Chapter 1

New and continuing matters

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

- bills introduced into the Parliament between 26 and 28 March 2018;[1]
- legislative instruments registered on the Federal Register of Legislation between 15 February and 14 March 2018;[2] and
- bills and legislative instruments previously deferred.

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

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

Instruments not raising human rights concerns

1.4 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.

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

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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: Consular Privileges and Immunities (Indirect Tax Concession Scheme) Amendment (United Arab Emirates) Determination 2018 [F2018L00074]; Family Law Amendment (Parenting Management Hearings) Bill 2017; Marine Safety (Domestic Commercial Vessel) Levy (Consequential Amendments) Bill 2018; and Narcotic Drugs Amendment (Cannabis) Regulations 2018 [F2018L00106].

Response required

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

Australian Institute of Health and Welfare Amendment Bill 2018

Purpose	Amends the *Australian Institute of Health and Welfare Act 1987* to replace the representative-based structure of the Australian Institute of Health and Welfare; and removes the requirement for the Institute to seek agreement from the Australian Bureau of Statistics for the collection of health and welfare-related information and statistics
Portfolio	Health
Introduced	House of Representatives, 28 March 2018
Rights	Privacy (see **Appendix 2**)
Status	Seeking additional information

Collection of health and welfare-related information and statistics

1.7 Items 13 and 14 of the bill remove the requirement in the *Australian Institute of Health and Welfare Act 1987* (AIHW Act) that the Australian Institute of Health and Welfare (the Institute) seeks the agreement of the Australian Bureau of Statistics (ABS) to collect health and welfare-related information and statistics. Instead, the bill would allow the Institute to collect health-related and welfare-related information and statistics, in consultation with the ABS if necessary, whether by the Institute itself or in association with other bodies or persons.

Compatibility of the measure with the right to privacy

1.8 Article 17 of the International Covenant on Civil and Political Rights (ICCPR) prohibits arbitrary or unlawful interferences with an individual's privacy. The right to privacy includes respect for informational privacy, including the right to respect for private and confidential information, particularly the collection, storing, use and sharing of such information.

1.9 It is unclear from the statement of compatibility whether the collection of health-related and welfare-related information and statistics would include personal information. The definition of 'health-related information and statistics' and 'welfare-related information and statistics' are defined in the AIHW Act to mean 'information and statistics collected and produced from' data relevant to health or health services and from data relevant to the provision of welfare services respectively. This appears to be broad enough to include personal information. The privacy policy of the

Australian Institute of Health and Welfare also indicates that personal information may be collected as part of its statistics and information collecting mandate.[1] Therefore, the collection (and subsequent use) of health-related information and welfare-related information by the Institute or the Institute in association with other bodies or persons would appear to engage and limit the right to privacy.

1.10 Limitations on the right to privacy will be permissible where they are prescribed by law and are not arbitrary, they pursue a legitimate objective, are rationally connected to (that is, effective to achieve) that objective and are a proportionate means of achieving that objective. In order to be proportionate, the limitation needs to be sufficiently circumscribed to ensure that it is only as extensive as is strictly necessary to achieve its objective. This includes having adequate and effective safeguards to ensure the limitation is no more extensive than is strictly necessary to achieve its objective. However, the statement of compatibility does not acknowledge the limitation on the right to privacy and merely states that the bill 'does not engage any of the applicable rights or freedoms'. Accordingly, no assessment is provided as to whether the limitation on the right to privacy is permissible. The statement of compatibility therefore does not meet the standards outlined in the committee's *Guidance Note 1*.

Committee comment

1.11 The preceding analysis raises questions about the compatibility of the measure with the right to privacy.

1.12 The statement of compatibility has not identified or addressed the right to privacy. The committee therefore seeks the advice of the minister as to:

- **the extent to which 'health-related information and statistics' and 'welfare-related information and statistics' includes personal information;**
- **whether the measure is aimed at achieving a legitimate objective for the purposes of human rights law;**
- **how the measure is effective to achieve (that is, rationally connected to) that objective; and**
- **whether the limitation is proportionate to the stated objective (including the extent of interference with the right to privacy, whether there are adequate and effective safeguards, who can collect information and who can access information).**

1 See Australian Institute of Health and Welfare, *Privacy Policy* (2018) https://www.aihw.gov.au/privacy-policy.

Home Affairs Legislation Amendment (Miscellaneous Measures) Bill 2018

Purpose	Makes a range of amendments including to the *Migration Act 1958* (the Migration Act) to provide that when an unlawful non-citizen is in the process of being removed to another country under section 198 and the removal is aborted then the person will be taken to have been continuously in the migration zone for the purposes of the Migration Act
Portfolio	Home Affairs
Introduced	House of Representatives, 28 March 2018
Rights	Liberty; non-refoulement; effective remedy (see **Appendix 2**)
Status	Seeking additional information

Expansion of visa bar

1.13 Currently, section 48A of the Migration Act applies to bar a person who is a non-citizen from applying for particular visas where they have been removed or deported from Australia under section 198 to another country but have been refused entry by that country and so are returned to Australia.

1.14 The proposed amendments to sections 42(2A) and 48A in the bill would expand the circumstances in which this visa bar applies so that it will apply where:

- an attempt to remove the person was made under section 198 but not completed; or
- the person is removed under section 198 but does not enter the destination country.

Compatibility of the measure with the right to liberty

1.15 The right to liberty includes the right not to be unlawfully or arbitrarily detained.[1] The effect of this measure is that a broader class of person will be barred from applying for visas and will therefore be subject to mandatory immigration detention prior to removal or deportation.[2] The detention of a non-citizen pending deportation will generally not constitute arbitrary detention, as it is permissible to detain a person for a reasonable period of time in these circumstances. However, detention may become arbitrary in the context of mandatory detention and the

1 UN Human Rights Committee, *General Comment 35: Liberty and security of person* (2014), [18].

2 See Migration Act sections 189, 198.

expanded visa bar, where individual circumstances are not taken into account, and a person may be subject to a significant length of detention.[3] There appears to be a risk in relation to the current measure that if a person is barred from applying, for example, for a new protection visa, then they could be subject to immigration detention for an extended period given that an attempt to deport the person has already failed.

1.16 The statement of compatibility acknowledges that the measure engages the right to be free from arbitrary detention but argues that the detention is neither unlawful nor arbitrary as it is for 'a legitimate purpose'.[4] In other words, the limitation on the right to liberty is permissible as it supports a legitimate objective, is rationally connected to that objective, and is a proportionate way to achieve that objective. The statement of compatibility explains the context of the measure and states that:

> While the proposed amendments will limit an unlawful non-citizen's opportunity to apply for a visa (through continuous application of statutory bars in ss48 and 48A), their re-detention will continue to be for the legitimate purpose of completing their removal from Australia under section 198 of the Migration Act as soon as it becomes reasonably practicable to do so. The removal of unlawful non-citizens under section 198 is mandated by the law and is an integral part of maintaining the integrity of Australia's migration system.[5]

1.17 In relation to circumstances where a person may be subject to prolonged immigration detention, the statement of compatibility points to departmental policies and procedures as a relevant safeguard:

> Where removal cannot be accomplished within reasonable timeframes, in line with established detention policy and procedures, the Department will review the detention decision and consider less restrictive forms of detention such as residence determination or grant of a Bridging visa E, as appropriate in circumstances of the case. [6]

1.18 It is significant that the department has policies and procedures in place to review detention and grant visas in appropriate circumstances so as to minimise the risk of arbitrary detention. However, it is noted that discretionary or administrative

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3 See *F.K.A.G v. Australia* (2094/2011), UN Human Rights Committee, 20 August 2013, [9.5]; *M.M.M et al v Australia* (2136/2012), UN Human Rights Committee, 25 July 2013, [10.4] ['the authors are kept in detention in circumstances where they are not informed of the specific risk attributed to each of them… They are also deprived of legal safeguards allowing them to challenge their indefinite detention'].

4 Statement of compatibility (SOC), p. 26.

5 SOC, p. 26.

6 SOC, p. 26.

safeguards alone may be insufficient for the purpose of international human rights law. This is because administrative and discretionary safeguards are less stringent than the protection of statutory processes and can be amended or removed at any time. Indeed, as a matter of Australian law, there are no safeguards to protect a person from being subject to prolonged or even indefinite detention due to an inability to deport the person. In this respect, the United Nations Human Rights Committee (UNHRC) has made clear that '[t]he inability of a state to carry out the expulsion of an individual because of statelessness or other obstacles does not justify indefinite detention'.[7]

1.19 The risk of arbitrariness may be exacerbated in circumstances where there may be limited effective means to challenge such detention. There is a consequential risk that the immigration detention is not reasonable, necessary and proportionate in the individual case as required in order to be a permissible limitation on the right to liberty.

1.20 As noted above, the detention of a non-citizen for a reasonable period of time pending deportation is likely to pursue a legitimate objective and be rationally connected to this objective. However, beyond stating that the expansion of the visa bar will 'correct the unintended operation of the law that leads to unlawful non-citizens…being treated differently'[8] it is unclear from the information provided in the statement of compatibility why the visa bar is necessary. In this respect, it is noted that current sections 48 and 48A themselves raise concerns in relation to human rights such that issues of consistency do not address or overcome such underlying concerns.[9] That is, given the context of mandatory immigration detention, there is a question as to whether the application of the visa bar is the least rights restrictive approach.

Committee comment

1.21 The committee requests the advice of the minister as to the compatibility of the measure with the right to liberty, including:

- **why it is necessary to apply a visa bar to those non-citizens which the government has attempted to remove from Australia under section 198 of the Migration Act;**
- **whether there are less rights restrictive approaches than the application of the visa bar; and**

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7 Human Rights Committee, *General Comment 35: Liberty and security of person* (2014), [18].

8 SOC, p. 23.

9 See, Parliamentary Joint Committee on Human Rights, *Seventh Report of the 44th Parliament* p. 30 (18 June 2014); *Tenth Report of the 44th Parliament* (26 August 2014) p. 78; *Fourteenth Report of the 44th Parliament* (28 October 2014) p. 114.

- **whether there are adequate and effective safeguards in place to ensure that a person is not subject to arbitrary detention (including the availability of periodic review of whether detention is reasonable, necessary and proportionate in the individual case, and the circumstances in which a person may apply for particular classes of visas or the visa bar may be lifted).**

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

1.22 Australia has non-refoulement obligations under the Refugee Convention for refugees, and under both the International Covenant on Civil and Political Rights (ICCPR) and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) for people who are found not to be refugees.[10] 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.[11] Non-refoulement obligations are absolute and may not be subject to any limitations.

1.23 Independent, effective and impartial review by a court or tribunal of decisions to deport or remove a person, including merits review in the Australian context, is integral to complying with non-refoulement obligations.[12]

1.24 The effect of expanding the visa bar may be that a person is unable to apply for a new protection visa and accordingly the person may be subject to removal from Australia.[13] The statement of compatibility acknowledges that the obligation of non-refoulement is absolute and may be engaged by the measure. However, it argues that the measure will not breach Australia's non-refoulement obligations as:

> …the obligations - if applicable - will have been assessed prior to the non-citizen's removal from Australia. A pre-removal clearance check is undertaken for all involuntary removals of unlawful non-citizens to ensure

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

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

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

13 Migration Act section 198.

> the proposed removal would not breach Australia's non-refoulement obligations. Where this check identifies outstanding protection claims, removal will not proceed until these claims have been fully assessed. An individual will not be removed from Australia in breach of non-refoulement obligations.[14]

1.25 However, as stated in the committee's previous human rights assessments, administrative and discretionary safeguards are less stringent than the protection of statutory processes, and are insufficient in and of themselves to satisfy the standards of 'independent, effective and impartial' review required to comply with Australia's non-refoulement obligations.

1.26 Under section 198 of the Migration Act an immigration officer is required to remove an unlawful non-citizen 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 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 independent, effective and impartial review of the decision as to whether removal is consistent with Australia's non-refoulement obligations.[15] Accordingly, there may be a risk that a person who is unable to apply for a new protection visa may be deported notwithstanding that Australia owes them protection obligations. In this respect, it is also unclear from the statement of compatibility as to whether there are circumstances in which the visa bar will be lifted, including where new information has come to light which supports the person's claim for protection.

Committee comment

1.27 The obligation of non-refoulement is absolute and may not be subject to any limitations.

1.28 The expansion of the visa bar occurs in a context where there is only a discretionary barrier to refoulement and no provision of access to independent, impartial and effective review of whether a removal is consistent with Australia's non-refoulement obligations.

1.29 As such, the visa bar is likely to be incompatible with Australia's obligations under the ICCPR and the Convention Against Torture, which require independent, effective and impartial review of non-refoulement decisions.

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14 SOC, p. 27.

15 See for example, Parliamentary Joint Committee on Human Rights, *Fourteenth Report of the 44th Parliament* (28 October 2014) pp. 77-78.

1.30 The committee seeks the further advice of the minister as to the compatibility of the expansion of the visa bar with the obligation of non-refoulement (including whether there are mechanisms in place to lift the visa bar where new information has come to light which supports a person's claim for protection).

Obligation to consider the best interests of the child

1.31 Under the Convention on the Rights of the Child (CRC), state parties are required to ensure that, in all actions concerning children, the best interests of the child are a primary consideration.[16] The statement of compatibility acknowledges that the expansion of the visa bar engages the rights of children as it would also apply to them.[17] The statement of compatibility, however, argues that the measure is compatible with the obligation to consider the best interests of the child as:

> Under policy, all actions taken by the Department which involve children involve an assessment of the child's best interests as a primary consideration. However, although the best interests of the child is a primary consideration, such considerations may be outweighed by other factors, such as the need to maintain the integrity of Australia's migration system and the fact that those subject to removal have no entitlement to remain lawfully in Australia. Consequently, it may not be in a child's best interests to be removed from Australia, but in certain circumstances, this will need to be balanced against other primary considerations.
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> …Where the best interest of the child overwhelmingly outweighs all other relevant considerations in relation to a removal, the case may be referred to the Minister for consideration to exercise his non-compellable powers to grant a visa.[18]

1.32 However, while the department and the minister may consider the best interests of the child as a matter of policy and discretion, the proposed expanded visa bar will still generally apply to children. This may be the case regardless of whether department or the minister has, in fact, substantively considered the best interests of the child in the context of the operation of the visa bar. Indeed, the statement of compatibility states that the best interests of the child is to be 'balanced against other primary considerations'. Further, it appears from the information provided that the matter may only be referred to the minister for intervention where the best interests of the child 'overwhelmingly outweighs' all other considerations. If this were the case, it would raise particular concerns. It is noted in this respect that the UN Committee on the Rights of the Child has explained that:

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16 CRC article 3(1).

17 SOC, p. 28.

18 SOC, p. 28.

> …the expression "primary consideration" means that the child's best interests may not be considered on the same level as all other considerations. This strong position is justified by the special situation of the child…'[19]

1.33 It follows that it would be inconsistent with Australia's obligations to treat other considerations as of equal weight to the obligation to consider the best interests of the child. In this context, as a matter of international human rights law, it does not appear that the importance of 'maintain[ing] the integrity of Australia's migration system' should be given equal or greater weight than the obligation to consider the best interests of the child. Other than current departmental policies and the potential exercise of discretion by the minister (which may not be sufficient for human rights purposes) the statement of compatibility does not provide any further information as to any procedural safeguards to ensure that the best interests of the child are given due consideration.

1.34 As such, the expansion of the visa bar, including its impact on the right to liberty and non-refoulement obligations, engages and may limit the obligation to consider the best interests of the child. Limitations on human rights may be permissible where they pursue a legitimate objective, are rationally connected to that objective and are a proportionate means of achieving that objective. The statement of compatibility does not expressly address these criteria in relation to this obligation. Accordingly, without further information it is not possible to conclude that the measure is compatible with the obligation to consider the best interests of the child.

Committee comment

1.35 The committee seeks the advice of the minister as to:

- **the relative weight which will be given to the obligation to consider the best interests of the child in departmental policies and procedures in the context of the proposed measure;**
- **what is the threshold for intervention on the basis that the measure would not be in the child's best interests;**
- **whether there are any procedural safeguards in place to ensure that the obligation to consider the best interests of the child is given due consideration;**
- **whether the measure is aimed at achieving a legitimate objective for the purposes of human rights law;**
- **how the measure is effective to achieve (that is, rationally connected to) that objective; and**

19 UN Committee on the Rights of the Child, *General comment No. 14 on the right of the child to have his or her best interests taken as a primary consideration,* CRC/C/GC/14 (29 May 2013).

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

National Consumer Credit Protection Amendment (Mandatory Comprehensive Credit Reporting) Bill 2018

Purpose	Amends the *National Consumer Credit Protection Act 2009* to introduce a mandatory comprehensive credit reporting regime; expands ASIC's powers to monitor compliance with the mandatory regime; imposes additional obligations as to where data held by a credit reporting body must be stored
Portfolio	Treasury
Introduced	House of Representatives, 28 March 2018
Rights	Privacy (see **Appendix 2**)
Status	Seeking additional information

Background

1.36 The *Privacy Amendment (Enhancing Privacy Protection) Act 2012* (the 2012 Act) amended the *Privacy Act 1988* (Privacy Act) to establish a framework under which credit providers and credit reporting bodies could collect, use and disclose comprehensive credit information. This framework came into effect in March 2014.[1] The 2012 Act was introduced to parliament shortly prior to the establishment of the committee, which means it was not subject to a human rights compatibility assessment in accordance with the terms of the *Human Rights (Parliamentary Scrutiny) Act 2011.*[2]

1.37 Prior to the framework established by the 2012 Act, the credit reporting system limited the information that could be collected, used and disclosed by credit providers and credit reporting bodies to 'negative information' about an individual. 'Negative information' includes identification information (such as a person's name and address), default history and any bankruptcy information about that person.[3]

1.38 The 2012 Act expanded the kind of information that was permitted in the credit reporting system. The expanded information (referred to as 'comprehensive credit information') that was able to be collected, used and disclosed included

1 See the commencement information for Schedule 2 in section 2 of the *Privacy Amendment (Enhancing Privacy Protection) Act 2012*.

2 The 2012 Act was introduced to parliament on 23 May 2012, whereas the committee's *First Report of 2012* considered bills introduced between 18 June-29 June 2012: see Parliamentary Joint Committee on Human Rights, *First Report of 2012* (August 2012) p.3.

3 Explanatory Memorandum to the National Consumer Credit Protection Amendment (Mandatory Comprehensive Credit Reporting) Bill 2018, [1.26].

repayment performance history of a person, the type of credit a person has, and the maximum amount of credit available to a person.

1.39 The 2012 Act permitted credit providers to disclose this information to credit reporting bodies on a voluntary basis.

Establishment of a mandatory comprehensive credit reporting scheme

1.40 The current bill seeks to amend the Privacy Act and the *National Consumer Credit Protection Act 2009* (the NCCP Act) to make it mandatory for large Authorised Deposit-taking Institutions (ADI) that are credit providers[4] to supply comprehensive credit information to eligible credit reporting bodies about all of the open credit accounts held with the licensee or with other members of the licensee's corporate group. The licensees must also supply updated information to credit reporting bodies on an ongoing basis.

1.41 The bill further provides that the regulations may set out the circumstances when a credit reporting body must share with credit providers credit information received under the mandatory comprehensive credit regime.[5]

Compatibility of the measure with the right to privacy

1.42 Article 17 of the International Covenant on Civil and Political Rights (ICCPR) prohibits arbitrary or unlawful interferences with an individual's privacy. The right to privacy includes respect for informational privacy, including the right to respect for private and confidential information, particularly the collection, storing, use and sharing of such information.

1.43 The introduction of a mandatory comprehensive credit reporting scheme engages the right to privacy by requiring large ADIs to supply comprehensive credit information to certain credit reporting bodies. This credit information includes significant personal and financial information about individual bank customers, and thus the measure limits the right to privacy. The statement of compatibility acknowledges that the right to privacy is engaged by the bill.[6]

1.44 The statement of compatibility emphasises that the mandatory comprehensive credit regime does not, of itself, allow for the collection, use and disclosure of an individual's credit information. This is because the framework for such collection, use and disclosure was established by the 2012 Act. However, it is noted that, by making the scheme mandatory for large ADIs instead of the current

4 See the definition of 'eligible licensee' in proposed section 133CN. An ADI is considered large when its total resident assets are greater than $100 billion: see the EM to the bill, [1.14]. Other credit providers will be subject to the regime if they are prescribed in regulations: see proposed section 133CN(1)(a).

5 See Division 3 of Schedule 1 of the bill.

6 Statement of Compatibility (SOC), [2.12].

voluntary scheme, in practical terms the bill expands the operation of the framework established by the 2012 Act. It is therefore necessary to assess the human rights compatibility of the mandatory comprehensive credit regime, which also requires considering the underlying human rights compatibility of the 2012 Act.

1.45 Limitations on the right to privacy will be permissible where they are prescribed by law and are not arbitrary, they pursue a legitimate objective, are rationally connected to (that is, effective to achieve) that objective and are a proportionate means of achieving that objective.

1.46 The statement of compatibility identifies the objective of the bill by reference to the objective of the 2012 Act, namely, 'improving the management of personal and credit reporting information'.[7] The statement of compatibility further states:

> A more comprehensive credit reporting regime allows credit providers to better establish a consumer's credit worthiness and lead to a more competitive and efficient credit market. A more comprehensive regime benefits consumers by enabling more reliable individuals to seek more competitive rates when purchasing credit and enabling those with a historically poor credit rating to demonstrate their credit worthiness through future consistency and reliability.[8]

1.47 As set out in the committee's *Guidance Note 1*, in order to be capable of justifying a proposed limitation on human rights, a legitimate objective must address a pressing or substantial concern, and not simply seek an outcome regarded as desirable or convenient. While the objectives identified in the statement of compatibility may be capable of being legitimate objectives for the purposes of international human rights law, further information is required to determine whether (and if so, how) this specific measure of mandatory credit reporting addresses a pressing or substantial concern. It is noted in this respect that a legitimate objective must be supported by a reasoned and evidence-based explanation. Further information as to the legitimate objective of the measure would also assist in determining whether the measure is rationally connected to this objective.

1.48 As to the proportionality of the measure, the statement of compatibility notes that the bill does not alter the existing protections set out in the Privacy Act governing the use and disclosure of credit information, and that 'the requirement to supply credit information only applies to the extent that the disclosure is permitted under the Privacy Act'.[9] It is in this respect that the amendments to the Privacy Act

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7 See SOC, [2.20] citing the explanatory memorandum to the Privacy Amendment (Enhancing Privacy Protection) Bill 2012.

8 SOC, [2.15].

9 SOC, [2.21].

introduced by the 2012 Act are particularly relevant. The statement of compatibility therefore sets out the safeguards that were in place to protect individuals' credit information in the 2012 Act, namely:

> Greater responsibility was placed on credit reporting bodies and credit providers to assist individuals to access, correct and resolve complaints about their personal information. Those amendments included specific rules to deal with pre-screening of credit offers and the freezing of access to an individual's personal information in cases of suspected fraud or identity theft.
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> 2.18 The amendments [in the 2012 Act] also restricted access to repayment history information to those credit providers who hold an Australian Credit Licence and are therefore subject to responsible lending obligations.
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> 2.19 Any effect on privacy rights was considered proportionate and limited by the introduction of specific safeguards, including:
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> - only de-identified information can be used for the purpose of research, and the research must be reasonably connected to the credit reporting system, and
> - the use of credit reporting information for the purposes of pre-screening is expressly limited to the purpose of excluding adverse credit risks from marketing lists.[10]

1.49 These safeguards are important in determining the proportionality of the measure. However, further information in the statement of compatibility would have been of assistance to determine the sufficiency of the safeguards in light of the amendments proposed in the bill, in particular: details regarding information security between credit providers and credit reporting bodies, details of how long credit information is retained, and further detail as to access to review for persons who have complaints relating to the use of their personal information.

1.50 Further, in order to be a proportionate limitation on the right to privacy, the limitation needs to be sufficiently circumscribed to ensure that it is only as extensive as is strictly necessary to achieve its objective. The information that may be disclosed through comprehensive credit reporting is potentially extensive, including a person's repayment history information and credit limits. This information would appear to include positive repayment performance history rather than merely any history of default.[11] It is not clear from the statement of compatibility whether such extensive information is necessary for determining a consumer's credit worthiness. Given the effect of the measure would be to make the disclosure of such information mandatory for ADIs (such that the limitation on privacy would affect a large number

10 SOC, [2.17]-[2.19]

11 See the definition of 'repayment history information' in section 6V of the *Privacy Act 1988*.

of individuals), this raises questions as to whether the limitations on the right to privacy are sufficiently circumscribed.

1.51 It is also noted that the power to set out by regulation the circumstances when a credit reporting body must share credit information also appears to be very broad. Without adequate safeguards, it is possible that leaving significant matters to be determined by regulation may result in the regulation-making power being exercised in such a way as to be incompatible with the right to privacy. In this respect, the statement of compatibility states that 'these circumstances will be limited and not extend beyond those circumstances in the Privacy Act'.[12] However, it is not clear whether the Privacy Act would constitute an effective safeguard for the purposes of the right to privacy in the context of this particular measure. For example, while the Privacy Act contains a range of general safeguards it is not a complete answer to this issue because the Privacy Act and the Australian Privacy Principles (APPs) contain a number of exceptions to the prohibition on disclosure of personal information. This includes permitting use or disclosure where the use or disclosure is authorised under an Australian law, which may be broader than the scope permitted under international human rights law.[13] Therefore, further information is required as to the operation of the specific safeguards in the Privacy Act so as to determine whether that Act provides effective safeguards of the right to privacy in these circumstances.

Committee comment

1.52 The preceding analysis raises questions as to the compatibility of the mandatory comprehensive credit reporting scheme with the right to privacy.

1.53 The committee therefore seeks further information from 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 proportionate limitation on the right to privacy (including whether the requirement to provide comprehensive credit information is sufficiently circumscribed, and information as to the adequacy and effectiveness of safeguards).**

12 SOC, [2.22].

13 APP 9; APP 6.2(b).

Offshore Petroleum and Greenhouse Gas Storage Amendment (Miscellaneous Amendments) Bill 2018

Purpose	To transfer oversight for offshore greenhouse gas storage environmental management from the minister to the National Offshore Petroleum Safety and Environmental Management Authority (NOPSEMA)
Portfolio	Industry, Innovation and Science
Introduced	House of Representatives, 28 March 2018
Rights	Presumption of innocence (see **Appendix 2**)
Status	Seeking additional information

Reverse legal burden offences

1.54 The bill contains a number of offence provisions which contain offence-specific defences:

- it is a defence to the offence of breaching a direction given by NOPSEMA, if the defendant proves that they took all reasonable steps to comply with the direction;[1] and
- it is a defence to the offence of refusing or failing to do anything required by a 'well integrity law' if the defendant proves that it was not practicable to do that thing because of an emergency prevailing at the relevant time.[2]

1.55 In respect of each of these defences, the defendant bears a *legal* burden of proof.[3] This means that the defendant rather than the prosecution must prove the existence of the matters relevant to the defence on the balance of probabilities.[4]

1 See, proposed sections 579A, 591B, 594A; and Item 40 of the bill, proposed amendment to section 584; Explanatory Memorandum (EM) p. 11.

2 See, proposed Schedule 2B, section 23; EM pp. 12-13.

3 Under section 13.5 of the Criminal Code a legal burden of proof on the defendant must be discharged on the balance of probabilities.

4 See, *Criminal Code Act 1995* (Criminal Code) schedule 1, subsection 13.1(3)-(5). By contrast, evidential burden, in relation to a matter, means the burden of adducing or pointing to evidence that suggests a reasonable possibility that the matter exists or does not exist: Criminal Code section 13.3(6).

Compatibility of the measures with the right to be presumed innocent

1.56 The right to be presumed innocent until proven guilty according to law usually requires that the prosecution prove each element of the offence (including fault elements and physical elements).[5]

1.57 An offence provision which requires the defendant to carry an evidential or legal burden of proof (commonly referred to as 'a reverse burden') with regard to the existence of some fact also engages and limits the presumption of innocence. This is because a defendant's failure to discharge the burden of proof may permit their conviction despite reasonable doubt as to their guilt. Similarly, a statutory exception, defence or excuse may effectively reverse the burden of proof, such that a defendant's failure to make out the defence may permit their conviction despite reasonable doubt. These provisions must be considered as part of a contextual and substantive assessment of potential limitations on the right to be presumed innocent in the context of an offence provision.

1.58 Reverse burden 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. In other words, such provisions must pursue a legitimate objective, be rationally connected to that objective and be a proportionate means of achieving that objective.

1.59 The statement of compatibility acknowledges that the offence-specific defences (which require the defendant to carry a reverse legal burden) engage and limit the right to be presumed innocent, but argues that this reverse burden is permissible. The statement of compatibility explains that in each case 'the burden is reversed because the matter is likely to be exclusively within the knowledge of the defendant, particularly given the remote nature of offshore operations'.[6] However, it is unclear from the information provided why the offence provision reverses the legal rather than merely the evidential burden of proof. This raises concerns that the reverse burden offences may not be the least rights restrictive approach to achieving the objective of the proposed legislative regime. Further, the statement of compatibility does not expressly explain how the reverse burden offences pursue a legitimate objective or are rationally connected to this objective.

Committee comment

1.60 The committee requests the advice of the minister as to:

- **whether the measure is aimed at achieving a legitimate objective for the purposes of human rights law;**

5 See, Article 14(2) of the International Covenant on Civil and Political Rights (ICCPR).

6 EM, Statement of Compatibility (SOC) pp. 11, 13; EM p. 33.

- **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 whether it is the least rights restrictive approach and whether reversing the legal burden of proof rather than the evidential burden of proof is necessary); and**
- **whether consideration could be given to amending the measures to provide for a reverse evidential burden rather than a reverse legal burden.**

Road Vehicle Standards Bill 2018

Purpose	Seeks to provide a new regulatory framework for the importation and provision of road vehicles into Australia
Portfolio	Infrastructure, Regional Development and Cities
Introduced	7 February 2018, House of Representatives
Rights	Privacy, not to incriminate oneself, presumption of innocence (see **Appendix 2**)
Status	Seeking additional information

Reverse burden offences

1.61 A number of provisions in the bill seek to introduce offences which include offence-specific defences.[1]

Compatibility of the measures with the right to be presumed innocent

1.62 Article 14(2) of the International Covenant on Civil and Political Rights (ICCPR) protects the right to be presumed innocent until proven guilty according to law. The right to be presumed innocent usually requires that the prosecution prove each element of an offence beyond reasonable doubt.

1.63 An offence provision which requires the defendant to carry an evidential or legal burden of proof (commonly referred to as 'a reverse burden') with regard to the existence of some fact engages and limits the presumption of innocence. This is because a defendant's failure to discharge the burden of proof may permit their conviction despite reasonable doubt as to their guilt. Similarly, a statutory exception, defence or excuse may effectively reverse the burden of proof, such that a defendant's failure to prove the defence may permit their conviction despite reasonable doubt. These provisions must be considered as part of a contextual and substantive assessment of potential limitations on the right to be presumed innocent in the context of an offence provision.

1.64 Reverse burden offences will not necessarily be inconsistent with the presumption of innocence provided that they are within reasonable limits, taking into account the importance of the objective being sought, and maintain the defendant's right to a defence. In other words, such provisions must pursue a legitimate objective, be rationally connected to that objective and be a proportionate means to achieve that objective.

1.65 Proposed subsections 16(3), 24(3)-(4), 32(2) and 43(2) provide offence-specific defences or exceptions to particular proposed offences in the bill. In doing

1 See proposed sections 16, 24, 32, 43.

so, the provisions reverse the evidential burden of proof as subsection 13.3(3) of the *Criminal Code* provides that a defendant who wishes to rely on any exception, exemption, excuse, qualification or justification bears an evidential burden in relation to that matter.

1.66 The statement of compatibility does not identify that the reverse burden offences in the bill engage and limit the presumption of innocence. However, the explanatory memorandum includes some information about the reverse evidential burdens including their regulatory context.[2] In this respect, the justification for reversing the burden of proof is, generally, that the relevant evidence will be peculiarly within the knowledge of the defendant[3] and that the defendant would be in a 'significantly better position than the Commonwealth'[4] to be able to present this evidence. The explanatory memorandum explains in relation to subsection 16(3) that it:

> …provides a defence for entering a non-compliant vehicle onto the RAV if the person who entered it can provide evidence that it was only non-compliant because of an approved component that they used. This evidence would be easily available to the defendant and it would be relatively inexpensive for them to present this evidence.[5]

1.67 However, more generally, without additional information it is unclear that these matters are a sufficient basis for permissibly limiting the right to be presumed innocent.

1.68 Further, it is unclear that reversing the evidential burden is necessary as opposed to including additional elements within the offence provisions themselves. This raises questions as to whether the measure is the least rights restrictive approach.

Committee comment

1.69 The committee draws to the attention of the minister its *Guidance Note 1* and *Guidance Note 2* which set out information specific to reverse burden offences.

1.70 The committee requests the advice of the minister as to:

- **whether the reverse burden offences are aimed at achieving a legitimate objective for the purposes of international human rights law;**
- **how the reverse burden offences are effective to achieve (that is, rationally connected to) their objective;**

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2 See, for example, Explanatory Memorandum (EM) p. 13.

3 See, for example, EM, p. 33, p. 38.

4 EM, p. 28.

5 EM, p. 13.

- **whether the limitation is a reasonable and proportionate measure to achieve the stated objective; and**
- **whether it would be feasible to amend the measures so that the relevant matters (currently in defences) are included as elements of the offence or alternatively, to provide that despite section 13.3 of the Criminal Code, a defendant does not bear an evidential (or legal) burden of proof in relying on the offence-specific defences.**

Coercive evidence gathering powers

1.71 Section 41 of the bill provides that the minister, secretary or a Senior Executive Service employee may issue a disclosure notice to persons who supply road vehicles or road vehicle components if the person giving the notice reasonably believes that: vehicles or components of that kind will or may cause injury; vehicles or components of that kind do not, or likely do not, comply with applicable national standards; and the person receiving the notice is capable of giving or producing applicable information, documents or evidence.

1.72 Section 42 sets out that a person is not excused from giving information or evidence or producing a document on the grounds that to do so might tend to incriminate the person or expose them to a penalty. Section 42(2) provides that the information, evidence or documents provided in response to a disclosure notice are not admissible in evidence against the individual in civil or criminal proceedings subject to limited exceptions.[6] Failure or refusal to comply with a disclosure notice is an offence with a sanction of up to 40 penalty units ($8,400) for an individual.[7]

Compatibility of the measure with the right not to incriminate oneself

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

1.74 Section 42 of the bill engages and limits this right by requiring that a person give information or evidence, or produce a document, notwithstanding that to do so might tend to incriminate that person. The right not to incriminate oneself may be subject to permissible limitations where the limitation pursues a legitimate objective, is rationally connected to that objective and is a proportionate way of achieving that objective.

1.75 The statement of compatibility acknowledges that the measure engages and limits this right. In relation to the proposed disclosure notices, it argues that it is

6 These exceptions are proceedings relating to a refusal or failure to comply with a disclosure notice, knowingly providing false or misleading information in response to a disclosure notice, or knowingly giving false or misleading information to a Commonwealth entity.

7 Section 43 of part 3, division 4.

appropriate to override the right not to incriminate oneself 'as failure to comply could seriously undermine the effectiveness of the regulatory scheme'.[8] The explanatory memorandum sets out further information as to why the abrogation of the right not to incriminate oneself is needed in the particular regulatory context:

> Disclosure notices may be issued where a Minister or inspector believes that road vehicle or approved road vehicle components pose a danger to any person. For this reason timely gathering of information about the extent and nature of any risks is critical. While it may be technically feasible for the Department to obtain information by other means that do not impinge on the right against self-incrimination, these actions may take a longer amount of time. The first priority in recalls of road vehicles or approved components is the rectification or remediation of the safety or non-compliance issue. Prosecution and resulting penalties for those involved in the supply of road vehicles or approved components is generally a secondary consideration.
>
> The Department may not always have specific information about the activities of particular suppliers – the Department may receive information about vehicle safety recalls, such as reports of faulty components in overseas markets, which will form the basis of its market surveillance activities. The receipt of such information may place the Department in the position where it needs to seek information from suppliers of similar vehicles or approved components in order to ascertain whether the same problem exists in Australia.[9]

1.76 The broad objective of gathering timely information on road vehicles or road vehicle components that may pose a danger to the public is likely to be a legitimate objective for the purposes of international human rights law. Requiring that suppliers produce information or documents on such matters also appears to be rationally connected to this objective. It is noted that it would have been useful had this information been also included in the statement of compatibility as well as the explanatory memorandum.

1.77 Questions arise, however, as to the proportionality of the measure. The availability of 'use' and 'derivative use' immunities can be an important factor in determining whether the abrogation of the privilege against self-incrimination is proportionate. That is, they may act as a relevant safeguard. In this case, a 'use' immunity would be available in relation to this measure. This means that, where a person has been required to give incriminating evidence, that evidence cannot be used against the person in any civil or criminal proceeding, subject to exceptions, but may be used to obtain further evidence against the person.

8 EM, SOC, p. 20.

9 EM, p. 44.

1.78 However, no 'derivative use' immunity is provided in the bill. This means that information or evidence indirectly obtained as a result of the person's incriminating evidence may be used in criminal proceedings against the person. It is acknowledged that a 'derivative use' immunity will not be appropriate in all cases (for example, because it would undermine the purpose of the measure or be unworkable).

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

1.80 In this case, the statement of compatibility does not substantively address why a 'derivative use' immunity would not be reasonably available. This raises the question as to whether the measure is the least rights restrictive way of achieving the stated objective as required in order for the limitation to be proportionate.

Committee comment

1.81 The committee seeks the advice of the minister as to:

- **whether the limitation is a reasonable and proportionate measure to achieve the stated objective;**
- **whether the persons and the scope of information that may be subject to compulsory disclosure is sufficiently circumscribed with respect to the stated objective of the measure; and**
- **whether a 'derivative use' immunity is reasonably available as a less rights restrictive alternative in section 42 to ensure information or evidence indirectly obtained from a person compelled to answer questions or provide information or documents cannot be used in evidence against that person.**

Compatibility of the measure with the right to privacy

1.82 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.

1.83 By requiring that a person give information or evidence or produce a document, including in circumstances where to do so might tend to incriminate that person, the proposed measure may also engage and limit the right to privacy.

1.84 The statement of compatibility does not acknowledge that the proposed coercive evidence gathering powers in section 41 may engage the right to privacy and therefore does not provide an assessment of whether the measure engages and limits this right.[10] It is unclear from the information provided as to the extent to which a person may be required to disclose personal or confidential information. As noted above, the measure appears to pursue a legitimate objective and be rationally connected to that objective. However, questions remain as to whether the measure is a proportionate means of achieving the objective in the context of limitations on the right to privacy.

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

Committee comment

1.86 The committee seeks the advice of the minister as to whether any limitation on the right to privacy is reasonable and proportionate to achieve the stated objective including:

- **what types of information may be subject to a disclosure notice and whether this could include personal or confidential information;**
- **whether there are less rights restrictive ways of achieving the objective;**
- **whether the persons who may be subject to compulsory disclosure is sufficiently circumscribed with respect to the stated objective of the measure; and**
- **whether there are adequate and effective safeguards in relation to the measure.**

10 It is noted that the statement of compatibility does acknowledge that the right to privacy is engaged by other measures in the bill, including in relation to the powers of inspectors, drawn from the *Regulatory Powers (Standards Provisions) Act 2014*, to enter premises and inspect documents or things on the premises. See, EM, SOC, pp. 18-19.

Treasury Laws Amendment (Enhancing ASIC's Capabilities) Bill 2018

Purpose	Seeks to amend the *Australian Securities and Investments Commission Act 2001* to require ASIC to consider competition in the financial system when performing its functions and exercising its powers and to remove the requirement for ASIC staff to be engaged under the *Public Service Act 1999*. Also seeks to make consequential amendments to several Acts
Portfolio	Treasury
Introduced	House of Representatives, 28 March 2018
Right	Just and favourable conditions of work (see **Appendix 2**)
Status	Seeking additional information

Removal of requirement for ASIC staff to be engaged under the Public Service Act

1.87 The bill seeks to amend the *Australian Securities and Investments Commission Act 2001* (ASIC Act) to provide that the chairperson of ASIC may employ such employees as the chairperson considers necessary for ASIC and may determine the terms and conditions of employment, including remuneration.[1] The chairperson would also determine in writing the ASIC Code of Conduct and the ASIC Values which apply to ASIC members and staff members.[2]

1.88 The effect of these amendments would be to remove the requirement for ASIC staff to be engaged under the *Public Service Act 1999* (PS Act), and consequently remove the requirement that ASIC staff members employed under the PS Act be subject to the Australian Public Service (APS) Code of Conduct and APS Values.

Compatibility of the measures with the right to just and favourable conditions of work

1.89 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).

1.90 The right to just and favourable conditions of work includes 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.

1 Item 7, proposed section 120.

2 Item 11, proposed sections 126B and 126C.

1.91 The PS Act contains a range of provisions in relation to the terms and conditions of employment of public servants. By removing the requirement that ASIC employ staff under the PS Act and providing that the ASIC chairperson may engage staff directly and set the terms and conditions of employment, the measures engage and may limit the right to just and favourable conditions of work.

1.92 This right may be permissibly limited where the limitation pursues a legitimate objective, is rationally connected to that objective and is a proportionate means of achieving that objective. The statement of compatibility does not acknowledge that any rights are engaged or limited by the measures and therefore does not provide an analysis against these criteria.

1.93 The explanatory memorandum states that the proposed amendments will 'support ASIC to more effectively recruit and retain staff in positions requiring specialist skills'.[3] This may be capable of being a legitimate objective for the purposes of international human rights law. However, limited information is provided in the explanatory materials to the bill as to how this objective addresses a pressing and substantial concern, as is required in order to constitute a legitimate objective for the purposes of international human rights law.

1.94 It is unclear from the explanatory materials, for example, how the PS Act operates as a barrier to the recruitment and retention of appropriate staff. The explanatory memorandum states that the amendments implement a recommendation made by the government commissioned report, *Fit for the Future: A Capability Review of ASIC*, published in December 2015. The report recommended that the government 'remove ASIC from the [PS Act] as a matter of priority, to support more effective recruitment and retention strategies'.[4] While not discussed in the explanatory materials for the bill, the report noted several ways in which the PS Act 'negatively impacts' ASIC, including that it impedes ASIC's ability to attract and retain staff who may pursue better remuneration elsewhere, including at peer regulators such as the Australian Prudential Regulation Authority; and that it slows down the ability for internal promotions, particularly at senior levels.[5] In accordance with *Guidance Note 1*, the committee's expectation is that information such as this would be included in the statement of compatibility as part of an assessment of whether the measures address a pressing and substantial concern for the purposes of international human rights law.

1.95 There are also questions about the proportionality of the measures and, in particular, whether the measures are the least rights restrictive approach. It is unclear, for example, why barriers to recruitment and retention of staff could not be

3 Explanatory memorandum, p. 9.

4 *Fit for the Future: A Capability Review of ASIC* (December 2015) p. 21.

5 *Fit for the Future: A Capability Review of ASIC* (December 2015) p. 108.

addressed through the negotiation of entitlements through the usual enterprise process or the current provisions for Individual Flexibility Arrangements (IFAs).[6] Further, the ASIC Act currently allows for the chairperson to employ persons outside the PS Act, under terms and conditions such as the chairperson determines.[7] Questions arise as to whether arrangements such as these may be pursued as less rights restrictive alternatives to the removal of the requirement that ASIC staff be engaged under the PS Act.

1.96 At present, APS employees are generally employed under relevant enterprise agreements which set out terms and conditions of employment. Section 311 of the bill provides that ASIC staff who are APS employees immediately prior to the date the proposed measures take effect will continue to be employed from this date of commencement on the same terms, conditions and with the same accrued entitlements under a written agreement under the ASIC Act.[8] This would appear to indicate that no ASIC staff member currently engaged under the PS Act will be worse off when the measures in the bill take effect. However, given the potential breadth of powers of the ASIC chairperson to employ and set out terms and conditions for ASIC staff, it is not clear from the information provided what safeguards are in place to ensure ASIC employees whose work conditions are governed currently under the PS Act are not worse off in future. Having regard to the breadth of the chairperson's powers and the obligation on state parties under ICESCR not to unjustifiably take any backwards steps (retrogressive measures) that might affect the right to just and favourable conditions of work,[9] concerns arise as to whether the measure as proposed contains adequate safeguards to protect just and favourable conditions of work.

Committee comment

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

1.98 The committee therefore seeks the advice of the Minister for Revenue and Financial Services as to:

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

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6 The ASIC Capability Review noted that the use of IFAs was relatively uncommon at ASIC at the time the review was conducted and, further, that such arrangements 'affect efficiency given the additional complexity of managing these arrangements'. See, *Fit for the Future: A Capability Review of ASIC* (December2015) pp. 107-108.

7 Part 6, sections 120(3) and 120(4) of the ASIC Act.

8 See also EM, p. 13.

9 See Article 2(1) of ICESCR.

- **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 whether less rights restrictive measures may be reasonably available and the sufficiency of any relevant safeguards; and**
- **whether the measure is compatible with Australia's obligations not to take any backwards steps (retrogressive measures) in relation to the right to just and favourable conditions of work.**

Treasury Laws Amendment (2018 Measures No. 4) Bill 2018

Purpose	Range of amendments concerning compliance with the Superannuation Guarantee
Portfolio	Treasury
Introduced	House of Representatives, 28 March 2018
Rights	Presumption of innocence (see **Appendix 2**)
Status	Seeking additional information

Strict liability and absolute liability offences

1.99 Schedule 1 of the bill seeks to amend the *Taxation Administration Act 1953* (TAA) to introduce a strict liability offence for employers who fail to comply with a direction from the Commissioner to pay a superannuation guarantee charge.[1] A person will not commit an offence if they took all reasonable steps within the required period to both comply with the direction and to ensure that the original liability was discharged before the direction was given.[2]

1.100 Schedule 1 also would allow the Commissioner to direct an employer to attend an approved education course where that employer has failed to comply with their superannuation guarantee obligations. Failure to comply with the education direction would be an absolute liability offence.[3]

1.101 Schedule 5 of the bill seeks to amend the TAA to introduce a strict liability offence for failing to provide security where ordered to do so by the Federal Court.[4] A person will not commit an offence to the extent that they are not capable of complying with the order.[5]

Compatibility of the measure with the presumption of innocence

1.102 Article 14(2) of the International Covenant on Civil and Political Rights (ICCPR) provides that everyone charged with a criminal offence has the right to be presumed innocent until proven guilty. Generally, consistency with the presumption of innocence requires the prosecution to prove each element of a criminal offence beyond reasonable doubt. The effect of applying strict liability to an element of an offence means that no fault element needs to be proven by the prosecution,

1 See Part 1 of Schedule 1 of the bill, proposed section 265-95(2).

2 See Part 1 of Schedule 1 of the bill, proposed section 265-95(3).

3 See Part 2 of Schedule 1 of the bill, proposed section 8C(1)(fa).

4 See Part 3 of Schedule 5 of the bill, proposed section 255-120(2).

5 See Part 3 of Schedule 5 of the bill, proposed section 255-120(3).

although the defence of mistake of fact is available to the defendant. Applying absolute liability to an element of an offence also means that no fault element needs to be proved by the prosecution, however the defence of mistake of fact is not available to the defendant. The strict liability and absolute liability offences engage the presumption of innocence because they allow for the imposition of criminal liability without the need to prove fault.

1.103 Strict liability and absolute liability offences will not necessarily be inconsistent with the presumption of innocence provided that they are within reasonable limits, taking into account the importance of the objective being sought, and maintain the defendant's right to a defence. In other words, such offences must pursue a legitimate objective and be rationally connected and proportionate to that objective.

1.104 While the statement of compatibility provides a general description of the nature and effect of each of the proposed offences,[6] it does not acknowledge that the presumption of innocence is engaged or limited by the strict liability and absolute liability offences in Schedule 1 and Schedule 5. Instead, the statement of compatibility states that both Schedule 1 and Schedule 5 do not engage any applicable rights or freedoms.[7]

1.105 It is noted that the explanatory memorandum to the bill also provides some information as to the rationale for and effect of the strict liability and absolute liability offences.[8] However, the information provided in the explanatory memorandum is not sufficient as it does not provide an assessment of whether the limitation on the presumption of innocence is permissible. As set out in the committee's *Guidance Note 1,* the committee's expectation is that statements of compatibility read as stand-alone documents, as the committee relies on the statement as the primary document that sets out the legislation proponent's analysis of the compatibility of the bill with Australia's international human rights obligations.

Committee comment

1.106 The strict liability and absolute liability offences introduced by Schedules 1 and 5 of the bill engage and limit the presumption of innocence.

1.107 The committee refers to its *Guidance Note 1* and seeks further information from the minister as to:

- **whether the strict liability and absolute liability offences introduced by the bill pursue a legitimate objective for the purposes of international human rights law;**

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6 See, Statement of Compatibility (SOC), 119-120, 122-123.

7 SOC, [10.11] and [10.31].

8 Explanatory Memorandum, 12-14, 25-26, 82-84.

- **whether the offences are rationally connected to (that is, effective to achieve) that objective; and**
- **whether the limitation on the presumption of innocence introduced by the strict liability and absolute liability offences is proportionate to that objective.**

Underwater Cultural Heritage Bill 2018

Purpose	Introduces a series of measures to provide for the protection and conservation of Australia's underwater cultural heritage
Portfolio	Environment and Energy
Introduced	House of Representatives, 28 March 2018
Rights	Fair Trial; criminal process rights (see **Appendix 2**)
Status	Seeking additional information

Civil penalties for breaches of protected underwater cultural heritage regime

1.108 The bill seeks to introduce a number of civil penalties for breaches of the proposed new regime for the protection and conservation of Australia's underwater cultural heritage. Some of these penalties are substantial, including penalties of up to 300 penalty units (currently, $63,500) for engaging in prohibited conduct within a protected zone without a permit,[9] possessing protected underwater cultural heritage without a permit,[10] and exporting underwater cultural heritage without a permit.[11] There is also a civil penalty of up to 800 penalty units (currently, $168,000) for engaging in conduct with an adverse impact on protected underwater cultural heritage without a permit.[12] There are corresponding criminal offences and strict liability offences, punishable by either imprisonment or civil penalties, which are discussed further below.

Compatibility of the measure with criminal process rights

1.109 Under Australian law, civil penalty provisions are dealt with in accordance with the rules and procedures that apply in relation to civil matters (for example, the

9 Proposed section 29(6).

10 Proposed section 31(6).

11 Proposed section 35(5).

12 Proposed section 30(6). There are also a number of civil penalties for which the proposed penalty is 120 penalty units ($25,000), however the committee considers such penalties in context would be unlikely to be considered criminal for the purposes of international human rights law: see proposed section 27 (failing to notify Minister of transfer of permit); section 28 (breach of permit condition); section 32 (supplying and offering to supply protected underwater cultural heritage without a permit); section 33 (advertising to sell underwater cultural heritage without a permit); section 34 (importing protected underwater cultural heritage without a permit); section 36 (importing underwater cultural heritage of a foreign country without a permit); section 37 (failing to produce a permit); section 38 (failing to respond to notice from Minister); section 39 (failing to comply with Ministerial direction); and section 40 (failing to advise Minister of discovery of underwater cultural heritage).

burden of proof is on the balance of probabilities). However, if the new civil penalty provisions are regarded as 'criminal' for the purposes of international human rights law, they will engage the criminal process rights under articles 14 and 15 of the International Covenant on Civil and Political Rights (ICCPR). The statement of compatibility acknowledges that the civil penalty provisions may engage criminal process rights if they are considered 'criminal' for the purposes of international human rights law.

1.110 As noted in the statement of compatibility, the committee's *Guidance Note 2* (see Appendix 4) sets out the relevant steps for determining whether civil penalty provisions may be considered 'criminal' for the purpose of international human rights law:

- first, the domestic classification of the penalty as civil or criminal (although the classification of a penalty as 'civil' is not determinative as the term 'criminal' has an autonomous meaning in human rights law);
- second, the nature and purpose of the penalty: a civil penalty is more likely to be considered 'criminal' in nature if it applies to the public in general rather than a specific regulatory or disciplinary context, *and* where there is an intention to punish or deter, irrespective of the severity of the penalty; and
- third, the severity of the penalty.

1.111 Here, the second and third steps of the test are particularly relevant as the penalties are classified as 'civil' under domestic law meaning they will not automatically be considered 'criminal' for the purposes of international human rights law. Under step two, the statement of compatibility indicates that the civil penalties are directed at a particular regulatory context, namely the regulation of underwater cultural heritage. Further, the statement of compatibility notes that the purpose of the penalties is to deter the 'deliberate destruction, looting or illegal salvage of protected underwater cultural heritage that is a national, non-renewable and unique historical asset'.[13] While the purpose of deterrence is often an indication that a penalty may be 'criminal' in nature, the narrow application of the penalties would indicate the penalty is unlikely to be considered 'criminal' under the second part of the test.

1.112 Even if step two of the test is not established, a penalty may still be 'criminal' for the purposes of international human rights law under step three where the penalty is a substantial pecuniary sanction. In determining whether a civil penalty is sufficiently severe to amount to a 'criminal' penalty under step three, the nature of the industry or sector being regulated and the relative size of the penalties in that regulatory context is relevant. It is noted that the conduct regulated by the bill that

13 Statement of Compatibility (SOC), p.11.

gives rise to the relevant civil penalties (such as damage and destruction to sites of underwater cultural heritage) may be substantial and irreversible, and that the penalties have been drafted having regard to those potential consequences. However, the civil penalties that may be imposed are substantial (300 penalty units for breaches of sections 29(6), 31(6) and 35(5) and 800 penalty units for breaching section 30(6). This raises concerns as to whether the overall severity of the penalty would mean that the penalties may be classified as 'criminal' for the purposes of international human rights law. Further information as to the relative size of the pecuniary penalties in the particular context that is being regulated would be of assistance in determining the human rights compatibility of the legislation.

1.113 If the civil penalties were assessed to be 'criminal' for the purposes of human rights law, this does not mean that the relevant conduct must be turned into a criminal offence in domestic law nor does it mean that the civil penalty is illegitimate. Instead, it means that the civil penalty provisions in question must be shown to be consistent with the criminal process guarantees set out in articles 14 and 15 of the ICCPR, including the right not to be tried twice for the same offence (Article 14(7)) and the right to be presumed innocent until proven guilty according to law (Article 14(2)).[14]

1.114 The statement of compatibility usefully explains that the civil penalty provisions are compatible with Article 14(7), as while there are corresponding criminal offences attaching to the same conduct, a person cannot be subject to the civil penalty provision if they have been convicted of the criminal offence (for which there are different pecuniary penalties applicable, and potential imprisonment), and any proceedings for a civil penalty provision are automatically stayed if criminal proceedings are commenced.[15] This would ensure that a person could not be punished twice for the same conduct, consistent with Article 14(7).

1.115 However, the presumption of innocence in Article 14(2) requires that the case against a person be demonstrated on the criminal standard of proof, that is, it must be proven beyond reasonable doubt. By contrast, the standard of proof applicable in the civil penalty proceedings introduced by the bill is the civil standard of proof, requiring proof on the balance of probabilities. Therefore, if the penalties were classified as 'criminal' for the purposes of international human rights law, it would be necessary to explain how the application of the civil standard of proof for such proceedings is compatible with Article 14(2) of the ICCPR. This would include an analysis of whether the limitation on the presumption of innocence pursues a

14 Other guarantees include the guarantee against retrospective criminal laws (Article 15(1)) and the right not to incriminate oneself (article 14(3)(g)). These guarantees are not engaged by the proposed civil penalties, as the law does not appear to apply retrospectively and the conduct giving rise to the offence does not appear to engage the right not to incriminate oneself.

15 SOC, p. 12.

legitimate objective, is rationally connected to this objective, and is proportionate to that objective.

Committee comment

1.116 The committee seeks the advice of the minister as to whether the civil penalty provisions in proposed sections 29(6), 30(6), 31(6), and 35(5) of the bill may be considered 'criminal' in nature for the purposes of international human rights law, addressing in particular whether the severity of the civil penalties that may be imposed on individuals is such that the penalties may be considered 'criminal' (including information as to the nature of the sector being regulated and the relative size of the pecuniary penalties in that regulatory context).

1.117 The committee also seeks the advice of the minister as to whether, assuming the penalties are considered 'criminal' for the purposes of international human rights law, the application of the civil standard of proof to the civil penalty provisions in sections 29(6), 30(6), 31(6), and 35(5) is compatible with the presumption of innocence in Article 14(2) of the ICCPR. This includes advice as to whether the limitation on the presumption of innocence pursues a legitimate objective, is rationally connected to this objective, and is proportionate to that objective, and whether the civil penalty provisions could be amended to apply the criminal standard of proof.

Strict liability offences

1.118 The bill also seeks to introduce a number of strict liability offences for breaches of the underwater cultural heritage protection regime, which are punishable by a pecuniary penalty of 60 penalty units.[16]

Compatibility of the measure with the presumption of innocence

1.119 As noted earlier, article 14(2) of the ICCPR provides that everyone charged with a criminal offence has the right to be presumed innocent until proven guilty. Generally, consistency with the presumption of innocence requires the prosecution to prove each element of a criminal offence beyond reasonable doubt. The effect of applying strict liability to an element of an offence is that no fault element needs to be proven by the prosecution (although the defence of mistake of fact is available to the defendant).

1.120 Strict liability offences engage the presumption of innocence because they allow for the imposition of criminal liability without the need to prove fault. The statement of compatibility acknowledges the strict liability offences engage and limit the presumption of innocence, but states that:

16 See proposed sections 27(6), 28(3), 29(5), 30(5), 31(5), 32(5), 33(4), 34(4), 35(4), 36(4), 37(5), 38(6), and 39(7).

> Application of strict liability has been set with consideration given to the guidelines regarding the circumstances in which strict liability is appropriate set out in *A Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers*. The penalties for the strict liability offences in the Bill do not include imprisonment, and do not exceed 60 penalty units for an individual.[17]

1.121 However, further information is required in order to determine whether the limitation on the presumption of innocence is permissible. In this respect, strict liability offences will not necessarily be inconsistent with the presumption of innocence provided that they are within reasonable limits, taking into account the importance of the objective being sought, and maintain the defendant's right to a defence. In other words, limits on the presumption of innocence must be reasonable, necessary and proportionate to the objective being sought.

Committee comment

1.122 The committee seeks the advice of the minister as to the compatibility of the strict liability offences with the presumption of innocence, in particular:

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

17 SOC, p.13.

Further response required

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

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**)
Previous report	3 of 2018
Status	Seeking further additional information

Background

1.124 The committee first reported on the bill in its *Report 3 of 2018*, and requested a response from the Minister for Social Services by 11 April 2018.[1]

1.125 The minister's response to the committee's inquiries was received on 19 April 2018. The response is discussed below and is reproduced in full at **Appendix 3**.

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

1.126 The measures in 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.

1 Parliamentary Joint Committee on Human Rights, *Report 3 of 2018* (27 March 2018) pp. 6-11.

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

1.127 The initial human rights analysis stated that the measures engage the right to privacy and the right to work.[2] The right to privacy is engaged and limited 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. The measure may also engage and limit the right to work insofar as individuals may be excluded from employment with the NDIS on the basis of their criminal record.

1.128 The statement of compatibility acknowledged 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.[3]

1.129 The initial analysis stated that the stated objective of the bill, namely to protect people with a disability from experiencing harm arising from unsafe support or services under the NDIS, was likely to be a legitimate objective for the purposes of international human rights law. Insofar as including information regarding spent, quashed and pardoned convictions may enable worker screening units to accurately assess a person's suitability as a disability support worker, the initial analysis also stated that the measure appears to be rationally connected to this objective.

1.130 However, the initial analysis also noted that questions arose as to whether the measures in the bill constituted a proportionate limitation on the right to privacy and right to work. 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.[4]

1.131 While it was acknowledged that there may be circumstances where it would be appropriate to permit disclosure, or taking into account of, a person's criminal history to properly assess whether a person poses an unacceptable risk of harm, the initial analysis noted that questions arose as to whether the breadth of the measure

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2 For further information as to the content of these rights, see Appendix 2. 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.

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

4 SOC, p. 12

in this bill is greater than necessary to achieve the stated objectives. This is because 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. This also raised questions as to whether there would 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.

1.132 Additionally, based on the information provided, it was 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.

1.133 The initial analysis also noted that it was unclear whether there are sufficient safeguards to ensure that the measure is a proportionate limitation on human rights. In this respect, the statement of compatibility recognises that 'it is critical that NDIS worker screening does not unreasonably exclude offenders from working in the disability sector'.[5] 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 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.
>
> 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.[6]

1.134 It was acknowledged in the initial analysis that 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. 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.

1.135 Accordingly, the committee requested the advice of the minister as to whether the measures were proportionate to achieving the stated objectives of the

5 SOC, p. 11.

6 SOC, p. 12.

bill (including whether the measures are the least rights restrictive way of achieving the objective and the existence of any safeguards).

Minister's response

1.136 The minister's response explains the importance of taking into account a person's entire criminal record when undertaking the NDIS worker screening, noting that it is important 'to ensure that the state and territory worker screening units tasked with making an informed assessment of an individual's suitability to work with people with disability can access and consider a complete picture of that person's criminal history'. In this respect, the minister explains the particular vulnerabilities of disabled persons that necessitate a more extensive criminal history check of potential NDIS workers:

> People with disability are some of the most vulnerable within the Australian community. It is not only sexual or violent offences that the worker screening regime seeks to mitigate against. Individuals employed within the NDIS are in a position of trust and in many cases will have access to the person with disability's personal belongings, finances and medication. Minor offences may be relevant to a person's integrity and general trustworthiness. On that basis, it is appropriate to have awareness of the circumstances […] surrounding even minor offences.

1.137 The minister's response further explains why a less rights restrictive approach, such as limiting the types of offences that could be disclosed, was not reasonably available:

> Limiting the categories of offences that can be disclosed to worker screening units would create a risk that relevant information is not available to inform a decision by a worker screening unit and could undermine the value of an NDIS worker screening outcome as a source of information for people with disability and for employers. Inaccurate risk assessments may also be unfair to workers themselves.
>
> …
>
> While, as the Committee points out, a person whose conviction is quashed may be factually and legally innocent, there are a range of reasons that a conviction may be quashed or pardoned that might not be so black and white. This will not be known until the specific circumstances surrounding the pardoned or quashed conviction are considered by the worker screening unit, which is why they need access to such information as proposed in the Bill.

1.138 It is acknowledged that undertaking an accurate risk assessment is important and, as noted in the initial analysis, a detailed criminal history check of individuals would assist in ascertaining whether a person poses a risk. However, it is noted that international human rights jurisprudence has raised concerns that indiscriminate and

open-ended disclosure of criminal record data may be incompatible with human rights where there are not adequate safeguards in place.[7] In this respect, the minister's response sets out the safeguards that would be in place in order to ensure that the assessment of risk is undertaken in a proportionate manner:

> Safeguards will be in place through a nationally consistent, risk-based approach that will provide state and territory worker screening units with a framework for considering a person's criminal history and patterns of behaviour over a lifetime that would indicate potential future risk to people with disability...
>
> State and territory worker screening units will be required to undertake a rigorous process to determine the relevance of a particular event to whether an applicant for an NDIS Worker Screening Check poses a risk to people with disability. In particular, worker screening units are required to consider:
>
> - the nature, gravity and circumstances of the event and how it […] contributes to a pattern of behaviour that may be relevant to disability-related work;
> - the length of time that has passed since the event occurred;
> - the vulnerability of the victim at the time of the event and the person's relationship to the victim or position of authority over the victim at the time of the event;
> - the person's criminal, misconduct and disciplinary, or other relevant history, including whether there is a pattern of concerning behaviour;
> - the person's conduct since the event; and
> - all other relevant circumstances in respect of their offending, misconduct or other relevant history, including attitudes towards offence or misconduct, and the impact on their eligibility to be engaged in disability-related work.

1.139 The minister further emphasises that a person's criminal history 'forms only one part of the analysis and risk assessment undertaken by a state or territory worker screening unit' and that a conviction for a minor offence, spent or quashed conviction would not necessarily prohibit that person from gaining employment with a provider within the NDIS.

1.140 These safeguards are important in determining whether the limitation on the right to privacy and right to work is proportionate. Notwithstanding the fact that the exception to the Crimes Act introduced by the bill creates a broad power to disclose,

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7 See, for example, *MM v United Kingdom,* App. No 24029/12, European Court of Human Rights (2012); *R (on the application of T and another) v Secretary of State for the Home Department and another* [2014] UKSC 35. 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).

the safeguards in the worker screening process described in the further information provided by the minister appear to be capable of ensuring that persons with spent, pardoned or quashed criminal convictions that bear no relevance to their suitability as an NDIS worker would not be unduly prevented from being employed by the NDIS.

1.141 However, it is not clear from the information provided by the minister whether the safeguards outlined are matters of departmental policy or matters to be set out in legislation or in delegated legislation in the future. Departmental policies and procedures are less compelling than legislation, as policies can be removed, revoked or amended at any time, and are not subject to the same levels of scrutiny or accountability as when the policies are enshrined in legislation.

1.142 The bill additionally provides that, before regulations can prescribe the persons to whom the criminal convictions may be disclosed, the minister must be satisfied, relevantly, that the person or body complies with applicable laws relating to privacy, human rights and records management, complies with principles of natural justice, and has risk assessment frameworks and appropriately skilled staff to assess risks to the safety of a person with a disability.[8] However, further information from the minister would assist in determining whether the safeguards set out in the minister's response are sufficient for the purposes of international human rights law, including whether the safeguards will be prescribed by legislation or legislative instrument.

1.143 Another relevant factor in determining whether safeguards are sufficient includes whether there is a possibility of monitoring and access to review.[9] It is noted, for example, that Working with Children Check decisions are able to be reviewed by applicants through state and territory administrative appeals tribunals.[10] Further information from the minister as to whether (and, if so, by what mechanism) a decision relating to a person's suitability for employment following worker screening will be able to be reviewed would therefore be of assistance to determine whether the limitation on the right to privacy and right to work is proportionate.

Committee response

1.144 The committee thanks the minister for his response.

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8 Section 85ZZGL of the bill.

9 See Parliamentary Joint Committee on Human Rights, *Guidance Note 1* (2014) p.2.

10 See Victorian Government Department of Justice and Regulation, *Working with Children Check: Failing the Check*, available at http://www.workingwithchildren.vic.gov.au/home/applications/application+assessment/failing+the+check/; NSW Civil and Administrative Tribunal, *Working with Children Checks,* available at http://www.ncat.nsw.gov.au/Pages/administrative_equal_opp/aed_your_matter/aeod_working-with-children/aeod_working-with-children.aspx .

1.145 The committee seeks further information from the minister as to the proposed safeguards in relation to the criminal history checks undertaken as part of the proposed NDIS Worker Screening Check, including:

- **whether the risk assessment framework outlined in the minister's response will be set out in legislation or a legislative instrument; and**
- **whether a decision relating to a person's suitability for employment following worker screening is able to be reviewed.**

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

1.146 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.

1.147 '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).[11] 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.[12]

1.148 The United Nations Human Rights Committee has not considered whether having a criminal record is a relevant personal attribute for the purposes of the prohibition on discrimination. 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.[13] While this jurisprudence is not binding on Australia, the case law from the Court is useful in considering Australia's obligations under similar provisions in the International Covenant on Civil and Political Rights (ICCPR).[14] 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

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11 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.

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

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

14 See also the *Australian Human Rights Commission Act 1986* (Cth) which considers discrimination in employment on the basis of a 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).

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.

1.149 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.[15]

1.150 The statement of compatibility did not recognise that the right to equality and non-discrimination is engaged by the measure, and so did not provide a substantive assessment of whether the measure constitutes a permissible limitation on that right. Accordingly, the committee requested the advice of the minister as to the compatibility of the measure with this right.

Minister's response

1.151 In relation to whether the differential treatment is rationally connected and proportionate to the legitimate objective of the measure, the minister's response explains:

> The more comprehensive data collected as part of the NDIS Worker Screening Check reflects that there is a higher degree of risk an individual may pose to person[s] with disability in the course of delivering supports and services. Differential treatment of individuals as a result of considering criminal history as a part of a risk-based worker screening would not constitute unlawful discrimination as there is sufficient research and objective evidence that supports the consideration of this information as a basis for determining risk.
>
> A complete criminal history, leads to a more accurate and reliable risk-based worker screening assessment which benefits both people with disability and the worker being screened. A comprehensive assessment is likely to be fairer to workers and reduce the chance of unjustified discrimination.
>
> It should be noted that employers do not get access to any criminal history information under the proposed approach to NDIS Worker Screening. Employers will only have access to worker screening outcomes, once the approved Worker Screening Unit has made a determination.
>
> Finally, I note that Working with Children Checks already operate in all jurisdictions with access to, and assessment of, full criminal history. People with disability deserve the same level of protection.

1.152 From the information provided, it appears that the differential treatment is based on reasonable and objective criteria. However, for the same reasons discussed

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

above in relation to the right to privacy and right to work, further information relating to the adequacy of the safeguards is required in order for the committee to complete its analysis as to whether the measure is compatible with the right to equality and non-discrimination.

Committee response

1.153 The committee thanks the minister for his response.

1.154 The committee seeks further information from the minister as to the proposed safeguards in relation to the criminal history checks undertaken as part of the proposed NDIS Worker Screening Check, including:

- **whether the risk assessment framework outlined in the minister's response will be set out in legislation or legislative instrument; and**
- **whether a decision relating to a person's suitability for employment following worker screening is able to be reviewed.**

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**)
Previous report	3 of 2018
Status	Seeking further additional information

Background

1.155 The committee first reported on the bill in its *Report 3 of 2018*, and requested a response from the Minister for Defence by 11 April 2018.[1]

1.156 The bill passed both Houses of Parliament on 28 March 2018 and received Royal Assent on 11 April 2018.

1.157 The minister's response to the committee's inquiries was received on 20 April 2018. The response is discussed below and is reproduced in full at **Appendix 3**.

Communicating AUSTRAC information to foreign intelligence agencies

1.158 Proposed section 133BA 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

1 Parliamentary Joint Committee on Human Rights, *Report 3 of 2018* (27 March 2018) pp. 52-56.

Reports and Analysis Centre (AUSTRAC) information[2] to a foreign intelligence agency if satisfied of certain matters and may authorise an ASD official to communicate such information on their behalf. The matters in respect of which the Director-General is to be satisfied before communicating AUSTRAC information 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.[3]

Compatibility of the measure with the right to privacy

1.159 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. The initial human rights analysis stated that, 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.

1.160 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 bill did not acknowledge this limitation on the right to privacy and therefore did not provide information on these matters. Accordingly, the committee requested 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

2 '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*.

3 Section 133BA(1) of the bill.

circumscribed and whether there are adequate and effective safeguards in relation to the operation of the measure).

Minister's response

1.161 In response to the committee's inquires, the minister's response provides some general information as to the purpose of the amendment and existing safeguards, but the response does not expressly address whether the limitation on the right to privacy is permissible. The minister's response states that the amendment 'is critical to ASD's work to combat terrorism, online espionage, transnational crime, cybercrime and cyber-enabled crime', and further states:

> As an independent statutory agency, this amendment now ensures that information is able to be appropriately shared, consistent with how other Australian domestic intelligence and security agencies manage this type of information. This work across the intelligence and security community is central to defending Australia and its national interests.

1.162 As noted in the initial human rights analysis, the right to privacy may be subject to permissible limitations and thus the purpose of the measure is relevant in determining whether the limitation on these rights is permissible.[4] The purposes of combating terrorism, online espionage, transnational crime, cybercrime and cyber-related crime is likely to be a legitimate objective for the purpose of international human rights law, and the information sharing for this purpose appears to be rationally connected to this objective.

1.163 Relevant to the proportionality of the measure, the minister's response provides the following general information about safeguards:

> As the committee would be aware, the Australian Transaction Reports and Analysis Centre (AUSTRAC) has made successive statements and provided advice to the parliament in relation to the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006*, including specifically regarding the sharing of information with foreign partners, and provided assurances that while the Act does engage a range of human rights, to the extent that it limits some rights, those limitations are reasonable, necessary and proportionate in achieving a legitimate objective.
>
> …
>
> This amendment to the Act does not extend or alter the current arrangement ASD receives by being part of the Department of Defence. Similarly, it is consistent with arrangements provided for all other intelligence and security agencies that require this function. This amendment is not, in effect, creating a new arrangement for ASD. These provisions reflect longstanding arrangements for agencies in the

4 See Parliamentary Joint Committee on Human Rights, *Guidance Note 1: Drafting Statements of Compatibility* (December 2014) p.2.

> intelligence and security community, and there are strong safeguards in place to ensure the function is appropriately exercised.
>
> In this context, there already exists strong compliance safeguards and ASD is subject to some of the most rigorous oversight arrangements in the country. This includes being subject [to] the oversight of the Inspector-General of Intelligence and Security, who has the powers of a standing royal commission and can compel officers to give evidence and hand over materials. The Inspector-General regularly reviews activities to ensure ASD's rules to protect the privacy of Australians are appropriately applied.

1.164 While the minister's response indicates that AUSTRAC has previously reported to parliament on the human rights compatibility of the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006,* that does not address the committee's specific inquiries in relation to the implications of the measures in this bill and their compatibility with the right to privacy.

1.165 It is acknowledged that the amendment is not creating a new arrangement for ASD, and that the amendments reflect current arrangements for agencies in the intelligence and security community. However, scrutiny committees consistently note that the fact that provisions replicate existing arrangements does not, of itself, address the committee's human rights concerns. Further information is therefore required from the minister as to what safeguards are in place to ensure the function is appropriately exercised. This includes information as to what constitutes an "appropriate undertaking" for the purpose of section 133BA of the bill (described at [1.158] above), including what is considered appropriate protection of confidential information by the foreign intelligence agency (section 133BA(1)(a)(i)). It is unclear from the information provided that the measure is a proportionate limitation on the right to privacy.

Committee response

1.166 The committee thanks the minister for her response.

1.167 The committee seeks further information from the minister as to the compatibility of the measure with the right to privacy including:

- **information as to the existing safeguards to protect the right to privacy (such as the *Privacy Act 1988*);**
- **the scope of information that may be subject to information sharing;**
- **what constitutes an "appropriate undertaking" in relation to the protection of confidential information by the foreign intelligence agency for the purposes of section 133BA(1)(a)(i) of the bill; and**
- **any other relevant safeguards that ensure the sharing of information between the ASD and foreign intelligence agencies is compatible with the right to privacy.**

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

1.168 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 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.

1.169 The United Nations (UN) Human Rights Committee has made clear that international law 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'.[5]

1.170 The initial analysis stated that 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.

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

1.172 A related issue 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.[6] This issue was also not addressed in the statement of compatibility.

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

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

6 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].

Minister's response

1.174 The minister's response did not substantively respond to the committee's inquiries as to the compatibility of the measures with the right to life and the prohibition on torture or cruel, inhuman, degrading treatment or punishment. In order to be compatible with these rights, information sharing powers must be accompanied by adequate and effective safeguards.

1.175 However, in this respect, the minister's response provides no information as to whether there is a prohibition on sharing information with foreign intelligence agencies where that information could lead to torture or cruel, inhuman, degrading treatment or punishment. Similarly, no information has been provided as to whether there is a prohibition on sharing information which could result in the prosecution of a person for an offence involving the death penalty. It is unclear whether or not there are any legal or policy requirements that mandate the consideration of such matters prior to the disclosure of information to a foreign intelligence organisation. By contrast, the Minister for Justice has previously provided the committee copies of the Australian Federal Police (AFP) National Guideline on international police-to-police assistance in death penalty situations and the AFP National Guideline on offshore situations involving potential torture or cruel, inhuman or degrading treatment or punishment. This allowed the committee to assess whether information sharing powers were compatible with human rights in the context of these guidelines.[7]

1.176 In relation to the minister's response in this instance, the fact that such information sharing powers are pre-existing and that there has been reporting to parliament does not address such human rights concerns. Indeed, as the prohibition on torture is absolute and cannot be subject to limitations, the minister's reference in the response to previous assessments of proportionality does not assist. While proportionality is relevant to an assessment of the compatibility of the measure with the right to life, in the context of the information sharing powers it is essential that there are effective safeguards in place. In relation to whether there are adequate safeguards in place, information as to what constitutes an "appropriate undertaking" for the purpose of section 133BA of the bill (described at [1.158] above) is relevant. This includes advice as to what is considered appropriate protection of confidential information by the foreign intelligence agency (section 133BA(1)(a)(i)), and whether it would include an undertaking that information shared with the foreign intelligence agencies would not result in persons being subject to the death penalty, torture or ill-treatment. Any further information, such as any policies about information sharing from the Director-General to a foreign intelligence agency, and what matters are

7 Parliamentary Joint Committee on Human Rights, *Report 8 of 2017* (15 August 2017) pp. 83-91.

taken into account when considering such communications, would also be of assistance.

1.177 In relation to the information provided by the minister relating to oversight of the ASD by the Inspector-General of Intelligence and Security, this information may be relevant to determining compatibility of the measure with human rights. In particular, the right to life and the prohibition against torture or cruel, inhuman or degrading treatment or punishment require an official and effective investigation to be undertaken when there are credible allegations against public officials concerning violations of these rights. However, further information is required as to the extent to which this oversight mechanism takes account of whether the ASD's rules are compatible with Australia's international human rights obligations.

Committee response

1.178 The committee thanks the minister for her response.

1.179 The committee seeks further information from the minister as to the compatibility of the measure with the right to life and the prohibition on torture or cruel, inhuman and degrading treatment or punishment.

1.180 In relation to the right to life, specific information as to any safeguards in place to protect the right to life, including information as to:

- **whether there is a prohibition on sharing information where that information may be used in investigations that may result in the imposition of the death penalty;**
- **whether there are any guidelines about information sharing in death penalty situations and whether the committee could be provided with a copy of any such guidelines; and**
- **whether the requirement that the Director-General receive "appropriate undertakings" from the foreign intelligence agency in order to share information pursuant to section 133BA(1) includes undertakings in relation to this matter and, if so, what constitutes an "appropriate undertaking". If such matters are set out in departmental policies or guidelines, a copy of those guidelines would be of assistance.**

1.181 In relation to the prohibition on torture, or cruel, inhuman or degrading treatment or punishment, specific information as to any safeguards in place to ensure compatibility with this right, including information as to:

- **whether there is a prohibition on sharing information where that information may result in a person being subject to torture, or cruel, inhuman or degrading treatment or punishment;**
- **whether there are any guidelines about information sharing in situations involving potential torture or cruel, inhuman or degrading treatment or**

punishment and whether the committee could be provided with a copy of any such guidelines; and

- **whether the requirement that the Director-General receive "appropriate undertakings" from the foreign intelligence agency in order to share information pursuant to section 133BA(1) includes undertakings in relation to this matter and, if so, what constitutes an "appropriate undertaking".**

1.182 In relation to each of these rights:

- **whether the oversight of the ASD by the Inspector-General of Intelligence and Security, referred to in the minister's response, includes oversight of whether the ASD's rules are compatible with Australia's international human rights obligations; and**
- **any other relevant safeguards that ensure the sharing of information between the ASD and foreign intelligence agencies is compatible with the right to life and the prohibition on torture, cruel, inhuman and degrading treatment or punishment.**

Operation outside the Public Service Act

1.183 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 *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.[8] Further, the Director-General may, at any time, by written notice, terminate the employment of such a person.[9]

Compatibility of the measure with just and favourable conditions at work

1.184 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).[10]

1.185 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

8 Item 29, proposed section 38A.

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

10 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).

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.[11]

1.186 The PS Act contains a range of provisions in relation to the terms and conditions of employment of public servants. As noted in the initial analysis, 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.

1.187 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'.[12] While the statement of compatibility points to some information as to why this objective may address a pressing and substantial concern, the initial analysis stated that further information would have been useful. It was unclear, for example, how the PS Act operates as a barrier to the recruitment and retention of appropriate staff. It was also unclear why this could not be addressed through the negotiation of entitlements through the usual enterprise agreement process.

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

1.189 Additionally, the initial analysis stated that 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.

1.190 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 was 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 was unclear whether they are sufficient given the potential breadth of the Director-General's powers.

1.191 The committee therefore sought the advice of the minister as to the compatibility of the measure with the right to just and favourable conditions of work.

Minister's response

1.192 The minister's response provides useful information as to the purpose of removing the ASD from the framework of the PS Act. In particular, the minister's

11 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.

12 Statement of compatibility (SOC) p. 7.

response states that the amendment 'pursues the legitimate objective of providing ASD with greater flexibility to recruit, retain, train, develop and remunerate its specialist staff, in accordance with the recommendations of the 2017 Independent Intelligence Review'. As to whether this measure addresses a pressing and substantial concern and is effective to achieve the objective, the minister's response states:

> This will provide ASD with greater flexibility to recognise the skills of its specialised workforce. This structure reflects the need to retain those individuals with highly sought after skills, such as those with science, technology, engineering and maths qualifications. Mobility across the public sector is also recognised as an important tool to bring in critical talent into ASD, but to also enable the further development of skills in different environments. To support this, the amendments made to the Intelligence Services Act include the specific provision that will allow for the transfer of employment from ASD to the Australian Public Service. As part of these arrangements, the prior service and accrued leave balances of staff within the Australian Public Service and ASD will continue to be recognised and ASD staff will continue to be able to access public sector superannuation schemes.
>
> […]
>
> Operating outside the Australian Public Service also provides the flexibility to design over time new employment categories and career pathways that are in addition to the standard public service structures. This will enable ASD to more directly market itself to the types of trades and skills it needs to attract, and highlight the skill development and career progression that can occur within these streams of work in the agency.
>
> It is recognised that ASD operates within a highly competitive employment market, even within the Australian security and intelligence community. There are several other agencies that also offer rewarding careers to people with many of the skills and attributes ASD seeks to engage. Overall, in recognition of the environment ASD seeks to recruit from, the amendments to the Intelligence Services Act effectively give the same flexibility to the Director-General of ASD for the recruitment and retention, and establishing workplace agreements, as the Australian Security Intelligence Organisation and the Australian Secret Intelligence Service.

1.193 Based on the information provided, it is likely that the measure pursues a legitimate objective for the purposes of international human rights law and that the measure is rationally connected to this objective.

1.194 In relation to the proportionality of the measure, the minister provides the following information as to why a less rights restrictive approach (such as staying within the framework of the PS Act) is not appropriate:

> As recognised by the Review, for ASD the option of continuing to operate within the Public Service Act employment framework, even with

> exemptions, is not the most effective way forward to ensure ASD can continue to deliver the outcomes required. It would increase the risk of further losing the critical skills needed to successfully perform this task and not address the need to improve ASD's position in the employment market to attract the highest quality candidates.

1.195 Further, the minister provides information as to the safeguards that are in place to protect just and favourable conditions of work. This includes new subsection 38F to the *Intelligence Services Act 2001*, which requires the Director-General of ASD to adopt the principles of the PS Act in relation to employees of ASD to the extent to which the Director-General considers they are consistent with the effective performance of the functions of ASD. The minister also points to the safeguards for workers under the *Fair Work Act 2009*, which the amendments introduced by the bill do not extinguish. The minister also provides the following information as to the oversight of the Inspector-General of Intelligence and Security of employment-related grievances in the ASD:

> In addition to the continuation of the protections afforded to staff by the Fair Work Act, the Inspector-General of Intelligence and Security (IGIS) provides additional safeguards not normally afforded to workers outside of the intelligence community. Through the amendments made to the Intelligence Services Act the IGIS will be given powers to investigate complaints regarding employment-related grievances from ASD employees. Previously the IGIS was not able to investigate these complaints, and ASD employees sought redress through the Public Service Commissioner or the Merit Protection Commissioner. From 1 July 2018, ASD employees can bring their grievances to the IGIS in the same way as for employees of the Australian Security Intelligence Organisation and the Australian Secret Intelligence Service.

1.196 Based on the information provided by the minister, there appear to be sufficient safeguards in place to conclude that, on balance, it is likely that the measure would be a proportionate limitation on the right to just and favourable conditions of work.

Committee response

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

1.198 Based on the further information provided by the minister, the committee considers that the measure is likely to be compatible with the right to just and favourable conditions at work.

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)
Rights	Equality and non-discrimination (see **Appendix 2**)
Previous report	3 of 2018
Status	Seeking further additional information

Background

1.199 The committee first reported on the instrument in its *Report 3 of 2018*, and requested a response from the Minister for Home Affairs by 11 April 2018.[1]

1.200 The minister's response to the committee's inquiries was received on 30 April 2018. The response is discussed below and is reproduced in full at **Appendix 3**.

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

1.201 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:

1 Parliamentary Joint Committee on Human Rights, *Report 3 of 2018* (27 March 2018) pp. 65-69.

- 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.

1.202 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

1.203 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.

1.204 '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).[2] 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).[3]

1.205 The initial human rights analysis stated that 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

2 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.

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

basis of national origin as it may disproportionately impact individuals from countries where English is not a national language or widely spoken.

1.206 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.[4]

1.207 The statement of compatibility states that the instrument does not engage any of the applicable rights or freedoms,[5] and so does not provide an assessment of whether the right to equality and non-discrimination is engaged by the measure.

1.208 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.[6]

1.209 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'.[7] The initial analysis stated that 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.[8]

1.210 Notwithstanding the legitimate objectives of the measure, it was unclear whether the measure is effective to achieve (that is, rationally connected to) and proportionate to that objective. In this respect, it was 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.

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4 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).

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

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

7 SOC, p. 8.

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

1.211 However, the initial analysis noted that the IELTS and the TOEFL iBT may exceed those requirements necessary to enter tertiary study.[9] It was 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 agent. This raised 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.

1.212 Similarly, it was 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 was unclear that this would necessarily ensure the person's proficiency in English at the required level.

1.213 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.[10]

1.214 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.[11] This raised

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9 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.

10 SOC, p. 8.

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

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.

1.215 Accordingly, the committee requested 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 rights-restrictive way of achieving the stated objective and the existence of any safeguards).

Minister's response

1.216 In relation to the right to equality and non-discrimination engaged by the instrument and discussed in the previous analysis, the minister provides the following general information:

> Guided by the 2014 Kendall Review, the Government is committed to protecting vulnerable visa applicants by ensuring that new and re-registering migration agents be required to prove that they have English language proficiency. The amendments made to the English language tests in *IMMI 18/003: Specified courses and exams for registration as a migration agent instrument* were a correction to the previous instrument *IMMI 12/097 Prescribed courses and exams for applicants for registration as a Migration Agent (Regulation 5)*. The Test of English as a Foreign Language (TOEFL) scores set out in the previous instrument 12/097 (with the exception of the writing subtest) were incorrect and did not align with the benchmarked International English Language Testing System (IELTS-TOEFL) equivalent scores.
>
> With IMMI 12/097 being repealed and replaced to reflect the new educational requirements for migration agents, it was an opportune time to revise the TOEFL scores. The TOEFL scores in IMMI 18/003 align with the benchmarks for all departmentally accepted English language tests.
>
> The broad application of these accepted English language proficiency levels for registered migration agents (which aligns with benchmarks required for certain visa applicants) is non-discriminatory. The measures are also reasonable and proportionate to ensure the quality and standards of advice to protect clients of migration agents.

1.217 As set out in the committee's initial report, it is acknowledged that the measure appears to pursue a legitimate objective for the purposes of international human rights law. However, as set out in detail above at [1.203]-[1.214] there are questions as to whether the measure as formulated is rationally connected and proportionate to that objective. In this respect while the minister's response merely states that the measure is non-discriminatory, no further information is provided in

support of this statement. The information provided by the minister otherwise does not substantively engage with the committee's inquiries and does not provide sufficient information for the committee to consider whether the instrument is compatible with human rights.

1.218 The *Human Rights (Parliamentary Scrutiny) Act 2011* requires a statement of compatibility to include an *assessment* of whether the legislative instrument is compatible with human rights,[12] and this has not occurred in relation to the statement of compatibility accompanying the instrument that is the subject of this analysis. As noted in the Committee's *Guidance Note 1,* the committee considers that statements of compatibility are essential to the examination of human rights in the legislative process, should identify the rights engaged by the instrument, and should provide a detailed and evidence-based assessment of the measures against the limitation criteria where applicable. In the absence of such information in the statement of compatibility, the committee may seek additional information from the proponent of the instrument and it is the committee's usual expectation that the minister's response would substantively address the committee's inquiries. In other words, the committee requires a more detailed assessment of the human rights engaged by the instruments beyond the minister's statement that the measure is non-discriminatory.

Committee response

1.219 The committee thanks the minister for his response.

1.220 The committee notes that the minister's response does not substantively address the committee's inquiries in relation to the compatibility of the instrument with the right to equality and non-discrimination.

1.221 The committee therefore restates its request for the advice of the minister in relation to the compatibility of the measure with the right to equality and non-discrimination, including:

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

12 Section 9(2) of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

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**)
Previous report	3 of 2018
Status	Seeking further 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

1.222 The committee first reported on the instruments in its *Report 3 of 2018*, and requested a response from the Minister for Foreign Affairs by 11 April 2018.[2]

1.223 The minister's response to the committee's inquiries was received on 27 April 2018. The response is discussed below and is reproduced in full at **Appendix 3**.

1.224 The instruments on which the committee sought the minister's advice were a number of new instruments under the *Autonomous Sanctions Act 2011* (the Act).[3] This Act, in conjunction with the Autonomous Sanctions Regulations 2011 (the 2011 regulations) and various instruments made under those 2011 regulations, provide the power for the government to impose broad sanctions to facilitate the conduct of Australia's external affairs (the autonomous sanctions regime).

1.225 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.[4] This analysis stated that, as the instruments under consideration expanded or applied the operation of the sanctions regime by designating or declaring that a person is subject to the sanctions regime, or by amending the regime itself, it was necessary to assess the human rights compatibility of the autonomous sanctions regime and aspects of the UN Charter sanctions regime as a whole when considering these instruments. A further response was therefore sought from the minister, which was considered in the committee's *Report 9 of 2016*.[5] The committee concluded its examination of various instruments and made a number of recommendations to assist the compatibility of the sanctions regime with human rights.[6]

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

1.226 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

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2 Parliamentary Joint Committee on Human Rights, *Report 3 of 2018* (27 March 2018) pp. 82-96.

3 See footnote 1.

4 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.

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

6 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.

Australia, or will otherwise deal with matters, things or relationships outside Australia.[7] The 2011 regulations set out the countries and activities for which a person or entity can be designated or declared.[8] 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 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.

1.227 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.[9] 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.

1.228 The autonomous sanctions regime provides that the minister may grant a permit authorising the making available of certain assets to a designated person.[10] An application for a permit can only be made for basic expenses, to satisfy a legal judgment or where a payment is contractually required.[11] A basic expense includes foodstuffs; rent or mortgage; medicines or medical treatment; public utility charges; insurance; taxes; legal fees and reasonable professional fees.[12]

Compatibility of the designations and declarations with multiple human rights

1.229 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

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

8 Section 6 of the Autonomous Sanctions Regulations 2011.

9 Section 14 of the Autonomous Sanctions Regulations 2011.

10 See section 18 of the Autonomous Sanctions Regulations 2011.

11 See section 20 of the Autonomous Sanctions Regulations 2011.

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

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).

1.230 The initial human rights analysis noted that aspects of the sanctions regimes may operate variously to both limit and promote human rights. However, consistent with committee practice 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.

1.231 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.

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

1.233 The committee further noted that the analysis is undertaken 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).[13] 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.

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

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

1.234 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 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.

1.235 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

1.236 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.[14]

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

Right to protection of the family

1.237 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.[15] 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

1.238 The right to an adequate standard of living is guaranteed by article 11 of the 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.[16]

Right to freedom of movement

1.239 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.[17] As noted in the initial analysis, 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

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

16 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.

17 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.

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

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

1.241 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.[18] 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.

1.242 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,[19] 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.[20] 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.

1.243 However, as previously noted by the committee, 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

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

19 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

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

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 was 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.[21]

1.244 The previous human rights analysis has also raised concerns that the minister can make the designation or declaration without hearing from the affected person 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.[22]

1.245 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.[23]

1.246 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

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21 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].

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

23 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.

circumstances change or new evidence comes to light, a person may remain subject to sanctions notwithstanding that the designation or declaration may no longer be required.[24] 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 raised questions as to whether the continued application of sanctions against those persons because of their status as (former) ICTY indictees is proportionate.

1.247 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.[25] 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.[26]

1.248 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.[27] 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.[28]

1.249 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

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. 49.

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.

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.[29]

1.250 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.[30]

1.251 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.[31] The previous human rights analysis noted that this lack of clarity raised 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.[32]

1.252 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.[33] 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, the initial human rights analysis stated that there are concerns that the current Australian model of autonomous sanctions regimes may be incompatible with the right to a fair hearing.

1.253 The committee has also previously noted that, in terms of comparative models, the United Kingdom (UK) has implemented its obligations in a manner that

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

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

31 See further below.

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

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

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;[34]
- quarterly reports must be made by the executive on the operation of the regime;[35]
- an Independent Reviewer of Terrorism Legislation reviews each designation and has unrestricted access to relevant documents, government personnel, the police and intelligence agencies;[36]
- 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;[37]
- 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);[38] 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.[39]

1.254 These kinds of safeguards in the UK asset-freezing regime are highly relevant indicia that there are more proportionate methods of achieving the legitimate

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

35 See section 30 of TAFA 2010.

36 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.

37 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].

38 See subs 16(3) of TAFA 2010.

39 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].

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

1.255 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.[40] Non-refoulement obligations are absolute and may not be subject to any limitations.

1.256 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.

1.257 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.[41] It was not clear whether this provision would apply to visa holders who have been found to engage Australia's non-refoulement obligations.

1.258 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.[42]

1.259 This therefore raised concerns that the declaration of a person who is an Australian visa holder under the autonomous sanctions regime, which may trigger

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

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

42 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.

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.

Initial information sought from the minister

1.260 In light of the human rights issues raised by the various sanctions instruments, the committee sought the advice of the minister as to the compatibility of the sanctions instruments with these rights.

1.261 In particular, the committee sought 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.

1.262 The committee also sought 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 movement. In particular, the committee sought 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 [1.234] to [1.254] above.

1.263 The committee also drew 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.

1.264 The committee also sought 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.[43]

Designations or declarations in relation to specified countries

1.265 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

1.266 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.

1.267 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.[44] 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.

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

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

1.268 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.

1.269 The committee therefore sought the advice of the minister as to the compatibility of the measures with the right to equality and non-discrimination.

Minister's response

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

1.270 In relation to the compatibility of the measures with the obligation of non-refoulement, the minister's response states:

> Under the *Autonomous Sanctions Regulations 2011*, I may declare a person who meets the criteria specified in regulation 6 for the purpose of preventing the person from travelling to, entering or remaining in Australia. A 'declared person' holding an Australian visa may therefore have their visa cancelled by the Minister for Home Affairs under the *Migration Regulations 1994*, regulation 2.43.
>
> However, under regulation 2.43(1)(aa) of the *Migration Regulations 1994*, the Minister for Home Affairs cannot cancel a visa that is classified as a 'relevant visa'. Regulation 2.43(3) of the *Migration Regulations 1994* provides that a 'relevant visa' includes, among others, a protection, refugee, or humanitarian visa. I note that under the *Autonomous Sanctions Regulations 2011*, I may also waive the operation of a declaration that was made for the purpose of preventing the person from travelling to, entering or remaining in Australia, on the grounds that it would be in the national interest, or on humanitarian grounds. This decision is subject to natural justice requirements, and may be judicially reviewed.
>
> I also note the Committee's comments in relation to section 197C of the *Migration Act 1958*. As outlined in the Explanatory Memorandum to this section at the time of its introduction, Australia will continue to meet its non-refoulement obligations through mechanisms other than the removal powers in section 198 of the *Migration Act 1958*, including through the protection visa application process, and through the use of the Minister's personal powers in the *Migration Act 1958*. These mechanisms ensure that non-refoulement obligations are addressed before a person becomes ready for removal under section 198.

1.271 The minister's response helpfully provides information as to the operation of the Migration Regulations in relation to persons who are declared under section 6(1)(b) or 2(b) of the 2011 regulations. In particular, the minister's response clarifies that persons on protection, refugee or humanitarian visas could not have their visa

cancelled under section 2.43(1)(aa) of the Migration Regulations.[45] This indicates that, in practical terms, there is less risk of persons to whom Australia owes protection obligations having their visa cancelled as a consequence of the minister's exercise of power to declare persons under the 2011 regulations. However, the classes of 'relevant visas' that cannot be cancelled under section 2.43(1)(aa) do not include all types of visas that are granted to persons to whom Australia owes protection obligations. For example, Safe Haven Enterprise visas (subclass 790), which apply to persons who arrived in Australia illegally, engage Australia's protection obligations and intend to work and/or study in regional Australia,[46] are not included within the definition of 'relevant visa' in section 2.43(3). Similarly, there may be persons on other types of visas for whom deportation to their country of origin upon cancellation of their visa would mean the person faces a real risk that they would face persecution, torture or other serious forms of harm.

1.272 For persons who may have their visa cancelled under section 2.43 of the Migration Regulations, the response identifies the minister's power to waive the operation of the declaration and the use of the immigration minister's personal powers in the *Migration Act 1958* as a form of safeguard. The minister also points to the human rights compatibility assessment in the explanatory memorandum to the bill which introduced section 197C of the Migration Act.[47] However, it is noted that the mechanisms referred to are entirely at the discretion of the relevant minister. While the minister identifies that decisions by the minister to waive the operation of a declaration may be judicially reviewed, effective and impartial review by a court or tribunal of decisions, including *merits* review in the Australian context, is integral in giving effect to non-refoulement obligations.[48]

1.273 Further, the committee has previously concluded that section 197C of the Migration Act is incompatible with Australia's non-refoulement obligations, and specifically noted the deficiency of mere administrative (rather than statutory) safeguards:

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45 'Relevant visas' are defined in regulation 2.43(3) and means a visa of the following subclasses: Subclass 050 (Bridging Visa E); Subclass 070 (Bridging (Removal Pending) Visa); Subclass 200 (Refugee Visa); Subclass 201 (In-country Special Humanitarian Visa); Subclass 202 (Global Special Humanitarian Visa); Subclass 203 (Emergency Rescue Visa); Subclass 204 (Women at Risk Visa); Subclass 449 (Humanitarian Stay (Temporary) Visa); Subclass 785 (Temporary Protection Visa); Subclass 786 (Temporary Humanitarian Concern Visa); Subclass 866 (Permanent Protection Visa).

46 See Department of Home Affairs, *Safe Haven Enterprise Visa (Subclass 790)* at https://www.homeaffairs.gov.au/trav/visa-1/790-

47 Section 197C was introduced by Schedule 5 to the *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014*.

48 ICCPR, article 2. See Parliamentary Joint Committee on Human Rights, *Report 4 of 2017* (9 May 2017) 102.

> This statement suggests that visa processes and the minister's discretionary and non-compellable powers to grant a visa are sufficient to enable Australia to comply with its non-refoulement obligations. However, the committee considers that, while the form of administrative arrangements is a matter for the Australian government to determine, non-reviewable, discretionary and non-compellable powers in relation to visa protection claims do not meet the requirement of independent, effective and impartial review of non-refoulement decisions, and are in breach of Australia's non-refoulement obligations under the ICCPR and the CAT.[49]

1.274 Therefore, while the risk of persons to whom Australia owes protection obligations being returned contrary to the prohibition on non-refoulement is low, to the extent that there is a risk, the administrative safeguards identified by the minister are not sufficient safeguards to enable Australia to comply with its non-refoulement obligations. This is because these arrangements do not meet the requirements of independent, effective and impartial review of non-refoulement decisions.

Committee response

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

1.276 The committee notes the information from the minister that persons on 'relevant visas' (including protection, refugee or humanitarian visas) cannot have their visa cancelled under section 2.43(1)(aa) of the Migration Regulations following the exercise of the minister's power to declare persons under the 2011 regulations.

1.277 To the extent that there remains a risk that persons to whom Australia owes protection obligations who are not on 'relevant visas' may have their visa cancelled if they are declared persons under the 2011 regulations, the committee reiterates its previous view that the safeguards to prevent non-refoulement of persons to whom Australia owes protection obligations are incompatible with Australia's obligations under the ICCPR and CAT because they do not meet the requirements of independent, effective and impartial review of non-refoulement decisions.

Compatibility of the measure with multiple rights

1.278 In relation to the remaining human rights engaged by the instruments and discussed in the previous analysis, the minister does not substantively address the committee's inquiries but instead provides the following general information:

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49 See Parliamentary Joint Committee on Human Rights, *Fourteenth Report of the 44th Parliament* (October 2014) p.77-78. See also *Thirty-sixth report of the 44th Parliament* (16 March 2016) pp. 149-194.

> The Government is committed to ensuring the human rights compatibility of Australia's sanctions regime. I have previously addressed in some detail the issues raised in the Report in my responses to the Committee in 2015 and 2016. Without repeating the detail of those responses, it remains the Government's view that sanctions measures are proportionate and appropriate in targeting those responsible for repressing human rights and democratic freedoms or to end regionally or internationally destabilising actions.
>
> Modern sanctions regimes impose highly targeted measures designed to limit the adverse consequences of a situation of international concern, to seek to influence those responsible for it to modify their behaviour, and to penalise those responsible. Australia does not impose sanction measures on individuals lightly.
>
> I continue to be satisfied that Australia's implementation of autonomous sanctions is proportionate to the objectives of each regime. I note that the Department of Foreign Affairs and Trade (DFAT) keeps the operation of Australia's sanction regimes under regular review.

1.279 While the minister has referred to previous responses provided to the committee in 2015 and 2016, those responses related to different sanctions instruments. The *Human Rights (Parliamentary Scrutiny) Act 2011* requires a statement of compatibility to include an *assessment* of whether the legislative instrument is compatible with human rights,[50] and this has not occurred in relation to the statements of compatibility accompanying the various instruments that are the subject of this analysis. As noted in the Committee's *Guidance Note 1,* the committee considers that statements of compatibility are essential to the examination of human rights in the legislative process, and should identify the rights engaged by the legislation, and should provide a detailed and evidence-based assessment of the measures against the limitation criteria where applicable. In the absence of such information in the statement of compatibility, the committee may seek additional information from the proponent of the instrument and it is the committee's usual expectation that the minister's response would substantively address the committee's inquiries. In other words, the committee requires a more detailed assessment of the human rights engaged by the instruments beyond the minister's statement of satisfaction with human rights compatibility.

1.280 Finally, in relation to the statements of compatibility for the instruments, the minister's response states:

> I note the Committee's concerns that the statement of compatibility with human rights (SCHR) in the Instruments does not engage in any substantive analysis of the rights and freedoms that are engaged and limited by the Instruments.

50 Section 9(2) of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

As I have indicated above, I consider that the Instruments and the broader sanctions framework is proportionate and compatible with human rights. I have asked DFAT to consider whether additional detail can be included in future statements.

Committee response

1.281 The committee thanks the minister for her response.

1.282 The committee notes that the minister's response does not substantively address the committee's inquiries in relation to the compatibility of the instruments with multiple rights.

1.283 The committee refers to its analysis above and seeks the further advice of the minister as to the compatibility of the designations and declarations of persons under the 2011 regulations 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 movement. In particular, the committee restates its request for the advice of the minister as to how the designation and declaration of persons pursuant to the autonomous sanctions regime is a proportionate limitation on these rights, having regard to the matters set out at [1.234] to [1.254] above.

1.284 The committee reiterates the analysis above 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. The committee therefore restates its request for the advice of the minister as to the compatibility of these measures with the right to equality and non-discrimination.

1.285 The committee draws the minister's attention to the committee's recommendations in *Report 9 of 2016* and seeks the minister's advice as to whether consideration could 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.**

1.286 The committee notes the minister has requested the Department of Foreign Affairs and Trade to include additional detail in future statements of compatibility, and draws the minister and department's attention to the committee's *Guidance Note 1*.

Advice only

1.287 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.

Australian Human Rights Commission Repeal (Duplication Removal) Bill 2018

Purpose	Seeks to repeal the *Australian Human Rights Commission Act 1986*
Legislation Proponent	Senator Cory Bernardi
Introduced	Senate, 15 February 2018
Rights	Effective Remedy (see **Appendix 2**)
Status	Advice only

Repeal of the *Australian Human Rights Commission Act 1986*

1.288 The bill seeks to repeal the whole of the *Australian Human Rights Commission Act 1986* (the AHRC Act).

1.289 The AHRC Act establishes the Australian Human Rights Commission (the AHRC) and gives the AHRC functions in relation to several international human rights treaties and instruments. The AHRC Act also regulates the processes for making and resolving complaints under four federal anti-discrimination acts: the *Racial Discrimination Act 1975,* the *Sex Discrimination Act 1984*, the *Disability Discrimination Act 1992* and the *Age Discrimination Act 2004*.

1.290 As stated in the statement of compatibility, the effect of the bill would be to abolish the AHRC and to repeal the mechanisms by which the AHRC Act provides redress for unlawful discrimination.[1]

Compatibility of the measure with the right to an effective remedy

1.291 Article 2 of the International Covenant on Civil and Political Rights (ICCPR) requires state parties to ensure access to an effective remedy for violations of human rights.[2] Relevantly, the right to an effective remedy requires state parties to establish appropriate judicial and administrative mechanisms for addressing claims

1 Statement of Compatibility (SOC), p.3.

2 See also International Convention on the Elimination of All Forms of Racial Discrimination, Article 6; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Article 14; Convention on the Elimination of All Forms of Discrimination against Women, Article 2.

of human rights violations under domestic law. The United Nations Human Rights Committee has noted the particular importance of national human rights institutions in giving effect to state parties' obligations to ensure access to effective remedies, in particular the role such institutions play in investigating allegations of human rights violations.[3]

1.292 By repealing the AHRC Act, and consequently the mechanisms through which victims of human rights violations may seek redress, the bill engages the right to an effective remedy. The statement of compatibility does not acknowledge that this right may be engaged by the bill. Rather, the statement of compatibility states that the bill touches on a 'number of human rights topics' but 'leaves untouched commonwealth legislation relating to human rights' (namely, the four federal anti-discrimination acts as well as elements of the *Fair Work Act 2009*).[4]

1.293 The statement of compatibility states that the purpose of the bill is to 'end commonwealth duplication of human rights advocacy performed by state-equivalent commissions' and that repealing the AHRC Act would 'encourage aggrieved plaintiffs to use relevant State and Territory anti-discrimination legislation'.[5] The statement of compatibility further states:

> The functionality of the Commission can be replicated if a government so wishes by other means. The offences under those Commonwealth Acts could be prosecuted by the Commonwealth. Alternatively, the government could propose consequential amendments to provide for applications by aggrieved plaintiffs to be lodged directly in the Federal Court. It is also observed that the bill does not touch the significant number of bodies at state levels tasked with upholding specific human rights...[6]

1.294 While there is overlap between the federal anti-discrimination laws and the state and territory discrimination laws, the schemes are not identical, and different matters and protected attributes are covered to differing degrees between the jurisdictions.[7] For example, Part IIA of the *Racial Discrimination Act* provides federal protection against racial vilification, and complaints of racial vilification are investigated and conciliated by the AHRC.[8] However, as the committee has previously noted, while all other states and territories have some form of anti-

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3 United Nations Human Rights Committee, *General Comment No.31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant* (2004) [15].

4 SOC, p.2.

5 SOC, p.2.

6 SOC, pp.2-3.

7 See generally, Australian Human Rights Commission, *A Quick Guide to Australian Discrimination Laws* (2014); Neil Rees, Simon Rice and Dominique Allen, *Australian anti-discrimination and equal opportunity law* (3rd edition, 2018) Chapter 10.

8 See AHRC Act, section 46P.

vilification laws, the Northern Territory (NT) presently does not and therefore any complaints of racial vilification in the NT must be brought under the *Racial Discrimination Act* to the AHRC.[9] State and territory jurisdictions would also not necessarily cover discriminatory conduct by the Commonwealth or Commonwealth officers.[10]

1.295 Further, in addition to the mechanisms under the four federal anti-discrimination acts, the AHRC Act also gives the AHRC specific functions in relation to equal opportunity in employment in order to give effect to Australia's obligations under the International Labour Organisation Convention (No 111) concerning Discrimination in respect of Employment and Occupation (ILO 111).[11] The AHRC Act defines 'discrimination' in that context as including distinction on the basis of religion, political opinion, or social origin that has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation.[12] These protected attributes of political opinion, religion or social origin are not covered in some state jurisdictions.[13] The repeal of the AHRC Act would therefore raise concerns that there would not be appropriate judicial and administrative mechanisms for addressing human rights violations, contrary to the right to an effective remedy.

1.296 In relation to the ability of the Commonwealth to prosecute offences under the federal discrimination laws, it is noted that unlawful discrimination is generally a civil matter in Australian law and there are only a small number of offences in federal

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9 See Parliamentary Joint Committee on Human Rights, *Freedom of Speech in Australia: Inquiry into the operation of Part IIA of the* Racial Discrimination Act 1975 (Cth) *and related procedures under the* Australian Human Rights Commission Act 1986 (Cth) (28 February 2017) [2.37]. It is noted that in September 2017 the Northern Territory government released a discussion paper on modernising the Northern Territory *Anti-Discrimination Act* to include provisions relating to anti-vilification: Northern Territory Department of Attorney-General and Justice, *Discussion Paper: Modernisation of the Anti-Discrimination Act* (September 2017) p.11.

10 Parliamentary Joint Committee on Human Rights, *Freedom of Speech in Australia: Inquiry into the operation of Part IIA of the* Racial Discrimination Act 1975 (Cth) *and related procedures under the* Australian Human Rights Commission Act 1986 (Cth) (28 February 2017) [2.37]; see also Legal Aid New South Wales, *Discrimination Law Complaints: Should I go to the ADB or AHRC?* (2018) https://www.legalaid.nsw.gov.au/publications/factsheets-and-resources/discrimination-toolkit/what-you-can-do-about-discrimination/discrimination-law-complaints.

11 See Part II, Division 4 of the *Australian Human Rights Commission Act 1986* (the AHRC Act).

12 See AHRC Act, section 3.

13 See for example, the South Australian *Equal Opportunity Act 1984* (SA); see also South Australia Equal Opportunity Commission, *Where do I complain – state or federal?* (2018) http://www.eoc.sa.gov.au/eo-you/discrimination-laws/where-do-i-complain-state-or-federal.

discrimination laws[14] and in the AHRC Act.[15] This raises concerns that relying on the criminal offence provisions under the federal discrimination laws would not provide a sufficiently effective mechanism for investigating and redressing human rights violations that would be compatible with the right to an effective remedy.

Committee comment

1.297 The committee draws the human rights implications of the bill in respect of the right to an effective remedy to the attention of the legislation proponent and the Parliament.

1.298 If the bill proceeds to further stages of debate, the committee may request information from the legislation proponent with respect to the compatibility of the bill with human rights.

14 For example, Part IV of the *Racial Discrimination Act 1975;* Division 4 of the *Disability Discrimination Act 1992*; Part 5 of the *Age Discrimination Act 2004*; Part IV of the *Sex Discrimination Act 1984*.

15 For example section 26 of the AHRC Act.

Criminal Code (Foreign Incursions and Recruitment—Declared Areas) Declaration 2018—Mosul District, Ninewa Province, Iraq [F2018L00176]

Purpose	Makes it an offence under section 119.2 of the *Criminal Code Act 1995* (the Criminal Code) to enter, or remain in, Mosul District, Ninewa Province, Iraq
Portfolio	Foreign Affairs and Trade
Authorising legislation	*Criminal Code Act 1995*
Last day to disallow	15 sitting days after tabling (tabled House of Representatives 26 March 2018, Senate 19 March 2018)
Rights	Fair trial; presumption of innocence; prohibition against arbitrary detention; freedom of movement; equality and non-discrimination (see **Appendix 2**)
Status	Advice only

Background

1.299 Section 119.2 of the Criminal Code makes it an offence for a person to intentionally enter, or remain in, a declared area in a foreign country where the person is reckless as to whether the area is a declared area. Under section 119.3 of the Criminal Code, the Minister for Foreign Affairs (the minister) may declare an area in a foreign country for the purposes of section 119.2 if the minister is satisfied that a listed terrorist organisation is engaging in a hostile activity in that area.

1.300 The committee previously considered these provisions as part of its assessment of the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014 (the bill) in its *Fourteenth Report of the 44th Parliament*.[1] The bill passed both Houses of Parliament and received Royal Assent on 2 November 2014.

1.301 The committee considered that the declared area offence provisions introduced by the bill were likely to be incompatible with the right to a fair trial and the presumption of innocence, the prohibition against arbitrary detention, the right to freedom of movement and the right to equality and non-discrimination.

1.302 Subsequent to the committee's analysis of the bill, the bill was amended to remove the ability of the minister to declare whole countries or neighbouring countries as declared areas (see section 119.3(2A) of the Criminal Code).

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1 Parliamentary Joint Committee on Human Rights, *Fourteenth Report of the 44th Parliament* (28 October 2014) pp. 34-44.

1.303 The committee has also previously considered specific declarations of an area in a foreign country for the purposes of section 119.2 of the Criminal Code.[2]

Declaration of Mosul District as a declared area

1.304 As a result of the Declaration, it is a criminal offence under section 119.2 of the Criminal Code for a person to enter, or remain in the Mosul District.

1.305 In order to prove the offence the prosecution is only required to prove that a person intentionally entered into (or remained in) the Mosul District and was reckless as to whether or not it had been declared by the minister. The prosecution is not required to prove that the person had any intention to undertake a terrorist or other criminal act. A person accused of entering or remaining in Mosul District province bears an evidential burden—that is, to establish a defence they must provide evidence that they were in the declared area solely for a legitimate purpose as defined by the Criminal Code.

Compatibility of the measure with multiple human rights

1.306 As stated above, the committee has previously concluded that the declared area offence provisions of the Criminal Code are likely to be incompatible with:

- the right to a fair trial and the presumption of innocence;
- the prohibition against arbitrary detention;
- the right to freedom of movement; and
- the right to equality and non-discrimination.

1.307 In light of the committee's previous conclusion that the declared area offence provisions in the Criminal Code are incompatible with human rights, it follows that the declaration of Mosul District, Ninewa Province, Iraq for the purposes of the declared area offence provision is also likely to be incompatible with human rights. This analysis is consistent with the committee's previous analysis and conclusions about earlier declarations made for the purposes of section 119.2.

1.308 The statement of compatibility for the Declaration argues that the 'Declaration is compatible with these human rights because it is a lawful, necessary and proportionate response to protect Australia's national security'.[3] It is acknowledged that the protection of national security from identified risks may be capable of constituting a legitimate objective for the purposes of international human rights law.

1.309 In this respect, the statement of compatibility provides a general explanation for the measure and states that:

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2 See, Parliamentary Joint Committee on Human Rights, *Eighteenth Report of the 44th Parliament* (10 February 2015) pp. 71-73.

3 Statement of Compatibility (SOC), p. 1.

> …The Islamic State (also known as the Islamic State of Iraq and the Levant or ISIL) is a listed terrorist organisation under the Criminal Code. ISIL's activities, including in the district of Mosul, and calls by ISIL's leadership, have attracted thousands of foreign fighters, including Australians, who have travelled to Iraq to join ISIL and engage in hostile activity…
>
> The declaration promotes the safety of Australians, including those who might be seeking to travel to Mosul district, Ninewa province, Iraq and those who may be at risk of harm posed by persons returning from Mosul district, Ninewa province, Iraq.[4]

1.310 However, the statement of compatibility does not provide more specific analysis of the specific threat to Australia's national security or how any such threat is addressed by declaring the district of Mosul. Further, the statement does not explain why it is not possible to rely on measures that are less restrictive of human rights, such as the existing provisions of the Criminal Code which prohibit engaging in hostile activities in foreign countries. The statement of compatibility does not acknowledge or address human rights concerns raised in the committee's previous reports.

Committee comment

1.311 Noting the concerns raised in the previous human rights assessment of the declared area offence and the above analysis, the committee draws the human rights implications of the Declaration to the attention of parliament.

4 SOC, p. 1.

National Consumer Credit Protection Amendment (Small Amount Credit Contract and Consumer Lease Reforms) Bill 2018

Purpose	This bill seeks to amend the *National Consumer Credit Protection Act 2009* and the National Credit Code in relation to small amount credit contracts and consumer leases
Legislation proponent	Mr Tim Hammond MP
Introduced	House of Representatives, 26 February 2018
Rights	Fair trial; criminal process rights; presumption of innocence (see **Appendix 2**)
Status	Advice only

Civil penalty provisions

1.312 The bill seeks to introduce a series of civil penalty provisions for failure to comply with the provisions governing small amount credit contracts (SACCs)[1] and consumer leases.[2] In relation to SACCs, civil penalties of 2,000 penalty units (currently, $420,000) may be imposed in circumstances including: where a licensee[3] fails to record assessments of a consumer's suitability for a SACC,[4] makes certain representations in relation to SACCs but without providing prescribed information,[5] makes unsolicited SACC invitations,[6] or enters into a SACC with a consumer where the repayments under the contract are not equal or would not meet prescribed requirements.[7] Civil penalties of 2,000 penalty units are also imposed in relation to

1 SACCs are defined in section 5 of the *National Consumer Credit Protection Act 2009* and are loans of up to $2,000 where the term of the contract is between 16 days and 12 months.

2 Consumer leases are contracts for goods (hired wholly or predominately for personal, domestic or household purposes) for longer than four months where: the consumer does not have the right or obligation to purchase the goods; and the total amount payable exceeds the cash price: see Exposure Draft Explanatory Memorandum to the Bill at [3.6] https://static.treasury.gov.au/uploads/sites/1/2017/10/c2017-t229374-Explanatory-Memorandum-1.pdf

3 A licensee means a person who holds a licence: section 5 of the *National Consumer Credit Protection Act 2009*.

4 Items 4 and 12, proposed sections 116A(1) and 129A of the bill.

5 Items 8 and 18, proposed sections 124B(1) and 133CB(1) of the bill.

6 Items 10 and 22, proposed sections 124C and 133CF of the bill.

7 Items 19 and 21, proposed sections 133CE(1) and 133CC(1) of the bill.

similar conduct relating to consumer leases,[8] the prohibited use of account statements,[9] avoidance schemes relating to SACCs and consumer leases,[10] charging prohibited monthly fees,[11] exceeding caps on fees and charges for consumer leases,[12] and canvassing of consumer leases at home.[13]

Compatibility of the measure with criminal process rights

1.313 Under Australian law, civil penalty provisions are dealt with in accordance with the rules and procedures that apply in relation to civil matters (for example, the burden of proof is on the balance of probabilities). However, if the new civil penalty provisions are regarded as 'criminal' for the purposes of international human rights law, they will engage the criminal process rights under articles 14 and 15 of the International Covenant on Civil and Political Rights (ICCPR). The statement of compatibility does not acknowledge that the civil penalty provisions may engage the criminal process rights in the ICCPR.

1.314 The committee's *Guidance Note 2* (see Appendix 4) sets out the three relevant steps for determining whether civil penalty provisions may be considered 'criminal' for the purpose of international human rights law. In this bill, the penalties are classified as 'civil' under domestic law meaning they will not automatically be considered 'criminal' for the purposes of international human rights law under the first part of the test.

1.315 Under step two, a civil penalty is more likely to be considered 'criminal' in nature if it applies to the public in general rather than a specific regulatory or disciplinary context, and where there is an intention to punish or deter, irrespective of the severity of the penalty. While there is no information in the statement of compatibility as to the purpose of the penalties, it is clear that the penalties apply in a particular regulatory context of consumer protection, and apply to licensees of SACCs and consumer leases rather than the public in general. This would suggest that the penalty is unlikely to be considered 'criminal' under the second part of the test.

1.316 Even if the penalty is not considered 'criminal' under step two, a penalty may still be 'criminal' for the purposes of international human rights law under step three if the penalty carries a substantial pecuniary sanction. In determining whether a civil penalty is sufficiently severe to amount to a 'criminal' penalty under step three, the nature of the industry or sector being regulated and the relative size of the penalties

8 Items 25,28,31,and 34, proposed sections 139A(1), 147A(1), 152A(1), 156A(1), 156C(1).

9 Item 36, proposed sections 160H(1)

10 See item 38, proposed sections 323A(1)and 323C(1),

11 See item 42, proposed section 31C(1).

12 See item 58, proposed section 175AA.

13 See item 62, proposed section 179VA.

in that regulatory context is relevant. No information is provided in the statement of compatibility as to the amount of the penalty in context, however it is noted that the maximum civil penalty that may be imposed (2,000 penalty units, or $420,000) is substantial. This raises concerns that the penalties may be classified as 'criminal' for the purposes of international human rights law, due to the substantial pecuniary sanction.

1.317 If the civil penalties were assessed to be 'criminal' for the purposes of human rights law, this does not mean that the relevant conduct must be turned into a criminal offence in domestic law nor does it mean that the civil penalty is illegitimate. Instead, it means that the civil penalty provisions in question must be shown to be consistent with the criminal process guarantees set out in article 14 of the ICCPR, including the right not to be tried twice for the same offence (Article 14(7)) and the right to be presumed innocent until proven guilty according to law (Article 14(2)).[14]

1.318 Here, there are concerns as to whether the bill would be compatible with these criminal process guarantees. For example, for many of the proposed civil penalties there are corresponding criminal offences attaching to the same conduct, and it is not clear whether a person could be subject to both criminal and civil penalties for the same conduct. Further, the standard of proof applicable in the civil penalty proceedings introduced by the bill is the civil standard of proof (requiring proof on the balance of probabilities) rather than the criminal standard of proof (requiring proof beyond reasonable doubt), raising concerns as to whether the measure is compatible with the presumption of innocence.

1.319 Therefore, if the penalties were classified as 'criminal' for the purposes of international human rights law, the committee's usual expectation is that the statement of compatibility would explain how the civil penalties are compatible with these criminal process rights, in particular whether any limitations on those rights are permissible.

Strict liability offences

1.320 The bill also introduces a series of strict liability offences alongside several of the civil penalty provisions discussed above in relation to SACCs and consumer leases.[15] The strict liability penalties range from 10 penalty units to 100 penalty units.

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14 Other guarantees include the guarantee against retrospective criminal laws (Article 15(1)) and the right not to incriminate oneself (article 14(3)(g)). These guarantees are not engaged by the proposed civil penalties, as the law does not appear to apply retrospectively and the conduct giving rise to the civil penalties do not appear to engage the right not to incriminate oneself.

15 See item 4, section 116A(3)-(4); item 10, section 124C(3)-(4); item 12, section 129A(3)-(4); item 21, section 133CE(6)-(7); item 22, section 133CF(3)-(4); item 25, section 139A(3)-(4); item 31, section 152A(3)-(4); item 36, section 160H(3)-(4); item 42, section 31C(3)-(4); item 62, section 179VA(3)-(4).

Compatibility of the measure with the presumption of innocence

1.321 As noted earlier, article 14(2) of the ICCPR provides that everyone charged with a criminal offence has the right to be presumed innocent until proven guilty. Generally, consistency with the presumption of innocence requires the prosecution to prove each element of a criminal offence beyond reasonable doubt. The effect of applying strict liability to an element of an offence is that no fault element needs to be proven by the prosecution (although the defence of mistake of fact is available to the defendant). The strict liability offences engage the presumption of innocence because they allow for the imposition of criminal liability without the need to prove fault.

1.322 Strict liability offences will not necessarily be inconsistent with the presumption of innocence provided that they are within reasonable limits, taking into account the importance of the objective being sought, and maintain the defendant's right to a defence. In other words, such offences must be rationally connected and proportionate to the objective being sought.

1.323 The statement of compatibility generally acknowledges that there are human rights implications of the strict liability offences when it states:

> Consistent with the Government's draft legislation, this bill imposes strict liability offences on SACC providers and consumer lease providers for some breaches of the new requirements.
>
> The imposition of strict liability for these offences is appropriate because of the potentially serious financial impact a contravention may have on an affected consumer. Requiring fault to be demonstrated as part of the offence would undermine deterrence and increase the likelihood of contraventions that could impact negatively on vulnerable consumers.
>
> Furthermore, by addressing rip-offs and predatory behaviour by SACC lenders and consumer lease providers, and improving financial inclusion, the bill would enhance the protection of human rights recognised under the International Covenant on Economic, Social and Cultural Rights.[16]

1.324 However, there is no specific engagement in the statement of compatibility with the right to presumption of innocence. Further, while the objective of protecting vulnerable consumers is likely to be a legitimate objective, and the strict liability offences appear to be rationally connected to this, further information would have been useful in the statement of compatibility as to the proportionality of the measures. For instance, as noted earlier, some of the strict liability offences impose substantial criminal penalties of up to 100 penalty units.[17] It is not clear from the information provided why some of the strict liability offences attract more severe

16 Statement of compatibility, pp.10-11.

17 See item 21, section 133CE(6)-(7); item 42, section 31C(3)-(4).

criminal penalties than others, particularly in circumstances where the accompanying civil penalty is 2000 penalty units for all of the strict liability offences.

Committee comment

1.325 The committee draws the human rights implications of the bill to the attention of the legislation proponent and the Parliament.

1.326 If the bill proceeds to further stages of debate, the committee may seek further information from the legislation proponent with respect to the human rights implications of the bill.

Bills not raising human rights concerns

1.327 Of the bills introduced into the Parliament between 26 and 28 March 2018, 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):

- Aboriginal and Torres Strait Islander Amendment (Indigenous Land Corporation) Bill 2018;
- Aboriginal and Torres Strait Islander Land and Sea Future Fund Bill 2018;
- Aboriginal and Torres Strait Islander Land and Sea Future Fund (Consequential Amendments) Bill 2018;
- Air Services Amendment Bill 2018;
- A New Tax System (Medicare Levy Surcharge—Fringe Benefits) Amendment (Excess Levels for Private Health Insurance Policies) Bill 2018;
- Australian Astronomical Observatory (Transition) Bill 2018;
- Biosecurity Legislation Amendment (Miscellaneous Measures) Bill 2018;
- Commerce (Trade Descriptions) Amendment Bill 2018;
- Corporations Amendment (Asia Region Funds Passport) Bill 2018;
- Customs Amendment (Illicit Tobacco Offences) Bill 2018;
- Education and Other Legislation Amendment (VET Student Loan Debt Separation) Bill 2018;
- Fair Work Amendment (Better Work/Life Balance) Bill 2018;
- Fair Work Amendment (Tackling Job Insecurity) Bill 2018;
- Higher Education Support Amendment (National Regional Higher Education Strategy) Bill 2018;
- Intellectual Property Laws Amendment (Productivity Commission Response Part 1 and Other Measures) Bill 2018;
- Interactive Gambling Amendment (Lottery Betting) Bill 2018;
- Medicare Levy Amendment (Excess Levels for Private Health Insurance Policies) Bill 2018;
- Offshore Petroleum and Greenhouse Gas Storage (Regulatory Levies) Amendment Bill 2018;
- Primary Industries Levies and Charges Collection Amendment Bill 2018;
- Private Health Insurance Legislation Amendment Bill 2018;
- Public Sector Superannuation Legislation Amendment Bill 2018;
- Social Services Legislation Amendment (Payments for Carers) Bill 2018;

- Statute Update (Autumn 2018) Bill 2018;
- Student Loans (Overseas Debtors Repayment Levy) Amendment Bill 2018;
- Treasury Laws Amendment (ASIC Governance) Bill 2018;
- Treasury Laws Amendment (Australian Consumer Law Review) Bill 2018;
- Treasury Laws Amendment (OECD Multilateral Instrument) Bill 2018;
- Treasury Laws Amendment (Tax Integrity and Other Measures) Bill 2018; and
- Underwater Cultural Heritage (Consequential and Transitional Provisions) Bill 2018.