair advantage of a participant who is distressed or vulnerable.<sup>9</sup>

2.13 The statement of compatibility explains that the 'fair and balanced requirement in legislation would complement these current Editorial Policies',<sup>10</sup> and additionally notes that 'the fair and balanced requirement would not require every perspective of an issue to receive equal time, nor every facet of an argument to be

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6 SOC, p. 5.

7 ABC Editorial Policies, *Editorial Guidance Note: Impartiality* (2014) <https://edpols.abc.net.au/guidance/impartiality/>.

8 ABC Editorial Policies, *Editorial Guidance Note: Impartiality* (2014) <https://edpols.abc.net.au/guidance/impartiality/>.

9 ABC Editorial Policies, *Editorial Guidance Note: Impartiality* (2014) <https://edpols.abc.net.au/guidance/impartiality/>.

10 SOC, p. 5.

explored'.<sup>11</sup> However, as the terms are not defined, it is unclear on the face of the legislation whether it is proposed that the words 'fair' and 'balanced' bear the same or a different meaning as the context in which they are used in the ABC editorial policies relating to impartiality.

2.14 If the words 'fair' and 'balanced' are taken to have the same meaning as the context in which they are used in the ABC editorial policy on impartiality, it is not clear why the measure is necessary or addresses a pressing or substantial concern. If the words have a different meaning, questions arise as to whether the law is sufficiently circumscribed to constitute a proportionate limitation on editorial freedom. For example, there is a risk that the concept of 'balance' could be construed to require differing viewpoints be presented in a way that is not consistent with the weight of evidence when it supports one perspective over another.

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

- whether there is reasoning or evidence that establishes that the stated objective addresses a pressing or substantial concern or whether the proposed changes are otherwise aimed at achieving a legitimate objective;
- how the measure is effective to achieve (that is, rationally connected to) that objective; and
- whether the limitation is proportionate, including information as to the meaning of the words 'fair' and 'balanced', and whether those words are intended to have the same meaning in the bill as those words used in the ABC's editorial policy on impartiality.

### **Minister's response**

2.16 The minister's response provides the following information on whether there is reasoning or evidence that the stated objective addresses a pressing or substantial concern, and whether the measure is effective to achieve the objective:

While the Australian Broadcasting Corporation's (ABC) Editorial Policies cover 'fair treatment' and 'a balance that follows the weight of evidence', these are only internal policies that can be amended at any time. The legitimate object[ive] of the Bill is to give certainty that it is a duty of the Board to ensure that the ABC's gathering and presentation of news and information is 'fair' and 'balanced' according to the recognised standards of objective journalism.

The purpose of the Bill is to provide certainty that the ABC continues to present its news and information in a 'fair' and 'balanced' manner. There is no other way to achieve this obligation in respect of the Board's duty, other than through legislation. The ABC's Editorial Policies, while a robust document, could be amended at any time to disregard such an important part of providing professional and steadfast journalistic news and

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11 SOC, p. 5.

information services. The Bill will ensure that 'fair' and 'balanced' reporting will be a duty of the Board as the obligation will be embedded in legislation.

2.17 As noted in the initial analysis, a legitimate objective must be one that addresses a pressing or substantial concern, and not merely an outcome that is desirable or convenient. The minister's response clarifies that embedding the requirement of 'fair' and 'balanced' reporting in legislation provides greater certainty of the ABC Board's duties than if those requirements remain in editorial policies, as such policies are able to be changed at any time. On balance and in light of the minister's response, this is likely to be a legitimate objective for the purposes of international human rights law.

2.18 In relation to whether the limitation is proportionate and in particular the intended meaning of the words 'fair' and 'balanced' in the legislation, the minister's response states:

The ABC's own Editorial Policies require the ABC to adhere to fair treatment in the gathering and presentation of news and information, and a balance in its news reporting that follows the weight of evidence. The measure contained in this Bill aims to create unity between the ABC Act and the ABC Editorial Policies; it merely protects this obligation in legislation.

2.19 The statement of compatibility and the minister's response indicate that the words 'fair' and 'balanced' are intended to have the same meaning as those words as they are used in the ABC editorial policy, such that the amendments 'create unity' between the legislation and editorial policies by protecting the obligation in legislation in addition to the editorial policy. The minister's clarification, coupled with the existing obligations in the ABC Act that 'fair' and 'balanced' reporting must also be 'accurate and impartial *according to the recognized standards of objective journalism*',<sup>12</sup> supports a conclusion that on balance the measures are likely to be proportionate for the purposes of international human rights law.

### **Committee response**

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

**2.21 On balance and in light of the information provided by the minister, the committee considers that the measures are likely to be compatible with the right to freedom of expression.**

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12 Section 8(1)(c) of the ABC Act.

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

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|--------------------------------|---|
| <b>Purpose</b>                 | Provides for matters necessary for the effective operation and administration of the <i>Corporations (Aboriginal and Torres Strait Islander) Act 2006</i> |
| <b>Portfolio</b>               | Prime Minister and Cabinet  |
| <b>Authorising legislation</b> | <i>Corporations (Aboriginal and Torres Strait Islander) Act 2006</i>  |
| <b>Last day to disallow</b>    | 7 December 2017   |
| <b>Right</b>                   | Privacy (see <b>Appendix 2</b> )  |
| <b>Previous report</b>         | 13 of 2017  |
| <b>Status</b>                  | Concluded examination   |

### Background

2.22 The committee first reported on the Corporations (Aboriginal and Torres Strait Islander) Regulations 2017 (the regulations) in its *Report 13 of 2017*, and requested a response from the Minister for Indigenous Affairs by 20 December 2017.<sup>1</sup>

2.23 The minister's response to the committee's inquiries was received on 18 December 2017. The response is discussed below and is reproduced in full at **Appendix 3**.

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

2.24 Subregulation 55(1) of the regulations provides that, for the purposes of paragraph 658-1(1)(k) of the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (CATSI Act), the Registrar of Aboriginal and Torres Strait Islander Corporations (registrar) has the function of making certain documents, and information in those documents, available to the public. Subregulation 55(3) provides that these documents may include documents containing personal information within the meaning given by subsection 6(1) of the *Privacy Act 1988* (Privacy Act).<sup>2</sup>

1 Parliamentary Joint Committee on Human Rights, *Report 13 of 2017* (5 December 2017) pp. 17-18.

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

**Compatibility of the measure with the right to privacy**

2.25 The right to privacy includes respect for informational privacy, including the right to respect for private and confidential information, particularly the storing, use and sharing of such information; and the right to control the dissemination of information about one's private life.

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

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

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

2.29 The initial analysis stated that questions also arise as to whether the measure is proportionate. In order to be proportionate, limitations on the right to privacy must be no more extensive than what is strictly necessary to achieve the legitimate objective of the measure, and be accompanied by adequate safeguards to protect the right to privacy. It was noted that the registrar may make documents available to the public that (relevantly) the registrar 'considers appropriate to make available to the public'.<sup>3</sup> The initial analysis set out that it was not clear from the explanatory statement or statement of compatibility as to how, and under what circumstances, the registrar may consider it appropriate that documents (which may contain personal information) should be disclosed to the public. For example, it was not clear whether the registrar's state of satisfaction is subject to any objective criteria, such as a requirement that the registrar's consideration of appropriateness is reasonable.

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

- whether the measure pursues a legitimate objective;
- whether the measure is effective to achieve (that is, rationally connected to) that objective; and
- whether the measure is a proportionate means of achieving the objective (including whether any limitation on the right to privacy is the least rights-

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

restrictive measure available, and whether there are adequate safeguards in place to protect the right to privacy).

### Minister's response

2.31 The minister's response acknowledges that the right to privacy is engaged by the measure, but explains that safeguards are in place to ensure protection of individuals' privacy whilst ensuring that Aboriginal and Torres Strait Islander corporations are properly supported and regulated. Ensuring the proper regulation and support mechanisms for Aboriginal and Torres Strait Islander corporations is likely to be a legitimate objective.

2.32 The minister explains that documents and information that would be made public pursuant to subregulation 55(1) only relate to those documents and information that were created in the context of the predecessor to the CATSI Act, namely the *Aboriginal Councils and Associations Act 1976* (ACA Act), and includes documents or information filed or lodged with the registrar or served on the Registrar under the ACA Act, that are kept by the registrar under the ACA Act, or are given or served on a person by the Registrar under the ACA Act.

2.33 The minister's response provides a detailed explanation of the nature of the information the Registrar may make public, by reference to the Registrar's policy statements *PS-12: Registers and the use and disclosure of information held by the Registrar* and *PS-01: Providing information and advice*. *PS-01: Providing information and advice* provides that the nature of the information that the Registrar may make public is 'by its nature uncontroversial' and includes:

- the name or Indigenous Corporation Number of a corporation;
- publicly available details about a corporation appearing on the Registrar's website;
- publicly available information or documents on the Register of Aboriginal and Torres Strait Islander Corporations;
- providing copies of a corporation's rule book to its members;
- the address and contact details of the Registrar or staff;
- general information about what functions the Registrar performs;
- information about the Registrar's public education programs;
- official publications produced by the Registrar; and
- standard responses covered by the Registrar's publications.

2.34 The minister's response further explains that, in determining whether it is appropriate to make the information public, the Registrar will consider:

- whether the information or document would be exempt from disclosure under the CATSI Act (in which case the documents will not be disclosed);

- whether a third party gave the information to the Registrar and the information related to a particular corporation (such as information provided by a liquidator or administrator); and
- whether there is a public interest in releasing the information.

2.35 The minister also advises that as an additional safeguard, personal information in documents may be removed before release.

2.36 The minister's response explains other safeguards in place relating to the disclosure of personal information:

Paragraph 4.15 of PS-01: *Providing information and advice* states that: 'The Registrar is also bound by the Australian Privacy Principles in the *Privacy Act 1988* (Privacy Act), which regulate the collection, use, and storage and collection of personal information. Information received from individuals will be dealt with in accordance with these statutory requirements...'

Paragraphs 7.1 to 7.8 of the Registrar's policy statement PS-15: *Privacy*, outlines the privacy obligations of the Registrar with respect to the use and disclosure of protected information. This applies to any equivalent material contained in documents created under the ACA Act that are held by the Registrar.

The Office of the Registrar of Indigenous Corporations (ORIC) has also published a privacy statement on its website to demonstrate its commitment to protect the privacy of officers of Aboriginal and Torres Strait Islander corporations. This statement can be found at <http://www.oric.gov.au/privacy-statement>. As ORIC is part of the Department of the Prime Minister and Cabinet (PM&C), it is also bound by PM&C's Privacy Policy.

Through the matters outlined in the relevant policy statements and the published privacy statements of ORIC and PM&C (published for the purposes of Australian Privacy Principles 1.3-1.5) as outlined above, the Registrar and ORIC are committed to the protection of the privacy of individuals in accordance with the Privacy Act. This includes any documents or information falling within the scope of section 55 of the CATSI Regulations.

2.37 It is noted that the Australian Privacy Principles in the *Privacy Act 1988* are not a complete answer to concerns about interference with the right to privacy in this context, as those principles contain a number of exceptions to the prohibition on disclosure of personal information.<sup>4</sup> It is also noted that policy guidance in the form of policy statements and privacy statements offer less protection than statutory processes, as they can be amended at any time. However, having regard to the

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4 For example an agency may disclose personal information or a government related identifier of an individual where its use or disclosure is required or authorised by or under an Australian Law: Australian Privacy Principles 6.2(b) and 9.

limited nature of the information that is likely to be disclosed and the requirements to which the Registrar must have regard before disclosing the information (including that disclosure be in the public interest), on balance the measure is likely to be compatible with the right to privacy.

### **Committee response**

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

**2.39 The preceding analysis indicates that the measure is likely to be compatible with the right to privacy.**

## Defence Legislation Amendment (Instrument Making) Bill 2017

|                        |   |
|------------------------|---|
| <b>Purpose</b>         | Amends the instrument making powers in the <i>Defence Act 1903</i> , including replacing a number of inquiry-specific regulation-making powers with a consolidated provision relating to inquiries concerning the Defence Force; enabling the minister to declare an area to be a defence aviation area in which buildings and objects can be regulated for the purposes of removing and reducing hazards to defence aviation; subjecting certain regulations to monitoring under the <i>Regulatory Powers (Standard Provisions) Act 2014</i> ; establishing an infringement notice scheme in declared public areas |
| <b>Portfolio</b>       | Defence   |
| <b>Introduced</b>      | House of Representatives, 14 September 2017   |
| <b>Rights</b>          | Multiple Rights (see <b>Appendix 2</b> )  |
| <b>Previous report</b> | 12 of 2017  |
| <b>Status</b>          | Concluded examination   |

### Background

2.40 The committee first reported on the Defence Legislation Amendment (Instrument Making) Bill 2017 (the bill) in its *Report 12 of 2017*, and requested a response from the Minister for Defence by 13 December 2017.<sup>1</sup>

2.41 The bill passed both Houses of Parliament on 16 November 2017 and received Royal Assent on 30 November 2017.

2.42 The minister's response to the committee's inquiries was received on 19 December 2017. The response is discussed below and is reproduced in full at **Appendix 3**.

### Amendment to the power to make regulations for inquiries

2.43 At present, the Defence (Inquiry) Regulations 1985 (the Inquiry Regulations) set out the different types of inquiries that can be undertaken in the Defence Force. These currently include General Courts of Inquiry, Boards of Inquiry, Combined Boards of Inquiry, Chief of the Defence Force Commissions of Inquiry, and Inquiry Officer Inquiries.

1 Parliamentary Joint Committee on Human Rights, *Report 12 of 2017* (28 November 2017) pp. 10-15.

2.44 The power to make those regulations is presently set out in section 124(1)(gc) of the *Defence Act 1903* (Defence Act), which provides that the Governor-General may make regulations providing for and in relation to 'the appointment, procedures and powers of courts of inquiry, boards of inquiry, Chief of the Defence Force commissions of inquiry, inquiry officers and inquiry assistants'. The bill amends this provision of the Defence Act and replaces it with a general power to make regulations relating to 'inquiries concerning the defence force'.<sup>2</sup>

2.45 The bill also amends several provisions that deal with the other powers included within the power to make regulations for inquiries, so as to replace the references to specific types of inquiry with a more general reference to 'an inquiry'. This includes amendments to the use and derivative use immunity provisions in the Defence Act.<sup>3</sup>

### ***Compatibility of the measure with the right to a fair trial and fair hearing***

2.46 The right to a fair trial and fair hearing is protected by article 14 of the International Covenant on Civil and Political Rights (ICCPR). The right applies to both criminal and civil proceedings and to cases before both courts and tribunals, whether ordinary or specialised, civilian or military.<sup>4</sup> The right is concerned with procedural fairness, and encompasses notions of equality in proceedings, the right to a public hearing and the requirement that hearings are conducted by an independent and impartial body.

2.47 The statement of compatibility states that the amendment allows greater flexibility in naming inquiries in the regulations, but does not change the substance of the regulation-making power. However, the initial analysis noted that the power to make regulations in relation to inquiries remains very broad, extending to the 'appointment, procedures and powers' of inquiries. Matters currently dealt with by the Inquiry Regulations include the conduct of inquiries, the manner of taking evidence, and the duties of witnesses (including obligations to answer questions).<sup>5</sup> The committee has previously commented that the Inquiry Regulations engage fair trial and fair hearing rights.<sup>6</sup> It is likely therefore that any new regulations enacted

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2 See item 2 of the Bill. Proposed section 124(1)(gc) goes on to note several exceptions to this regulation-making power in relation to certain inquiries, namely inquiries conducted by the Defence Force Remuneration Tribunal under Part IIIA of the Act; or the Inspector-General ADF under Part VIIIB; or the Defence Honours and Awards Appeals Tribunal under Part VIIC.

3 See sections 124(2A) and 124(2C) of the Defence Act.

4 UN Human Rights Council, *General Comment No.32: Article 14, Right to equality before courts and tribunals and to fair trial* (2006) [22].

5 See, *Defence (Inquiry) Regulations 1985*. See also Parliamentary Joint Committee on Human Rights, *Twenty-Third Report of the 44<sup>th</sup> Parliament* (18 June 2015) pp. 18-21.

6 See also, Parliamentary Joint Committee on Human Rights, *Twenty-Third Report of the 44<sup>th</sup> Parliament* (18 June 2015) pp. 18-21.

pursuant to the broad regulation-making power proposed by the bill would also engage fair trial and fair hearing rights.

2.48 The committee has previously commented on some of the safeguards contained in the current Inquiry Regulations. In particular, the committee concluded that the use and derivative immunity use provisions in the current Inquiry Regulations appear to be consistent with the right not to incriminate oneself under international human rights law.<sup>7</sup> However, the initial analysis noted that it is not clear whether other safeguards will be in place to ensure that the inquiries established pursuant to the broader regulation-making power proposed by the bill are compatible with the right to a fair trial and fair hearing. International human rights law generally requires that states have sufficient safeguards in place to prevent violations of human rights occurring. Without adequate safeguards, it is possible that the broad regulation-making power may be exercised in such a way as to be incompatible with the right to a fair trial and a fair hearing.<sup>8</sup>

2.49 The initial analysis stated that any proposed legislative instrument revising the Inquiry Regulations will need to ensure that the powers in relation to defence inquiries are applied in a manner compatible with human rights. This includes safeguards to ensure that, where the rights of individuals may arise from an inquiry, the inquiries are established to ensure the equitable, impartial and independent administration of justice so as to ensure that such an inquiry takes place under conditions that genuinely afford the guarantees stipulated in the ICCPR.<sup>9</sup>

2.50 In its initial analysis in *Report 12 of 2017*, the committee stated that it will consider the human rights compatibility of any proposed regulations in relation to defence inquiries once they are received.

### **Use of force in executing warrants**

2.51 The bill additionally seeks to incorporate the standard provisions in Part 2 of the *Regulatory Powers (Standard Provisions) Act 2014* (Regulatory Powers Act) for monitoring whether the regulations in relation to 'defence aviation areas' are being complied with.<sup>10</sup> This includes monitoring powers such as powers of entry and inspection,<sup>11</sup> and the requirement that a warrant may be issued if an issuing officer is

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7 See, Parliamentary Joint Committee on Human Rights, *Twenty-Third Report of the 44<sup>th</sup> Parliament* (18 June 2015) p. 21.

8 See, for example, Human Rights Committee, Freedom of movement (Art.12), UN DocCCPR/C/21/Rev.1/Add.9, General Comment No.27, *Pinkney v Canada* HRC Communication No. 27/1977, UN Doc CCPR/C/14/D/27/1977; *Hasan and Chaush v Bulgaria* ECHR 30985/96 (26 October 2000) [84].

9 UN Human Rights Council, *General Comment No.32: Article 14, Right to equality before courts and tribunals and to fair trial* (2006) [22].

10 Within defence aviation areas, buildings and objects can be regulated for the purposes of removing and reducing hazards to defence aviation.

11 See for example sections 18 and 19 of the *Regulatory Powers (Standard Provisions) Act 2014*.

satisfied, by information on oath or affirmation, that it is reasonably necessary that one or more authorised persons have access to a premises.<sup>12</sup>

2.52 The bill would also introduce a new section setting out modifications to the application of the Regulatory Powers Act in relation to defence aviation areas, including powers for authorised persons to enter land to take action such as the removal, destruction or modification of a building, structure or objects within a defence aviation area, for the purpose of ensuring compliance with the regulations. The bill also introduces new section 117AF(3) which provides:

(3) In executing a monitoring warrant for the purposes mentioned in paragraph (1)(a) [i.e. the purpose of ensuring compliance with the monitored provision]:

(a) an authorised person may use such force against persons and things as is necessary and reasonable in the circumstances; and

(b) a person assisting the authorised person may use such force against things as is necessary and reasonable in the circumstances.

2.53 An 'authorised person' is a 'defence aviation area inspector',<sup>13</sup> who is a person appointed as such by the Secretary or Chief of Defence Force and may include an APS employee in the Department and a member of the Defence Force.<sup>14</sup>

### ***Compatibility with the right to life***

2.54 The right to life is protected by article 6(1) of the ICCPR and article 1 of the Second Optional Protocol to the ICCPR. The right to life has three core elements to it:

- it prohibits the state from arbitrarily killing a person;
- it imposes an obligation on the state to protect people from being killed by others or identified risks; and
- it requires the state to undertake an effective and proper investigation into all deaths where the state is involved.

2.55 The statement of compatibility states that this aspect of the bill does not engage any applicable rights and freedoms.<sup>15</sup> However, empowering authorised persons to use force against persons may engage and limit the right to life, as force may be used in a manner that could lead to a loss of life.

2.56 A measure that limits the right to life may be justifiable if it is demonstrated that it addresses a legitimate objective, is rationally connected to that objective and is a proportionate means of achieving that objective. As no information was provided in the statement of compatibility, the initial analysis assessed that it was not possible

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12 Section 32(2) of the *Regulatory Powers (Standard Provisions) Act 2014*.

13 See proposed section 117AE(2)(b) of the bill.

14 See proposed section 117AG(1) of the bill.

15 SOC [6].

to determine the extent to which the right to life may be engaged and limited, and whether such a limitation is permissible.

2.57 Questions arise because there is no definition of what constitutes 'force' (including whether it includes lethal force) and what safeguards are in place governing the use of force. It is noted that there is a requirement that a person not be appointed a defence aviation area inspector unless the appointer 'is satisfied that the person has the knowledge, training or experience necessary to properly exercise the powers of a defence aviation area inspector',<sup>16</sup> but there is no information as to whether that knowledge, training or experience includes specific training in relation to the use of force in the context of executing warrants. Further, while the use of force is limited to 'such force against persons as is necessary and reasonable in the circumstances',<sup>17</sup> no information is provided in the statement of compatibility as to whether there is any oversight over the exercise of that power, such as consideration of any particular vulnerabilities of the person who is subjected to the use of force, and any access to review to challenge the use of force.

2.58 The committee therefore sought the advice of the minister as to the compatibility of the measure with this right, including:

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

***Compatibility with the right to freedom from torture, cruel, inhuman and degrading treatment or punishment***

2.59 Article 7 of the ICCPR and the Convention against Torture provide an absolute prohibition against torture, cruel, inhuman or degrading treatment or punishment. This means torture can never be justified under any circumstances, regardless of the objective sought to be achieved. The aim of the prohibition is to protect the dignity of the person and relates not only to acts causing physical pain but also those that cause mental suffering.

2.60 As noted above, the statement of compatibility states that this aspect of the bill does not engage any applicable rights and freedoms.<sup>18</sup> However, empowering persons to use force against other persons may engage these rights, as force may be used in such a way that causes pain (physical or mental) in such a way that it amounts to a violation of Article 7.

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16 Proposed section 117AG(2) of the bill.

17 See proposed section 117AF(3) of the bill.

18 SOC [6].

2.61 The initial analysis noted that there are concerns as to whether the breadth of the proposed powers may lead to an authorised person taking action that may constitute degrading treatment for the purposes of international human rights law. As set out above at [2.56] and [2.57], questions arise as to what constitutes 'force', whether there are adequate safeguards in place in relation to the use of force, and whether there is any monitoring or oversight over the exercise of the use of force, such as consideration of any particular vulnerabilities of the person who is subjected to the use of force, and any access to review to challenge the use of force.

2.62 The committee therefore sought the advice of the minister as to the compatibility of the measure with this right, including any safeguards in place governing the use of force, and any monitoring or oversight in relation to the use of force.

### **Minister's response**

2.63 The minister's response provides the following information in relation to the committee's inquiries:

While in most cases Defence can reach agreement with landowners regarding aviation hazards, the powers referred to in the new provisions of the Bill are important because they provide guidance in the event that agreement is not possible. The provision relating to use of force is aimed at achieving a legitimate objective, being the removal or reduction of hazards to defence aviation to enhance the safety of defence aviation.

Under new subsection 117AF(3), use of force against a person is limited to defence aviation area inspectors. Before appointing a defence aviation area inspector, the Secretary or the Chief of the Defence Force must be satisfied that the person has the knowledge, training or experience necessary to properly exercise the powers of a defence aviation area inspector. Since those powers include the power to use necessary and reasonable force, this will require the person to have sufficient knowledge, training or experience necessary to properly exercise the power to use force.

Importantly, the use of force is limited to what is necessary and reasonable. Factors that may be relevant in determining what is reasonable include the urgency of the aviation situation, other avenues that may be available to remove or reduce the hazard, the effect not removing or reducing the hazard will have on safety or operational requirements, and the particular circumstances of the person in question. Apart from a situation involving self-defence, it is difficult to imagine a scenario which would justify the deliberate use of lethal force or force that would cause serious injury to a person.

If a defence aviation area inspector used force beyond what was necessary or reasonable, they would be subject to the ordinary criminal law, and could be investigated and prosecuted the same as any other person. A

person subjected to the use of force would be able to report to the police or complain to Defence.

In this context, Defence considers that the chances of this provision limiting the right to life or the right to freedom from torture, cruel, inhuman and degrading treatment or punishment, extremely remote.

2.64 The objective of enhancing the safety of defence aviation is likely to be a legitimate objective for the purpose of human rights law, and providing for defence aviation inspectors to use force to remove or reduce hazards appears to be rationally connected to this objective.

2.65 The minister's explanation of the factors relevant to determining whether (and the extent to which) to use force, and the clarification that the Secretary or the Chief of the Defence Force must be satisfied that a defence aviation inspector has the knowledge, training or experience necessary to properly exercise the powers of a defence aviation area inspector (including adequate training in relation to the use of force), assists in determining compatibility with the right to life and the right to freedom from torture, cruel, inhuman and degrading treatment. This information provided by the minister, coupled with the requirement in the bill that any force used may only be that which is reasonable and necessary in the circumstances, tends to suggest that the risk of the use of force being lethal force or force that would cause serious injury to a person, is very low. On balance and in light of the information provided by the minister, the measure appears to be compatible with the right to life and the right to freedom from torture, cruel, inhuman and degrading treatment.

### **Committee response**

**2.66 The committee thanks the minister for her response and has concluded its examination of this issue.**

**2.67 In light of the information provided by the minister, the measure appears to be compatible with the right to life and the right to freedom from torture, cruel, inhuman and degrading treatment.**

## Financial Sector Legislation Amendment (Crisis Resolution Powers and Other Measures) Bill 2017

|                        |  |
|------------------------|--|
| <b>Purpose</b>         | Amends the <i>Banking Act 1959</i> , <i>Insurance Act 1973</i> , <i>Life Insurance Act 1995</i> and five other Acts to give the Australian Prudential Regulation Authority additional powers for crisis resolution, and resolution planning, in relation to regulated entities |
| <b>Portfolio</b>       | Treasury   |
| <b>Introduced</b>      | House of Representatives, 19 October 2017  |
| <b>Rights</b>          | Right not to incriminate oneself; privacy (see <b>Appendix 2</b> )   |
| <b>Previous report</b> | 12 of 2017   |
| <b>Status</b>          | Concluded examination  |

### Background

2.68 The committee first reported on the Financial Sector Legislation Amendment (Crisis Resolution Powers and Other Measures) Bill 2017 (the bill) in its *Report 12 of 2017*, and requested a response from the Treasurer by 13 December 2017.<sup>1</sup>

2.69 The Treasurer's response to the committee's inquiries was received on 14 December 2017. The response is discussed below and is reproduced in full at **Appendix 3**.

### Information gathering powers of statutory managers

2.70 The bill would insert a new section 62ZOD into the *Insurance Act 1973* (Insurance Act) and a new section 179AD into the *Life Insurance Act 1995* (Life Insurance Act) which set out the powers and functions of statutory managers under the Insurance Act and Life Insurance Act respectively.<sup>2</sup>

2.71 This includes a new power to require a person who has, at any time, been an officer of the body corporate to give the statutory manager information relating to the business of the body corporate that the statutory manager requires.<sup>3</sup> A person

1 Parliamentary Joint Committee on Human Rights, *Report 12 of 2017* (28 November 2017) pp. 25-30.

2 An Insurance Act and Life Insurance Act 'statutory manager' is either the Australian Prudential Regulation Authority (APRA) or an administrator appointed by APRA to control a body corporate's business: see Schedule 2, item 58, proposed section 62ZOA(8) to the Insurance Act; see Schedule 3, item 52, proposed section 179AA(8) to the Life Insurance Act.

3 Schedule 2, item 58, proposed section 62ZOD(2) to the Insurance Act; Schedule 3, item 52, proposed section 179AD(2) to the Life Insurance Act.

commits an offence punishable by 12 months imprisonment if the person fails to comply with this requirement to give information.<sup>4</sup> An individual is not excused from complying with the requirement to give information on the ground that doing so would tend to incriminate the individual or make the individual liable to a penalty.<sup>5</sup>

2.72 However, information given in compliance with the requirement is not admissible in evidence against the individual in a criminal proceeding or a proceeding for the imposition of a penalty, other than proceedings in respect of the falsity of the information, provided the person has claimed the privilege against self-incrimination before giving that information and that giving the information might in fact incriminate the individual.<sup>6</sup>

### ***Compatibility of the measure with the right not to incriminate oneself***

2.73 The specific guarantees of the right to a fair trial in the determination of a criminal charge guaranteed by article 14 of the ICCPR include the right not to incriminate oneself (article 14(3)(g)).

2.74 The right to a fair trial, and in particular the right not to incriminate oneself, is engaged where a person is required to give information to the Insurance Act or Life Insurance Act statutory manager which may incriminate them and that incriminating information can be used to investigate criminal charges. The statement of compatibility acknowledges the privilege against self-incrimination is engaged by the bill.<sup>7</sup>

2.75 The right not to incriminate oneself may be subject to permissible limitations where the limitation pursues a legitimate objective, is rationally connected to that objective and is a proportionate way of achieving that objective. The statement of compatibility states that the limitation on the right not to incriminate oneself is permissible on the basis that:

Engaging the right against self-incrimination in this way is necessary and justified as only the key personnel of a relevant entity will have access to

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4 Schedule 2, item 58, proposed section 62ZOD(3) to the Insurance Act; Schedule 3, item 52, proposed section 179AD(3) to the Life Insurance Act.

5 Schedule 2, item 58, proposed section 62ZOD(4) to the Insurance Act; Schedule 3, item 52, proposed section 179AD(4) to the Life Insurance Act.

6 Schedule 2, item 58, proposed section 62ZOD(5) to the Insurance Act; Schedule 3, item 52, proposed section 179AD(5) to the Life Insurance Act.

7 The statement of compatibility also addresses the privilege against self-incrimination in relation to the new information gathering powers to allow APRA to obtain information from current and past officers of an insurer and a life insurance entity that is under statutory management: see Statement of Compatibility (SOC), 224-225. The provisions relating to APRA's powers to obtain information include a use and a derivative use immunity provision and therefore do not raise human rights concerns: Schedule 2, item 58, proposed section 62ZOI(5) and (6) of the *Insurance Act 1973*; Schedule 3, item 52, proposed section 179AI(5) and (6) of the *Life Insurance Act 1995*.

information and documents relating to that entity's financial condition. It is essential for APRA or a statutory manager to be able to obtain this information quickly to assist with the management and crisis resolution of an insurance or life insurance entity that is financially distressed.

By compelling relevant officers to provide the required information and documents, APRA and other statutory managers will be able to maximise their ability to rehabilitate a distressed insurance or life insurance entity. This will benefit the entity's customers, creditors and other suppliers...<sup>8</sup>

2.76 A legitimate objective – that is, one that is capable of justifying a proposed limitation on human rights – must address a pressing or substantial concern and not simply seek an outcome regarded as desirable or convenient. The initial analysis stated that the statement of compatibility does not provide any information or evidence as to the pressing or substantial need to be able to obtain information quickly to assist with the management and crisis resolution of an insurance or life insurance entity. The administrative convenience, in and of itself, is unlikely to be sufficient to constitute a legitimate objective for the purposes of international human rights law.

2.77 Further, the availability of 'use' and 'derivative use' immunities can be one important factor in determining whether the limit on the right not to incriminate oneself is proportionate. That is, they may act as a relevant safeguard. In this respect, the initial assessment noted that information gathering powers in proposed sections 62ZOD and 179AD relating to statutory managers include a 'use' immunity provision, such that incriminating information or documents provided cannot be directly used against a person in criminal proceedings or in proceedings where the person may be liable to a penalty.<sup>9</sup> However, no 'derivative use' immunity is provided for proposed sections 62ZOD and 179AD, which would prevent information or evidence indirectly obtained from being used in criminal proceedings against the person.

2.78 In contrast, it is noted that in relation to APRA's information gathering powers which are also introduced by this bill in proposed sections 62ZOI and 179AI, both a 'use' and a 'derivative' use immunity provision are included, such that information or documents obtained 'as a direct or indirect consequence' of providing information are not admissible against the person.<sup>10</sup>

2.79 The lack of derivative use immunity in relation to the information gathering powers of statutory managers in proposed sections 62ZOD and 179AD raises

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8 SOC, pp. 224-225.

9 See, Schedule 2, item 58, proposed section 62ZOD(5) to the Insurance Act; Schedule 3, item 52, proposed section 179AD(5) to the Life Insurance Act.

10 Schedule 2, item 58, proposed section 62ZOI(5) and (6) of the *Insurance Act 1973*; Schedule 3, item 52, proposed section 179AI(5) and (6) of the *Life Insurance Act 1995*.

questions about whether the measure is the least rights restrictive way of achieving its objective. It was acknowledged that a 'derivative use' immunity will not be appropriate in all cases because it is not reasonably available as a less rights restrictive alternative (for example, because it would undermine the purpose of the measure or be unworkable). In this respect, it was noted that the availability or lack of availability of a 'derivative use' immunity needs to be considered in the regulatory context of the proposed powers. The extent of interference that may be permissible as a matter of international human rights law may be, for example, greater in contexts where there are difficulties regulating specific conduct, persons subject to the powers are not particularly vulnerable or powers are otherwise circumscribed with respect to the scope of information which may be sought. That is, there are a range of matters which influence whether the limitation is proportionate. However, no information is provided in the statement of compatibility to explain why a 'derivative use' immunity is provided in relation to persons who give information in compliance with APRA's information gathering powers, but not to persons who give information in compliance with statutory manager's information gathering powers.

2.80 Noting the preceding analysis, the committee sought the advice of the Treasurer as to:

- whether there is reasoning or evidence that establishes that the stated objective addresses a pressing or substantial concern or whether the proposed changes are otherwise aimed at achieving a legitimate objective for the purposes of international human rights law;
- how the measure is effective to achieve (that is, rationally connected to) that objective;
- whether the limitation is proportionate to achieve the stated objective;
- whether the persons who may be subject to examination and the scope of information that may be subject to compulsory disclosure is sufficiently circumscribed with respect to the stated objective of the measure; and
- whether a derivative use immunity is reasonably available as a less rights restrictive alternative in sections 62ZOD of the *Insurance Act 1973* and 179AD of the *Life Insurance Act 1995* to ensure information or evidence indirectly obtained from a person compelled to give information or documents cannot be used in evidence against that person.

### **Treasurer's response**

2.81 The Treasurer's response first explains the broader objectives, context and necessity for the bill:

... [the amendments proposed by the bill] will enable APRA to appoint a statutory manager to an insurer or, in certain circumstances, a related body corporate. Appointment of a statutory manager will generally only

occur in situations of urgency, for example where the failing insurer poses a threat to financial system stability.

There is a pressing need for such a measure because of the lack of a statutory management regime for insurers as compared with the Banking Act and consequently, a substantial gap in APRA's resolution regime for insurers to effectively and efficiently manage and resolve a distressed or failing insurer. Statutory management powers will be exercised with the broad objectives of protecting the interests of policyholders of insurers and ensuring the stability of Australia's financial system, both of which are such pressing or substantial concerns for most Australians that the limitation upon the right to claim privilege against self-incrimination in the measure is warranted and justified.

2.82 In relation to whether there is reasoning or evidence that the stated objective addresses a pressing or substantial concern, and how the measure is effective to achieve the stated objective, the Treasurer's response explains:

It is critical that a statutory manager, having taken over what will often be an insolvent or near insolvent financial institution or related entity, be in a position to obtain all relevant information relating to the business of the body corporate from officers (and former officers) in order for the statutory manager to control, stabilise, investigate and (to the extent possible) resolve the body corporate or resolve a related entity.

Overriding the privilege against self-incrimination is justified in this context because only the key personnel of an insurer will have access to information and documents relating to the insurer's business, including its financial condition. It is essential for a statutory manager to be able to obtain this information quickly to assist with the management and crisis resolution of an insurer that is financially distressed. In circumstances where an insurer is distressed or failing, especially where its failure may have an adverse effect on financial stability, time is of the essence in ensuring the orderly resolution of the insurer. By compelling relevant officers or ex-officers promptly to provide required information and documents relating to the business of the body corporate, statutory managers will be able to maximise their ability to rehabilitate a distressed insurer, or to ensure an orderly resolution and exit of a failing insurer. This will ultimately benefit the insurer's customers, creditors and other suppliers. In the event of a significant crisis, APRA would also be able to use the information gathered to support decision making and prevent contagion in the financial system, ensuring that financial system stability is maintained.

2.83 The Treasurer's response provides an explanation as to the pressing or substantial need to be able to obtain information quickly to assist with the management and crisis resolution of an insurance or life insurance entity, and it is likely that in this case the information gathering powers pursue a legitimate objective

for the purposes of international human rights law, and are rationally connected to that objective.

2.84 As to the proportionality of the proposed measure, the Treasurer's response explains that the information gathering powers can only be used in limited circumstances in a particular regulatory context, namely, where a statutory manager has been appointed. The Treasurer explains that there is a high threshold for triggering such an appointment to an insurer or related body corporate. For example, the Treasurer explains that certain conditions for the appointment must first be met (such as insolvency) and that at least one of a number of conditions must be satisfied before such an appointment to an insurer or body corporate is made, including that the failure of the insurer poses a threat to the stability of the financial system.

2.85 The Treasurer further explains that the information gathering applies to a narrow group of persons. In particular, the Treasurer explains that the powers apply only in relation to an 'officer' as defined in section 9 of the *Corporations Act 2001* (the Corporations Act) (e.g. a director or other senior person with significant strategic responsibilities in relation to the failing entity), and a person who has been such an officer. The Treasurer explains the rationale for applying the information-gathering powers to officers as follows:

Circumstances may exist where the failure of the insurer can be attributed to a failure by one or more officers to comply with their statutory responsibilities, including where there has been a breach of Corporations Act provisions carrying an offence. This raises the real possibility of the statutory manager's ability to fulfil his or her duties being hampered by a refusal to provide information on self-incrimination grounds, making the override of the privilege against self-incrimination necessary in this instance.

2.86 The Treasurer further explains that, in this particular regulatory context, the absence of a derivative use immunity is necessary for the following reasons:

...if derivative use immunity is applied, it would often be very difficult for the prosecution to show that the evidence they rely on to prove a criminal case against an officer relating to the failure of the financial institution was uncovered through an absolutely independent and separate investigation process. This may in turn lead to hesitation on the part of a statutory manager to exercise the information gathering power, undermining the purpose for which the power was conferred.

If derivative use immunity applied, then further evidence obtained through a chain of inquiry resulting from the protected evidence cannot be used in relevant proceedings even if the additional evidence would have been uncovered through independent investigative processes. Also, where the information-obtaining power is exercised against officers or ex-officers who may have been responsible for the deterioration or failure of a financial institution, for example, a director implicated in a failure such as

HIH, a derivative use immunity would not be helpful in building a case against the director for breach of their duties under law.

These provisions are consistent with the majority of existing self-incrimination provisions in other APRA-administered legislation, including provisions in the *Superannuation Industry (Supervision) Act 1993* (the SIS Act) and *Private Health Insurance (Prudential Supervision) Act 2015* (PHI Act).

2.87 Finally, the Treasurer explains the rationale for why a 'derivative use' immunity is provided in relation to persons who give information in compliance with APRA's information gathering powers, but not to persons who give information in compliance with statutory manager's information gathering powers:

The committee has also noted the difference between APRA's proposed information gathering powers (in proposed sections 62ZOI of the Insurance Act and 179AI of the Life Insurance Act), which includes derivative use immunity, and the proposed statutory manager's powers to require officers to provide information (in proposed sections 62ZOD and 179AD), which do not. ...

APRA's information gathering power applies in respect of any person while the statutory manager's information gathering power is more circumscribed in scope and applies only in respect of officers (and ex-officers) of an insurer. This is a crucial distinction. Officers are in a different situation to ordinary persons in that they are the key personnel of the insurer with greater access to the relevant information and documents relating to the insurer. Also, an officer may well have breached directors' duties in connection with the failure of the insurer. Therefore, while use immunity is appropriate in this context, derivative use immunity may impede any prosecution or penalty proceedings against these officers for breach of their duties, especially given the issues identified above relating to the application of derivative use immunity. By contrast, APRA's information gathering power extends to any person, including an ordinary citizen, and the greater protection afforded by derivative use immunity is justified in this particular context because of the wider scope of the power.

2.88 As noted in the initial analysis, there are a range of matters which influence whether a limitation on the right not to incriminate oneself is permissible. In the present case, the Treasurer has explained in detail the regulatory context of the proposed powers and the application of the powers to officers and former officers who may have greatest access to relevant information and documents relating to insurers (rather than all persons). The Treasurer's therefore response suggests that a 'derivative use' immunity is not reasonably available in this context. In light of the further information provided by the Treasurer, it is likely that the limitation on the right not to incriminate oneself is proportionate to the legitimate objective of the measure.

## Committee response

**2.89** The committee thanks the Treasurer for his response and has concluded its examination of this issue.

**2.90** In light of the information provided by the Treasurer and in the particular regulatory context of the measure, the committee considers that the limitation on the right not to incriminate oneself is proportionate to the legitimate objective of the measure.

## Information sharing provisions

2.91 Schedule 4 of the bill includes a number of proposed amendments to the *Financial Sector (Business Transfer Group Restructure) Act 1999* (Transfer Act) to extend the scope of section 42 of the Transfer Act to allow APRA to provide information (including personal information) to a body that receives the shares of another body as part of a compulsory transfer of business.<sup>11</sup>

### ***Compatibility of the measure with the right to privacy***

2.92 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. Schedule 4 of the bill engages and limits the right to privacy by enabling APRA to provide information, which includes personal information, to a receiving body.

2.93 The statement of compatibility acknowledges that the right to privacy is engaged and limited by the proposed amendment to section 42 of the Transfer Act. As to the objective of the proposed amendment, the statement of compatibility explains:

The provision is necessary because under the compulsory transfer provisions a receiving body's board must consent to the transfer. In order to facilitate this it will be necessary and appropriate for APRA to provide information to the receiving body about the business, including confidential information and information relating to staff and executives of the body being transferred. It will also be necessary for APRA to share such information in the process of settling the detail of the transfer, including the schedule of assets and liabilities, and in documentation relating to transferred staff.<sup>12</sup>

2.94 As noted earlier in relation to the right against self-incrimination, a legitimate objective must address a pressing or substantial concern. While the statement of compatibility states that the provision is necessary, it is not clear from the information provided how this aspect of the bill addresses a pressing or substantial concern that would justify a limitation on the right to privacy.

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11 Schedule 4, item 92, proposed section 42 of the Transfer Act.

12 SOC, p. 226.

2.95 The statement of compatibility then sets out safeguards that are contained in the bill to protect the right to privacy, namely that:

- the *Privacy Act 1998* (Privacy Act) would apply to the information;
- where information is provided to APRA, the existing APRA confidentiality provisions would apply; and
- where information is provided to other statutory managers, the statutory manager would be responsible for the relevant entity and as such their access to the information would be no different to the previous manager's access to the information.<sup>13</sup>

2.96 However, the initial analysis stated that these safeguards do not demonstrate that the limitation on the right to privacy is proportionate to the objective sought to be achieved. For example, while the Privacy Act contains a range of general safeguards it is not a complete answer because the Privacy Act and the Australian Privacy Principles (APPs) contain a number of exceptions to the prohibition on disclosure of personal information. Relevantly, for example, an agency may disclose personal information or a government related identifier of an individual where its use or disclosure is required or authorised by or under an Australian Law.<sup>14</sup> This means that the Privacy Act and the APPs may not operate as an effective safeguard of the right to privacy in these circumstances.

2.97 Further, the initial analysis noted that no information is provided setting out the content of APRA's confidentiality provisions, and how these provisions would apply to safeguard personal information. It was stated that it is not possible to determine at this stage whether the APRA confidentiality provisions provide an adequate safeguard. Similarly, while the amendments will place the statutory manager in no different position to the previous manager's access to information, it is not clear from the information provided the extent of the previous manager's access to information. Therefore, it is not possible to conclude based on the information provided whether the measure is sufficiently circumscribed to constitute a proportionate limitation on the right to privacy.

2.98 The committee therefore sought the advice of the Treasurer as to:

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

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13 SOC, p. 227.

14 APP 9; APP 6.2(b).

## Treasurer's response

2.99 The Treasurer's response provides an overview of the current transfer powers under the Transfer Act, and explains the amendments introduced by the bill and their objective as follows:

The Bill supplements the Transfer Act by providing that, as an alternative to requiring a transfer of business, APRA may transfer the shares (ownership) of the failing entity to a new owner. The ability to transfer the shares of a failing regulated entity could, in some circumstances, provide a more efficient and simpler means of achieving an orderly resolution, than affecting a full transfer of all of the assets and liabilities of the entity. This is an enhancement of the Transfer Act to provide APRA with greater flexibility and certainty when considering the resolution options available to address and resolve a failing entity. The enhancement will enable APRA to more quickly achieve an orderly resolution of a distressed entity which is in the interests of most Australians as it helps prevent contagion in the financial system, ensuring that financial system stability is maintained.

As with other resolution powers to be exercised by APRA, compulsory transfer powers are exercised with the broad objectives of protecting the interests of depositors and policyholders and maintaining the stability of Australia's financial system, both of which are such pressing or substantial concerns for most Australians that the limitation to privacy in the measure is warranted and justified.

2.100 The stated objective of protecting the interests of depositors and policyholders and maintaining the stability of Australia's financial system is likely to be legitimate for the purposes of international human rights law.

2.101 The Treasurer's response also explains how the proposed information sharing powers are rationally connected to this objective as follows:

As explained in the statement of compatibility referred to by the committee, the proposed information sharing provisions (in particular, the amended section 42, applicable to both transfer of shares and transfer of business) are a necessary component of the framework for transfers under the Transfer Act.

In order for APRA to require a compulsory transfer, a receiving body's board must consent to the transfer from the transferring body (as is currently the case with a transfer of business). As with a transfer of business, in order for the receiving body's board to consent, it must be apprised of relevant knowledge of what is to be transferred to it, including all relevant information and documentation pertaining to the transferring body which may contain personal information relating to staff or individuals who have insurance or other arrangements with the failed entity. Without being so informed, it is impossible for the board to reach a decision as to whether to consent to the transfer. Therefore the information sharing provisions ensure that the receiving body can be

provided relevant information about the staff, management and insurance arrangements as part of their due diligence when they are deciding whether or not to consent to the transfer.

2.102 The Treasurer's response also provides further information as to the safeguards in place to protect the right to privacy. The Treasurer explains that section 56 of the *Australian Prudential Regulation Authority Act 1998* (APRA Act) imposes confidentiality upon APRA officers in respect of 'protected information' and 'protected documents'. Documents and information become 'protected' by virtue of both having been received by APRA and relating to the affairs of entities that APRA regulates, or customers of those entities, or entities that APRA registers or collects data from under the *Financial Sector (Collection of Data) Act 2001* (FSCODA). The Treasurer's response continues:

Subsection 56(2) of the APRA Act makes it an offence for a person who is, or has been, an APRA officer to disclose protected information or a protected document to any person or to a court, subject to certain exceptions. Information relating to a transferring body subject to the proposed information sharing provisions under the measure would be protected information under section 56 of the APRA Act as having been received by APRA and relating to the affairs of entities regulated by APRA.

The secrecy regime under section 56 extends to the receiving body's officers because they fall within paragraph (c) of the definition of 'officer' in subsection 56(1) of the APRA Act (received in course of their employment). As such, onward disclosure of the information by the receiving body to other persons is restricted under section 56.

Also, as noted in section 42 of the Transfer Act, subsection 56(9) of the APRA Act allows for conditions to be imposed on disclosure of protected information to restrict the use to which the receiving body may put the information to. Failure to comply with any condition so imposed is an offence. For example, if APRA were to disclose information about staff or insurance contracts of a failed insurer to a body corporate that was considering taking on ownership of the failed insurer via a transfer of shares, APRA could impose conditions under subsection 56(9) on the body corporate and its officers at the time of disclosing the information. Such conditions might require the recipients to only use the information for the purposes of deciding whether or not to accept the transfer, and not to further disclose the information.

As such, the secrecy regime under section 56 of the APRA Act affords an effective and appropriate degree of protection to any personal information that may be included within protected information. Where the information is provided to a statutory manager, it is important to note that a statutory manager is, in any case, subject to the secrecy regime under section 56 of the APRA Act, as signposted under subsection 14C(5) of the Banking Act, and proposed subsections 62ZOK(4) and 179AK(4) of the Insurance Act and Life Insurance Act respectively.

2.103 Based on the information provided in the Treasurer's response, it appears that there are a number of safeguards in place in order to protect any personal information that may be disclosed. On balance, it is likely the measure will be compatible with the right to privacy.

**Committee response**

**2.104 The committee thanks the Treasurer for his response and has concluded its examination of this issue.**

**2.105 In light of the information provided in the Treasurer's response, the committee considers that the measure is likely to be compatible with the right to privacy.**

## Health Insurance (General Medical Services Table) Amendment (Obstetrics) Regulations 2017 [F2017L01090]

|                                |   |
|--------------------------------|---|
| <b>Purpose</b>                 | Amends the <i>Health Insurance (General Medical Services Table) Regulations 2017</i> to introduce a requirement that during the planning and management of a pregnancy a mental health assessment be performed by a medical practitioner or other qualified health professional, including screening for drug and alcohol use and domestic violence |
| <b>Portfolio</b>               | Health  |
| <b>Authorising legislation</b> | <i>Health Insurance Act 1973</i>  |
| <b>Last day to disallow</b>    | 16 November 2017  |
| <b>Right</b>                   | Privacy (see <b>Appendix 2</b> )  |
| <b>Previous report</b>         | 12 of 2017  |
| <b>Status</b>                  | Concluded examination   |

### Background

2.106 The committee first reported on the Health Insurance (General Medical Services Table) Amendment (Obstetrics) Regulations 2017 [F2017L01090] (the regulations) in its *Report 12 of 2017*, and requested a response from the Minister for Health by 13 December 2017.<sup>1</sup>

2.107 The minister's response to the committee's inquiries was received on 8 December 2017. The response is discussed below and is reproduced in full at **Appendix 3**.

### Mental health assessments during pregnancy

2.108 The regulations introduce changes to the Medicare Benefits Schedule (MBS). The MBS provides for the payment of Medicare benefits for professional services rendered to eligible persons, and for the calculation of Medicare benefits by reference to the fees for medical services which are set out in prescribed tables. The regulations include the introduction of a new requirement during the planning and management of a pregnancy for a mental health assessment to be performed by the medical practitioner or another suitably qualified health professional. The mental health assessment includes 'screening for drug and alcohol use and domestic violence of the patient'.<sup>2</sup> A mental health assessment (including screening for drug

1 Parliamentary Joint Committee on Human Rights, *Report 12 of 2017* (28 November 2017) pp. 31-33.

2 See item 24 of the Regulations, amendment to Schedule 1 (items 16590 and 16591).

and alcohol use and domestic violence) is also required in postnatal consultations between 4 and 8 weeks after birth.<sup>3</sup>

### ***Compatibility of the measure with the right to privacy***

2.109 The right to privacy prohibits arbitrary or unlawful interferences with an individual's privacy, family, correspondence or home. The right to privacy includes the right to personal autonomy and physical and psychological integrity, including respect for reproductive autonomy and autonomy over one's own body (including in relation to medical testing). The statement of compatibility does not consider whether the right to privacy is engaged or limited by the bill.

2.110 The initial human rights assessment stated that, based on the information provided, it was not clear as to the extent to which the mental health assessment will be compulsory, and what 'screening' entails. If a patient may refuse to take the test, and if 'screening' is minimally invasive (such as being limited to asking questions), the analysis noted that it may be that a patient's right to personal autonomy and physical and psychological integrity is not limited. However, if 'screening' includes more invasive procedures, such as a blood test to test for alcohol or drugs, the right to personal autonomy and physical and psychological integrity as an aspect of the right to privacy may be engaged and limited.

2.111 Limitations on the right to privacy will be permissible where they are not arbitrary, they pursue a legitimate objective, are rationally connected to that objective and are a proportionate means of achieving that objective. The explanatory statement and the statement of compatibility note that the objective of the regulations is to improve obstetrics care for patients and to implement the recommendations of the MBS Review Taskforce so as to reflect current best clinical practice in light of the latest evidence and to improve health outcomes. The initial analysis stated that these are likely to be legitimate objectives for the purposes of international human rights law. Screening for mental health issues during and immediately following pregnancy appears also to be rationally connected to those objectives.

2.112 However, as noted earlier, it is unclear based on the information provided what 'screening' of a patient for drugs or alcohol or domestic violence entails, and whether the screening is mandatory for the patient. If the screening is mandatory or involves the collection of blood samples or other tests for drug or alcohol use, such that the measure places a limitation on the right to privacy, then it will need to be demonstrated that this is the least rights-restrictive approach to achieve the legitimate objective, and that adequate safeguards are in place in relation to the use of samples and test results.

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

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3 See item 9 of the Regulations, amendment to Schedule 1 (item 16407).

- what is meant by 'screening for drug and alcohol use and domestic violence', including whether it includes taking a blood test or related procedures;
- whether it is compulsory for a patient to undertake a mental health assessment (including screening for drug and alcohol use and domestic violence);
- what are the consequences for a refusal to undertake such an assessment; and
- whether the screening for drug and alcohol use and domestic violence is proportionate, including whether the measure is the least rights-restrictive means reasonably available to achieve the stated objective, and the effectiveness of any safeguards to protect a patient's privacy.

### **Minister's response**

2.114 The minister's response provides the following information to the committee:

- The mental health assessment can be met if the medical practitioner enquires about the mental wellbeing of the patient. This is a mandatory requirement.
- If the patient consents to a comprehensive assessment, the medical practitioner can discuss significant risk factors to the patient's wellbeing (such as drug and alcohol use and domestic violence).
- If the patient does not consent to a comprehensive assessment, a Medicare benefit is still payable for the service. This ensures that all patients will continue to have access to Medicare-subsidised obstetrics services.

...

The provision of a comprehensive mental health assessment, subject to the patient's consent, is intended to enable the prevention or early detection of mental health disorders. These disorders, which affect one in 10 women during pregnancy and one in seven women after birth, have the potential to have a negative impact on the physical and mental wellbeing of mothers and their children.

2.115 In relation to the meaning of 'screening for drug and alcohol use and domestic violence', the minister explains:

...the word 'screening' in items 16590 and 16591 and new postnatal item 16407. In the context of these items, screening does not involve the use of any diagnostic techniques such as diagnostic imaging or pathology tests. Screening is simply asking patients a series of questions on certain risks [sic] factors. In other words, it is part of the comprehensive mental health assessment which the patient may or may not consent to. This terminology would be understood by medical practitioners and is

consistent with the relevant clinical guidelines, *Mental Health Care in the Perinatal Period: Australian Clinical Practice Guideline*.

As noted above, if the patient does not consent to a comprehensive assessment, a Medicare benefit is still payable for the service.

2.116 The minister's response explains that the proposed mental health screening is minimally invasive, does not involve diagnostic techniques such as pathology tests, and can only be undertaken with the patient's consent. Based on the further information provided by the minister, it is likely that the measure will be compatible with the right to privacy.

### **Committee response**

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

**2.118 In light of the further information provided by the minister, the committee considers that the measure is likely to be compatible with the right to privacy.**

## Proceeds of Crime Amendment (Proceeds and Other Matters) Bill 2017

|                        |  |
|------------------------|--|
| <b>Purpose</b>         | Seeks to amend the <i>Proceeds of Crime Act 2002</i> , including to align the unexplained wealth regime with other types of orders, so that it covers situations where wealth is 'derived or realised, directly or indirectly' from certain offences; clarifies that property becomes 'proceeds' or an 'instrument' of an offence under the Act when 'proceeds' or an 'instrument' are used to improve the property or discharge an encumbrance security or liability incurred in relation to the property; and clarifies that property or wealth will only be 'lawfully acquired' in situations where the property or wealth is not 'proceeds' or an 'instrument' of an offence |
| <b>Portfolio</b>       | Justice  |
| <b>Introduced</b>      | House of Representatives, 18 October 2017  |
| <b>Rights</b>          | Right to a fair trial; right to a fair hearing; privacy (see <b>Appendix 2</b> )   |
| <b>Previous report</b> | 12 of 2017   |
| <b>Status</b>          | Concluded examination  |

### Background

2.119 The committee first reported on the Proceeds of Crime Amendment (Proceeds and Other Matters) Bill 2017 (the bill) in its *Report 12 of 2017*, and requested a response from the Minister for Justice by 13 December 2017.<sup>1</sup>

2.120 The minister's response to the committee's inquiries was received on 19 December 2017. The response is discussed below and is reproduced in full at Appendix 3.

### Changes to the definition of 'proceeds' and an 'instrument' in the Proceeds of Crime Act

2.121 The bill seeks to amend the definitions of 'proceeds' and 'instrument' in the *Proceeds of Crime Act 2002* (the POC Act). The bill seeks to provide that property will be considered to become 'proceeds' or an 'instrument' (and therefore be liable to being restrained or forfeited under the POC Act) where proceeds or instruments of crime are used to make improvements on property, service mortgage repayments on

1 Parliamentary Joint Committee on Human Rights, *Report 12 of 2017* (28 November 2017) pp. 34-42.

property and/or service loans taken out in relation to property.<sup>2</sup> It also introduces a definition of 'improvements' to clarify that where proceeds or instruments are used to renovate property, demolish structures, or repair or maintain assets, the property will become 'proceeds' or an 'instrument'.<sup>3</sup>

2.122 The bill also seeks to provide that wealth or property will only be 'lawfully acquired' (and therefore not liable to restraint, freezing or forfeiture) in situations where property or wealth is not 'proceeds' or an 'instrument' of an offence.<sup>4</sup> The explanatory memorandum explains that this amendment would ensure a court, when determining whether property is 'lawfully acquired', examines the origins of property or wealth used to discharge securities or encumbrances or to make improvements to property, as well as situations where property may be gifted to another person.<sup>5</sup>

### ***Compatibility of the amendments with the right to a fair trial and the right to a fair hearing***

2.123 The right to a fair trial and fair hearing is protected by articles 14 and 15 of the International Covenant on Civil and Political Rights (ICCPR). The rights are concerned with procedural fairness, and encompass notions of equality in proceedings, the right to a public hearing and the requirement that hearings are conducted by an independent and impartial body. Specific guarantees of the right to a fair trial in relation to a criminal charge include the presumption of innocence,<sup>6</sup> the right not to incriminate oneself,<sup>7</sup> and the guarantee against retrospective criminal laws.<sup>8</sup>

### ***Previous committee comment on the Proceeds of Crime Act***

2.124 The committee has previously raised concerns that the underlying regime established by the POC Act for the freezing, restraint or forfeiture of property may be considered 'criminal' for the purposes of international human rights law.<sup>9</sup> For example, a forfeiture order may be made against property where (relevantly) a court is satisfied that the property is 'proceeds' of an indictable offence or an

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2 Item 6 of the bill; Explanatory Memorandum (EM) [19].

3 Item 13 of the bill; EM [22].

4 Item 12 of the bill.

5 EM [37].

6 Article 14(2) of the ICCPR.

7 Article 14(3)(g) of the ICCPR.

8 Article 15(1) of the ICCPR.

9 Parliamentary Joint Committee on Human Rights, *Thirty-First Report of the 44<sup>th</sup> Parliament* (24 November 2015) pp. 43-44; *Twenty-Sixth Report of the 44<sup>th</sup> Parliament Report 1 of 2017* (16 February 2017); *Report 2 of 2017* (21 March 2017) p. 6; *Report 4 of 2017* (9 May 2017) pp. 92-93.

'instrument' of one or more serious offences.<sup>10</sup> The fact a person has been acquitted of an offence with which the person has been charged does not affect the court's power to make such a forfeiture order.<sup>11</sup> Further, a finding need not be based on a finding that a particular person committed any offence.<sup>12</sup> A finding that a court is satisfied that the property is 'proceeds' of an indictable offence or an 'instrument' of one or more serious offences appears to entail 'blameworthiness' or 'culpability' which the committee has previously considered would suggest that the provisions may be criminal in character, and therefore may engage criminal process rights which must be complied with in order for the measures to be compatible with fair trial and fair hearing rights.<sup>13</sup>

2.125 The committee has also 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 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 ICCPR.<sup>14</sup>

2.126 The committee has 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. It is noted that in his response to the committee's inquiries relating to the Law Enforcement Legislation Amendment (State Bodies and Other Measures) Bill 2016, the minister stated that 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. However, noting the concerns raised in relation to the POC Act, it would be of considerable assistance if the POC Act were subject to a foundational human rights assessment.

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10 Section 49 of the POC Act.

11 Sections 51 and 80 of the POC Act.

12 Section 49(2)(a) of the POC Act.

13 Parliamentary Joint Committee on Human Rights, *Thirty-First Report of the 44<sup>th</sup> Parliament* (24 November 2015) p. 43.

14 Parliamentary Joint Committee on Human Rights, *Thirty-First Report of the 44<sup>th</sup> Parliament* (24 November 2015) pp. 43-44; *Twenty-Sixth Report of the 44<sup>th</sup> Parliament Report 1 of 2017* (16 February 2017); *Report 2 of 2017* (21 March 2017) p. 6; *Report 4 of 2017* (9 May 2017) pp. 92-93.

### *Compatibility of the amendments*

2.127 The existing human rights concerns with the POC Act mean that any extensions of the provisions in that Act by this bill may raise similar concerns. In particular, as outlined in the initial analysis, applying a broader basis on which a person's assets may be frozen, restrained or forfeited to include property subject to a mortgage in which mortgage payments have been serviced by illicit funds, without a finding of criminal guilt beyond reasonable doubt, may limit the right to be presumed innocent and the prohibition against double punishment should the POC Act provision be criminal in nature. Further, several aspects of the bill operate retrospectively, which may engage the absolute prohibition against retrospective punishment in criminal proceedings.<sup>15</sup>

2.128 The statement of compatibility states that the POC Act is civil in character, and on this basis the criminal process rights do not apply.<sup>16</sup> However, as noted in the committee's *Guidance Note 2*, the term 'criminal' has an autonomous meaning in international human rights law, such that even if a penalty or other sanction is classified as civil in character domestically it may nevertheless be considered 'criminal' for the purposes of international human rights law.<sup>17</sup>

2.129 In addition to the domestic classification of the offence, the committee's *Guidance Note 2* explains that two other relevant factors in determining whether the provisions should be characterised as 'criminal' in character concern the nature and purpose of the measure and the severity of the penalty. The purpose of the bill is described in the statement of compatibility as to ensure that proceeds of crime authorities can restrain and confiscate property or wealth in certain circumstances, so that 'criminals are not able to deliberately restructure their affairs to avoid the operation of the Act and retain their ill-gotten gains'.<sup>18</sup> The broader purpose of the POC Act is outlined in section 5 of the Act and includes to punish and deter persons from breaching laws. The initial analysis noted that this raises concerns that the freezing, restraint or forfeiture proceedings that are expanded by the bill may be characterised as a form of punishment.<sup>19</sup> As to the severity of the penalty, it was noted that the freezing, restraint or forfeiture orders can involve significant sums of

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15 See, in this respect, the report of the United Kingdom Parliamentary Joint Committee on Human Rights, *Joint Committee on Human Rights Third Report* (26 November 2001), [40]-[41] where similar concerns were raised in relation to the UK *Proceeds of Crime Bill*.

16 Statement of Compatibility (SOC) [21]-[23]. See section 315 of the POC Act which relevantly provides that '[p]roceedings on an application order or a confiscation order are not criminal proceedings', that the rules of construction applicable only in criminal law do not apply, and that rules of evidence applicable in civil proceedings do apply.

17 Parliamentary Joint Committee on Human Rights, *Guidance Note 2: Offence provisions, civil penalties and human rights* (December 2014) p. 3.

18 SOC [15].

19 See *R v Green* [1983] 9 CRR 78; *Johnston v British Columbia* [1987] 27 CRR 206.

money, which raises concerns that the cumulative effect of the purpose and severity of the measures would lead to the provisions being characterised as 'criminal'.

2.130 If the provisions were to be characterised as 'criminal' for the purposes of human rights law, this does not mean that the provisions are necessarily illegitimate, nor does it convert the provisions into a criminal offence in domestic law. Rather, it means that the provisions in question must be shown to be consistent with the criminal process guarantees set out in Articles 14 and 15 of the ICCPR, including any justifications for any limitations of these rights.

2.131 The committee therefore sought the advice of the minister as to whether these amendments to the POC Act are compatible with these rights, including:

- By reference to the committee's *Guidance Note 2*, whether the freezing, restraint or forfeiture powers that are broadened by the amendments to the definitions of 'proceedings' and an 'instrument' in the bill may be characterised as 'criminal' for the purposes of international human rights law, having regard to the nature, purpose and severity of those powers; and
- The extent to which the provisions are compatible with the criminal process guarantees set out in Articles 14 and 15, including any justification for any limitations of these rights where applicable.

2.132 As the POC Act was introduced prior to the establishment of the committee and no statement of compatibility was provided for that legislation, the committee recommended in its *Report 12 of 2017* that the minister 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. This would inform the committee's consideration of the compatibility of the amendments in the context of the legislative scheme as a whole.

### **Minister's response**

2.133 In relation to whether the amendments may be characterised as civil or criminal for the purposes of international human rights law, the minister's response analyses the POC Act in light of *Guidance Note 2* and considers the freezing, restraint or forfeiture powers that are broadened by the amendments to the definitions of 'proceedings' and an 'instrument' in the bill should not be characterised as 'criminal' for the purposes of international human rights law. The minister's response states:

On the first criterion, it is clear that asset recovery actions, including those under the unexplained wealth regime, are characterised as civil in nature under Australian domestic law.

On the second criterion, the *Proceeds of Crime Act 2002* (POC Act) is not solely focused on deterring or punishing persons for breaching laws, but is primarily focused on remedying the unjust enrichment of criminals who profit at society's expense. Actions under the POC Act also make no determination of a person's guilt or innocence and can be taken against assets without a finding of any form of culpability against a particular individual.

On the third criterion, Guidance Note 2 provides that a penalty is likely to be considered criminal for the purposes of human rights law if the penalty is imprisonment or a substantial pecuniary sanction. Proceedings under the POC Act cannot in themselves create any criminal liability and do not expose people to any criminal sanction (or a subsequent criminal record). Further, penalties under the POC Act cannot be commuted into a period of imprisonment.

On whether the sanction is substantial, it also remains open to a court to decrease the quantum to be forfeited under the Act to accurately reflect the quantum that has been derived or realised from crime, ensuring that orders are aimed primarily at preventing the retention of ill-gotten gains, rather than the imposition of a punishment or sanction.

2.134 While the POC Act cannot in itself create criminal liability under domestic law, as noted in the initial analysis, the broader purpose of the POC Act is outlined in section 5 of the Act and includes to punish and deter persons from breaching laws, which raises concerns that the freezing, restraint or forfeiture proceedings that are expanded by the bill may be characterised as a form of punishment. Further, while it remains open to a court to decrease the quantum to be forfeited, it remains the case that significant sums of money may be frozen, restrained or forfeited, raising concerns that the cumulative effect of the purpose and severity of the measures would lead to the provisions being characterised as 'criminal'.

2.135 In relation to the committee's recommendation that the minister 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, the minister's response states:

I note this recommendation and reiterate my previous comments as outlined at paragraph 1.115 of the Committee's report, namely that legislation established prior to the enactment of the *Human Rights (Parliamentary Scrutiny) Act 2011* is not required to be subject to a human rights compatibility assessment. The Government continually reviews the POC Act to ensure that it addresses emerging trends in criminal conduct and will continue to undertake a human rights compatibility assessment when developing Bills to amend the Act.

2.136 In light of the committee's previously raised concerns about the sufficiency of safeguards in the POC Act to protect the right to a fair trial and the right to a fair hearing, in order to fully assess the compatibility of the proposed measures it is necessary for a detailed assessment of the POC Act in respect of these concerns to be undertaken.

### **Committee response**

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

**2.138 The committee notes that the amendments to the definitions of 'proceedings' and an 'instrument' in the bill have the effect of broadening the**

circumstances in which a person's assets may be subject to being frozen, restrained or forfeited under the POC Act.

**2.139** 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, the amendments also raise concerns regarding the right to a fair hearing and the right to a fair trial, as although the regime established by the POC Act for the freezing, restraint or forfeiture of property is classified as civil or administrative under domestic law, its content may nevertheless be considered 'criminal' under international human rights law.

**2.140** The committee reiterates its previous view that the POC Act would benefit from a full review of the human rights compatibility of the legislation.

#### ***Compatibility of the measure with the right to privacy***

2.141 The right to privacy includes the right not to be subject to arbitrary or unlawful interference with a person's privacy, family, home or correspondence. As noted in the statement of compatibility, the amendments to the bill may engage and limit the right not to be subject to arbitrary or unlawful interference with a person's home, as the amendments affect orders that can be used to restrain and forfeit real property.<sup>20</sup>

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

2.143 As noted earlier, the objective of the bill is stated to be to ensure that criminals are not able to restructure their affairs to avoid the operation of the proceeds of crime legislation.<sup>21</sup> 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 that objective.

2.144 In relation to the proportionality of the measure, the statement of compatibility outlines several safeguards and protections in place to protect individuals whose property may be subject to other orders affected by the amendments in the bill. This includes, where a person's property is subject to a restraining order, a court may be able to make allowances for expenses to be met out of property covered by the restraining order,<sup>22</sup> or refuse to make an order where

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20 SOC [27].

21 The amendments were introduced following several court cases where doubts had been raised as to whether it was possible to consider the origins of payments made on property in order to determine whether the property could be forfeited: see *Commissioner of Australian Federal Police v Huang* [2016] WASC 5; *Commissioner of Australian Federal Police v Hart & Ors* [2016] QCA 215

22 Section 24 of the POC Act.

it is not in the public interest to do so.<sup>23</sup> Property will also cease to be 'proceeds' of an offence or an 'instrument' of an offence in certain circumstances, including if it is acquired by a third party for sufficient consideration without the third party knowing, and in circumstances that would not arouse reasonable suspicion, that the property was proceeds of an offence or an instrument of an offence.<sup>24</sup> A person may also seek a compensation order for the proportion of the value of the property they did not derive or realise from the commission of an offence.<sup>25</sup>

2.145 Notwithstanding these safeguards, the initial analysis noted that a person may still be liable for their property to be forfeited where a person has been acquitted of an offence, or where their conviction has been subsequently quashed.<sup>26</sup> This appears to leave open the possibility that a person may be acquitted of an offence, but nonetheless be liable to have their real property forfeited because they have made mortgage payments, or made improvements on that property, using funds that the court considers on the balance of probabilities are 'proceeds' from that offence.<sup>27</sup> There does not appear to be a safeguard in place to allow the court to revoke the forfeiture order upon an acquittal. The initial assessment stated that this raises questions both as to whether there are adequate safeguards in place to protect a person's home as well as whether the amendments are the least rights-restrictive means of achieving the objective.

2.146 The committee therefore sought the advice of the minister as to whether the limitation on the right to privacy is proportionate to the objective of the measure (including whether there are adequate safeguards in place to protect persons' property from being forfeited where they have been acquitted of the offence, and whether there are other less-rights restrictive means of achieving the objective).

### **Minister's response**

2.147 In response, the minister provided the following information:

This concern... only arises in relation to non-conviction based forfeiture orders under the POC Act. This method of forfeiture is specifically designed to allow proceeds authorities to seize and forfeit property where they can establish a link to criminal conduct on the balance of probabilities (the civil standard of proof). This system of forfeiture functions independently of any criminal finding of guilt, which is established on the higher standard of 'beyond reasonable doubt'.

The Australian Law Reform Commission previously recommended the adoption of a non-conviction based forfeiture regime in its review of the

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23 Sections 17(4) and 19(3) of the POC Act, and also sections 47(4), 48(2) and 49(4).

24 Section 330(4) of the Act.

25 Sections 77 and 94A.

26 Section 80 of the POC Act.

27 Section 48(1)(c) of the POC Act.

*Proceeds of Crime Act 1987*, which found that the previous system of conviction-based forfeiture was ineffective at confiscating criminal assets and undermining the profitability of criminal enterprises.

As noted in the Explanatory Memorandum to the Bill, the Act already contains safeguards and protections that ensure the measures are no more onerous than necessary to achieve their objectives. I also note that the civil forfeiture orders under the Act make no determination of a person's guilt or innocence and impose no criminal penalties upon an individual. Allowing these orders to be revoked where it is found that a person did not commit an offence beyond reasonable doubt, as is the case with an acquittal, would therefore be inappropriate and counterproductive to the underlying aims of non-conviction based forfeiture.

2.148 As noted earlier, the objective of confiscating criminal assets is an important objective and the proceeds of crime legislation provides law enforcement agencies with important and necessary tools in the fight against crime. However, the effect of a non-conviction based forfeiture order where a person has been acquitted of an offence is that a person may have their property seized even though they have been found not to have committed a crime by the criminal justice system. This raises concerns as to the compatibility of this measure with the right not to be arbitrarily subjected to interferences with a person's home. As noted in the previous analysis, in light of the committee's previously raised concerns about the sufficiency of safeguards in the POC Act, in order to fully assess the compatibility of the proposed measures it is necessary for a detailed assessment of the POC Act in respect of these concerns to be undertaken.

### **Committee response**

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

**2.150 The preceding analysis raises concerns as to the compatibility of the measure with the right to privacy, in particular, the right not to be arbitrarily subjected to interferences with a person's home. This is because a non-conviction based forfeiture order may apply to a person's real property because a person has made mortgage payments, or made improvements on that property, using funds that the court considers on the balance of probabilities are 'proceeds' from that offence, notwithstanding that a person has been acquitted of an offence to the criminal standard of proof.**

**2.151 The committee reiterates its previous view that the POC Act would benefit from a full review of the human rights compatibility of the legislation.**

## **Amendments to the unexplained wealth regime**

2.152 The POC Act also currently requires a court to make an 'unexplained wealth'<sup>28</sup> order where (relevantly) the court is not satisfied that the whole or any part of the person's wealth was not 'derived from' one or more relevant offences.<sup>29</sup> The bill seeks to amend the POC Act so that it additionally covers wealth that is 'derived or realised, directly or indirectly' from certain offences. In particular, the bill would amend section 179E of the POC Act to provide that an unexplained wealth order must be made where the court is not satisfied the whole or any part of a person's wealth is not 'derived or realised, directly or indirectly' from the commission of certain offences.<sup>30</sup> According to the statement of compatibility, this would align the unexplained wealth provisions with the revised definition of 'proceeds' and an 'instrument', discussed above. The burden of proving that a person's wealth is not derived or realised, directly or indirectly, from one or more of the relevant offences would lie on the person against which an order is being sought.<sup>31</sup>

### ***Compatibility of the amendments to the unexplained wealth regime with the right to a fair trial and the right to a fair hearing***

2.153 The committee has previously commented on the human rights compatibility of the unexplained wealth regime. In those reports, the committee raised concerns that the unexplained wealth provisions in the POC Act may involve the determination of a criminal charge, and that the operation of the reverse burden placed on a respondent effectively gives rise to a presumption of unlawful conduct, which may constitute a significant limitation on the right to be presumed innocent until proven guilty (if the POC Act were to be considered criminal for the purposes of international human rights law).<sup>32</sup> Concerns have also been raised insofar as a preliminary unexplained wealth order may be made against a person who does not appear at hearing, and so may not have an opportunity to be heard.<sup>33</sup> The amendments to the unexplained wealth regime, which broaden the basis on which unexplained wealth orders may be made, means that those matters raised in previous analyses are of equal relevance here. It is also noted that these

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28 'Unexplained wealth' refers to an amount that is the difference between a person's total wealth and the wealth shown to have been derived lawfully: see section 179E(2) of the Act.

29 See section 179E(1) of the POC Act.

30 See proposed amendment to section 179E(1) of the POC Act.

31 See proposed amendment to section 179E(3) of the POC Act.

32 See, Parliamentary Joint Committee on Human Rights, *First Report of 2013*, p. 27; *Third Report of 2013*, p. 120; *Sixth Report of 2013*, p. 189; *Fourth Report of the 44<sup>th</sup> Parliament* (March 2014) p. 1; *Ninth Report of the 44<sup>th</sup> Parliament* (July 2014), p. 133.

33 See, Parliamentary Joint Committee on Human Rights, *Fourth Report of the 44<sup>th</sup> Parliament* (March 2014) p. 6.

amendments are intended to operate retrospectively to a degree,<sup>34</sup> which additionally raises the issue of compatibility of the amendments with the absolute prohibition on retrospective criminal laws.

2.154 As discussed above in relation to the amendments to the definitions of 'proceeds' and an 'instrument', relevant factors in determining whether a measure is characterised as 'criminal' in nature are the domestic characterisation of the measure, the nature and purpose of the measure and the severity of the measure.<sup>35</sup> As the minister considers that the measures are not criminal in nature based on the domestic characterisation of the measure, no explanation is provided as to whether the measure is criminal by reference to the nature, purpose and severity of the measure, and further whether any potential limitations on fair trial and fair hearing rights are permissible.

2.155 The committee therefore sought the advice of the minister as to whether these amendments are compatible with fair trial and fair hearing rights, including:

- By reference to the committee's *Guidance Note 2*, whether the proposed amendments to the unexplained wealth regime in the bill may be characterised as 'criminal' for the purposes of international human rights law, having regard to the nature, purpose and severity of the measures; and
- The extent to which the amendments are compatible with the criminal process guarantees set out in Articles 14 and 15, including any justification for any limitations of these rights where applicable.

### Minister's response

2.156 The minister's response answered these queries together with the identical queries raised regarding the amendments to the definition of 'proceeds' and an 'instrument'. This response was discussed and analysed at [2.133] to [2.136] above, and the same analysis applies in the context of the unexplained wealth regime.

### Committee response

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

**2.158 The committee notes that the amendments to the unexplained wealth regime raise concerns regarding the compatibility of the measure with the right to a fair hearing and the right to a fair trial. The committee reiterates its previous view that the POC Act would benefit from a full review of the human rights compatibility of the legislation.**

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34 The amendments apply after the commencement in relation to property derived or realised after commencement, from the commission of an offence occurring before or after that commencement: see item 14(1).

35 Parliamentary Joint Committee on Human Rights, *Guidance Note 2: Offence provisions, civil penalties and human rights* (December 2014) p. 3.

## Social Services Legislation Amendment (Housing Affordability) Bill 2017

|                        |   |
|------------------------|---|
| <b>Purpose</b>         | Seeks to amend the <i>Social Security (Administration) Act 1999</i> , <i>Social Security Act 1999</i> and <i>A New Tax System (Family Assistance) (Administration) Act 1999</i> to incorporate a scheme for automatic deduction of rent and other household payments from social security or family tax benefit payments of tenants in social housing |
| <b>Portfolio</b>       | Social Services   |
| <b>Introduced</b>      | House of Representatives, 14 September 2017   |
| <b>Rights</b>          | Multiple Rights (see <b>Appendix 2</b> )  |
| <b>Previous report</b> | 12 of 2017  |
| <b>Status</b>          | Concluded examination   |

### Background

2.159 The committee first reported on the Social Services Legislation Amendment (Housing Affordability) Bill 2017 (the bill) in its *Report 12 of 2017*, and requested a response from the Minister for Social Services by 13 December 2017.<sup>1</sup>

2.160 The minister's response to the committee's inquiries was received on 11 December 2017. The response is discussed below and is reproduced in full at **Appendix 3**.

### Automatic deduction of rent and housing payments from social security or family tax benefit payments

2.161 The bill seeks to amend the *Social Security (Administration) Act 1999*, *Social Security Act 1999* and *A New Tax System (Family Assistance) (Administration) Act 1999* to introduce an automatic rent deduction scheme (ARDS). ARDS is a scheme for tenants in social (public or community) housing for the automatic deduction of rent and other household payments from the tenants' social security or family tax benefit payments.

2.162 The bill provides that a social housing lessor (landlord) may request the Secretary deduct an amount from a social housing tenant's 'divertible welfare

1 Parliamentary Joint Committee on Human Rights, *Report 12 of 2017* (28 November 2017) pp. 43-52.

payment<sup>2</sup> or family tax benefit to satisfy rent, household utilities or both that are payable by the tenant.<sup>3</sup> The request can be made by the lessor to the Secretary in the following circumstances:

(a) both of the following apply:

(i) the tenant has an ongoing or outstanding obligation to pay an amount for rent, household utilities, or both, in relation to the tenant's occupancy of premises let by the lessor;

(ii) the tenant's agreement with the lessor for occupancy of the premises, or another written agreement with the lessor, authorises the lessor to make requests under this Part for deductions from divertible welfare payments payable to the tenant; or

(b) the tenant is to pay to the lessor an amount for loss of, or damage to, property, as a result of the tenant's occupancy of premises let by the lessor so as to comply with an order of a court, or of a tribunal or other body that has the power to make orders, and either:

(i) the period for appealing against the order ends without an appeal being made; or

(ii) if an appeal is made against the order—the appeal is finally determined or otherwise disposed of; or

(c) the tenant agrees, in writing, to pay to the lessor an amount for loss of, or damage to, property, as a result of the tenant's occupancy of premises let by the lessor.<sup>4</sup>

2.163 A 'social housing tenant' is defined as a person who is 18 years or older who pays, or is liable to pay, rent in relation to a premises let by a social housing lessor, whether or not the person is named in the agreement with the lessor for occupancy of the premises.<sup>5</sup> According to the explanatory memorandum, this definition will allow deductions to be sought from the welfare payment of any of the adult occupants of the house.<sup>6</sup>

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2 See proposed section 124QB of the *Social Security (Administration) Act 1999*, which defines 'divertible welfare payment' as a social security payment or a payment under the ABSTUDY scheme that is payable to a particular person and is not '(i) an Australian Victim of Terrorism Overseas Payment; or (ii) a Disaster Recovery Allowance; or (iii) a student start-up loan; or (iv) an ABSTUDY student start-up loan under the *Student Assistance Act 1973*; or (v) of a kind determined in an instrument [made by the Minister]'

3 See proposed section 124QF(3) to the *Social Security (Administration) Act 1999* and proposed section 67D(3) to the *A New Tax System (Family Assistance) (Administration) Act 1999*.

4 Proposed section 124QF(1) to the *Social Security (Administration) Act 1999* and proposed section 67D(1) to the *A New Tax System (Family Assistance) (Administration) Act 1999*.

5 Proposed section 124QD to the *Social Security (Administration) Act 1999*.

6 Explanatory Memorandum (EM) p. 7.

### **Compatibility of the automatic rent deduction scheme with multiple rights**

2.164 The initial analysis stated that the ARDS engages and limits several human rights, including:

- the right to social security;
- the right to an adequate standard of living;
- the right to privacy;
- the right to protection of the family; and
- the right to equality and non-discrimination (see **Appendix 2**)

2.165 The ARDS raises similar issues against the right to social security, the right to an adequate standard of living, the right to privacy and the right to protection of the family. Distinct considerations arise in relation to the right to equality and non-discrimination, which are discussed further below.

2.166 The right to social security recognises the importance of adequate social benefits in reducing the effects of poverty and plays an important role in realising many other economic, social and cultural rights. The Committee on Economic, Social and Cultural Rights has noted that social security benefits must be adequate in amount and duration having regard to the principle of human dignity, so as to avoid any adverse effect on the levels of benefits and the form in which they are provided.<sup>7</sup> Additionally, the right to an adequate standard of living in Article 11 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) requires Australia to take steps to ensure the availability, adequacy and accessibility of food, clothing, water and housing for all people in Australia. Under the Convention on the Rights of the Child (CRC), children have the right to benefit from social security and to a standard of living adequate for a child's physical, mental, spiritual, moral and social development.<sup>8</sup> Additionally, Australia has obligations under Article 23 of the International Covenant on Civil and Political Rights (ICCPR) and Article 10 of the ICESCR to provide the widest possible protection and assistance to the family.

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

2.168 The initial analysis stated that the ARDS may limit these rights, as the scheme limits social housing tenants' freedom and autonomy to make decisions about the way in which their social security payments or family tax benefits are used.

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7 UN Committee on Economic, Social and Cultural Rights, *General Comment No. 19: The Right to Social Security*, UN Doc E/C.12/GC/19 (2008), [22].

8 Article 26 and Article 27 of the Convention on the Rights of the Child.

The minister acknowledged in the statement of compatibility that the right to social security, the right to an adequate standard of living, the right to privacy, the right to protection of the family and the rights of children are engaged and limited by the ARDS. However, in relation to the right to privacy, the statement of compatibility only addressed the right to privacy insofar as it related to the disclosure of personal information. The statement of compatibility did not otherwise address the right to privacy, including the extent to which the bill may interfere with a person's private and home life through limiting affected persons' ability to choose the way in which their social security or family tax benefits are used.

2.169 For a limitation on a human right to be permissible, it must pursue a legitimate objective, be rationally connected to that objective, and be a proportionate way to achieve that objective. The statement of compatibility explained that the objective of ARDS is to prevent evictions due to arrears and debt which may force a person, and their children, into homelessness.<sup>9</sup> The statement of compatibility further stated:

ARDS aims to:

1. reduce the risk that social housing tenants will accumulate rental arrears and other housing debt risking their tenancies,
2. reduce the cost of managing social housing arrears and debt, and
3. better secure the income stream associated with housing assets.<sup>10</sup>

2.170 A legitimate objective is one that is necessary to address an area of public and social concern, not one that simply seeks an outcome that is regarded as desirable or convenient. The initial analysis stated that the objective of reducing the risk of rental arrears, evictions and homelessness is capable of constituting a legitimate objective for the purposes of international human rights law.<sup>11</sup> However, where a measure may limit a human right, the committee's usual expectation is that the accompanying statement of compatibility provides a reasoned and evidence-based explanation of how the measure supports a legitimate objective.<sup>12</sup> In this instance, no evidence was provided in the statement of compatibility as to the extent to which rental arrears in the social housing sector is a pressing issue.

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9 Statement of Compatibility (SOC) p. 2.

10 SOC p. 1.

11 The UN Special Rapporteur on adequate housing has recently emphasised the importance of the right to adequate housing and noted that it is a human right which is interdependent with other human rights, particularly the right to equality and non-discrimination and the right to life: *Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context*, A/HRC/34/51, (2017) [11].

12 Parliamentary Joint Committee on Human Rights, *Guidance Note 1—Drafting Statements of Compatibility* (December 2014).

2.171 The statement of compatibility noted that, in most jurisdictions, social housing tenants have a condition in their lease to use a voluntary rent deduction scheme to pay housing tenancy costs, and that tenancy tribunals may order defaulting tenants to use the voluntary rent deduction scheme. It stated that under the present scheme tenants may 'bypass their social housing provider and cancel their authorised tenancy tribunal ordered voluntary rent deductions' due to social security payments and family tax benefits being 'absolutely inalienable' under the existing law.<sup>13</sup> However, no evidence was provided as to the extent to which tenants have engaged in 'bypassing' of tribunal orders, and no evidence was provided to explain the extent to which the existing scheme of voluntary rent deduction is ineffective to address the stated objective of reducing the risk of rental arrears, evictions and homelessness.

2.172 The statement of compatibility stated that people subject to the ARDS will benefit by way of a reduction in their liability to a social housing lessor, and that the scheme is designed to ensure persons continue to enjoy an adequate standard of living (including housing) by reducing the risk of arrears build-up which may lead to eviction and possible homelessness.<sup>14</sup> It further stated that by preventing rental arrears and possible eviction, the bill will assist a person's capacity to meet the basic needs of his or her family and protects the rights of children.<sup>15</sup> On these bases, the statement of compatibility argued that the measures are compatible with the rights to social security, an adequate standard of living, protection of the family and the rights of children.

2.173 However, the initial analysis stated that the application of the ARDS to persons with an 'ongoing or outstanding obligation'<sup>16</sup> to pay rent or housing utilities suggests that the scheme may apply to tenants with ongoing obligations to pay rent regardless of whether or not they are in rental arrears. This may result in tenants having limitations placed on their social security payments or family tax benefits, even in circumstances where they may not need assistance managing rental payments or payment of household utilities. The initial analysis stated that it was not clear how applying the scheme to persons in such circumstances was rationally connected to the objective of reducing risk of evictions and homelessness, as such persons may not be at risk. On the contrary, there may be a risk that the imposition of the ARDS on persons who are not at risk could encourage welfare dependency by reducing a person's independent financial management capabilities.

2.174 Similarly in relation to the proportionality of the measure, the initial analysis stated the application of the ARDS to persons with an ongoing (but not an

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13 SOC, p. 1.

14 SOC, pp. 2-3.

15 SOC, pp. 2-3.

16 Proposed section 124QF(1) to the *Social Security (Administration) Act 1999* and proposed section 67D(1) to the *A New Tax System (Family Assistance) (Administration) Act 1999*.

outstanding) obligation to pay rent did not appear to be the least rights-restrictive means of achieving the objectives of reducing the risk of rental arrears, evictions and homelessness. There appeared to be other less rights-restrictive means of achieving these objectives, including limiting the scheme to persons who have an outstanding obligation to pay rent, or have a demonstrated risk of falling into rental arrears that is determined by reasonable and objective criteria, for example because the person may have fallen into rental arrears on several previous occasions.

2.175 In its *2016 Review of Stronger Futures Measures*, the committee commented that income management is most effective when it is voluntary, or when it is applied to individuals after considering their particular circumstances – that is, when it is applied flexibly.<sup>17</sup> The committee also raised concerns that compulsory income management provisions which operate inflexibly raise the risk that the regime would be applied to people who did not need assistance managing their budget.<sup>18</sup> The initial analysis of the present bill noted that the bill does not appear to include any requirement that a social housing lessor or the Secretary consider an individual's particular circumstances, beyond the requirement that a tenant has ongoing or outstanding obligation to pay rent and authority under the tenant's lease for the lessor to make the request. For example, there does not appear to be any requirement (discretionary or otherwise) for the Secretary to consider a tenant's personal circumstances, such as whether the imposition of the ARDS would cause hardship, in determining whether a deduction should be made following a request from a lessor.<sup>19</sup> This raised concerns that the measure may not provide sufficient flexibility to treat different cases differently having regard to the merits of an individual case.

2.176 The initial analysis stated that the absence of any discretion to consider a tenant's personal circumstances raised particular concerns in relation to the right to protection of the family and the rights of children. If, for example, the timing of the automatic rent deduction was such that it made it difficult for a parent to pay for other necessities in circumstances of financial stress, this could affect the standard of living of children under the tenant's care. This raised additional questions about the proportionality of the measure to the protection of the family and the rights of the child.

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

- whether there is reasoning or evidence that establishes that the stated objective addresses a pressing or substantial concern or whether the proposed changes are otherwise aimed at achieving a legitimate objective

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17 Parliamentary Joint Committee on Human Rights, *2016 Review of Stronger Futures Measures* (16 March 2016) pp. 50-54.

18 Parliamentary Joint Committee on Human Rights, *2016 Review of Stronger Futures Measures* (16 March 2016) p. 61.

19 See section 124QG.

- (including any evidence of the extent to which the existing scheme of voluntary rent deduction is ineffective);
- how the automatic rent deduction scheme is effective to achieve (that is, rationally connected to) that objective (including its potential application to those who are not and have not been in rental arrears); and
  - whether the automatic rent deduction scheme is a proportionate limitation on these rights, in particular whether applying the scheme described in paragraph [2.162] above to both ongoing and outstanding obligations to pay rent is the least rights-restrictive means of achieving the stated objective, and whether the scheme provides sufficient flexibility to treat different cases differently.

### **Minster's response**

2.178 In relation to whether the stated objective addresses a pressing or substantial concern, the minister's response states:

Rent arrears and a failure to pay other tenancy charges is the single most significant tenancy management issue facing social housing providers nationally. The impact of failed social housing tenancies due to rent arrears is significant-including the direct impact of exits into homelessness and the longer-term impacts of housing instability (particularly in terms of continuity of support arrangements; employment opportunities and school attendance for children).

State and territory governments estimate that the social housing system is losing more than \$30 million annually from unpaid rent and administrative costs. This places an additional and unnecessary burden on the already financially strained public housing system.

The current Rent Deduction Scheme (RDS) is voluntary and easy to bypass. This is because arrangements can be cancelled by the tenant without the housing provider's knowledge, which can lead to increasing rental arrears and eventual eviction.

For example in 2013-14, around 80,000 households in social housing stopped their voluntary deductions at some time during the year which put them at greater risk of falling behind in their rent.

Social housing tenants not paying their rent can also put pressure on local support and homelessness services.

2.179 The minister's response also addresses the effectiveness of the current voluntary rent deduction scheme:

In 2013-14, more than 8,900 social housing tenants, including families with children, were in serious rental arrears, with more than 2,300 people evicted due to rent defaults. In NSW, during the same period, over 80 per cent of those evicted due to serious rental arrears had previously participated in the current voluntary Rent Deduction Scheme (RDS) but

had then cancelled. If an ARDS were in place, this group would have been unable to cancel their payment. This strongly suggests that ARDS would be effective in reducing tenancy eviction rates.

2.180 Based on the further information provided by the minister, it is likely that the ARDS addresses a pressing and substantial concern for the purposes of international human rights law.

2.181 The minister's response further explains that the ARDS will improve the operational efficiency of social housing, by ensuring social housing providers receive rent from tenants on time, including from those tenants who consistently fail to pay. The minister's response further explains that:

Tenants have a legal obligation to pay rent as part of their tenancy agreements with their relevant housing providers. The ARDS acts as both a facility to enable the payment of these rents in a cost effective manner for housing providers, and a seamless mechanism for the tenant to ensure that their legal obligations are met.

...

ARDS recognises that social welfare payments should be used towards a person's and their family's basic needs and is intended to support security of tenure in housing. It also recognises that a person's home is an important precondition to their ability to exercise their human rights and their economic, social and cultural rights in particular.

2.182 In light of further information as to the level of arrears in the social housing context, to the extent that the ARDS would apply to persons that have an *outstanding* obligation to pay rent, the scheme appears to be rationally connected to the objective of reducing the risk of homelessness insofar as it could reduce tenancy eviction rates by preventing rental arrears from occurring.

2.183 However, the minister's response does not overcome the committee's specific concerns that the application of the ARDS to persons with an *ongoing* (but not an outstanding) obligation to pay rent does not appear to be rationally connected to the objective of reducing the risk of evictions and homelessness. This is because persons in such circumstances may not be at risk of eviction. This is also relevant to whether the limitation is proportionate, as concerns remain that tenants may have limitations placed on their social security and family tax benefits in circumstances where they pose no risk of falling into arrears. It would appear that a less rights-restrictive means of achieving the objective would include only applying the scheme to persons who have an outstanding obligation to pay rent, or have a demonstrated risk of falling into rental arrears that is determined by reasonable and objective criteria (such as previously falling into arrears).

2.184 As to the safeguards that are in place to consider individual circumstances, the minister's response explains that states and social housing providers are responsible for tenancy management and 'they would continue to retain

responsibility and flexibility for tenancy management and rent setting policies', such as deciding to which of their occupants of properties covered by a current lease ARDS should apply. The minister's response further explains:

If a tenant is not able to resolve their concerns regarding an Automatic Rent Deduction Scheme (ARDS) deduction with their housing provider or a State based Review Body, they could approach the Department of Human Services (DHS). If it is a matter where the Commonwealth has responsibility, DHS and the Department of Social Services would monitor such requests for review as part of their usual business operations.

The Secretary (or their delegate) also has the power to intervene and make a decision as to whether a deduction is made and the amount deducted. Policy guidelines will also be developed following the passing of the Bill, which will provide further clarity on the operation of ARDS.

In addition, deductions under the scheme will stop as soon as the person is no longer living in public or community housing covered by a current lease.

An ARDS is designed to work alongside government funded financial counselling and other available support services, to ensure that tenants continue to be housed safely and affordably while they get the help they need to sustain their tenancy.

2.185 While the minister's response provides information about the avenues that may be pursued by persons who have concerns over the operation of the scheme, it remains unclear whether sufficient safeguards are in place to accommodate tenants' individual circumstances. This includes whether the automatic deduction of rent would increase financial hardship or would operate in a manner that prevented a person having funds available to meet other basic and reasonable needs. In relation to the Secretary's power to intervene and make a decision as to whether a deduction is made, it is also not clear whether that power includes a discretion to consider matters beyond the requirement that a tenant has ongoing or outstanding obligation to pay rent and authority under the tenant's lease for the lessor to make the request. While the minister's response indicates that policy guidance will be provided in relation to the operation of the ARDS, this is less stringent than the protection of statutory processes. This is because such guidance can be removed, revoked or amended at any time and is not required as a matter of law. Therefore, based on the information provided, it is not possible to conclude that the safeguards referred to by the minister overcome the concerns that the blanket operation of the scheme may not provide sufficient flexibility to have regard to an individual's particular circumstances.

### **Committee response**

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

**2.187 Notwithstanding the legitimate objective of the bill, the preceding analysis indicates that the automatic rent deduction scheme may be incompatible with the**

right to social security, the right to an adequate standard of living, the right to privacy, the right to protection of the family and the rights of children. This is because:

- the application of the scheme to persons with an ongoing (but not an outstanding) obligation to pay rent does not appear to be rationally connected or proportionate to the stated objective of the bill of reducing the risk of rental arrears and homelessness; and
- the bill does not appear to provide sufficient flexibility to have regard to a tenant's individual circumstances.

### ***The right to equality and non-discrimination***

2.188 The right to equality and non-discrimination is protected by the ICCPR and the ICESCR. It 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.

2.189 'Discrimination' refers to a distinction based on a personal attribute (for example, race, sex, or religion) which has either the purpose (called 'direct' discrimination) or the effect (called 'indirect' discrimination) of adversely affecting human rights. 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.<sup>20</sup>

2.190 Demographic information published by the Australian Institute of Health and Welfare in July 2017 states that in social housing households, the majority of tenants were female (62%) and that 43% reported a disability, although only 29% identified a disability support pension as their main source of income.<sup>21</sup> Similarly in state-owned and managed Indigenous housing, approximately three quarters of tenants were female (76%) and 34% of tenants reported having a disability. In community housing households, 57% of tenants were female with more than one-third (35%) reporting having a disability.<sup>22</sup>

2.191 The initial analysis noted that the statement of compatibility does not acknowledge that the right to equality and non-discrimination is engaged or limited by the bill. However, the information in the preceding paragraph indicates that the ARDS may have a disproportionate impact on women and persons with a disability.

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

21 Australian Institute of Health and Welfare, *Housing Assistance in Australia 2017* (13 July 2017) <https://www.aihw.gov.au/reports/web/web-189/housing-assistance-in-australia-2017/contents/social-housing-tenants-1>.

22 Australian Institute of Health and Welfare, *Housing Assistance in Australia 2017* (13 July 2017) <https://www.aihw.gov.au/reports/web/web-189/housing-assistance-in-australia-2017/contents/social-housing-tenants-1>.

Where a measure impacts on particular groups disproportionately it establishes *prima facie* that there may be indirect discrimination.<sup>23</sup>

2.192 Differential treatment (including the differential effect of a measure that is neutral on its face) will not constitute unlawful discrimination if the differential treatment is based on reasonable and objective criteria such that it serves a legitimate objective, is rationally connected to that legitimate objective and is a proportionate means of achieving that objective. For the reasons stated earlier, no evidence is provided in the statement of compatibility as to whether the existing scheme is ineffective to address the stated objective of reducing the risk of rental arrears, evictions and homelessness. This raises questions as to whether the measure is based on reasonable and objective criteria to justify the disproportionate impact this measure may have on women and persons with a disability. Information to justify the rationale for the differential effect on women and persons with a disability will also be relevant to the proportionality analysis.

2.193 The committee therefore sought the advice of the minister as to the compatibility of the automatic rent deduction scheme with the right to equality and non-discrimination.

### **Minster's response**

2.194 In response, the minister provides the following information:

An ARDS is not discriminatory; it is a mechanism available for social housing providers to use to ensure rent is paid when it is due. It is a matter for housing providers to determine to which tenants ARDS will apply.

An ARDS will assist tenants by ensuring that they are able to honour rent and other household costs associated with tenancy obligations they have entered into.

The intent of this measure is to improve longer-term housing stability and reduce the risk of homelessness. ARDS may therefore have a comparatively larger positive impact on women and persons with a disability as they are most likely to be overrepresented in social housing.

2.195 As noted earlier, a measure that is neutral on its face or without intent to discriminate may constitute indirect discrimination where a measure disproportionately affects people with a particular personal attribute. As noted by the minister in his response, women and persons with a disability are most likely to be overrepresented in social housing. In light of the demographic information [2.190] above, it appears that the ARDS may have a disproportionate impact on women and persons with a disability and therefore constitutes indirect discrimination.

2.196 As discussed above, the minister has provided further information as to the effectiveness of the existing scheme and the legitimate objective of the ARDS. The

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23 *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).

minister has also identified that the scheme may positively impact women and persons with a disability as it will reduce their risk of homelessness.

2.197 However, the concerns discussed above in relation to the application of the scheme to persons with an ongoing obligation to pay rent are equally relevant in ascertaining whether the discrimination would be unlawful. By applying the scheme to persons with an ongoing (but not an outstanding) obligation to pay rent, there is a risk that the scheme may restrict social housing tenants' (of which women and persons with a disability are overrepresented) social security payments and family tax benefits in circumstances where those persons are not at risk of falling into arrears. There appear to be other, less rights-restrictive, measures available, such as applying the scheme only to those persons who are at risk. The minister has not provided information as to any reasonable and objective criteria to justify the disproportionate impact the measure may have on women and persons with a disability.

### **Committee response**

**2.198 The committee thanks the minister for his response.**

**2.199 The committee is unable to conclude that the measure is compatible with the right to equality and non-discrimination.**

### **Amendments to the trial of the cashless welfare arrangements**

2.200 Part 3D of the *Social Security (Administration) Act 1999* provides for the trial of cashless welfare arrangements. The trial permits certain welfare payments to be divided into 'restricted' and 'unrestricted' portions, with recipients being unable to spend the restricted portions of such payments on alcohol or gambling.<sup>24</sup> Currently, section 124PM provides that a person who receives a 'restrictable payment'<sup>25</sup> may use the restricted portion of the payment to purchase goods or services other than alcohol beverages or gambling, and 'may use the unrestricted portion of the payment, as paid to the person, at the person's discretion'.

2.201 Item 7 of the bill proposes to repeal section 124PM and substitute it with the following provision:

A person who received a restrictable payment may use the restricted portion of the payment, as paid under subsection 124PL(2), to purchase goods or services, other than alcoholic beverages or gambling.

2.202 The effect of this amendment, according to the explanatory memorandum, would be to allow for automatic rent deductions 'to be made from the unrestricted portion of a cashless debit card participant's welfare payment, if necessary'.<sup>26</sup>

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24 See section 124PB of the *Social Security (Administration) Act 1999*.

25 Which includes a number of payments, including specified social security payments and family tax benefits: see section 124PD(1) of the *Social Security (Administration) Act 1999*.

26 EM, p. 6.

**Compatibility of the amendments to the cashless welfare arrangements with the right to equality and non-discrimination**

2.203 The committee has previously commented on the human rights compatibility of the cashless welfare arrangements.<sup>27</sup> The committee has also examined the income management regime in its 2013 and 2016 Reviews of the Stronger Futures measures.<sup>28</sup> Those reports noted that the cashless welfare arrangements engage and limit several human rights, including the right to social security, the right to privacy and family and the right to equality and non-discrimination.

2.204 The initial assessment stated that, in allowing for automatic rent deductions to be made from the unrestricted portion of a cashless debit card participant's welfare payment, the bill appears to further restrict how a person subject to the cashless welfare regime may spend their social security payment or family tax benefit. It appears, for example, that a possible outcome of rent being automatically deducted from the unrestricted portion of a person's welfare payment is that a cashless welfare participant could have no amount of their unrestricted welfare payment remaining. That is, the amendment to section 124PM appears to leave open the possibility that no portion, or only a small portion, of a cashless welfare participant's welfare payment could be used at the person's discretion.

2.205 The issues raised in the previous section relating to the automatic rent deduction scheme apply equally to the amendments to the cashless welfare arrangements.<sup>29</sup> Further, the amendments to the cashless welfare regime raise additional issues in relation to the right to equality and non-discrimination. This is because, as the committee has previously commented, while the cashless welfare scheme does not directly discriminate on the basis of race, Indigenous people are disproportionately affected by the cashless welfare regime in the locations where the scheme currently operates.<sup>30</sup>

2.206 As noted earlier, differential treatment (including the differential effect of a measure that is neutral on its face) will not constitute unlawful discrimination if the

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27 See Parliamentary Joint Committee on Human Rights, *Report 11 of 2017* (17 October 2017) pp. 126-137; *Report 9 of 2017* (5 September 2017) pp. 34-40; *Report 7 of 2016* (11 October 2016) pp. 58-61; *Twenty-seventh report of the 44<sup>th</sup> Parliament* (8 September 2015) pp. 20-29; *Thirty-first report of the 44<sup>th</sup> Parliament* (24 November 2015) pp. 21-36.

28 Parliamentary Joint Committee on Human Rights, *Eleventh Report of 2013: Stronger Futures in the Northern Territory Act 2012 and Related Legislation* (27 June 2013) and *2016 Review of Stronger Futures Measures* (16 March 2016).

29 See also the previous comments of the committee: Parliamentary Joint Committee on Human Rights, *Report 11 of 2017* (17 October 2017) pp. 126-137; *Report 9 of 2017* (5 September 2017) pp. 34-40; *Report 7 of 2016* (11 October 2016) pp. 58-61; *Twenty-seventh report of the 44<sup>th</sup> Parliament* (8 September 2015) pp. 20-29; *Thirty-first report of the 44<sup>th</sup> Parliament* (24 November 2015) pp. 21-36.

30 See, Parliamentary Joint Committee on Human Rights, *Thirty-first report of the 44<sup>th</sup> Parliament* (24 November 2015) pp. 21-36.

differential treatment is based on reasonable and objective criteria such that it serves a legitimate objective, is rationally connected to that legitimate objective and is a proportionate means of achieving that objective.

2.207 The minister does not acknowledge that the amendments to the cashless welfare regime introduced by the bill engage and limit the right to equality and non-discrimination. However, as noted earlier, measures that disproportionately impact particular groups establish *prima facie* that there may be indirect discrimination. In addition to the concerns raised at [2.175] above in relation to the ARDS, the particular impact on participants in the cashless welfare scheme raises further questions as to the proportionality of the measure.

2.208 Accordingly, the committee sought the advice of the minister as to whether the amendments to the cashless welfare arrangements introduced by the bill are compatible with the right to equality and non-discrimination (including whether the measure pursues a legitimate objective, is rationally connected to that objective and is a proportionate limitation on the right).

### **Minster's response**

2.209 The minister's response provides the following information in relation to the amendments to the cashless welfare arrangements:

These amendments do not adversely affect CDC participants. They simply provide consistency for all welfare recipients subject to deductions such as the ARDS, regardless of whether they are also subject to the CDC.

The amendments to allow the automatic deduction of rent where a person is also subject to the cashless debit card (CDC) do not have a negative effect on any CDC participants, including those that identify as Aboriginal or Torres Strait Islander. The interaction between the ARDS and the CDC program was considered carefully during drafting to ensure that CDC participants were not disadvantaged by the introduction of the ARDS.

Generally, the amendments to cashless welfare provisions (contained in Part 30 of the *Social Security (Administration) Act 1999*) will allow for the automatic deduction of rent from the restricted portion of a CDC participant's payment.

2.210 While the minister's response states that the amendments do not adversely affect participants in the cashless welfare scheme, removing the reference in current section 124PM to a person's ability to 'use the unrestricted portion of the payment... at the person's discretion' would allow for automatic rent deductions to be made from a person's previously unrestricted portion of their welfare payment.<sup>31</sup> The bill therefore appears to further restrict how a person subject to the cashless welfare regime may spend their social security or family tax benefit, and may limit, or entirely preclude, a person's discretionary income if they are subject to both the

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31 See item 7 of the bill, and page [6] of the explanatory memorandum.

ARDS and the cashless welfare regime. As such, the measure would appear to constitute a further limitation on the right to social security and right to privacy.

2.211 Additionally, as the committee has previously noted in its analysis of the cashless welfare regime,<sup>32</sup> Indigenous people are disproportionately affected by the cashless welfare regime in the locations where the scheme currently operates. This aspect of the bill therefore raises additional concerns in relation to the compatibility of the measure with the right to equality and non-discrimination. However, the minister has not provided any further information which directly addresses the compatibility of the amendments to the cashless welfare regime with this right. In light of the effect of the amendments on a person's discretionary income and the committee's previous analyses of the cashless welfare regime, serious concerns remain as to the compatibility of the amendments to the cashless welfare regime with the right to equality and non-discrimination.

### **Committee response**

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

**2.213 The effect of the amendments to the cashless welfare arrangements would be to allow for automatic rent deductions to be made from the previously unrestricted portion of a cashless debit card participant's welfare payment. This limits the right to equality and non-discrimination, as Indigenous people are disproportionately affected by the cashless welfare regime in locations where the scheme currently operates.**

**2.214 In light of the effect of the amendments on a person's discretionary income and the committee's previous analyses of the cashless welfare regime,<sup>33</sup> the proposed amendments to the cashless welfare regime introduced by the bill may be incompatible with the right to equality and non-discrimination.**

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32 See Parliamentary Joint Committee on Human Rights, *Report 11 of 2017* (17 October 2017) pp. 126-137; *Report 9 of 2017* (5 September 2017) pp. 34-40; *Report 7 of 2016* (11 October 2016) pp. 58-61; *Twenty-seventh report of the 44<sup>th</sup> Parliament* (8 September 2015) pp. 20-29; *Thirty-first report of the 44<sup>th</sup> Parliament* (24 November 2015) pp. 21-36.

33 See Parliamentary Joint Committee on Human Rights, *Report 11 of 2017* (17 October 2017) pp. 126-137; *Report 9 of 2017* (5 September 2017) pp. 34-40; *Report 7 of 2016* (11 October 2016) pp. 58-61; *Twenty-seventh report of the 44<sup>th</sup> Parliament* (8 September 2015) pp. 20-29; *Thirty-first report of the 44<sup>th</sup> Parliament* (24 November 2015) pp. 21-36.

## Treasury Laws Amendment (Banking Executive Accountability and Related Measures) Bill 2017

|                        |   |
|------------------------|---|
| <b>Purpose</b>         | Seeks to amend the <i>Banking Act 1959</i> to establish the Banking Executive Accountability Regime and provide the Australian Prudential Regulation Authority with strengthened powers |
| <b>Portfolio</b>       | Treasury  |
| <b>Introduced</b>      | House of Representatives, 19 October 2017   |
| <b>Rights</b>          | Privacy; not to incriminate oneself (see <b>Appendix 2</b> )  |
| <b>Previous report</b> | 12 of 2017  |
| <b>Status</b>          | Concluded examination   |

### Background

2.215 The committee first reported on the Treasury Laws Amendment (Banking Executive Accountability and Related Measures) Bill 2017 (the bill) in its *Report 12 of 2017*, and requested a response from the Treasurer by 13 December 2017.<sup>1</sup>

2.216 The Treasurer's response to the committee's inquiries was received on 14 December 2017. The response is discussed below and is reproduced in full at **Appendix 3**.

### Coercive examination and information gathering powers

2.217 Schedule 2 of the bill seeks to amend the *Banking Act 1959* to provide the Australian Prudential Regulation Authority (APRA) with new examination and information gathering powers. The powers include enabling APRA to require a person to appear before an APRA-appointed investigator and 'provide all reasonable assistance in connection with the investigation' and to require a person to produce books, accounts, documents or sign a record that may be relevant to an investigator, regardless of whether the provision of such information may incriminate the person.<sup>2</sup> Failure to comply with these requirements would be an offence and carry a maximum penalty of 30 penalty units (currently \$6,300).<sup>3</sup>

1 Parliamentary Joint Committee on Human Rights, *Report 12 of 2017* (28 November 2017) pp. 53-57.

2 See Schedule 2, item 9, sections 61A and 61C. Under the bill, a person is required to appear before an investigator where the investigator 'reasonably believes or suspects that a person... can give information relevant to the investigator's investigation'. See proposed schedule 2, item 9, section 61C.

3 See Schedule 2, item 9, section 61G.

**Compatibility of the measure with the right not to incriminate oneself**

2.218 Specific guarantees of the right to a fair trial in the determination of a criminal charge guaranteed by article 14 of the International Covenant on Civil and Political Rights (ICCPR) include the right not to incriminate oneself (article 14(3)(g)).

2.219 Schedule 2 of the bill engages and limits this right by requiring a person to attend an examination, answer questions or provide books, accounts, documents or sign a record notwithstanding that to do so might tend to incriminate that person. The right not to incriminate oneself may be subject to permissible limitations where the limitation pursues a legitimate objective, is rationally connected to that objective and is a proportionate way of achieving that objective.

2.220 The statement of compatibility acknowledges that the right not to incriminate oneself is engaged by the bill, but states that the limitation on this right is permissible on the following bases:

Engaging the right against self-incrimination in this way is necessary and justified as the public benefit in removing the liberty outweighs the loss to the individual. The information which would be obtained by APRA is critical in it performing its regulatory functions, specifically protecting depositors in an ADI [authorised deposit-taking institution], ensuring the stability of Australia's financial system including through investigating prudential matters.

2.221 While the broad objectives of protecting depositors and ensuring the stability of Australia's financial system may be capable of constituting legitimate objectives, the statement of compatibility provides no information about the importance of these objectives in the specific context of the measure. In order to demonstrate that the measure pursues a legitimate objective for the purposes of international human rights law, a reasoned and evidence-based explanation of why the measure addresses a substantial and pressing concern is required.

2.222 Questions also remain as to whether the limitation is rationally connected to and a proportionate means of achieving the objectives. In particular, the availability of use and derivative use immunities can be an important factor in determining whether the abrogation of the privilege against self-incrimination is proportionate. That is, they may act as a relevant safeguard. The statement of compatibility states that a 'use' immunity would be available.<sup>4</sup> This means that, where a person has been required to give incriminating evidence, that evidence cannot be used against the person in any civil or criminal proceeding, subject to exceptions,<sup>5</sup> but may be used to obtain further evidence against the person.

2.223 However, no 'derivative use' immunity is provided in the bill, which would prevent information or evidence indirectly obtained from being used in criminal

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4 SOC, p. 79.

5 This includes proceedings concerning the falsity of the information provided. See SOC, p. 79.

proceedings against the person. It is acknowledged that a 'derivative use' immunity will not be appropriate in all cases because it is not reasonably available as a less rights restrictive alternative. For example, because it would undermine the purpose of the measure or be unworkable. However, the statement of compatibility does not substantively address why a 'derivative use' immunity would not be reasonably available in this case. This raises the question as to whether the measure is the least rights restrictive way of achieving the stated objective as required in order for the limitation to be proportionate.

2.224 Further, it is noted that the availability or lack of availability of a 'derivative use' immunity needs to be considered in the regulatory context of the proposed powers. The extent of interference that may be permissible as a matter of international human rights law may be, for example, greater in contexts where there are difficulties regulating specific conduct, persons subject to the powers are not particularly vulnerable or powers are otherwise circumscribed with respect to the scope of information which may be sought. That is, there is a range of matters which influence whether the limitation is proportionate.

2.225 The committee therefore sought the advice of the Treasurer as to:

- whether there is reasoning or evidence that establishes that one or more of the stated objectives addresses a pressing or substantial concern or whether the proposed changes are otherwise aimed at achieving a legitimate objective for the purposes of international human rights law;
- how the measure is effective to achieve (that is, rationally connected to) that objective;
- whether the limitation is a reasonable and proportionate measure to achieve the stated objective;
- whether the persons who may be subject to examination and the scope of information that may be subject to compulsory disclosure is sufficiently circumscribed with respect to the stated objective of the measure;
- whether a derivative use immunity is reasonably available as a less rights restrictive alternative in proposed schedule 2 to ensure information or evidence indirectly obtained from a person compelled by APRA to answer questions or provide information or documents cannot be used in evidence against that person.

### **Treasurer's response**

2.226 The Treasurer's response explains that the limitation on the right not to incriminate oneself is aimed at addressing a substantial concern:

...The concern is that APRA must be able to acquire or access relevant information to ensure it can effectively investigate a prudential matter relating to an Authorised Deposit-Taking Institution (ADI) which, in turn, is likely to affect the ability of APRA to effectively perform its regulatory

functions and meet its broad objectives of protecting depositors and ensuring the stability of Australia's financial system.

The evidence to support these provisions is that information relevant to the prudential matters of an ADI is not always within the possession, custody or control of the ADI. There are cases where information relevant to an investigation concerning the prudential affairs of an ADI is legitimately in the possession of others including, but not limited to, current or former officers, agents, contractors or employees of the ADI.

In cases where the person with the possession, custody or control of the relevant information forms the view that the provision of that information to APRA may potentially incriminate them or make them liable to a penalty, that person would, in the absence of any limitation on the right not to incriminate oneself, be entitled to refuse to disclose that information without any recourse in law.

The difficulty for APRA in this scenario is that the absence of that relevant information may stymie the progress of APRA's investigation into prudential matters of the ADI.

2.227 The further information provided in the Treasurer's response supports the conclusion that the measures address a substantial concern and are therefore likely to be considered legitimate objectives for the purposes of international human rights law. The coercive examination and information gathering powers may be of assistance to APRA in performing its regulatory functions and, in turn, pursuing the objectives of protecting depositors and ensuring the stability of Australia's financial system. Accordingly, the measures are likely to be rationally connected to the stated objectives.

2.228 In relation to whether the limitation is proportionate to the stated objectives, the Treasurer's response identifies internal oversight mechanisms within APRA as safeguards, including that the decision to appoint an investigator is subject to the approval of senior APRA officers. The response also notes that the circumstances in which an investigation may commence are limited to matters concerning ADIs and related entities<sup>6</sup> under subsections 13(4), 13A(1) or 61(1) of the *Banking Act 1959*, which broadly relate to the inability or failure of ADIs to meet their obligations. This explanation from the Treasurer is relevant to the proportionality analysis as it explains the particular regulatory context in which such investigations occur and in which the examination and information gathering powers are used.

2.229 The Treasurer's response further states that, as set out in the bill, an appointed investigator needs to have 'reasonable belief' that a person has custody or

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6 Subsection 61(1) of the *Banking Act 1959* also stipulates that APRA may appoint a person to investigate prudential matters relating to a body corporate that is an ADI; an authorised non-operating holding company; or a subsidiary of an ADI or of an authorised non-operating holding company.

control of books, accounts or documents relevant to the investigation in order to exercise his or her powers under section 61A of the bill. Similarly, the examination powers under proposed section 61C of the bill are available if an investigator 'reasonably believes or suspects' that a person can offer information relevant to the investigation. That the powers are exercised on evidentiary or otherwise only 'reasonable' grounds is also relevant in determining the adequacy of safeguards.

2.230 The Treasurer's response also identifies the provision of a 'use' immunity as a relevant safeguard. In regard to whether a derivative use immunity would be reasonably available, the Treasurer's response states:

As the committee has noted, direct use immunity is conferred by these provisions, but not derivative use immunity. The reason for this is that if derivative use immunity applied, it would impair APRA's ability to effectively perform its regulatory functions.

...

In most cases, establishing compliance with derivative use immunity would be substantially more difficult. It would require persuading the court to the required standard that no part of the original information was taken into account, directly or indirectly, when obtaining the information upon which the prosecution is based.

If derivative use immunity applied, then further evidence obtained through a chain of inquiry resulting from the protected evidence cannot be used in relevant proceedings even if the additional evidence would have been uncovered through independent investigative processes. Also, where the information-obtaining power is exercised against officers or ex-officers who may have been responsible for the deterioration or failure of a financial institution, for example, a director implicated in a failure such as HIH, a derivative use immunity would not be helpful in building a case against the director for breach of their duties under law.

APRA concurs with ASIC's view expressed in ASIC's submissions to the Australian Law Reform Commission Inquiry into Traditional Rights and Freedoms: Issues Paper 46 (March 2015) at page 25: 'Any grant of derivative use immunity has the potential to render a person conviction-proof for an unforeseeable range of offences.'

These provisions are consistent with the majority of existing self-incrimination provisions in other APRA-administered legislation, including provisions in the SIS Act and PHI Act.

2.231 The Treasurer's response effectively argues that a derivative use immunity would not be reasonably available, contending that it would be difficult to establish compliance with derivative use immunity in subsequent legal proceedings; that persons responsible for financial crimes may escape conviction if a derivative use immunity were granted; and that the self-incrimination provisions in the bill are consistent with other APRA-administered legislation.

2.232 However, as noted in the initial analysis, the regulatory context in which the abrogation against self-incrimination operates is relevant in determining the proportionality of the measure. The Treasurer has explained the particular regulatory context in which APRA operates, and the limited operation of the information sharing provisions to when investigations have been commenced concerning ADIs and related entities when such ADIs are failing or are unable to meet their obligations. The requirement that the power only be exercised on 'reasonable' grounds also provides an additional safeguard. Therefore, while administrative difficulties such as proving that evidence in an investigation was obtained independently of protected evidence are unlikely, in isolation, to be a sufficient reason for not providing a derivative use immunity, the specific regulatory context of the proposed powers and the circumstances in which an investigation may commence, on balance, tend to suggest that the limitation on the right not to incriminate oneself may be proportionate.

### **Committee response**

**2.233 The committee thanks the Treasurer for his response and has concluded its examination of this issue.**

**2.234 Based on the further information provided, the committee considers that, on balance, the measure may be compatible with the right not to incriminate oneself.**

### ***Compatibility of the measure with the right to privacy***

2.235 The right to privacy includes respect for informational privacy, including the right to respect for private and confidential information, particularly the use and sharing of such information and the right to control the dissemination of information about one's private life.

2.236 By requiring a person to attend an examination, answer questions or provide books, accounts, documents or sign a record in connection with an APRA investigation, including in circumstances where the provision of such information may tend to incriminate the person, Schedule 2 of the bill engages and limits the right to privacy.

2.237 The statement of compatibility does not acknowledge that the proposed examination and information gathering powers engage the right to privacy and therefore does not provide an assessment of the human rights compatibility in relation to this aspect of the measure.<sup>7</sup>

2.238 Assuming that the measure pursues the objectives outlined above in relation to the right not to incriminate oneself (that is, protecting depositors and ensuring the

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7 It is noted that the statement of compatibility does acknowledge that the right to privacy is engaged by another measure in the bill that requires authorised deposit-taking institutions (ADIs) to provide information to APRA, including personal information, on persons with senior executive responsibility within the ADI or its subsidiaries: See SOC p. 80.

stability of Australia's financial system), for the reasons earlier stated, these may be capable of being legitimate objectives. However, questions remain as to whether the objectives address a pressing and substantial concern specifically in relation to this measure, and whether the measure is rationally connected to and a proportionate means of achieving the objectives in the context of limitations on the right to privacy.

2.239 In particular, to be proportionate, a limitation on the right to privacy should only be as extensive as is strictly necessary to achieve its legitimate objective and must be accompanied by appropriate safeguards. Information and evidence as to whether the measure is the least rights-restrictive way of achieving the stated objective of the measure, and of any safeguards in place to protect a person's informational privacy when providing information pursuant to APRA's examination and information gathering powers, would be of assistance in determining the proportionality of the measure.

2.240 The committee therefore sought the advice of the Treasurer as to:

- whether the proposed coercive examination and information gathering powers pursue a legitimate objective (including reasoning or evidence that establishes that the stated objectives address a pressing or substantial concern);
- how the measure is effective to achieve (that is, rationally connected to) those objectives; and
- whether the limitation is reasonable and proportionate to achieve the stated objectives (including whether there are less rights restrictive ways of achieving that objective, whether the persons who may be subject to examination and the scope of information that may be subject to compulsory disclosure is sufficiently circumscribed with respect to the stated objective of the measure; and whether there are adequate and effective safeguards in relation to the measure).

### **Treasurer's response**

2.241 In relation to whether the coercive examination and information gathering powers pursue a legitimate objective and are rationally connected to that objective, the Treasurer's response refers to the advice provided in relation to the compatibility of the measure with the right not to incriminate oneself (discussed at [2.226]-[2.227] above). As noted earlier, in light of the Treasurer's response, it appears the measure pursues a legitimate objective and is rationally connected to that objective.

2.242 As to the proportionality of the measure, the Treasurer's response cites as a relevant safeguard subsection 56(2) of the *Australian Prudential Regulation Authority Act 1998* (APRA Act), which makes it an offence for a current or former APRA officer to disclose 'protected information' or a 'protected document'. However, it is noted that this provision is subject to a range of exceptions which allow for the disclosure of information in certain circumstances. For example, subsection 56(5)(a) of the

APRA Act stipulates that it is not an offence for a person to disclose information to another financial sector supervisory agency or other agency specified in regulations when the person is satisfied that the information will assist that agency to perform its functions or exercise its powers.

2.243 In further reference to the proportionality of the proposed measure, the Treasurer highlights his advice in relation to the right not to incriminate oneself. As set out above, this includes that the scope of investigations are limited to the inability or failure of ADIs to meet their obligations and that investigators must have a 'reasonable' basis for exercising their powers. Noting the information provided on potential safeguards, including subsection 56(2) of the APRA Act, as well as the specific regulatory context of the proposed powers, on balance, the limitation on the right to privacy may be proportionate.

### **Committee response**

**2.244 The committee thanks the Treasurer for his response and has concluded its examination of this issue.**

**2.245 Based on the further information provided, the committee considers that, on balance, the measure may be compatible with the right to privacy.**

**Mr Ian Goodenough MP**

**Chair**