Chapter 1

New and continuing matters

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

- bills introduced into the Parliament between 12 February and 22 March 2018 (consideration of 3 bills from this period has been deferred);[1]
- legislative instruments registered on the Federal Register of Legislation between 9 January and 14 February 2018 (consideration of 2 legislative instruments from this period has been deferred);[2] and
- bills and legislative instruments previously deferred.

1.2 The committee has concluded its consideration of 12 bills and instruments that were previously deferred.[3]

Instruments not raising human rights concerns

1.3 The committee has examined the legislative instruments registered in the period identified above, as listed on the Federal Register of Legislation. Instruments raising human rights concerns are identified in this chapter.

1.4 The committee has concluded that the remaining instruments do not raise human rights concerns, either because they do not engage human rights, they contain only justifiable (or marginal) limitations on human rights or because they promote human rights and do not require additional comment.

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

2 The committee examines legislative instruments registered in the relevant period, as listed on the Federal Register of Legislation. See, https://www.legislation.gov.au/.

3 These are: Australian Education Amendment (2017 Measures No. 2) Regulations 2017 [F2017L01501]; Criminal Code Amendment (High Risk Terrorist Offenders) Regulations 2017 [F2017L01490]; Crimes (Overseas) (Declared Foreign Countries) Amendment Regulations 2017 [F2017L01520]; Federal Financial Relations (National Partnership Payments) Determination No. 124 (September 2017) [F2017L01505]; Federal Financial Relations (National Partnership Payments) Determination No. 125 (October 2017) [F2017L01509]; Federal Financial Relations (National Partnership Payments) Determination No. 126 (October 2017) [F2017L01510]; Federal Financial Relations (National Partnership Payments) Determination No. 127 (November 2017) [F2017L01539]; Federal Financial Relations (National Partnership Payments) Determination No. 123 (August 2017) [F2017L01143]; Federal Financial Relations (National Partnership Payments) Determination No. 122 (July 2017) [F2017L01148]; Legislation (Deferral of Sunsetting—Privacy Guidelines for the Medicare Benefits and Pharmaceutical Benefits Programs) Certificate 2017 [F2017L01719]; National Security Information (Criminal and Civil Proceedings) Amendment Regulations 2017 [F2017L01660]; and Treasury Laws Amendment (Reducing Pressure on Housing Affordability Measures No. 2) Bill 2018.

Response required

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

Anti-Money Laundering and Counter-Terrorism Financing Rules Amendment Instrument 2017 (No. 4) [F2017L01678]

Purpose	Amends the Anti-Money Laundering and Counter-Terrorism Financing Rules 2007 (No. 1) to allow the AUSTRAC CEO to exempt reporting entities from particular provisions of the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* where a requesting officer of an eligible agency reasonably believes that providing a designated service to a customer would assist the investigation of a serious offence
Portfolio	Attorney-General
Authorising legislation	*Anti-Money Laundering and Counter-Terrorism Financing Act 2006*
Last day to disallow	15 sitting days after tabling (tabled Senate and House of Representatives on 5 February 2018)
Right	Fair hearing (see **Appendix 2**)
Status	Seeking additional information

Exemptions for reporting entities from compliance with obligations under the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006*

1.6 The Anti-Money Laundering and Counter-Terrorism Financing Rules Amendment Instrument 2017 (No. 4) [F2017L01678] (the instrument) allows the CEO of the Australian Transaction Reports and Analysis Centre (AUSTRAC) to exempt reporting entities from certain obligations under the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (AML/CTF Act).

1.7 Section 75.2 of the instrument provides that, if a requesting officer[4] of an eligible agency[5] reasonably believes that providing a designated service to a

4 'Requesting officer' is defined under subsection 75.10(2) of the instrument, and means the head of an eligible agency, or a member of an eligible agency who is a Senior Executive Service (SES) employee or equivalent, or who holds the rank of superintendent or higher.

5 'Eligible agency' is defined under subsection 75.10(1) of the instrument, and means the Australian Crime Commission, the Australian Federal Policy, the Immigration Department, the NSW Crime Commission or the police force or service of a State or the Northern Territory.

customer would assist the investigation of a serious offence,[6] the officer may request the AUSTRAC CEO to exempt specified reporting entities from certain obligations under the AML/CTF Act. Section 75.3 provides that the exemption in section 75.2 applies to the following provisions of the AML/CTF Act:

- section 29 (identity verification for certain pre-commencement customers);
- section 32 (carrying out the applicable customer identification procedure before the commencement of the provision of a designated service);
- section 34 (carrying out the applicable customer identification procedure after the commencement of the provision of a designated service);
- section 35 (verification of identity of customers);
- section 36 (ongoing customer due diligence);
- section 82 (compliance with Part A of an anti-money laundering and counter-terrorism financing program);
- section 136 (false or misleading information);
- section 137 (producing false or misleading documents);
- section 138 (false documents);
- section 139 (providing a designated service using a false customer name or customer anonymity); and
- section 142 (conducting transactions so as to avoid reporting requirements relating to threshold transactions).

1.8 Under the AML/CTF Act, designated services include (among other things) dealings with accounts by financial institutions, the administration of trusts, the supply of goods by way of lease or hire-purchase, and the guarantee of loans.[7] A reporting entity is any person that provides a designated service.[8]

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

1.9 The right to a fair trial and fair hearing is protected by article 14 of the International Covenant on Civil and Political Rights (ICCPR). Additional guarantees in the determination of a criminal charge include the right to be presumed innocent and the right not to incriminate oneself.[9] The right also encompasses notions of the

6 'Serious offence' is defined under subsection 75.10(3) of the instrument, and means an offence against a Commonwealth, State or Territory law, punishable on indictment by imprisonment for 2 or more years, or an offence against a law of a foreign country constituted by conduct that, if it had occurred in Australia, would constitute a serious offence.

7 AML/CTF Act section 6.

8 AML/CTF Act section 5, definition of *reporting entity*.

9 International Covenant on Civil and Political Rights (ICCPR) article 14(2)-14(7).

fair administration of justice and prohibits investigatory techniques that incite individuals to commit a criminal offence.[10]

1.10 An exemption granted by the AUSTRAC CEO may engage the right to a fair trial in this respect. This is because it is unclear whether exempting reporting entities from compliance with obligations under the AML/CTF Act could permit those entities (on behalf of a law enforcement officer) to encourage or incite an individual to commit a criminal offence, or to provide incriminating information that might later be relied upon in criminal proceedings. That is, it is unclear whether the exemption could allow conduct which rises to the level of entrapment for the purposes of international human rights law which would constitute a limitation on the right to a fair trial.[11]

1.11 Limitations on human rights may be permissible where the measure pursues a legitimate objective, is effective to achieve (that is, rationally connected to) that objective, and is a proportionate means of achieving that objective.

1.12 The statement of compatibility for the instrument does not identify that the right to a fair trial may be engaged and limited and does not explain whether an exemption granted by the AUSTRAC CEO could be used to incite or encourage the commission of an offence.[12] Accordingly, the statement of compatibility does not provide a substantive assessment of whether any limitation on the right to a fair hearing and a fair trial would be permissible.

1.13 However, in relation to the objective of the measure, the explanatory statement nevertheless states:

> AUSTRAC is aware of instances when law enforcement enquiries with reporting entities about the activities of certain customers have adversely affected the progress of related law enforcement investigations.
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> The issue for law enforcement arises when reporting entities undertake actions, in line with their obligations under the AML/CTF Act, which have the effect of alerting customers to possible closer scrutiny of their financial transactions. Customers then cease their activities with the reporting entity, thus limiting the ability of law enforcement officers to investigate the financial transactions.

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10 See, *Ramanauskas v Lithuania*, European Court of Human Rights (ECHR) Application No. 74420/01, 5 February 2008, [55]. The ECHR has consistently held that entrapment violates article 6 of the European Convention on Human Rights, which is equivalent to article 14 of the ICCPR.

11 See, *Khudobin v Russia,* ECHR Application No. 59696/00, 26 October 2006; *Baltins v Latvia,* ECHR Application No. 25282/07, 8 January 2013; *Ramanauskas v Lithuania*, ECHR Application No. 74420/01, 5 February 2008, [55].

12 Statement of compatibility (SOC), p. 5.

> A temporary exemption from certain AML/CTF Act obligations is needed in circumstances where actions taken by reporting entities, in line with these AML/CTF obligations, could undermine invstigations by law enforcment into certain customers of the reporting entities.[13]

1.14 Ensuring the effective investigation of serious offences is likely to constitute a legitimate objective for the purposes of international human rights law.

1.15 However, it is unclear from the information provided whether the measure is rationally connected and proportionate to this objective. For example, in relation to whether the measure is rationally connected, it is unclear how compliance with the specific obligations listed in section 75.3 would operate to undermine an investigation.

1.16 In relation to the proportionality of the measure, it is unclear whether there are adequate and effective safeguards to ensure that reporting entities (on behalf of law enforcement officials or otherwise) are not able to incite or encourage the commission of an offence, or to ensure that evidence obtained by enticement is not relied upon in criminal or civil proceedings.

Committee comment

1.17 The right to a fair trial and fair hearing may be engaged and limited by the measure. The preceding analysis raises questions as to whether the measure is compatible with these rights.

1.18 Accordingly, the committee requests the advice of the Attorney-General as to whether the measure is compatible with the right to a fair trial and fair hearing including:

- **whether an exemption granted by the AUSTRAC CEO could permit law enforcement officers (acting through reporting entities) to incite or encourage the commission of an offence (including whether there are any safeguards in place);**
- **if the right to a fair trial and fair hearing may be limited by the measure:**
  - **how the measure is effective to achieve (that is, rationally connected to) its stated objectives; and**
  - **whether any limitation is a reasonable and proportionate means of achieving the stated objective (including whether there are adequate and effective safeguards in place, such as, to ensure that law enforcement officers are not able to incite or encourage the commission of an offence, or to rely on evidence that has been improperly obtained in criminal proceedings).**

13 Explanatory statement (ES), p. 1.

Crimes Amendment (National Disability Insurance Scheme – Worker Screening) Bill 2018

Purpose	Seeks to amend the *Crimes Act 1914* to create exceptions to provisions that would prevent the disclosure of spent, quashed and pardoned convictions for persons who work or seek to work with people with disability in the NDIS
Portfolio	Social Services
Introduced	House of Representatives, 15 February 2018
Rights	Privacy; work; equality and non-discrimination (see **Appendix 2**)
Status	Seeking additional information

Permitting disclosure of spent, quashed and pardoned convictions in certain circumstances

1.19 The measures in the Crimes Amendment (National Disability Insurance Scheme – Worker Screening) Bill 2018 (the bill) seek to create exceptions to Part VIIC of the *Crimes Act 1914* (Crimes Act) with respect to persons who work, or seek to work, with persons with disability in the National Disability Insurance Scheme (NDIS). The effect of these exceptions would be that the spent, quashed and pardoned convictions of persons working or seeking to work with persons with disability under the NDIS may be disclosed to and by, and taken into account by, Commonwealth, State and Territory agencies for the purposes of assessing the person's suitability as a disability worker.

Compatibility of the measure with the right to privacy and the right to work

1.20 The right to privacy encompasses respect for informational privacy, including the right to respect for private information and private life, particularly the storing, use and sharing of personal information.

1.21 The measures engage the right to privacy by enabling the disclosure, and the taking into account, of information relating to a person's spent convictions, quashed convictions and convictions for which the person has been pardoned.

1.22 The right to work in the International Covenant on Economic, Social and Cultural Rights (ICESCR) provides that everyone must be able to freely accept or choose their work, and includes a right not to be unfairly deprived of work. The right to work further requires that state parties to the ICESCR provide a system of protection guaranteeing access to employment. This right must be made available in a non-discriminatory manner.[1] The measures may engage the right to work, as

1 Pursuant to article 2(1) of the International Covenant on Economic, Social and Cultural Rights.

individuals may be excluded from employment with the NDIS on the basis of their criminal record.

1.23 These rights may be subject to permissible limitations which are provided by law and are not arbitrary. In order for a limitation not to be arbitrary, it must pursue a legitimate objective and be rationally connected and proportionate to achieving that objective.

1.24 The statement of compatibility acknowledges that the measure engages and limits the right to privacy and the right to work. However, the statement also argues that these limitations are permissible as they are reasonable to protect people with disability.[2]

1.25 The statement of compatibility further states that 'the paramount objective of the bill is to protect people with a disability from experiencing harm arising from unsafe supports or services under the NDIS'.[3] This appears to be a legitimate objective for the purposes of international human rights law. In this respect, it is noted that the measures are directed at promoting the rights of persons with disabilities—consistent with Australia's obligations under the Convention on the Rights of Persons with a Disability—by ensuring that the supports and services provided through the NDIS are delivered by a suitable workforce.[4]

1.26 Including additional information regarding spent, quashed and pardoned convictions may enable worker screening units to accurately assess a person's suitability as a disability support worker, and in this respect the measure also appears to be rationally connected to this objective.

1.27 However, there are questions about whether the measures in the bill constitute a proportionate limit on the right to privacy and the right to work in this instance. In relation to the proportionality of the measure, the statement of compatibility states:

> The Bill provides access to a worker's detailed criminal history information to state-based worker screening units to enable a thorough risk-based worker screening assessment proportionate to determining the potential risk of harm to people with a disability receiving services under the NDIS. Further, the permission to access such information will be obtained from a worker applying for a worker screening access check as a part of the application process.[5]

1.28 It is acknowledged that, in some circumstances, it may be appropriate to permit the disclosure, or the taking into account, of a person's criminal history

2 Statement of compatibility (SOC), pp. 11-12.

3 SOC, p. 10.

4 SOC, p. 10.

5 SOC, p. 12

information so as to properly assess whether a person poses an unacceptable risk of harm, including when persons work with vulnerable people. In order to be a proportionate limitation on human rights, such limitations must be sufficiently circumscribed and only be as extensive as is strictly necessary to achieve their legitimate objectives.

1.29 In this instance, there are questions as to whether the breadth of the measure is greater than necessary to achieve the stated objectives. The measure appears to permit the disclosure, and the taking into account, of a person's entire criminal record, including minor convictions (for example, shoplifting), regardless of whether those criminal convictions bear any relevance to the person's capacity to perform the job or indicate that the person poses an unacceptable risk.

1.30 In this respect, jurisprudence concerning the right to privacy in the United Kingdom has held that legislation requiring the disclosure of a person's entire criminal history may be incompatible with the right to privacy where disclosure of such information is not determined by reference to whether it is relevant to the legitimate purpose of enabling employers to assess the suitability of an individual for a particular kind of work.[6] This raises questions as to whether there may be other, less rights-restrictive alternatives available, such as only requiring disclosure of serious offences or offences that are relevant to a person's suitability as a disability worker.

1.31 Additionally, it is unclear why it is necessary to permit the disclosure and the taking into account of spent and quashed convictions, and wrongful convictions for which the person has been pardoned. In the case of a wrongful conviction, for example, the person may be factually and legally innocent of the offence with which they were charged. In those circumstances, it is not clear how requiring persons to disclose this criminal history is proportionate to the legitimate objectives.

1.32 Further, it is unclear whether there are sufficient safeguards to ensure that the measure is a proportionate limitation on human rights. The statement of compatibility recognises that 'it is critical that NDIS worker screening does not unreasonably exclude offenders from working in the disability sector'.[7] The statement of compatibility further states:

> The State and Territory-operated worker screening units will be required to have appropriately skilled staff to assess risks to people with disability, to comply with the principles of natural justice, and to comply with a

6 See T*, R (on the application of) v Greater Manchester Chief Constable & Ors* [2013] EWCA Civ 25 (29 January 2013). The UK Supreme Court in that case held the relevant legislation to be incompatible with article 8 of the European Convention on Human Rights. See also the decision of Bell J in the Victorian Supreme Court in *ZZ v Secretary, Department of Justice* [2013] VSC 267 (22 May 2013).

7 SOC, p. 11.

> nationally consistent risk assessment and decision-making framework, including considerations of the circumstances surrounding any offence. The Bill provides the means to gain the necessary information to assess such circumstances.
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> In this way, the Bill…supports a proportionate approach to safeguards that does not unduly prevent a person from choosing to work in the NDIS market, but ensures the risk of harm to people with disability is minimised, by excluding workers whose behavioural history indicates they pose a risk from certain services and supports.[8]

1.33 The bill provides some safeguards in relation to the persons who may disclose criminal history information and take that information into account, and the persons to whom that information may be disclosed. In particular, it is noted that criminal history information may only be disclosed to or by, or taken into account by, prescribed persons and bodies. Before a person or body is prescribed, the minister must be satisfied that the person or body has a legislative basis for being prescribed, complies with the principles of natural justice, and has a risk assessment framework and appropriately skilled staff to assess risks to the safety of a person with disability.[9] However, the safeguards in the bill do not appear to limit the scope of the criminal history information that may be disclosed or taken into account.

Committee comment

1.34 The preceding analysis raises questions as to whether the measure is compatible with the right to privacy and the right to work. Accordingly, the committee requests the advice of the minister as to whether the measures are reasonable and proportionate to achieving the stated objectives of the bill (including whether the measures are the least rights-restrictive way of achieving the objective and the existence of any safeguards).

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

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

1.36 'Discrimination' encompasses both measures that have a discriminatory intent (direct discrimination) and measures which have a discriminatory effect on the enjoyment of rights (indirect discrimination).[10] The UN Human Rights Committee has

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8 SOC, p. 12.

9 See proposed sections 85ZZGI, 85ZZGJ and 85ZZGK and 85ZZGL.

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

described indirect discrimination as 'a rule or measure that is neutral at face value or without intent to discriminate', which exclusively or disproportionately affects people with a particular personal attribute.[11]

1.37 The United Nations Human Rights Committee has not considered whether having a criminal record constitutes 'other status'. However, relevantly, the European Court of Human Rights has interpreted non-discrimination on the grounds of 'other status' to include an obligation not to discriminate on the basis of a criminal record.[12] While this jurisprudence is not binding on Australia, the case law from the Court is useful in considering Australia's obligations in similar provisions in the International Covenant on Civil and Political Rights (ICCPR).[13] Providing that certain persons may disclose, and may take into account, information in relation to a person's criminal history information for the purposes of worker screening for the NDIS is likely to engage the right to equality and non-discrimination. This is because persons may be excluded from employment with the NDIS on the basis of their criminal record.

1.38 However, the statement of compatibility does not recognise that the right to equality and non-discrimination is engaged by the measure, and so does not provide a substantive assessment of whether the measure constitutes a permissible limitation on that right.

1.39 Under international human rights law, 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.[14]

1.40 As outlined above, the objective of the measure appears to be legitimate for the purposes of human rights law. However, on the basis of the information provided, it is not apparent that the measure is rationally connected and proportionate to that objective.

1.41 This is because the bill would permit the disclosure and the taking into account of a person's *entire* criminal history, including information relating to convictions that may not be relevant to a person's suitability as a disability worker in

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11 See e.g. *Althammer v Austria,* Human Rights Committee, 8 August 2003, [10.2].

12 See *Thlimmenos v Greece*, ECHR Application No. 34369/97 (6 April 2000).

13 See also the Australian Human Rights Commission Act 1986 (Cth) which considers discrimination in employment on the basis of criminal record as part of Australia's obligations under International Labour Organisation Convention 111, the *Discrimination (Employment and Occupation) Convention 1958,* which prohibits discrimination in employment. See Australian Human Rights Commission*, 'On the Record: Discrimination in Employment on the basis of Criminal Record under the AHRC Act'* (2012).

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

the NDIS, quashed convictions, and convictions for which a person has been pardoned. Given that a person's criminal history may not be relevant to their suitability as a disability worker in the NDIS, it is unclear that taking such information into account would be an effective means of achieving the legitimate objective. There are also questions as to whether there are other, less rights restrictive, alternatives available to achieve the objective. It is also unclear whether there are adequate and effective safeguards to ensure that NDIS screening units and prospective employers do not take into account irrelevant matters when making decisions about excluding persons from employment.

Committee comment

1.42 The preceding analysis raises questions as to whether the measure is compatible with the right to equality and non-discrimination. Accordingly, the committee requests the advice of the minister as to the compatibility of the measure with this right.

Export Control Bill 2017

Purpose	Amends the framework for regulating the export of goods, including agricultural products and food, from Australian territory
Portfolio	Agriculture and Water Resources
Introduced	Senate, 7 December 2017
Rights	Privacy; freedom of association; work (see **Appendix 2**)
Status	Seeking additional information

Requirement to be a 'fit and proper person'

1.43 The Export Control Bill 2017 (the bill) would impose conditions on the export of some types of goods including requiring that: a person holds an export licence; an establishment or premises is registered for export operations; and the export is in accordance with an approved export arrangement. Under the bill, the secretary[1] may refuse or suspend a licence, registration or an arrangement if the applicant or a person who participates or would participate in managing or controlling the export business is not a 'fit and proper person'.[2] Subsection 372(2) of the bill provides that in determining whether the person is a 'fit and proper person' the secretary must have regard to a range of matters including whether the person or an associate of that person:

- has been convicted of an offence or ordered to pay a pecuniary penalty under particular legislation;[3]
- has provided false, misleading or incomplete information in an application and/or to the secretary; or
- had an application, registration or licence revoked, suspended or refused.[4]

1 The 'secretary' is the Secretary of the Department of the minister who will administer the Export Control Act 2017 if the bill passes the parliament and receives Royal Assent: Explanatory memorandum (EM) p. 6.

2 See, for example, sections (a) sections 112, 117, 123, 127 and 138 (decisions in relation to registered establishments); (b) sections 151, 156, 165, 171 and 179 (decisions in relation to 8 approved arrangements); (c) sections 191, 196, 201, 205 and 212 (decisions in relation to export licences).

3 The legislation is the bill; the *Biosecurity Act 2015*; another Act prescribed by the rules; the *Criminal Code* or the *Crimes Act 1914* to the extend it relates to the *Biosecurity Act 2015* or another Act prescribed by the rules: see section 372(2) of the rules.

1.44 In determining whether the person is a 'fit and proper person' the secretary may also have regard to:

- whether the person has been convicted or ordered to pay a penalty under any other Australian law;
- the interests of the industry or business that relate to the person's export business; or
- any other relevant matter.[5]

1.45 Section 373 further provides that the rules may prescribe kinds of persons who are required to be 'fit and proper persons' for the purposes of the bill.

Compatibility of the measure with the right to work, the right to freedom of association and the right to equality and non-discrimination

1.46 The right to work provides that everyone must be able to freely accept or choose their work, and includes a right not to be unfairly deprived of work. The right to work also requires that state parties provide a system of protection guaranteeing access to employment. This right must be made available in a non-discriminatory manner.[6] The right to freedom of association protects the right of all persons to group together voluntarily for a common goal and to form and join an association.[7]

1.47 By providing that in order to engage in certain export related activities a person must be 'fit and proper,' the measure may engage and limit the right to work, the right to equality and non-discrimination and the right to freedom of association. This is because a person may be unable to engage in export related business due to, for example, their conduct or the conduct of an associate. It is noted that the 'fit and proper person' test may encompass a broad range of conduct which also extends to

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4 'Associate' is defined in section 13 of the bill as including (a) a person who is or was a consultant, adviser, partner, representative on retainer, employer or employee of: (i) the first person; or (ii) any corporation of which the first person is an officer or employee or in which the first person holds shares; (b) a spouse, de facto partner, child, parent, grandparent, grandchild, sibling, aunt, uncle, niece, nephew or cousin of the first person; (c) a child, parent, grandparent, grandchild, sibling, aunt, uncle, niece, nephew or cousin of a spouse or de facto partner of the first person; (d) any other person not mentioned in paragraph (a), (b) or (c) who is or was: directly or indirectly concerned in; or in a position to control or influence the conduct of; a business or undertaking of: the first person; or a corporation of which the first person is an officer or employee, or in which the first person holds shares; (e) a corporation: of which the first person, or any of the other persons mentioned in paragraphs (a), (b), (c) and (d), is an officer or employee; or in which the first person, or any of those other persons, holds shares; (f) if the first person is a body corporate—another body corporate that is a related body corporate (within the meaning of the *Corporations Act 2001*) of the first person.

5 Subsection 373(3).

6 Pursuant to article 2(1) of the International Covenant on Economic, Social and Cultural Rights.

7 Article 22 of the International Covenant on Civil and Political Rights.

the conduct of the person's associates. In this respect, the 'fit and proper person' test may also penalise a person for associating with certain individuals. The right to work, the right to equality and non-discrimination and the right to freedom of association may be subject to permissible limitations provided that such measures pursue a legitimate objective, are rationally connected to that objective and are a proportionate means of achieving that objective.

1.48 In relation to the application of the 'fit and proper person' test, the statement of compatibility states that the measure pursues 'the legitimate objective of ensuring that persons who have been approved to export goods from Australian territory are persons who are trustworthy…[as] the government needs to be certain that the persons responsible for export operations will not abuse the trust placed in them'.[8] Given the particular regulatory context, this is likely to be a legitimate objective for the purposes of international human rights law.

1.49 The measure would also appear to be rationally connected to this objective. The statement of compatibility explains that the reason why the measure extends to a person's business associates is that:

> Business associates and others may have influence over the primary person such that they may be able to compel them to undertake illegal activities on their behalf, through inducement or other means. Putting a fit and proper person test in place will notify the Department of any associates of the primary person who may pose a risk and allow them to take action to ensure Australia's agricultural exports are not compromised.[9]

1.50 In relation to the measure's application, the statement of compatibility notes that the requirements will only extend to persons who are voluntarily seeking to benefit from the export of goods from Australian territory. This is a relevant factor in respect of whether the measure is a proportionate limitation on human rights.

1.51 Further in relation to the proportionality of the limitation, the statement of compatibility notes that section 372 provides an exhaustive list of factors to be taken into account by the secretary in determining whether the person is a 'fit and proper' person, that associates are limited to those defined in section 13 of the bill and that the secretary's decision is reviewable.[10] While these factors are relevant, it is noted that the secretary's discretion to determine that a person is not a fit and proper person is still potentially very broad and may allow the secretary to take account of, for example, types of criminal conviction that may be less serious and 'any other matter' which the secretary considers relevant. It is unclear from the information provided why each such category of factor needs to be taken into account to achieve

8 Statement of compatibility (SOC), p. 451.

9 SOC, p. 451.

10 SOC, pp. 454-455.

the legitimate objective of the measure. Further, while 'associates' are restricted to those set out in section 13, this list is still substantial and includes family members, advisers, employees and business contacts. This raises a concern that the limitation may not be the least rights restrictive approach.

1.52 Finally, who is required to be a 'fit and proper person' will be able to be set out in delegated legislation. This raises a related concern as to whether the classes of person subject to the requirement are sufficiently circumscribed.

Committee comment

1.53 The preceding analysis indicates that there are questions as to the proportionality of the limitation on the right to work, the right to freedom of association and engagement of the right to equality and non-discrimination.

1.54 The committee therefore seeks the advice of the minister as to whether:

- **the limitation is a reasonable and proportionate measure for the achievement of its stated objective (including whether the measure is sufficiently circumscribed, the breadth of the secretary's discretion and the availability of relevant safeguards); and**
- **consideration could be given to: amending section 372 to restrict the range of factors that the secretary may consider as adversely affecting whether a person is a 'fit and proper person'; restricting the list of 'associates' in section 13; and setting out who is required to be a fit and proper person in primary legislation rather than in delegated legislation.**

Extradition (El Salvador) Regulations 2017 [F2017L01581]

Extradition Legislation Amendment (2017 Measures No. 1) Regulations 2017[F2017L01575]

Purpose	The Extradition (El Salvador) Regulations 2017 seek to declare El Salvador as an 'extradition country' for the purposes of the *Extradition Act 1988*; the Extradition Legislation Amendment (2017 Measures No. 1) Regulations 2017 seek to remove reference to India from the list of extradition countries and also seek to amend certain definitions in the Extradition (Physical Protection of Nuclear Material) Regulations 1988 and the Extradition Regulations 1988
Portfolio	Attorney-General
Authorising legislation	*Extradition Act 1988*
Last day to disallow	[F2017L01581]: 15 sitting days after tabling (tabled Senate 7 December 2017) [F2017L01575]: 15 sitting days after tabling (tabled Senate 6 December 2017)
Rights	Prohibition against torture, cruel, inhuman and degrading treatment; life; fair hearing and fair trial; liberty; equality and non-discrimination (see **Appendix 2**)
Status	Seeking additional information

Background

1.55 The committee has considered human rights issues raised by extradition regulations and the *Extradition Act 1988* (the Extradition Act) on several previous occasions.[1] As the Extradition Act was legislated prior to the establishment of the committee, the scheme has never been required to be subject to a foundational human rights compatibility assessment by the relevant minister in accordance with the terms of the *Human Rights (Parliamentary Scrutiny) Act 2011*. The committee has previously stated that the Extradition Act would benefit from a comprehensive

1 See the committee's comments in Parliamentary Joint Committee on Human Rights, *First report of 2013* (6 February 2013) pp. 111-112; see also *Sixth report of 2013* (15 May 2013) p. 149; *Tenth report of 2013* (26 June 2013) p. 56; *Twenty-second report of the 44th Parliament* (13 May 2015) pp. 108-110; *Report 4 of 2017* (9 May 2017) pp. 70-73.

review from the relevant minister to assess its provisions against Australia's obligations under international human rights law.[2]

Extending the definition of 'extradition country' to include El Salvador

1.56 The Extradition Act provides the legislative basis for extradition in Australia. The Extradition Act allows Australia to receive extradition requests from countries that are declared by regulation to be an 'extradition country'[3] and for powers under that Act to be exercised in relation to such a request.

1.57 The Extradition (El Salvador) Regulations 2017 (the El Salvador regulations) seek to declare El Salvador as an 'extradition country' for the purposes of the Extradition Act. Previously, the extradition relationship between Australia and El Salvador was governed by the *Treaty between the United Kingdom of Great Britain and Ireland and El Salvador for the Mutual Surrender of Fugitive Criminals 1883*, which Australia inherited when it obtained independent status as a constitutional monarchy.

1.58 As the El Salvador regulations expand the operation of the Extradition Act, it is necessary to assess the human rights compatibility of the Extradition Act as a whole when considering these regulations.

1.59 The committee has previously considered that extradition pursuant to the Extradition Act may engage and limit a range of human rights, including the:

- prohibition against torture, cruel, inhuman and degrading treatment;
- right to life;
- right to a fair hearing and fair trial;
- right to liberty; and
- right to equality and non-discrimination.[4]

1.60 The statement of compatibility acknowledges that these rights are engaged by the El Salvador regulations.[5]

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2 Parliamentary Joint Committee on Human Rights, *Tenth report of 2013* (26 June 2013) p. 56; *Twenty-second report of the 44th Parliament* (13 May 2015) pp. 108-110; *Report 4 of 2017* (9 May 2017) pp. 70-73.

3 'Extradition country' is defined in section 5 of the Extradition Act to mean, relevantly '(a) any country (other than New Zealand) that is declared by the regulations to be an extradition country.'

4 It is noted that it is difficult to assess the compatibility of the Extradition Act for human rights in the absence of a foundational human rights compatibility assessment. Therefore, the rights listed are not intended to be comprehensive and there may be other human rights engaged and limited by the Extradition Act.

5 Statement of Compatibility (SOC) p. 4.

Compatibility of the measure with the prohibition against torture, cruel, inhuman and degrading treatment

1.61 Australia has obligations under article 3 of the Convention against Torture and other Cruel, Inhuman or Degrading Treatment (CAT) not to extradite a person to another country where there are substantial grounds for believing that he or she would be in danger of being subjected to torture. Australia's obligations under article 7 of the International Covenant on Civil and Political Rights (ICCPR) are broader in scope and not only prohibit torture but also prohibit 'cruel, inhuman or degrading treatment or punishment'.[6] The United Nations (UN) Human Rights Committee has held that article 7 prohibits extradition of a person to a place where that person may be in danger of torture or cruel, inhuman or degrading treatment or punishment if extradited.[7]

1.62 The statement of compatibility states that the El Salvador regulations are consistent with a person's rights in respect of the prohibition against torture, cruel, inhuman and degrading treatment.[8] In this respect, it is noted that section 22(3) of the Extradition Act prohibits the Attorney-General from determining that a person should be surrendered where there are substantial grounds for believing the person would be in danger of being tortured. This is an important safeguard for the purposes of international human rights law. However, there is no equivalent legal requirement in relation to the extradition of persons who may be in danger of cruel, inhuman or degrading treatment or punishment if returned. While there is a general discretion for the Attorney-General not to surrender a person, as stated in previous human rights assessments by the committee, ministerial discretion not to remove a person, rather than a legislative obligation, is not a sufficient safeguard for the purposes of international human rights law.[9]

Committee comment

1.63 The committee seeks the advice of the Attorney-General as to the adequacy of the safeguards in the El Salvador regulations and Extradition Act in relation to the extradition of persons who may be in danger of being subject to cruel, inhuman or degrading treatment or punishment upon return to the extradition country.

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6 See, also, Committee against Torture, General Comment No. 4 (2017) on the implementation of article 3 of the Convention in the context of article 22, advanced unedited version (9 February 2018) [26].

7 UN Human Rights Committee, *General Comment No.20: Article 7 (Prohibition of Torture, or other Cruel, Inhuman or Degrading Treatment of Punishment)* (1992) [9].

8 SOC, p. 7.

9 See, for example, Parliamentary Joint Committee on Human Rights, *Tenth Report of 2013* (June 2013) p. 58.

Compatibility of the measure with the right to life

1.64 The right to life imposes an obligation on Australia to protect people from being killed by others or from identified risks. While the ICCPR does not completely prohibit the imposition of the death penalty, international law prohibits states which have abolished the death penalty (such as Australia) from exposing a person to the death penalty in another nation state. This prohibits a state from deporting or extraditing a person to a country where that person may face the death penalty.[10] The Constitution of El Salvador retains the death penalty only for cases provided by military laws during an international state of war.[11]

1.65 The statement of compatibility states that the Extradition Act is 'consistent with the Australian Government's longstanding opposition to the death penalty', citing section 22(3) of the Extradition Act.[12] That section requires the Attorney-General not to surrender a person to a country where the offence is punishable by a penalty of death, unless the country gives an undertaking that the person will not be tried for the offence; if tried, the death penalty will not be imposed; or if the death penalty is imposed it will not be carried out. The statement of compatibility also notes that in practice undertakings relating to the death penalty in extradition cases have always been honoured.[13] It also notes that 'given the public nature of extradition, the Australian Government would most likely be aware of a breach of a death penalty undertaking' as Australia monitors Australian citizens who have been extradited through its consular network. Additionally, it states that it is open to the decision-maker to consider ongoing monitoring as a condition of the extradition and it is open to the person subject to the extradition request to challenge the decision.[14]

1.66 These are important safeguards that are relevant to the determination of whether the Extradition Act is compatible with the right to life. However, diplomatic assurances and undertakings may be breached, and the Extradition Act does not *require* the Attorney-General to refuse extradition if there are substantial grounds to believe the person would be in danger of being subjected to the death penalty. It also does not *require* any monitoring of the treatment of people extradited to ensure that assurances are being complied with.[15] The UN Human Rights Committee has also

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10 *Judge v Canada* (929/1998), Human Rights Committee, 13 August 2003, [10.4]; *Kwok v Australia* (1442/05) Human Rights Committee, 23 November 2009, [9.4],[9.7].

11 See El Salvador's Depository Notification to the Optional Protocol to the International Covenant on Civil and Political Rights, Aiming at the Abolition of the Death Penalty (8 April 2014) available https://treaties.un.org/doc/Publication/CN/2014/CN.201.2014-Eng.pdf . See also Article 2(2) of the Second Optional Protocol to the International Covenant on Civil and Political Rights.

12 SOC, p. 7.

13 SOC, p. 7.

14 SOC, p. 7.

15 Parliamentary Joint Committee on Human Rights, *Sixth report of 2013* (15 May 2013) p. 154.

noted that diplomatic assurances alone may not be sufficient to eliminate the risk in circumstances where there is no mechanism for monitoring of their enforcement or no means through which the assurances could be effectively implemented.[16]

Committee comment

1.67 The committee seeks the advice of the Attorney-General as to the adequacy of the safeguards in place to protect the right to life of persons who may be subject to the death penalty if extradited.

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

1.68 Article 14 of the ICCPR provides that everyone has the right to a fair and public hearing in the determination of any criminal charge. European human rights jurisprudence has recognised that fair trial rights may be engaged where a person is extradited in circumstances where there is a real risk of a flagrant denial of justice in the country to which the individual is to be extradited.[17] While it is not binding on Australia, the interpretation of the right to a fair trial and fair hearing under the European Convention of Human Rights is instructive.[18] It is also noted that the position in European human rights law jurisprudence is consistent with the United Nations Model Treaty on Extradition, which includes a mandatory ground of refusing extradition '[i]f the person whose extradition is requested…would not receive the minimum guarantees in criminal proceedings, as contained in the International Covenant on Civil and Political Rights, article 14'.[19] The committee has therefore

16 *Alzery v Sweden* (1416/2005) Human Rights Committee, 10 November 2006, [11.5]

17 See, *Al Nashiri v Poland,* European Court of Human Rights (24 July 2014), [562]-[569]; *Othman (Abu Qatada) v United Kingdom,* European Court of Human Rights (17 January 2012), [252]-[262]; *R v Special Adjudicator ex parte Ullah* [2004] 2 AC 323, per Lord Steyn at [41]; *Soering v United Kingdom* European Court of Human Rights (7 July 1989) [113].

18 It is acknowledged that in 2007 the UN Working Group on Arbitrary Detention noted the reluctance of states to extend the application of the prohibition of refoulement to articles 9 and 14. However the Working Group continued by stating that 'to remove a person to a State where there is a genuine risk that the person will be detained without legal basis, or without charges over a prolonged time, or tried before a court that manifestly follows orders from the executive branch, cannot be considered compatible with the obligation in article 2 of the International Covenant on Civil and Political Rights, which requires that States parties respect and ensure the Covenant rights for all persons in their territory and under their control': see *Report of the Working Group on Arbitrary Detention to the Human Rights Council,* 9 January 2007, UN Doc. A/HRC/4/40, [44]-[49].

19 Model Treaty on Extradition, adopted by General Assembly resolution 45/116 as amended by General Assembly resolution 52/88, available at: https://www.unodc.org/pdf/model_treaty_extradition.pdf.

previously noted its concern that the Extradition Act does not provide for the denial of a fair trial or fair hearing as a ground for an extradition objection.[20]

1.69 The statement of compatibility states that the Australian Government's position is that article 14 of the ICCPR does not contain non-refoulement obligations (that is, obligations not to return a person to their country of origin).[21] The statement of compatibility does, however, provide information as to safeguards in the Extradition Act which would allow a decision-maker to consider matters going to fair hearing and fair trial rights, including the extradition objection precluding extradition if it would result in double jeopardy,[22] and the general discretion to refuse surrender.[23] The statement of compatibility further notes that it is open to decision-makers to request assurances that persons being extradited would receive a fair trial.

1.70 However, as noted earlier, a general executive discretion to refuse to surrender a person may not be a sufficient safeguard for the purposes of international human rights law.

1.71 An additional issue in relation to the right to a fair hearing and fair trial is that, under the Extradition Act, the requesting State is not required to produce any evidence that there is a case to answer before a person is extradited (this is sometimes referred to as the 'no evidence' model).[24] Further, a person who may be subject to the extradition is prohibited from adducing any evidence to contradict the allegation that the person has engaged in conduct constituting an extradition offence (and prohibits a magistrate or Judge from receiving such evidence).[25] The provisions which govern an appeal to a higher court in relation to extradition also prohibit a person from adducing such evidence on appeal and prohibit the court from receiving such evidence on review or appeal.[26]

1.72 The absence of any requirement that there be a case to answer before a person is extradited raises questions as to whether there are sufficient safeguards in place to ensure that extradition of persons occurs in a manner that is compatible with the right to a fair hearing and fair trial. As the Joint Standing Committee on Treaties noted in its review of Australia's extradition laws in 2001, 'the consequences for a person who is facing extradition to a foreign country where the legal system,

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20 Parliamentary Joint Committee on Human Rights, *Sixth report of 2013* (15 May 2013) pp. 154-155; *Tenth Report of 2013* (June 2013) pp. 60-61.

21 SOC, p. 8.

22 Extradition Act section 7(e).

23 SOC, p. 8.

24 Joint Standing Committee on Treaties, Report 40, *Extradition – a review of Australia's law and policy,* August 2001, [3.77].

25 Section 19(5), Extradition Act.

26 Section 21A(4), Extradition Act.

language and availability of legal assistance may present great difficulties, mean that extradition cannot be treated merely as an administrative step'.[27] The statement of compatibility to the El Salvador regulations does not address the human rights compatibility of the 'no evidence' approach.

Committee comment

1.73 The committee seeks the advice of the Attorney-General as to:

- **the adequacy of the safeguards in place to prevent the extradition of persons who may, on surrender, suffer a flagrant denial of justice; and**
- **whether, in not requiring any evidence to be produced before a person can be extradited, and in preventing a person subject to extradition from producing evidence about the alleged offence, the El Salvador regulations and the Extradition Act are compatible with the right to a fair trial and fair hearing.**

Compatibility of the measure with the right to liberty

1.74 The right to liberty is a procedural guarantee requiring that persons not be arbitrarily and unlawfully deprived of liberty. This requires that detention must be lawful, reasonable, necessary and proportionate in all the circumstances. Imposing a rule that bail must be refused except in special circumstances, as occurs in the Extradition Act,[28] appears to limit this right. This concern is heightened by the potentially lengthy period in which a person may be detained during extradition proceedings.[29] It is noted that this is of particular concern in the context of the El Salvador regulations, which increase the period in which a person must be brought

27 Joint Standing Committee on Treaties, Report 40, *Extradition – a review of Australia's law and policy,* August 2001, [3.77]. The Joint Standing Committee also noted at that time that there were persuasive grounds for Australia to consider increasing its evidentiary requirements from the default 'no evidence' model: [3.80].

28 See sections 15(6), 18(3), 19(9A), 21(2B), 21(6)(f)(iv), 32(3), 35(6)(g)(iv), 49C(3).

29 This is particularly the case if the proposed amendments to the Extradition Act in Schedule 3 of the Crimes Legislation Amendment (International Crime Cooperation and Other Measures) Bill 2016 come into effect. Those amendments would provide that where a person has been released on bail and a temporary surrender warrant for the extradition of the person has been issued, the magistrate, judge or relevant court *must* order that the person be committed to prison to await surrender under the warrant. The committee has previously concluded in relation to this proposed amendment that there was a risk the measure is not a proportionate limitation on the right to liberty, as the measure may not be the least rights restrictive measure in each individual case in circumstances where it obliges a court to commit a person awaiting transfer to prison regardless of their individual risk: see Parliamentary Joint Committee on Human Rights, *Report 4 of 2017* (9 May 2017) p. 98. As at 26 March 2018, this bill is before the Senate.

before a magistrate or eligible Federal Circuit Court judge after being arrested from 45 days[30] to 60 days.[31]

1.75 As such, the limitation must be shown to seek to achieve a legitimate objective, have a rational connection to that objective and be proportionate. The statement of compatibility notes that a presumption against bail is appropriate 'given the serious flight risk posed in extradition matters and Australia's international obligations to secure the return of the alleged offenders to face justice in the requesting country'.[32] However, as the committee has previously stated, while preventing people who may be a flight risk from avoiding the extradition process may be capable of being a legitimate objective, it is not clear that a blanket prohibition on bail except in special circumstances is a proportionate response.[33]

1.76 In *Griffiths v Australia,* the UN Human Rights Committee found that Australia had breached Article 9(1) of the ICCPR on the basis that the complainant's continuing detention pending extradition without adequate individual justification was arbitrary.[34] It reiterated that in order to avoid a characterisation of arbitrariness, detention should not continue beyond the period for which the State party could provide appropriate justification.[35] It also concluded that there may be less rights-restrictive measures to achieve the same ends, such as the imposition of reporting obligations, sureties or other conditions which would take account of individual circumstances.[36]

1.77 The UN Human Rights Committee also found Australia in violation of article 9(4) of the ICCPR in circumstances where the complainant was 'effectively precluded, by virtue of the State party's law and practice, from taking effective proceedings before a court in order to obtain a review of the lawfulness of his continuing detention, as the courts had no power to review whether his detention continued to be lawful after a lapse of time and to order his release on this basis'.[37] The Australian government responded to this ruling by noting (relevantly) that it was open to the complainant to apply for bail, citing the power of the Court under section 21(6) of the Extradition Act to order release on bail if there were 'special

30 This is the default period provided by section 17(2)(a) of the Extradition Act.

31 Section 6 of the El Salvador Regulations.

32 SOC, p. 9.

33 Parliamentary Joint Committee on Human Rights, *Sixth report of 2013* (15 May 2013) 156-157; *Report 4 of 2017* (9 May 2017) pp. 95-97.

34 *Griffiths v Australia* (193/2010), UN Human Rights Committee, 21 October 2014, [7.3].

35 *Griffiths v Australia* (193/2010), UN Human Rights Committee, 21 October 2014, [7.2]; see also, *C v Australia* (90/1999), UN Human Rights Committee, 28 October 2002, [8.2].

36 *Griffiths v Australia* (193/2010), UN Human Rights Committee, 21 October 2014, [7.2].

37 *Griffiths v Australia* (193/2010), UN Human Rights Committee, 21 October 2014, [7.5].

circumstances' justifying that release, and also pointed to the availability of the writ of mandamus in the High Court of Australia and judicial review under the *Judiciary Act 1903*.[38] However, it is not clear that the requirement of a court considering whether 'special circumstances' exist would be sufficient consideration of whether a person's detention may be compatible with Article 9. It is also not clear how such matters would be able to be raised through judicial review. Therefore, questions arise as to whether the current framework for review in the Extradition Act, as expanded by the El Salvador regulations, provides sufficient opportunity for persons to challenge the lawfulness of their continuing detention for the purposes of international human rights law.

1.78 Further, extradition invariably results in the detention of a person pending extradition and may also involve lengthy detention in a foreign country while awaiting trial. This potentially lengthy detention of persons without first testing the evidence against them raises additional concerns that the 'no evidence' model discussed above may give rise to a circumstance where a person may be arbitrarily detained. This matter was not addressed in the statement of compatibility.

Committee comment

1.79 The committee seeks the advice of the Attorney-General as to:

- **whether a presumption against bail except in special circumstances is a proportionate limitation on the right to liberty;**
- **whether, having regard to *Griffiths v Australia,* the El Salvador regulations and the Extradition Act provide an opportunity for persons to review the lawfulness of their detention pending extradition in accordance with article 9(4) of the ICCPR;**
- **whether detaining persons during the extradition process without first testing the evidence against the person is compatible with the right to liberty; and**
- **whether section 6 of the El Salvador regulations, which increases the period in which a person must be brought before a magistrate or eligible Federal Circuit Court judge after being arrested from 45 days to 60 days, is a proportionate limitation on the right to liberty.**

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

1.80 The right to equality and non-discrimination provides that everyone is entitled to enjoy their rights without discrimination of any kind, and that all people

38 See 'Griffiths v Australia (1973/2010) – Australian Government response' available at Attorney-General's Department 'Human Rights Communications' website at https://www.ag.gov.au/RightsAndProtections/HumanRights/Pages/Humanrightscommunications.aspx.

are equal before the law and entitled without discrimination to the equal and non-discriminatory protection of the law. The prohibited grounds of discrimination are race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Under 'other status' the following have been held to qualify as prohibited grounds: age, nationality, marital status, disability, place of residence within a country and sexual orientation. The prohibited grounds of discrimination are often described as 'personal attributes'.

1.81 As noted in the statement of compatibility, section 7 of the Extradition Act promotes this right to the extent that it sets out grounds on which a person might raise an objection to extradition, including grounds to object where:

- surrender is sought for the purpose of prosecuting or punishing the person on account of his or her race, sex, sexual orientation, religion, nationality or political opinions; or
- the person may be prejudiced at his or her trial, or punished, detained or restricted in his or her personal liberty, by reason of his or her race, sex, sexual orientation, religion, nationality or political opinions.[39]

1.82 While these are important safeguards, it does not cover all of the grounds that are considered 'prohibited grounds' of discrimination in the international human rights conventions to which Australia is a party, including discrimination on the basis of disability, language, opinions (other than political opinions), social origin or marital status. The statement of compatibility notes that the person subject to extradition 'has an opportunity to make representations to the decision-maker regarding all of the protected attributes in article 26 of the ICCPR',[40] however no information is provided in the statement of compatibility as to how such matters would be taken into account. There does not appear to be any legal requirement for a decision-maker to refuse to surrender a person where they may be subject to discrimination on a prohibited ground that is not included in section 7 of the Extradition Act.

Committee comment

1.83 The committee seeks the advice of the Attorney-General as to the compatibility of the El Salvador regulations and the Extradition Act with the right to equality and non-discrimination. In particular, the committee seeks information as to the safeguards in place to ensure:

- **a person is not extradited where their surrender is sought for the purpose of prosecuting or punishing the person on account of her or his personal attribute that is protected under article 26 of the ICCPR but not listed in section 7 of the Extradition Act; and**

39 SOC, p. 9.

40 SOC, p. 9.

- **a person is not extradited where they may be prejudiced at her or his trial, or punished, detained or restricted in her or his personal liberty, by reason of a personal attribute that is protected under article 26 of the ICCPR but not listed in section 7 of the Extradition Act.**

Removing India from the list of extradition countries in the Extradition (Commonwealth Countries) Regulations 2010

1.84 Item 1 of the Extradition Legislation Amendment (2017 Measure No. 1) Regulations (Extradition Amendment Regulations) seeks to remove India from the list of extradition countries in Schedule 1 in the Extradition (Commonwealth Countries) Regulations 2010 (the Commonwealth Countries Regulations). This is because extradition requests between Australia and India are now governed under the Extradition (India) Regulations 2010 (the India Regulations) and the Extradition Act, so the reference to India in the Commonwealth Countries Regulations is no longer required.

Compatibility of the measure with multiple rights

1.85 The human rights analysis discussed earlier in relation to the El Salvador regulations applies equally to the Extradition Amendment Regulations. However, it is noted that there are several additional safeguards included in the India regulations that are not present in the El Salvador regulations and which modify the operation of the Extradition Act, including:

- article 4(3)(d) of the bilateral extradition treaty with India (implemented domestically through the India Regulations) allows a request for extradition to be refused if surrender is likely to have exceptionally serious consequences for the person whose extradition is sought, including because of the person's age or state of health; and
- if Australia receives a request under the India Extradition Treaty, then supporting documentation to establish that the person sought has committed the offence must be provided.[41] This is a departure from the 'no evidence' standard discussed above in relation to the El Salvador regulations.

1.86 However, it is also noted that the Commonwealth Countries Regulations, which will no longer apply to India as a result of the Extradition Amendment Regulations, provides for additional safeguards which would have provided greater safeguards to protect human rights, including:

- the standard of evidence required to support an extradition request under the Commonwealth Countries Regulations is that of a 'prima facie' case,[42]

41 Statement of Compatibility to the Extradition Legislation Amendment (2017 Measure No.1) Regulations, p. [6].

42 See section 8 of the Extradition (Commonwealth Countries) Regulations 2010.

which provides a greater level of scrutiny than the 'no evidence' standard under the Extradition Act; and

- a requirement that the person must not be surrendered if the Attorney-General is satisfied that it would be 'unjust, oppressive or too severe a punishment' to surrender the person, such as where the offence is trivial or where the accusation against the person was not made in good faith or in the interests of justice.[43]

1.87 These safeguards in the Commonwealth Countries Regulations are relevant to the determination of whether the human rights engaged and limited by the Extradition Act are proportionate. In particular, the presence of the 'prima facie' evidence test in the Commonwealth Countries Regulations would address some of the concerns discussed earlier concerning the default 'no evidence' standard in the Extradition Act in relation to the right to a fair trial and fair hearing and the right to liberty. Similarly, the requirement that a person must not be extradited if it would be 'unjust, oppressive or too severe a punishment' may assist in determining whether the measure is compatible with the right to a fair trial and fair hearing. By removing India from the scope of the Commonwealth Countries Regulations, these safeguards are no longer available.

Committee comment

1.88 The committee seeks the advice of the Attorney-General as to the compatibility of Items 2 and 3 of the Extradition Legislation Amendment (2017 Measure No.1) Regulations with human rights, having regard to the matters discussed at [1.61] to [1.83] above, in particular the:

- **prohibition against torture, cruel, inhuman and degrading treatment;**
- **right to life;**
- **right to a fair hearing and fair trial;**
- **right to liberty; and**
- **right to equality and non-discrimination.**

1.89 The committee seeks the advice of the Attorney-General as to whether removing India from the list of 'extradition countries' in the Extradition (Commonwealth Countries) Regulations 2010 is a proportionate limitation on human rights, having regard to the safeguards in that regulation that are not present in the Extradition Act or the Extradition (India) Regulations 2010.

43 See section 9 of the Extradition (Commonwealth Countries) Regulations 2010.

Amendments to reflect changes made to the Convention on the Physical Protection of Nuclear Material 1979

1.90 Items 2, 3 and 4 of the Extradition Amendment Regulations also seek to amend the Extradition (Physical Protection of Nuclear Materials) Regulations 1988 (the Nuclear Materials Regulations) and the Extradition Regulations 1988 to reflect amendments made to the Convention on the Physical Protection of Nuclear Material (the Nuclear Material Convention). That convention relevantly requires states parties to provide extradition and mutual assistance to facilitate the enforcement of a series of offences relating to the protection, storage and transportation of nuclear material. Amendments to that convention were made by the Amendment to the Convention on the Physical Protection of Nuclear Material (the Amended Nuclear Material Convention) which expands the list of offences for which signatories may request a person's extradition. The Amended Nuclear Material Convention also requires signatories not to regard offences committed under that convention as a 'political offence' when considering a request for extradition or mutual assistance.[44] As a consequence, a request for extradition or for mutual legal assistance based on an offence under the Nuclear Material Convention (as amended by the Amended Nuclear Material Convention) cannot be refused on the ground it is a political offence.

Compatibility of the measure with multiple rights

1.91 The effect of the amendments introduced relating to the Amended Nuclear Material Convention in the Extradition Amendment Regulations is to expand the operation of the Extradition Act to include a broader range of offences, and to remove offences under the Nuclear Material Convention (as amended by the Amended Nuclear Material Convention) from the scope of the 'political offence' extradition objection. As a consequence, the human rights analysis discussed above in relation to the El Salvador regulations applies equally to these amendments.

1.92 As noted in the statement of compatibility, there are some safeguards contained in the Nuclear Material Convention (as amended by the Amended Nuclear Material Convention) that are incorporated into Australian law through the Nuclear Materials Regulations that may assist in determining the proportionality of the limitations on human rights, including:

- article 11B of the Amended Nuclear Material Convention provides that nothing in the convention shall be interpreted as an obligation to extradite where the extraditing state has substantial grounds for believing that the request for extradition for one of the offences under the convention 'has been made for the purpose of prosecuting or punishing a person on account

44 Under the Extradition Act, there is an extradition objection in relation to an extradition offence if the offence is a 'political offence' in relation to the extradition country: Section 7(a), Extradition Act.

of that person's race, religion, nationality, ethnic origin or political opinion or that compliance with the request would cause prejudice to that person's position for any of these reasons'; and

- article 12 of the Nuclear Material Convention provides that any persons in relation to whom proceedings are being carried out in connection with the offences in the convention 'shall be guaranteed fair treatment at all stages of the proceedings'.

1.93 However, concerns remain in relation to the human rights compatibility of the Extradition Amendment Regulations for the same reasons as those outlined above in relation to the El Salvador Regulations. For example, it is noted that the 'no evidence' standard applies in relation to these amendments. While the statement of compatibility states that the 'prima facie' standard is not required because extradition is not a criminal process,[45] the statement of compatibility does not specifically address the concerns raised above that the 'no evidence' standard may not provide a sufficient safeguard to ensure that extradition of persons occurs in a manner that is compatible with the right to a fair hearing and fair trial or right to liberty.

Committee comment

1.94 The committee seeks the advice of the Attorney-General as to the compatibility of items 2 and 3 of the Extradition Legislation Amendment (2017 Measure No.1) Regulations with human rights having regard to the matters discussed at [1.61] to [1.83] above, in particular the:

- **prohibition against torture, cruel, inhuman and degrading treatment;**
- **right to life;**
- **right to a fair hearing and fair trial;**
- **right to liberty; and**
- **right to equality and non-discrimination.**

45 Statement of Compatibility to the Extradition Legislation Amendment (2017 Measure No.1) Regulations, page [5]-[6].

Higher Education Support Legislation Amendment (Student Loan Sustainability) Bill 2018

Purpose	Amends the *Higher Education Support Act 2003* including to: provide a new minimum repayment income of $44,999 for the compulsory repayment of Higher Education Loan Program (HELP) debts; replace the current repayment thresholds and introduce additional repayment thresholds; index HELP repayment thresholds to the consumer price index instead of average weekly earnings; and introduce, from 1 January 2019, a combined lifetime limit on the amount a student can borrow under HELP of $150,000 for students studying medicine, dentistry and veterinary science courses, and $104,440 for other students
Portfolio	Education and Training
Introduced	House of representatives, 14 February 2018
Rights	Education; equality and non-discrimination (see **Appendix 2**)
Status	Seeking additional information

Background

1.95 The committee has commented on proposed reforms to the funding of higher education and reforms to the Higher Education Loan Program (HELP) on a number of occasions.[1]

1.96 Most recently, the committee considered the Higher Education Support Legislation Amendment (A More Sustainable, Responsive and Transparent Higher Education System) Bill 2017 (2017 bill) in its *Report 5 of 2017* and *Report 7 of 2017*.[2] The current 'Student Loan Sustainability' bill[3] (2018 bill) reintroduces a number of the measures contained in the 2017 bill.

Lowering repayment threshold for HELP debts and changes to indexation

1.97 Schedule 1 of the 2018 bill lowers the current minimum repayment income for HELP loans to $44,999 per annum (currently, the repayment threshold is

1 Parliamentary Joint Committee on Human Rights, *Twelfth Report of the 44th Parliament* (24 September 2014) pp. 8-13; *Eighteenth Report of the 44th Parliament* (10 February 2015) pp. 43-64; *Twenty-second Report of the 44th Parliament* (13 May 2015) pp. 163-174; *Report 5 of 2017* (14 June 2017) pp. 22-30 and *Report 7 of 2017* (8 August 2017) pp. 41-60.

2 Parliamentary Joint Committee on Human Rights*, Report 5 of 2017* (14 June 2017) pp. 22-30 and *Report 7 of 2017* (8 August 2017) pp. 41-60.

3 Higher Education Support Legislation Amendment (Student Loan Sustainability) Bill 2018.

$55,874).[4] It also introduces additional repayment thresholds and rates (1 percent at $45,000 and increasing to 10 percent on salaries over $131,989 per annum).[5] The equivalent measure contained in the 2017 bill sought to lower the repayment threshold to $41,999 per annum.[6]

1.98 From 1 July 2019 repayment thresholds including the minimum repayment amount will be indexed using the Consumer Price Index (CPI) rather than Average Weekly Earnings (AWE).[7] This is a reintroduced measure which is contained in the 2017 bill.

Compatibility of the measures with the right to education

1.99 Article 13 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) protects the right to education. It specifically requires, with a view to achieving the full realisation of the right to education, that:

> Higher education shall be made equally accessible to all, on the basis of capacity, by every appropriate means, and in particular by the progressive introduction of free education.

1.100 Australia has obligations to progressively introduce free higher education by every appropriate means and also has a corresponding duty to refrain from taking retrogressive measures, or backwards steps, in relation to the realisation of the right to education.[8] Retrogressive measures, a type of limitation, may be permissible under international human rights law providing that they address a legitimate objective, are rationally connected to that objective and are a proportionate way to achieve that objective.[9]

1.101 The Australian system of higher education allows students to defer the costs of their education under a HELP loan until they start earning a salary above a certain threshold. The proposed lowering of the repayment threshold engages and may limit the right to education as it imposes payment obligations on those who earn lower incomes. This appears to be contrary to the requirement under article 13 of the ICESCR to ensure that higher education is equally accessible and progressively free. Similarly, the proposed change to indexation also engages and may limit the right to education as it may increase the amount to be paid, relative to earnings, in the event that growth in the CPI exceeds growth in AWE. In this respect, the United Nations

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4 Statement of compatibility (SOC) p. 4; Schedule 1, item 2.

5 Schedule 1, item 2.

6 See schedule 3 of the 2017 bill.

7 Explanatory Memorandum (EM) p. 1.

8 See, UN Committee on Economic, Social and Cultural Rights, *General Comment 13: the Right to education* (8 December 1999) [44]-[45].

9 See, for example, UN Committee on Economic, Social and Cultural Rights, *General Comment 13: the Right to education* (8 December 1999) [44]-[45].

(UN) Committee on Economic, Social and Cultural Rights has raised serious concerns about access to education in the context of the operation of student loan schemes internationally.[10]

1.102 The committee previously corresponded with the minister about the compatibility of the measures in the 2017 bill which sought to lower the repayment threshold with the right to education. The repayment threshold in the 2018 bill is slightly higher than the amount in the 2017 bill, but the measures raise substantively identical issues in relation to the right to education. While the statement of compatibility to the 2018 bill identifies that these measures engage the right to education, it does not include the level of detail previously provided by the minister in his response to the 2017 bill. Where a measure that the committee has previously considered is reintroduced, previous ministerial responses to the committee's requests for further information should be used to inform the statement of compatibility for the reintroduced measure. This additional information may assist the committee to determine whether or not the reintroduced measures are compatible with human rights, including taking into account previous conclusions.

1.103 In the context of this measure, the committee has previously concluded that lowering the repayment threshold may be compatible with the right to education. This was based on the information that was previously provided by the minister in response to the committee's request for information. However, in the absence of any detail from the minister in the statement of compatibility to the 2018 bill, further information is required in order for the committee to conclude its assessment of the reintroduced measure.

1.104 Nevertheless, the statement of compatibility argues that the measures are compatible with the right to education as they do not increase the overall cost to students or prevent access to higher education:

> Access to higher education will be maintained through the continued availability of HELP loans. As individuals will commence repayment sooner, it may create the belief that costs are increasing for students, thereby reducing access to higher education. By lowering the repayment threshold, and altering the indexation of the threshold to grow in line with CPI, this measure makes the overall scheme more affordable for Government in the

10 For example, the UN Committee on Economic, Social and Cultural Rights raised concerns about access to education in relation to the operation of the student loans scheme in the United Kingdom which shares similar elements to the Australian HELP scheme: UN Committee on Economic, Social and Cultural Rights , Concluding observations on the United Kingdom of Great Britain and Northern Ireland, E/C.12/1/Add.79 (5 June 2002) [22]; UN Committee on Economic, Social and Cultural Rights, Concluding observations on the United Kingdom of Great Britain and Northern Ireland, E/C.12/GBR/CO/5 (12 July 2009) [44]; UNESCR, Concluding observations on the United Kingdom of Great Britain and Northern Ireland, E/C.12/GBR/CO/6 (14 July 2016) [65]-[66].

long-term, and does not result in an overall increase in costs for students.[11]

1.105 However, this does not fully address whether the changes to indexation and the repayment threshold may act as a disincentive for access to education or, more generally, how such measures impact upon Australia's obligations of progressive realisation.

1.106 Additionally, there may be a category of low income earners who, due to earning below the repayment threshold, may never have had to repay off the entire amount of their HELP-debt. If such low income earners now have to repay HELP-loans due to a change in thresholds, there are questions as to whether this could be an indirect reduction in freely accessible higher education for these classes of individuals.

1.107 Should the measure constitute a limitation on the right to education, it is unclear from the information provided whether this limitation is permissible as a matter of international human rights law. The statement of compatibility identifies the objective of the measure as 'ensuring the long term viability of the HELP scheme'.[12] However, it does not provide an evidence-based explanation of how this constitutes a legitimate objective for the purposes of international human rights law. In this respect, a legitimate objective must address a pressing or substantial concern and not simply seek an outcome regarded as desirable or convenient. Additionally, as set out above, a limitation must be rationally connected to, and a proportionate way to achieve, its stated objective in order to be permissible under international human rights law.

Committee comment

1.108 The preceding analysis raises questions as to whether the measures are compatible with the right to education.

1.109 Accordingly, the committee requests the further advice of the minister as to:

- **whether the proposed change in indexing from AWE to CPI means that students would pay more or less for their university degrees (including for their degree overall and as a proportion of their wages);**
- **whether requiring some classes of low income earners to repay HELP-debts could constitute an indirect reduction in the amount of government funding of higher education;**
- **whether the proposed changes to the repayment threshold and indexation could have an adverse impact on access to education;**

11 SOC, p. 5.

12 SOC, p. 4.

- **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 a reasonable and proportionate measure to achieve the stated objective.**

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

1.110 The right to equality and non-discrimination is protected by articles 2 and 26 of the International Covenant on Civil and Political Rights (ICCPR). Article 2(2) of ICESCR also prohibits discrimination specifically in relation to the human rights contained in the ICESCR such as the right to education. In addition to these general non-discrimination provisions, articles 1, 2, 3, 4 and 15 of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) further describe the content of these obligations, including the specific elements that state parties are required to take into account to ensure the rights to equality for women.[13]

1.111 'Discrimination' encompasses a distinction based on a personal attribute (for example, race, sex or on the basis of disability),[14] which has either the purpose (called 'direct' discrimination), or the effect (called 'indirect' discrimination), of adversely affecting human rights.[15] The UN Human Rights Committee has explained indirect discrimination as 'a rule or measure that is neutral on its face or without

13 Article 1 of CEDAW defines 'discrimination against women' as 'any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field'.

14 The prohibited grounds are race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status: ICCPR articles 2 and 26; ICESCR article 2(2); UN Human Rights Committee, *General Comment 18*, *Non-discrimination* (10 November 1989) [1]. Under 'other status' the following have been held to qualify as prohibited grounds: age, nationality, marital status, disability, place of residence within a country and sexual orientation: See, for example, *Schmitz-de-Jon v Netherlands*, UN Human Rights Committee 855/99 (2001); *Gueye v France* UN Human Rights Committee 196/85 (1989); *Danning v Netherlands,* UN Human Rights Committee 180/84 (1990); *Lindgren et al v Sweden* UN Human Rights Committee 298-9/88 (1990) *Young v Australia*, UN Human Rights Committee 941/00 (2003); UN Human Rights Committee, Concluding observations on Ireland, A/55/40 (2000) [422]-[451]. See, also, UN Committee on Economic, Social and Cultural Rights, *General Comment 20, Non-discrimination in economic, social and cultural rights*, E/C.12/GC/20 (2 July 2009) [28]-[35].

15 UN Human Rights Committee, *General Comment 18*, Non-discrimination (1989) [7].

intent to discriminate', which exclusively or disproportionately affects people with a particular protected attribute.[16]

1.112 Reducing the minimum repayment income threshold for HELP debts to $44,999 may have a disproportionate impact on women and other vulnerable groups.[17] In relation to women, this is because, on average, women are more likely to earn less than men, and therefore more are likely to be affected by the reduction in the repayment threshold to cover those earning between $44,999 and $55,000.

1.113 The change in indexation may also have a disproportionate effect on women and other vulnerable groups. As women, on average, earn less over a lifetime of employment, are more likely to take time out of the workforce to care for children and are more likely to be engaged in part-time employment, they may take longer to pay off their HELP debt than their male counterparts.[18] Where a person takes longer to repay a HELP debt, any changes in indexation under the HELP scheme relative to their earnings may have a more significant effect on them. This is because they may be subject to the indexation changes and repayment obligations for a longer period of time.

1.114 Where a measure impacts on particular groups disproportionately, it establishes *prima facie* that there may be indirect discrimination.[19] Differential treatment (including the differential effect of a measure that is neutral on its face)[20] will not constitute unlawful discrimination if the differential treatment is based on reasonable and objective criteria such that it serves a legitimate objective, is effective to achieve that legitimate objective and is a proportionate means of achieving that objective.

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

17 See, for example, the UN Committee on Economic, Social and Cultural Rights, General Comment 20, Non-discrimination in economic, social and cultural rights, E/C.12/GC/20 (2 July 2009) [28]-[35].

18 See, Australian Bureau of Statistics (ABS), Employee Earnings and Hours (May 2016) http://www.abs.gov.au/ausstats/abs@.nsf/0/27641437D6780D1FCA2568A9001393DF?Opendocument; ABS, Gender indicators, Australia (August 2016) http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/by%20Subject/4125.0~August%202016~Main%20Features~Economic%20Security~6151; Workplace Gender Equality Agency, Gender pay gap statistics (March 2016) https://www.wgea.gov.au/sites/default/files/Gender_Pay_Gap_Factsheet.pdf (last accessed 24 May 2017); See, for example, Senate Standing Committee on Education and Employment, The Future of HECS (28 October 2014) p. 52.

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

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

1.115 The statement of compatibility acknowledges that the measures engage the right to equality and non-discrimination due to their disproportionate impacts on women:

> …the introduction of new HELP repayment thresholds, may be seen as limiting the right to non-discrimination due to disproportionate impacts on women and other low income groups.
>
> The Government currently carries a higher deferral subsidy from demographic groups that tend to have lower incomes. This includes women, individuals in part-time work, or individuals in low paid professions. As a result, some of these individuals, including women, may be making repayments for the first time as a result of the introduction of a lower minimum repayment threshold. Addressing this income inequality, however, is not the role of the higher education loans system.[21]

1.116 This statement is identical to the information provided in the statement of compatibility for the 2017 bill.[22] As with the 2017 bill, the statement of compatibility to the 2018 bill does not provide a substantive assessment of whether the measure amounts to indirect discrimination nor does it address the concerns expressed by the committee in its consideration of the measures in the 2017 bill.

1.117 Further, the argument in the statement of compatibility that a negative impact on women results from income inequality is not an adequate justification of the measure for the purposes of human rights law in circumstances where the measure has the potential to exacerbate inequality. Rather, as set out above, where there is evidence that a measure may have a disproportionate negative effect on women it shows *prima facie* that the measure itself may be discriminatory. In these circumstances, the measure may still be compatible with the right to equality and non-discrimination where the measure serves a legitimate objective, is effective to achieve that objective and is a proportionate means of achieving that objective. However, the statement of compatibility does not address whether this is the case with respect to these measures. Further, international human rights law recognises that it is fundamentally the role of government to address existing inequalities and ensure that these are not exacerbated through particular measures. In this respect, the United Nations (UN) Committee on Economic, Social and Cultural Rights, in its concluding observations on Australia in July 2017, recommended that Australia 'intensify its efforts to address the remaining obstacles to achieving substantive equality between men and women'.[23] As the minister's response to the 2017 bill did not fully address such issues, the committee previously advised that it was not

21 SOC, p. 6.

22 See, SOC to the 2017 bill, p. 10.

23 UN Committee on Economic, Social and Cultural Rights, Concluding observations on the fifth periodic report of Australia, E/C.12/AUS/CO/5 (11 July 2017) [22].

possible to conclude that the measure was compatible with the right to equality and non-discrimination.[24]

Committee comment

1.118 The measure engages the right to equality and non-discrimination.

1.119 The preceding analysis raises questions as to whether the disproportionate negative effect on women (which indicates *prima facie* indirect discrimination) amounts to unlawful discrimination.

1.120 Accordingly, the committee requests the further advice of the minister as to:

- **whether the measure pursues a legitimate objective for the purposes of international human right law and whether there is reasoning or evidence that establishes that this objective addresses a pressing or substantial concern;**
- **how the measure is effective to achieve (that is, rationally connected to) the stated objective; and**
- **whether the limitation is a reasonable and proportionate measure to achieve the stated objective.**

Restriction on how much students can borrow under HELP to cover tuition fees

1.121 Schedule 3 of the 2018 bill introduces a new combined limit on how much students can borrow under HELP to cover their tuition fees from 1 January 2019. Currently, the limit applies only to debts incurred through FEE-HELP,[25] VET FEE-HELP[26] and VET Student Loans.[27] Under the proposal, debts incurred by Commonwealth supported students under HECS-HELP[28] will also be included in the

24 Parliamentary Joint Committee on Human Rights, *Report 7 of 2017* (8 August 2017) pp. 41-60.

25 FEE−HELP is a loan scheme that assists eligible fee paying students to pay all or part of their tuition fees. It is for domestic undergraduate and postgraduate students who do not have a Commonwealth supported place.

26 VET Student Loans commenced on 1 January 2017, replacing the VET FEE-HELP scheme, which ceased for new students on 31 December 2016.

27 The VET Student Loans program is an income contingent loan offered by the Australian Government that helps eligible students pay for some vocational education and training (VET) diploma level or above courses.

28 A commonwealth supported student place is part subsidised by the Australian government through the government paying part of the fees for the place directly to the university. Students are also required to contribute towards the study and pay the remainder of the fee called the 'student contribution amount' for each unit they are enrolled in at the higher education institution. HECS−HELP is a loan scheme for eligible students enrolled in Commonwealth supported places to pay their student contribution amounts.

lending limit. This means that all eligible domestic students will be subject to a single combined lending limit for their tuition fees. The lifetime limit will be $150,000 for students studying medicine, dentistry and veterinary science courses and $104,440 for other students. Loan limits will be indexed according to CPI.[29] The loan limit will not be retrospective with respect to HECS-HELP.[30]

Compatibility of the measure with the right to education

1.122 As set out above, article 13 of the ICESCR protects the right to education including ensuring that higher education is equally accessible, on the basis of capacity and through the progressive introduction of free higher education.

1.123 The combined lifetime loan limit on all HELP lending may restrict access to tertiary or further education for individuals who have reached the loan limit and who are unable to afford to pay their tuition fees upfront. Accordingly, the measure appears to be a backward step, or limitation, on the level of attainment of the right to higher education.[31] As noted above, such limitations or retrogressive measures may be permissible under international human rights law provided that they address a legitimate objective, are rationally connected to that objective and are a proportionate way to achieve that objective. In this context, the UN Committee on Economic, Social and Cultural Rights has noted that:

> There is a strong presumption of impermissibility of any retrogressive measures taken in relation to the right to education, as well as other rights enunciated in the Covenant. If any deliberately retrogressive measures are taken, the State party has the burden of proving that they have been introduced after the most careful consideration of all alternatives and that they are fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the State party's maximum available resources.[32]

1.124 The statement of compatibility acknowledges that the measure engages the right to education and argues that any limitation on the right is permissible. It identifies the objective of the measure as 'ensuring access to tertiary education for those who cannot afford to pay their tuition upfront'.[33] While ensuring access to tertiary education may be capable of constituting a legitimate objective for the purposes of international human rights law, limited information is provided in the

29 Explanatory memorandum (EM), p. 22.

30 SOC, p. 6.

31 See, UN Committee on Economic, Social and Cultural Rights, General Comment 13: the Right to education (8 December 1999).

32 See, UN Committee on Economic, Social and Cultural Rights, General Comment 13: the Right to education (8 December 1999) [45].

33 SOC, p. 6.

statement of compatibility as to how this constitutes a pressing or substantial concern in the specific circumstances of the measure.

1.125 Further, it is unclear from the information provided how this measure is rationally connected to (that is, effective to achieve) this objective. This is because rather than ensuring access to higher education for those who cannot afford to pay fees upfront, the measure would appear instead to restrict access to higher education for those unable to pay if they have already reached the HELP limit.

1.126 In relation to the proportionality of the limitation, the statement of compatibility states that the loan limit is:

> …firstly, sufficient to support almost nine years of full time study as a Commonwealth supported student and, secondly, can reasonably be repaid within a borrower's lifetime, this measure is consistent with fair and shared access to education.[34]

1.127 However, this may not fully take into account all potential impacts on access to education for students, particularly in the context of lifelong learning or retraining. Additionally, while the loan amount may be sufficient to support nine years of fulltime study as a Commonwealth supported student, this does not appear to fully acknowledge the context of current higher education funding arrangements. Currently, in many graduate and postgraduate programs there are few commonwealth supported student places.[35] If a commonwealth supported place is unavailable, this means that students will usually have to pay higher fees in respect of such graduate and postgraduate programs. While students may be able to borrow the cost of their tuition under FEE-HELP, they will reach the lifetime loan limit sooner due to the higher costs of tuition. However, the effect of the measure will be to count both the FEE-HELP debt and any HECS-HELP debt (that students have already incurred, for example, during their undergraduate degree) for the purposes of the lifetime limit. This means that it is possible an Australian student who completes, for example, an undergraduate bachelor degree as a commonwealth supported student followed by a full-fee paying graduate degree may reach the lifetime loan limit. Accordingly, this raises a particular concern that the measure could have a significant

34 SOC, p. 6.

35 See, Study Assist, Commonwealth Supported places, http://studyassist.gov.au/sites/studyassist/helppayingmyfees/csps/pages/commonwealth-supported-places.

impact on access to higher education for some students.[36] Further, no information has been provided in the statement of compatibility about the consideration of alternatives, in the context of Australia's use of its maximum available resources. Based on the information provided, it is unclear that the measure is proportionate.

Committee comment

1.128 The preceding analysis raises questions as to the compatibility of the measure with the right to education.

1.129 The committee therefore seeks 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;**
- **whether the limitation is a reasonable and proportionate measure to achieve the stated objective (including in the context of lifelong learning or a future need for retraining);**
- **whether alternatives to the measure have been fully considered; and**
- **how the measure complies with Australia's obligation to use the maximum of its available resources to ensure higher education is accessible to all, on the basis of capacity, by every appropriate means, and by the progressive introduction of free education.**

36 A student who completed a four year undergraduate Bachelor of Arts degree with honours as a Commonwealth supported student at, for example, Macquarie University might graduate with a HECS-HELP debt of approximately $43,016. If the student decided to undertake a graduate law degree such as a Juris Doctor as a full-fee paying student at, for example, the University of Melbourne the cost of this three year program would be approximately $124,385. These two programs of study would push the student over the proposed total lifetime HELP-loan limit: see, Melbourne University JD, Fees and Scholarships, http://law.unimelb.edu.au/study/jd#fees-and-scholarships; Macquarie University, Courses, Bachelor of Arts, https://courses.mq.edu.au/2018/domestic/undergraduate/bachelor-of-arts.

Identity-matching Services Bill 2018

Australian Passports Amendment (Identity-matching Services) Bill 2018

Purpose	Seeks to facilitate the exchange of identity information between Commonwealth, state, local and territory governments and certain non-government entities by providing explicit legal authority for the Department of Home Affairs to collect, use and disclose identification information in order to operate identity-matching services
Portfolio	Home Affairs; Foreign Affairs and Trade
Introduced	House of Representatives, 7 February 2018
Rights	Privacy (see **Appendix 2**)
Status	Seeking additional information

Background

1.130 The committee previously examined the instrument providing legislative authority for the government to fund the National Facial Biometric Matching Capability (the Capability) in its *Report 9 of 2017* and its *Report 11 of 2017*.[1] The Capability facilitates the sharing and matching of facial images as well as biometric information between agencies through a central interoperability hub (the Hub) and the National Driver Licence Facial Recognition Solution (the NDLFRS). In relation to this measure, the committee concluded that there was a risk of incompatibility with the right to privacy through the use of the existing laws as a basis for authorising the collection, use, disclosure and retention of facial images. The committee stated that setting funding for the Capability without new primary legislation which circumscribes the Capability's operation raises serious concerns as to the adequacy of safeguards to ensure that the measure is a proportionate limitation on the right to privacy.[2]

1 Parliamentary Joint Committee on Human Rights, *Report 9 of 2017* (5 September 2017) pp. 25-27; *Report 11 of 2017* (17 October 2017) pp. 84-91.

2 Parliamentary Joint Committee on Human Rights, *Report 11 of 2017* (17 October 2017) p. 91.

Facilitating facial and biometric data identity matching

1.131 The Identity-matching Services Bill 2018 (the Identity Matching Bill) provides that the secretary of the Department of Home Affairs may develop, operate and maintain the Hub and the NDLFRS.[3]

1.132 The Hub would facilitate the sharing and matching of facial images as well as biometric information between government agencies by relaying electronic communications.[4]

1.133 The NDLFRS will include a database of identification information from state and territory authorities and will make driver licence facial images available through the identity matching service described below at [1.135].[5]

1.134 The Identity Matching Bill provides an explicit legal basis to authorise the Department of Home Affairs to collect, use and disclose 'identification information' about an individual if it occurs through the Hub or the NDLFRS and is for a range of specified purposes.[6] 'Identification information' is defined to include a person's name (current and former); address (current and former); place and date of birth; current or former sex, gender identity or intersex status; any information contained in a driver's licence, passport or visa and a facial image of the person.[7]

1.135 As set out in the explanatory memorandum, the Hub and the NDLFRS will support a range of identity matching services:

- the Face Verification Service (FVS), which enables a facial image and associated biographic details of a person to be compared on a one-to-one

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3 Identity Matching Bill section 14.

4 Identity Matching Bill, Explanatory Memorandum (IMB, EM) p. 2.

5 IMB, EM, p. 2.

6 Identity Matching Bill sections 3 and 17, 18; EM, p. 2-3. Under subsection 17(2) 'identification information' may be collected, used or disclosed for the following purposes: (a) providing or developing an identity-matching service for identity and community protection activities, being an activity for: (i) preventing and detecting identity fraud; (ii) preventing, detecting, investigating or prosecuting a federal, state or territory offence or starting or conducting proceedings for proceeds of crime; (iii) investigating or gathering intelligence relevant to national security; (iv) checking the background of a person with access to an asset, facility or person associated with government or protecting a person with a legally assumed identity or under witness protection; (v) promoting community safety, including identifying a person suffering or at risk of suffering physical harm (including missing or deceased persons or those affected by disaster) and a person reasonably believed to be involved in a significant risk to public health or safety; (vi) promoting road safety, including the integrity of driver licensing systems; and (vii) verifying the identity of an individual; (b) developing, operating or maintaining the NDLFRS; or (c) protecting the identities of persons who have legally assumed identities or are under witness protection.

7 Identity Matching Bill, section 5.

basis against an image held on a specific government record for that same individual;

- the Face Identification Service (FIS), which searches or matches facial images on a one-to-many basis to help determine the identity of an unknown person, or detect instances where a person may hold multiple fraudulent identities;
- the One Person One Licence Service (OPOLS), which will allow state and territory agencies to detect instances where a person may hold multiple driver licences across jurisdictions;
- the Facial Recognition Analysis Utility Service (FRAUS), which will allow state and territory agencies to assess the accuracy and quality of their data holdings; and
- the Identity Data Sharing Service (IDSS), which will allow for the sharing of biometric identity information between Commonwealth, state and territory agencies.[8]

1.136 The explanatory memorandum states that all states and territories have agreed to introduce or preserve legislation to support the collection, use and disclosures of facial images and identity information via these identity matching services.[9]

Compatibility of the measures with the right to privacy

1.137 The right to privacy includes respect for informational privacy, including the right to respect for private information, particularly the storing, use and sharing of personal information; and the right to control the dissemination of information about one's private life. As noted in the committee's previous reports, the collection, use and disclosure of identity information (including photographs) through the Hub and the NDLFRS engages and limits the right to privacy.[10] The right to privacy may be subject to permissible limitations which are provided by law and are not arbitrary. In order for limitations not to be arbitrary, the measure must pursue a legitimate objective and be rationally connected and proportionate to achieving that objective.

1.138 The statement of compatibility to the Identity Matching Bill acknowledges that authorising the Department of Home Affairs to collect, use and disclose information including personal and sensitive information engages and limits the right

8 IMB, EM, p. 4.

9 Identity Matching Bill, Statement of Compatibility (IMB, SOC) p. 40.

10 Parliamentary Joint Committee on Human Rights, *Report 9 of 2017* (5 September 2017) 25-27; *Report 11 of 2017* (17 October 2017) p. 84-91. See, also, for example, *Peck v United Kingdom* (2003) 36 EHRR 41.

to privacy but argues that this limitation is permissible.[11] The statement of compatibility states that the measure pursues a range of objectives for each identity matching service (namely, the FVS, FIS, OPOLS, FRAUS and IDSS). These include the detection and prevention of identity fraud, national security, law enforcement, protective security, road safety and community safety.[12] These are likely to constitute legitimate objectives for the purposes of international human rights law.

1.139 The statement of compatibility to the Identity Matching Bill indicates that matching facial images, biometric data and identities through the Hub and the NDLFRS is also likely to be rationally connected (that is, effective to achieve) these objectives.

1.140 In relation to proportionality, each of the identity matching services provide for differing degrees of use, access and disclosure of personal information. However, there are general concerns in relation to proportionality that underlie each of the services. As such, the services will be discussed collectively below. Where there are particular concerns in relation to a specific identity matching service, these will also be discussed further below.

1.141 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. In relation to the scope of the limitation on the right to privacy proposed under the Identity Matching Bill, the statement of compatibility explains:

> The Bill is designed to facilitate Home Affairs to provide the identity-matching services, rather than authorise information-sharing by other organisations participating in the services. The Bill has been developed on the basis that other agencies or organisations participating in the identity-matching services must have their own legal authority to do so, and must comply with legislated privacy protections that apply to them.
>
> This provides an additional layer of protection for the identification information held within the NDLFRS or transmitted via the interoperability hub, by ensuring that there is no automatic exemption from privacy protections for users of the identity-matching services.[13]

1.142 Providing that agencies must have their own authorisation to access data could assist to circumscribe the limitation on the right to privacy. However, it appears that, depending on the scope of the authorisation provided to other agencies, facilitating access to identity matching services via the Hub and NDLFRS still could be a very extensive limitation on the right to privacy. In this respect, the scope

11 IMB, SOC, p. 44.

12 IMB, SOC, p. 45-56.

13 SOC, p. 44.

provided for commonwealth, state and territory agencies to determine what information they will provide and the circumstances in which information will be available through an authorisation, does not fully address privacy concerns in relation to the Identity Matching Bill.[14] This is because these agencies may not have adequate and effective safeguards in place to ensure that the disclosure and use of information to and from the Hub is a proportionate limit on the right to privacy.

1.143 More generally, who can access facial images and other biometric data, and in what circumstances, is relevant to whether the measure is sufficiently circumscribed. The Identity Matching Bill sets out who can use particular identity matching services through the Hub and the NDLFRS and in some cases for what purposes. The extent of access differs depending on the particular service. For example, the FIS can be used by a defined list of commonwealth, state and territory agencies as well as those prescribed through delegated legislation.[15] Restricting access to the FIS to specified particular agencies would assist with the proportionality of the measure. This is because the FIS is a more extensive limitation on the right to privacy in that it allows agencies to identify an unknown person. However, it is noted that in relation to the FIS the minister is empowered to prescribe further agencies by delegated legislation, such that it is unclear whether the measure is sufficiently circumscribed. In relation to the FVS, providing an agency otherwise has authorisation, the FVS may be used more broadly by an any agency of the commonwealth, state or territory or local government authorities or non-government entities that have been prescribed by regulation.[16] For the FVS and other identity matching services (the FRAUS, IDSS and OPOLs), there would therefore appear to be a potentially broad range of agencies that could access such services for a range of purposes.

1.144 Further, to the extent that current Australian privacy laws may apply to the proposed facility to match facial images and other biometric data, there are questions as to whether the current laws would provide adequate and effective safeguards for the purposes of international human rights law. In particular, while facial images are a type of personal information protected by the Australian Privacy Principles (APPs) and the *Privacy Act 1988* (Privacy Act),[17] compliance with the APPs and the Privacy Act does not necessarily provide an adequate safeguard for the purposes of international human rights law. This is because the APPs contain a number of exceptions to the prohibition on use or disclosure of personal information, including (as noted by the minister) where its use or disclosure is

14 See, SOC, p. 44.

15 Identity Matching Bill subsection 8(2).

16 Identity Matching Bill subsection 10(2).

17 See, Privacy Act, section 6.

authorised under an Australian Law,[18] which may be a broader exception than permitted in international human rights law. There is also a general exemption in the APPs on the disclosure of personal information for a secondary purpose where it is reasonably necessary for one or more enforcement related activities conducted by, or on behalf of, an enforcement body.[19] Therefore, in the absence of greater safeguards in the Identity Matching Bill, there are serious questions as to whether the safeguards currently provided under Australian law would be sufficient for the purposes of international human rights law.

1.145 The number and type of facial images and other biometric data that may be collected, accessed, used and disclosed through the Hub and the NDLFRS is also relevant to the proportionality of the limitation. The statement of compatibility indicates the broad range of facial images and biometric information which would be accessible or searchable through the Hub including state and territory driver licences (via the NDLFRS). As the Hub will permit access to driver licences, the personal information of a significant proportion of the adult Australian population will be retained. A centralised facility for searching such large repositories of facial images and biometric data is a very extensive limitation on the right to privacy. The extent of the limitation heightens concerns as to whether the measure is overly broad and insufficiently circumscribed. There is a serious question as to whether having databases of, and facilitating access to, facial images of a very significant portion of the population in case they are needed is the least rights restrictive approach to achieving the stated objectives of the measure.

1.146 The statement of compatibility explains that the Identity Matching Bill restricts the authorisation for the Department of Home Affairs to collect, use and disclose information to a defined set of purposes, including providing an identity matching service for the purpose of an identity or community protection activity. Section 6 of the Identity Matching Bill defines 'identity or community protection activities' as detecting identity fraud, law enforcement activities, national security activities, protective security activities, community safety activities, road safety activities and verifying identity. Given these broad purposes, it appears that the range of information that could be subject to collection, disclosure and use is extensive. As noted above, driver licence photographs will be subject to the Hub and so the Hub will include personal information of a large number of the adult population. As such, it is unclear that restricting the Department of Home Affairs' authorisation to these purposes is sufficient to ensure that the measure is adequately circumscribed. Indeed, it appears that the measure may allow, for example, photographs to be collected from a range of sources. For example, it appears possible that social media photographs could be used.

18 APP 9; APP 6.2(b).

19 APP; 6.2(e).

1.147 The scope of historical facial images that will be subject to the Hub is also unclear. In this respect, while the Identity Matching Bill contains a number of offence provisions relating to unauthorised access and disclosure, there is still a further concern about whether the Hub will provide adequate and effective protection against misuse in respect of vulnerable groups. For example, it is unclear the extent to which there are specific safeguards for survivors of domestic or gender-based violence who may have changed their identity and to protect against the risks of unintended consequences. If historical facial images are available, it is also possible that it may reveal that a person has undergone a change in gender identity particularly as identification information is defined to include current or former sex or gender identities.[20] This may also engage the right to equality and non-discrimination.

1.148 More generally, it is noted that international human rights case law has raised concerns as to the compatibility of biometric data retention programs with the right to privacy. In *S and Marper v United Kingdom,* the European Court of Human Rights held that laws in the United Kingdom that allowed for fingerprints, cellular samples and DNA profiles to be indefinitely retained despite the affected persons being acquitted of offences was incompatible with the right to privacy. The court expressed particular concern about the 'indiscriminate and open-ended retention regime' which applied the same retention policy to persons who had been convicted to those who had been acquitted.[21] The court considered that the 'blanket and indiscriminate nature of the powers of retention' failed to strike 'a fair balance between the competing public and private interests'.[22]

1.149 Similarly, the United Kingdom (UK) Court of Appeal in *Wood v Commissioner of Police for the Metropolis,*[23] concluded that the retention of photographs which had been taken by police of a person in circumstances where the person had not committed any criminal offence had a disproportionate impact on the right to privacy under the UK *Human Rights Act.*[24] Collectively, these authorities suggest that the indiscriminate retention of a person's data (including biometric information and photographs) may not be a proportionate limitation on the right to privacy. In relation to accessing biometric information, the UK Courts have recently found that

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20 See, Identity Matching Bill section 5.

21 See, *S and Marper v United Kingdom,* European Court of Human Rights Application Nos.30562/04 and 30566/04 (2008) [119]. See, also, for example, *NK v Netherlands*, UN Human Rights Committee, CCPR/C/120/D/2326/2013 (27 November 2017).

22 See, *S and Marper v United Kingdom,* European Court of Human Rights Application Nos.30562/04 and 30566/04 (2008) [127].

23 *Wood v Commissioner of Police for the Metropolis* [2009] EWCA Civ 414 (21 May 2009).

24 *Wood v Commissioner of Police for the Metropolis* [2009] EWCA Civ 414 (21 May 2009) at [89] and [97].

data retention and access programs were inconsistent with the right to privacy in the context of European Union (EU) law to the extent the objective pursued by that access was not strictly limited solely to fighting serious crime and where access was not subject to prior review by a court or independent administrative authority.[25] The interpretation of the human right to privacy under the European Convention of Human Rights and the EU Charter of Fundamental Rights in those cases is instructive in informing Australia's international human rights law obligations in relation to the corresponding right to privacy under the ICCPR.

1.150 Further, some of the identity matching services under the Identity Matching Bill appear to have a more extensive impact on the right to privacy than others. For example, as noted above, the FIS would allow images of unknown individuals to be searched and matched against government repositories of facial images through the Hub. This particular identity matching service raises specific concerns given the scope of its potential impact on the right to privacy. It may not only reveal the identity of the individual but, depending on the circumstances, may reveal who a person is in contact with, when and where. For example, this could be the case with matching unidentified CCTV images of people with facial images held by government agencies. This in turn could potentially allow conclusions to be drawn about the person's political opinions, sexual habits, religion or medical concerns. This also raises concerns about whether such a measure could engage other human rights such as the right to freedom of association and the right to freedom of expression. In this context, it appears that the FIS may not be the least rights restrictive approach to achieve the stated objectives particularly noting that the facial images of the vast majority of adult Australians will be searchable through the Hub.

Committee comment

1.151 The preceding analysis raises questions as to whether the identity matching services which will be facilitated by the Interoperability Hub (the Hub) and the National Driver Licence Facial Recognition Solution (NDLFRS) are a proportionate limitation on the right to privacy.

1.152 The committee requests the advice of the Minister for Home Affairs as to whether the limitations on the right to privacy contained in the Identity Matching Bill are reasonable and proportionate measures to achieve the stated objective. This includes information in relation to:

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25 *Secretary of State for the Home Department v Watson MP & Ors* [2018] EWCA Civ 70 (30 January 2018) applying the Court of Justice of the European Union decision in *Tele2 Sverige AB v Post-och telestyrelsen* and *Secretary of State for the Home Department v Watson and Others* [2016] EUECJ C-203/15; see also *Digital Rights Ireland Limited v Minister for Communications, Marine and Natural Resources & Others* and *Seitlinger and Others* [2014] EUECJ C-293/12. See, also, for example, the committee's consideration of the Telecommunications (Interception and Access) Amendment (Data Retention) Bill 2014 in its *Fiftieth Report of the 44th Parliament* (14 November 2014) pp. 10-22.

- **whether the provisions in the Identity Matching Bill governing access to facial images and other biometric data are sufficiently circumscribed for each of the identity matching services;**
- **whether the *Privacy Act 1988* (Privacy Act) will apply to the operation of the Hub and, if so, whether it will act as an adequate and effective safeguard noting the various exceptions to the collection, use and disclosure of information under the Privacy Act;**
- **whether the Identity Matching Bill contains adequate and effective safeguards for the purposes of international human rights law;**
- **whether, in light of the number, types and sources of facial images and other biometric data that may be collected, accessed, used and disclosed through the Hub and the NDLFRS, these measures are the least rights restrictive approach (including whether having facial images of the vast majority of Australians searchable via the Hub is the least rights restrictive approach and whether there are restrictions as to the sources from which facial images may be collected);**
- **whether the measures are a proportionate limitation on the right to privacy with reference to the potential relevance of international jurisprudence such as that outlined at [1.148] – [1.149];**
- **the extent to which historical facial images will be subject to the Hub, and whether the Identity Matching Bill provides adequate and effective protection against misuse and in respect of vulnerable groups; and**
- **in relation to the Face Identification Service (FIS), whether allowing images of unknown individuals to be searched and matched against government repositories of facial images through the Hub is the least rights restrictive approach to achieve the stated objective.**

Department of Foreign Affairs and Trade participation in identity matching services

1.153 The Australian Passports Amendment (Identity-Matching Services) Bill 2018 (the Passport Amendment Bill) seeks to amend the *Australian Passports Act 2005* (Passports Act) to insert an additional purpose for the use and disclosure of personal information. Specifically, the Passport Amendment Bill would authorise the Department of Foreign Affairs and Trade (DFAT) to participate in a specified service to share and match information relating to the identity of a person.[26] It would also provide that the minister may arrange for the use of computer programs to make decisions or exercise powers under the Passports Act.[27]

26 See proposed subsection 46(d) of the Passports Act.

27 See proposed section 56A of the Passports Act.

Compatibility of the measure with the right to privacy

1.154 Permitting the minister to authorise DFAT to participate in the identity matching services and thereby share and match identity information, engages and limits the right to privacy. According to the statement of compatibility, the types of information to be disclosed and matched include biographic details such as names, dates of birth and gender as well as facial images.[28]

1.155 The statement of compatibility acknowledges that the measure engages and limits human rights but argues that this limitation is permissible.[29] It argues that the measure is 'pursuing the legitimate objective of making fast and secure identity verification available to support a range of identity-check processes'.[30] This would appear to be a description of the process the measure will facilitate rather than why this process pursues a legitimate objective for the purposes of international human rights law. For a limitation on a right to seek to achieve a legitimate objective, it must be demonstrated that the objective is one that addresses an area of public or social concern that is pressing and substantial enough to warrant limiting the right. In this respect, the statement of compatibility goes on to state the services will provide a tool in support of the legitimate objective of 'combatting identity crime and supporting national security, law enforcement and community safety'.[31] As set out above, these are likely to be legitimate objectives for the purposes of international human rights law. It also appears that the measure is rationally connected to these objectives.

1.156 However, as outlined above at [1.140]-[1.150], there are serious questions about the proportionality of the limitation the identity matching services impose on the right to privacy. These concerns apply equally in relation to DFAT sharing and matching personal information through such services.

1.157 Additionally, the measure will authorise the sharing and matching of DFAT's repositories of personal information including passport photographs and biographic information. This means that the photographs and biometric data of a significant proportion of the population including children will be subject to the identity matching services through the Hub. There is a serious question as to whether having databases of, and facilitating access to, facial images of a very significant portion of the population in case they are needed is the least rights restrictive approach to achieving the stated objectives of the measure.

1.158 Beyond stating that there will be policy and administrative safeguards, the statement of compatibility provides limited information as to the nature of any

28 Statement of compatibility (SOC) to the Passport Amendment Bill, p 4.

29 SOC, Passport Amendment Bill, p. 4.

30 SOC, Passport Amendment Bill, p. 5.

31 SOC, Passport Amendment Bill, p. 5.

safeguards that will be in place with respect to DFAT sharing personal information via the identity matching services. Accordingly, it is unclear whether there are adequate and effective safeguards in place to ensure that the limitation on human rights is proportionate or that the measure is sufficiently circumscribed.

Committee comment

1.159 The preceding analysis raises questions as to whether authorising the Department of Foreign Affairs and Trade (DFAT) to participate in the identity matching services and thereby share and match identity information is a proportionate limitation on the right to privacy.

1.160 The committee requests the advice of the Minister for Foreign Affairs as to whether the limitation on the right to privacy by the measures in the Passport Amendment Bill are a reasonable and proportionate measure to achieve the stated objective. This includes information in relation to:

- **whether the *Privacy Act 1988* (Privacy Act) will apply to DFAT's disclosure of photographs and biographical information and, if so, whether it will act as an adequate and effective safeguard for the purposes of international human rights law noting the various exceptions to the collection, use and disclosure of information under the Privacy Act;**
- **whether the Passport Amendment Bill contains adequate and effective safeguards and is sufficiently circumscribed for the purposes of international human rights law;**
- **whether, in light of the number, types and sources of facial images and other biometric data that may be shared and matched, these measures represent the least rights restrictive approach to achieving the stated objectives (including whether having facial images of the vast majority of Australians searchable via the identity matching services is the least rights restrictive approach);**
- **whether the measure is a proportionate limitation on the right to privacy with reference to the potential relevance of international jurisprudence such as that outlined at [1.148]-[1.149];**
- **the extent to which DFAT's historical facial images will be subject to the identity matching services, and whether the Passport Amendment Bill or other Australian laws provide adequate and effective protection against misuse and in respect of vulnerable groups; and**
- **in relation to the Face Identification Service (FIS), whether allowing images of unknown individuals to be searched and matched against DFAT facial images through the Hub is the least rights restrictive approach to achieve the stated objective.**

Intelligence Services Amendment (Establishment of the Australian Signals Directorate) Bill 2018

Purpose	Amends the *Intelligence Services Act 2001* to establish the Australian Signals Directorate (ASD) as an independent statutory agency within the Defence portfolio reporting directly to the Minister for Defence; amend ASD's functions to include providing material, advice and other assistance to prescribed persons or bodies, and preventing and disrupting cybercrime; and give the Director-General powers to employ persons as employees of ASD. Also makes a range of consequential amendments to other Acts, including to the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* to provide that the Director-General of ASD may communicate AUSTRAC information to a foreign intelligence agency if satisfied of certain matters
Portfolio	Defence
Introduced	House of representatives, 15 February 2018
Rights	Privacy; life; freedom from torture, cruel, inhuman or degrading treatment or punishment; just and favourable conditions at work (see **Appendix 2**)
Status	Seeking additional information

Communicating AUSTRAC information to foreign intelligence agencies

1.161 Proposed section 133B of the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (AMLCT Act) provides that the Director-General of the Australian Signals Directorate (ASD) may communicate Australian Transaction Reports and Analysis Centre (AUSTRAC) information[1] to a foreign intelligence agency if satisfied of

1 'AUSTRAC information' is defined in section 5 of the AMLCT ACT as meaning eligible collected information (or a compilation or analysis of such information) and 'eligible collected information' is defined as information obtained by the AUSTRAC CEO under that Act or any other Commonwealth, State or Territory law or information obtained from a government body or certain authorised officers, and includes financial transaction report information as obtained under the *Financial Transaction Reports Act 1988*.

certain matters[2] and may authorise an ASD official to communicate such information on their behalf.

Compatibility of the measure with the right to privacy

1.162 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. As AUSTRAC information may include a range of personal and financial information, the disclosure of this information to foreign intelligence agencies engages and limits the right to privacy.

1.163 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. However, the statement of compatibility for the Intelligence Services Amendment (Establishment of the Australian Signals Directorate) Bill 2018 (the bill) does not acknowledge this limitation on the right to privacy so does not provide an assessment as to whether the limitation is permissible in accordance with the committee's *Guidance Note 1*.

Committee comment

1.164 The preceding analysis raises questions as to whether the measure is compatible with the right to privacy.

1.165 The committee therefore requests the advice of the minister as to:

- **whether the measure is 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 a reasonable and proportionate measure to achieve the stated objective (including whether the measure is sufficiently circumscribed and whether there are adequate and effective safeguards in relation to the operation of the measure).**

Compatibility of the measure with the right to life and the prohibition on torture, cruel, inhuman, degrading treatment or punishment

1.166 Under international human rights law every human being has the inherent right to life, which should be protected by law. The right to life imposes an obligation

2 The matters in respect of which the Director-General is to be satisfied are (a) the foreign intelligence agency has given appropriate undertakings for: (i) protecting the confidentiality of the information; and (ii) controlling the use that will be made of it; and (iii) ensuring that the information will be used only for the purpose for which it is communicated to the foreign country; and (b) it is appropriate, in all the circumstances of the case, to do so.

on state parties to protect people from being killed by others or from identified risks. While the International Covenant on Civil and Political Rights (ICCPR) does not completely prohibit the imposition of the death penalty, international law prohibits states which have abolished the death penalty (such as Australia) from exposing a person to the death penalty in another nation state.

1.167 As the United Nations (UN) Human Rights Committee has made clear, this prohibits the provision of information to other countries that may be used to investigate and convict someone of an offence to which the death penalty applies. In this context, the UN Human Rights Committee stated in 2009 its concern that Australia lacks 'a comprehensive prohibition on the providing of international police assistance for the investigation of crimes that may lead to the imposition of the death penalty in another state', and concluded that Australia should take steps to ensure it 'does not provide assistance in the investigation of crimes that may result in the imposition of the death penalty in another State'.[3]

1.168 The sharing of information internationally with foreign intelligence agencies could accordingly engage the right to life. This issue was not addressed in the statement of compatibility.

1.169 A related issue potentially raised by the measure is the possibility that sharing of information may result in torture, or cruel, inhuman or degrading treatment or punishment. Under international law the prohibition on torture is absolute and can never be subject to permissible limitations.[4] This issue was also not addressed in the statement of compatibility.

Committee comment

1.170 In relation to the right to life, the committee seeks the advice of the minister about the compatibility of the measure with this right (including the existence of relevant safeguards).

1.171 In relation to the prohibition on torture, or cruel, inhuman or degrading treatment or punishment, the committee seeks the advice of the minister in relation to the compatibility of the measure with this right (including any relevant safeguards).

Operation outside the Public Service Act

1.172 The bill proposes that ASD will operate outside the *Public Service Act 1999* (PS Act) in relation to the employment of staff. Proposed section 38A of the

3 Human Rights Committee, *Concluding observations on the fifth periodic report of Australia*, CCPR/C/AUS/CO/5, 7 May 2009, [20].

4 Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment 1984, 4(2); UN Human Rights Committee, *General Comment 20: Article 7* (1992) UN Doc HRI/GEN/1, [3].

Intelligence Services Act 2001 provides that the Director-General of ASD may employ such employees of ASD as the Director-General thinks necessary and may determine the terms and conditions on which employees are to be employed.[5] Further, the Director-General may, at any time, by written notice, terminate the employment of such a person.[6]

Compatibility of the measure with just and favourable conditions at work

1.173 The right to work and rights in work are protected by articles 6(1), 7 and 8(1)(a) of the International Covenant on Economic, Social and Cultural Rights (ICESCR).[7]

1.174 The UN Committee on Economic, Social and Cultural Rights has stated that the obligations of State parties to the ICESCR in relation to the right to work include the obligation to ensure individuals their right to freely chosen or accepted work, including the right not to be deprived of work unfairly, allowing them to live in dignity. The right to work is understood as the right to decent work providing an income that allows the worker to support themselves and their family, and which provides safe and healthy conditions of work.[8]

1.175 The PS Act contains a range of provisions in relation to the terms and conditions of employment of public servants. By providing that the PS Act does not apply and that the Director-General may engage staff, set their conditions of employment through determinations and terminate their employment, the measure engages and may limit the right to just and favourable conditions at work.

1.176 The statement of compatibility acknowledges that the measure engages this right and argues that it pursues the objective of providing 'ASD with greater flexibility to recruit, retain, develop and remunerate its specialist staff'.[9] While the statement of compatibility points to some information as to why this objective may address a pressing and substantial concern, further information would have been useful. It is unclear, for example, how the PS Act operates as a barrier to the recruitment and retention of appropriate staff. It is also unclear why this could not be addressed

5 Item 29, proposed section 38A.

6 Item 29, proposed section 38A(4).

7 Related provisions relating to such rights for specific groups are also contained in article 5(i) of the International Convention on the Elimination of All Forms of Racial Discrimination (CERD), articles 11 and 14(2)(e) of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), article 32 of the Convention on the Rights of the Child (CRC) and article 27 of the Convention on the Rights of Persons with Disabilities (CRPD).

8 See, UN Committee on Economic, Social and Cultural Rights, *General Comment No. 23: on the right to just and favourable conditions of work (article 7 of the International Covenant on Economic, Social and Cultural Rights)* (26 April 2016) pp. 3 and 7.

9 Statement of compatibility (SOC) p. 7.

through the negotiation of entitlements through the usual enterprise agreement process.

1.177 Further, there is no specific information provided as to how the measure is rationally connected to (that is, effective to achieve) this stated objective.

1.178 Additionally, there are a number of questions about the proportionality of the measure. In this respect, the measure as proposed does not provide for minimum levels of entitlements or working conditions.

1.179 Currently, Australian Public Service (APS) employees are generally employed under relevant enterprise agreements which set out terms and conditions of employment. In this respect, it is unclear whether current APS employees who become employees of the ASD could be worse off under the measure. While the statement of compatibility points to the availability of some potential safeguards, it is unclear whether they are sufficient given the potential breadth of the Director-General's powers.

Committee comment

1.180 The preceding analysis raises questions as to whether the measure is compatible with the right to just and favourable conditions at work.

1.181 The committee therefore seeks 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 a reasonable and proportionate measure to achieve the stated objective.**

Legislation (Deferral of Sunsetting—Australian Crime Commission Regulations) Certificate 2017 [F2017L01709]

Purpose	Defers the date of automatic repeal ('sunsetting') of the Australian Crime Commission Regulations 2002 by 12 months, from 1 April 2018 to 1 April 2019
Portfolio	Attorney-General
Authorising legislation	*Legislation Act 2003*
Last day to disallow	Exempt from disallowance[1]
Right[s]	Privacy; liberty; effective remedy; fair trial and fair hearing; prohibition against torture, cruel, inhuman or degrading treatment or punishment (see **Appendix 2**)
Status	Seeking additional information

Background

1.182 The Australian Crime Commission Regulations 2002 (ACC regulations) are scheduled to sunset, that is, be automatically repealed, on 1 April 2018. This certificate defers the sunsetting date for 12 months, to 1 April 2019.[2]

1.183 While the certificate of deferral does not amend the current ACC regulations, the certificate has the effect of continuing their operation for a further 12 months. Accordingly, the committee is obliged to provide an assessment as to the compatibility of the certificate with human rights. This includes an assessment of the potential impact of the extension of the operation of the ACC regulations.

1.184 While the Attorney-General is not required to provide a statement of compatibility for this instrument,[3] where a legislative instrument engages human

1 Under section 5 of the *Human Rights (Parliamentary Scrutiny) Act 2011*, the certificate 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.

2 Under section 50 of the *Legislation Act 2003* (Legislation Act), all legislative instruments registered on the Federal Register of Legislation after 1 January 2005 are repealed on the first 1 April or 1 October that falls on or after their tenth anniversary of registration. Instruments made before 1 January 2005 (when the sunsetting regime was introduced) sunset on a staggered basis, in accordance with the schedule in subsection 50(2). Section 51 of the Legislation Act provides that the Attorney-General may defer the sunsetting of a legislative instrument by up to 12 months, subject to certain conditions.

3 See footnote 1 above.

rights, including by continuing the effect of measures that engage rights, it is good practice for an assessment to be provided as to human rights compatibility.

Conferral of powers under state laws

1.185 Section 55A of the *Australian Crime Commission Act 2002* (ACC Act) provides Commonwealth legislative authority for the conferral by the states[4] of certain duties, functions or powers on the Australian Criminal Intelligence Commission (ACIC),[5] members of its board or staff, or a judge of the Federal Court or Federal Circuit Court. These may include duties, functions or powers of a kind specified in relevant regulations.

1.186 Section 8A and schedules 3, 4 and 5 of the ACC regulations prescribe provisions of state and territory laws for the purpose of section 55A. These include:

- under subsection 8A(1), duties, functions or powers provided in 19 provisions of state and territory Acts and regulations, specified in schedule 4, which may be conferred on the Commission; and
- under subsection 8A(2), duties, functions or powers provided in 305 provisions of state and territory Acts and regulations, specified in schedule 3, which may be conferred on the Commission's CEO, a member of its staff, the Chair or a member of its Board.

1.187 In each instance, the relevant duties, powers or functions may be conferred on the ACIC, members of its board or staff or federal judges for the purposes of, or in relation to, the investigation of a matter or the undertaking of an intelligence operation relating to a relevant criminal activity,[6] in so far as the relevant crime is, or includes, an offence or offences against a state law, whether or not that offence or those offences have a federal aspect.

Compatibility of the measure with multiple human rights

1.188 The right to privacy prohibits arbitrary or unlawful interferences with an individual's privacy, family, correspondence or home. This includes informational privacy, the right to personal authority and physical and psychological integrity, and

4 'State' is defined in section 4 of the ACC Act to include the Australian Capital Territory and the Northern Territory.

5 In 2016 the Australian Crime Commission and CrimTrac were merged to form the Australian Criminal Intelligence Commission (ACIC). Pursuant to subsection 7(1A) of the ACC Act and section 3A of the Regulations, the ACIC is the body which now exercises the powers and functions of the ACC under the ACC Act and Regulations.

6 Under section 4 of the ACC Act, 'relevant criminal activity' is defined as 'any circumstances implying, or any allegations, that a relevant crime may have been, may be being, or may in future be, committed against a law of the Commonwealth, of a State or of a Territory'. 'Relevant crime' means serious and organised crime, or indigenous violence or child abuse.

prohibitions on unlawful and arbitrary state surveillance or interference with a person's home or workplace.

1.189 The right to liberty of the person is a procedural guarantee not to be arbitrarily and unlawfully deprived of liberty.

1.190 The right to a fair trial and a fair hearing encompasses notions of the fair administration of justice and prohibits investigatory techniques that incite individuals to commit a criminal offence.[7]

1.191 Australia is also required to ensure that those whose human rights are violated have access to an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity.

1.192 It appears that some of the provisions set out in schedules 3 and 4 to the Regulations, allowing the conferral of powers under state laws on the Commission, its board or staff, engage the right to privacy, the right to liberty, the right to a fair trial and a fair hearing, or the right to an effective remedy, and may engage other human rights. These include provisions relating to criminal intelligence operations, use of assumed identities by law enforcement personnel, use of surveillance devices, witness protection, and spent convictions.

1.193 For example, schedule 3 allows the conferral of powers on the CEO or staff of the ACIC under a number of provisions of the New South Wales *Law Enforcement (Controlled Operations) Act 1997* (NSW Act). This includes the power under section 13 of the NSW Act to engage in 'controlled activities' when part of an authorised 'controlled operation',[8] which may be conferred on any member of staff of the ACIC. Controlled activities are activities which, but for section 16 of the NSW Act, would be unlawful. Section 16 provides that any activity engaged in by a participant in an authorised operation, and in accordance with the authority for the operation, is not unlawful and does not constitute an offence or corrupt conduct despite any other Act or law.

1.194 As such, where that power is conferred, it would allow any member of the ACIC's staff, given the authority, to commit an otherwise unlawful act. Schedule 3 also permits the conferral on the CEO of the ACIC of the power, under subsection

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7 See, *Ramanauskas v Lithuania*, European Court of Human Rights (ECHR) Application No. 74420/01, 5 February 2008, [55]. The ECHR has consistently held that entrapment violates article 6 of the European Convention on Human Rights, which is equivalent to article 14 of the ICCPR.

8 Section 4 of the NSW Act defines a 'controlled operation' as an operation conducted for the purpose of obtaining evidence of criminal activity or corrupt conduct, arresting any person involved in criminal activity or corrupt conduct, frustrating criminal activity or corrupt conduct, or carrying out an activity reasonably necessary to facilitate one of the above purposes; and involving a controlled activity.

14(1) of the NSW Act, to grant (or refuse) retrospective authority for controlled activities.

1.195 While there appear to be some safeguards in relation to the controlled operations,[9] by allowing a broad range of activities that would otherwise be unlawful, these provisions could have a significant impact on various rights, including (but not restricted to) the right to liberty, the right to a fair trial and a fair hearing, the right to privacy and the right not to be subject to torture, cruel, inhuman or degrading treatment or punishment. The provisions may also prevent a person from seeking an effective remedy where his or her rights have been violated, insofar as a participant in a controlled operation is granted protection from criminal liability.

1.196 Another example is the prescription of powers under South Australia's *Listening and Surveillance Devices Act 1972* (SA Act).[10] Schedule 3 of the ACC regulations enables the conferral of powers on a staff or board member of the ACIC under section 7 of the SA Act to use listening devices to overhear, record, monitor or listen to private conversations without the consent of the parties, and in certain circumstances to disclose the information derived from their use. Powers are also able to be conferred under section 9 of the SA Act including, in subsection 9(2), powers to break into, enter and search any premises; stop, detain and search a vehicle; and detain and search any person; where an officer suspects on reasonable grounds that an unauthorised listening device is being held. Use of these powers would engage and limit the right to privacy of individuals subject to searches or surveillance, including respect for the privacy of a person's home, workplace and correspondence. The provision for the detention of persons also engages and limits the right to liberty.

1.197 It is noted that some of the powers prescribed in schedule 3 of the ACC regulations appear to be accompanied by certain duties which may act as safeguards on the use and scope of the power. However, there is no obligation in the ACC regulations requiring that where powers are conferred, the corresponding duties must be conferred along with them. It is unclear whether very broad powers could be conferred on the ACIC or its staff, without the safeguards contained in the original state or territory legislation.

1.198 In schedule 4, several powers are prescribed relating to the receipt or disclosure of information, which may include personal information. These include

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9 Section 7 of the NSW Act provides that controlled operations must not be authorised where they would involve inducing or encouraging a person to engage in criminal activity or corrupt conduct that they would not otherwise be expected to engage in; engaging in conduct likely to seriously endanger the health or safety of any person or result in serious loss or damage to property; or the commission of a sexual offence.

10 Schedule 3 also prescribes powers relating to surveillance devices under the *Surveillance Devices Act 1999* (Victoria), *Surveillance Devices Act 1998* (Western Australia) and *Surveillance Devices Act [2007]* (Northern Territory).

powers to receive information under subsection 11(1) of the First Home Owner Grants Regulation 2000 (WA), subsection 37(d) of the *Gambling and Racing Control Act 1999* (ACT), and subsection 97(d) of the *Taxation Administration Act 1999* (ACT); and the power to disclose information about spent convictions under subsection 17(3) of the *Spent Convictions Act 2000* (ACT). Once again, these powers engage and limit the right to informational privacy.

1.199 Limitations on human rights may be permissible where the measure pursues a legitimate objective, is effective to achieve (that is, rationally connected to) that objective, and is a proportionate means of achieving that objective.

1.200 However, no information is provided in the explanatory statement to the certificate about the human rights engaged by (the continued operation of) subsections 8A(1) and (2) and schedules 3 and 4 of the ACC regulations. As stated above, while a statement of compatibility is not required for this instrument, where a legislative instrument engages human rights, including by continuing the effect of measures that appear to engage rights, it is good practice for an assessment to be provided as to their human rights compatibility. In the absence of further information, it is not possible to conclude that the instrument is compatible with human rights.

Committee comment

1.201 The measure appears to engage and limit a range of human rights. The preceding analysis raises questions as to whether the measure is compatible with human rights.

1.202 The committee therefore seeks the advice of the Attorney-General as to:

- **the human rights engaged by subsections 8A(1) and (2) and schedules 3 and 4 of the ACC regulations;**
- **where these measures engage and limit human rights:**
  - **whether the measure is aimed at achieving a legitimate objective for the purposes of human rights law;**
  - **how the measures are effective to achieve (that is, rationally connected to) a legitimate objective; and**
  - **whether the limitations are reasonable and proportionate to achieve that objective; and**
- **whether it would be feasible to amend the ACC regulations, when remade, to require that any state powers conferred on the ACIC or its personnel which limit human rights will only be exercisable where accompanied by the conferral of the corresponding duties and safeguards in the relevant state law.**

Collection and use of 'national policing information'

1.203 Subsection 4(1) of the ACC Act defines 'national policing information' as information that is collected by the Australian Federal Police, a state police force, or a body prescribed by the regulations, and is of a kind prescribed by the regulations.

1.204 Section 2A of the ACC regulations prescribes eight bodies (listed in schedule 1A) that collect 'national policing information', and prescribes the kind of national policing information collected as information held under, or relating to the administration of, 24 specified databases or electronic systems.

1.205 Section 9A of the ACC regulations prescribes six organisations to which national policing information may be disclosed by the CEO of the ACIC, without requiring the approval of the board, in addition to those specified in the ACC Act.[11]

Compatibility of the measure with the right to privacy

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

1.207 As national policing information is likely to include private, confidential and personal information, its collection, use and disclosure by the ACIC engages and limits the right to privacy.

1.208 The committee previously examined the human rights implications of this measure in relation to the right to privacy in its *Report 7 of 2016* and *Report 8 of 2016*.[12] The committee sought advice as to whether the limitation was a reasonable and proportionate measure for the achievement of its stated objective, and in particular, whether there were sufficient safeguards in place to protect the right to privacy, noting in particular that the ACIC is not subject to the *Privacy Act 1988* (Privacy Act).

1.209 In response, the then Minister for Justice agreed that the collection and disclosure of national policing information engages and limits the right to privacy, but stated that the limitation was reasonable and proportionate to achieving the

11 Section 59AA of the ACC Act provides for the disclosure of information in the ACIC's possession by its CEO. Subsection 59AA(1B) provides that where that information is national policing information, the CEO must obtain the approval of the board before disclosing it, except to specified bodies, including bodies prescribed by the regulations.

12 Parliamentary Joint Committee on Human Rights, *Report 7 of 2016* (11 October 2016) pp. 30-32; *Report 8 of 2016* (9 November 2016) pp. 72-74. The Australian Crime Commission Amendment (National Policing Information) Regulation 2016 [F2016L00712], and the Australian Crime Commission Amendment (National Policing Information) Regulation 2016 which were examined in those reports introduced the provisions relating to national policing information into the ACC regulations.

objective of enabling the ACIC to fulfil its functions. The minister advised that the ACC Act provided sufficient safeguards to protect the right to privacy, and that the ACIC also had technical and administrative mechanisms in place to ensure that national policing information is collected, used and stored securely.

1.210 The minister noted that while the ACIC is not subject to the Privacy Act, the ACIC is experienced in the appropriate handling of sensitive information, and has safeguards and accessibility mechanisms specifically designed for the sensitive nature of its operations. The minister advised that the ACIC was in the process of preparing an information handling protocol addressing the way it would treat personal information.

1.211 On this basis, the previous human rights analysis in the committee's report stated that the legislative and administrative safeguards outlined in the minister's response were likely to improve the proportionality of the limitation on the right to privacy resulting from the collection, use and disclosure of national policing information, and may ensure that the measure would only impose proportionate limitations on this right. Nonetheless, the committee considered it difficult to reach a conclusion that the measure was compatible with human rights without the detail of the information handling protocol being available. The committee requested that a copy of the information handling protocol be provided to the committee once it was finalised.

1.212 However, the committee has not to date received a copy of that document, and it does not appear to be publicly available. No information is provided in the explanatory statement to this certificate of deferral about the engagement of the right to privacy by the (continued operation of) this measure.

Committee comment

1.213 The measure engages and limits the right to privacy. The committee previously concluded, based on information provided by the then Minister for Justice, that there appear to be relevant safeguards in place that may assist to ensure that it is a proportionate limit on the right to privacy.

1.214 The committee requests an update from the Attorney-General regarding the preparation of an information handling protocol by the ACIC, and reiterates its request that a copy of this document be provided to the committee.

Disclosure of 'ACC information'

1.215 Sections 9 and 10 and schedules 6 and 7 of the ACC regulations prescribe 5 international organisations, 98 Australian bodies corporate and 38 classes of body corporate to whom ACC information (defined by section 4 of the Act as information that is in the ACIC's possession) may be disclosed, in accordance with sections 59AA and 59AB of the Act.

Compatibility of the measure with the right to privacy

1.216 As noted above, the right to privacy includes respect for informational privacy. As ACC information is likely to include private, confidential and personal information, its disclosure by the ACIC engages and limits the right to privacy.

1.217 Limitations on the right to privacy may be permissible where the measure pursues a legitimate objective, is effective to achieve (that is, rationally connected to) that objective, and is a proportionate means of achieving that objective.

1.218 However, no information is provided in the explanatory statement to the certificate of deferral about the engagement of the right to privacy by the (continued operation of) this measure. As stated above, while a statement of compatibility is not required for this instrument, where a legislative instrument engages human rights, including by continuing the effect of measures that appear to engage rights, it is good practice for an assessment to be provided as to their human rights compatibility. In the absence of further information, it is not possible to conclude that the limitations on the right to privacy are justifiable.

Committee comment

1.219 The measure engages and limits the right to privacy. The preceding analysis raises questions as to whether the measure is compatible with that right.

1.220 The committee requests the Attorney-General's advice as to:

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

Migration (IMMI 18/003: Specified courses and exams for registration as a migration agent) Instrument 2018 [F2017L01708]

Purpose	Prescribes tertiary courses that must be completed, and exams that must be passed, in order to register as a migration agent. Prescribes the English language tests that certain persons must take in order to register as a migration agent, and the minimum scores that a person must achieve
Portfolio	Home Affairs
Authorising legislation	Migration Agents Regulations 1998
Last day to disallow	15 sitting days after tabling (tabled Senate and House of Representatives on 5 February 2018)
Right	Equality and non-discrimination (see **Appendix 2**)
Status	Seeking additional information

Requirement for certain persons to complete additional English language exams to register as a migration agent

1.221 Relevantly, section 7(2) of the Migration (IMMI 18/003: Specified courses and exams for registration as a migration agent) Instrument 2018 [F2017L01708] (the instrument) introduces new language proficiency exams for persons seeking to register as a migration agent unless specified residency and study requirements are met. Persons are exempt from language proficiency exams if they have successfully met specified requirements in Australia, New Zealand, the United Kingdom, the Republic of Ireland, the United States of America, the Republic of South Africa or Canada as follows:

- secondary school studies to the equivalent of Australian Year 12 level with minimum 4 years secondary school or equivalent study, and have successfully completed a Bachelor degree or higher; or
- they have successfully completed the equivalent of secondary school studies to at least Australian Year 10 with at least 10 years of primary or secondary schooling, or their secondary school studies and degree; and
- while completing their primary or secondary schooling, or their secondary school studies and degree, they were resident in one of those countries.

1.222 If these requirements are not met, then section 8 of the instrument provides that persons who are required to complete the English-language proficiency test must achieve:

- in the International English Language Testing System (IELTS), an overall score of at least 7, with a minimum score of 6.5 in each component of the test (speaking, listening, reading and writing); or
- in the Test of English as a Foreign Language internet-based test (TOEFL iBT), an overall score of at least 94, with minimum scores of 20 in speaking and listening, 19 in reading, and 24 in writing.

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

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

1.224 'Discrimination' encompasses both measures that have a discriminatory intent (direct discrimination) and measures which have a discriminatory effect on the enjoyment of rights (indirect discrimination).[1] The UN Human Rights Committee has described indirect discrimination as 'a rule or measure that is neutral at face value or without intent to discriminate', which exclusively or disproportionately affects people with a particular personal attribute (for example, national origin or language).[2]

1.225 Requiring certain persons to complete an English language proficiency test to be eligible for registration as a migration agent engages the right to equality and non-discrimination on the basis of language competency or 'other status'. It may also indirectly discriminate on the basis of national origin as it may disproportionately impact individuals from countries where English is not a national language or widely spoken.

1.226 Further, by providing that persons who completed their education and were resident in specified countries are not required to undertake a language proficiency test, the measure may also further indirectly discriminate on the basis of national origin. This is because it will have a disproportionate negative effect on individuals from countries that are not excused from the English language proficiency test requirement. Where a measure impacts on particular groups disproportionately, it establishes *prima facie* that there may be indirect discrimination.[3]

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

2 See, e.g., *Althammer v Austria*, Human Rights Committee, 8 August 2003, [10.2].

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

1.227 The statement of compatibility states that the instrument does not engage any of the applicable rights or freedoms,[4] and so does not provide an assessment of whether the right to equality and non-discrimination is engaged by the measure.

1.228 Under international human rights law, 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.[5]

1.229 The statement of compatibility states that the objective of the instrument is to 'strengthen the educational qualifications of migration agents…to ensure that their clients receive high standards of service'.[6] These are likely to be legitimate objectives for the purposes of human rights law, particularly given the complexities of the Australian migration system and the potentially serious effect that poor advice can have on individuals.[7]

1.230 Notwithstanding the legitimate objectives of the measure, it is unclear whether the measure is effective to achieve (that is, rationally connected to) and proportionate to that objective. In this respect, it is acknowledged that a level of proficiency in English may be needed to practise effectively as a migration agent in Australia. Requiring a person either to complete all or part of their education in English, or to complete an English-language proficiency test, may therefore be an effective means of ensuring the necessary level of proficiency.

1.231 However, it is noted that the IELTS and the TOEFL iBT may exceed those requirements necessary to enter tertiary study.[8] It is unclear from the information provided that merely completing 10 years of primary and secondary education, to the equivalent of Australian Year 10 level, would ensure a person possesses a level of English proficiency equivalent to that of a person who achieves the required IELTS or TOEFL iBT scores. Consequently, it appears possible that persons who are not educated in Australia, or in another prescribed country, may be required to meet a potentially higher standard of English language proficiency than their Australian (or prescribed country) counterparts in order to be eligible for registration as a migration

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4 Statement of compatibility (SOC), p. 8.

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

6 SOC, p. 8.

7 C N Kendall, *2014 Independent Review of the Office of the Migration Agents Registration Authority: Final Report* (September 2014), p. 142.

8 See, for example, Flinders University, English language requirements, http://www.flinders.edu.au/international-students/study-at-flinders/entry--and-english-requirements/english-language-requirements.cfm; Australian National University, English language admission requirements for students, https://policies.anu.edu.au/ppl/document/ANUP_000408.

agent. This raises concerns as to whether the differential requirements would be effective to achieve the stated objectives, and whether the differential requirements are based on reasonable and objective criteria.

1.232 Similarly, it is unclear from the information provided that the exemption for a person who completed their school education at an institution in one of the prescribed countries where they were resident is rationally connected to the stated objective. This is because it is unclear that this would necessarily ensure the person's proficiency in English at the required level.

1.233 In relation to the proportionality of the measure, the statement of compatibility states:

> Strengthening educational requirements for the migration agent industry does not exclude applicants from the profession, provided they meet the applicable standards, which are reasonable and transparent.[9]

1.234 However, there are questions as to whether the application of these standards is sufficiently circumscribed with respect to the stated objective of the measure. For example, the instrument would require a person to complete an English proficiency test irrespective of whether their education was primarily in English, if the person did not complete their education in a prescribed country. For example, English may be the primary language used in an institution (for example, an international school) in a country that is not a prescribed country. Further, a number of universities consider that secondary and tertiary studies completed in English from countries that are not listed in the instrument satisfy the English proficiency requirements necessary for entry into the migration law program.[10] This raises questions as to whether requiring a person who was educated primarily in English to also sit a proficiency test is the least rights-restrictive means of achieving the stated objectives of the measure.

Committee comment

1.235 The preceding analysis raises questions as to whether the measure is compatible with the right to equality and non-discrimination. Accordingly, the committee requests the advice of the minister as to:

- **how the measures are effective to achieve (that is, rationally connected to) the stated objectives; and**
- **whether the measures are reasonable and proportionate to achieving the stated objectives of the instrument (including how the measures are based on reasonable and objective criteria, whether the measures are the least**

9 SOC, p. 8.

10 See, for example, Australian National University, English language admission requirements for students, https://policies.anu.edu.au/ppl/document/ANUP_000408.

rights-restrictive way of achieving the stated objective and the existence of any safeguards).

Social Services Legislation Amendment (Encouraging Self-sufficiency for Newly Arrived Migrants) Bill 2018

Purpose	Amends the *Social Security Act 1991* to increase the newly arrived resident's waiting period from 104 weeks to 156 weeks for certain social security payments and concession cards; introduce a newly arrived resident's waiting period of 156 weeks for bereavement allowance, widow allowance, parenting payment and carer allowance; and make a technical amendment; amends the *Farm Household Support Act 2014* to increase the newly arrived resident's waiting period from 104 weeks to 156 weeks; amends the *A New Tax System (Family Assistance) Act 1999* and *Social Security Act 1991* to introduce a newly arrived resident's waiting period of 156 weeks for family tax benefit; and amends the *Paid Parental Leave Act 2010* to introduce a newly arrived resident's waiting period of 156 weeks for parental leave pay and dad and partner pay
Portfolio	Social Services
Introduced	House of representatives, 15 February 2018
Rights	Social security; adequate standard of living; women's rights (see **Appendix 2**)
Status	Seeking additional information

Background

1.236 The committee has considered the human rights implications of a waiting period for classes of newly arrived residents to access social security payments on a number of occasions.[1]

Newly arrived resident's waiting period for social security payments

1.237 The Social Services Legislation Amendment (Encouraging Self-sufficiency for Newly Arrived Migrants) Bill 2018 (the bill) would increase the waiting period for newly arrived residents to access a range of social security payments including bereavement allowance, widow allowance, parenting payment, carer allowance, farm household allowance, family tax benefit, parental leave pay and dad and partner pay from 104 weeks (2 years) to 156 weeks (3 years).[2] It will also extend the

1 Parliamentary Joint Committee on Human Rights, *Report 7 of 2016* (11 October 2016) pp. 2-11; *Report 8 of 2016* (9 November 2016) pp. 57-61; *Report 2 of 2017* (21 March 2017) pp. 41-43; *Report 4 of 2017* (9 May 2017) pp. 149-154.

2 Explanatory memorandum (EM), p. 1.

waiting period to access the low income Health Care Card (HCC) and Commonwealth Seniors Card from 104 weeks (2 years) to 156 weeks (3 years).

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

1.238 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, particularly the right to an adequate standard of living and the right to health.[3] The right to an adequate standard of living requires state parties to take steps to ensure the availability, adequacy and accessibility of food, clothing, water and housing for *all* people in Australia, and also imposes on Australia the obligations listed above in relation to the right to social security.[4]

1.239 Australia has obligations to progressively realise these rights and also has a corresponding duty to refrain from taking retrogressive measures, or backwards steps.[5] Retrogressive measures, a type of limitation, may be permissible under international human rights law providing that they address a legitimate objective, are rationally connected to that objective and are a proportionate way to achieve that objective.

1.240 Extending the waiting period to three years (from the current two years) further restricts access to social security (including health care cards) for newly arrived residents. Accordingly, the measure constitutes a retrogressive measure, a type of limitation, in the realisation of the right to social security, the right to an adequate standard of living and the right to health.

1.241 The statement of compatibility acknowledges that the measure engages the right to social security and states that:

> Given the current fiscal environment…three years is a reasonable period to expect new permanent migrants to support themselves and their families when they first settle in Australia. This will reduce the burden placed on Australia's welfare payments system and improve its long-term sustainability.[6]

1.242 In general terms, budgetary constraints and financial sustainability have been recognised as a legitimate objective for the purpose of justifying reductions in government support that impact on the progressive realisation of economic, social

3 See, International Covenant on Economic, Social and Cultural Rights (ICESCR) article 9; United Nations Committee on Economic, Social and Cultural Rights, General Comment 19: the right to social security, E/C.12/GC/19 (4 February 2008).

4 See, ICESCR, article 11.

5 See, ICESCR, article 2.

6 Statement of compatibility (SOC), p. 29.

and cultural rights. However, the United Nations Committee on Economic, Social and Cultural Rights has explained that any retrogressive measures:

> …require the most careful consideration and would need to be fully justified by reference to the totality of the rights provided for in the Covenant [ICESCR] and in the context of the full use of the maximum available resources.[7]

1.243 In this respect, limited information has been provided in the statement of compatibility to support the characterisation of financial sustainability or budgetary constraints as a pressing or substantial concern in these specific circumstances. If this were a legitimate objective for the purposes of international human rights law, reducing government spending through this measure may be capable of being rationally connected to this stated objective.

1.244 In relation to the proportionality of the limitation, the statement of compatibility explains that there will be a range of exemptions from the waiting period. These include exemptions for humanitarian migrants, New Zealand citizens on a Special Category visa, and holders of certain temporary visas, including temporary protection visas and Safe Haven Enterprise Visas, to be able to immediately access family tax benefit payments, parental leave pay and dad and partner pay.[8] It is relevant to the proportionality of the limitation that certain classes of visa holders will be able to access a number of social security payments.

1.245 The statement of compatibility explains that there will also be a provision for migrants who become lone parents after becoming an Australian resident, to access social security payments:

> Migrants who become a lone parent after becoming an Australian resident will continue to be exempt from the waiting period for parenting payment, newstart allowance and youth allowance. Those who receive an exemption from the waiting period for one of these payments will also be exempt from the waiting period for FTB [family tax benefit]. Those who subsequently have a new child will also be able to transfer to PLP [parental leave pay] or DaPP [dad and partner pay] if they are otherwise qualified. This ensures that parents who lose the support – financial and otherwise – of a partner have access to support for themselves and their children.[9]

1.246 The statement of compatibility further explains that the availability of Special Benefit social security payments are an additional safeguard in relation to the measure:

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7 UN Committee on Economic, Social and Cultural Rights, General Comment 3: the nature of state party obligations, E/1991/23 (14 December 1990) [9].

8 SOC, p. 30.

9 SOC, p. 30.

> …migrants who experience a substantial change in circumstances after the start of their waiting period, and are in financial hardship, will continue to be exempt from the waiting period for special benefit. Special benefit is a payment of last resort that provides a safety net for people in hardship who are not otherwise eligible for other payments. Those who receive this exemption and have dependent children will also be exempt from the waiting period for FTB. Consistent with established policy (contained in the Guide to Social Security Law) this may include migrants:
>
> - who are the victim of domestic or family violence;
> - who experience a prolonged injury or illness and are unable to work, or whose partner or sponsor does;
> - whose dependent child develops a severe medical condition, disability or injury; or
> - whose sponsor or partner dies, becomes a missing person or is imprisoned leaving the migrant with no other means of support.
>
> These exemptions ensure that there continues to be a safety net available for potentially vulnerable individuals and families who are unable to support themselves despite their best plans.

1.247 The Special Benefit appears to provide an important safeguard such that these individuals could afford the basic necessities to maintain an adequate standard of living in circumstances of financial hardship. This is of considerable importance in relation to the proportionality of the limitation.

1.248 However, increasing the waiting period to access social security for newly arrived residents generally from two years to three years is still a considerable reduction in the availability of social security. In this respect, it would be useful for further information to be provided about any consideration of alternatives to reducing access to social security, in the context of Australia's use of its maximum available resources.

Committee comment

1.249 The preceding analysis raises questions as to the compatibility of the measure with the right to social security and the right to an adequate standard of living.

1.250 The committee therefore seeks 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 in the specific circumstances of the proposed legislation;**
- **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 its stated objective (including the extent of the reduction in access**

to social security payments; what level of support Special Benefit payments provide; and whether the measure is the least rights restrictive approach); and

- **whether alternatives to reducing access to social security, in the context of Australia's use of its maximum available resources, have been fully considered.**

Compatibility of the measure with the right to maternity leave

1.251 The right to maternity leave is protected by article 10(2) of the International Covenant on Economic, Social and Cultural Rights (ICESCR) and article 11(2)(b) of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)[10] and includes an entitlement for parental leave with pay or comparable social security benefits for a reasonable period before and after childbirth.

1.252 The UN Committee on Economic, Social and Cultural Rights has further explained that the obligations of state parties to the ICESCR in relation to the right to maternity leave include the obligation to guarantee 'adequate maternity leave for women, paternity leave for men, and parental leave for both men and women'.[11] By extending the waiting period for access to parental leave pay and dad and partner pay, the measure engages and limits this right.

1.253 In restricting the paid maternity leave support available to newly arrived migrants for a further year (bringing the total waiting period to three years), the measure is a retrogressive measure, a type of limitation, for the purposes of international human rights law.

1.254 As noted above, limitations on human rights may be permissible under international human rights law providing that they address a legitimate objective, are rationally connected to that objective and are a proportionate way to achieve that objective.

1.255 The statement of compatibility acknowledges that the measure engages the right to paid maternity leave but appears to argue that this limitation is permissible.

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10 The Australian government on ratification of CEDAW in 1983 made a statement and reservation that: 'The Government of Australia advises that it is not at present in a position to take the measures required by Article 11(2)(b) to introduce maternity leave with pay or with comparable social benefits throughout Australia.' This statement and reservation has not been withdrawn. However, after the Commonwealth introduced the Paid Parental Leave scheme in 2011, the Australian Government committed to establishing a systematic process for the regular review of Australia's reservations to international human rights treaties: See, Attorney-General's Department, Right to Maternity Leave https://www.ag.gov.au/RightsAndProtections/HumanRights/Human-rights-scrutiny/PublicSectorGuidanceSheets/Pages/Righttomaternityleave.aspx.

11 UN Committee on Economic, Social and Cultural Rights, *General Comment 16, The equal right of men and women to the enjoyment of all economic, social and cultural rights* (2005). See also, article 3 of ICESCR.

However, limited information or reasoning has been provided as to whether the objectives of ensuring financial sustainability or budgetary constraints address a pressing or substantial concern in these specific circumstances. As noted above, reducing government spending through this measure would appear to be rationally connected to this stated objective.

1.256 In relation to the proportionality of the limitation, the statement of compatibility states:

> While it is acknowledged that the upbringing of children requires a sharing of responsibility between men and women and society as a whole, it is reasonable to expect that migrants who make the decision to have a child during their initial settlement period should also allow for the costs of supporting themselves and their children during the waiting period.
>
> The Australian welfare system is targeted so that those who most need help receive it. In order to sustain this, those who can support their children are expected to do so.[12]

1.257 However, this does not fully take into account that the timing of having children and a consequential need for paid maternity leave may not necessarily be something that is fully in the hands of potential parents. Noting that the measure applies to a range of visas, it also does not explain why newly arrived residents would necessarily be in a better position to adequately support the costs of having children than other individuals.

1.258 The statement of compatibility further explains in relation to the proportionality of the measure that there is a transitional period so that migrants who may have a baby born between 1 July 2018 and 1 January 2019 will still be able to access paid parental leave. While having a transitional period may be an important safeguard ensuring expectant parents who had planned care arrangements around the existing parental leave provisions would not be affected by the changes, it does not address broader concerns.

1.259 It is noted that increasing the waiting period to access paid parental leave from two years to three years is a considerable reduction in the availability of parental leave pay and dad and partner pay. It may have particularly significant consequences for those who have no access to other paid parental leave arrangements through their employer. In this respect, it would be useful for further information to be provided about any consideration of alternatives to reducing access to social security, in the context of Australia's use of its maximum available resources.

12 SOC, p. 31.

Committee comment

1.260 The preceding analysis raises questions as to the compatibility of the measure with the right to paid parental leave.

1.261 The committee therefore seeks 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 in the specific circumstances of the proposed legislation;**
- **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 its stated objective (including the extent of the reduction in access to parental leave payments; the existence of relevant safeguards; and whether the measure is the least rights restrictive approach); and**
- **whether alternatives to reducing access to paid parental leave, in the context of Australia's use of its maximum available resources, have been fully considered.**

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

1.262 The right to equality and non-discrimination is protected by articles 2 and 26 of the ICCPR. In addition to these general non-discrimination provisions, articles 1, 2, 3, 4 and 15 of the CEDAW further describe the content of these obligations, including the specific elements that state parties are required to take into account to ensure the rights to equality for women.[13]

1.263 'Discrimination' encompasses a distinction based on a personal attribute (for example, race, sex or on the basis of disability),[14] which has either the purpose (called 'direct' discrimination), or the effect (called 'indirect' discrimination), of adversely affecting human rights.[15] The UN Human Rights Committee has explained indirect discrimination as 'a rule or measure that is neutral on its face or without

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13 Article 1 of CEDAW defines 'discrimination against women' as 'any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field'.

14 The prohibited grounds are race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status: ICCPR articles 2 and 26; ICESCR article 2(2); UN Human Rights Committee, *General Comment 18*, *Non-discrimination* (10 November1989) [1]. Under 'other status' the following have been held to qualify as prohibited grounds: age, nationality, marital status, disability, place of residence within a country and sexual orientation.

15 UN Human Rights Committee, *General Comment 18*, Non-discrimination (1989) [7].

intent to discriminate', which exclusively or disproportionately affects people with a particular protected attribute.[16]

1.264 As women are the primary recipients of paid parental leave, increasing the waiting period for access may have a disproportionate negative effect on women who are newly arrived residents. Where a measure impacts on particular groups disproportionately, it establishes *prima facie* that there may be indirect discrimination.[17] Differential treatment (including the differential effect of a measure that is neutral on its face)[18] will not constitute unlawful discrimination if the differential treatment is based on reasonable and objective criteria such that it serves a legitimate objective, is effective to achieve that legitimate objective and is a proportionate means of achieving that objective.

1.265 The statement of compatibility acknowledges that the right to equality and non-discrimination is engaged. It states that the measure pursues the objective of 'ensuring newly arrived migrants meet their own living costs…in order to keep the system sustainable into the future'.[19] As noted above, limited information or reasoning has been provided as to whether the objectives of ensuring financial sustainability or budgetary constraints address a pressing or substantial concern in these specific circumstances. Further, while the statement of compatibility points to the existence of particular exemptions which may operate as safeguards, no information is provided as to whether the measure is the least rights restrictive approach.

Committee comment

1.266 The preceding analysis raises questions as to the compatibility of the measure with the right to equality and non-discrimination.

1.267 The committee therefore seeks 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 in the specific circumstances of the proposed legislation;**
- **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 its stated objective (including whether it is based on reasonable and objective criteria; the extent of the reduction in access to parental**

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

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

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

19 SOC, p. 36.

leave payments; the existence of relevant safeguards; and whether the measure is the least rights restrictive approach); and

- **whether alternatives to reducing access to paid parental leave, in the context of Australia's use of its maximum available resources, have been fully considered.**

Treasury Laws Amendment (Black Economy Taskforce Measures No. 1) Bill 2018

Purpose	Introduces offences prohibiting the production, distribution and possession of sales suppression tools in relation to entities that have Australian tax obligations. Also requires entities providing courier or cleaning services that have an ABN to report to the Australian Taxation Office information about transactions that involve engaging other entities to undertake those courier or cleaning services for them
Portfolio	Treasury
Introduced	House of Representatives, 7 February 2018
Rights	Presumption of innocence, privacy (see **Appendix 2**)
Status	Seeking additional information

Strict liability offences relating to the production, distribution and possession of sales suppression tools

1.268 Schedule 1 of the Treasury Laws Amendment (Black Economy Taskforce Measures No. 1) Bill 2018 (the bill) seeks to introduce offence provisions relating to the production or supply of electronic sales suppression tools[1] and the acquisition, possession or control of such tools where the person is required to keep or make records under an Australian taxation law.[2] A person will also commit an offence where they have incorrectly kept records using electronic sales suppression tools.[3] Each of these offences are offences of strict liability.[4]

1 'Electronic sales suppression tools' are defined in proposed section 8WAB of the bill to mean a device, software, program or other thing, a part of any such thing, or a combination of any such things or parts, that meets the following conditions: (a) it is capable of falsifying, manipulating, hiding, obfuscating, destroying, or preventing the creation of, a record that: (i) an entity is required by a taxation law to keep or make; and (ii) is, or would be, created by a system that is or includes an electronic point of sale system; (b) a reasonable person would conclude that one of its principal functions is to falsify, manipulate, hide, obfuscate, destroy, or prevent the creation of, such records.

2 See sections 8WAC and 8WAD of the bill.

3 Section 8WAE of the bill.

4 See sections 8WAE(4), 8WAD(3), 8WAE(2) of the bill.

Compatibility of the measure with the right to the presumption of innocence

1.269 The right to the presumption of innocence requires that everyone charged with a criminal offence has the right to be presumed innocent until proven guilty according to law.

1.270 Strict liability offences limit the right to be presumed innocent until proven guilty because they allow for the imposition of criminal liability without the need to prove fault. The bill therefore engages and limits the right to the presumption of innocence by imposing strict liability offences.

1.271 Strict liability offences will not necessarily be inconsistent with the presumption of innocence provided that they are within reasonable limits which take into account the importance of the objective being sought and maintain the defendant's right to a defence.

1.272 The statement of compatibility for the bill states that the bill does not engage 'any of the applicable rights or freedoms',[5] but does state that 'applying strict liability to these offences covered by these amendments is appropriate because it substantially improves the effectiveness of the prohibition on electronic sales suppression tools'.[6]

1.273 Where legislation provides for a strict liability offence, the committee's usual expectation is that the statement of compatibility provides an assessment of whether such limitations on the presumption of innocence are proposed in pursuit of a legitimate objective, are rationally connected to this objective, and are a reasonable, necessary and proportionate means to achieving that objective. The committee's *Guidance Note 2* sets out some of the key human rights compatibility issues in relation to provisions that create strict liability offences. Further information from the minister in this regard will assist the committee to conclude whether the measure permissibly limits the right to be presumed innocent.

Committee comment

1.274 The committee notes that its *Guidance Note 2* sets out information specific to strict liability offences.

1.275 The committee seeks the advice of the Treasurer as to:

- **whether the strict liability offences are aimed at achieving a legitimate objective for the purposes of human rights law;**
- **how this measure is effective to achieve (that is, rationally connected to) that objective; and**

5 Statement of Compatibility (SOC), [1.109].

6 SOC, [1.104].

- **whether the limitation on the right to be presumed innocent is proportionate to achieve the stated objective.**

Various Instruments made under the Autonomous Sanctions Act 2011[1]

Purpose	Amends the Autonomous Sanctions Regulations 2011
Portfolio	Foreign Affairs
Authorising legislation	*Autonomous Sanctions Act 2011*
Last day to disallow	[F2018L00049]: 15 sitting days after tabling (tabled Senate 5 February 2018, notice of motion to disallow must be given by 8 May 2018) [F2017L01063] and [F2017L01080]: 15 sitting days after tabling (tabled Senate 4 September 2017) [F2017L01592]: 15 sitting days after tabling (tabled Senate 8 February 2018, notice of motion to disallow must be given by 8 May 2018) [F2018L00102] and [F2018L00108]: 15 sitting days after tabling (tabled Senate 15 February 2018, notice of motion to disallow must be given by 25 June 2018) [F2018L00099], [F2018L00101] and [F2018L00100]: 15 sitting days after tabling (tabled Senate 14 February 2018, notice of motion to disallow must be given by 21 June 2018)
Rights	Multiple rights (see **Appendix 2**)
Status	Seeking additional information

1 Autonomous Sanctions (Designated Persons and Entities – Democratic People's Republic of Korea) Amendment List 2017 (No. 2) [F2017L01063]; Autonomous Sanctions (Designated Persons and Entities – Democratic People's Republic of Korea) Amendment List 2017 (No.3) [F2017L01592]; Autonomous Sanctions (Designated Persons and Entities and Declared Persons – Syria) List 2017 [F2017L01080]; Autonomous Sanctions (Designated Persons and Entities – Democratic People's Republic of Korea) Continuing Effect Declaration 2018 [F2018L00049]; Autonomous Sanctions (Designated Persons and Entities and Declared Persons – Zimbabwe) Continuing Effect Declaration 2018 [F2018L00108]; Autonomous Sanctions (Designated Persons and Entities and Declared Persons – Iran) Continuing Effect Declaration 2018 [F2018L00102]; Autonomous Sanctions (Designated Persons and Entities and Declared Persons – Libya) Continuing Effect Declaration and Revocation Instrument 2018 [F2018L00101]; Autonomous Sanctions (Designated and Declared Persons – Former Federal Republic of Yugoslavia) Continuing Effect Declaration and Revocation Instrument 2018 [F2018L00099]; Autonomous Sanctions (Designated Persons and Entities and Declared Persons – Syria) Continuing Effect Declaration and Revocation Instrument 2018 [F2018L00100].

Background

1.276 This report considers a number of new instruments under the *Autonomous Sanctions Act 2011* (the Act).[2] This Act, in conjunction with the Autonomous Sanctions Regulations 2011 (the 2011 regulations) and various instruments made under those 2011 regulations, provides the power for the government to impose broad sanctions to facilitate the conduct of Australia's external affairs (the autonomous sanctions regime).

1.277 Initial human rights analysis of various autonomous sanctions instruments was undertaken in 2013, and further detailed analysis (of autonomous sanctions and of the UN Charter sanctions regime) was made in 2015 and 2016.[3] This analysis stated that, as the instruments under consideration expanded or applied the operation of the sanctions regime by designating or declaring that a person is subject to the sanctions regime, or by amending the regime itself, it was necessary to assess the human rights compatibility of the autonomous sanctions regime and aspects of the UN Charter sanctions regime as a whole when considering these instruments. A further response was therefore sought from the minister, which was considered in the committee's *Report 9 of 2016*.[4] The committee concluded its examination of various instruments and made a number of recommendations to assist the compatibility of the sanctions regime with human rights.[5]

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

1.278 Each of the new instruments designates and declares persons for the purpose of the 2011 regulations. Persons are designated and declared where the Minister for Foreign Affairs is satisfied that doing so will facilitate the conduct of Australia's relations with other countries or with entities or persons outside of Australia, or will otherwise deal with matters, things or relationships outside Australia.[6] The 2011 regulations set out the countries and activities for which a person or entity can be designated or declared.[7] For example, the Autonomous Sanctions (Designated Persons and Entities – Democratic People's Republic of Korea) Amendment List 2017 (No. 2) [F2017L01063] designates and declares certain persons

2 See footnote 1.

3 See, Parliamentary Joint Committee on Human Rights, *Sixth report of 2013* (15 May 2013) pp. 135-137; and *Tenth report of 2013* (26 June 2013) pp. 13-19; *Twenty-eighth report of the 44th Parliament* (17 September 2015) pp. 15-38; and *Thirty-third report of the 44th Parliament* (2 February 2016) pp. 17-25.

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

5 Parliamentary Joint Committee on Human Rights, *Report 9 of 2016* (22 November 2016) p. 53; see also *Report 10 of 2017* (12 September 2017) pp. 27-31.

6 Section 10(2) of the Autonomous Sanctions Act 2011.

7 Section 6 of the Autonomous Sanctions Regulations 2011.

or entities for the purposes of the 2011 regulations on the basis that the Minister for Foreign Affairs is satisfied that the person or entity is assisting in the violation or evasion by the Democratic People's Republic of Korea (DPRK) of specified United Nations (UN) Security Council Resolutions.

1.279 The effect of the designations and declarations in each of the instruments is that the listed persons:

- are subject to financial sanctions such that it is an offence for a person to make an asset directly or indirectly available to, or for the benefit of, a designated person.[8] A person's assets are therefore effectively 'frozen' as a result of being designated; and
- are subject to a travel ban to prevent the persons travelling to, entering or remaining in Australia.

1.280 The autonomous sanctions regime provides that the minister may grant a permit authorising the making available of certain assets to a designated person.[9] An application for a permit can only be made for basic expenses, to satisfy a legal judgment or where a payment is contractually required.[10] A basic expense includes foodstuffs; rent or mortgage; medicines or medical treatment; public utility charges; insurance; taxes; legal fees and reasonable professional fees.[11]

Compatibility of the designations and declarations with multiple human rights

1.281 The statement of compatibility for each of the instruments states that the instruments are compatible with human rights and freedoms. However, the statements of compatibility provide only a broad description of the operation and effect of each instrument, and none provide any substantive analysis of the rights and freedoms that are engaged and limited by the instruments. This is the case notwithstanding that committee reports have previously raised significant human rights concerns in relation to such instruments on a number of previous occasions. As set out in the committee's *Guidance Note 1,* the committee's usual expectation is that the statement of compatibility provides a detailed and evidence-based assessment of the rights engaged and limited by the measure, including whether any limitations on such rights are permissible (that is, whether they are prescribed by law, pursue a legitimate objective, are rationally connected to that objective, and are proportionate).

1.282 It is noted that aspects of the sanctions regimes may operate variously to both limit and promote human rights. However, consistent with committee practice

8 Section 14 of the Autonomous Sanctions Regulations 2011.

9 See section 18 of the Autonomous Sanctions Regulations 2011.

10 See section 20 of the Autonomous Sanctions Regulations 2011.

11 See subsection 20(3)(b) of the Autonomous Sanctions Regulations 2011.

to comment by exception, the current and previous examination of Australia's sanctions regimes has been, and is, focused solely on measures that impose restrictions on individuals.

1.283 The committee has previously noted that the autonomous sanctions regime engages and may limit multiple human rights, including:

- the right to privacy;
- the right to a fair hearing;
- the right to protection of the family;
- the right to an adequate standard of living;
- the right to freedom of movement;
- the prohibition against non-refoulement; and
- the right to equality and non-discrimination.

1.284 Further analysis of the rights engaged by the current instruments is set out below.

1.285 The committee further notes that the analysis below is in relation to the human rights obligations owed to individuals located in Australia. The committee is unaware whether any of the designations or declarations made under the autonomous or UN Charter sanctions regime has affected individuals living in Australia (although as at 21 February 2018 the consolidated list of individuals subject to sanctions currently includes two Australian citizens who have been delegated pursuant to the UN Charter sanctions regime).[12] The analysis below therefore provides an assessment of whether the amendments to the autonomous sanctions regime introduced by the instruments could breach the human rights of persons to whom Australia owes such obligations, irrespective of whether there have already been instances of individuals in Australia affected by these measures.

Right to privacy, right to a fair hearing, right to protection of the family, right to an adequate standard of living and the right to freedom of movement

Right to privacy

1.286 Article 17 of the International Covenant on Civil and Political Rights (ICCPR) prohibits arbitrary or unlawful interference with an individual's privacy, family, correspondence or home. The designation and declaration of a person under the autonomous sanctions regimes is a significant incursion into a person's right to personal autonomy in one's private life (within the right to privacy). In particular, the freezing of a person's assets and the requirement for a designated person to seek the

12 See the Department of Foreign Affairs and Trade, 'Consolidated List', available at: http://dfat.gov.au/international-relations/security/sanctions/pages/consolidated-list.aspx.

permission of the minister to access their funds for basic expenses imposes a limit on that person's right to a private life, free from interference by the state.

1.287 Further, the designation process under the autonomous sanctions regimes limits the right to privacy of close family members of a designated person. As noted above, once a person is designated under either sanctions regime, the effect of designation is that it is an offence for a person to directly or indirectly make any asset available to, or for the benefit of, a designated person (unless it is authorised under a permit to do so). This could mean that close family members who live with a designated person will not be able to access their own funds without needing to account for all expenditure, on the basis that any of their funds may indirectly benefit a designated person (for example, if a spouse's funds are used to buy food or public utilities for the household that the designated person lives in).

Right to a fair hearing

1.288 The right to a fair hearing is protected by article 14 of the ICCPR. The right applies both to criminal and civil proceedings, to cases before both courts and tribunals and to military disciplinary hearings. The right applies where rights and obligations, such as personal property and other private rights, are to be determined. In order to constitute a fair hearing, the hearing must be conducted by an independent and impartial court or tribunal, before which all parties are equal, and have a reasonable opportunity to present their case. Ordinarily, the hearing must be public, but in certain circumstances, a fair hearing may be conducted in private. The committee's previous human rights analysis of the autonomous sanctions regimes therefore noted that the designation and declaration process under the sanctions regimes limits the right to a fair hearing because it does not provide for merits review of the minister's designation or declaration under the autonomous sanctions regime before a court or tribunal.[13]

Right to protection of the family

1.289 The right to respect for the family is protected by articles 17 and 23 of the ICCPR and article 10 of the International Covenant on Economic, Social and Cultural Rights (ICESCR). An important element of protection of the family is to ensure family members are not involuntarily separated from one another. Laws and measures which prevent family members from being together, impose long periods of separation or forcibly remove children from their parents, will therefore engage this right. A person who is declared under the autonomous sanctions regime for the purpose of preventing the person from travelling to, entering or remaining in Australia will have their visa cancelled pursuant to the Migration Regulations 1994.[14]

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13 See further below and Parliamentary Joint Committee on Human Rights, *Report 9 of 2016* (22 November 2016) p. 45.

14 See Migration Regulations 1994, section 2.43(1)(aa) and section 116(1)(g) of the Migration Act 1958.

This makes the person liable to deportation which may result in that person being separated from their family, which therefore engages and limits the right to protection of the family.

Right to an adequate standard of living

1.290 The right to an adequate standard of living is guaranteed by article 11 of ICESCR and requires state parties to take steps to ensure the availability, adequacy and accessibility of food, clothing, water and housing for all people in Australia. The imposition of economic sanctions on a person engages and limits this right, as persons subject to such sanctions will have their assets effectively frozen and may therefore have difficulty paying for basic expenses.[15]

Right to freedom of movement

1.291 The right to freedom of movement is protected under article 12 of the ICCPR and includes a right to leave Australia as well as the right to enter, remain, or return to one's 'own country'. 'Own country' is a concept which encompasses not only a country where a person has citizenship but also one where a person has strong ties, such as long standing residence, close personal and family ties and intention to remain, as well as the absence of such ties elsewhere.[16] The power to cancel a person's visa that is enlivened by designating or declaring a person under the autonomous sanctions regime may engage and limit the freedom of movement. This is because a person's visa may be cancelled (with the result that the person may be deported) in circumstances where that person has strong ties to Australia such that Australia may be considered their 'own country' for the purposes of international human rights law, despite that person not holding formal citizenship.

Limitations on human rights

1.292 Each of these rights may be subject to permissible limitations under international human rights law. In order to be permissible, the measure must seek to achieve a legitimate objective and be reasonable, necessary and proportionate to achieving that objective. In the case of executive powers which seriously disrupt the lives of individuals subjected to them, the existence of safeguards is important to

15 The minister may grant a permit for the payment of such expenses (including foodstuffs, rent or mortgage, medicines or medical treatment, public utility charges, insurance, taxes, legal fees and reasonable professional fees): Section 18 and 20 of the Autonomous Sanctions Regulations 2011. However, the minister must not grant a permit unless the minister is satisfied that it would be in the national interest to grant the permit and is satisfied about any circumstance or matter required by the regulations to be considered for a particular kind of permit: section 18(3) of the Autonomous Sanctions Regulations 2011.

16 UN Human Rights Committee, *General Comment No.27: Article 12 (Freedom of Movement)* (1999). See also *Nystrom v Australia* (1557/2007), UN Human Rights Committee, 1 September 2011.

prevent arbitrariness and error, and ensure that the powers are exercised only in the appropriate circumstances.

1.293 The committee has previously accepted that the use of international sanctions regimes to apply pressure to governments and individuals in order to end the repression of human rights may be regarded as a legitimate objective for the purposes of international human rights law.[17] However, it has expressed concerns that the sanctions regimes may not be regarded as proportionate to their stated objective, in particular because of a lack of effective safeguards to ensure that the regimes, given their serious effects on those subject to them, are not applied in error or in a manner which is overly broad in the individual circumstances.

1.294 For example, the previous human rights analysis raised concerns that the designation or declaration under the autonomous sanctions regime can be solely on the basis that the minister is 'satisfied' of a number of broadly defined matters,[18] and that there is no provision for merits review before a court or tribunal of the minister's decision. In response to previous questions from the committee in relation to these issues, the minister noted that the decisions were subject to judicial review under the *Administrative Decisions (Judicial Review) Act 1977* (ADJR Act) and under common law.[19] This appears to be one safeguard available under general law insofar as it does secure the minimum requirement that the minister act in accordance with the legislation.

1.295 However, as noted in the committee's previous report, the effectiveness of judicial review as a safeguard within the sanctions regimes relies, in significant part, on the clarity and specificity with which legislation specifies powers conferred on the executive. The scope of the power to designate or declare someone is based on the minister's satisfaction in relation to certain matters which are stated in broad terms. It is noted that this formulation limits the scope to challenge such a decision on the basis of there being an error of law (as opposed to an error on the merits) under the ADJR Act or at common law. As the committee has previously explained, judicial review will generally be insufficient, in and of itself, to operate as a sufficient safeguard for human rights purposes in this context.[20]

1.296 The previous human rights analysis has also raised concerns that the minister can make the designation or declaration without hearing from the affected person

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17 Parliamentary Joint Committee on Human Rights, *Report 9 of 2016* (22 November 2016) p. 44.

18 See the examples in the committee's previous analysis at paragraph [1.114] of the *Twenty-Eighth report of the 44th Parliament* and section 6 of the Autonomous Sanctions Regulations 2011

19 Parliamentary Joint Committee on Human Rights, *Report 9 of 2016* (22 November 2016) p. 46.

20 Parliamentary Joint Committee on Human Rights, *Report 9 of 2016* (22 November 2016) pp. 46-47; and *Twenty-eighth Report of the 44th Parliament* (17 September 2015) [1.116] to [1.123].

before the decision is made. In response to previous questions from the committee, the minister indicated that the designation or declaration without hearing from the affected person was necessary to ensure the effectiveness of the regime, as prior notice would effectively 'tip off' the person and could lead to assets being moved off-shore. However, the previous human rights analysis noted that there may be less rights-restrictive measures available, such as freezing assets on an interim basis until complete information is available including from the affected person.[21]

1.297 There is also no requirement to report to Parliament setting out the basis on which persons have been declared or designated and what assets, or the amount of assets that have been frozen. In response to previous questions from the committee, the minister stated that public disclosure of assets frozen could risk undermining the administration of the sanctions regimes. However, the previous human rights analysis noted that it was difficult to accept the minister's justification as information identifying declared or designated persons is already publicly available on the Consolidated List of individuals subject to sanctions, which is available on the Department of Foreign Affairs and Trade website.[22]

1.298 Previous human rights analysis has also noted that once the decision is made to designate or declare a person, the designation or declaration remains in force for three years and may be continued after that time (such as occurs through these instruments). There is no requirement that if circumstances change or new evidence comes to light the designation or declaration will be reviewed before the three year period ends. In response to previous questions from the committee on this issue, the minister noted that designations and declarations may be reviewed at any time and persons may request revocation if circumstances change or new evidence comes to light. While this is true, without an automatic requirement of reconsideration if circumstances change or new evidence comes to light, a person may remain subject to sanctions notwithstanding that designation or declaration may no longer be required.[23] This is of particular relevance in the context of the Autonomous Sanctions (Designated and Declared Persons – Former Federal Republic of Yugoslavia) Continuing Effect Declaration and Revocation Instrument 2018 [F2018L00099], which renews the designation and declarations, against many persons for a further three years on the basis of (among other things) their indictment before the International Criminal Tribunal for the former Yugoslavia (ICTY). However, the ICTY closed on 31 December 2017 with remaining appeals being determined by the UN Mechanism for International Criminal Tribunals (MICT), which raises questions as to whether the

21 Parliamentary Joint Committee on Human Rights, *Report 9 of 2016* (22 November 2016) p. 47.

22 See, http://dfat.gov.au/international-relations/security/sanctions/pages/consolidated-list.aspx; Parliamentary Joint Committee on Human Rights, *Report 9 of 2016* (22 November 2016) pp. 48-49.

23 Parliamentary Joint Committee on Human Rights, *Report 9 of 2016* (22 November 2016) p. 49.

continued application of sanctions against those persons because of their status as (former) ICTY indictees is proportionate.

1.299 Similarly, a designated or declared person will only have their application for revocation considered once a year. If an application for review has been made within the year, the minister is not required to consider it. The minister has previously stated that this requirement is intended to ensure the minister is not required to consider repeated, vexatious revocation requests.[24] However, the previous human rights analysis noted that the provision gives the minister a discretion that is broader than merely preventing vexatious applications and the current requirement may affect meritorious applications for revocation.[25]

1.300 There is also no requirement to consider whether applying the ordinary criminal law to a person would be more appropriate than freezing the person's assets on the decision of the minister. The minister has previously stated that the imposition of targeted financial sanctions is considered, internationally, to be a preventive measure that operates in parallel to complement the criminal law.[26] The previous human rights analysis accepted that such measures may be preventive, but also noted that without further guidance from the minister (such as when and in what circumstances complementary targeted action would be needed) that there appeared to be a risk that such action may not be the least restrictive of human rights in every case.[27]

1.301 The previous human rights analysis also raised concerns relating to the minister's unrestricted power to impose conditions on a permit to allow access to funds to meet basic expenses. While the minister has previously stated that such discretion is appropriate, the previous human rights analysis expressed concern as the broad discretion to impose conditions on access to money for basic expenses does not appear to be the least rights-restrictive way of achieving the legitimate objective.[28]

1.302 The previous human rights analysis also raised concerns that there is no requirement that in making a designation or declaration the minister must take into account whether doing so would be proportionate with the anticipated effect on an individual's private and family life. The committee has previously noted that this absence of safeguards in relation to family members raises concerns as to the proportionality of the measure.[29]

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24 Parliamentary Joint Committee on Human Rights, *Report 9 of 2016* (22 November 2016) p. 49.

25 Parliamentary Joint Committee on Human Rights, *Report 9 of 2016* (22 November 2016) p. 49.

26 Parliamentary Joint Committee on Human Rights, *Report 9 of 2016* (22 November 2016) p. 50.

27 Parliamentary Joint Committee on Human Rights, *Report 9 of 2016* (22 November 2016) p. 50.

28 Parliamentary Joint Committee on Human Rights, *Report 9 of 2016* (22 November 2016) p. 50.

29 Parliamentary Joint Committee on Human Rights, *Report 9 of 2016* (22 November 2016) p. 51.

1.303 Further, limited guidance is available under the Act or 2011 regulations or any other publicly available document setting out the basis on which the minister decides to designate or declare a person.[30] The previous human rights analysis noted that this lack of clarity raises concerns as to whether the regime represents the least rights-restrictive way of achieving its objective, as the scope of the law is not made evident to those who may fall within the criteria for listing and who may seek in good faith to comply with the law.[31]

1.304 The European Court of Human Rights decision in *Al-Dulimi and Montana Management Inc. v Switzerland* provides further useful guidance on the interaction between UN Security Council sanctions and international human rights law.[32] This case confirmed the presumption that UN Security Council Resolutions are to be interpreted on the basis that they are compatible with human rights. The European Court of Human Rights found that domestic courts should have the ability to exercise scrutiny so that arbitrariness can be avoided. This case also indicated that, even in circumstances where an individual is specifically listed by the UN Security Council Committee, individuals should be afforded a genuine opportunity to submit evidence to a domestic court to seek to show that their inclusion on the UN Security Council list was arbitrary. That is, the state is still required to afford fair hearing rights in these circumstances. In light of this case and the concerns discussed above, there are concerns that the current Australian model of autonomous sanctions regimes may be incompatible with the right to a fair hearing.

1.305 The committee has also previously noted that, in terms of comparative models, the United Kingdom (UK) has implemented its obligations in a manner that incorporates a number of safeguards not present in the Australian autonomous sanctions regime, including:

- challenges to designations made by the executive can be made by way of full merits appeal rather than solely by way of judicial review;[33]
- quarterly reports must be made by the executive on the operation of the regime;[34]
- an Independent Reviewer of Terrorism Legislation reviews each designation and has unrestricted access to relevant documents, government personnel, the police and intelligence agencies;[35]

30 See further below.

31 Parliamentary Joint Committee on Human Rights, *Report 9 of 2016* (22 November 2016) p. 48.

32 *Al-Dulimi and Montana Management Inc. v Switzerland,* ECHR (Application no. 5809/08) (21 June 2016).

33 See section 26 of *Terrorist Asset-Freezing etc. Act 2010* (UK) (TAFA 2010).

34 See section 30 of TAFA 2010.

- the executive provides a 'Designation Policy Statement' to Parliament setting out the factors used when deciding whether to designate a person;
- an Asset-Freezing Review sub-group annually reviews all existing designations, or earlier if new evidence comes to light or there is a significant change in circumstances, and the executive invites each designated person to respond to whether they should remain designated;[36]
- the prohibition on making funds available does not apply to social security benefits paid to family members of a designated person (even if the payment is made in respect of a designated person);[37] and
- when the executive is considering designating a person, operational partners are consulted, including the police, to determine whether there are options available other than designation—for example, prosecution or forfeiture of assets—to ensure that there is not a less rights restrictive alternative to achieve the objective.[38]

1.306 These kinds of safeguards in the UK asset-freezing regime are highly relevant indicia that there are more proportionate methods of achieving the legitimate objective of the Australian autonomous sanctions regimes. That is, it would appear that a less rights-restrictive approach is reasonably available.

The prohibition on non-refoulement and the right to an effective remedy

1.307 Australia has non-refoulement obligations under the Refugee Convention, the ICCPR and the Convention Against Torture (CAT). 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.[39] Non-refoulement obligations are absolute and may not be subject to any limitations.

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

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

37 See subs 16(3) of TAFA 2010.

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

39 See, Committee against Torture, *General Comment No.4 (2017) on the implementation of article 3 in the context of article 22* (9 February 2018).

1.308 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 giving effect to non-refoulement obligations.

1.309 As noted earlier, an Australian visa holder who is declared under the autonomous sanctions regime for the purpose of preventing the person from travelling to, entering or remaining in Australia will have their visa cancelled pursuant to the Migration Regulations 1994.[40] It is not clear whether this provision would apply to visa holders who have been found to engage Australia's non-refoulement obligations.

1.310 Section 198 of the Migration Act requires an immigration officer to remove an unlawful non-citizen (which includes persons whose visas have been cancelled) in a number of circumstances as soon as reasonably practicable. Section 197C of the Migration Act also provides that, for the purposes of exercising removal powers under section 198, it is irrelevant whether Australia has non-refoulement obligations in respect of an unlawful non-citizen. There is thus no statutory protection ensuring that an unlawful non-citizen to whom Australia owes protection obligations will not be removed from Australia, nor is there any statutory provision granting access to effective and impartial review of the decision as to whether removal is consistent with Australia's non-refoulement obligations. As stated in previous human rights assessments, ministerial discretion not to remove a person is not a sufficient safeguard under international law.[41]

1.311 This therefore raises concerns that the declaration of a person who is an Australian visa holder under the autonomous sanctions regime, which may trigger the cancellation of a person's visa, in the absence of any statutory protections to prevent the removal of persons to whom Australia owes non-refoulement obligations, may be incompatible with the obligation of non-refoulement in conjunction with the right to an effective remedy.

Committee comment

1.312 The committee notes that the relevant statements of compatibility assert that the instruments are compatible with human rights and freedoms and draws the minister's attention to its *Guidance Note 1* which sets out the committee's expectations in relation to drafting statements of compatibility.

1.313 The committee seeks the advice of the minister as to the compatibility of the measures with the right to privacy, right to a fair hearing, right to protection of the family, right to an adequate standard of living and the right to freedom of

40 See, Migration Regulations 1994, section 2.43(1)(aa) and section 116(1)(g) of the Migration Act 1958.

41 See, for example, Parliamentary Joint Committee on Human Rights, *Fourteenth Report of the 44th Parliament* (October 2014) pp. 76-77; *Report 11 of 2017* (17 October 2017) pp. 108-111.

movement. In particular, the committee seeks the advice of the minister as to how the designation and declaration of persons pursuant to the autonomous sanctions regime is a proportionate limit on these rights, having regard to the matters set out in [1.286] to [1.306] above.

1.314 The committee notes that the consequence of the exercise of the power to declare persons under the autonomous sanctions regime is that the person is prohibited from travelling and may have their visa cancelled. The committee seeks the advice of the minister as to the compatibility of this measure with the prohibition on non-refoulement in conjunction with the right to an effective remedy. This includes any safeguards in place to ensure that persons to whom Australia owes protection obligations will not be subject to refoulement as a consequence of being declared under the autonomous sanctions regime.

1.315 The committee draws the minister's attention to the Committee's recommendations in *Report 9 of 2016* that consideration be given to the following measures, several of which have been implemented in relation to the comparable regime in the United Kingdom, to ensure compatibility with human rights:

- **the provision of publicly available guidance in legislation setting out in detail the basis on which the minister decides to designate or declare a person;**
- **regular reports to Parliament in relation to the regimes including the basis on which persons have been declared or designated and what assets, or the amount of assets, that have been frozen;**
- **provision for merits review before a court or tribunal of the minister's decision to designate or declare a person;**
- **provision for merits review before a court or tribunal of an automatic designation where an individual is specifically listed by the UN Security Council Committee;**
- **regular periodic reviews of designations and declarations;**
- **automatic reconsideration of a designation or declaration if new evidence or information comes to light;**
- **limits on the power of the minister to impose conditions on a permit for access to funds to meet basic expenses;**
- **review of individual designations and declarations by the Independent National Security Legislation Monitor;**
- **provision that any prohibition on making funds available does not apply to social security payments to family members of a designated person (to protect those family members); and**
- **consultation with operational partners such as the police regarding other alternatives to the imposition of sanctions.**

1.316 The committee seeks the advice of the minister as to whether a substantive assessment of the human rights engaged and limited by the autonomous sanctions regime will be included in future statements of compatibility to assist the committee fully to assess the compatibility of the measure with human rights in future.[42]

Designations or declarations in relation to specified countries

1.317 The autonomous sanctions regime allows the minister to make a designation or declaration in relation to persons involved in some way with (currently) eight specified countries.

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

1.318 The right to equality and non-discrimination provides that everyone is entitled to enjoy their rights without discrimination of any kind, and that all people are equal before the law and entitled without discrimination to the equal and non-discriminatory protection of the law. Unlawful discrimination may be direct (that is, having the purpose of discriminating on a prohibited ground), or indirect (that is, having the effect of discriminating on a prohibited ground, even if this is not the intent of the measure). One of the prohibited grounds of discrimination under international human rights law is discrimination on the grounds of national origin and nationality.

1.319 The previous human rights analysis of the sanctions regime considered that the designation of persons in relation to specified countries may limit the right to equality and non-discrimination.[43] This is because nationals of listed countries may be more likely to be considered to be 'associated with' or work for a specified government or regime than those from other nationalities. Where a measure impacts on particular groups disproportionately it establishes *prima facie* that there may be indirect discrimination.

1.320 A disproportionate effect on a particular group may be justifiable such that the measure does not constitute unlawful indirect 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. Information to justify the rationale for differential treatment will be relevant to this proportionality analysis.

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42 See further section 8(3) of the *Human Rights (Parliamentary Scrutiny) Act 2011.*

43 Parliamentary Joint Committee on Human Rights, *Report 9 of 2016* (22 November 2016) pp. 53-54.

Committee comment

1.321 The preceding analysis indicates that the designations or declarations in relation to specified countries appear to have a disproportionate impact on persons on the basis of national origin or nationality.

1.322 The committee seeks the advice of the minister as to the compatibility of the measures with the right to equality and non-discrimination.

Advice only

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

Appropriation Bill (No. 3) 2017-2018

Appropriation Bill (No. 4) 2017-2018

Purpose	Appropriation Bill (No. 3) 2017-2018 seeks to appropriate money from the Consolidated Revenue Fund for the ordinary annual services of the government; Appropriation Bill (No. 4) 2017-2018 seeks to appropriate money from the Consolidated Revenue Fund for services that are not the ordinary annual services of the Government
Portfolio	Finance
Introduced	House of Representatives, 8 February 2018
Rights	Multiple rights (see **Appendix 2**)
Status	Advice only

Background

1.324 The committee has considered the human rights implications of appropriations bills in a number of previous reports,[1] and they have been the subject of correspondence with the Department of Finance.[2] During the 44th Parliament, the Minister for Finance previously invited the committee to meet with departmental officials about this issue.[3]

1 See, Parliamentary Joint Committee on Human Rights, *Third report of 2013* (13 March 2013) p. 65; *Seventh report of 2013* (5 June 2013) p. 21; *Third report of the 44th Parliament* (4 March 2014) p. 3; *Eighth report of the 44th Parliament* (24 June 2014) p. 5 and p. 31; *Twentieth report of the 44th Parliament* (18 March 2015) p. 5; *Twenty-third report of the 44th Parliament* (18 June 2015) p. 13;*Thirty-fourth report of the 44th Parliament* (23 February 2016) p. 2; *Report 2 of 2017* (21 March 2017) p.44; *Report 5 of 2017* (14 June 2017) p. 42.

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

3 See, for example, Parliamentary Joint Committee on Human Rights, *Eighth Report of the 44th Parliament* (June 2014) pp. 5-7, 33.

1.325 The committee previously reported on Appropriation Bill (No. 1) 2017-2018 and Appropriation Bill (No. 2) 2017-2018 (the earlier 2017-2018 bills) in its *Report 5 of 2017*.[4]

Potential engagement and limitation of human rights by appropriations Acts

1.326 As previously stated in respect of the 2017-2018 bills, proposed government expenditure to give effect to particular policies may engage and limit and/or promote a range of human rights. This includes rights under the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR).[5]

1.327 The committee's report has previously noted that:

> …the allocation of funds via appropriations bills is susceptible to a human rights assessment that is directed at broader questions of compatibility—namely, their impact on progressive realisation obligations and on vulnerable minorities or specific groups. In particular, the committee considers there may be specific appropriations bills or specific appropriations where there is an evident and substantial link to the carrying out of a policy or program under legislation that gives rise to human rights concerns.[6]

Compatibility of the bills with multiple rights

1.328 As with the earlier 2017-2018 bills, and previous appropriations bills, the current bills are accompanied by a brief statement of compatibility, which notes that the High Court has stated that, beyond authorising the withdrawal of money for broadly identified purposes, appropriations Acts 'do not create rights and nor do they, importantly, impose any duties'.[7] The statements of compatibility conclude that, as their legal effect is limited in this way, the bills do not engage, or otherwise affect, human rights.[8] The statements of compatibility also state that '[d]etailed information on the relevant appropriations…is contained in the portfolio [Budget] statements'.[9] No further assessment of the human rights compatibility of the bills is provided.

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4 Parliamentary Joint Committee on Human Rights, *Report 5 of 2017* (14 June 2017) p. 42.

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

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

7 Appropriation Bill (No. 3) 2017-2018: explanatory memorandum (EM), statement of compatibility (SOC), p. 4; Appropriation Bill (No. 4) 2017-2018: EM, SOC, p. 4.

8 Bill No. 3, EM, SOC, p. 4; Bill No. 4, EM, SOC, p. 4.

9 Bill No. 3, EM, SOC, p. 4; Bill No. 4, EM, SOC, p. 4.

1.329 A full human rights analysis in respect of such statements of compatibility can be found in the committee's *Report 9 of 2016*.[10] Under international human rights law, Australia has obligations to respect, protect and fulfil human rights. These include specific obligations to progressively realise economic, social and cultural (ESC) rights using the maximum of resources available;[11] and a corresponding duty to refrain from taking retrogressive measures, or backwards steps, in relation to the realisation of these rights. This means that any reduction in allocated government funding for measures which realise socio-economic rights, such as specific health and education services, may be considered as retrogressive in respect of the attainment of ESC rights and, accordingly, must be justified for the purposes of international human rights law.

1.330 The cited view of the High Court that appropriations Acts do not create rights or duties as a matter of Australian law does not address the fact that appropriations may nevertheless engage human rights for the purposes of international law, as specific appropriations reducing expenditure may be regarded as retrogressive, or as limiting rights. The appropriation of funds facilitates the taking of actions which may affect both the progressive realisation of, and the failure to fulfil, Australia's obligations under the treaties listed in the *Human Rights (Parliamentary Scrutiny) Act 2011*.

1.331 As previously stated, while such bills present particular difficulties for human rights assessments because they generally include high-level appropriations for a wide range of outcomes and activities across many portfolios, the allocation of funds via appropriations bills is susceptible to a human rights assessment directed at broader questions of compatibility.[12]

Committee comment

1.332 The committee notes that, as with previous appropriations bills, the statements of compatibility for the current bills provide no assessment of their

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

11 See, UN Office of the High Commissioner for Human Rights, *Manual on Human Rights Monitoring*, http://www.ohchr.org/Documents/Publications/Chapter20-48pp.pdf; Article 2(1) of the International Covenant on Economic, Social and Cultural Rights (ICESCR).

12 There are a range of international resources to assist in the preparation of human rights compatibility assessments of budgets: See, for example, Diane Elson, *Budgeting for Women's Rights: Monitoring Government Budgets for Compliance with CEDAW*, (Unifem, 2006) *https://www.internationalbudget.org/wp-content/uploads/Budgeting-for-Women%E2%80%99s-Rights-Monitoring-Government-Budgets-for-Compliance-with-CEDAW.pdf*; UN Practitioners' Portal on Human Rights Approaches to Programming, *Budgeting Human Rights*, http://hrbaportal.org/archives/tools/budgeting-human-rights; Rory O'Connell, Aoife Nolan, Colin Harvey, Mira Dutschke, Eoin Rooney, *Applying an International Human Rights Framework to State Budget Allocations: Rights and Resources* (Routledge, 2014).

compatibility with human rights on the basis that they do not engage or otherwise create or impact on human rights. However, while the committee acknowledges that appropriations bills present particular challenges in terms of human rights assessments, the appropriation of funds may engage and potentially limit or promote a range of human rights that fall under the committee's mandate.

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

- **whether the bills are compatible with Australia's obligations of progressive realisation with respect to economic, social and cultural rights;**
- **whether any reductions in the allocation of funding are compatible with Australia's obligations not to unjustifiably take retrogressive or backward steps in the realisation of economic, social and cultural rights; and**
- **whether the allocations are compatible with the rights of vulnerable groups (such as children; women; Aboriginal and Torres Strait Islander Peoples; persons with disabilities; and ethnic minorities).**

1.334 The committee would welcome the opportunity to engage further with the department on these and related matters concerning statements of compatibility for appropriations bills.

Australian Citizenship Legislation Amendment (Strengthening the Commitments for Australian Citizenship and Other Measures) Bill 2018

Purpose	Seeks to make a range of amendments to the *Australian Citizenship Act 2007*, the *Migration Act 1958* and other legislation including in relation to citizenship eligibility requirements, character requirements and review of decisions
Sponsor	Senator Pauline Hanson
Introduced	7 February 2018, Senate
Rights	Obligation to consider the best interests of the child; children's right to nationality; children to be heard in judicial and administrative proceedings; fair hearing; freedom of movement; equality and non-discrimination (see **Appendix 2**)
Status	Advice only

Background

1.335 The committee previously examined the Australian Citizenship Legislation Amendment (Strengthening the Requirements for Australian Citizenship and Other Measures) Bill 2017 (2017 bill) in its *Report 8 of 2017* and *Report 10 of 2017*.[1] The 2017 bill contained a number of reintroduced measures that were previously contained in the Australian Citizenship and Other Legislation Amendment Bill 2014 (2014 bill), examined in the committee's *Eighteenth Report of the 44th Parliament* and *Twenty-Fourth Report of the 44th Parliament*.[2]

1.336 The 2014 bill lapsed at the prorogation of the 44th parliament and the 2017 bill is not proceeding.[3]

1.337 The Australian Citizenship Legislation Amendment (Strengthening the Commitments for Australian Citizenship and Other Measures) Bill 2018 (2018 bill) is substantially the same as the 2017 bill. Accordingly, the committee's previous assessment is summarised briefly below.

1 Parliamentary Joint Committee on Human Rights, *Report 8 of 2017* (15 August 2017) pp. 2-31, *Report 10 of 2017* (12 September 2017) pp. 35-53.

2 Parliamentary Joint Committee on Human Rights, *Eighteenth Report of the 44th Parliament* (10 February 2015) 4-30; *Twenty-fourth Report of the 44th Parliament* (23 June 2015) pp. 25-73.

3 The 2017 bill was discharged from the Senate Notice Paper on 18 October 2017.

Summary of measures in the 2018 bill

1.338 The 2018 bill seeks to make a number of amendments to the *Australian Citizenship Act 2007* (Citizenship Act) that were contained in the 2017 bill, including to:

- amend the general eligibility criteria under section 21(2) of the Citizenship Act to require that applicants have 'competent English';[4]
- require the minister to be satisfied that a person 'has integrated into the Australian community' in order for that person to be eligible for citizenship by conferral;[5]
- grant the minister a discretionary power to revoke a person's Australian citizenship, up to 10 years after citizenship was first granted, where the minister is 'satisfied' that the person became an Australian citizen as a result of fraud or misrepresentation by themselves or a third party with a requirement of a court finding as to fraud or misrepresentation;[6]
- extend the 'good character' requirements for applicants for Australian citizenship to persons under 18 years of age;[7]
- provide that a child found abandoned in Australia is taken to have been born in Australia and to be an Australian citizen by birth, unless it is proved that the person was outside Australia before they were found abandoned or they are not an Australian citizen by birth;[8]
- restrict automatic citizenship at 10 years of age for a child born in Australia;[9]
- remove the power of the Administrative Appeals Tribunal (AAT) to review a decision made by the minister personally under the Citizenship Act, if the

4 Item 8, proposed subsection 3(1).

5 Item 43, proposed subsection 21(2)(fa).

6 Item 113, proposed section 34AA.

7 Item 26, proposed paragraph 16(2)(c).

8 Item 20, proposed subsections 12(8) and 12(9).

9 Currently, under the Citizenship Act, section 12, a child born in Australia automatically becomes an Australian citizen at 10 years of age if the child has been ordinarily resident in Australia throughout the 10 years since their date of birth. The 2018 bill proposes to withhold citizenship to those who would otherwise be entitled to it under this provision for reasons including: one or both of the child's parents were foreign diplomats; the child was effectively present in Australia as an unlawful non-citizen; or one or both of the child's parents came to Australia before the child was born, did not hold a substantive visa at the time of the child's birth and was an unlawful non-citizen at any time prior to the child's birth. See item 20.

minister has stated in a notice that the decision was made in the public interest;[10]

- empower the minister to set aside decisions made by the AAT in reviewing decisions of the minister's delegates, if the minister's delegate had originally decided that an applicant for citizenship was not of good character, or was not satisfied as to the person's identity, and the minister is satisfied it is in the public interest to set aside the AAT's decision; and[11]
- extend the bar on approval for citizenship to cases where a person is subject to a court order.[12]

1.339 The 2017 bill sought to amend the general residence requirement in the Citizenship Act to require citizenship by conferral applicants to have been a permanent resident for four years before they are eligible to apply for citizenship.[13] Under the Citizenship Act, the current requirement is 12 months.[14] The 2018 bill seeks to change the requirement from 12 months to eight years. This measure is the only substantive change between the 2017 bill and the 2018 bill.

Compatibility of the measures with human rights

1.340 The committee examined each of the above reintroduced measures in its previous assessment of the 2017 bill in *Report 8 of 2017* and *Report 10 of 2017*.

1.341 In relation to measures in the 2017 bill that were previously contained in the 2014 bill, the committee drew the various human rights implications of these measures to the attention of the parliament in its *Report 8 of 2017* including in relation to:

- *The power to revoke Australian citizenship due to fraud or misrepresentation – removal of court finding*: the previous human rights analysis raised concerns in relation to this measure and the obligation to consider the best interests of the child, the child's right to nationality, the right of the child to be heard in judicial and administrative proceedings, the right to a fair trial and a fair hearing and the right to freedom of movement.[15]
- *Extending the good character requirement to include applicants for Australian citizenship under 18 years of age*: the previous human rights

10 Item 126, proposed subsection 52(4).

11 Item 127, proposed section 52A.

12 Item 103, proposed subsection 30(8).

13 Item 56, proposed subsection 22(1A).

14 See, Citizenship Act, subsection 22(1)(c).

15 See, Parliamentary Joint Committee on Human Rights, *Report 8 of 2017* (15 August 2017) pp. 12-22.

analysis raised concerns in relation to this measure and the obligation to consider the best interests of the child as a primary consideration.[16]

- *Citizenship to a child found abandoned in Australia:* the previous human rights analysis raised concerns in relation to this measure and the obligation to consider the best interests of the child and a child's right to nationality.[17]
- *Limiting automatic citizenship at 10 years of age:* the previous human rights analysis raised concerns in relation to this measure and the obligation to consider the best interests of the child and a child's right to nationality.[18]
- *Personal ministerial decisions not subject to merits review:* the previous human rights analysis raised concerns in relation to this measure and the right to a fair hearing.[19]
- *Ministerial power to set aside decisions of the AAT if in the public interest:* the previous human rights analysis raised concerns in relation to this measure and the right to a fair hearing.[20]
- *Extension of bars to citizenship where a person is subject to a court order:* the previous human rights analysis raised concerns in relation to the right to equality and non-discrimination.[21]

1.342 In relation to two measures that were new in the 2017 bill, the committee concluded its examination in its *Report 10 of 2017* after receiving a response from the minister:[22]

- *Requirement that applicants for Australian citizenship have 'competent English'*: the previous analysis set out that the measure engages the right to equality and non-discrimination on the basis of language, and may also indirectly discriminate on the basis of national origin, in causing a disproportionate impact on individuals from countries where English is not

16 See, Parliamentary Joint Committee on Human Rights, *Report 8 of 2017* (15 August 2017) pp. 22-24.

17 See, Parliamentary Joint Committee on Human Rights, *Report 8 of 2017* (15 August 2017) pp. 24-25.

18 See, Parliamentary Joint Committee on Human Rights, *Report 8 of 2017* (15 August 2017) pp. 25-27.

19 See, Parliamentary Joint Committee on Human Rights, *Report 8 of 2017* (15 August 2017) pp. 27-28.

20 See, Parliamentary Joint Committee on Human Rights, *Report 8 of 2017* (15 August 2017) pp. 28-29.

21 See, Parliamentary Joint Committee on Human Rights, *Report 8 of 2017* (15 August 2017) pp. 29-31.

22 Parliamentary Joint Committee on Human Rights, *Report 10 of 2017* (12 September 2017) pp. 35-53.

the national language or widely spoken. The analysis in *Report 10 of 2017* stated that concerns remained, including as to whether the English language requirement was rationally connected to the stated objective of promoting social cohesion; whether there would be adequate government support to bring adults up to the required English level; and the existence of adequate exemptions. The committee therefore concluded that the measure appeared likely to be incompatible with the right to equality and non-discrimination.[23]

- *Requirement that the minister be satisfied that a person 'has integrated into the Australian community' in order for that person to be eligible for citizenship by conferral*: the previous analysis noted that the measure potentially engaged and limited multiple human rights, including the right to equality and non-discrimination and the right to freedom of expression. A particular concern was noted in that there was nothing on the face of the legislation which appeared to limit the minister's discretion in determining the basis on which a person will be considered to have integrated into the Australian community. The proposed provision to exclude merits review of the minister's personal decision to refuse a citizenship application also raised concerns in relation to the right to a fair hearing. Noting the broad scope of the proposed power, the committee concluded that there may be human rights concerns in relation to its operation.[24] However, it was noted that setting out criteria for the exercise of this power by legislative instrument may be capable of addressing some of these concerns.

Committee comment

1.343 The committee refers to its previous consideration of the 2017 bill in its *Report 8 of 2017* and *Report 10 of 2017*.

1.344 Noting the human rights concerns raised in relation to the 2017 bill, the committee draws the human rights implications of the reintroduced measures in the 2018 bill to the attention of the parliament.

23 Parliamentary Joint Committee on Human Rights, *Report 10 of 2017* (12 September 2017) p. 49.

24 Parliamentary Joint Committee on Human Rights, *Report 10 of 2017* (12 September 2017) p. 53.

Migration Legislation Amendment (2017 Measures No. 4) Regulations 2017 [F2017L01425]

Purpose	Sought to introduce a series of amendments to the *Migration Regulations 1994*, including new and expanded visa conditions for most temporary visas, and restrictions on applying for visas for persons whose visa had previously been cancelled
Portfolio	Home Affairs
Authorising legislation	*Migration Act 1958*
Last day to disallow	This regulation was disallowed on 5 December 2017
Rights	Right to liberty; protection of family; freedom of expression and assembly; freedom of movement (see **Appendix 2**)
Status	Advice only

Background

1.345 The Migration Legislation Amendment (2017 Measures 4) Regulations 2017 (the amendment regulations) were disallowed in the Senate on 5 December 2017.

Schedule 1: Outstanding public health debt conditions

1.346 Schedule 1 of the amendment regulations sought to create a new visa condition that the visa holder must not have an 'outstanding public health debt'.[1] Breach of this visa condition would be a ground for considering cancellation of the visa.[2]

Compatibility of the measures with multiple rights

1.347 The introduction of a visa condition that outstanding public health debts must be paid engages and limits a number of human rights, in particular:

- the right to health;
- the right to social security; and
- the right to equality and non-discrimination.

1.348 The right to health is guaranteed by article 12(1) of the International Covenant on Economic, Social and Cultural Rights (ICESCR), and is fundamental to the

1 A public health debt is a debt relating to public health or aged care services that has been reported to the Department of Immigration and Border Protection as outstanding by a Commonwealth, State or Territory health authority under an agreement between the authority and the Department: see the proposed definition in regulation 1.03

2 Statement of Compatibility (SOC), p. 6.

exercise of other human rights. The right to health is understood as the right to enjoy the highest attainable standard of physical and mental health, and requires available, accessible, acceptable and quality health care. In particular, in relation to accessibility, the United Nations (UN) Economic, Social and Cultural Rights Committee has noted:

> health facilities, goods and services must be affordable for all. Payment for health-care services, as well as services related to the underlying determinants of health, has to be based on the principle of equity, ensuring that these services, whether privately or publicly provided, are affordable for all, including socially disadvantaged groups.[3]

1.349 The right to health requires states to ensure the right of access to health facilities, goods and services on a non-discriminatory basis.[4] Similarly, the right to equality and non-discrimination provides that everyone is entitled to enjoy their rights without discrimination of any kind, and that all people are equal before the law and entitled without discrimination to the equal and non-discriminatory protection of the law. The ICCPR defines 'discrimination' as a distinction based on a personal attribute (including nationality and national or social origin), which has either the purpose ('direct' discrimination), or the effect ('indirect' discrimination), of adversely affecting human rights.

1.350 The right to social security includes the right to access benefits to prevent access to health care from being unaffordable. As the UN Economic, Social and Cultural Rights Committee has stated in relation to the right to social security, 'States parties have an obligation to guarantee that health systems are established to provide adequate access to health services for all'.[5] Australia has an obligation in relation to these rights for *all* people in Australia.

1.351 As explained in the statement of compatibility, temporary visa holders generally do not have access to Medicare and so are expected to pay directly for the health care services they receive.[6] The absence of Medicare for temporary visa holders raises issues around the economic accessibility of health care. While the measure does not exclude access to health care services in its terms, in practice it may do so as those who cannot afford such services would be unable to access such

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3 UN Economic, Social and Cultural Rights Committee, *General Comment No. 14: The Right to the Highest Attainable Standard of Health* (2000), [12].

4 UN Economic, Social and Cultural Rights Committee, *General Comment No. 14: The Right to the Highest Attainable Standard of Health* (2000), [12], [18], [43]; see also Article 2(2) of the International Covenant on Economic, Social and Cultural Rights.

5 UN Economic, Social and Cultural Rights Committee, *General Comment No. 19: The Right to Social Security* (2008), [13].

6 SOC, p. 6. The statement of compatibility notes that some temporary visa holders are eligible for Medicare through a Reciprocal Health Care Arrangement (RHCA) and some temporary visa holders are provided with Medicare eligibility (for example, protection visa holders).

health care services. The possibility of visa cancellation where outstanding health debts remain unpaid raises an additional obstacle on individuals being able to access health care, as persons may be deterred from accessing such care because of the significant consequences of being unable to pay. This therefore limits the right to health and the right to social security. Further, while Australia enjoys a degree of discretion in differentiating between nationals and non-nationals, the application of this measure to temporary visa-holders (who by definition will not be citizens of Australia) may also engage Australia's obligations in relation to non-discrimination on the grounds of nationality and national origin.

1.352 Limitations on these rights will be permissible if the measures serve a legitimate objective, are rationally connected to this objective and are a proportionate means of achieving that objective.

1.353 The statement of compatibility explains that the new costs arrangements 'are necessary, reasonable and proportionate to achieve the aim of limiting the financial burden on Australia's public health system, through raising the awareness of temporary visa holders of their liability for health services used in Australia'.[7] However, 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. While the statement of compatibility notes that health care providers 'have noted cases where temporary visa holders incurred debts for treatment which they did not pay, and for which they were unlikely to pay, and where there was limited capacity for the relevant health authority to recover the debt', it provides no information or evidence as to the extent to which this occurs and is a pressing issue. Insofar as the measure aims to raise awareness of visa holders' liability for health services, it is not clear this would be a legitimate objective, as to be capable of justifying a proposed limitation on human rights. This is because a legitimate objective must address a pressing or substantial concern and not simply seek an outcome regarded as desirable or convenient.

1.354 Limitations on human rights must also be rationally connected to, and a proportionate way to achieve, the legitimate objective. The statement of compatibility provides no information or explanation of how the measure is rationally connected to (that is, effective to achieve) the stated objective.

1.355 As to the proportionality of the measure, it is relevant whether there are adequate safeguards in place and whether there are other less rights-restrictive means of achieving the objectives. As to safeguards, the statement of compatibility explains:

> A decision on reporting a debt will ultimately be a matter for the relevant health authority. For example, a relevant health authority may choose not to inform the Department of a health debt where the debt is too small to

7 SOC, p. 9.

> warrant a referral, where the authority is inclined to waive the debt for compelling/compassionate reasons or where an appropriate payment plan is in place. When a debt is resolved, the health authority will notify the Department that this has happened.
>
> In situations where an outstanding public health debt has been reported, the initial action for the Department will be to encourage the visa holder to contact the health facility to which the monies are owed and arrange to pay the debt. Breach of a visa condition is a ground for considering cancelling that visa. However, the preferred outcome is to have the debt repaid prior to the person being granted further visas or cancellation being pursued. On occasions consideration of visa cancellation may be appropriate; however this would be discretionary and due consideration will be given to individual circumstances.[8]

1.356 The statement of compatibility further notes that it 'is intended that cancellation will only be considered in cases where there is a serious breach or repeated breaches suggest[ing] a pattern of adverse behaviour in the area of compliance with visa conditions'.[9] However, these limitations appear to be matters within the discretion of the decision-maker and matters of departmental policy rather than a legal requirement. It appears as a matter of law that the visa cancellation power could be used in less serious cases. Accordingly, such discretionary safeguards may not be sufficient from the perspective of international human rights law.

1.357 It also appears there are a range of other, less rights-restrictive measures that may be available to achieve the stated objective. For example, raising awareness of a person's liability to pay for their health care costs could occur at the time the person applies for the visa through the provision of information. It is not clear from the statement of compatibility whether less rights-restrictive alternatives had been considered, which raises further questions as to the proportionality of the measure.

Schedule 2: Amendments to visa conditions

1.358 Schedule 2 of the amendment regulations sought to introduce a series of amendments to the Migration Regulations 1994 (the migration regulations) relating to visa conditions with which visa holders must comply, namely:

- broadening the wording of condition 8303 in Schedule 8 of the migration regulations so as to make it a condition of a person's visa that the visa-holder must not become involved in 'activities that endanger or threaten any individual'.[10] This proposed condition was in addition to the current requirement that visa holders do not become involved in 'activities

8 SOC, p. 6.

9 SOC, p. 8.

10 Item 112 of Schedule 2 of the amendment regulations.

disruptive to, or violence threatening harm to, the Australian community or a group within the Australian community'.[11] Condition 8303 applies to most temporary visas.

- extending condition 8564 so that it would be a mandatory condition for most temporary visa holders. Condition 8564 requires visa holders not to engage in criminal conduct. At present, the condition only applies on a discretionary basis to Bridging Visa E (BVE).[12]
- introducing new condition 8304 to create a new condition requiring visa holders to identify themselves by the same name in all dealings with Commonwealth, State or Territory government agencies. The condition would have applied mandatorily to most temporary visas.

1.359 Non-compliance with the proposed visa conditions would mean that the visa holder may be considered for visa cancellation under section 116(1)(b) of the *Migration Act 1958* (Migration Act). Under section 116(1)(b), officers have a discretion to determine whether visa cancellation was appropriate.

1.360 Where a person's visa is cancelled on grounds of breach of condition 8303 or 8564, the amendment regulations also sought to introduce amendments to prevent former temporary visa holders whose visas had been cancelled on these 'behaviour-related'[13] grounds from making a BVE application. The effect of this is that persons whose visas were cancelled would not be allowed back into the community on a bridging visa while arrangements were made for those persons to depart, unless the department has assessed that the person does not pose a risk to the community and grants a BVE without the need for the non-citizen to apply.[14]

Compatibility of the measures with the right to liberty

1.361 Article 9 of the International Covenant on Civil and Political Rights (ICCPR), prohibits the arbitrary and unlawful deprivation of liberty. This prohibition against arbitrary detention requires that detention must be lawful, reasonable, necessary and proportionate in all the circumstances and subject to regular review. The concept of 'arbitrariness' extends beyond the apparent 'lawfulness' of detention to

11 See clause 8303 in Schedule 8 of the Migration Regulations 1994.

12 A BVE is a temporary visa that is ordinarily granted to 'unlawful non-citizens' to enable them to lawfully live in the community while their immigration status is finalised or while they make arrangements to leave Australia: Parliamentary Joint Committee on Human Rights, *Second Report of the 44th Parliament* (February 2014) pp. 107-108.

13 'Behaviour related grounds' were defined as grounds where visa applicants had their previous visa cancelled under section 116 of the Migration Act because they had been assessed as a risk to public health, safety or the good order of the community or an individual or because they engaged in criminal conduct.

14 SOC, p. 20.

include elements of injustice, lack of predictability and lack of due process.[15] The right to liberty applies to all forms of deprivations of liberty, including immigration detention, although what is considered arbitrary may vary depending on context.

1.362 Under the Migration Act, the cancellation of the visa of a non-citizen living in Australia results in that person being classified as an unlawful non-citizen, and subject to mandatory immigration detention prior to removal or deportation.[16] A person whose visa is cancelled under section 116(1)(b) of the Migration Act for breaching the proposed visa conditions would be detained and become liable for removal from Australia. In particular, persons who breach the 'behaviour related' conditions in conditions 8303 and 8564 would not be eligible for a bridging visa and so would not be permitted to remain in the community. This includes holders of temporary protection visas and safe haven visas who have been found to engage Australia's non-refoulement obligations.[17] The measure accordingly engages and limits the right to liberty.

1.363 The statement of compatibility acknowledges that the right to liberty is engaged by the introduction of the new visa conditions. However, for each of the proposed new or expanded visa conditions, the statement explains that the limitations on the right to liberty are reasonable, proportionate and necessary.

1.364 For the amendments to condition 8303, the statement of compatibility explains that the purpose of the amendment is 'the protection of the Australian community from behaviour that threatens or endangers an individual'.[18] The statement of compatibility describes the legitimate objective of the expanded application of condition 8564 to be 'the protection of the Australian community from criminal conduct'.[19] For the amendments to visa condition 8304, the statement of compatibility explains that the legitimate objective is 'the protection of the Australian community from identity fraud'.[20] The amendments to the BVE application validity requirements were stated to be for the safety of the Australian community.

1.365 Each of these objectives is capable of being a legitimate objective for the purposes of international human rights law. However, the statement of compatibility provides limited information about the importance of these objectives in the context of the particular measures. In order to show that the measures are in furtherance of a legitimate objective for the purposes of international human rights law, a reasoned

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15 Human Rights Committee, *General Comment 35: Liberty and security of person* (2014), [11]-[12]

16 See sections 189 and 198 of the *Migration Act 1958* (Cth).

17 Statement of Compatibility (SOC), p. 14.

18 SOC, pp. 13-14.

19 SOC, p. 16.

20 SOC, p. 19.

and evidence-based explanation of why the measure addresses a substantial and pressing concern is required. This may include, for example, information or evidence that demonstrates that introducing a requirement that visa holders do not become involved in activities that endanger or threaten individuals is a pressing or substantial concern. The statement of compatibility also provides limited information as to whether the limitations imposed by the measures are rationally connected to (that is, effective to achieve) the stated objectives.

1.366 There are also concerns in relation to the proportionality of each of the measures. In relation to condition 8303, the statement of compatibility explains that the amendment would empower the minister to cancel a person's visa in a broad range of circumstances:

> …where they [(visa holders)] engage in adverse behaviour against individuals within the community, such as where there is objective evidence of harassment, stalking, intimidation, bullying, or otherwise threatening an individual, but which may not necessarily be subject to criminal sanctions. These activities may include public 'hate speech' or online vilification targeted at both groups and individuals based on gender, sexuality, religion and ethnicity. Evidence provided by law enforcement agencies of conspiracy to cause harm or incite violence against an individual can also be considered under condition 8303.[21]

1.367 While the statement of compatibility explains that the minister or officers determining whether a visa should be cancelled for breaching condition 8303 may exercise discretion taking 'account of all of the circumstances of the applicant and consider[ing] each case on its own merits',[22] it remains the case that the visa condition requiring persons not to be involved in 'activities that endanger or threaten any individual' is very broad. It includes, for example, conduct that falls short of criminal conduct.[23] It would appear to be broad enough to allow the minister or departmental officer the discretion to cancel a visa (and consequently detain a person) in circumstances where the conduct is not unlawful but is merely disruptive or undesirable. This raises serious concerns that the measure may not have been sufficiently circumscribed to achieve the stated objective of the measure.

1.368 Similarly in relation to the expanded application of condition 8564 to most temporary visas, no information is provided in the statement of compatibility as to the meaning of 'criminal conduct'. The statement of compatibility explains that this condition 'will capture criminal conduct that is not captured by section 501 or

21 SOC, p. 12.

22 SOC, p. 12.

23 SOC, p. 12.

paragraph 116(1(e)'.[24] This therefore would appear to include within its scope potentially minor criminal conduct, and conduct which has not necessarily been the subject of a criminal conviction in a court of law. This similarly raises concerns as to the proportionality of the measure.

1.369 In relation to new condition 8304, the statement of compatibility explains that the introduction of this condition is 'in response to heightened risks when a person is able to deal with different government agencies under different names preventing law enforcement agencies from sharing important information and protecting Australia's national security'.[25] While the statement of compatibility states that the cancellation power for breaching this condition will be enlivened 'where there is evidence of intentional use of more than one identity concurrently in order to gain an advantage or deceive',[26] it does not appear that this is an express requirement in either proposed condition 8304 or section 116(1)(b) of the Migration Act. It is not clear whether this condition could potentially cover minor discrepancies (such as incorrect spelling of names on a person's Medicare card) and also whether it sufficiently accommodates visa holders whose identity documents from their home country have been spelled incorrectly or inconsistently, or are incorrectly translated. This raises concerns as to whether there are less rights-restrictive measures available and whether the measure is sufficiently circumscribed.

1.370 The new visa conditions, and the consequence of detention following visa cancellation for breach of those conditions, is of particular concern in relation to visa holders who have been found to engage Australia's non-refoulement obligations, as it gives rise to the prospect of prolonged or indefinite detention. The statement of compatibility explains that Australia will not remove a person where it would be inconsistent with Australia's non-refoulement obligations (the consequence of which may be prolonged or indefinite detention), however it further states that the 'determining factor' in determining whether detention is arbitrary is 'not the length of detention, but whether the grounds for detention are justifiable'.[27] The statement of compatibility further explains non-refoulement obligations are considered as part of the discretion to cancel a visa under section 116. However, while the United Nations Human Rights Committee has accepted that detention for the control of

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24 Section 116(1)(e) allows the Minister to cancel a visa if satisfied that '(e) the presence of its holder in Australia is or may be, or would or might be, a risk to: (i) the health, safety or good order of the Australian community or a segment of the Australian community; or (ii) the health or safety of an individual or individuals'. Section 501 sets out circumstances in which the minister or their delegate may cancel a visa on character grounds, including where a person has a substantial criminal record.

25 SOC, p. 18.

26 SOC, p. 18.

27 SOC, p. 14.

immigration is not arbitrary *per se*,[28] it has consistently considered that Australia's application of mandatory immigration detention (including the possibility of prolonged or indefinite detention) and the impossibility of challenging such detention is contrary to Article 9(1) of the ICCPR.[29] Further, the UN Human Rights Council's Working Group on Arbitrary Detention has recently stated that the detention of asylum seekers, immigrants or refugees must never be unlimited or of excessive length, and a maximum period should be provided by law.[30]

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

1.371 The right to protection of the family includes ensuring that family members are not involuntarily and unreasonably separated from one another. This right may be engaged where a person is expelled from a country without due process and is thereby separated from their family.[31] While there is significant scope for states parties to enforce their immigration policies and to require departure of unlawfully present persons, where a family has been in the country for a significant duration of time additional factors justifying the separation of families going beyond a simple enforcement of immigration law must be demonstrated in order to avoid a characterisation of arbitrariness or unreasonableness.[32] The measure engages and limits the right to protection of the family as visa cancellation for breaching the proposed visa conditions could operate to separate family members.[33]

1.372 Limitations on the right to protection of the family are permissible where the limitations pursue a legitimate objective, and are rationally connected and proportionate to that objective. As noted earlier, while the stated objectives of the proposed new or expanded visa conditions are capable of being legitimate objectives for the purposes of international human rights law, insufficient information was provided to determine the importance of the objectives in the specific context of the

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28 See, recently, Human Rights Council Working Group on Arbitrary Detention, *Opinions adopted by the Working Group on Arbitrary Detention at its seventy-ninth session: Opinion No.42/2017* (22 September 2017), [30].

29 See, for example, *C v Australia* (900/1999) Human Rights Committee, 13 November 2002, [8.2]; *Bakhtiyari et al. v. Australia* (1069/2002) Human Rights Committee, 6 November 2003, [9.3]; *D and E v. Australia* (1050/2002) Human Rights Committee, 9 August 2006, [7.2]; *Shafiq v. Australia* (1324/2004) Human Rights Committee, 13 November 2006, [7.3]; *Shams et al. v. Australia,* (1255/2004) Human Rights Committee, 11 September 2007, [7.2]; *F.J. et al. v. Australia* (2233/2013) Human Rights Committee, 2 May 2016, [10.4].

30 See Human Rights Council Working Group on Arbitrary Detention, *Opinions adopted by the Working Group on Arbitrary Detention at its eightieth session: Opinion No.71/2017,* A/HRC/WGAD/2017/71 (21 December 2017), [3], [49].

31 *Leghaei v Australia* (1937/2010) Human Rights Committee, 26 March 2015.

32 *Winata v Australia* (9030/2000) Human Rights Committee, 26 July 2001, [7.3].

33 See *Leghaei v Australia* (1937/2010) Human Rights Committee, 26 March 2015; *Winata v Australia* (9030/2000) Human Rights Committee, 26 July 2001.

measures. Similarly, there is limited information in the statement of compatibility as to the rational connection between the stated objectives and the measures.

1.373 As to proportionality, the statement of compatibility explains that any separation of family members in Australia by a person being removed as a result of breaching their visa conditions will not be inconsistent with the right to protection of the family, as 'the decision to cancel will appropriately weigh the impact of separation from family from the best interests of any children against the non-citizen's risk to the community by engaging in this prohibited conduct'.[34] However, no information is provided in the statement of compatibility as to whether such factors are weighed or balanced as a matter of policy rather than as a legal requirement. This raises concerns as to whether there are sufficient safeguards to protect against arbitrary interference with family life.

Compatibility of the measure with the freedom of assembly and freedom of expression

1.374 The right to freedom of opinion and expression is protected by article 19 of the ICCPR. The right to freedom of opinion is the right to hold opinions without interference, and cannot be subject to any exception or restriction. The right to freedom of expression extends to the communication of information or ideas through any medium, including written and oral communications, the media, public protest, broadcasting, artistic works and commercial advertising. The right to freedom of assembly is guaranteed by article 21 of the ICCPR. The right protects the right of individuals and groups to meet and engage in peaceful protest and other forms of collective activity in public.

1.375 Freedom of assembly and freedom of expression may be subject to permissible limitations that are necessary to protect the rights or reputations of others, national security, public order (*ordre public*), or public health or morals. Limitations must be prescribed by law, pursue a legitimate objective, be rationally connected to the achievement of that objective and a proportionate means of doing so.

1.376 The statement of compatibility does not address whether the rights to freedom of assembly and expression are engaged or limited by the measures. However, it appears that amended condition 8303 could engage and limit these rights insofar as it allows a person's visa to be cancelled where their conduct is threatening to an individual. As noted earlier in the context of the right to liberty, the scope of the new condition is not clear. It would appear to apply to conduct falling short of criminal conduct, and appears broad enough to apply to exercises of the freedom of expression and assembly, such as a campaign of civil disobedience or acts of political protest within an immigration detention facility that is deemed by an official or the minister to be threatening. This raises concerns as to whether the

34 SOC, pp. 15, 17, and 20.

limitation on these rights pursues a legitimate objective, is rationally connected to the objective and is proportionate. It would have been useful if such matters were addressed in the statement of compatibility.

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

1.377 Australia has non-refoulement obligations under the Refugee Convention, the ICCPR and the Convention Against Torture (CAT). 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.[35] 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 giving effect to non-refoulement obligations. Non-refoulement obligations are absolute and may not be subject to any limitations.

1.378 As noted earlier, the statement of compatibility notes that the amended visa conditions will apply to holders of temporary visa holders and safe haven enterprise visa holders who have been found to engage Australia's non-refoulement obligations. The statement of compatibility further states, however, that 'Australia takes its international obligations seriously, and will not remove a person where it would be inconsistent with Australia's non-refoulement obligations'.[36]

1.379 However, section 198 of the Migration Act requires an immigration officer to remove an unlawful non-citizen (which, as noted earlier, includes persons whose visas have been cancelled) in a number of circumstances as soon as reasonably practicable. Section 197C of the Migration Act also provides that, for the purposes of exercising removal powers under section 198, it is irrelevant whether Australia has non-refoulement obligations in respect of an unlawful non-citizen. There is thus no statutory protection ensuring that an unlawful non-citizen to whom Australia owes protection obligations will not be removed from Australia, nor is there any statutory provision granting access to effective and impartial review of the decision as to whether removal is consistent with Australia's non-refoulement obligations. As stated in previous human rights assessments by the committee, ministerial discretion not to remove a person is not a sufficient safeguard under international law.[37] This therefore raises serious concerns that the expansion of the conditions with which visa holders must comply (the breach of which may result in visa cancellation and deportation), in the absence of any statutory protections to prevent

35 See, Committee against Torture, *General Comment No.4 (2017) on the implementation of article 3 in the context of article 22* (9 February 2018).

36 SOC, p. 14.

37 See, for example, Parliamentary Joint Committee on Human Rights, *Fourteenth Report of the 44th Parliament* (October 2014) 76-77; *Report 11 of 2017* (17 October 2017) pp. 108-111.

the removal of persons to whom Australia owes non-refoulement obligations, may be incompatible with the obligation of non-refoulement in conjunction with the right to an effective remedy.

Compatibility of the measure with the right to freedom of movement

1.380 The right to freedom of movement is protected under article 12 of the ICCPR and includes a right to leave Australia as well as the right to enter, remain, or return to one's 'own country'. 'Own country' is a concept which encompasses not only a country where a person has citizenship but also one where a person has strong ties, such as long standing residence, close personal and family ties and intention to remain, as well as the absence of such ties elsewhere.[38]

1.381 The statement of compatibility does not acknowledge that the right to enter one's own country is engaged and limited. While the amended or expanded visa conditions apply to temporary visa holders, it is possible that the right to freedom of movement is engaged by this measure, as the visa cancellation and subsequent deportation may apply to a person who, despite not holding formal citizenship, has strong ties to Australia such that Australia can be considered their 'own country'. This may apply, for example, to holders of temporary protection visas whose protection claims have not been determined for many years, during which time they may have established close personal and family ties.

1.382 As noted earlier, there are concerns in relation to whether the limitations pursue a legitimate objective, are rationally connected to the objective and are proportionate. It would have been useful if such matters were addressed in the statement of compatibility. In particular, it would have been useful for the statement of compatibility to explain whether there are any safeguards in place applicable to individuals for whom Australia is their 'own country', such as ensuring their visa is only cancelled as a last resort where other mechanisms to protect the safety of the Australian community are unavailable.

Schedule 2: Changes to Public Interest Criterion 4020

1.383 The amendment regulations had also proposed to broaden the visa refusal powers on the grounds of fraud under Public Interest Criterion (PIC) 4020 to allow consideration of any previous cases of fraud in the 10 years prior to the current visa application (rather than the current requirement of 12 months) and also of instances of fraud in previous visa applications made (in addition to the current provision that limits consideration to fraud in respect of visas currently held).

38 UN Human Rights Committee, *General Comment No.27: Article 12 (Freedom of Movement)* (1999). See also *Nystrom v Australia* (1557/2007), UN Human Rights Committee, 1 September 2011.

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

1.384 As noted above, the right to protection of the family includes ensuring that family members are not involuntarily and unreasonably separated from one another. The measure engages and limits the right to protection of the family as persons who have engaged in fraud will be excluded from further visa applications for 10 years, and therefore unable to return to Australia, which may involve the separation of families.[39]

1.385 The statement of compatibility states the extended period of 10 years is necessary to protect the integrity of the visa framework:

> There is a risk that where a visa applicant has provided fraudulent documents in visa applications, they will also give incorrect, bogus or fraudulent information to other government agencies, such as social security and tax. It is the Department's view that a lesser time exclusion would not be as effective in achieving this goal given the current trend for applicants to actively 'wait out' the exclusion period and immediately re-apply.[40]

1.386 Protecting the integrity of the visa framework is likely to be a legitimate objective for the purposes of international human rights law. Expanding the period in which previous cases of fraud can be considered from 12 months to 10 years is likely to be rationally connected to this objective.

1.387 As to proportionality, the statement of compatibility explains that any separation of family members as a result of the changes to PIC 4020 will not be inconsistent with the right to protection of the family, as application of PIC 4020 'will take into account any mitigating or compelling circumstances and weigh these against the need to protect the integrity of the migration programme'.[41] In this respect the statement of compatibility explains that under policy guidance, flexibility is applied when officers assess a visa applicant against PIC 4020. The circumstances the officers will take into account include:

- whether the incorrect information was more than a typographical error, or the person did not realise the documents provided were not genuine;
- whether the omission was the result of the applicant being ignorant to its relevance;

39 See *Leghaei v Australia* (1937/2010) Human Rights Committee, 26 March 2015; *Winata v Australia* (9030/2000) Human Rights Committee, 26 July 2001.

40 SOC, p. 23.

41 SOC, p. 24.

- whether the information was also 'false or misleading' at the time it is given.[42]

1.388 The statement of compatibility further explains that policy guidance states that applicants who accidentally provide false or incorrect information will not be subject to refusal (including typographical errors, misunderstanding the requirements of the visa application form, or the provision of the wrong documents).[43] Delegates also have a discretion to waive the requirements of PIC 4020 where the existing circumstances of the individual have changed to the extent where the person should be given a visa, such as in compelling and compassionate circumstances (including where the person is unfit to travel, death or serious illness in the family, or natural disaster or civil unrest in the applicant's home country).[44]

1.389 While these safeguards in the form of policy guidance may be capable of addressing some concerns, policy guidance is less stringent than the protection of statutory processes as the safeguards within that policy guidance can be removed, revoked or amended at any time and are not required as a matter of law. Additionally, decision-making by a delegate as to whether fraud has occurred pursuant to PIC 4020 falls short of the ordinary manner in which fraud or misrepresentation is determined to have occurred, that is, through adjudication by a court. This raises concerns as to whether the safeguards provided in the policy guidance are sufficient, and whether the interference on the right to protection of the family is proportionate.

Committee comment

1.390 The committee notes that the Migration Legislation Amendment (2017 Measures No. 4) Regulations 2017 were disallowed on 5 December 2017.

1.391 The committee draws the human rights implications of the Migration Legislation Amendment (2017 Measures No. 4) Regulations 2017 to the attention of the minister and parliament.

42 SOC, pp. 23-24.

43 SOC, p. 24.

44 SOC, p. 24.

Migration Regulations (IMMI 17/129: Specification of Regional Areas for a Safe Haven Enterprise Visa) Instrument 2017 [F2017L01607]

Purpose	Specifies postcodes within Australia that are taken to be 'regional areas' for the purposes of the Migration Regulations 1994
Portfolio	Home Affairs
Authorising legislation	Migration Regulations 1994
Last day to disallow	Exempt from Disallowance[1]
Rights	Multiple Rights (see **Appendix 2**)
Status	Advice only

Specification of postcodes within Australia for Safe Haven Enterprise visas

1.392 The Migration Regulations (IMMI 17/129: Specification of Regional Areas for a Safe Haven Enterprise Visa) Instrument 2017 (the instrument) specifies postcodes within Australia which are taken to be a 'regional area' for the purpose of the provisions of the Migration Regulations 1994 (the migration regulations) relating to Safe Haven Enterprise Visas (SHEV). Applicants for a SHEV must include in their application an indication that the applicant or a member of the applicant's family unit intends to study or work while accessing minimum social security benefits in a regional area.

Compatibility of the measure with multiple rights

Previous committee consideration of Safe Haven Enterprise Visas

1.393 Safe haven enterprise visas (SHEVs) were created by the *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014* (RALC Act). SHEVs are a form of temporary protection visa that may be granted to persons who are found to be owed protection obligations and who indicate an intention to work or study in regional areas in Australia. The visas are granted for a period of five years.

1 Under section 5 of the *Human Rights (Parliamentary Scrutiny) Act 2011*, the determinations are not required to be accompanied by statements of compatibility because they are 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.

1.394 The committee has previously reported on the human rights compatibility of temporary protection visas (TPVs) and SHEVs.[2] The committee has previously considered that SHEVs, as a form of temporary protection visa, may engage multiple human rights, in particular Australia's non-refoulement obligations and the right to freedom of movement.[3]

Non-refoulement

1.395 Australia's non-refoulement obligations mean 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. The committee has previously considered that the absence of procedural and substantive safeguards to protect against the refoulement of holders of TPVs and SHEVs may be incompatible with Australia's non-refoulement obligations.[4]

Right to freedom of movement

1.396 Article 12 of the ICCPR protects freedom of movement and relevantly includes the right to move freely within a country for those who are lawfully within the country, the right to leave any country and the right to enter one's own country. The right may be restricted in certain circumstances.

1.397 The right to leave a country encompasses both the legal right and practical ability to leave a country. It applies not just to departure for permanent emigration but also for the purpose of travelling abroad; and applies to every person lawfully within Australia, including those who have been recognised as refugees. States are therefore required to provide necessary travel documents to ensure this right can be realised.[5]

1.398 People who hold a SHEV, or whose last substantive visa was a SHEV, are barred from making a valid application for a Bridging Visa B (a category of visa which

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2 See Parliamentary Joint Committee on Human Rights, *Fourteenth Report of the 44th Parliament* (28 October 2014) pp. 70-92; *Twenty-fourth Report of the 44th Parliament* (23 June 2015) pp. 20-24; *Thirty-Sixth Report of the 44th Parliament* (16 March 2016) pp. 19-25, pp. 149-194; *Report 7 of 2016* (11 October 2016) pp. 108-112.

3 Parliamentary Joint Committee on Human Rights, *Thirty-Sixth Report of the 44th Parliament* (16 March 2016) pp. 19-25, pp. 149-194. See also *Fourteenth Report of the 44th Parliament* (28 October 2014) pp. 80-85. The committee also raised concerns in relation to TPVs more broadly in relation to the right to health, the right to protection of the family and the rights of the child.

4 See Parliamentary Joint Committee on Human Rights, *Thirty-Sixth Report of the 44th Parliament* (16 March 2016) pp. 163-167 in relation to TPVs and Parliamentary Joint Committee on Human Rights, *Report 7 of 2016* (11 October 2016) 109 in relation to SHEVs.

5 See UN Human Rights Committee, *General Comment 27: Freedom of movement* (1999) [8]-[10].

allows overseas travel). As the SHEV class visa has a more restricted travel facility than the Bridging Visa B class, the committee has previously noted that prohibiting SHEV holders from applying for a Bridging Visa B engages and limits the right to freedom of movement.[6] The committee concluded that a person who has been recognised as one to whom Australia owes protection obligations, but does not have the necessary travel documents to allow them to travel (and return to Australia at the conclusion of their travel), is not able to practically realise their right to leave the country. The committee therefore previously concluded that the introduction of SHEVs engages and limits the right to freedom of movement for SHEV holders; and that the minster had not provided sufficient justification so as to enable a conclusion that the regulation is compatible with this right.[7]

1.399 In the present instrument, specifying the postcodes in which persons who are SHEV holders may study or work also engages and limits the right of persons lawfully within the territory to have liberty of movement and freedom to choose their own residence. The United Nations (UN) Human Rights Committee has stated that an alien who entered the country illegally, but whose status has been regularised, should be considered to be lawfully within the territory for the purposes of the right to freedom of movement.[8] This means that, once a person is lawfully within a country, any limitation on a person's freedom of movement has to be justified by article 12(3) of the ICCPR, which provides that freedom of movement shall not be subject to any restrictions except those which are provided by law, and are necessary to protect national security, public health or morals or the rights and freedoms of others.[9]

1.400 While noting that a statement of compatibility was not required to be tabled with this instrument,[10] the committee's legislative terms of reference require it to provide an assessment as to the compatibility of the instrument with human rights.[11] Where a legislative instrument engages human rights it is good practice for an assessment to be provided as to human rights compatibility.[12] In the absence of

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6 See Parliamentary Joint Committee on Human Rights, *Report 7 of 2016* (11 October 2016) pp. 108-110.

7 See Parliamentary Joint Committee on Human Rights, *Report 7 of 2016* (11 October 2016) pp. 108-111.

8 UN Human Rights Committee, *General Comment 27: Freedom of movement* (1999) [4].

9 See UN Human Rights Committee, *General Comment 27: Freedom of movement* (1999) [4].

10 See section 5 of the *Human Rights (Parliamentary Scrutiny) Act 2011.*

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

12 As per the committee's *Guidance Note 1: Drafting statements of compatibility*: 'the committee considers statements of compatibility as essential to the examination of human rights in the legislative process', p. 3.

further information, it is not possible to conclude that the limitation on the right to freedom of movement is justifiable.

Committee comment

1.401 It is not possible to conclude that the proposed amendments to the safe haven enterprise visas introduced by the instrument are compatible with human rights.

1.402 The committee draws the human rights implications of the instrument to the attention of the parliament.

Social Services Legislation Amendment (Drug Testing Trial) Bill 2018

Purpose	Seeks to introduce a two year mandatory drug testing trial for 5000 recipients of Newstart Allowance and Youth Allowance
Portfolio	Social Services
Introduced	House of Representatives, 28 February 2018
Rights	Social security; adequate standard of living; equality and non-discrimination; privacy (see **Appendix 2**)
Status	Advice only

Background

1.403 The committee previously examined the human rights compatibility of a mandatory drug testing trial for new recipients of Newstart Allowance and Youth Allowance (proposed drug testing trial) in its *Report 8 of 2017* and *Report 11 of 2017.* This measure was previously included as Schedule 12 to the Social Services Legislation Amendment (Welfare Reform) Bill 2017 (Welfare Reform Bill).[1] However, the Welfare Reform Bill was subsequently amended to remove Schedule 12.

1.404 The Social Services Legislation Amendment (Drug Testing Trial) Bill 2018 (the Drug Testing Trial Bill) is substantially the same as Schedule 12 of the Welfare Reform Bill. Accordingly, the committee's previous assessment is summarised below.

Summary of the measures in the Drug Testing Trial Bill

1.405 The Drug Testing Trial Bill seeks to make a number of amendments to the *Social Security Act 1991* (Social Security Act), the *Social Security (Administration) Act 1999* and consequential amendments to other Acts that were contained in Schedule 12 to the Welfare Reform Bill. As with the Welfare Reform Bill, the Drug Testing Trial bill seeks to establish a mandatory drug testing trial involving 5,000 new recipients of Newstart Allowance and Youth Allowance. The Drug Testing Bill specifies that the regions to be the subject of the trial are Canterbury-Bankstown (New South Wales) Logan (Queensland) and Mandurah (Western Australia). If they reside in a trial site, all people making a claim for Newstart Allowance or Youth Allowance after the commencement of the Drug Testing Trial Bill would be asked to acknowledge on their claim form that they may be required to undergo a drug test as a condition of payment.

1 Parliamentary Joint Committee on Human Rights, *Report 8 of 2017* (15 August 2017) pp. 46-77; *Report 11 of 2017* (17 October 2017) pp. 138-203.

1.406 Recipients who test positive will then be subject to income management (including the use of a cashless welfare card) for 24 months and be subject to further random tests. If a recipient tests positive to a subsequent test, they will be required to repay the cost of these tests through reduction in their fortnightly social security payment. This may be varied due to hardship. Recipients who test positive to more than one test during the 24 month period will be referred to a contracted medical professional for assessment.[2] If the medical professional recommends treatment, the recipient will be required to complete certain treatment activities, such as counselling, rehabilitation and/or ongoing drug testing, as part of their employment pathway plan.[3]

1.407 Recipients who do not comply with their employment pathway plan, including drug treatment activities, would be subject to a participation payment compliance framework, which may involve the withholding of payments. Recipients would not be exempted from this framework if the reason for their non-compliance is wholly or substantially attributable to drug or alcohol use.[4]

1.408 Recipients who refuse to take the test will have their payment cancelled on the day they refuse, unless they have a reasonable excuse. If they reapply, payment will not be payable for 4 weeks from the date of cancellation and they will still be required to undergo random mandatory drug testing.

Compatibility of the measure with human rights

1.409 The committee examined this reintroduced measure in its previous assessment of the proposed drug testing trial in *Report 8 of 2017* and *Report 11 of 2017*. The previous human rights analysis stated that the proposed drug testing trial would engage and limit a number of human rights, in particular the right to privacy, the right to social security and right to an adequate standard of living, and the right to equality and non-discrimination.

1.410 As to the right to social security and the right to an adequate standard of living, the previous analysis noted that the measure engaged these rights in three ways. First, the measure may result in a reduction in social security payments to cover the costs of positive drug tests, or penalise a person for failing to fulfil their mutual obligation requirements. Secondly, the risk of the result of the test being disclosed to law enforcement, immigration or other welfare authorities may cause people to avoid applying for necessary welfare payments, causing destitution. Thirdly, the measure may impermissibly discriminate against those with substance addictions which rise to the level of disability. The previous human rights analysis stated that the measure was likely to be incompatible with the right to social security

2 See Explanatory Memorandum (EM) p. 5.

3 See EM, p. 5.

4 This aspect of the measure is subject to the passage of the Welfare Reform Bill.

and adequate standard of living as it appeared the measure was unlikely to be proportionate to the legitimate objective of the measure.[5] These same concerns apply equally to the reintroduced measures.

1.411 As to the right to privacy, the previous human rights analysis noted that the bill engaged and limited the right to privacy in several respects. First, drug testing is an invasive procedure and so may violate a person's legitimate expectation of privacy. Secondly, the measure requires the divulging of private medical information to a firm contracted to conduct the drug testing. Thirdly, the use of a card in purchasing essential goods after a person's welfare benefit is quarantined will disclose that a person receives quarantined social security payments. The previous human rights analysis stated that the bill appeared to provide adequate safeguards with respect to the retention and disclosure of drug test results, which were to be set out in proposed Social Security (Drug Test Rules) in the event the bill was passed.[6] However, overall with respect to the use of personal information and the issues of bodily integrity, noting that limitations on this right must be no more extensive than what is strictly necessary to achieve the legitimate objective of the measure, the previous human rights analysis concluded that the measure was likely to be incompatible with the right to privacy. While the measure was considered to be aimed at a legitimate objective, there appeared to be other, less rights restrictive ways to achieve this objective.[7]

1.412 It is noted that the Drug Testing Trial Bill additionally provides that the Secretary of the Department of Social Services must determine that a person is not to be subject to income management if the Secretary is satisfied that being subject to the regime would pose a serious risk to the person's mental, physical or emotional wellbeing.[8] This is a change from the measure as it was initially introduced in the Welfare Reform Bill. At the time the committee undertook its initial analysis of the Welfare Reform Bill, this was a matter of discretion for the Secretary.[9] However, the minister had foreshadowed these amendments in his response to the Welfare Reform Bill, and the human rights analysis considered that the amended provision,

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5 Parliamentary Joint Committee on Human Rights, *Report 11 of 2017* (17 October 2017) pp. 160-167

6 It is noted that the EM to the Drug Trial Testing Bill includes the discussion of the privacy implications of the bill that was included in the Minister's response to the committee in relation to Schedule 12 of the Welfare Reform Bill: see page 11 of the EM. As noted, this information allowed the committee to conclude that some aspects of the bill relating to the retention and disclosure of drug test results were accompanied by adequate safeguards.

7 See Parliamentary Joint Committee on Human Rights, *Report 11 of 2017* (17 October 2017) pp. 152-160.

8 See proposed section 123UFAA(1C).

9 See Parliamentary Joint Committee on Human Rights, *Report 8 of 2017* (15 August 2017) pp. 46-77.

while alleviating some of the concerns as to the proportionality of the interference with the right to privacy, still raised human rights concerns.[10] This is because the provisions appear to operate inflexibly, raising the risk that the regime will be applied to people who do not need assistance in managing their budget.[11] These concerns remain in the Drug Testing Trial Bill. This is particularly the case in light of the fact that, although the Secretary must determine that a person is not to be subject to income management if the Secretary is satisfied that being subject to the regime would pose a serious risk to the person's mental, physical or emotional wellbeing,[12] the Secretary is not required, when determining whether someone should be subject to income management, to 'inquire into whether the person being subject to the income management regime…poses a serious risk to the person's mental, physical or emotional wellbeing'.[13]

1.413 Finally, as to the right to equality and non-discrimination, the previous human rights analysis noted that the measure may disproportionately affect those with drug and alcohol dependencies[14] and Indigenous people. The previous human rights analysis stated that the measure was likely to be incompatible with the right to equality and non-discrimination, noting the measure appeared likely to have a disproportionate negative impact on particular groups and that it appeared the measure was unlikely to be the least rights-restrictive measure.[15] It is noted that the statement of compatibility to the Drug Testing Trial Bill states (in contrast to the Welfare Reform Bill) that individuals will be selected for drug testing at random.[16] However, it goes on to state, in relation to Australia's obligations under the Convention on the Elimination of all forms of Racial Discrimination and the Convention on the Rights of Persons with a Disability that 'it is intended that recipients will be selected for testing on the basis of their risk factors for having drug misuse issues'.[17] It is therefore not clear whether the selection process for the drug

10 Parliamentary Joint Committee on Human Rights, *Report 11 of 2017* (17 October 2017) pp. 156-157.

11 Parliamentary Joint Committee on Human Rights, *Report 11 of 2017* (17 October 2017) pp. 156-157.

12 See proposed section 123UFAA(1C).

13 See proposed section 123UFAA(1D).

14 Where a person's drug use rises to that of dependence or addiction, the person has a disability which is not only considered an 'other status' for the purpose of the International Covenant on Civil and Political Rights but is also protected from discrimination under the Convention on the Rights of Persons with Disabilities: see Parliamentary Joint Committee on Human Rights, *Report 11 of 2017* (17 October 2017) p. 167.

15 Parliamentary Joint Committee on Human Rights, *Report 11 of 2017* (17 October 2017) pp. 167-169.

16 Statement of Compatibility to the Drug Testing Trial Bill, p. 6.

17 Statement of Compatibility to the Drug Testing Trial Bill, p. 7.

testing trial within the trial area will be entirely random.[18] In any event, concerns remain as to the disproportionate negative impact on those with drug and alcohol dependencies and Indigenous people. It also remains the case that the minister has not explained how income management and, in certain circumstances, reducing payments of persons who fail to undertake treatment activities would be an effective or proportionate means of ensuring job seekers get the support they need to address drug dependency issues.

Committee comment

1.414 The committee refers to its previous consideration of the proposed mandatory drug testing trial for new recipients of Newstart Allowance and Youth Allowance in its *Report 8 of 2017* and *Report 11 of 2017*. The previous human rights assessment of the measure concluded that the proposed mandatory drug testing trial was likely to be incompatible with the right to privacy, the right to social security and right to an adequate standard of living, and the right to equality and non-discrimination.

1.415 Noting the human rights concerns raised in relation to the proposed mandatory drug testing trial in the Welfare Reform Bill, the committee draws the human rights implications of the reintroduced measures in the Drug Testing Trial Bill to the attention of the parliament.

18 This was an issue raised by the committee in *Report 11 of 2017* (17 October 2017) p. 168.

Telecommunications (Interception and Access) Regulations 2017 [F2017L01701]

Purpose	Remakes and repeals the Telecommunications (Interception and Access) Regulations 1987 to prescribe the forms in relation to issuing warrants and authorisations under the *Telecommunications (Interception and Access) Act 1979* and prescribe the role of a Public Interest Advocate
Portfolio	Attorney-General
Authorising legislation	*Telecommunications (Interception and Access) Act 1979*
Last day to disallow	Currently, 8 May 2018 (Senate)
Rights	Privacy; freedom of expression; effective remedy; fair hearing (see **Appendix 2**)
Status	Advice only

Background

1.416 The committee has considered proposed amendments to the *Telecommunications (Interception and Access) Act 1979* (TIA Act) on a number of previous occasions.[1]

1.417 As the TIA Act was legislated prior to the establishment of the committee, the scheme has never been required to be subject to a foundational human rights compatibility assessment in accordance with the terms of the *Human Rights*

1 Parliamentary Joint Committee on Human Rights, Law Enforcement Integrity Legislation Amendment Bill 2012, *Fifth Report of 2012* (October 2012) pp. 12-21; Telecommunications (Interception and Access) Amendment (Data Retention) Bill 2014, *Fifteenth Report of the 44th Parliament* (14 November 2014) pp. 10-22; *Twentieth report of the 44th Parliament* (18 March 2015) pp. 39-74; and *Thirtieth report of the 44th Parliament* (10 November 2015) pp. 133-139; the Counter-Terrorism Legislation Amendment Bill (No. 1) 2015, *Thirty-second report of the 44th Parliament* (1 December 2015) pp. 3-37 and *Thirty-sixth report of the 44th Parliament* (16 March 2016) pp. 85-136; the Law Enforcement Legislation Amendment (State Bodies and Other Measures) Bill 2016, *Report 9 of 2016* (22 November 2016) pp. 2-8 and *Report 1 of 2017* (16 February 2017) pp. 35-44; the Telecommunications (Interception and Access – Law Enforcement Conduct Commission of New South Wales) Declaration 2017 [F2017L00533], *Report 7 of 2017* (8 August 2017) pp. 30-33; the Investigation and Prosecution Measures Bill 2017, Report 12 of 2017 (28 November 2017) pp. 84-88; and the National Security Legislation Amendment (Espionage and Foreign Interference) Bill 2017, *Report 2 of 2018* (13 February 2018) pp. 2-36.

(Parliamentary Scrutiny) Act 2011. As the committee has previously noted,[2] it is difficult to assess the human rights compatibility of measures which extend, amend or operationalise the TIA Act without the benefit of a foundational human rights assessment.

1.418 The Telecommunications (Interception and Access) Regulations 2017 [F2017L01701] (the regulations) repeal and remake the Telecommunications (Interception and Access) Regulations 1987 (1987 regulations), which are due to sunset. The explanatory statement explains that the regulations remake the 1987 regulations 'in substantially the same form, with minor modifications to ensure the regulations remain fit for purpose'.[3] The regulations prescribe matters including the forms in relation to issuing warrants and authorisations under the TIA Act and the role of the Public Interest Advocate (PIA) in the journalist information warrant process.

Warrants authorising agencies to intercept and access communications and telecommunications data

1.419 The TIA Act provides a legislative framework that criminalises the interception and accessing of telecommunications. However, the Act sets out exceptions that enable defined or declared agencies to apply for access to communications[4] and telecommunications data.[5]

1.420 Chapters 2 and 3 of the TIA Act provide for warranted access by an agency to the content of communications, including both communications passing across telecommunications services[6] and stored communications content. Chapter 4 of the TIA Act provides for warrantless access to telecommunications data (metadata) by a defined or declared 'interception agency'.

1.421 However, access to telecommunications data relating to a journalist or their employer where the purpose is to identify a journalist's source is prohibited unless a warrant has been obtained (a 'journalist information warrant').[7]

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2 See, for example, Parliamentary Joint Committee on Human Rights, Law Enforcement Legislation Amendment (State Bodies and Other Measures) Bill 2016, *Report 9 of 2017* (22 November 2016) pp. 2-8 and the National Security Legislation Amendment (Espionage and Foreign Interference) Bill 2017, *Report 2 of 2018* (13 February 2018) pp. 2-36.

3 Explanatory statement (ES), [5].

4 'Communication' is defined in section 5 of the TIA Act as including: 'conversation and a message, and any part of a conversation or message, whether: (a) in the form of: (i) speech, music or other sounds; (ii) data; (iii) text; (iv) visual images, whether or not animated; or (v) signals; or (b) in any other form or in any combination of forms'.

5 'Telecommunications data' refers to metadata rather than information that is the content or substance of a communication: see section 172 of the TIA Act.

6 That is, the interception of live communications.

7 See, Division 4C, Part 4-1, Chapter 4 of the TIA Act.

1.422 As noted above, the regulations prescribe the forms in relation to issuing warrants and authorisations, including warrants authorising agencies to intercept telecommunications, stored communication warrants and journalist information warrants. The prescribed forms are substantially the same as those contained in the 1987 regulations.

Compatibility of the measure with the right to privacy

1.423 The right to privacy includes 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. As the regulations relate to the powers of agencies to access an individual's private communications and telecommunications data, the regulations engage and limit the right to privacy.

1.424 A limitation on the right to privacy will be permissible under international human rights law where it addresses a legitimate objective, is rationally connected to that objective and is a proportionate means of achieving that objective.

1.425 The statement of compatibility acknowledges that the warrants and authorisations regime engages the right to privacy and identifies the objectives of the measure as 'national security, public safety, addressing crime, and protecting the rights and freedoms of individuals'.[8] In general terms, these may be capable of constituting a legitimate objective for the purposes of international human rights law. Enabling access to telecommunications and communications data would also appear to be rationally connected to this objective.

1.426 As to the proportionality of the measure, the statement of compatibility focuses on safeguards in relation to the journalist information warrant process (discussed from [1.433] below) but provides little further information in relation to the other prescribed warrants and authorisations.

1.427 In its consideration of measures enabling agencies to access powers under the TIA Act,[9] the committee has previously noted that, although access to private communications occurs via a warrant regime which itself may be sufficiently circumscribed, the use of warrants does not provide a complete answer as to whether chapters 2 and 3 of the TIA Act constitute a proportionate limit on the right to privacy.

8 ES, statement of compatibility (SOC), [30].

9 See, Parliamentary Joint Committee on Human Rights, Telecommunications (Interception and Access - Law Enforcement Conduct Commission of New South Wales) Declaration 2017 [F2017L00533], *Report 7 of 2017*(8 August 2017) pp. 30-33 and Law Enforcement Legislation Amendment (State Bodies and Other Measures) Bill 2016, *Report 1 of 2017* (16 February 2017) pp. 35-44.

1.428 The committee has also previously raised concerns in relation to the warrantless access to telecommunications data (metadata) under chapter 4 of the TIA Act. These concerns included that the internal self-authorisation process for access to telecommunications data by prescribed agencies did not contain sufficient safeguards; the possibility of accessed data subsequently being used for an unrelated purpose; and safeguards in relation to the period of retention of such data.[10]

1.429 In relation to the specific situation of journalists and their sources, the requirement of a warrant prior to accessing a journalist's telecommunications data may provide a relevant safeguard. However, it is unclear whether this is a sufficient safeguard as it does not prevent the metadata of suspected sources being accessed without a warrant in order to determine the identity of the source.

1.430 As these concerns in relation to the interception and access of communications and telecommunications data by prescribed agencies under the TIA Act remain unresolved, it cannot be determined that the limitation on the right to privacy related to the regulations is proportionate to the stated objective. On a number of previous occasions the committee has recommended that the TIA Act would benefit from a foundational review of its human rights compatibility.[11]

Committee comment

1.431 The committee considers that the *Telecommunications (Interception and Access) Act 1979* would benefit from a full review of its compatibility with the right to privacy, including the sufficiency of safeguards.

1.432 Noting the human rights concerns regarding the right to privacy identified in its previous reports on the regulations, the committee draws the human rights implications of the regulations to the attention of the parliament.

10 Parliamentary Joint Committee on Human Rights, Telecommunications (Interception and Access) Amendment (Data Retention) Bill 2014, *Fifteenth Report of the 44th Parliament* (November 2014) pp. 10-22; *Twentieth report of the 44th Parliament* (18 March 2015) pp. 39-74 and Law Enforcement Legislation Amendment (State Bodies and Other Measures) Bill 2016, *Report 1 of 2017* (16 February 2017) p. 36.

11 See, for example, Parliamentary Joint Committee on Human Rights, National Security Legislation Amendment (Espionage and Foreign Interference) Bill 2017, *Report 2 of 2018* (13 February 2018) pp. 2-36; Telecommunications (Interception and Access – Law Enforcement Conduct Commission of New South Wales) Declaration 2017 [F2017L00533], *Report 7 of 2017* (8 August 2017) p. 33; Investigation and Prosecution Measures Bill 2017, *Report 12 of 2017* (28 November 2017) p. 88.

Journalist information warrant process and role of the Public Interest Advocate

1.433 As noted at [1.421] above, the TIA Act prohibits eligible persons[12] from authorising access to telecommunications data relating to a journalist or their employer where the purpose is to identify a journalist's source, unless a journalist information warrant has been obtained.[13] The TIA Act sets out that the minister (in the case of ASIO) or the issuing authority (in the case of enforcement agencies) must not issue a journalist information warrant to eligible persons unless the minister or issuing authority is satisfied that the public interest in issuing the warrant outweighs the public interest in protecting the confidentiality of the identity of the source.[14] The TIA Act also provides that in making that assessment, the minister or issuing authority is to have regard to any submissions made by a 'Public Interest Advocate' (PIA).[15]

1.434 The regulations prescribe the process for applying for a journalist information warrant and matters relating to the performance of the role of a PIA. Under the scheme the PIA will make submissions to the minister or issuing authority as to whether a warrant should be issued and whether any conditions or restrictions should be imposed on the warrant.[16] In relation to the role of the PIA, the regulations set out:

- that only the most senior members of the legal profession may be appointed as PIAs and prescribing levels of security clearance for certain PIAs;
- that agencies are required to provide a PIA with a copy of a proposed request or application for a journalist information warrant or notify a PIA prior to making an oral application;
- the processes for PIAs to receive further information (or a summary of further information) provided to the minister or issuing authority by agencies and to prepare new or updated submissions based on that information; and
- matters relating to submissions made by PIAs.

1.435 The committee previously considered the measures outlined above, which were contained in the Telecommunications (Interception and Access) Amendment (Public Interest Advocates and Other Matters) Regulation 2015 [F2015L01658], in its

12 Eligible persons are defined in the Act as the Director-General of Security; Deputy Director-General of Security; an ASIO employee or an ASIO affiliate under certain conditions. See, subsection 175(2) and subsection 176(2) in Division 3, Part 4-1 of Chapter 4 of the TIA Act.

13 See, Division 4C of Part 4-1 of Chapter 4 of the TIA Act.

14 See subparagraph 180L(b), subdivision B, division 4C of the TIA Act.

15 See subparagraphs 180L(2)(b)(v) and 180T(2)(b)(v), subdivision B of division 4C of the TIA Act.

16 EM, SOC, [37].

Thirty-second report of the 44th Parliament and *Thirty-fifth report of the 44th Parliament*.[17] Drawing on the committee's previous assessments, matters raising human rights concerns are set out below.

Compatibility of the measure with multiple rights

1.436 Accessing telecommunications data relating to a journalist, or their employer, where the purpose is to identify a journalist's source, in the context of the journalist information warrant and PIA scheme, engages and may limit multiple rights, including:

- right to privacy;[18]
- right to freedom of expression;[19]
- right to an effective remedy;[20] and
- right to a fair hearing.[21]

1.437 The statement of compatibility argues that the regulations engage the right to privacy and engage and promote the right to freedom of expression, but no assessment of the compatibility of the measure with the right to an effective remedy or a fair hearing is provided.

1.438 In relation to the right to privacy, the statement of compatibility explains that the role of the PIA in the warrant process 'ensures that any interference with the privacy of any person or persons that may result from disclosing telecommunications data would be lawful, justifiable and proportionate'.[22]

1.439 In relation to the right to freedom of expression, the statement of compatibility contends that the warrant and PIA scheme intends to promote the protection of this right:

> …The existence of robust oversight of authorisation requests protects against access to source information occurring in a way which is inconsistent with the assurances of confidentiality that may be given by a journalist to a source save where the public interest outweighs the maintenance of confidentiality. Independent authority, through the creation of journalist information warrants issued by a judicial officer or

17 Parliamentary Joint Committee on Human Rights, *Thirty-second report of the 44th Parliament* (1 December 2015) pp. 44-48 and *Thirty-fifth report of the 44th Parliament* (25 February 2016) pp. 18-26.

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

19 Article 19, ICCPR.

20 Article 2, ICCPR.

21 Article 14, ICCPR.

22 EM, SOC, [34].

> AAT member minimises the potential for deterring sources from actively assisting the press to inform the public on matters of public interest and ensures that the freedom of the press is not adversely affected by the measure.
>
> […]
>
> The Public Interest Advocate process further supports the right to freedom of expression by requiring the balance of competing public interests between disclosure of information for national security and law enforcement purposes and the protection of confidential sources which support freedom of expression.[23]

1.440 The statement of compatibility also outlines that the warrant and PIA scheme contains adequate safeguards, including by requiring that agencies provide a PIA with a copy of a proposed request or application for a warrant prior to making an oral application; enabling PIAs to receive further information provided to the minister or issuing authority by agencies; enabling PIAs to prepare a new or updated submission based on any further information provided; and by prescribing criteria that ensure PIAs are 'appropriately skilled and independent and able to advocate in the public interest'.[24]

1.441 The committee previously considered that the journalist information warrant and PIA schemes may seek to better protect the right to privacy and the right to freedom of expression in the context of the TIA Act. However, it was noted that the regulations may lack sufficient safeguards to appropriately protect these rights. As noted at [1.429] above, it does not appear that any safeguards exist in the regulations to prevent the metadata of suspected sources being accessed directly, without a warrant, in order to determine the identity of the source. Therefore, notwithstanding the journalist information warrant process, the metadata measure may still have a 'chilling effect' on freedom of expression for certain individuals.

1.442 Further, the committee's previous assessment noted that the regulations do not enable the PIA to seek instructions from any person affected by the journalist information warrant.[25] The previous analysis stated that it was unclear how a PIA would be able to effectively represent the interests of a person subject to the warrant in these circumstances, or provide information that would relevantly weigh on the issuing authority's determination as to whether to grant a warrant.

1.443 Further, the previous assessment noted that the regulations provide no procedural guarantees to ensure the PIA is able to make a submission on an

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23 EM, SOC, [40]-[41].

24 EM, SOC, [36].

25 Parliamentary Joint Committee on Human Rights, *Thirty-fifth report of the 44th Parliament* (25 February 2016), pp. 23-24.

application for a journalist information warrant prior to the issuance of a warrant.[26] In response to the committee's inquiries in this regard, the then Attorney-General noted that it would be beyond the scope of the regulation-making power in the TIA Act to prevent warrants being made in the absence of a submission from a PIA, because the legislation provides discretion to the issuing authority as to whether to issue a journalist information warrant. While the previous analysis acknowledged that a minister may not make delegated legislation that is contrary to the primary statute, it was considered that this additional safeguard could be incorporated in an appropriately amended primary statute. Despite relevant additional safeguards identified in the Attorney-General's response the concern remained that a minister or issuing authority may still issue a journalist information warrant without any submission from a PIA, thereby limiting the right to a fair hearing and an effective remedy, and, consequentially, the right to privacy and freedom of expression.

1.444 As these concerns in relation to the measure remain unresolved, it cannot be determined that the limitation on the right to privacy, the right to freedom of expression, the right to a fair hearing and the right to an effective remedy are proportionate to the stated objective.

Committee comment

1.445 The committee reiterates its view that the *Telecommunications (Interception and Access) Act 1979* would benefit from a full review of its compatibility with the right to privacy, including the sufficiency of safeguards.

1.446 Noting the human rights concerns identified in its previous reports, the committee draws the human rights implications of this aspect of the regulations to the attention of the parliament.

26 Parliamentary Joint Committee on Human Rights, *Thirty-fifth report of the 44th Parliament* (25 February 2016), pp. 24-25.

Bills not raising human rights concerns

1.447 Of the bills introduced into the Parliament between 12 February and 22 March, the following did not raise human rights concerns (this may be because the bill does not engage or promotes human rights, and/or permissibly limits human rights):

- Banking Amendment (Rural Finance Reform) Bill 2018;
- Bankruptcy Amendment (Debt Agreement Reform) Bill 2018;
- Competition and Consumer Amendment (Free Range Eggs) Bill 2018;
- Competition and Consumer Amendment (Misleading Representations About Broadband Speeds) Bill 2018;
- Interstate Road Transport Legislation (Repeal) Bill 2018;
- Marine Safety (Domestic Commercial Vessel) Levy Bill 2018;
- Marine Safety (Domestic Commercial Vessel) Levy Collection Bill 2018;
- Migration Amendment (Clarification of Jurisdiction) Bill 2018;
- National Housing Finance and Investment Corporation Bill 2018;
- National Housing Finance and Investment Corporation (Consequential Amendments and Transitional Provisions) Bill 2018;
- Protection of the Sea Legislation Amendment Bill 2018;
- Social Services Legislation Amendment (14-month Regional Independence Criteria) Bill 2018;
- Treasury Laws Amendment (Illicit Tobacco Offences) Bill 2018;
- Treasury Laws Amendment (Income Tax Consolidation Integrity) Bill 2018;
- Treasury Laws Amendment (2018 Measures No. 3) Bill 2018; and
- Veterans' Affairs Legislation Amendment (Veteran-centric Reforms No. 1) Bill 2018.