Chapter 2

Concluded matters

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

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

Australian 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**)
Previous reports	4 of 2018
Status	Concluded examination

Background

2.3 The committee first reported on the bill in its *Report 4 of 2018*, and requested a response from the Minister for Health by 23 May 2018.[1]

2.4 The minister's response to the committee's inquiries was received on 24 May 2018. The response is discussed below and is reproduced in full at **Appendix 3**.

Collection of health and welfare-related information and statistics

2.5 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

1 Parliamentary Joint Committee on Human Rights, *Report 4 of 2018* (8 May 2018) pp. 2-3.

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

2.6 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.

2.7 The initial human rights analysis stated that it was 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.[2] 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.

2.8 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, as noted in the initial analysis, 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 was 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*.

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

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

- 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).

Minister's response

2.10 The minister's response states that the collection of personal information for statistical purposes is to support the Institute's core functions. The minister explains the importance of such information in this context:

> …collect[ing] for statistical purposes to support the development of an evidence base across the health, welfare and housing sectors. Specifically, the Institute collects personal information for survey purposes, to maintain health and welfare data sets, to maintain national registers and to undertake data linkage activities for health and medical research. The provision of such information is critical to enhance the quality and usefulness of its reports and publications, noting that the Institute is responsible for the production of over 180 reports covering subject areas; such as health and welfare expenditure, hospitals, disease and injury, mental health, ageing, homelessness, disability and child protection.

2.11 These purposes for which the Institute collects personal information are likely to be legitimate for the purposes of human rights law. The minister's response describes the change to remove the requirement to seek agreement from the ABS to collect health-related information and statistics and welfare-related information and statistics as one which would 'provide greater autonomy' to the Institute to collect data relating to these core functions. This would appear to be rationally connected to the legitimate objective.

2.12 In relation to the proportionality of the proposed measure, the minister's response first explains that the Institute is required to comply with the requirements of the *Privacy Act 1988* (the Privacy Act). In addition, the minister's response outlines the following safeguards relating to the protection of personal information:

> Furthermore, access to personal information is restricted by confidentiality provisions under Section 29 of the AIHW Act. Access to personal information held by the Institute is restricted to Institute staff, to staff of other bodies contracted to undertake specific functions on behalf of the Institute and to anyone outside the Institute with the approval of the AIHW Ethics Committee.

> In addition, section 29 of the AIHW Act, prohibits individuals who acquire information, either arising from their employment or doing any act or thing under an arrangement with the Institute, from disclosing (or making a record of) information concerning a person where the disclosure is not made for the purposes of the AIHW Act. It also prevents individuals in receipt of information acquired under the AIHW Act from being required to divulge or communicate that information to a court.
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> Section 29 also provides criminal penalties for the unauthorised disclosure of personal information where it is not made for the purpose of the AIHW Act. Fines of up to $2,000 or imprisonment for 12 months, or both, apply.
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> The AIHW Ethics Committee (established under section 16 of the AIHW Act) is responsible for making decisions on the ethical acceptability of proposals that relate to the Institute's activities and Institute-assisted activities (activities engaged in by bodies or persons, other than the Institute). These proposals may include identifiable data (i.e. data that contains personal information) and the AIHW Ethics Committee can impose conditions on the release of such data as it deems appropriate. Researchers are required to complete an Undertaking of Confidentiality should they be provided with access to personal information by the AIHW Ethics Committee.
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> These legislative provisions are backed by internal policies and procedures at the Institute to protect personal information collected by the Institute. This includes information security and privacy (technical, physical and personnel aspects), data custody, data linkage protocols, data confidentialisation techniques and the release of statistical information. Institute staff and contractors are required to sign confidentiality deeds before being granted access to data.
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> The Institute also has measures in place to ensure the safe and secure storage of personal information. Electronic and paper records containing personal information are stored in accordance with the Australian Government's Protective Security Policy Framework and record management practices comply with the Australian Government requirements as specified in the *Archives Act 1983*. Physical security policies also provide additional protections and are in place for regulating access to, and the storage of, linked data sets.

2.13 Having regard to the safeguards to protect personal information identified in the minister's response, it is likely that the measure will be a proportionate limitation on the right to privacy.

Committee response

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

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

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**)
Previous reports	4 of 2018
Status	Concluded examination

Background

2.16 The committee first reported on the bill in its *Report 4 of 2018*, and requested a response from the Minister for Home Affairs by 23 May 2018.[1]

2.17 A response from the Assistant Minister for Home Affairs was received on 30 May 2018. The response is discussed below and is reproduced in full at **Appendix 3**.

Expansion of visa bar

2.18 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.

2.19 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.

2.20 These proposed amendments were previously introduced in the Migration and Maritime Powers Amendment Bill (No. 1) 2015. That bill lapsed on the

1 Parliamentary Joint Committee on Human Rights, *Report 4 of 2018* (8 May 2018) pp. 4-11.

prorogation of the 44th parliament.[2] The committee considered the human rights compatibility of these measures in its *Thirtieth Report of the 44th Parliament* and *Thirty-fourth report of the 44th Parliament.*[3]

Compatibility of the measure with the right to liberty

2.21 The right to liberty includes the right not to be unlawfully or arbitrarily detained.[4] 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.[5] 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 expanded visa bar, where individual circumstances are not taken into account, and a person may be subject to a significant length of detention.[6] The initial human rights analysis stated that 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.

2.22 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'.[7] 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:

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2 See Parliament of Australia, Migration and Maritime Powers Amendment Bill (No.1) 2015, available https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=r5532.

3 Parliamentary Joint Committee on Human Rights, *Thirtieth Report of the 44th Parliament* (10 November 2015) pp. 28-52; *Thirty-fourth report of the 44th Parliament* (23 February 2016) pp. 29-65.

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

5 See Migration Act, sections 189, 198.

6 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'].

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

> 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.[8]

2.23 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. [9]

2.24 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 was noted that discretionary or administrative 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'.[10]

2.25 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.

2.26 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-

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8 SOC, p. 26.

9 SOC, p. 26.

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

citizens…being treated differently',[11] it was unclear from the information provided in the statement of compatibility why the visa bar is necessary. In this respect, it was 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.[12] That is, given the context of mandatory immigration detention, there was a question as to whether the application of the visa bar is the least rights restrictive approach.

2.27 The committee therefore requested 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
- 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).

Assistant minister's response

2.28 The assistant minister's response provides the following information on the measure:

> The *Migration Act 1958* (the Act) currently imposes bars on all non-citizens preventing them from lodging further protection visa applications in circumstances where a non-citizen has previously had a protection visa cancelled or an application for a protection visa refused. These mechanisms prevent non-citizens, either lawful or unlawful, from lodging ongoing visa applications to inappropriately prolong their stay in Australia and delay their departure.
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> Currently, where a non-citizen is removed from Australia, but is refused entry into the destination country and the non-citizen is returned to Australia, visa bars continue to apply. However, where the Department of Home Affairs (the Department) has attempted to remove a non-citizen but the removal from Australia cannot be completed, for a reason other than

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11 SOC, p. 23.

12 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; Parliamentary Joint Committee on Human Rights, *Thirty-fourth report of the 44th Parliament* (23 February 2016) pp. 33-34.

refusal in the destination country, visa bars no longer apply on return to Australia.

The amendments are necessary to ensure that any non-citizen who the Department attempts to remove, but is then returned to Australia, irrespective of the circumstances, is treated in the same way. These arrangements would treat non-citizens as if they had never departed Australia (i.e. that they were continuously in the Migration Zone) and restore them to their previous immigration status. The visa bars are no more advantageous or disadvantageous than if the Department had not attempted to remove the non-citizen.

Visa bars are the least restrictive approach within the Act to achieve the Department's legislative objectives and ensure that the Department is able to re-facilitate the removal of non-citizens from Australia as soon as reasonably practicable.

2.29 In relation to the availability of relevant safeguards, the assistant minister's response states:

The Department has safeguards to ensure that non-citizens are not subject to arbitrary detention. The Detention Review Committee conducts formal review of efforts to progress all non-citizens detained in immigration held detention towards status resolution outcomes. The committee ensures that:

- where a non-citizen is managed in a held detention environment, that the detention remains lawful and reasonable;
- the location of the person, whether held detention, specialised detention, community detention or in the community on a Bridging visa, remains appropriate to the non-citizen's situation and conducive to status resolution;
- where a non-citizen is managed in the community, either on a residence determination or through a Bridging visa, community risk is regularly and appropriately considered; and
- regardless of the location, the non-citizen's status resolution progresses and the appropriate departmental services are in place to support an outcome.

The Minister has a personal, non-compellable power to lift a visa bar or grant a visa, if he thinks it is in the public interest to do so. Generally, the Department on behalf of a person makes a request for the Minister to use their public interest powers. However, a non-citizen or a non-citizen's authorised representative can request in writing for the Minister to exercise his public interest power. Requests are referred to the Minister where they meet the Minister's issued guidelines under section 48B of the Act.

2.30 The minister's identification of policy safeguards is relevant to the proportionality of the limitation on the right to liberty. However, as the committee

has previously stated in relation to Australia's mandatory immigration detention system and statutory bar on visa applications, the internal review mechanisms identified by the minister, while important, do not meet the standard required under international human rights law.[13] This is because none of these mechanisms are set out in statute and no person in immigration detention has any legal entitlement to require those reviews to occur, such as by seeking administrative or judicial review. The other mechanisms set out in the minister's response are entirely at the discretion of the minister personally. The UN Human Rights Committee and the Working Group on Arbitrary Detention have on many occasions raised concerns as to Australia's application of mandatory immigration detention and the impossibility of challenging such detention, and has found such detention to be in breach of Article 9(1) of the ICCPR.[14] By extending the visa bar further and accordingly extending the scope of non-citizens who may be subsequently liable for detention under the Migration Act, the measure is consequently also incompatible with the right to liberty.

Committee response

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

2.32 In its *Thirty-fourth report of the 44th Parliament,* the committee considered that the statutory bar on visa claims in the event of unsuccessful removal from Australia, in the context of Australia's mandatory immigration detention policy, was incompatible with Article 9 of the ICCPR.[15]

2.33 As the measures in the bill seek to reintroduce this statutory bar in identical terms, and having regard to relevant international jurisprudence, the committee considers that the proposed statutory bar on visa claims in the event of unsuccessful removal from Australia is incompatible with Article 9 of the ICCPR.

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

2.34 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

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13 See, for example, Parliamentary Joint Committee on Human Rights, *Thirty-fourth report of the 44th Parliament* (23 February 2016) pp. 33-34.

14 See, for example, *FJ et al v Australia,* Communication No.2233/2013, UN Doc. CCPR/C/116/D/2233/2013 (2016); *Opinions adopted by the Working Group on Arbitrary Detention at its eightieth session, 20-24 November 2017,* Opinion No. 71/2017, UN Doc. A/HRC/WGAD/2017/71 (2017).

15 Parliamentary Joint Committee on Human Rights, *Thirty-fourth report of the 44th Parliament* (23 February 2016) pp. 33-34. The relevant bill, *Migration and Maritime Powers Amendment Bill (No. 1) 2015*, lapsed at prorogation on 15 April 2016.

Treatment or Punishment (CAT) for all, including people who are found not to be refugees.[16] 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.[17] Non-refoulement obligations are absolute and may not be subject to any limitations.

2.35 Independent, effective and impartial review by a court or tribunal of decisions to deport or remove a person, including merits review in the Australian context, is integral to complying with non-refoulement obligations.[18]

2.36 The initial analysis stated that 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.[19] 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 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.[20]

2.37 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.

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16 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).

17 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.

18 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.

19 Migration Act, section 198.

20 SOC, p. 27.

2.38 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.[21] 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 was 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.

2.39 The committee therefore sought 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).

Assistant minister's response

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

> The Australian Government takes its international obligations seriously. Australia is party to several treaties that contain both explicit and implicit non-refoulement obligations not to forcibly remove a non-citizen to a place where they may be subjected to persecution or particular forms of harm. The Department does not seek to resile from or limit Australia's non-refoulement obligations under Article 6 and 7 of the ICCPR and Article 3(1) of the Convention Against Torture.
>
> A non-citizen will [not be] removed from Australia in breach of our non-refoulement obligations.
>
> The pre-removal clearance process is used to review a non-citizen's circumstances and relevant country information to identify whether there is any risk that the proposed removal would breach Australia's international non-refoulement obligations. This process is also used to identify whether there are any protection claims that have not already been assessed by the Department which raise protection issues and whether new information, such as country information, suggests that previously assessed claims may now raise a risk.

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

> Additionally, the Minister has a personal, non-compellable power to lift a visa bar or grant a visa, if he thinks it is in the public interest to do so. This may include where new information has been identified to support a person's protection claim, allowing new protection claims to be assessed by the Department. The Minister has issued guidelines, to outline the circumstances in which he may consider exercising his public interest power under section 48B of the Act and to inform departmental officers about when and how to refer cases. These guidelines are consistent with the intention of the visa bar and cover circumstances where there is new information or significant changes in circumstances, which relates to Australia's non-refoulement obligations.
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> The form of administrative arrangements in place to support Australia meeting its *non-refoulement* obligations is a matter for the Government. It is the Government's position that there are sufficient procedural safeguards in place for ensuring all non-citizens are afforded an opportunity to have their claims assessed.

2.41 Notwithstanding the minister's identification that the department does not seek to resile from or limit Australia's non-refoulement obligations, it is noted that section 197C of the Migration Act provides that, for the purposes of removing a person from Australia under section 198, 'it is irrelevant whether Australia has non-refoulement obligations in respect of an unlawful non-citizen' and that the duty to remove a person as soon as practicable arises irrespective of whether there has been an assessment of Australia's non-refoulement obligations.

2.42 As noted in the initial analysis, UN human rights jurisprudence also makes clear that the provision of effective and impartial review of non-refoulement decisions by a court or tribunal is integral to complying with the obligation of non-refoulement under the ICCPR and CAT. Further, the committee's long-standing view is that the minister's non-compellable powers are an insufficient protection against unlawful refoulement and that international law is clear that administrative arrangements are insufficient to protect against unlawful refoulement.[22] This is because 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.[23]

2.43 The mechanisms set out in the minister's response are entirely administrative and there is no legal protection against non-refoulement in the form of a reviewable decision. Consistent with the committee's longstanding position, the

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22 See, for example, Parliamentary Joint Committee on Human Rights, *Thirtieth Report of the 44th Parliament* (10 November 2015) 32; *Thirty-fourth report of the 44th Parliament* (23 February 2016) 35-36; *Second Report of the 44th Parliament* (11 February 2014), [1.89] to [1.99]; *Fourth Report of the 44th Parliament* (18 March 2014) [3.55] to [3.66].

23 Parliamentary Joint Committee on Human Rights, *Thirty-fourth report of the 44th Parliament* (23 February 2016) p. 35.

absence of an effective and impartial review of non-refoulement decisions is incompatible with Australia's non-refoulement obligations under international law.

Committee response

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

2.45 In its *Thirty-fourth report of the 44th Parliament,* the committee considered that the statutory bar on visa claims in the event of unsuccessful removal from Australia failed to provide for effective and impartial review of non-refoulement decisions, and accordingly the measure was incompatible with Australia's non-refoulement obligations under international law.

2.46 As the measures in the bill seek to reintroduce this statutory bar in identical terms, the committee considers that the proposed statutory bar on visa claims in the event of unsuccessful removal from Australia is incompatible with Australia's non-refoulement obligations under international law.

Obligation to consider the best interests of the child

2.47 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.[24] The statement of compatibility acknowledges that the expansion of the visa bar engages the rights of children as it would also apply to them.[25] 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.
>
> …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.[26]

2.48 However, the initial analysis stated that while the department and the minister may consider the best interests of the child as a matter of policy and

24 CRC, article 3(1).

25 SOC, p. 28.

26 SOC, p. 28.

discretion, the proposed expanded visa bar will still generally apply to children. This may be the case regardless of whether the 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 appeared 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 was noted in this respect that the UN Committee on the Rights of the Child has explained that:

> …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…'[27]

2.49 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 did 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.

2.50 As such, the initial analysis stated that 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 was not possible to conclude that the measure is compatible with the obligation to consider the best interests of the child.

2.51 The committee therefore sought 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;

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27 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).

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

Assistant minister's response

2.52 In response to the committee's inquiries, the assistant minister provides the following information:

> In planning the removal of a child, the best interests of the minor must be taken into consideration as **'a'** but not **'the' only** consideration. As such, other primary considerations may outweigh the best interests of the child in certain circumstances.
>
> In considering the best interests of the child, during the removal planning, the Department considers the age, mental capacity, maturity, health, welfare and special needs of the minor. The views of the minor is another consideration that can be given due weight in the removal process and in accordance with the maturity of the minor. The amendments to the visa bars will not change these processes or considerations.
>
> The Department also carefully considers the placement of children and their families when facilitating their removal. The Department takes steps to minimise the impact of detention on minors by considering alternatives to held detention such as alternative places of detention, immigration residential housing or immigration transit accommodation. This approach is consistent with paragraph 3 of the Department's Detention Values ... which prescribe that children and, where possible, their families will not be detained in an immigration detention facility. This is reflected in domestic legislation through s 4AA of the Act, which provides that the Parliament affirms as a principle that a minor shall only be detained as a measure of last resort.
>
> The visa bars treat all non-citizens, including children, as if they had never departed Australia restoring them to their previous immigration status. The visa bars are no more advantageous or disadvantageous than if the non-citizen had not been attempted to be removed from Australia. They achieve the Department status resolution and removal objectives of managing and maintaining the integrity of the migration programme and are a reasonable and proportionate mechanism for consistently managing

> all unlawful non-citizens including those that the Department must re-progress to remove from Australia.
>
> The Minister maintains his personal and non-compellable power to lift a visa bar or grant a visa, to a non-citizen, including children, if he thinks it is in the public interest to do so.

2.53 A copy of the 'Detention Values' document was attached to the minister's response (and is set out in full at appendix 3).

2.54 In relation to the minister's response that the best interests of the child is 'a', but not 'the only' consideration, such that other primary considerations may outweigh the best interests of the child in certain circumstances, as noted in the initial analysis, the UN Committee on the Rights of the Child has made clear that the child's best interests may not be considered on the same level as all other considerations.[28]

2.55 As to the considerations noted by the minister in the Detention Values policy document and section 4AA of the Migration Act, these matters may assist in the proportionality of the limitation as it applies to the detention of children but it does not assist in assessing the impact of the expanded visa bar on Australia's non-refoulement obligations. In any event, while section 4AA affirms the principle that a minor shall only be detained as a measure of last resort, in light of the minister's identification that other primary considerations might outweigh the best interests of the child, it is not clear that this statutory provision would of itself be sufficient. In relation to the matters set out in the Detention Values policy statement, as discussed above, policy safeguards are less reliable than the protection of safeguards set out in legislation and are not sufficient from the perspective of international human rights law. The minister's personal and non-compellable power is also not a sufficient safeguard, for the reasons discussed above.

Committee response

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

2.57 In its *Thirty-fourth report of the 44th Parliament,* the committee considered that the statutory bar on visa claims in the event of unsuccessful removal from Australia was incompatible with Australia's obligations under the Convention on the Rights of the Child to consider the best interests of the child.

2.58 The measures in the bill seek to reintroduce this statutory bar in identical terms. In view of the further information provided by the minister and the preceding analysis, the committee considers the measures are likely to be

28 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).

incompatible with Australia's obligations under the Convention on the Rights of the Child to consider the best interests of the child.

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**)
Previous reports	4 of 2018
Status	Concluded examination

Background

2.59 The committee first reported on the bill in its *Report 4 of 2018*, and requested a response from the Treasurer by 23 May 2018.[1]

2.60 The Treasurer's response to the committee's inquiries was received on 24 May 2018. The response is discussed below and is reproduced in full at **Appendix 3**.

Background

2.61 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.[2] 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*.[3]

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1 Parliamentary Joint Committee on Human Rights, *Report 4 of 2018* (8 May 2018) pp. 12-16.

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

3 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.

2.62 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.[4]

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

2.64 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[5] 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.

2.65 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.[6]

Compatibility of the measure with the right to privacy

2.66 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.

2.67 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

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

5 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).

6 See Division 3 of Schedule 1 of the bill.

thus the measure limits the right to privacy. The statement of compatibility acknowledges that the right to privacy is engaged by the bill.[7]

2.68 As noted in the initial human rights analysis, 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 was noted that by making the scheme mandatory for large ADIs instead of the current 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.

2.69 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.

2.70 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'.[8] 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.[9]

2.71 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 was required to determine whether (and if so, how) this specific measure of mandatory credit reporting addresses a pressing or substantial concern. It was noted in this respect that a legitimate objective must be supported by a reasoned and evidence-based

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7 Statement of compatibility (SOC), [2.12].

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

9 SOC, [2.15].

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.

2.72 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'.[10] It is in this respect that the amendments to the Privacy Act 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.
>
> 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.
>
> 2.19 Any effect on privacy rights was considered proportionate and limited by the introduction of specific safeguards, including:
>
> - 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.[11]

2.73 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.

10 SOC, [2.21].

11 SOC, [2.17]-[2.19]

2.74 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.[12] The initial analysis stated that 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 of individuals), this raised questions as to whether the limitations on the right to privacy are sufficiently circumscribed.

2.75 It was 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'.[13] However, it was 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.[14] 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.

2.76 The committee therefore sought further information from the Treasurer as to:

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

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

13 SOC, [2.22].

14 APP 9; APP 6.2(b).

- 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).

Treasurer's response

2.77 As to the legitimate objective of the measure, the Treasurer's response provides more information on the underlying objective of the 2012 Act, by reference to the explanatory memorandum to that Act:

> … The introduction of comprehensive credit reporting is aimed at providing a more balanced and accurate picture of an individual's credit situation than currently exists, providing positive information about a person's credit situation such as when an individual has met their credit payments.
>
> The introduction of more comprehensive credit reporting allows credit providers to access an enhanced set of personal information tools directly relevant to establishing an individual's credit worthiness. This will allow credit providers to make a more robust assessment of credit risk, which is expected [to] lead to lower credit default rates. More comprehensive credit reporting is also expected to improve competition in the credit market, which may result in reductions to the cost of credit for individuals. The amendments will enable legitimate commercial activity, facilitating consumer lending and transactions, and thus the participation of individuals in the economy. These are legitimate objectives.

2.78 The Treasurer's response explains that there has been a 'first mover problem' in relation to the voluntary scheme established by the 2012 Act, such that 'credit providers have failed to participate in the voluntary regime'. The Treasurer's response explains that prior to the enactment of the 2012 Act, a number of credit providers had indicated their intention to participate in the (voluntary) comprehensive credit regime, but this did not eventuate.

2.79 The overall objectives of comprehensive credit reporting, being to lower credit default rates and improve competition in the credit market, are likely to be legitimate objectives for the purposes of human rights law. In the context of this particular measure, the pressing and substantial concern the Treasurer has identified appears to be that the voluntary scheme does not address these objectives. This is because the credit providers have not participated in the scheme on a voluntary basis. On balance, and having regard to the overall objectives of the comprehensive credit reporting scheme, the measure is likely to pursue a legitimate objective for the purposes of international human rights law.

2.80 The Treasurer's response also explains that mandatory comprehensive credit reporting will be an effective means of achieving the objective of lowering credit default rates and improving competition in the credit market, as it will ensure that credit providers' participation in the scheme 'occurs in a more timely and coordinated way'. Such participation is necessary for the scheme to achieve its objectives.

2.81 In relation to the proportionality of the proposed measure, the Treasurer's response provides the following information as to the safeguards in the bill in relation to information security and the retention of data:

> The Bill includes new security provisions to further guarantee the security and protection of consumer information. The Bill requires that credit reporting bodies store credit information within Australia and, where information is stored on a cloud server, the cloud server will have to be recognised by the Australian Systems Directorate.
>
> These new security arrangements are in addition to the existing protections in the Privacy Act. The Privacy Act imposes requirements on both credit reporting bodies and credit providers to take reasonable steps to protect credit-related information from misuse, interference and loss, and from unauthorised access, modification or disclosure (section 20Q and section 21S of the Privacy Act). The law also currently requires credit reporting bodies to ensure that regular audits of credit providers are conducted by an independent person to determine whether credit providers are taking the required actions.
>
> The Privacy Act also already sets out the period that information can be retained before it must be destroyed (see sections 20V to 20ZA) and includes requirements for both a credit reporting body and credit provider to correct information including at the person's request (see sections 20S to 20U and section 21U to 21W of the Privacy Act).
>
> While the mandatory regime will increase the volume of information in the credit reporting system, this was the volume that was anticipated would be in system as a result of the Privacy Amendment Act and was contemplated when considering the impacts on an individual's privacy as part of the development of that Act.

2.82 The Treasurer's response also provides information from the explanatory memorandum to the 2012 Act as to safeguards that allow individuals to access information about them that is collected and disclosed through the comprehensive credit reporting scheme:

> The [2012 Act] introduces a number of safeguards to provide individuals with the tools to access information held about them, and correct any inaccuracies. The [2012 Act] also makes improvements to the complaints process, to ensure that the first organisation to receive the individual's complaint is responsible for taking action. In moving to more comprehensive credit reporting it has been recognised that additional

> safeguards around the use of repayment history information, the fifth new category of information, are also necessary. Repayment performance history will only be available by credit providers who are licensees [and to lenders mortgage insurers in relation to services they provide to credit providers] and subject to the responsible lending obligations in the National Consumer Credit Protection Act 2009.

2.83 The response further points to the following safeguards in the 2012 Act relating to the use of credit reporting information for the purposes of pre-screening individuals, which continue to apply to the new mandatory scheme introduced by the bill:

> Pre-screening is subject to specific requirements, including only the use of negative credit reporting information, the requirement for notice at the time of collection that information may be used for this purpose, an opt out opportunity, and a prohibition on individuals being identified for other direct marketing. Any entity involved in pre-screening must maintain auditable evidence to verify compliance, and which is available to individuals. Pre-screening is also only available to credit providers who are subject to the National Consumer Credit Protection Act 2009.

2.84 The Treasurer's response explains that these safeguards ensure that 'the smallest possible set of data is used for the narrowest purposes to achieve the objective of providing a functional consumer credit market'.

2.85 The Treasurer's response identifies that the approach adopted in the 2012 Act and the bill is a less rights restrictive approach than that which was recommended by the Australian Law Reform Commission, which had recommended that secondary uses of credit reporting information should be subject to a broad discretion exercised by credit reporting bodies or credit providers.[15] This recommendation was not accepted by the government. The response also explains that the approach of taking into account positive action such as payment as well as negative information like defaults allows for 'more effective risk assessment' than if only negative information were used.

2.86 Overall, the mandatory supply of comprehensive credit information to credit reporting bodies represents a significant limitation on a person's right to privacy, in light of the extensive financial information about people (including repayment history information and credit limits) that will be able to be disclosed. However, on balance the safeguards identified in the response to protect people's right to privacy, including relating to the storage and retention of the information, restrictions on who can access the comprehensive information, and the applicable provisions of the Privacy Act, suggest that the measure is accompanied by adequate safeguards so as to constitute a proportionate limitation on the right to privacy.

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15 See Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice (ALRC Report 108)* (2008) Recommendation 57-2.

Committee response

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

2.88 The committee considers that the mandatory comprehensive credit scheme introduced by the bill engages and limits the right to privacy. However, having regard to the information provided by the minister as to the safeguards in place to protect the right to privacy, the committee considers that the measure is likely to be a proportionate limitation on the right to privacy.

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**)
Previous report	4 of 2018
Status	Concluded examination

Background

2.89 The committee first reported on the bill in its *Report 4 of 2018*, and requested a response from the Minister for Urban Infrastructure and Cities by 23 May 2018.[1]

2.90 The minister's response to the committee's inquiries was received on 23 May 2018. The response is discussed below and is reproduced in full at **Appendix 3**.

Reverse burden offences

2.91 A number of provisions in the bill seek to introduce offences which include offence-specific defences.[2]

Compatibility of the measures with the right to be presumed innocent

2.92 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.

2.93 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

1 Parliamentary Joint Committee on Human Rights, *Report 4 of 2018* (8 May 2018) pp. 20-25.

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

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.

2.94 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.

2.95 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 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.

2.96 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.[3] 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[4] and that the defendant would be in a 'significantly better position than the Commonwealth'[5] 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.[6]

2.97 However, the initial analysis stated that without additional information it was unclear that these matters are a sufficient basis for permissibly limiting the right to be presumed innocent.

2.98 Further, it was unclear that reversing the evidential burden is necessary as opposed to including additional elements within the offence provisions themselves.

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

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

5 EM, p. 28.

6 EM, p. 13.

This raised questions as to whether the measure is the least rights restrictive approach.

2.99 The committee drew to the attention of the minister its *Guidance Note 1* and *Guidance Note 2*, which set out information specific to reverse burden offences, and requested the minister's advice 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;
- 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.

Minister's response

2.100 The minister's response usefully addresses the reverse burden offences in each of the proposed subsections 16(3), 24(3)-(4), 32(2) and 43(2). In general, the response explains that the legitimate objective of the offences is to ensure road vehicles provided for the first time in Australia meet the necessary standards, including safety standards, thereby limiting risks to the community. This is likely to be a legitimate objective for the purposes of international human rights law.

2.101 The minister's response states that in some cases it would be more costly and resource-intensive for the prosecution to disprove, rather than for the defendant to establish the relevant matter. While this particular difficulty is acknowledged, it is noted that this justification alone is unlikely to be sufficient for reversing the burden of proof for the purposes of international human rights law.

2.102 The minister's response further states that the offence provisions in proposed subsections 16(3), 24(3)-(4) and 43(2) are reasonable and proportionate as the relevant matters necessary to prove an exception to the offences would be peculiarly within the knowledge of the defendant. For example, in relation to subsection 16(3), which relates to the entry of non-compliant vehicles onto the Register of Approved Vehicles (RAV), the response states:

> …[T]he precise details of the design and manufacture of the vehicle, and the procurement and use of components, is peculiarly within the knowledge of the type approval holder. It is a core requirement of type approvals that type approval holders retain this information in 'supporting documentation', rather than provide all this information to the Department of Infrastructure, Regional Development and Cities (the

> Department) to gain an approval. While the Department can access this information by requesting it, this is a costly and resource intensive exercise, requiring the Department to obtain a full outline of the design and manufacturing process and spend taxpayer resources to develop a detailed understanding of one type approval holder's production process.
>
> Secondly, an inability to effectively prosecute would undermine the Department's ability to achieve the objective of clause 16. The reversal of evidential burden is reasonable and proportionate — the provision reverses only the evidential, and not the legal, burden of proof. Type approval holders, to whom this offence relates, will already be required under the Act to possess or have access to the relevant documentation, and a detailed understanding of their own processes. That is, they will already be required to hold the information that would be necessary for discharging the evidentiary burden. A circumstance that would require a person to bear an evidential burden would apply almost exclusively to corporations, rather than individuals, because individuals are unlikely to be able to hold the technical information and ensure conformity of production in fulfilment of a type approval holder's obligations.

2.103 Based on the further detailed information provided by the minister, it may be accepted that the matters such as those stated above in relation to subsection 16(3) would be peculiarly within the knowledge of the defendant. In relation to subsection 16(3), for example, the response states that persons to whom the offence relates will already be required to possess the type of information relevant to discharging the evidentiary burden. This indicates that the reversal of the evidential burden of proof may constitute a reasonable and proportionate limitation on the presumption of innocence. The minister provides a similar justification in relation to subsections 24(3)-(4) and 43(2).[7] The fact that the reverse burden offences impart an evidential rather than a legal burden on defendants also assists with the proportionality of the measures.

2.104 The regulatory context in which these measures operate, and the importance of the objective being sought, is also relevant to a human rights compatibility assessment. In particular, this broader context is explained by the minister in relation to section 32(2):[8]

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7 With respect to subsection 24(3), it is noted that one of the exceptions to the offence of providing a vehicle in Australia for the first time that is not on the RAV includes 'a circumstance set out in the rules': subsection 24(3)(f) of the Road Vehicle Standards Bill 2018. The committee will consider the human rights compatibility of any legislative instrument enacted pursuant to this proposed section of the bill once it is received.

8 Subsection 32(2) provides that the offence of giving false or misleading information or documents under or for the purposes of the bill does not apply if the information or document is not false or misleading in a material particular.

> …[T]his is a proportionate measure within the broader context of the regulatory framework. Entities regulated by the Bill are given significant freedoms to import and provide vehicles without Government oversight of each vehicle. For example, type approval holders can import thousands of vehicles per year with no individual vehicle checks. In return for such freedoms, the Australian government sets high standards for integrity and honesty, such as requiring all information to be true and accurate. Commensurate with this expectation the evidentiary burden is placed on the person who furnished the false or misleading information initially to provide evidence that the matter was not false or misleading in a material particular. This is a reasonable and proportionate trade-off in the context of the potential scale of community impact incurred should the false or misleading information be of a material nature.
>
> Secondly, this offence is reasonable and proportionate when you consider the context of volumes of information and the cost to Government (and thus the community) of regulatory actions. Approval holders have significant record keeping obligations. For example, type approval holders must maintain supporting information that outlines the entire manufacturing and compliance process - from source material to testing evidence to manufacturing instructions. This information is important for demonstrating compliance with the national road vehicle standards.
>
> The information can be requested to audit compliance with the Bill. Any false or misleading information, regardless of its materiality, can cause significant delays in the auditing of such documentation. The wrong contact details provided for a testing facility or incorrectly recorded qualification of test engineers (although the real qualifications may be compliant) are such examples. The burden to present evidence about the materiality of such false or misleading information - particularly after causing significant delays to an audit - presents an unreasonable cost to Government, a cost that is ultimately borne by the community. Therefore it is reasonable and proportionate that the person providing false or misleading information in the first place has the burden of presenting evidence that the information was not materially false or misleading.

2.105 In this case, having regard to the regulatory context of the measures as described by the minister and the importance of ensuring compliance with the national road vehicle standards, the offence provision in section 32 may be a reasonable and proportionate limitation on the right to be presumed innocent.

2.106 In light of the minister's further information, the offence-specific defences or exceptions in proposed subsections 16(3), 24(3)-(4), 32(2) and 43(2) appear, on balance, to be compatible with the presumption of innocence.

Committee response

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

2.108 Based on the further information provided, the committee considers that, on balance, the offence provisions in the bill may be compatible with the right to be presumed innocent.

Coercive evidence gathering powers

2.109 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.

2.110 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.[9] 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.[10]

Compatibility of the measure with the right not to incriminate oneself

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

2.112 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.

2.113 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 appropriate to override the right not to incriminate oneself 'as failure to comply could seriously undermine the effectiveness of the regulatory scheme'.[11] 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:

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9 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.

10 Section 43 of part 3, division 4.

11 EM, SOC, p. 20.

> 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.[12]

2.114 The initial analysis stated that 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 was noted that it would have been useful had this information been included in the statement of compatibility as well as the explanatory memorandum.

2.115 Questions arose, 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.

2.116 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 was 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).

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12 EM, p. 44.

2.117 Further, it was noted that the availability or lack of availability of a 'derivative use' immunity needs to be considered in the regulatory context of the proposed powers. The extent of interference 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.

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

2.119 The committee therefore sought 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.

Minister's response

2.120 In relation to the proportionality of the measure, the minister's response explains that the proposed disclosure notices would only apply to a limited cohort of persons in a particular regulatory context, namely, to persons who supply road vehicles or components in trade or commerce.

2.121 The minister's response further states that the use of disclosure notices is reasonable in the context of seeking to obtain information on road vehicles or related components that may pose a danger to the public in a timely manner. The response states that, while in some cases it may be feasible to obtain information by other means, 'the additional time taken to obtain such information may significantly increase the risk to public safety'.

2.122 As to the scope of information that may be subject to compulsory disclosure by persons who supply road vehicles or road vehicle components, the minister's response states:

> …[T]he broad scope of information that can be obtained through a disclosure notice under s 42 is necessary to achieve the objective of the provision. Information relevant to whether a vehicle has a safety defect or

> demonstrates non-compliance varies greatly. Given the complexity of road vehicles and their supply chains, relevant information could range from information about a source material (such as quality of steel), customer complaints through dealership service departments, evidence of testing results or the calibration metrics on a specific piece of machinery.
>
> Given the breadth of relevant circumstances and information, listing all the types of information that can be requested would risk missing vital or unique information that was not considered when drafting the list. This would unreasonably limit the achievement of the objective of the clause - to gather all relevant information on dangerous vehicles or components in a timely manner to mitigate risks to the community.

2.123 The minister's response also provides the following information as to whether a derivative use immunity would be reasonably available:

> Including a derivative use immunity for this offence is not appropriate in the broader context of ensuring that the Bill is able to meet its objectives.
>
> The Bill, including clause 42, has been drafted to be consistent with the existing requirements of the *Australian Consumer Law*, which overlaps to some extent with the recalls scheme set out in the Bill. This is designed to prevent suppliers of road vehicles 'legislation shopping' by pressuring regulators to use legislation with more lenient compliance tools.
>
> A disclosure notice is used in situations where information about unsafe or non-compliant vehicles is not forthcoming from vehicle suppliers - presenting an immediate risk of harm to the community. A derivative use immunity may provide an incentive for non-compliant suppliers to initially withhold information from the regulator, then use the subsequent disclosure notice to 'confess' to other serious non-compliance. This is not appropriate in the context of the serious community harm that can be caused by any delay.
>
> It should be noted, providing for derivative use immunity may prevent the Department from sharing information with other Departments or State and Federal Police. Such an agency will also be bound by any derivative use immunity. In the event that the other agency wished to commence criminal or civil penalty proceedings against that person, it would not be able to make use of any evidence derived as a result of the originally received information. It would also face the additional evidentiary hurdle of establishing that no use was made of the shared information in obtaining the evidence to be relied upon in the prosecution. This is particularly concerning as the Department will continue to collaborate with the Australian Competition and Consumer Commission where information raises consumer protection issues.

2.124 It is acknowledged that, from a practical perspective, the inclusion of a derivative use immunity could make subsequent investigations by different agencies more difficult. However, this reasoning of itself would not be sufficient to justify a limitation on the right not to incriminate oneself. This is because it is not permissible

to limit a human right where the measure is merely seeking an outcome that is desirable or convenient rather than addressing a pressing and substantial concern.

2.125 However, as noted above, there is a range of matters which influence whether a limitation on the right not to incriminate oneself is permissible. In this case, the minister has provided useful information on the pressing need for the evidence gathering powers, the regulatory context of the proposed measures and the limited cohort of persons (those who supply road vehicles or road vehicle components) who may be subject to them. It is further noted that the bill as drafted only provides for the issuance of a disclosure notice if the minister, secretary or a Senior Executive Service employee 'reasonably believes' that, broadly, there is a safety issue in relation to road vehicles or components of that kind or that they do not comply with applicable road safety standards (see [2.109] above). The requirement that the power only be exercised on these 'reasonably' held grounds may further assist the proportionality of the measure.

2.126 In light of the further information provided by the minister, on balance, it is likely that the limitation on the right not to incriminate oneself is proportionate to the legitimate objective of the measure.

Committee response

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

2.128 Based on the further information provided by the minister, including as to the particular regulatory context of the measure, the committee considers that the measure is likely to be compatible with the right not to incriminate oneself.

Compatibility of the measure with the right to privacy

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

2.130 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.

2.131 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.[13] It was unclear from the information provided as to the extent to

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13 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.

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, the initial analysis stated that questions arose as to whether the measure is a proportionate means of achieving the objective in the context of limitations on the right to privacy.

2.132 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.

2.133 The committee therefore sought 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.

Minister's response

2.134 In relation to the types of information that may be subject to disclosure, the minister's response explains that this may include a wide range of information 'in order to capture all relevant information about an unsafe vehicle or component', possibly including personal or confidential information. The minister argues that imposing limitations on the capturing of personal or confidential information would undermine the objective of the measure on the following grounds:

> First, it risks vital information not being provided that goes to the safety of a vehicle or component, on the basis that it may contain personal information. Secondly, it would provide a screen for suppliers of dangerous road vehicles or components to hide behind when responding to a disclosure notice by being able to claim that relevant information cannot be provided due to the presence of personal or confidential information.

2.135 The minister further states that, while the department will have regard to whether relevant information, documents or other evidence are likely to be

otherwise available, including whether they may be provided voluntarily, this is not always possible or appropriate. The response cites a number of reasons for this, including that a person may have previously failed to respond or to fully respond to a voluntary request; concerns that a voluntary request will be met with delays or protracted negotiations; or the department has information from other sources that is inconsistent with the information voluntarily provided. The minister therefore appears to argue that a less rights restrictive approach to obtaining information in the particular circumstances of the measure may not be reasonably available.

2.136 The minister also cites a range of matters the department will consider before issuing a disclosure notice, including:

- whether there is a risk that the information, documents or evidence may otherwise be destroyed, not provided or provided only on terms unacceptable to the Department;
- whether it may be appropriate to issue a disclosure notice to obtain such information or documents from a potential respondent for evidentiary purposes, including obtaining oral evidence under oath or by way of affirmation;
- whether it is appropriate to use other powers to obtain the information, documents or evidence (e.g. search warrant powers or wait for any future discovery process); and
- the burden of the disclosure on the recipient, including time and cost considerations.

2.137 While these factors may potentially assist the proportionality of the measure, they appear to be departmental policies or procedures, rather than a legal requirement. In this respect, it is noted that departmental policies and procedures are less stringent than legislation as they can be removed, revoked or amended at any time and are not subject to the same levels of scrutiny or accountability as if the policies were enshrined in legislation.

2.138 As noted above at [2.124] in relation to the compatibility of the measure with the right not to incriminate oneself, the bill provides that a disclosure notice be issued on certain limited and reasonably held grounds. In this respect, the minister cites as a relevant safeguard the fact that under the bill a disclosure notice may only be issued if the person giving the notice reasonably believes that a supplier is capable of giving information, producing documents or giving evidence in relation to the vehicles or components in question.[14]

2.139 Finally, the minister explains other safeguards in place relating to the disclosure of information:

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14 See, subsection 41(1)(b) of the bill.

> This overarching legal framework for personal information also includes robust oversight arrangements for the handling of personal information. Central to the oversight regime are judicial review, the Commonwealth Ombudsman and the *Privacy Act 1988* (Privacy Act). The Department will be required to collect, handle and store such information in accordance with the *Privacy Act 1988*, including the *Australian Privacy Principles*. Departmental officers that receive personal and confidential information are also bound by the *Public Service Act 1999* and the Australia Public Service Code of Conduct.
>
> The Department is also under an implied legal obligation to use information, documents or evidence provided in response to a disclosure notice for the purposes for which the notice was issued, the purpose being to assist the Department in investigating a possible recall under Part 3 of the Bill and to reach a view as to whether such a recall notice is necessary. This obligation reflects the legal requirement that statutory powers are to be used for proper purposes.

2.140 It is noted that the Australian Privacy Principles in the *Privacy Act 1988* are not a complete answer to concerns about interference with the right to privacy in this context, as those principles contain a number of exceptions to the prohibition on disclosure of personal information.[15] However, noting the information provided on potential safeguards, including the limited grounds on which a disclosure notice may be issued and the specific regulatory context of the proposed powers, on balance, the limitation on the right to privacy may be proportionate.

Committee response

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

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

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

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
Rights	Just and favourable conditions of work (see **Appendix 2**)
Previous report	4 of 2018
Status	Concluded examination

Background

2.143 The committee first reported on the bill in its *Report 4 of 2018*, and requested a response from the Minister for Revenue and Financial Services by 23 May 2018.[1]

2.144 The minister's response to the committee's inquiries was received on 24 May 2018. The response is discussed below and is reproduced in full at **Appendix 3**.

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

2.145 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.[2] The chairperson would also determine in writing the ASIC Code of Conduct and the ASIC Values which apply to ASIC members and staff members.[3]

2.146 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

1 Parliamentary Joint Committee on Human Rights, *Report 4 of 2018* (8 May 2018) pp. 26-29.

2 Item 7, proposed section 120.

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

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

2.147 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).

2.148 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.

2.149 The PS Act contains a range of provisions relating to the terms and conditions of employment of public servants. The initial human rights analysis stated that, 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.

2.150 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.

2.151 The explanatory memorandum states that the proposed amendments will 'support ASIC to more effectively recruit and retain staff in positions requiring specialist skills'.[4] The initial analysis stated that 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.

2.152 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'.[5] 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

4 Explanatory memorandum (EM), p. 9.

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

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.[6] 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.

2.153 There were also questions about the proportionality of the measures and, in particular, whether the measures are the least rights restrictive approach. It was unclear, for example, why barriers to recruitment and retention of staff could not be addressed through the negotiation of entitlements through the usual enterprise agreement process or the current provisions for Individual Flexibility Arrangements (IFAs).[7] 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.[8] Questions arose 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.

2.154 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.[9] 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. As a result, 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,[10] concerns arose as to whether the

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

7 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.

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

9 See also EM, p. 13.

10 See Article 2(1) of ICESCR.

measure as proposed contained adequate safeguards to protect just and favourable conditions of work.

2.155 The committee therefore sought 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;
- 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.

Minister's response

2.156 The minister's response restates the objective of the bill, as set out in the explanatory memorandum, as supporting 'more effective recruitment and retention strategies' for ASIC. As indicated at [2.151] above, this may be capable of being a legitimate objective for the purposes of international human rights law. As to whether the measure addresses a pressing and substantial concern and is effective to achieve the stated objective, the minister's response states that ASIC is required to recruit staff with knowledge of, and expertise in, financial markets and financial services. The minister explains that as a result, ASIC is 'often competing against the private sector, as opposed to other public sector agencies, when recruiting suitable staff' and accordingly that '[e]mployment under the PS Act restricts ASIC's ability to provide conditions which allow ASIC to be able to compete more effectively in the labour market for suitable staff'. The minister further explains that this will bring ASIC into line with other financial regulators (the Australian Prudential Regulation Authority and the Reserve Bank of Australia) that are also able to recruit staff outside of the PS Act.

2.157 The minister's response also provides information as to how the PS Act may operate as a barrier to the effective recruitment and retention of appropriate staff:

> - Limitations on employment of temporary employees
>
> ASIC can only employ temporary staff under the PS Act for a total maximum period of three years, even though it may require employees for major litigation and other enforcement matters for a longer period of time. The move from the PS Act allows ASIC to employ staff for periods over the entire life of the matter or project. It also allows ASIC to reemploy

temporary staff who have the relevant litigation and regulatory experience.

- Limitation on the employment of contractors and consultants

Subsection 120(3) of the current legislation limits the ASIC Chairperson's ability to employ contractors and consultants because:

— the power to employ consultants and contractors is not able to be delegated, so the Chairperson is the only person able to employ these staff and must do so directly; and

— the terms and conditions for contractors and consultants must be approved by the Minister.

- Classification structure

The public sector classification and remuneration system is not suited to the work ASIC (and the other financial regulators) undertakes. To recruit and retain staff in positions requiring specialist skills, ASIC needs to be able to separate remuneration from the public sector classified levels. This is particularly important given the significance of the powers delegated to ASIC staff.

- Delegations

The current staffing delegations set out in the PS Act lack clarity and have resulted in ASIC having to seek legislative amendments in 2017. The lack of clarity is an on-going risk.

2.158 Based on the information provided, the removal of the requirement for ASIC to employ staff under the PS Act may be rationally connected to the stated objective noting the particular context in which ASIC operates.

2.159 The minister also provides information as to the safeguards that are in place to protect just and favourable conditions of work, which is relevant to determining the proportionality of the measure. Safeguards identified by the minister include the protections provided under Part 2-4 of Chapter 2, Division 7 of the *Fair Work Act 2009*, which set out the circumstances in which enterprise agreements may be varied or terminated. In particular, the minister notes that variations to or terminations of enterprise agreements cannot take place without the agreement of employees. The minister states in relation to the next enterprise agreement, due for negotiation in 2019, that:

> The move from the PS Act will not change those negotiations at all, as the procedures under which terms and conditions of employment are negotiated are prescribed in the FW Act [*Fair Work Act 2009*]. The FW Act provides that for the agreement to be approved it must pass the "better off overall" test when compared against the relevant modern award. Similarly, the EAC Bill has no impact on the requirement for ASIC to comply with the Australian Workplace Bargaining Policy.

2.160 The minister also reiterates that under the transitional provisions set out in the bill, staff who transfer from employment under the PS Act to employment under the ASIC Act 'retain the same terms and conditions of employment that applied immediately before the commencement date', including maintaining accrued entitlements, and that the existing enterprise agreement remains in place. This is an important safeguard for existing ASIC staff employed under the PS Act. While these transitional provisions do not provide specific protection for ASIC employees who will be subject to future arrangements set by the chairperson, on balance, some of the existing measures referred to by the minister under the *Fair Work Act* would assist with proportionality from the perspective of international human rights law.

2.161 Based on the information provided by the minister, including the existence of relevant safeguards, on balance, the measure may be a proportionate limitation on the right to just and favourable conditions of work, and the obligation not to unjustifiably take any backwards steps (retrogressive measures) in relation to this right. However, this may depend on how these measures are implemented in practice.

Committee response

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

2.163 Based on the further information provided, the committee considers that, on balance, the measure may be compatible with 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**)
Previous reports	4 of 2018
Status	Concluded examination

Background

2.164 The committee first reported on the bill in its *Report 4 of 2018*, and requested a response from the Minister for Revenue and Financial Services by 23 May 2018.[1]

2.165 The minister's response to the committee's inquiries was received on 24 May 2018. The response is discussed below and is reproduced in full at **Appendix 3**.

Strict liability and absolute liability offences

2.166 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.[2] 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.[3]

2.167 Schedule 1 would also 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.[4]

2.168 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.[5]

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1 Parliamentary Joint Committee on Human Rights, *Report 4 of 2018* (8 May 2018) pp. 30-32.

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

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

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

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

A person will not commit an offence to the extent that they are not capable of complying with the order.[6]

Compatibility of the measure with the presumption of innocence

2.169 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, 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.

2.170 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.

2.171 The initial human rights analysis stated that, while the statement of compatibility provides a general description of the nature and effect of each of the proposed offences,[7] 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.[8]

2.172 It was 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.[9] However, the initial analysis stated that 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

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

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

8 SOC, [10.11] and [10.31].

9 Explanatory memorandum (EM), pp. 12-14, 25-26, 82-84.

legislation proponent's analysis of the compatibility of the bill with Australia's international human rights obligations.

2.173 The committee referred to its *Guidance Note 1* and sought 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;
- 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.

Minister's response

Schedule 1 of the Bill

2.174 In relation to whether the proposed strict liability and absolute liability offences in Schedule 1 of the bill pursue a legitimate objective for the purposes of international human rights law, the minister's response explains that the objective of the measures is to ensure compliance with superannuation guarantee obligations. The minister's response further states:

> Ensuring compliance with superannuation guarantee obligations forms a legitimate objective for the purposes of human rights law because, unlike other debts owed to the Commonwealth, the ultimate beneficiaries of the superannuation guarantee payments are individuals. Any amounts of superannuation guarantee charge paid by the employer to the Commissioner are distributed to the superannuation funds of employees who did not receive the minimum level of contributions from their employer.

2.175 Based on the information provided, ensuring compliance with superannuation guarantee obligations appears to be advancing a legitimate objective for the purposes of international human rights law.

2.176 The minister's response also explains how the measures are rationally connected to (that is, effective to achieve) this objective. The response states that applying absolute liability and strict liability to these offences 'substantially improves the effectiveness of ensuring employer compliance with existing and future superannuation guarantee obligations which are required by superannuation and taxation laws' and acts as a 'significant and real deterrent to those entitles who fail to meet their superannuation guarantee obligations'.

2.177 As to whether the limitation on the presumption of innocence introduced by the strict liability offence for failing to comply with a direction from the Commissioner to pay a superannuation guarantee charge is proportionate, the

minister's response states that the strict liability offence is appropriate and proportionate in the circumstances in light of the defences that are available that will protect persons who have taken reasonable steps to try and discharge liability.[10] The minister's response further explains that the direction from the commissioner (failure to comply with which gives rise to the strict liability offence) 'is only intended to be applied to employers who have the capability to pay but have consistently refused to do so' and that 'outside of these defences there are no reasons for an employer not to pay their employee's superannuation guarantee contribution'. Having regard to these matters, and the availability of the defence of honest mistake of fact, on balance the strict liability offence introduced by Schedule 1 appears to be a proportionate limitation on the presumption of innocence.

2.178 As to the absolute liability offence for failing to attend an approved education course where the employer has failed to comply with superannuation guarantee obligations, the minister's response states this is proportionate to the stated objectives, having regard to the defence that is available under section 8C(1B) of the TAA that a person will not commit an offence to the extent the person is not capable of complying with the education direction. The effect of the defence, as explained in the explanatory memorandum, is that 'an employer who is genuinely incapable of complying with the direction will not commit an offence'.[11] The minister's response explains that there are no reasons for an employer not to attend the education course under the direction beyond those covered by this defence. Noting the direction to attend an education course arises in circumstances where an employer has failed to comply with superannuation guarantee obligations, and in light of the information provided by the minister, this would appear to be a proportionate limitation on the presumption of innocence.

Schedule 5 of the Bill

2.179 In relation to whether the proposed offence in Schedule 5 of the bill pursues a legitimate objective for the purposes of international human rights law, the minister states:

> This measure addresses instances of non-compliance with the security deposit rules which predominantly arise where the value of the security deposit (which reflects the value of the tax related liability) exceeds the existing penalty for failing to provide the security deposit. Entities who fail to comply with a Court order risk committing a criminal offence resulting in criminal penalties. These consequences provide appropriate incentives to ensure compliance with the Court order and reflect the seriousness of a failure to comply.

10 See proposed section 265-95(3) discussed above.

11 Explanatory memorandum, p. 26.

> This is a legitimate objective for the purposes of human rights law because it addresses the underlying non-compliance by taxpayers who actively avoid paying their tax related liabilities. These taxpayers have already committed an offence under the tax law for failing to comply with the existing security deposit requirement.

2.180 The objective of addressing non-compliance by taxpayers actively avoiding their tax-related liabilities is likely to be legitimate for the purposes of international human rights law.

2.181 The minister's response further explains how the strict liability offence is an effective means (that is, is rationally connected) to achieve the objective:

> Applying strict liability to this offence will substantially improve the effectiveness of ensuring taxpayer compliance with existing and future tax related liabilities required under the tax law. The provision has a rational connection to the objective as it will act as a significant and real deterrent to those entities who fail to comply with a Federal Court order to provide the security. It is also consistent with the existing offence for failing to comply with tax related obligations, which as noted above, are subject to an offence of absolute liability.

2.182 As to the proportionality of the proposed offence, the minister states:

> The strict liability offence in Schedule 5 to the Bill is appropriate and proportionate in the context of ensuring greater compliance with orders made by the Court to provide security to the Commissioner for an outstanding tax related liability. There are no reasons for a taxpayer to not comply with the Court order beyond those covered by the applicable defence of not being capable of complying.

2.183 Having regard to the availability of the defence available to a defendant if they are not capable of complying with the court order, as well as the availability of the defence of honest mistake of fact, on balance the strict liability offence appears to be compatible with the presumption of innocence.

Committee response

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

2.185 The committee considers that the strict liability and absolute liability offences are likely to be compatible with the presumption of innocence.

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**)
Previous reports	4 of 2018
Status	Concluded examination

Background

2.186 The committee first reported on the bill in its *Report 4 of 2018*, and requested a response from the Minister for the Environment and Energy by 23 May 2018.[1]

2.187 A response from the Assistant Minister for the Environment was received on 25 May 2018 and is discussed below and is reproduced in full at **Appendix 3**.

Civil penalties for breaches of protected underwater cultural heritage regime

2.188 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,[2] possessing protected underwater cultural heritage without a permit,[3] and exporting underwater cultural heritage without a permit.[4] 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

1 Parliamentary Joint Committee on Human Rights, *Report 4 of 2018* (8 May 2018) pp. 33-37.

2 Proposed section 29(6).

3 Proposed section 31(6).

4 Proposed section 35(5).

heritage without a permit.[5] 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

2.189 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 acknowledges that the civil penalty provisions may engage criminal process rights if they are considered 'criminal' for the purposes of international human rights law.

2.190 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.

2.191 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

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5 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).

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'.[6] The initial human rights analysis noted that, 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.

2.192 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 was noted that the conduct regulated by the bill that 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. This raised 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. The initial analysis stated that 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.

2.193 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)).[7]

2.194 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

6 Statement of compatibility (SOC), p.11.

7 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.

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.[8] This would ensure that a person could not be punished twice for the same conduct, consistent with Article 14(7).

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

2.196 The committee therefore sought 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. The committee also sought 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.

Assistant minister's response

2.197 The assistant minister's response addresses each of the relevant tests for determining whether a civil penalty is 'criminal' for the purposes of human rights law. The response states that the civil penalties are classified as such under domestic law. However, as noted in the initial analysis, this is not determinative as the term 'criminal' has an autonomous meaning in human rights law.

2.198 As to the second part of the test, the assistant minister's response explains the nature and purpose of the penalty:

> The penalties proposed in the Underwater Cultural Heritage Bill 2018 (the Bill) aim to deter and punish conduct that could harm protected underwater cultural heritage, and are set at a level reflecting the significant value of the non-renewable heritage resource that would be negatively impacted by a breach of any of the regulated actions. Although the application of the penalty provisions is not expressly limited in the Bill, in practice only a particular sector of the community will be regulated by this Bill, notably natural persons and bodies corporate who possess and or

8 SOC, p. 12.

> trade in protected underwater cultural heritage or who undertake development actions that may impact protected underwater cultural heritage (for example by physically damaging, disturbing or removing protected underwater cultural heritage from the marine environment). As such the primary groups likely to offend are limited to a small group of persons or bodies corporate.

2.199 The assistant minister's response clarifies that while the purpose of the penalties is to deter and punish, the penalties in practice apply to a particular sector of the community. This narrow application and particular regulatory context suggests that the penalties are unlikely to be classified as 'criminal' under the second step of the test.

2.200 As to the third step (severity of the penalty), the assistant minister's response firstly emphasises that the pecuniary penalty 'reflects the intrinsic and social value of protected sites and individual articles that may be possessed or traded and are framed to be an appropriate and proportionate deterrent to natural persons and bodies corporate'. As to the size of the penalties, the assistant minister's response explains:

> The size of the pecuniary penalties also reflects the broad range and scale of contraventions that can occur such as systemic breaches of requirements to possess a permit (prior to exporting protected underwater cultural heritage), deliberate actions (such as disturbance of a site and the recovery of protected underwater cultural heritage without permit), or a cost of business approach by developers to the total destruction of underwater cultural heritage sites.
>
> The inclusion of civil penalties in the Bill provides an option for an appropriate and proportionate response to the deliberate contravention of provisions protecting underwater cultural heritage. A criminal conviction may result in a disproportionate response which would impact on an individual's current or future ability to work. This scale of the pecuniary penalties give the court flexibility in identifying a suitable penalty for each case on its merits enabling a proportionate response to corporate bodies and individuals.

2.201 It is acknowledged that the nature of the industry being regulated by the bill is such that its conduct may cause substantial and potentially irreversible damage to underwater sites. However, the penalties are substantial for an individual (300 penalty units for breaches of sections 29(6), 31(6) and 35(5) and 800 penalty units for breaching section 30(6)). Notwithstanding the particular regulatory context in which the penalties operate, concerns remain that the overall severity of the penalty may be such that the penalties would be classified as 'criminal' for the purposes of international human rights law.

2.202 As noted in the initial analysis, civil penalty provisions that may be classified as 'criminal' for the purposes of human rights law must be shown to be consistent with the criminal process guarantees. Relevantly, the civil penalties in the bill must

be compatible with the presumption of innocence. In this context, concerns arise due to the fact that the standard of proof required in civil penalty proceedings is the civil standard of proof on the balance of probabilities, rather than the criminal standard of 'beyond reasonable doubt'. This would constitute a limitation on the right to be presumed innocent.

2.203 While the assistant minister's position is that the penalties are not 'criminal', the response nonetheless helpfully addresses whether the measure would constitute a permissible limitation on the right to be presumed innocent. As to the legitimate objective of such a limitation, the assistant minister's response discusses the overall objective of the bill:

> The Bill pursues a legitimate objective which is to provide for the identification, protection and conservation of Australia's underwater cultural heritage. Underwater cultural heritage is threatened by a mix of environmental, chemical, biological and cultural processes. The Bill aims to manage the negative impacts to underwater cultural heritage which can be caused by both natural persons and bodies corporate.

2.204 This is likely to be a legitimate objective for the purposes of international human rights law. Regulating this conduct by requiring permits in relation to protected underwater cultural heritage, and civil penalties (and the accompanying civil standard of proof) to address breaches of these requirements, appears to be rationally connected to this objective. As to proportionality, the minister's response explains that the limitation on the presumption of innocence is proportionate in light of the 'unique and irreplaceable underwater cultural heritage in-situ' and notes that courts will have 'flexibility in identifying a suitable penalty for each case on its merits enabling a proportionate response to corporate bodies and individuals'.

2.205 As to whether the bill could be amended to a less rights restrictive approach of applying the criminal standard of proof to the civil penalties, the assistant minister's response states that the purpose of having civil penalties (with a civil standard of proof) alongside criminal penalties is to 'provide regulatory flexibility in responding appropriately and proportionately to contraventions'.

2.206 On balance, having particular regard to the purpose of the penalties and the overall scheme within which the penalties operate, the application of the civil standard of proof to the penalty provisions may be a proportionate limitation on the presumption of innocence.

Committee response

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

2.208 The committee considers that, having regard to the overall severity of the penalties, the civil penalty provisions in proposed sections 29(6), 30(6), 31(6), and 35(5) may be considered 'criminal' for the purposes of international human rights law. This means that the penalties must be compatible with criminal process

guarantees. In light of the information provided by the minister, the committee considers that the civil penalty provisions may be compatible with criminal process guarantees.

Strict liability offences

2.209 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.[9]

Compatibility of the measure with the presumption of innocence

2.210 As noted above, 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).

2.211 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:

> 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.[10]

2.212 However, further information was 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.

2.213 The committee therefore sought the advice of the minister as to the compatibility of the strict liability offences with the presumption of innocence, in particular:

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9 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).

10 SOC, p.13.

- 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.

Assistant minister's response

2.214 The assistant minister's response states that the purpose of the strict liability offences is to 'ensure the integrity of the regulatory regime in order to prevent potential harm to Australia's protected underwater cultural heritage'. This objective, in light of the broader objective of the bill to protect Australia's underwater cultural heritage, is likely to be a legitimate objective for the purposes of international human rights law. The introduction of offence provisions to address non-compliance with the regime also is rationally connected to this objective.

2.215 As to proportionality, the assistant minister's response states:

> The use of strict liability is proportionate to achieve the stated objective because the penalty amounts are within reasonable limits. As noted in the Explanatory Memorandum to the Bill, the penalties for the strict liability provisions in the Bill are limited to 60 penalty units for an individual, and do not include imprisonment. Consequently, individuals who contravene a strict liability provision of the Bill will not be subject to unreasonable or unduly harsh penalties, taking into account the Bill's legitimate objective of protecting and conserving Australia's underwater cultural heritage.
>
> Finally, the strict liability provisions of the Bill maintain the defendant's right to a defence. This is because defence of mistake of fact will remain available to a defendant, so that a person cannot be held liable if he or she had an honest and reasonable belief that they were complying with relevant legal obligations. Additionally, the existence of strict liability also does not make any other defence unavailable to a defendant.

2.216 The further information provided from the assistant minister indicates that the penalties are within reasonable limits and maintain the defendant's right to a defence. Having regard to the further information provided by the assistant minister, the strict liability offences are likely to be compatible with the presumption of innocence.

Committee response

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

2.218 The committee considers that the strict liability offences are likely to be compatible with the presumption of innocence.

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) [F2017L01063] and [F2017L01080]: 15 sitting days after tabling (tabled Senate 4 September 2017) [F2017L01592]: 15 sitting days after tabling (tabled Senate 8 February 2018) [F2018L00102] and [F2018L00108]: 15 sitting days after tabling (tabled Senate 15 February 2018) [F2018L00099], [F2018L00101] and [F2018L00100]: 15 sitting days after tabling (tabled Senate 14 February 2018)
Rights	Multiple rights (see **Appendix 2**)
Previous reports	3 & 4 of 2018
Status	Concluded examination

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

2.219 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] The minister's response to the committee's inquiries was received on 27 April 2018 and discussed in *Report 4 of 2018*.[3]

2.220 The committee requested a further response from the minister by 23 May 2018.

2.221 The minister's further response to the committee's inquiries was received on 4 June 2018. The response is discussed below and is reproduced in full at **Appendix 3**.

2.222 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).[4] 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).

2.223 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 undertaken in 2015 and 2016.[5] 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*.[6] 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.[7]

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

3 Parliamentary Joint Committee on Human Rights, *Report 4 of 2018* (8 May 2018) pp. 64-83.

4 See footnote 1.

5 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.

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

7 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.

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

2.224 Each of the new instruments designates and declares persons for the purpose of the 2011 regulations. Persons are designated and declared where the Minister for Foreign Affairs is satisfied that doing so will facilitate the conduct of Australia's relations with other countries or with entities or persons outside of Australia, or will otherwise deal with matters, things or relationships outside Australia.[8] The 2011 regulations set out the countries and activities for which a person or entity can be designated or declared.[9] 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.

2.225 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.[10] 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.

2.226 The autonomous sanctions regime provides that the minister may grant a permit authorising the making available of certain assets to a designated person.[11] An application for a permit can only be made for basic expenses, to satisfy a legal judgment or where a payment is contractually required.[12] A basic expense includes foodstuffs; rent or mortgage; medicines or medical treatment; public utility charges; insurance; taxes; legal fees and reasonable professional fees.[13]

Compatibility of the designations and declarations with multiple human rights

2.227 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

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

9 Section 6 of the Autonomous Sanctions Regulations 2011.

10 Section 14 of the Autonomous Sanctions Regulations 2011.

11 See section 18 of the Autonomous Sanctions Regulations 2011.

12 See section 20 of the Autonomous Sanctions Regulations 2011.

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

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.

2.228 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.

2.229 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.

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

2.231 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 June 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).[14] 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.

14 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

2.232 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.

2.233 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

2.234 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 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.[15]

15 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

2.235 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.[16] 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

2.236 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.[17]

Right to freedom of movement

2.237 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.[18] 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

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

17 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.

18 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

2.238 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.

2.239 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.[19] 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.

2.240 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,[20] 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.[21] 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.

2.241 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

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

20 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

21 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.[22]

2.242 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.[23]

2.243 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.[24]

2.244 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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22 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].

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

24 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.[25] 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.

2.245 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.[26] 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.[27]

2.246 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.[28] 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.[29]

2.247 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

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. 49.

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

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

2.248 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.[31]

2.249 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.[32] 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.[33]

2.250 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.[34] 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.

2.251 The committee has also previously discussed comparative models of sanctions regimes which provide safeguards not present in the Australian

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

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

32 See further below.

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

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

autonomous sanctions regime, including the United Kingdom (UK).[35] The committee noted that safeguards in comparable asset-freezing regimes are highly relevant indicia that there are more proportionate methods of achieving the legitimate objective of the Australian autonomous sanctions regimes. That is, it would appear that a less rights-restrictive approach is reasonably available.

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

2.252 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.[36] Non-refoulement obligations are absolute and may not be subject to any limitations.

2.253 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.

2.254 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.[37] It was not clear whether this provision would

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35 On 23 May 2018, the *Sanctions and Anti-Money Laundering Act 2018* (UK) (SAML Act) was passed, repealing and replacing Part 1 of the *Terrorist Asset Freezing etc Act 2010* (UK), which was previously referred to in the committee's reports on sanctions regimes. The *Sanctions and Anti-Money Laundering Act 2018* (UK) retains some of the safeguards previously discussed by the committee, including the requirement to report to parliament on the operation of the regime (section 30 of SAML Act) and oversight by an independent reviewer of sanctions enacted for a counter-terrorism purpose (section 31 of SAML Act). However, some of the safeguards previously discussed have been repealed. The United Kingdom Joint Committee on Human Rights (JCHR) reported on the SAML bill and raised a number of human rights concerns in relation to it: see JCHR, *Legislative Scrutiny: The Sanctions and Anti-Money Laundering Bill* (28 February 2018). The JCHR's report also made a number of recommendations to amend the (then) SAML bill, and the government subsequently accepted the JCHR's recommendation that there be independent review of counter-terrorism sanctions (as had been the case under the previous law) and amended the bill accordingly: see *Government response from the Minister of State for Europe and the Americas, relating to the Committee's report on Legislative Scrutiny: The Sanctions and Anti-Money Laundering Bill*, dated 25 April 2018, available https://www.parliament.uk/documents/joint-committees/human-rights/Sanctions-Anti-Money-Laundering-bill-response.pdf.

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

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

apply to visa holders who have been found to engage Australia's non-refoulement obligations.

2.255 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.[38]

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

Initial information sought from the minister

2.257 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.

2.258 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 regime.

2.259 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 [2.232] to [2.251] above.

38 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.

2.260 The committee also drew the minister's attention to the committee's recommendations in *Report 9 of 2016* that consideration be given to the measures which have been implemented in relation to comparable regimes, to ensure compatibility with human rights.

2.261 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.[39]

Minister's first response

Minister's first response - Compatibility of the measure with the prohibition on non-refoulement and the right to an effective remedy

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

> 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.

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

2.263 The minister's response helpfully provided 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 clarified that persons on protection, refugee or humanitarian visas could not have their visa cancelled under section 2.43(1)(aa) of the Migration Regulations.[40] This indicated 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,[41] 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.

2.264 For persons who may have their visa cancelled under section 2.43 of the Migration Regulations, the response identified 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 pointed to the human rights compatibility assessment in the explanatory memorandum to the bill which introduced section 197C of the Migration Act.[42] However, it was noted that the mechanisms referred to are entirely at the discretion of the relevant minister. While the minister identified 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.[43]

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40 '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).

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

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

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

2.265 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:

> 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.[44]

2.266 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.

2.267 The committee noted 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.

2.268 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 reiterated 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.

44 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.

Minister's first response - 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

2.269 In relation to the remaining human rights discussed above, the minister's first response did not substantively address the committee's inquiries but instead provided the following general information:

> 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.

2.270 While the minister 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,[45] 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.

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

2.271 Finally, in relation to the statements of compatibility for the instruments, the minister's first response stated:

> 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.
>
> 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.

2.272 The committee noted that the minister's response did not substantively address the committee's inquiries in relation to the compatibility of the instruments with multiple rights.

2.273 The committee therefore reiterated its previous request for advice from the minister. The committee also noted the minister has requested the Department of Foreign Affairs and Trade to include additional detail in future statements of compatibility, and drew the minister and department's attention to the committee's *Guidance Note 1*.

Minister's second response

2.274 The minister's second response firstly notes the committee's recommendations in *Report 9 of 2016* of changes that could be made to make the sanctions regime more human rights-compliant, having regard to comparable international sanctions regimes. The minister's response notes that 'the Government continues to be satisfied that Australia's autonomous sanctions regime is compatible with human rights' and that 'the Government has no immediate plans to adopt the measures proposed by the Committee', but that it will keep the sanctions regime under review.

2.275 The minister's second response also reiterates the legitimate objectives of the sanctions regimes:

> It is the Government's view that modern sanctions regimes impose highly targeted measures in response to situations of international concern. This includes the grave repression of human rights or democratic freedoms of a population by a government, or the proliferation of weapons of mass destruction or their means of delivery, or internal or international armed conflict. Thus, autonomous sanctions pursue legitimate objectives, and have appropriate safeguards in place to ensure that that any limitation of human rights engaged by the imposition of sanctions is justified.

2.276 As noted previously, it is accepted that the sanctions regime pursues a legitimate objective for the purposes of international human rights law.

Compatibility of the measures with the right to a fair hearing

2.277 In relation to the compatibility of the measures with the right to a fair hearing, the response states that the 'limitation on access to merits review in this context is reasonable as it reflects the seriousness of the foreign policy and national security considerations involved, as well as the nature of the material relied upon'. The response further states:

> Further, while merits review is unavailable for a decision to designate and/or declare a person under the Regulations, there are clear procedures for requesting revocation of designations and declarations, and judicial review is available under the *Administrative Decisions (Judicial Review) Act 1976* (the ADJR Act).
>
> In addition, there is a three-yearly review process for targeted financial sanctions and travel bans that ensures that effective safeguards and controls are in place. This three-yearly review process includes a public consultation period, which invites submissions from the public to inform the assessment of whether a person continues to meet the criteria for designation and declaration under regulation 6 of the Regulations.
>
> Finally, a person may apply at any time requesting the revocation of their designation or declaration in the event of changed circumstances or if new evidence comes to light. Failure to make a decision or unreasonable delay following such a request may be grounds for judicial review. Finally, the Minister may review and/or revoke designations and declarations at any time on her own initiative, including when circumstances change or new evidence comes to light.

2.278 As noted in previous analysis, the availability of judicial review to secure the minimum requirement that the minister act in accordance with the law is one relevant safeguard available. However, as noted in previous analysis, the effectiveness of judicial review as a safeguard within the sanctions regimes relies, in significant part, on the clarity and specificity with which legislation specifies powers conferred on the executive. The scope of the power to designate or declare someone is based on the minister's satisfaction in relation to certain matters which are stated in broad terms.[46] It is noted that this formulation limits the scope to challenge such a

46 For example, under the autonomous sanctions regime a person can be designated or declared by the minister on a number of grounds relating to whether the minister is subjectively satisfied the person is or has been involved in certain activities. These include, for example, that a person is a supporter of the former regime of Slobodan Milosevic; is a close associate of the former Qadhafi regime in Libya (or an immediate family member); is providing support to the Syrian regime; is responsible for human rights abuses in Syria; has engaged in activities that seriously undermine democracy, respect for human rights and the rule of law in Zimbabwe; or is responsible for, or complicit in, the threat to the sovereignty and territorial integrity of Ukraine.

decision on the basis of there being an error in law (as opposed to an error on the merits) under the ADJR Act or at common law.

2.279 It is also not clear that the request for revocation process and three-yearly review process outlined in the minister's response would overcome the fair hearing concerns raised in previous analysis. In particular, a designated or declared person will only have their application for revocation considered once per year and the minister is not required to consider an application if it is made within the year. Similarly, while the minister may review or revoke designations or declarations at their own initiative, there is no requirement to reconsider or review the designation within the three-yearly review period if circumstances change or new evidence comes to light, raising concerns that a person may remain subject to sanctions notwithstanding the circumstances have changed.

2.280 More broadly, as noted in the previous analysis, the European Court of Human Rights has considered that persons subject to sanctions should be 'afforded at least a genuine opportunity to submit appropriate evidence to a court, for examination on the merits, to seek to show their inclusion on the impugned lists had been arbitrary'.[47] The Court of Justice of the European Union has similarly held that when considering the compatibility of judicial review of sanctions decisions in light of the right to an effective remedy and to a fair trial,[48] that 'judicial review cannot be restricted to an assessment of the cogency in the abstract of the reasons relied on, but must concern whether those reasons…[are] substantiated'.[49] It is also noted that the UK Joint Committee on Human Rights has recently expressed concern about the restriction of court reviews of sanctions to judicial review.[50]

2.281 For these reasons, serious concerns remain as to whether the autonomous sanctions regime is compatible with the right to a fair hearing.

Compatibility of the measures with the right to privacy

2.282 In relation to the compatibility of the designations and declarations of persons under the 2011 regulations with the right to privacy, the minister's second response states:

> As noted above, an interference with privacy will not be arbitrary where it is reasonable, necessary and proportionate in the individual circumstances.

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

48 Pursuant to Article 47 of the EU Charter of Fundamental Freedoms.

49 *European Commission and Others v Kadi,* Court of Justice of the European Union (Grand Chamber)(Cases C‑584/10 P, C‑593/10 P and C‑595/10 P)(18 July 2013) [119].

50 JCHR, *Legislative Scrutiny: The Sanctions and Anti-Money Laundering Bill* (28 February 2018) [48]-[54].

> The imposition of targeted financial sanctions and travel bans is reasonable. The Minister uses predictable, publicly available criteria when designating or declaring a person as being subject to such measures. These criteria are designed to capture only those persons the Minister is satisfied are involved in activities giving rise to situations of international concern, as set out in regulation 6 of the Regulations.
>
> Targeted financial sanctions and travel bans under the autonomous sanctions regime are necessary and proportionate. They are only imposed, by definition, in response to situations of international concern, including where there are, or have been, human rights abuses, weapons proliferation (in defiance of UN Security Council resolutions), indictment in international criminal tribunals, activities that seriously undermine democracy, and threats to the sovereignty and territorial integrity of a State. Given the seriousness of these issues, the Government considers that targeted financial sanctions and travel bans are the least rights-restrictive ways to respond to situations of international concern.
>
> The Government's position is that any interference with the right to privacy as a consequence of the operation of the autonomous sanctions regime is not unlawful or arbitrary.

2.283 It is acknowledged that in an individual case, when accompanied by sufficient safeguards, the imposition of sanctions on an individual may constitute a proportionate limitation on a person's right to a private and home life. For example, in *Bouchra Al Assad v Council of the European Union*, the General Court of the European Union held that the freezing of a person's funds pursuant to targeted sanctions did not constitute a disproportionate impact on a person's private life, having regard to the 'primary importance of protecting the civilian populations in Syria', the availability of periodic review, and the possibility of authorising funds in order to meet basic needs or certain commitments.[51]

2.284 By contrast, before the European Court of Human Rights in *Nada v Switzerland,* the complainant was subject to a travel ban pursuant to UN sanctions and was restricted access to Swiss territory, the effect of which was that he was confined to an Italian enclave within Swiss territory. The Court considered that preventing the applicant from leaving the confined area impacted the person's ability to exercise their right to maintain contact with family, which was an interference with the applicant's right to respect for his private life. The Court found that, notwithstanding the legitimate aims pursued by the sanctions, the state's failure to

51 *Bouchra Al Assad v Council of the European Union* Judgment of the General Court (Sixth Chamber) (Case No. T-202/12) (12 March 2014) [107]-[121].

take 'all possible measures to adapt the sanctions regime to the applicant's individual situation' meant that the interference was not proportionate.[52]

2.285 To that end, whether the imposition of sanctions on an individual constitutes a proportionate limitation on the right to a private life will depend on the availability of other safeguards, including the availability of review. As noted above, there are serious concerns as to whether the current mechanisms for review of decisions relating to the sanctions regime are sufficient from the perspective of the right to a fair hearing. There is a risk, therefore, that the absence of sufficient safeguards may result in the autonomous sanctions regime being incompatible with the right to privacy.

2.286 The minister's response does not address the committee's specific concern as to the impact of the designation process on the right to privacy of close family members of a designated person who may not be able to access their own funds without needing to account for all expenditure (due to the possibility that use of their funds may indirectly benefit a designated person, which would be an offence).[53] This remains a concern with respect to the personal autonomy of family members of designated and declared persons.

2.287 It is noted that UN Human Rights Committee jurisprudence confirms the risk that the domestic implementation of sanctions regimes may breach the right to privacy. In *Sayadi and Vinck v Belgium,* the UN Human Rights Committee found a violation of Article 17 of the ICCPR in circumstances where the complainants' names were on a UN sanctions list notwithstanding the dismissal of criminal investigations against them and attempts by the state party to request removal of the names from the list. The UN Human Rights Committee found that Belgium (as the state party responsible for the presence of the authors' names on the list) violated Article 17, due in part to the fact that 'the dissemination of personal information about the authors constitutes an attack on their honour and reputation, in view of the negative association that some persons could make between the authors' name and the title of the sanctions list'.[54]

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

2.288 As to the compatibility of the measures with the right to protection of the family, the response states:

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52 *Nada v Switzerland,* ECHR (Grand Chamber) (Application No. 10592/08) (12 September 2012) [167]-[199].

53 See Parliamentary Joint Committee on Human Rights, *Report 3 of 2018* (27 March 2018) [1.287].

54 *Sayadi and Vinck v Belgium,* UN Human Rights Committee (Application No. 1472/2006) (22 October 2008) [10.12].

> As the listing criteria in regulation 6 are drafted by reference to specific foreign countries, it is rare, as a practical matter, that a person declared for a travel ban will have immediate family in Australia and face deportation from Australia.
>
> To the extent that a person has known connections to Australia, the Department of Foreign Affairs and Trade (DFAT) is able to consult with relevant agencies in advance of a designation and declaration to determine the possible impacts of the designation and declaration on any family members in Australia.
>
> To the extent that the travel bans imposed pursuant to the Instruments engage and limit the right to protection of the family in a particular case, the Regulations allow the Minister to waive the operation of a travel ban on the grounds that it would be either: (a) in the national interest; or (b) on humanitarian grounds. This provides a mechanism to address circumstances in which issues such as the possible separation of family members in Australia are involved. In addition, this decision may be judicially reviewed.
>
> Finally, were such a separation to take place, for the reasons outlined in relation to Article 17 above, the position of the Australian Government is that such a separation would be justified in the circumstances of the individual case.

2.289 The minister's response helpfully provides information as to the practical operation of the sanctions regime and the process undertaken by DFAT to ascertain the impact on family members, and it is acknowledged that as a practical matter the impact on family members in Australia would be rare. The possibility of waiving the travel ban on humanitarian grounds or in the national interest to protect a family in an individual case is also a relevant safeguard.

2.290 As with the right to privacy discussed above, whether the imposition of a travel ban would constitute a proportionate limitation on the right to protection of the family will depend on the availability of other safeguards, such as the availability of review. For the reasons discussed above in relation to the right to a fair hearing, the availability of judicial review of a decision to waive a travel ban may not, of itself, be a sufficient safeguard. Further, as with the right to privacy, there is a risk that the absence of sufficient safeguards may result in the autonomous sanctions regime being incompatible with the right to protection of the family.

Compatibility of the measures with the right to an adequate standard of living

2.291 In relation to the compatibility of the measures with the right to an adequate standard of living, the minister states:

> The Government considers any limitation on the enjoyment of Article 11(1), to the extent that it occurs, is justified. The Regulations allow for any adverse impacts on family members as a consequence of targeted financial sanctions to be mitigated. As the Committee notes, the

> Regulations state that the Minister may grant a permit for the payment of basic expenses (among others) if it is in the national interest to do so. The objective of the basic expenses exemption is, in part, to enable the Australian Government to administer the sanctions regime in a manner compatible with relevant human rights standards.
>
> As noted above, DFAT consults relevant agencies in advance of a designation and declaration of a person with known connections to Australia to determine the possible impacts of the designation and declaration on any family members in Australia. Where such impacts are identified, the Minister may issue a permit to ensure that the asset freeze does not adversely affect any person who does not meet the criteria for designation.
>
> The Government considers that the permit process is a flexible and effective safeguard on any limitation to the enjoyment of Article 11(1).

2.292 The ability of the minister to grant a permit for the payment of basic expenses is an important safeguard. However, as also indicated in the minister's response, this safeguard is qualified by the requirement that the minister must not grant such a permit unless the minister is satisfied that it would be in the national interest to do so.[55] The minister may also make the permit subject to conditions.[56] As the committee has previously noted, this discretion of the minister does not appear to be the least rights-restrictive way of achieving the legitimate objective.[57]

Right to freedom of movement

2.293 In relation to the compatibility of the measures with the right to freedom of movement, the minister states:

> To the extent that Article 12(4) is engaged in an individual case, such that a person is prevented from entering Australia as their 'own country', the Government's position is that the imposition of the travel ban would be justified. As set out above in relation to Article 17 of the ICCPR, travel bans are a reasonable and proportionate means of achieving the legitimate objectives of Australia's autonomous sanctions regime.
>
> Travel bans are reasonable because they are only imposed on persons who the Minister is satisfied are responsible for giving rise to situations of international concern. Thus, preventing a person who is, for example,

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55 Section 18(3)(a) of the Autonomous Sanctions Regulations 2011.

56 Section 18(4) of the Autonomous Sanctions Regulations.

57 By way of contrast, the sanctions that were the subject of scrutiny in the decision of *Bouchra Al Assad v Council of the European Union*, discussed above in relation to the right to privacy, allowed for the authorisation of the release of funds after having determined the funds were necessary to satisfy basic needs, without an additional requirement that it be in the national interest: See Article 19(3) of *Council Decision 2011/782/CFSP concerning restrictive measures against Syria.*

> responsible for human rights abuses in Syria, from travelling to, entering or remaining in Australia, is a reasonable means to achieve the legitimate foreign policy objective of seeking to influence and penalising those responsible for such abuses, and signal Australia's condemnation of such acts. Australia's practice in this respect is consistent with likeminded partners such as the US, the EU, and the UK.
>
> Travel bans are proportionate because while they engage and limit declared individuals' right to freedom of movement, they are the least restrictive means by which to achieve the legitimate objective of influencing and penalising those responsible for giving rise to situations of international concern. As set out above, by denying access to international travel, travel bans seek to influence persons who contribute to situations of international concern, including human rights abuses and weapons proliferation.

2.294 It is acknowledged that the travel bans are in pursuit of a legitimate objective and that they are a means to achieve the legitimate objective of seeking to influence and penalise people responsible for human rights abuses. However, as with the other human rights discussed above, the safeguards currently in place in the autonomous sanctions regime may not be sufficient, such that the limitation on freedom of movement may not be proportionate. In this respect, the UN Human Rights Committee noted in *Sayadi and Vinck v Belgium* (discussed above in relation to the right to privacy) that UN Security Council resolutions do not prevent consideration of whether travel bans for persons on sanctions lists are compatible with the right to freedom of movement.[58] The UN Human Rights Committee considered that in that case the facts of the case did not disclose that the restrictions of the authors' right to leave the country were necessary to protect national security and public order, and accordingly concluded there was a violation of Article 12.[59]

Overall assessment of the compatibility of the autonomous sanctions regime with human rights

2.295 It is acknowledged that the autonomous sanctions regime is a complex regime undertaken to give domestic effect to international obligations. However, the committee is required to assess the instruments for compatibility with human rights under the seven core human rights treaties to which Australia is a party. The autonomous sanctions regime may have significant human rights impacts on individuals and their immediate families. As such, it is important from a human rights perspective that sanctions regimes impose only proportionate limitations on human rights.

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58 *Sayadi and Vinck v Belgium,* UN Human Rights Committee (Application No. 1472/2006) (22 October 2008) [10.6].

59 *Sayadi and Vinck v Belgium,* UN Human Rights Committee (Application No. 1472/2006) (22 October 2008) [10.8].

2.296 From the analysis above, there are serious concerns that the current operation of the sanctions regime is not accompanied by adequate safeguards so as to constitute a proportionate limitation on the rights discussed above. There is therefore a serious risk of incompatibility with these rights.

Committee response

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

2.298 The committee notes that the information provided in the minister's response would be useful to include in future statements of compatibility relating to the autonomous sanctions regime.

2.299 The preceding analysis indicates that there is a risk that the autonomous sanctions regime may be incompatible with the right to a fair hearing, right to privacy, right to protection of the family, right to an adequate standard of living and the right to freedom of movement.

2.300 The committee reiterates its previous comment from *Report 9 of 2016* that consideration be given to the following measures that may ensure the autonomous sanctions regime is compatible 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.**

Designations or declarations in relation to specified countries

2.301 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

2.302 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.

2.303 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.[60] 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.

2.304 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.

2.305 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 first response

2.306 The minister's first response did not substantively respond to the committee's concerns, as outlined at [2.269]-[2.273] above. The committee therefore reiterated its request for advice as to the compatibility of the measures with the right to equality and non-discrimination.

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

Minister's second response

2.307 As to the compatibility of the measures with the right to equality and non-discrimination, the minister states:

> The Government's position is that any differential treatment of people as a consequence of the application of the Regulations does not amount to discrimination pursuant to Article 26 of the ICCPR.
>
> The Government refers the Committee to the listing criteria in regulations 6(1) and 6(2) of the Regulations, and notes that the criteria contained in the Regulation are reasonable and objective. They are reasonable insofar as they list only those States and activities which the Government has specifically determined give rise to situations of international concern. The criteria are also objective, as they provide a clear, consistent and objectively-verifiable reference point by which the Minister is able to make a designation or declaration. The Regulations serve a legitimate objective, as discussed above.
>
> Finally, they are proportionate. As discussed above, the Government's view is that denying access to international travel and the international financial system are a justified and less rights-restrictive means of achieving the aims of the Regulations. The Government does not have information that supports the view that affected groups are vulnerable; rather, they are people the Minister is satisfied are involved in activities giving rise to situations of international concern. Further, there are several safeguards, such as the availability of judicial review and regular review processes, in place to ensure that any limitation is proportionate to the objective being sought.

2.308 The minister’s response indicates that there may be an objective and justifiable basis for a difference in treatment on the basis of national origin and nationality. In relation to the question of whether this difference in treatment is reasonable or proportionate, the minister's response relies on the existing safeguards under the sanctions regime. For the reasons discussed above, there are concerns as to whether those safeguards are sufficient for the purposes of international human rights law. Accordingly, based on the information provided it is not possible to conclude whether the designations or declarations in relation to specified countries are compatible with the right to equality and non-discrimination.

Committee response

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

2.310 Noting the concerns discussed in the previous analysis as to the adequacy of the safeguards in the sanctions regime, the committee considers that it is not possible to conclude whether the designations or declarations in relation to specified countries are compatible with the right to equality and non-discrimination.

Mr Ian Goodenough MP

Chair