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 available on the committee's website.[1]

Court and Tribunal Legislation Amendment (Fees and Juror Remuneration) Regulations 2018 [F2018L00819]

Purpose	Increases certain court fees payable in the High Court of Australia, Federal Court of Australia and Federal Circuit Court of Australia; increases the frequency of fee indexation in the High Court of Australia, Federal Court of Australia, Federal Circuit Court of Australia, National Native Title Tribunal and Administrative Appeals Tribunal; and increases the indexation of juror remuneration in the Federal Court of Australia
Portfolio	Attorney-General
Authorising legislation	*Administrative Appeals Tribunal Act 1975; Family Law Act 1975; Federal Circuit Court of Australia Act 1999; Federal Court of Australia Act 1976; Judiciary Act 1903; Migration Act 1958; Native Title Act 1993*
Last day to disallow	15 sitting days after tabling (tabled in the Senate and the House of Representatives on 25 June 2018)
Right	Fair hearing; effective remedy
Previous report	Report 9 of 2018
Status	Concluded examination

Background

2.3 The committee first reported on the instrument in its *Report 9 of 2018*, and requested a response from the Attorney-General by 26 September 2018.[2]

1 See https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Scrutiny_reports

2.4 The Attorney-General's response to the committee's inquiries was received on 27 September 2018. The response is discussed below and is available in full on the committee's website.[3]

Increase to High Court fees

2.5 The regulations increase the base court fees prescribed by the *High Court of Australia (Fees) Regulation 2012* (High Court Fees Regulation), payable in the High Court of Australia on or after 1 July 2018 by 17.5%.[4] The fees include:

- filing fees;
- hearing fees;
- fees for obtaining documents;
- annual subscription fees for copies of reasons for judgments; and
- any other fees under the regulations for services provided on or after 1 July 2018.[5]

2.6 The increase applies to all fee categories, including 'financial hardship fees'. Under section 12 of the High Court Fees Regulation, the Registrar may determine that a person may pay the 'financial hardship fee' instead of the usual fee that would otherwise be payable if, in the Registrar's opinion, at the time the usual fee is payable, the payment of the fee would cause financial hardship to the individual.[6] In making this decision, the Registrar must consider the 'individual's income, day-to-day living expenses, liabilities and assets'.[7]

Compatibility of the measure with the rights to a fair hearing and an effective remedy: initial analysis

2.7 In its initial analysis the committee raised questions as to the compatibility of the increase to the High Court fees with the rights to a fair hearing and an effective remedy. This is because an increase in court fees by 17.5%, particularly for those suffering hardship, may preclude persons from being able to access the court and access justice.

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2 Parliamentary Joint Committee on Human Rights, *Report No 9 of 2018* (11 September 2018), pp. 2-6.

3 The minister's response is available in full on the committee's scrutiny reports page: https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Scrutiny_reports.

4 Fee and Juror Remuneration Regulations, schedule 1, items 89 to 103.

5 Fees and Juror Remuneration Regulations, schedule 1, item 88.

6 High Court Fees Regulation, section 12(1)(c).

7 High Court Fees Regulation, section 12(2).

2.8 The full initial human rights analysis is set out at *Report 9 of 2018* (11 September 2018), pp. 2-6.[8]

2.9 The committee therefore sought the advice of the Attorney-General as to:

- whether the limitation on the right to a fair hearing is proportionate to the stated objective of the measure, addressing, in particular, whether less rights-restrictive options are available (noting the impact the measure may have on those who would suffer financial hardship); and
- whether the increase in the 'financial hardship' category of court fees in the High Court by 17.5 per cent is compatible with the right to an effective remedy (including any safeguards in place to protect persons who may suffer hardship).

Attorney-General's response and analysis

2.10 As noted in the committee's initial analysis, ensuring the security of the court, including the physical security of court staff and visitors, by upgrading security arrangements is likely to be a legitimate objective for the purpose of international human rights law. Raising revenue to fund security upgrades by increasing court fees may also be rationally connected to this objective.[9]

2.11 In response to the committee's request for advice, the Attorney-General's response first cites the Productivity Commission's 2014 report into *Access to Justice Arrangements,* in which the Commission considered that further increases in court fees could be undertaken without unreasonably impeding access to justice. In this regard, however, it is noted that the Productivity Commission also acknowledged that 'the effect of court fees on access to justice may be particularly acute for financially disadvantaged individuals'. [10]

2.12 Regarding the proportionality of the 17.5% increase to High Court fees, the Attorney-General's response states:

> The range of safeguards and exemptions in place further confirm the proportionality of this measure, and that the measure is compatible with the right to a fair hearing and effective remedy.
>
> As the statement of compatibility and the Committee described, there are hearing fee and filing fee exemptions for a range of circumstances for litigants who would be considered to be in financial hardship. These exemptions ensure that those who may otherwise have limited right to an effective remedy have access to justice.

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8 Parliamentary Joint Committee on Human Rights, *Report 9 of 2018* (11 September 2018), pp. 2-6.

9 Parliamentary Joint Committee on Human Rights, *Report 9 of 2018* (11 September 2018), p. 4.

10 Productivity Commission, *Access to Justice* Arrangements No 72 (2014) vol 1, p. 561.

> For example, this includes holders of Commonwealth health concession cards, which means that recipients of Australian Government income support payments are exempt from filing and hearing fees. The effect of this is that a person earning a modest income would not be required to pay filing and hearing fees because of the cut out income limits that apply to income support payments.
>
> In addition, and as also identified by the Committee, the Registrar of the High Court may also defer the payment of fees in circumstances where there is urgency that overrides the requirement to pay the fee immediately.

2.13 As acknowledged in the committee's initial assessment, fee exemptions, waivers and deferrals are important safeguards of the right to a fair hearing in the context of increases in court fees.[11]

2.14 In response to the committee's concern that fee waivers do not apply to document or service fees, the Attorney-General's response explains that:

> It is worth noting that document and service fees represent only a very small component of the fees raised by the High Court, and as such are only expected to have a marginal impact for High Court litigants. This is reflected in the small change in the cost of these fees. For example, the majority of document or service fees received by the High Court in 2016-17 were for searching or inspecting a document (Item 201) and for a litigation search for a person involved in proceedings (Item 208). The increase in the cost of each of these items as a result of this measure is $5.

2.15 This information is relevant to assessing the sufficiency of the safeguards in place, including fee waivers, and indicates that the impact of the lack of availability of fee waivers for document or service fees is minor.

2.16 More broadly, regarding the particular increase to the financial hardship fee category of High Court fees, the Attorney-General's response explains that:

> High Court fees are structured so as to distinguish between litigants on the basis of capacity to pay, with the 'financial hardship' category of fees being a third of the general filing fee. As such, the increase of 17.5 per cent to the 'financial hardship' category of fees is an increase from a significantly lower base, while also maintaining the 3 : 1 ratio with the general filing fee.

2.17 The Attorney-General's response also states that:

> Given the combination of the fee exemptions that apply for High Court litigants, the additional safeguards available to the Registrar, the

11 Parliamentary Joint Committee on Human Rights, *Report 9 of 2018* (11 September 2018), p. 5. See, also, the committee's consideration of the Federal Courts Legislation Amendment (Fees) Regulation 2015 in the *33rd Report of the 44th Parliament* (2 February 2016), p. 36.

continuation of a significantly lower fee category for applicants, and the small impact of changes to document and service fees, the Government considers that this measure represents the least rights-restrictive option available, and ensures the ongoing right to a fair hearing, as well as continuing to provide the right to effective remedy.

2.18 The information provided by the Attorney-General focuses on how the financial hardship category of fees is calculated relative to the general filing fees. However, it does not explicitly address whether a 17.5 per cent increase to the financial hardship category, as distinct from other categories, is the least rights restrictive approach to achieving the legitimate objective of ensuring the security of the court. Nonetheless, the availability of the safeguards referred to in the Attorney-General's response indicates that, on balance, the increases to the High Court fees may be a proportionate limitation on the rights to a fair hearing and an effective remedy.

Committee response

2.19 The committee thanks the Attorney-General for his response and has concluded its examination of this issue.

2.20 Based on the information provided by the Attorney-General, the committee considers that the measures may be compatible with the rights to a fair hearing and an effective remedy.

Migration (IMMI 18/046: Determination of Designated Migration Law) Instrument 2018 [F2018L00446]

Purpose	Makes subdivision AF of Part 2, Division 3, of *the Migration Act 1958* part of the 'designated migration law' for the purposes of section 495A of that Act
Portfolio	Home Affairs
Authorising legislation	*Migration Act 1958*
Last day to disallow	Exempt from disallowance[12]
Right	Liberty
Previous report	Report 7 of 2018
Status	Concluded examination

Background

2.21 The committee first reported on the instrument in its *Report 7 of 2018*, and requested a response from minister by 29 August 2018.[13]

2.22 The minister's response to the committee's inquiries was received on 19 September 2018. The response is discussed below and is available in full on the committee's website.[14]

Use of computer to determine status as 'eligible non-citizen'

2.23 The instrument makes subdivision AF of Part 2, Division 3 of the Migration Act 1958 (Migration Act) part of the 'designated migration law'. The designation permits the minister to arrange for computer programs to be used to make a decision, exercise a power, comply with an obligation or do anything else related to these actions in subdivision AF of Part 2, Division 3 of the Migration Act.

2.24 Subdivision AF of the Migration Act regulates bridging visas.[15] Section 73 of the Migration Act provides that the minister may grant a bridging visa to an 'eligible

12 Under section 5 of the *Human Rights (Parliamentary Scrutiny) Act 2011*, the instrument is not required to be accompanied by a statement of compatibility because it is exempt from disallowance. The committee nevertheless scrutinises exempt instruments because section 7 of the same Act requires it to examine all instruments for compatibility with human rights.

13 Parliamentary Joint Committee on Human Rights, *Report 7 of2018* (17 August 2018) 11-15.

14 The minister's response is available in full on the committee's scrutiny reports page: https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Scrutiny_reports

non-citizen' if certain criteria prescribed by the regulations are satisfied.[16] Under section 72 of the Migration Act, non-citizens are 'eligible non-citizens' if they have been 'immigration cleared',[17] belong to a particular class of persons,[18] or have been determined by the minister to be 'eligible non-citizens'.[19] The minister may make such a determination if certain criteria are satisfied, including that 'the minister thinks that the determination would be in the public interest'.[20] The power to make the determination may only be exercised by the minister personally.[21]

Compatibility of the measure with the right to liberty: initial analysis

2.25 In its initial analysis, the committee noted that the use of a computer by the minister to exercise their personal power to determine whether a non-citizen is an 'eligible non-citizen' (and therefore eligible to apply for a bridging visa), including whether such a determination is 'in the public interest',[22] could engage and limit the right to liberty. This is because, in the absence of a bridging visa or other valid visa, a non-citizen will be classified as an 'unlawful non-citizen' and subject to immigration detention. The full initial human rights analysis is set out at *Report 7 of 2018* (17 August 2018) pp. 11-15.[23]

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

- whether, and to what extent, a computer program will be used to exercise the minister's personal powers in subdivision AF of Part 2, Division 3 of the Migration Act; and

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15 Bridging visas are temporary visas that allow 'eligible non-citizens' to lawfully stay in Australia or lawfully leave and return to Australia for a limited period while they make an application for a substantive visa, wait for their application for a substantive visa to be processed, or make arrangements to leave Australia, finalise their immigration matter or wait for an immigration decision.

16 Migration Act, section 73.

17 Migration Act, section 72(1)(a). Section 172(1) of the Migration Act sets out the criteria for when a person will be 'immigration cleared'. The criteria vary depending on a range of factors, including how and where the person entered Australia, whether they complied with section 166 of the Migration Act, whether they were initially refused immigration clearance or bypassed immigration clearance and were then granted a substantive visa and whether they are in a prescribed class of persons.

18 Migration Act, section 72(1)(b). Section 2.20 of the *Migration Regulations 1994* prescribes the relevant classes of persons.

19 Migration Act, subsection 72(1)(c).

20 Migration Act, subsection 72(2)(e).

21 Migration Act, subsection 72(3).

22 Migration Act, subsection 72(2)(e).

23 Parliamentary Joint Committee on Human *Report 7 of 2018* (17 August 2018) pp. 11-15.

- whether 'public interest' considerations by the minister could be exempted from the 'designated migration law'.

2.27 To the extent a computer program would be used to exercise the minister's personal power, the committee sought advice of the minister as to the existence of adequate safeguards to ensure a person is not deprived of liberty where it is not reasonable, necessary and proportionate, and whether less rights restrictive alternatives were reasonably available.

Minister's response and analysis

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

> Bridging visas (BVs) were introduced in 1994 as part of the *Migration Reform Act 1992* to supplement the legislative requirement for mandatory detention of unlawful non-citizens. BVs provide an interim or 'bridging' lawful immigration status to non-citizens, until they reach a durable immigration outcome – either grant of a substantive visa or departure from Australia.
>
> Migration (IMMI 18/046: Determination of Designated Migration Law) Instrument 2018, remakes the previous Migration Instrument (IMMI07/091), which allowed the Minister to arrange for the use of a computer program to grant a BV to applicants who have made valid applications for certain substantive visas.
>
> If a lawful non-citizen makes a valid application while in Australia for a substantive visa, they will in nearly all cases be granted a Bridging visa A (BVA) in association with the substantive visa application.
>
> BVAs are automatically granted through departmental computer systems at the same time a valid substantive visa application is made. A BV will only come into effect if an individual's substantive visa expires before a decision is made on the new substantive visa application.
>
> Importantly, the computer program can only grant a BV and cannot make a decision to refuse. In instances where the online application 'hits' against risk systems, or where binary responses provided by an applicant do not support an immediate auto-grant decision, the computer program will refer the BV application to a departmental decision maker to manually decide upon the application.
>
> The computer program is designed to grant BVs in association with substantive applications in the majority of straightforward cases. Instances in which the BV application cannot be immediately granted by the computer program, including where there are public interest considerations, are always considered by a delegate or the Minister.
>
> The Minister's personal decision-making powers are not automated through departmental computer programs. The public interest power in section 72 of the *Migration Act 1958* (the Migration Act) can only be

> exercised by the Minister personally and is incapable of being decided by a computer program. The Minister's personal power involves considering any applicable legal obligations.

2.29 The minister's response clarifies that a computer program will not be used to exercise the minister's personal power in subdivision AF of Part 2, Division 3 of the Migration Act. Based on the information provided by the minister, the instrument is likely to be compatible with the right to liberty.

Committee response

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

2.31 Based on the information provided by the minister, the committee considers that the measures are likely to be compatible with the right to liberty.

Migration (Validation of Port Appointment) Bill 2018

Purpose	Seeks to validate the appointment of a proclaimed port in the Territory of Ashmore and Cartier Islands
Portfolio	Home Affairs
Introduced	House of Representatives, 20 June 2018
Rights	Non-refoulement; liberty; fair hearing; effective remedy
Previous report	Report 7 of 2018
Status	Concluded examination

Background

2.32 The committee first reported on the bill in its *Report 7 of 2018*, and requested a response from the Minister for Home Affairs by 29 August 2018.[1]

2.33 The minister's response to the committee's inquiries was received on 31 August 2018. The response is discussed below and is available in full on the committee's website.[2]

Validation of a 'proclaimed port'

2.34 Under subsection 5(5)(a) of the *Migration Act 1958* (the Migration Act) the minister may, by notice published in the Gazette, appoint ports in an external territory as 'proclaimed ports'.[3]

2.35 On 23 January 2002 a notice was published purporting to appoint an area of waters within the Territory of Ashmore and Cartier Islands as a 'proclaimed port' (2002 appointment).[4]

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1 Parliamentary Joint Committee on Human Rights, *Report 7 of 2018* (14 August 2018) pp. 15-22.

2 The minister's response is available in full on the committee's scrutiny reports page: https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Scrutiny_reports

3 Under section 5 of the Migration Act: a ***port*** is defined as a 'proclaimed port' or a 'proclaimed airport'. A ***proclaimed port*** is defined as including a port appointed by the minister under subsection 5(5). A person is defined as having ***entered Australia by sea*** including if the person entered the 'migration zone' except on an aircraft. The ***migration zone*** means 'the area consisting of the States, the Territories, Australian resource installations and Australian sea installations and, to avoid doubt, includes: (a) land that is part of a State or Territory at mean low water; and (b) sea within the limits of both a State or a Territory and a port; and (c) piers, or similar structures, any part of which is connected to such land or to ground under such sea; *but does not include sea within the limits of a State or Territory but not in a port*' (emphasis added).

2.36 The effect of this 2002 appointment was to provide that people arriving by boat without a valid visa, who entered certain waters of the Territory of Ashmore and Cartier Islands, would be entering an 'excised offshore place' for the purposes of the Migration Act and would thereby become 'offshore entry persons', now 'unauthorised maritime arrivals' (UMAs) under the Migration Act.[5]

2.37 On 11 July 2018, the Federal Circuit Court held, in *DBC16 v Minister for Immigration & Anor,*[6] that the purported appointment of an area of waters within the Territory of Ashmore and Cartier Islands as a proclaimed port, was invalid. Accordingly, the applicant in that case was not an UMA.[7]

2.38 The bill would correct a number of errors in the 2002 appointment and retrospectively validate it including by:

- providing that there was a properly proclaimed port at Ashmore and Cartier Islands at all relevant times;
- correcting the geographical coordinates of the area of waters specified in the 2002 appointment noting that the 2002 appointment omitted some details relating to the geographical coordinates;
- validating things done under the Migration Act that would be invalid or ineffective directly or indirectly because of the terms of the 2002 appointment.[8]

2.39 Section 5 provides that the bill will not affect rights or liabilities arising between parties to proceedings where judgment has been delivered by a court prior to the commencement of the bill, if the validity of the appointment was at issue in the proceedings and the judgment set aside the appointment or declared it to be invalid.[9]

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4 Explanatory memorandum (EM) p. 2.

5 See, Statement of compatibility (SOC) p. 6; The Hon. Peter Dutton, Minister for Home Affairs, *Proof House of Representatives Hansard*, 20 June 2018, p. 8.

6 [2018] FCCA 1801.

7 [2018] FCCA 1801, p. 26 [111].

8 EM p. 2; sections 3-4 of the bill.

9 The statement of compatibility states that this clause is included as there are ongoing proceedings in the Federal Circuit Court and Federal Court which are currently challenging the validity of the 2002 appointment: SOC, p. 5.

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

2.40 Australia has non-refoulement obligations under the Refugee Convention[10] and under both the International Covenant on Civil and Political Rights (ICCPR) and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) for all people, including people who are found not to be refugees.[11] This means that Australia must not return any person to a country where there is a real risk that they would face persecution, torture or other serious forms of harm, such as the death penalty; arbitrary deprivation of life; or cruel, inhuman or degrading treatment or punishment.[12] Non-refoulement obligations are absolute and may not be subject to any limitations.

2.41 Independent, effective and impartial review by a court or tribunal of decisions to deport or remove a person, including merits review in the Australian context, is integral to complying with non-refoulement obligations.[13]

2.42 Given that the 2002 appointment has been found to have been invalidly made, this will have a range of consequences. Specifically, the effect of the 2002 appointment being invalid may be that persons who entered the area of waters within the Territory of Ashmore and Cartier Islands without a valid visa may not have been correctly classified as 'offshore entry persons' (now UMAs).

2.43 The classification of a person as an UMA significantly affects how their rights and obligations under the Migration Act are to be determined and how their applications for a visa may be processed. For example, persons who entered the area of waters within the Territory of Ashmore and Cartier Islands between 13 August 2012 and 1 June 2013 without a valid visa and were classified as UMAs became 'fast track applicants' under the Migration Act.[14] This would have resulted in the 'fast

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10 1951 Convention relating to the Status of Refugees and its 1967 Protocol (the Refugee Convention).

11 CAT, article 3(1); ICCPR, articles 6(1) and 7; and Second Optional Protocol to the International Covenant on Civil and Political Rights Aiming at the Abolition of the Death Penalty; Convention Relating to the Status of Refugees 1951 and its Protocol 1967 (Refugee Convention).

12 See Refugee Convention, article 33. The non-refoulement obligations under the CAT and ICCPR are known as 'complementary protection' as they are protection obligations available both to refugees and to people who are not covered by the Refugee Convention, and so are 'complementary' to the Refugee Convention.

13 ICCPR, article 2; *Agiza v Sweden*, Communication No. 233/2003, UN Doc CAT/C/34/D/233/2003 (2005) [13.7]; *Josu Arkauz Arana v. France*, CAT/C/23/D/63/1997, (CAT), 5 June 2000; *Mohammed Alzery v Sweden*, Communication No. 1416/2005, U.N. Doc. CCPR/C/88/D/1416/2005 (2006) [11.8]. See, also, Parliamentary Joint Committee on Human Rights, *Report 2 of 2017* (21 March 2017) pp 10-17; *Report 4 of 2017* (9 May 2017) pp. 99-111.

14 The Hon. Peter Dutton, Minister for Home Affairs, *Proof House of Representatives Hansard*, 20 June 2018, p. 7.

track' process applying to the assessment and review of their claims for refugee status and applications for protection visas.

2.44 However, the committee has previously considered that the 'fast track' assessment process raises serious human rights concerns.[15] In particular, the committee has found elements of the 'fast track' assessment process are likely to be incompatible with the obligation of non-refoulement and the right to an effective remedy.[16] This was on the basis that as the 'fast track' assessment process does not provide for full merits review it is likely to be incompatible with Australia's obligations under the ICCPR and the CAT of ensuring independent, effective and impartial review, including merits review, of non-refoulement decisions.[17] While the statement of compatibility acknowledges that the measure engages the obligation of non-refoulement, it does not acknowledge the concerns outlined in the committee's previous reports.[18]

2.45 The statement of compatibility argues that the validation merely maintains the 'status quo'.[19] However, as noted above, in circumstances where the appointment was not validly made, this may fundamentally change how people should have been treated under the Migration Act. In this respect, the statement of compatibility provides no information as to how those individuals would have been treated if the appointment had never been made. It may be that a process that was capable of complying with Australia's obligations of non-refoulement may have applied to these individuals. It was unclear from the information provided how many people may be adversely affected by the validation. There were also questions as to the extent of the impact of the validation on Australia's non-refoulement obligations including how many persons who entered the waters of the Territory of Ashmore and Cartier Islands during the relevant period:

- are yet to have their claims for asylum or applications for protection visas determined;

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15 Parliamentary Joint Committee on Human Rights, *Fourteenth Report of the 44th Parliament* (28 October 2014) pp. 70-92; *Thirty-sixth report of the 44th Parliament* (16 March 2016) pp. 174-187; *Report 4 of 2017* (9 May 2017) pp. 99-106; *Report 2 of 2017* (21 March 2017) pp. 10-17; *Report 12 of 2017* (28 November 2017) pp. 89- 92.

16 Parliamentary Joint Committee on Human Rights, *Ninth report of the 44th Parliament* (15 July 2014) pp. 43-44; *Fourteenth report of the 44th Parliament* (28 October 2014) p. 88; *Report 2 of 2017* (21 March 2017) pp. 10-17.

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

18 SOC, p. 6.

19 SOC, p. 5.

- have had their applications refused under the 'fast track' process (and are present in Australia, offshore immigration detention or have been subject to removal or return).

2.46 The committee therefore noted its previous concerns as to the compatibility of the 'fast track' assessment process with Australia's non-refoulement obligations and sought the advice of the minister as to the extent of the impact of the validation on Australia's obligations, including:

- how individuals arriving at the area of waters within the Territory of Ashmore and Cartier Islands would have been treated if the 2002 appointment had not been made;
- the extent of any detriment to individuals if the 2002 appointment is validated;
- how many persons who entered the area of waters within the Territory of Ashmore and Cartier Islands without a valid visa during the relevant period:
    - are yet to have their claims for asylum or applications for protection visas determined (either in Australia or offshore immigration detention);
    - have had their applications refused under the 'fast track' process (including how many are present in Australia, are present in offshore immigration detention and how many have been subject to removal or return);
- any other information relevant to the compatibility of the measure with the obligation of non-refoulement.

Minister's response

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

> The appointment of a proclaimed port in the Territory of Ashmore and Cartier Islands was published in the Commonwealth of Australia Gazette No. GN 3 on 23 January 2002. The appointment excised certain waters of the Territory of Ashmore and Cartier Islands for the purposes of the *Migration Act 1958* (the Act). The intended effect of the appointment was to make unauthorised boat arrivals who entered the designated 'excised offshore place', 'offshore entry persons' (now 'unauthorised maritime arrivals' (UMAs)) under the Act.
>
> The Bill seeks to validate the appointment and maintains the status quo in relation to the processing of UMAs who entered Australia via this proclaimed port between 23 January 2002 and 1 June 2013. Enactment of the Bill will ensure that there was a properly proclaimed port in the Territory of Ashmore and Cartier Islands at all relevant times and that

> actions or decisions which relied on the appointment, have been valid and effective.
>
> If the appointment had not been made, the affected persons would not be UMAs under the Act. However, the affected persons would be unlawful non-citizens subject to immigration detention.
>
> All affected persons have had the opportunity to seek protection and have their claims assessed.

2.48 Apart from identifying that if the appointment had not been made the affected persons would not be UMAs under the Migration Act and instead would have been unlawful non-citizens subject to immigration detention, the information provided by the minister does not respond to the committee's specific inquiries. This makes any assessment of the extent of the impact of the validation on Australia's obligations difficult to determine.

2.49 To the extent that there may be persons who have been subject to the fast track assessment process as a result of the invalid 2002 appointment, the concerns previously expressed in the committee's analysis as to the compatibility of the fast track assessment process apply equally here.

2.50 As noted in the initial analysis, the committee has previously raised concerns as to the absence of a full merits review in the fast track assessment process, and the implications this may have on Australia's obligations under the ICCPR and CAT to ensure independent, effective and impartial review of non-refoulement decisions.[20] In this respect, the minister's response states that:

> The Government is of the view that there is no express requirement under the International Covenant on Civil and Political Rights (ICCPR) or the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) to provide merits review in the assessment of *non-refoulement* obligations. To the extent that obligations relating to review are engaged in the context of immigration proceedings, the Government is of the view that these obligations are satisfied where either merits review or judicial review is available. Although merits review may be an important safeguard, there is no obligation to provide merits review where judicial review is available.

2.51 As the committee has noted in previous human rights analysis of the fast track assessment process, while there is no express requirement for external merits review in the articles of the relevant conventions or jurisprudence relating to obligations of non-refoulement, analysis of how the obligation applies, and may be fulfilled, in the Australian domestic legal context indicates that the availability of

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20 See the committee's comments on the human rights compatibility of the fast-track review process in, Parliamentary Joint Committee on Human Rights, *Thirty-sixth report of the 44th Parliament* (16 March 2016) pp. 174-187; see also *Report 12 of 2017* (28 November 2017) p. 92 and *Report 8 of 2018* (21 August 2018) pp. 25-28.

merits review of such decisions would likely be required to comply with Australia's obligations under international law.[21] In formulating this view, the committee has followed its usual approach of drawing on the jurisprudence of bodies recognised as authoritative in specialised fields of law that can inform the human rights treaties that fall directly under the committee's mandate.

2.52 The jurisprudence of the UN Human Rights Committee and the UN Committee against Torture establish the proposition that there is a strict requirement for 'effective review' of non-refoulement decisions.[22] The purpose of an 'effective' review is to 'avoid irreparable harm to the individual'.[23] In particular, in *Singh v Canada,* the UN Committee against Torture considered a claim in which the complainant stated that he did not have an effective remedy to challenge the decision of deportation because the judicial review available in Canada was not an appeal on the merits but was instead a 'very narrow review for gross errors of law'.[24] In this case, the Committee against Torture concluded that judicial review was insufficient for the purposes of ensuring persons have access to an effective remedy:

> The Committee notes that according to Section 18.1(4) of the Canadian *Federal Courts Act*, the Federal Court may quash a decision of the Immigration Refugee Board if satisfied that: the tribunal acted without jurisdiction; failed to observe a principle of natural justice or procedural fairness; erred in law in making a decision; based its decision on an erroneous finding of fact; acted, or failed to act, by reason of fraud or perjured evidence; or acted in any other way that was contrary to law. The Committee observes that none of the grounds above include a review on the merits of the complainant's claim that he would be tortured if returned to India.
>
> …the State party should provide for judicial review of the merits, rather than merely of the reasonableness, of decisions to expel an individual where there are substantial grounds for believing that the person faces a

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21 Parliamentary Joint Committee on Human Rights, *Thirty-sixth report of the 44th Parliament* (16 March 2016) pp. 182-183; see also *Report 12 of 2017* (28 November 2017) p. 92 and *Report 8 of 2018* (21 August 2018) pp. 25-28.

22 See *Agiza v Sweden,* Committee against Torture Communication No.233/2003, CAT/C/34/D/233/2003 (24 May 2005) [13.7]; *Josu Arkauz Arana v France,* Committee against Torture Communication No.63/1997, CAT/C/23/D/63/1997 (5 June 2000); *Alzery v Sweden*, Human Rights Committee Communication No.1416/2005, CCPR/C/88/D/1416/2005 (20 November 2006) [11.8]. For an analysis of this jurisprudence, see Parliamentary Joint Committee on Human Rights, *Thirty-sixth report of the 44th Parliament* (16 March 2016) pp. 182-183.

23 *Alzery v Sweden*, Human Rights Committee Communication No.1416/2005, CCPR/C/88/D/1416/2005 (20 November 2006) [11.8].

24 *Singh v Canada,* UN Committee against Torture Communication No.319/2007, CAT/C/46/D/319/2007 (30 May 2011) [8.8];

> risk of torture. The Committee accordingly concludes that in the instant case the complainant did not have access to an effective remedy against his deportation to India…[25]

2.53 In the Australian context, as noted, external merits review is unavailable but judicial review is available. Judicial review in Australia is governed by the *Administrative Decisions (Judicial Review) Act 1977* and the common law,[26] and represents a limited form of review in that it allows a court to consider only whether the decision was lawful (that is, within the power of the relevant decision maker). The court cannot undertake a full review of the facts (that is, the merits), as well as the law and policy aspects of the original decision to determine whether the decision is the correct or preferable decision. There are therefore serious concerns as to whether judicial review in the Australian context would be sufficient to be 'effective review' for the purposes of Australia's non-refoulement obligations.[27] Accordingly, the committee has previously concluded that judicial review in the Australian context is not likely to be sufficient to fulfil the international standard required of 'effective review' because it is only available on a number of restricted grounds of review.

2.54 As to whether the limited merits review process for fast track applicants through the Immigration Assessment Authority (IAA) process would constitute 'effective' review, the minister's response states:

> All fast track applicants, like other non-citizens seeking Australia's protection, receive a full and comprehensive assessment of their claims for protection. Most fast track applicants who are found to not engage Australia's protection obligations are automatically referred to the IAA for an independent and impartial merits review. While the IAA generally conducts a merits review based on information provided by the applicant as part of their protection visa application, it has the discretion to consider new information and conduct an interview in exceptional circumstances, for example, where there is a change in circumstances or new information which suggests that there is an increased risk to the applicant.
>
> In *Plaintiff M174 v Minister for Immigration and Border Protection – High Court – M174/2016*, the High Court confirmed the robustness of the fast track process. It affirmed that the IAA, "when conducting a review of a fast track reviewable decision, is not concerned with the correction of error on the part of the Minister or delegate but is engaged in a *de novo* consideration of the merits of the decision that has been referred to it". The IAA considers "the application for a protection visa afresh and to

25 *Singh v Canada,* UN Committee against Torture Communication No.319/2007, CAT/C/46/D/319/2007 (30 May 2011) [8.8]-[8.9].

26 See section 75(v) of the *Constitution* and section 39B of the *Judiciary Act 1903.*

27 See Parliamentary Joint Committee on Human Rights, *Report 8 of 2018* (21 August 2018) pp. 25-28.

> determine for itself whether or not it is satisfied that the criteria for the grant of the visa have been met."
>
> As discussed above, it is the view of the Government that there is no express requirement under the ICCPR or the CAT to provide merits review in the assessment of *non-refoulement* obligations.

2.55 As noted above, the purpose of 'effective review' is to avoid irreparable harm to the individual. In the context of Article 3 of the CAT, the Committee against Torture has held that states parties to the CAT are obliged 'in determining whether there is a risk of torture under article 3, to give a fair hearing to persons subject to expulsion orders'.[28] The Committee against Torture has also been critical of state parties taking into account information in making decisions about the real and personal risk of torture where the complainant has not had an opportunity to contest the information.[29]

2.56 As noted in previous human rights analysis of the fast track merits review process, the merits review conducted by the IAA is limited as it is conducted on the information provided by the applicant to the department and will not involve an interview. Further, the IAA is only able to reaffirm the decision or remit it to the department (rather than substitute for the decision the correct or preferable decision). As the fast track merits review is only conducted on the papers and without the affected person being able to make further representations or be present, there are significant questions as the effectiveness of the processes. The features of the system place it substantially apart from other forms of merits review in Australia, where a tribunal member generally considers any additional material an applicant may wish to provide, comes to their own decision about the facts of the case and may substitute their own decision for the decision originally made.[30]

2.57 Previous human rights analysis has therefore concluded that the fast track assessment process and the absence of external merits review of fast track decisions is likely to be incompatible with Australia's non-refoulement obligations.[31]

Committee response

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

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28 *Sogi v Canada,* Committee against Torture Communication No.297/2006, CAT/C/39/D/297/2006 (16 November 2007) [10.5].

29 See, for example, *EJ v Sweden,* Committee against Torture Communication No.306/2006, CAT/C/41/D/306/2006 (21 November 2008) [8.4].

30 Parliamentary Joint Committee on Human Rights, *Thirty-sixth report of the 44th Parliament* (16 March 2016) p.184-185.

31 Parliamentary Joint Committee on Human Rights, *Thirty-sixth report of the 44th Parliament* (16 March 2016) pp. 182-183; *Report 12 of 2017* (28 November 2017) p. 92 and *Report 8 of 2018* (21 August 2018) pp. 25-28.

2.59 Consistent with the committee's previous conclusions, the preceding analysis indicates that the measure is likely to be incompatible with Australia's obligations under the International Covenant on Civil and Political Rights and the Convention against Torture to ensure independent, effective and impartial review, including merits review, of non-refoulement decisions.

Compatibility of the measure with the right to a fair hearing

2.60 Validating the 2002 appointment may engage and limit the right to a fair hearing on a number of grounds.

2.61 First, given the 2002 appointment has been found to be invalid, the 'fast track' assessment process may have incorrectly been applied to individuals who arrived at the area of waters within the Territory of Ashmore and Cartier Islands. Previous human rights analysis of the 'fast track' assessment process noted that the 'fast track' assessment and review process is quite limited and there were concerns as to the independence and the impartiality of such a review. Accordingly, the committee previously concluded that the fast-track assessment process may be incompatible with the right to a fair hearing.[32]

2.62 Secondly, validating the 2002 appointment may adversely affect any person who seeks to challenge an act or decision under the Migration Act on the basis that the impugned action or decision is invalid under the 2002 appointment. Accordingly, the validation may further limit the right to a fair hearing. The minister, in his second reading speech explains that the:

> …validity of the Appointment is now being challenged in the Federal Circuit Court and the Federal Court…A successful challenge to the Appointment could mean that affected persons did not enter Australia at an excised offshore place and are therefore not unauthorised maritime arrivals under the act. It could also mean that some affected persons are not fast-track applicants under the act.[33]

2.63 It was noted that the court in *DBC16 v Minister for Immigration & Anor*[34] reached precisely this finding in relation to the invalidity of the appointment and accordingly made a declaration that the applicant was not an UMA. No further information is provided in the statement of compatibility about the nature of any other challenges related to the 2002 appointment. Nevertheless section 5 of the bill provides that the bill will not affect rights or liabilities arising between parties to proceedings where judgment has been delivered by a court prior to the

32 Parliamentary Joint Committee on Human Rights, *Thirty-sixth report of the 44th Parliament* (16 March 2016) pp. 174-187; *Report 12 of 2017* (28 November 2017) p. 92.

33 The Hon. Peter Dutton, Minister for Home Affairs, *Proof House of Representatives Hansard*, 20 June 2018, p. 7.

34 [2018] FCCA 1801.

commencement of the bill, if the validity of the appointment was at issue in the proceedings and the judgment set aside the appointment or declared it to be invalid. While this may operate as a relevant safeguard, it does not address circumstances where a proceeding is on foot but judgment has not been issued. It also does not address the situation where proceedings have not yet been commenced by affected individuals. This raised questions as to whether the measure is the least rights restrictive approach.

2.64 More generally, the right to a fair hearing is not addressed in the statement of compatibility, and accordingly no assessment was provided as to whether any limitation is permissible.

2.65 The committee therefore requested the advice of the minister as to the compatibility of the measure with the right to a fair hearing, 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 (including whether it is the least rights restrictive approach and the scope of individuals likely to be affected), particularly in light of the fact that the 2002 appointment has been found to be invalid.

Minister's response

2.66 The minister's response discusses the extent to which fair hearing rights are engaged and limited by the bill insofar as fair hearing rights may apply to the 'fast track' assessment process to which persons affected by the invalid 2002 appointment would have been subject. In particular, the minister's response reiterates the government's position that Article 13 of the ICCPR, which deals with the expulsion of aliens lawfully in the territory of the state party, does not apply in the present circumstances. In this respect, the UN Human Rights Committee has stated that 'illegal entrants and aliens who have stayed longer than the law or their permits allow, in particular, are not covered' by article 13.[35]

2.67 As to article 14 of the ICCPR, the minister's response states that this article 'expressly relates only to persons facing criminal charges or suits of law and may not be directly applicable to the administrative assessment of non-refoulement obligations'. The minister's response reiterates the arguments discussed above in the context of the right to an effective remedy and non-refoulement obligations that there is no express requirement to provide merits review in the assessment of non-

35 UN Human Rights Committee, *General Comment No.15: The Position of Aliens under the Covenant* (1986) para. [9].

refoulement obligations and further states that, if article 14 is engaged, the measure is compatible with the right to a fair hearing 'as, following a robust and fair assessment of their protection claims, all fast track applicants have the ability to seek judicial review'.

2.68 Article 14 of the ICCPR requires that in the determination of a person's rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The concept of 'suit at law' is based on the nature of the right in question rather than on the status of one of the parties, and is to be determined on a case by case basis.[36] However, the UN Human Rights Committee has indicated that the guarantee in article 14 does not generally apply in extradition, expulsion or deportation proceedings.[37] However, as noted earlier in relation to the right to non-refoulement and the right to an effective remedy, the UN Committee against Torture has interpreted the non-refoulement obligation in article 3 of the Convention against Torture as requiring a fair hearing for persons subject to expulsion orders when determining whether there is a risk of torture if a person is returned to their country of origin,[38] and that states parties should provide merits review and not solely judicial review.[39] Therefore, the nature and fairness of the hearing that persons receive is relevant in determining whether the persons receive an 'effective' review for the purposes of the right to non-refoulement and the right to an effective remedy, discussed above.

2.69 An additional issue related to the right to a fair hearing relates to the application of the bill to persons who have instituted court proceedings but where judgment has not been delivered before the provisions in the bill commence. The minister's response on this aspect of the bill states:

> Government policy around the management of UMAs has been highly effective in responding to the enduring threat of maritime people smuggling and protecting the integrity of Australia's migration framework.

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36 UN Human Rights Committee, *General Comment No.32: Right to Equality before Courts and Tribunals and to Fair Trial* (2007) [16].

37 UN Human Rights Committee, *General Comment No.32: Right to Equality before Courts and Tribunals and to Fair Trial* (2007) [17]. See *PK v Canada,* UN Human Rights Committee Communication No.1234/03, CCPR/C/89/D/1234/2003 (3 April 2007), especially [7.5] where the committee rejected the applicability of article 14 to a claim relating to the complainant's right to receive protection in the state party's territory. See also *Zündel v Canada,* UN Human Rights Committee Communication No.1341/2005, CCPR/C/89/D/1341/2005 (20 March 2007) at [6.8] which held that deportation proceedings do not fall within the scope of article 14.

38 *Sogi v Canada,* Committee against Torture Communication No.297/2006, CAT/C/39/D/297/2006 (16 November 2007) [10.5].

39 *Singh v Canada,* UN Committee against Torture Communication No.319/2007, CAT/C/46/D/319/2007 (30 May 2011) [8.8]-[8.9].

> In order to maintain public confidence in our border protection arrangements, it is imperative that we uphold the original intent of the appointment. For these reasons it is appropriate for the Bill to apply to persons who have instituted proceedings but where judgment has not been delivered before the provisions commence.
>
> By reinstating the validity of the appointment, the Bill does not impose any new obligations on affected persons. Instead, it maintains the status quo in relation to the processing of UMAs and, where relevant, fast track applicants under the Act who entered Australia via this proclaimed port between 23 January 2002 and 1 June 2013.

2.70 The UN Human Rights Committee has also stated that where a judicial body is entrusted with the task of deciding about expulsions or deportations, the guarantee of equality of all persons before courts and tribunals in article 14 and the principles of impartiality, fairness and equality of arms in article 14 apply to such proceedings.[40] The UN Human Rights Committee has also stated that 'if the legality of an alien's entry or stay is in dispute, any decision on this point leading to his expulsion or deportation ought to be taken in accordance with article 13'.[1] In circumstances where the effect of the 2002 appointment being found to be invalid is that the legality of the affected person's entry or stay in Australia may be in dispute, and the validity of the 2002 appointment is under challenge in the courts, fair hearing rights under articles 13 and 14 may have some relevance for persons whose proceedings are on foot but judgment has not been delivered. These rights demand that each side be given the opportunity to contest all the arguments and evidence adduced by the other party.[41] The Human Rights Committee has stated that the article requires that 'an alien […] be given full facilities for pursuing his remedy against expulsion so that this right will in all circumstances of his case be an effective one'.[42]

2.71 The effect of retrospectively validating the invalid 2002 appointment means that persons whose proceedings are currently on foot would be unable to continue to contest the validity of the 2002 appointment through the courts. This may limit the right to a fair hearing accordingly.

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40 UN Human Rights Committee, *General Comment No.32: Right to Equality before Courts and Tribunals and to Fair Trial* (2007) [62].

41 UN Human Rights Committee, *General Comment No. 32: The right to equality before courts and tribunals and to a fair trial* (2007) [13], citing *Jansen-Gielen v The Netherlands,* UN Human Rights Committee Communication No.846/1999, CCPR/C/71/D/846/1999 (3 April 2001) [8.2] and *Äärelä and Näkkäläjärvi v. Finland,* UN Human Rights Committee Communication No.779/1997, Human Rights Committee, CCPR/C/73/D/779/1997 (24 October 2001) [7.4].

42 UN Human Rights Committee, *General Comment No. 15: The Position of Aliens under the Covenant* (1986) [10].

2.72 The minister's stated objective of limiting fair hearing rights is to 'maintain public confidence in our border protection arrangements' and 'protecting the integrity of Australia's migration framework'. The committee has previously considered that ensuring the integrity of the immigration system is capable of constituting a legitimate objective for the purposes of international human rights law.[43]

2.73 The minister's response otherwise does not provide any information as to how the measure is rationally connected or proportionate to this objective, beyond stating that the measure is appropriate. It is not clear, for example, how many individuals may be affected by this aspect of the bill. In these circumstances, it is not possible to conclude whether the measure is compatible with fair hearing rights.

Committee response

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

2.75 To the extent that fair hearing rights are engaged by the application of the bill to persons who are challenging the validity of the 2002 appointment, where proceedings are on foot but judgment has not been delivered, the committee is unable to conclude whether the measure is compatible with fair hearing rights.

Compatibility of the measure with the right to an effective remedy for impermissible limitations on human rights

2.76 Where measures impermissibly limit human rights, those affected have a right to an effective remedy. The right to an effective remedy is protected by article 2 of the ICCPR, and may include restitution, guarantees of non-repetition of the original violation, or satisfaction. The UN Human Rights Committee has stated that while limitations may be placed in particular circumstances on the nature of the remedy provided (judicial or otherwise), states parties must comply with the fundamental obligation to provide a remedy that is effective.[44]

2.77 As outlined above, classification as an UMA may have led to the imposition of measures which were likely to be incompatible with human rights including the obligation of non-refoulement. Those classified as an UMA will have been subject to mandatory immigration detention[45] and may also have been transferred to offshore

43 See, for example, Parliamentary Joint Committee on Human Rights, *Report 11 of 2017* (17 October 2017) p. 101; Parliamentary Joint Committee on Human Rights, *Nineteenth report of the 44th Parliament* (3 March 2015) p. 18.

44 UN Human Rights Committee, *General Comment No. 29: States of Emergency (Article 4)* (2001) [14].

45 See Migration Act, sections 189, 198.

immigration detention.[46] In some cases, it may have resulted in prolonged immigration detention (including offshore detention) or delays in processing claims.[47] The committee has previously raised human rights concerns about the impact of both onshore and offshore immigration detention including in relation to:

- the right to liberty and the prohibition on arbitrary detention;
- the right to humane treatment in detention;
- the right to health; and
- the rights of the child.[48]

2.78 Classification as an UMA may also have impacted upon whether an individual found to be a refugee was entitled to a permanent protection visa or temporary protection visa. The consequence of being granted a temporary rather than permanent visa may also have restricted access to family reunion and the right to the protection of the family.[49]

2.79 It appears that the validation could operate to close a potential avenue for individuals who entered certain waters of the Territory of Ashmore and Cartier Islands and were classified as UMAs to seek a remedy in relation to possible violations of such human rights, as affected persons would in effect be precluded from contesting the validity of the appointment in court. However, the statement of compatibility does not acknowledge that the right to an effective remedy is engaged by the measure and accordingly does not provide an assessment as to whether it is compatible with this right. As noted above, while there is a potential safeguard in the bill in relation to proceedings where judgment has been delivered, there is no such safeguard more generally in relation to ongoing proceedings or proceedings that have not yet been brought. Further, that safeguard would appear to only operate in relation to a person who is a party to the particular proceedings where judgment has been delivered, rather than all those who may be affected by the judgment.

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46 See, Parliamentary Joint Committee on Human Rights, *Migration Legislation Amendment (Regional Processing and Other Measures) Act 2012 and related legislation: Ninth Report of 2013* (June 2013) p. 19.

47 See, Parliamentary Joint Committee on Human Rights, *Migration Legislation Amendment (Regional Processing and Other Measures) Act 2012 and related legislation: Ninth Report of 2013* (June 2013) p. 58.

48 See, Parliamentary Joint Committee on Human Rights, *Migration Legislation Amendment (Regional Processing and Other Measures) Act 2012 and related legislation: Ninth Report of 2013* (June 2013).

49 See, Parliamentary Joint Committee on Human Rights, *Migration Legislation Amendment (Regional Processing and Other Measures) Act 2012 and related legislation: Ninth Report of 2013* (June 2013) p. 60.

2.80 The committee therefore sought the advice of the minister as to whether the measure is compatible with the right to an effective remedy (including how individuals who arrived at the area of waters within the Territory of Ashmore and Cartier Islands would have been treated if the 2002 appointment had not been made and the effect of the validation on the ability of individuals to seek remedies in relation to possible violations of human rights).

Minister's response

2.81 In response, the minister states that if the appointment had not been made, the affected persons would not be UMAs under the Migration Act but as the persons had entered Australia without a visa that was in effect, the persons would have been unlawful non-citizens subject to immigration detention. The minister's response continues:

> As discussed above, by reinstating the validity of the appointment, the Bill does not impose any new obligations on affected persons. Instead, it maintains the status quo in relation to the processing of UMAs who entered Australia via this proclaimed port between 23 January 2002 and 1 June 2013.
>
> To the extent that obligations relating to review under Article 2 of the ICCPR or Article 14 of the ICCPR may be engaged in immigration proceedings, the Government's position is that these obligations are also satisfied where access to judicial review is available. Similarly, there is no express procedural obligation in Article 3 of the CAT to provide merits review where *non-refoulement* obligations have been considered and properly assessed by the department and where judicial review is available.
>
> Where the State Party elects to provide merits review in the assessment of *non-refoulement* obligations, there is no express obligation to provide a full de novo review of the initial decision. Both the ICCPR and the CAT permit the State Party to determine the appropriate mechanism for merits review where sufficient safeguards are in place.

2.82 The issues relating to compatibility of the 'fast track' assessment process and the limited review rights available with the right to an effective remedy and non-refoulement obligations were discussed above.

2.83 The minister's response otherwise does not respond to the committee's specific concerns as to whether validating the 2002 appointment would close a potential avenue for individuals who entered certain waters of the Territory of Ashmore and Cartier Islands and were classified as UMAs to seek a remedy in relation to possible violations of such human rights. As noted in the initial analysis, the committee's previous human rights analysis of UMAs has raised a number of concerns in relation to the compatibility of both onshore and offshore immigration detention with human rights, including the right to liberty and the prohibition on arbitrary detention, the right to humane treatment in detention, the right to health,

the rights of the child, and the right of protection of the family. Concerns therefore remain as to how persons who were classified as UMAs pursuant to the invalid 2002 appointment would be able to obtain an effective remedy for impermissible limitations on human rights which resulted from that invalid appointment. It would appear as a result of the bill that any opportunity to pursue that remedy has been closed.

Committee response

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

2.85 The committee is unable to conclude whether the measure is compatible with the right to an effective remedy for impermissible limitations on human rights.

Modern Slavery Bill 2018

Purpose	Seeks to require certain large businesses and government entities to provide the minister annual reports on actions to address modern slavery risks in their operations and supply chains (Modern Slavery Statements). Also seeks to require the minister to publish Modern Slavery Statements in an online register
Portfolio	Home Affairs
Introduced	House of Representatives, 28 June 2018
Rights	Multiple rights
Previous report	Report 8 of 2018
Status	Concluded examination

Background

2.86 The committee first reported on the bill in its *Report 8 of 2018*, and requested a response from the minister by 5 September 2018.[1]

2.87 A response from the assistant minister to the committee's inquiries was received on 19 September 2018. The response is discussed below and is available in full on the committee's website.[2]

Modern slavery reporting requirements

2.88 The bill seeks to require certain government and non-government entities (reporting entities)[3] to provide an annual report on actions they have taken to address modern slavery risks in their operations and supply chains (Modern Slavery Statement) to the minister. The Modern Slavery Statement would be required to identify the reporting entity, and to describe:

- the reporting entity's structure, operations and supply chains;

1 Parliamentary Joint Committee on Human Rights, *Report 8 of 2018*, pp. 17-22.

2 The minister's response is available in full on the committee's scrutiny reports page: https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Scrutiny_reports

3 Proposed section 4 provides that 'reporting entities' include: entities with a consolidated revenue of at least $100 million for the reporting period that are Australian entities or that carry on business in Australia; the Commonwealth; corporate Commonwealth entities and Commonwealth companies with a consolidated revenue of at least $100 million for the reporting period; and entities that have volunteered to comply with the modern slavery reporting requirements.

- the risks of modern slavery practices[4] in the operations and supply chains of the reporting entity, and any entities that the reporting entity owns or controls;
- the actions taken by the reporting entity and any entity that the reporting entity owns, to assess and address those risks, including due diligence and remediation processes;
- how the reporting entity assesses the effectiveness of such actions;
- consultation undertaken with entities that the reporting entity owns, and entities with which the reporting entity has prepared a joint statement; and
- any other relevant information.[5]

2.89 The bill also seeks to require the minister to register all Modern Slavery Statements given in accordance with the requirements in the bill in an online register.[6] Where a Modern Slavery Statement does not comply with the requirements in the bill, the minister would still be able to register the statement, although they would not be required to do so.[7]

2.90 Additionally, the bill seeks to permit other entities (so long as they are Australian entities or carry on business in Australia) to comply with the reporting requirements in the bill on a voluntary basis. An entity would be able to volunteer to comply with the reporting requirements by giving written notice to the minister.[8]

2.91 In *Report 8 of 2018* (21 August 2018) at pp 17-20,[9] the committee drew the positive human rights implications of the bill to the attention of the minister and parliament, and welcomed the proposed reporting requirements, which promote the right to freedom from slavery and forced labour.

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4 'Modern slavery' is defined in proposed section 4 as conduct which would constitute: an offence under Division 270 or 271 of the *Criminal Code* (offences relating to human trafficking, slavery and slavery-like practices); an offence under either of those Divisions if the conduct took place in Australia; trafficking in persons, as defined in Article 3 of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children to the UN Convention against Transnational Organized Crime; and the worst forms of child labour, as defined in Article 3 of the ILO Convention.

5 Proposed section 16.

6 Proposed section 19(1).

7 Proposed section 19(2).

8 Proposed section 6.

9 Parliamentary Joint Committee on Human Rights, *Report 8 of 2018* (21 August 2018), pp. 17-20 https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Scrutiny_reports/2018/Report_8_of_2018

Compatibility of the measure with the right to privacy

2.92 In its initial analysis, the committee raised questions as to the compatibility of the measures in the bill with the right to privacy.[10] This is because Modern Slavery Statements may result in the disclosure of personal information, and there is also a small risk that a modern slavery statement could identify victims or potential victims of modern slavery.[11] The full initial human rights analysis is set out at *Report 8 of 2018* (21 August 2018) pp. 20-22.[12]

2.93 The committee requested the minister's advice as to whether the measures are a reasonable and proportionate means of achieving their stated objective (including any safeguards in place against the disclosure of personal information, or any information that could identify a victim or potential victim of modern slavery).

Minister's response and analysis

2.94 As noted in the committee's initial analysis, the objective of the bill - strengthening Australia's approach to modern slavery by the development and maintenance of responsible and transparent supply chains - is likely to be a legitimate objective for the purposes of international human rights law, and the measures appear to be rationally connected to this objective.[13]

2.95 In relation to the proportionality of the measures, the Assistant Minister's response states that the bill:

> …does not directly seek to collect or disclose personal information and does not contain any measures that require or encourage reporting entities to provide personal information, including information that could identify potential victims.

2.96 The response also reiterates the point made in the statement of compatibility that there are safeguards to ensure that personal information is not disclosed. These include the provision of detailed guidance on what information should be reported in Modern Slavery Statements, the publicly accessible nature of the legislation, and the wording of the reporting criteria in the bill—all of which do not require disclosure of personal information. The Assistant Minister's response also indicates that a requirement to redact or refuse to publish a Modern Slavery

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10 Parliamentary Joint Committee on Human Rights, *Report 8 of 2018* (21 August 2018), pp. 20-22.

11 Parliamentary Joint Committee on Human Rights, *Report 8 of 2018* (21 August 2018), pp. 20-22.

12 Parliamentary Joint Committee on Human Rights, *Report 8 of 2018* (21 August 2018), pp. 20-22 https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Scrutiny_reports/2018/Report_8_of_2018.

13 See Parliamentary Joint Committee on Human Rights, *Report 8 of 2018* (21 August 2018), pp. 21.

Statement that contained personal information would not be feasible as it would require the department to undertake detailed and resource intensive scrutiny of over 3,000 statements annually. However, the response states that the department will monitor the overall quality of Modern Slavery Statements. It should be noted, however, that from the perspective of international human rights law, the administrative inconvenience of identifying and redacting any potential personal information (including information that could identify a victim or potential victim of modern slavery) would not, of itself, justify a limitation on the right to privacy.

2.97 The Assistant Minister's response also reiterates the low risk that the bill will result in the disclosure of personal information, and states that the safeguards contained in the bill are therefore sufficient in light of that low risk. The Assistant Minister's response further states:

> The Department has also carefully assessed other approaches, including amending the Bill to include an express requirement that statements not contain personal or other identifying information. The Department does not consider that this approach would be more effective than providing detailed information about privacy issues in guidance material, which could include case studies and comprehensive advice.

2.98 As outlined in the committee's initial human rights analysis,[14] the safeguards in the form of detailed policy guidance are important and relevant to the proportionality of the measures. In this particular case,[15] detailed policy guidance about privacy issues and comprehensive advice in relation to such issues may be capable, in practice, of preventing personal information or information that may identify a victim of modern slavery from being disclosed. This is the case particularly in circumstances where, as noted in the initial analysis, most information would be business rather than individual information, and the risk of identifying victims or potential victims through the Modern Slavery Statements is very small.[16]

2.99 The Assistant Minister's response states in this respect that similar legislation in the United Kingdom[17] and California[18] does not include specific safeguards to address the right to privacy, and the Department is not aware of any cases where personal information has been disclosed as part of these regimes. This is useful

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14 Parliamentary Joint Committee on Human Rights, *Report 8 of 2018* (21 August 2018), pp. 20-22.

15 It is noted that discretionary or administrative safeguards alone may be insufficient for the purpose of international human rights law. This is because such safeguards are less stringent than the protection of statutory processes and can be amended or removed at any time.

16 Parliamentary Joint Committee on Human Rights, *Report 8 of 2018* (21 August 2018), pp. 20-22.

17 *Modern Slavery Act 2015* (UK).

18 *Transparency in Supply Chains Act 2010*.

information. However, it is not necessarily determinative, given the differences between these pieces of legislation and the contexts within which they operate. For example, in the United Kingdom, public authorities are required to comply with Article 8 of the European Convention on Human Rights, which protects the right to privacy.[19] In any event, the United Kingdom's *Modern Slavery Act 2015* contains some specific safeguards to protect personal information from being disclosed in circumstances that would breach restrictions on disclosure under other laws.[20]

2.100 Ultimately, the sufficiency of the safeguards to protect the right to privacy will depend on how the measures, as well as any accompanying departmental oversight and policy guidance, operate in practice. In light of the very low risk that Modern Slavery Statements will contain personal or identifying information, and in light of the legitimate objective of the bill, on balance the measures in the bill may be a proportionate limitation on the right to privacy. However, the committee recommends that the implementation of the bill (including compliance with any policy guidance relating to privacy matters) be monitored by government to ensure that the bill operates in a manner that is compatible with the right to privacy.

Committee response

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

2.102 Based on the further information provided by the assistant minister, the committee considers that the measures may be compatible with the right to privacy. However, it is noted that much may depend on the adequacy of the applicable safeguards in practice. The committee therefore recommends that the modern slavery reporting regime be monitored to ensure that the implementation of the bill is compatible with the right to privacy.

19 Section 6 of the *Human Rights Act 1998* (UK).

20 For example, public authorities are not required to disclose information to the Anti-slavery Commissioner if it would breach any restriction on disclosure: see section 43(5) of the *Modern Slavery Act 2015* (UK). See also section 48(6)(e)(ii), which limits the requirement to provide access to independent child trafficking advocates to information that would not contravene a restriction on disclosure of information and section 52(4)(b) (which provides that regulations relating to information to be notified to the Secretary of State may not require or authorise the inclusion of information which contravenes any other restriction on the disclosure of information).

2.103 The committee requests that a copy of any guidance materials relating to the preparation of Modern Slavery Statements be provided to the committee when they are available.

Mr Ian Goodenough

Chair