



Parliamentary Joint Committee on Human Rights

Human rights scrutiny report

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1 The human rights committee secretariat is staffed by parliamentary officers drawn from the Department of the Senate Legislative Scrutiny Unit (LSU), which usually includes two principal research officers with specialised expertise in international human rights law. LSU officers regularly work across multiple scrutiny committee secretariats.

Committee information

Under the *Human Rights (Parliamentary Scrutiny) Act 2011* (the Act), the committee is required to examine bills, Acts and legislative instruments for compatibility with human rights, and report its findings to both Houses of the Parliament. The committee may also inquire into and report on any human rights matters referred to it by the Attorney-General.

The committee assesses legislation against the human rights contained in the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR); as well as five other treaties relating to particular groups and subject matter.² **Appendix 2** contains brief descriptions of the rights most commonly arising in legislation examined by the committee.

The establishment of the committee builds on Parliament's established tradition of legislative scrutiny. The committee's scrutiny of legislation is undertaken as an assessment against Australia's international human rights obligations, to enhance understanding of and respect for human rights in Australia and ensure attention is given to human rights issues in legislative and policy development.

Some human rights obligations are absolute under international law. However, in relation to most human rights, prescribed limitations on the enjoyment of a right may be justified under international law if certain requirements are met. Accordingly, a focus of the committee's reports is to determine whether any limitation of a human right identified in proposed legislation is justifiable. A measure that limits a right must be **prescribed by law**; be in pursuit of a **legitimate objective**; be **rationaly connected** to its stated objective; and be a **proportionate** way to achieve that objective (the **limitation criteria**). These four criteria provide the analytical framework for the committee.

A **statement of compatibility** for a measure limiting a right must provide a **detailed and evidence-based assessment** of the measure against the limitation criteria.

Where legislation raises human rights concerns, the committee's usual approach is to seek a response from the legislation proponent, or else draw the matter to the attention of the proponent on an advice-only basis.

More information on the committee's analytical framework and approach to human rights scrutiny of legislation is contained in Guidance Note 1 (see **Appendix 4**).

2 These are the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD); the Convention on the Elimination of Discrimination against Women (CEDAW); the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT); the Convention on the Rights of the Child (CRC); and the Convention on the Rights of Persons with Disabilities (CRPD).

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Chapter 1

New and continuing matters

- 1.1 This chapter provides assessments of the human rights compatibility of:
- bills introduced into the Parliament between 25 and 28 June 2018 (consideration of 2 bills from this period has been deferred);¹
 - legislative instruments registered on the Federal Register of Legislation between 24 May and 18 June 2018 (consideration of 2 legislative instruments from this period has been deferred);² and
 - bills and legislative instruments previously deferred.
- 1.2 The committee has concluded its consideration of three legislative instruments that were previously deferred.³

Instruments not raising human rights concerns

- 1.3 The committee has examined the legislative instruments registered in the period identified above, as listed on the Federal Register of Legislation. Instruments raising human rights concerns are identified in this chapter.
- 1.4 The committee has concluded that the remaining instruments do not raise human rights concerns, either because they do not engage human rights, they contain only justifiable (or marginal) limitations on human rights or because they promote human rights and do not require additional comment.

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- 1 See Appendix 1 for a list of legislation in respect of which the committee has deferred its consideration. The committee generally takes an exceptions based approach to its substantive examination of legislation.
- 2 The committee examines legislative instruments registered in the relevant period, as listed on the Federal Register of Legislation. See, <https://www.legislation.gov.au/>. It is noted that the Australian Citizenship Amendment (Concessional Application Fees) Regulations 2018 [F2018L00734] was disallowed in the Senate on 25 June 2018. Accordingly, the committee makes no comment on the regulations at this time.
- 3 These are: Customs (Prohibited Exports) Amendment (Defence and Strategic Goods) Regulations 2018 [F2018L00503]; Export Control (Animals) Amendment (Information Sharing and Other Matters) Order 2018 [F2018L00580]; and Financial Framework (Supplementary Powers) Amendment (2018 Measures No. 1) Regulations 2018 [F2018L00456].

Response required

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

Family Assistance (Public Interest Certificate Guidelines) (Education) Determination 2018 [F2018L00464]

Purpose	Makes guidelines for the Secretary of the Department of Education and Training or their delegate in exercising their power under paragraph 168(1)(a) of the <i>A New Tax System (Family Assistance) (Administration) Act 1999</i> to disclose certain information if it is necessary in the public interest to do so
Portfolio	Education
Authorising legislation	<i>A New Tax System (Family Assistance) (Administration) Act 1999</i>
Last day to disallow	15 sitting days after tabling (tabled House of Representatives 8 May 2018; tabled Senate 8 May 2018)
Rights	Privacy; rights of the child (see Appendix 2)
Status	Seeking additional information

Background

1.6 The Family Assistance (Public Interest Certificate Guidelines) (Education) Determination 2018 (2018 Determination) replaces the Family Assistance (Public Interest Certificate Guidelines) Determination 2015 (2015 Determination).

1.7 The committee considered the human rights compatibility of the 2015 Determination in its *Twenty-eighth Report of the 44th Parliament* and *Thirtieth Report of the 44th Parliament*.¹

Disclosure of personal information

1.8 The 2018 Determination sets out the circumstances in which the secretary may give a public interest certificate, which allows for the disclosure of information obtained by an officer in the course of their duties or in exercising their powers.² The

1 Parliamentary Joint Committee on Human Rights, *Twenty-eighth Report of the 44th Parliament* (17 September 2015), pp. 3-9; Parliamentary Joint Committee on Human Rights, *Thirtieth Report of the 44th Parliament* (10 November 2015), pp. 140-149.

2 Pursuant to section 168(1)(a) of the *A New Tax System (Family Assistance) (Administration) Act 1999* (Administration Act).

secretary may give a public interest certificate if the following conditions are satisfied:

- the information cannot reasonably be obtained from a source other than the department;
- the person to whom the information will be disclosed has sufficient interest in the information; and
- the secretary is satisfied that the disclosure is for at least one of a number of specified purposes, including:
 - to prevent, or lessen, a threat to the life, health or welfare of a person;
 - to make or support a proceeds of crime order;
 - to correct a mistake of fact in relation to the administration of a program of the department;
 - to brief a minister;
 - to assist with locating a missing person or in relation to a deceased person;
 - for research, statistical analysis and policy development;
 - to facilitate the progress or resolution of matters of relevance within the portfolio responsibilities of a department that is administering any part of the family assistance law or the social security law;
 - to contact a person in respect of their possible entitlement to recompense in a reparations process;
 - to enable a child protection agency of a state or territory to contact the parent or relative in relation to a child;
 - to facilitate the administration of public housing;
 - to ensure a child is enrolled in or attending school; or
 - to plan for, meet or monitor the infrastructure and resource needs in one or more schools.³

1.9 Section 6 of the 2018 Determination further provides that in giving a public interest certificate, other than to facilitate 'enforcement related activities', the secretary must have regard to:

- whether the person to whom the information relates is, or may be, subject to physical, psychological or emotional abuse; and

3 Family Assistance (Public Interest Certificate Guidelines) (Education) Determination 2018, section 7.

- whether the person in question may be unable to give notice of his or her circumstances because of age; disability; or social, cultural, family or other reasons.⁴

1.10 Section 7(3) of the 2018 Determination provides that public interest certificates to facilitate 'enforcement related activities'⁵ can be given 'in any case where the Secretary considers doing so is in the public interest', without any other limitation.⁶ In other words, when issuing a public interest certificate for the disclosure of information to facilitate enforcement related activities, the secretary is not required to have regard to the factors prescribed in section 6 set out in paragraph [1.9] above. This is a new ground of disclosure that was not included in the 2015 Determination.⁷

Compatibility of the measure with the right to privacy

1.11 The right to privacy encompasses respect for informational privacy, including the right to respect private and confidential information, particularly the use and sharing of such information and the right to control the dissemination of information.⁸

1.12 The disclosure of protected information (including personal information) pursuant to a public interest certificate engages and limits the right to privacy.

1.13 The statement of compatibility acknowledges that the 2018 Determination engages and may limit the right to privacy.⁹ However, apart from stating generally that the determination 'ensure[s] that protected information may only be disclosed for specified grounds and purposes that are recognised as necessary in the public interest',¹⁰ the statement of compatibility only provides an assessment of

4 Family Assistance (Public Interest Certificate Guidelines) (Education) Determination 2018, section 6.

5 'Enforcement related activities' is defined in the *Privacy Act 1988* (Privacy Act) to mean: the prevention, detection, investigation, prosecution or punishment of criminal offences or breaches of a law imposing a penalty or sanction; the conduct of surveillance activities, intelligence gathering activities or monitoring activities; the conduct of protective or custodial activities; the enforcement of laws relating to the confiscation of the proceeds of crime; the protection of the public revenue; the prevention, detention, investigation or remedying of misconduct of a serious nature, or other conduct prescribed by the regulations; or the preparation for, or conduct of, proceedings before any court or tribunal, or the implementation of court/tribunal orders.

6 Family Assistance (Public Interest Certificate Guidelines) (Education) Determination 2018, subsection 7(3).

7 Explanatory statement (ES), p. 1.

8 International Covenant on Civil and Political Rights, article 17.

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

10 SOC, p. 11.

compatibility with the right to privacy in relation to the issuing of public interest certificates to disclose information to facilitate 'enforcement related activities'.¹¹ It does not assess whether disclosure of personal information for the other purposes set out at [1.8] above constitutes a justifiable limitation on the right to privacy.

1.14 The right to privacy may be subject to permissible limitations which are provided by law and are not arbitrary. In order for limitations not to be arbitrary, they must seek to achieve a legitimate objective and be rationally connected (that is, effective to achieve) and proportionate to that objective. The committee's usual expectation is that each limitation on human rights will be assessed on the basis of a reasoned and evidence-based explanation of how the measure supports a legitimate objective for the purposes of international human rights law.

1.15 The statement of compatibility explains that the objective of permitting information to be disclosed to facilitate 'enforcement related activities' is to 'allow for the monitoring or intelligence gathering activities before deciding to undertake an enforcement activity'.¹² It also notes that the provisions align the Family Assistance Law secrecy provisions with the 'enforcement body' exceptions that apply under the *Privacy Act 1988* in relation to personal information.¹³ In relation to whether these objectives address a pressing or substantial concern, the explanatory statement states that:

The narrow construct of the previous Guidelines has hampered the Department's ability to share information with other agencies and departments for enforcement related activities. This severely reduced the Department's capacity to effectively manage complex risks faced by the Department and other regulators, as well as the public.¹⁴

1.16 While this appears to be capable of constituting a legitimate objective for the purposes of human rights law, further information is required to determine why this

11 The SOC also addresses the disclosure of personal information relating to homeless young people in the context of the rights of parents of children, which raises additional issues discussed further below.

12 SOC, p. 11.

13 SOC, p. 11. The Australian Privacy Principles (APPs) contain an exemption to the prohibition on the disclosure of personal information by an APP entity for a secondary purpose where the entity reasonably believes it is reasonably necessary for one or more 'enforcement related activities' conducted by, or on behalf of, an 'enforcement body': APP 6.2(e). An 'enforcement body' is defined in section 6(1) of the Privacy Act as a list of specific bodies. The list includes Commonwealth, State and Territory bodies that are responsible for policing, criminal investigations, and administering laws to protect the public revenue or to impose penalties or sanctions. Examples of enforcement bodies are the Australian Federal Police, a police force or service of a State or Territory, the Australian Crime Commission, the Australian Securities and Investments Commission and AUSTRAC: see ES, p. 3.

14 ES, pp. 1-2.

objective is important in the context of the particular measure. This would include, for example, information as to what the 'complex risks faced by the department and other regulators' entail, and how the broad power to disclose for enforcement related activities would facilitate management of these. 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.

1.17 Further, in order to be a proportionate limitation on the right to privacy, regimes that permit the collection and disclosure of personal information need to be sufficiently circumscribed and accompanied by sufficient safeguards.

1.18 The statement of compatibility explains that there are 'safeguards built into the legislative scheme to ensure that any protected information disclosed in the public interest is only used for the public interest purpose'.¹⁵ It notes, for example, that the disclosure of information in accordance with the 2018 Determination does not give the person to whom the information is disclosed the authority to disclose that information to further parties, unless such disclosure is permitted by section 162(2)(e) of the Act,¹⁶ or otherwise authorised by law.¹⁷

1.19 The statement of compatibility also explains that:

While a public interest certificate will provide the authority under law for the purposes of use and disclosure, key requirements of the *Privacy Act 1988* will still apply to APP [Australian Privacy Principles] entities, such as requirements relating to collection notices.¹⁸

1.20 However, it remains unclear whether all recipients of the information disclosed for a purpose outlined in the 2018 Determination would be subject to the provisions of the Privacy Act. In particular, the expansion of the public interest disclosure powers to disclosure for 'enforcement related activities' would allow disclosure to state and territory enforcement bodies (such as state or territory police services), and it is unclear from the information provided the extent to which the safeguards in the Privacy Act would be applicable to them. This concern is also present for other purposes for which information may be disclosed. In particular, the determinations allow personal protected information to be shared with the 'agent or contracted service provider' of a state or territory department or authority.

15 SOC, p. 11.

16 Section 162(2)(e) of the Administration Act provides that a person may make a record of protected information, disclose protected information to 'any person', or 'otherwise use such information' for the purpose for which the information was disclosed under sections 167 or 168 of the Act. Section 168(1)(a) permits disclosures that are 'necessary in the public interest', to which the 2018 Determination applies.

17 SOC, p. 11.

18 SOC, p. 9.

However, no information is given as to who such agents or contractors might be and whether they would be bound by the provisions of the Privacy Act (which does not apply to most state or territory government agencies).

1.21 Further, as the committee has noted previously,¹⁹ the Australian Privacy Principles (APPs) in the Privacy Act 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. This includes permitting use or disclosure for a secondary purpose where it is authorised under an Australian law or where reasonably necessary for one or more 'enforcement related activities'. These exemptions to the general prohibition on disclosure for a secondary purpose may be broader than the scope permitted under international human rights law.²⁰ 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 for the right to privacy in these circumstances.

1.22 There are also questions as to whether the public interest disclosure power pursues the least rights restrictive approach. For example, it is not clear from the information provided why the power to disclose for 'enforcement related activities' is not limited by the requirement that the secretary have regard to any situation in which the person to whom the information relates is, or may be, subject to physical, psychological or emotional abuse, as is required for other public interest disclosures.²¹ Further, and more broadly, it is unclear why it is necessary to enable the disclosure of protected personal information in a form that identifies individuals when the information is being disclosed for purposes such as research, statistical analysis, policy development, briefing the minister and meeting or monitoring infrastructure and resource needs. In such cases it would appear that the information could be disclosed in a de-identified form, which would be a less rights restrictive approach.

Committee comment

1.23 The preceding analysis raises questions as to whether the power to disclose personal information is compatible with the right to privacy.

1.24 The committee therefore seeks the advice of the minister as to:

- **whether each of the proposed purposes for which information can be shared (as outlined in paragraph [1.8] to [1.10] above) is aimed at achieving a legitimate objective for the purposes of international human rights law;**

19 See, for example, Parliamentary Joint Committee on Human Rights, *Report 1 of 2018* (6 February 2018), p. 87; Parliamentary Joint Committee on Human Rights, *Report 3 of 2018* (27 March 2018), p. 202.

20 APP 9; APP 6.2(b).

21 See section 6 of the 2018 Determination.

- **how the measure is effective to achieve (that is, rationally connected to) that objective;**
- **whether the limitation on the right to privacy is proportionate to the achievement of each objective (including whether the purposes for which information can be disclosed are sufficiently circumscribed, and what safeguards apply to the collection, storage and disclosure of personal and confidential information); and**
- **whether the Australian Privacy Commissioner has been consulted in relation to the 2018 Determination.**

Disclosure of personal information relating to homeless young people

1.25 Part 3 of the 2018 Determination applies to the disclosure of information relating to homeless young people.²² It provides that the secretary may issue a public interest certificate for the disclosure of such information if satisfied:

- the information cannot reasonably be obtained from a source other than the department;
- the disclosure will not result in harm to the homeless young person; and
- the disclosure is for one of the following purposes:
 - the information is about a homeless young person's family member and the secretary is satisfied the homeless young person or a family member has been subjected to abuse or violence (abuse or violence);²³
 - the disclosure is necessary to verify qualifications for a payment under family assistance law or a social security payment on the grounds of being a homeless person (verification for payment);²⁴
 - the disclosure will facilitate reconciliation between a homeless young person and his or her parent or parents (reconciliation);²⁵ and
 - the disclosure is necessary to inform the parent or parents whether the homeless young person has been in contact with the Department of Education and Training or Human Services Department (assurance).²⁶

22 Subsection 25(2) of the 2018 Determination defines 'homeless young person' as a person under 18 years of age who has sought assistance on the ground of being homeless.

23 Family Assistance (Public Interest Certificate Guidelines) (Education) Determination 2018, section 27.

24 Family Assistance (Public Interest Certificate Guidelines) (Education) Determination 2018, section 28.

25 Family Assistance (Public Interest Certificate Guidelines) (Education) Determination 2018, section 29.

1.26 Section 6 of the 2018 Determination, discussed at paragraph [1.8], also applies to the disclosure of information relating to homeless young people.

Compatibility of the measure with the right to privacy and the rights of the child

1.27 Children have special rights under human rights law taking into account their particular vulnerabilities. Children's rights are protected under a number of treaties, particularly the Convention on the Rights of the Child (CRC). All children under the age of 18 years are guaranteed these rights.

1.28 Article 16 of the CRC provides that children have the right not to be subjected to arbitrary or unlawful interference with their privacy.²⁷ The right has the same content as the general right to privacy, discussed above.

1.29 Article 3 of the CRC requires states parties to ensure that, in all actions concerning children, the best interests of the child are a primary consideration.²⁸ The disclosure of personal information relating to homeless young people under the age of 18 years engages and limits these rights. The statement of compatibility acknowledges that the 2018 Determination engages article 3 of the CRC generally. However, it does not specifically address how disclosure of personal information relating to homeless young people is compatible with article 3. It also does not address the limitation the measure imposes on the child's right to privacy. As noted above, the committee's usual expectation where a measure may limit a human right is that the accompanying statement of compatibility provides a reasoned and evidence-based explanation of how the measure supports a legitimate objective for the purposes of international human rights law. Further information is therefore required to determine whether the power to disclose information relating to homeless young people pursues a legitimate objective and is rationally connected to this objective.

1.30 In relation to proportionality, it is noted that under the determination, the secretary can only issue a public interest certificate to disclose information relating to homeless young people if they are satisfied that the disclosure 'will not result in harm to the homeless young person'.²⁹ However, at international law, the right of a child to have his or her best interests taken as a primary consideration is broader than the right of a child not to be harmed. The child's best interests includes the enjoyment of the rights set out in the CRC, and, in the case of individual decisions, 'must be assessed and determined in light of the specific circumstances of the

26 Family Assistance (Public Interest Certificate Guidelines) (Education) Determination 2018, section 30.

27 Convention on the Rights of the Child, article 16.

28 Convention on the Rights of the Child, article 3(1).

29 Family Assistance (Public Interest Certificate Guidelines) (Education) Determination 2018, paragraph 26(1)(a).

particular child'.³⁰ On this basis, this raises concerns that there may be a less rights restrictive approach to the sharing of a homeless young person's personal information, such as requiring the decision-maker to be satisfied that the disclosure would be in the best interests of the child, rather than that the disclosure will not result in harm to the child.

Committee comment

1.31 The preceding analysis indicates that the measure engages and limits the right of children to have their best interests taken as a primary consideration and the child's right to privacy. The committee therefore seeks the advice of the minister as to:

- **whether the disclosure of personal information relating to homeless young people is aimed at achieving a legitimate objective for the purposes of international human rights law;**
- **how the measure is effective to achieve (that is, rationally connected to) that objective; and**
- **whether the limitation is a reasonable and proportionate measure for the achievement of that objective.**

30 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*, UN Doc CRC/C/GC/14 (29 May 2013), p. 3.

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

Purpose	Makes subdivision AF of Part 2, Division 3, of <i>the Migration Act 1958</i> part of the 'designated migration law' for the purposes of section 495A of that Act
Portfolio	Home Affairs
Authorising legislation	<i>Migration Act 1958</i>
Last day to disallow	Exempt from disallowance ¹
Right	Liberty (see Appendix 2)
Status	Seeking additional information

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

1.32 The Migration (IMMI 18/046: Determination of Designated Migration Law) Instrument 2018 (2018 instrument) makes subdivision AF of Part 2, Division 3 of the *Migration Act 1958* (Migration Act) part of the 'designated migration law'. The designation permits the minister to arrange for computer programs to be used to make a decision, exercise a power, comply with an obligation or do anything else related to these actions in subdivision AF of Part 2, Division 3 of the Migration Act.²

1.33 Subdivision AF of the Migration Act regulates bridging visas.³ Section 73 of the Migration Act provides that the minister may grant a bridging visa to an 'eligible non-citizen' if certain criteria prescribed by the regulations are satisfied.⁴ Under section 72 of the Migration Act, non-citizens are 'eligible non-citizens' if they have

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

2 Migration Act, section 495A(1).

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

4 Migration Act, section 73.

been 'immigration cleared',⁵ belong to a particular class of persons,⁶ or have been determined by the minister to be 'eligible non-citizens'.⁷ The minister may make such a determination if certain criteria are satisfied, including that 'the minister thinks that the determination would be in the public interest'.⁸ The power to make the determination may only be exercised by the minister personally.⁹

Compatibility of the measure with the right to liberty

1.34 Article 9 of the International Covenant on Civil and Political Rights (ICCPR), prohibits the arbitrary and unlawful deprivation of liberty. This prohibition against arbitrary detention requires that detention must be lawful, reasonable, necessary and proportionate in all the circumstances and subject to regular review. The concept of 'arbitrariness' extends beyond the apparent 'lawfulness' of detention to include elements of injustice, lack of predictability and lack of due process.¹⁰ The right to liberty applies to all forms of deprivations of liberty, including immigration detention, although what is considered arbitrary may vary depending on context.

1.35 Bridging visas are generally only available to people who do not otherwise hold an effective visa.¹¹ Under the Migration Act, a non-citizen who does not hold a valid visa (such as a bridging visa) is classified as an unlawful non-citizen and is subject to mandatory detention prior to removal or deportation.¹² 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, where individual circumstances are not taken into account, and a person may be subject to a significant length of detention.

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

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

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

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

9 Migration Act, subsection 72(3).

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

11 With the exception of Bridging Visa B: see *Migration Regulations 1994*, section 1302.

12 Migration Act, sections 189; 198.

1.36 The use of a computer by the minister to exercise their personal power to determine whether a non-citizen is an 'eligible non-citizen' (and therefore eligible to apply for a bridging visa), including whether such a determination is 'in the public interest',¹³ could engage and limit the right to liberty. This is because, in the absence of a bridging visa or other valid visa, a non-citizen will be classified as an 'unlawful non-citizen' and subject to immigration detention.

1.37 The right to liberty may be subject to permissible limitations which are provided by law and are not arbitrary. In order for limitations not to be arbitrary, the measure must pursue a legitimate objective and be rationally connected (that is, effective to achieve) and proportionate to achieving that objective.

1.38 The explanatory statement does not provide sufficient information to assess whether the measure engages and may limit the right to liberty. In particular, the explanatory statement does not explain why there is a need to use computers to make a decision, exercise a power, comply with an obligation or do anything else related to these actions associated with eligibility to apply for and grant bridging visas.

1.39 The explanatory memorandum to the *Migration Legislation Amendment (Electronic Transactions and Methods of Notification) Act 2001* (2001 Act), which inserted section 495A of the Migration Act, under which the 2018 instrument is made, does provide some information as to the intended operation of computer programs:

In the migration context, a computer program will only be making decisions on certain visa applications where the criteria for grant are simple and objective. There is no intention for complex decisions, requiring any assessment of discretionary criteria, to be made by computer programs. Those complex decisions will continue to be made by persons who are delegates of the Minister.¹⁴

1.40 However, it appears that under the 2018 instrument some matters which could be subject to decision by computer program may involve complex or discretionary considerations. Specifically, for the minister to determine whether a person is an 'eligible non-citizen' involves a decision as to whether the minister thinks such a determination would be in the 'public interest'.¹⁵ By contrast, it is noted that, in relation to other provisions of the Migration Act that involve consideration of the 'public interest', the Migration Act has exempted such determinations from being

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

14 Explanatory memorandum, Migration Legislation Amendment (Electronic Transactions and Methods of Notification) Bill 2001, p. 3.

15 Migration Act 1958, subsection 72(2)(e).

'designated migration law' (that is, the decision cannot be made by computer).¹⁶ It is unclear why subsection 72(2)(e) of the Migration Act is not similarly exempted from the 'designated migration law' or excluded from the 2018 instrument.

1.41 Noting that a potential consequence of a determination that a person is not an 'eligible non-citizen' is that the person may be subject to immigration detention, further information is required as to how the 2018 instrument will operate and be applied. This includes the extent to which a computer program will be used for determining a person's eligibility to apply for a bridging visa (including the assessment of whether it is in the 'public interest' to make such a determination). Further information is also required as to the safeguards in place to ensure a person is not deprived of liberty as a consequence of such a decision where it is not reasonable, necessary and proportionate.

Committee comment

1.42 The preceding analysis raises questions as to the compatibility with the right to liberty of the designation of subdivision AF of Part 2, Division 3 of the Migration Act as part of the 'designated migration law'.

1.43 The committee seeks further information from the minister as to the compatibility of the measure with the right to liberty, including:

- **whether, and to what extent, a computer program will be used to exercise the minister's personal powers in subdivision AF of Part 2, Division 3 of the Migration Act; and**
- **whether 'public interest' considerations by the minister could be exempted from the 'designated migration law'.**

1.44 If a computer program will be used to exercise the minister's personal power in subdivision AF of Part 2, Division 3 of the Migration Act, the committee seeks further information about the compatibility of this measure with the right to liberty, including:

- **the existence of adequate and effective safeguards to ensure a person is not deprived of liberty where it is not reasonable, necessary and proportionate; and**
- **whether less rights restrictive alternatives are reasonably available.**

16 Migration Act sections 48B, 495A(3)(a); see, also, explanatory memorandum, Migration Legislation Amendment (Electronic Transactions and Methods of Notification) Bill 2001, p. 14.

Migration (Validation of Port Appointment) Bill 2018

Purpose	Seeks to validate the appointment of a proclaimed port in the Territory of Ashmore and Cartier Islands
Portfolio	Home Affairs
Introduced	House of Representatives, 20 June 2018
Rights	Non-refoulement; liberty; fair hearing; not to be expelled without due process; effective remedy (see Appendix 2)
Status	Seeking additional information

Validation of a 'proclaimed port'

1.45 Under subsection 5(5)(a) of the *Migration Act 1958* (the Migration Act) the minister may, by notice published in the Gazette, appoint ports in an external territory as 'proclaimed ports'.¹

1.46 On 23 January 2002 a notice was published purporting to appoint an area of waters within the Territory of Ashmore and Cartier Islands as a 'proclaimed port' (2002 appointment).²

1.47 The effect of this 2002 appointment was to provide that people arriving by boat without a valid visa, who entered certain waters of the Territory of Ashmore and Cartier Islands, would be entering an 'excised offshore place' for the purposes of the Migration Act and would thereby become 'offshore entry persons', now 'unauthorised maritime arrivals' (UMAs) under the Migration Act.³

1.48 On 11 July 2018, the Federal Circuit Court held, in *DBC16 v Minister for Immigration & Anor*,⁴ that the purported appointment as a proclaimed port, of an

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

2 Explanatory memorandum (EM) p. 2.

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

4 [2018] FCCA 1801.

area of waters within the Territory of Ashmore and Cartier Islands, was invalid. Accordingly, the applicant in that case was not an UMA.⁵

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

- providing that there was a properly proclaimed port at Ashmore and Cartier Islands at all relevant times;
- correcting the geographical coordinates of the area of waters specified in the 2002 appointment noting that the 2002 appointment omitted some details relating to the geographical coordinates;
- validating things done under the Migration Act that would be invalid or ineffective directly or indirectly because of the terms of the 2002 appointment.⁶

1.50 Section 5 provides that the bill will not affect rights or liabilities arising between parties to proceedings where judgment has been delivered by a court prior to the commencement of the bill, if the validity of the appointment was at issue in the proceedings and the judgment set aside the appointment or declared it to be invalid.⁷

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

1.51 Australia has non-refoulement obligations under the Refugee Convention for refugees⁸ and under both the International Covenant on Civil and Political Rights (ICCPR) and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) for all people, including people who are found not to be refugees.⁹ 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,

5 [2018] FCCA 1801, p. 26 [111].

6 EM p. 2; bill sections 3-4.

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

8 1951 Convention relating to the Status of Refugees and its 1967 Protocol (the Refugee Convention).

9 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).

inhuman or degrading treatment or punishment.¹⁰ Non-refoulement obligations are absolute and may not be subject to any limitations.

1.52 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.¹¹

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

1.54 The classification of a person as an UMA significantly affects how their rights and obligations under the Migration Act are to be determined and how their applications for a visa may be processed. For example, persons who entered the area of waters within the Territory of Ashmore and Cartier Islands between 13 August 2012 and 1 June 2013 without a valid visa and were classified as UMAs became 'fast track applicants' under the Migration Act.¹² This would have resulted in the 'fast track' process applying to the assessment and review of their claims for refugee status and applications for protection visas.

1.55 However, the committee has previously considered that the 'fast track' assessment process raises serious human rights concerns.¹³ In particular, the committee has found elements of the 'fast track' assessment process are likely to be incompatible with the obligation of non-refoulement and the right to an effective remedy.¹⁴ This was on the basis that as the 'fast track' assessment process does not provide for full merits review it is likely to be incompatible with Australia's

10 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.

11 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.

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

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

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

obligations under the ICCPR and the CAT of ensuring independent, effective and impartial review, including merits review, of non-refoulement decisions.¹⁵ While the statement of compatibility acknowledges that the measure engages the obligation of non-refoulement, it does not acknowledge the concerns outlined in the committee's previous reports.¹⁶

1.56 The statement of compatibility argues that the validation merely maintains the 'status quo'.¹⁷ However, as noted above, in circumstances where the appointment was not validly made, this may fundamentally change how people should have been treated under the Migration Act. In this respect, the statement of compatibility provides no information as to how those individuals would have been treated if the appointment had never been made. It may be that a process that was capable of complying with Australia's obligations of non-refoulement may have applied to these individuals. It is unclear from the information provided how many people may be adversely affected by the validation. There are also questions as to the extent of the impact of the validation on Australia's non-refoulement obligations including how many persons who entered the waters of the Territory of Ashmore and Cartier Islands during the relevant period:

- are yet to have their claims for asylum or applications for protection visas determined;
- have had their applications refused under the 'fast track' process (and are present in Australia, offshore immigration detention or have been subject to removal or return).

Committee comment

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

1.58 Given the 2002 appointment has been found by the courts to be invalid, persons who entered waters of the Territory of Ashmore and Cartier Islands without a valid visa may not have been correctly classified as 'offshore entry persons' (now 'unauthorised maritime arrivals') and the 'fast track' assessment process may have been incorrectly applied to them.

1.59 The committee has previously considered that the 'fast track' assessment process is likely to be incompatible with Australia's obligations under the International Covenant on Civil and Political Rights and the Convention Against

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

16 SOC, p. 6.

17 SOC, p. 5.

Torture of ensuring independent, effective and impartial review, including merits review, of non-refoulement decisions.

1.60 Accordingly, by retrospectively validating the 2002 appointment, the measure engages the obligation of non-refoulement and the right to an effective remedy. The committee seeks the advice of the minister as to the extent of the impact of the validation on Australia's obligations, including:

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

Compatibility of the measure with the right to a fair hearing

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

1.62 First, given the 2002 appointment has been found to be invalid, the 'fast track' assessment process may have incorrectly been applied to individuals who arrived at the area of waters within the Territory of Ashmore and Cartier Islands. Previous human rights analysis of the 'fast track' assessment process noted that the 'fast track' assessment and review process is quite limited and there were concerns as to the independence and the impartiality of such a review. Accordingly, the committee previously concluded that the fast-track assessment process may be incompatible with the right to a fair hearing.¹⁸

1.63 Secondly, validating the 2002 appointment may adversely affect any person who seeks to challenge an act or decision under the Migration Act on the basis that

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

the impugned action or decision is invalid under the 2002 appointment. Accordingly, the validation may further limit the right to a fair hearing. The minister, in his second reading speech explains that the:

...validity of the Appointment is now being challenged in the Federal Circuit Court and the Federal Court...A successful challenge to the Appointment could mean that affected persons did not enter Australia at an excised offshore place and are therefore not unauthorised maritime arrivals under the act. It could also mean that some affected persons are not fast-track applicants under the act.¹⁹

1.64 It is noted that the court in *DBC16 v Minister for Immigration & Anor*²⁰ reached precisely this finding in relation to the invalidity of the appointment and accordingly made a declaration that the applicant was not an UMA. No further information is provided in the statement of compatibility about the nature of any other challenges related to the 2002 appointment. Nevertheless section 5 of the bill provides that the bill will not affect rights or liabilities arising between parties to proceedings where judgment has been delivered by a court prior to the commencement of the bill, if the validity of the appointment was at issue in the proceedings and the judgment set aside the appointment or declared it to be invalid. While this may operate as a relevant safeguard, it does not address circumstances where a proceeding is on foot but judgment has not been issued. It also does not address the situation where proceedings have not yet been commenced by affected individuals. This raises questions as to whether the measure is the least rights restrictive approach.

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

Committee comment

1.66 The committee requests the advice of the minister as to the compatibility of the measure with the right to a fair hearing, including:

- **whether the measure is aimed at achieving a legitimate objective for the purposes of human rights law;**
- **how the measure is effective to achieve (that is, rationally connected to) that objective; and**
- **whether the limitation is a reasonable and proportionate measure to achieve the stated objective (including whether it is the least rights restrictive approach and the scope of individuals likely to be affected),**

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

20 [2018] FCCA 1801.

particularly in light of the fact that the 2002 appointment has been found to be invalid.

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

1.67 Where measures impermissibly limit human rights, those affected have a right to an effective remedy. The right to an effective remedy is protected by article 2 of the ICCPR, and may include restitution, guarantees of non-repetition of the original violation, or satisfaction. The UN Human Rights Committee has stated that while limitations may be placed in particular circumstances on the nature of the remedy provided (judicial or otherwise), states parties must comply with the fundamental obligation to provide a remedy that is effective.²¹

1.68 As outlined above, classification as an UMA may have led to the imposition of measures which were likely to be incompatible with human rights including the obligation of non-refoulement. Those classified as an UMA will have been subject to mandatory immigration detention²² and may also have been transferred to offshore immigration detention.²³ In some cases, it may have resulted in prolonged immigration detention (including offshore detention) or delays in processing claims.²⁴ The committee has previously raised human rights concerns about the impact of both onshore and offshore immigration detention including in relation to:

- the right to liberty and the prohibition on arbitrary detention;
- the right to humane treatment in detention;
- the right to health; and
- the rights of the child.²⁵

1.69 Classification as an UMA may also have impacted upon whether an individual found to be a refugee was entitled to a permanent protection visa or temporary protection visa. The consequence of being granted a temporary rather than

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

22 See Migration Act, sections 189, 198.

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

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

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

permanent visa may also have restricted access to family reunion and the right to the protection of the family.²⁶

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

Committee comment

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

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

National Disability Insurance Scheme (Incident Management and Reportable Incidents) Rules 2018 [F2018L00633]

National Disability Insurance Scheme (Complaints Management and Resolution) Rules 2018 [F2018L00634]

Purpose	[F2018L00633]: prescribes the requirements for NDIS providers to implement and maintain incident management systems to record reportable incidents, and for inquiries by the NDIS Quality and Safeguards Commissioner in relation to reportable incidents. [F2018L00634]: prescribes the requirements for the resolution of complaints relating to NDIS providers, complaints to and inquiries by the NDIS Quality and Safeguards Commissioner
Portfolio	Social Services
Authorising legislation	<i>National Disability Insurance Scheme Act 2013</i>
Last day to disallow	15 sitting days after tabling (tabled Senate 18 June 2018)
Rights	Privacy; fair hearing; rights of persons with disabilities (see Appendix 2)
Status	Seeking additional information

Disclosure of information relating to complaints

1.72 The National Disability Insurance Scheme (Complaints Management and Resolution) Rules 2018 (the Complaints Management Rules) set out the rules governing the resolution of complaints about NDIS providers that have been made to the Commissioner.

1.73 Section 25 of the Complaints Management Rules provides that the Commissioner may give information, including about any action taken in relation to an issue raised in a complaint, to any person or body that the Commissioner considers has a sufficient interest in the matter.

Compatibility of the measure with the right to privacy

1.74 Article 22 of the Convention on the Rights of Persons with Disabilities (CRPD) guarantees that no person with disabilities shall be subjected to arbitrary or unlawful interference with their privacy.¹ The right to privacy includes respect for private and

1 See also Article 17 of the International Covenant on Civil and Political Rights.

confidential information, particularly the storing, use and sharing of such information, and the right to control the dissemination of information about one's private life.

1.75 The statement of compatibility addresses the right to privacy in relation to a different aspect of the Complaints Management Rules,² but does not specifically address whether section 25 engages and limits the right to privacy. However, it would appear that the provision of 'information' could include personal information, including information about complainants or persons the subject of a complaint. If this is the case, then the provision would engage and limit the right to privacy.

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

1.77 The statement of compatibility describes the overall objective of the Complaints Management Rules as being to 'ensure providers are responsive to the needs of people with disability and focussed on the timely resolution of issues and that, when things go wrong, something is done about it'.³ While this is capable of being a legitimate objective for the purposes of international human rights law, no information is provided as to the importance of this objective in the context of the particular measure. Further information as to the purpose of the particular measure (that is, the purpose of allowing the Commissioner to give information to 'any person or body that the Commissioner considers has a sufficient interest in the matter') would assist in determining whether the measure pursues a legitimate objective. Additional information in this respect would also assist in determining whether the measure is rationally connected to (that is, effective to achieve) the objective.

1.78 As to proportionality, the statement of compatibility explains that any personal information collected by the Commissioner in the performance of their functions is 'protected Commission information' under the *National Disability Insurance Scheme Act 2013* (the NDIS Act). It states that therefore:

[protected Commission information] will be handled in accordance with the limitations placed on the use and disclosure of protected Commission information under the Act, the *National Disability Insurance Scheme (Protection and Disclosure of Information – Commissioner) Rules 2018*, the *Privacy Act 1988*, and any other applicable Commonwealth, State or Territory legislation. Information will only be dealt with where reasonably necessary for the fulfilment of the Commissioner's lawful and legitimate functions.⁴

2 See Statement of compatibility (SOC) to the Complaints Management Rules, pp. 33-34.

3 SOC, p. 32.

4 SOC, p. 34.

1.79 However, this general description of the safeguards does not assist in determining whether the measure is a proportionate limitation on the right to privacy. In order to be proportionate, limitations on the right to privacy must be no more extensive than what is strictly necessary to achieve the legitimate objective of the measure, and be accompanied by adequate safeguards to protect the right to privacy. Further information as to the specific safeguards in the NDIS Act, the National Disability Insurance Scheme (Protection and Disclosure of Information – Commissioner) Rules 2018 and the *Privacy Act 1988* that would protect personal and confidential information that may be disclosed pursuant to section 25 of the Complaints Management Rules would assist in determining whether the measure is proportionate.

1.80 It is also not clear from the information provided what is meant by a person having a 'sufficient interest' in the information. The explanatory statement states that a person may have 'sufficient interest' in the matter 'if the Commissioner is satisfied that, in relation to the purpose of disclosure, the proposed recipient has a genuine and legitimate interest in the information'.⁵ The explanatory statement further states:

Other persons or bodies that may have a sufficient interest in the matter may include:

- with the consent of the person with disability affected by an issue raised in a complaint, independent advocates or representatives;
- with the consent of a person with disability affected by an issue raised in a complaint, their family members, carers or other significant people.

In providing information, the Commissioner must comply with his or her obligations under the *Privacy Act 1988*, and should consider whether providing the information is appropriate or necessary for the proper handling of the complaint.⁶

1.81 However, beyond the reference to these safeguards in the explanatory statement, it is not clear from the information provided whether these safeguards and limitations on the meaning of 'sufficient interest' (such as the requirement to provide information with the consent of the person with disability, or the requirement that the Commissioner should consider whether providing information is appropriate or necessary for the proper handling of the complaint) are required as matters of law, or whether they are matters of discretion for the Commissioner.

5 Explanatory Statement (ES) to the Complaints Management Rules, p. 25.

6 ES to the Complaints Management Rules, p. 25.

Committee comment

1.82 The preceding analysis indicates that the Commissioner's power to give information, including about any action taken in relation to an issue raised in a complaint, to any person or body that the Commissioner considers has a sufficient interest in the matter may engage and limit the right to privacy.

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

- whether the measure is aimed at pursuing a legitimate objective for the purposes of international human rights law;
- how the measure is effective to achieve (that is, rationally connected to) its stated objective; and
- whether the limitation is a reasonable and proportionate measure to achieve the stated objective (including information as to the specific safeguards in the NDIS Act, the National Disability Insurance Scheme (Protection and Disclosure of Information – Commissioner) Rules 2018 and the *Privacy Act 1988* that protect personal and confidential information when the Commissioner exercises their power under section 25 of the rules).

Record keeping and incident and complaint management requirements

1.84 Section 10(2) of the Complaints Management Rules states that appropriate records of complaints received by the NDIS provider must be kept and include information about complaints, any action taken to resolve complaints, and the outcome of any action taken. Those records must be kept for 7 years from the day the record is made.⁷ The complaints management system must also provide for the collection of statistical and other information relating to complaints made to the provider to review issues raised in complaints, identify and address systemic issues raised through the complaints management and resolution process, and report information relating to complaints to the Commissioner if requested to do so.⁸

1.85 Similarly, section 12 of the National Disability Insurance Scheme (Incident Management and Reportable Incidents) Rules 2018 (Reportable Incidents Rules) sets out the documentation, record keeping and statistics requirements in relation to the incident management systems. An NDIS provider must provide specified information in the record of each incident that occurs, including a description of the incident, the names and contact details of the persons involved in the incident, the names and contact details of any witnesses to the incident, the name and contact details of the person making the record of the incident, and the details and outcomes of any

7 Section 10(3) of the Complaints Management Rules.

8 Section 10(4) of the Complaints Management Rules.

investigations into the incident.⁹ These records must also be kept for 7 years from the day the record is made and the incident management system must also provide for the collection of statistical and other information relating to incidents.¹⁰

Compatibility of the measure with the right to privacy

1.86 As the provisions in the Complaints Management Rules and Reportable Incidents Rules relate to the storing, use and sharing of information (including personal information), the provisions engage and limit the right to privacy.

1.87 The statement of compatibility to the Complaints Management Rules discusses the right to privacy in general terms (discussed above), but does not specifically address the record keeping requirements in those rules. The statement of compatibility to the Reportable Incidents Rules does not acknowledge that the rules may engage and limit the right to privacy.

1.88 The explanatory statement to the Reportable Incidents Rules states that it is 'crucial that the incident management system is documented so that compliance with the system can be monitored and enforced, including by quality auditors and the Commissioner'.¹¹ Similarly, the explanatory statement to the Complaints Management Rules states that the documentation and record keeping requirement 'is fundamental to the proper functioning of a complaints management and resolution system as it ensures that persons with disability and their families and carers are aware of their rights and can advocate for their needs and safety where appropriate'.¹² The explanatory statement to each of the instruments explains that the collection of statistics and other information is for the purpose of identifying any systemic issues that may exist.¹³ Each of these objectives appear to be legitimate objectives for the purposes of international human rights law, and the measures appear to be rationally connected to this objective.

1.89 As to proportionality, as noted above, limitations on the right to privacy must be accompanied by adequate safeguards. There is limited information in the explanatory statement or statement of compatibility as to the safeguards that apply to the information stored pursuant to the record keeping requirements, such as requirements for keeping records secure and confidential, or penalties for unauthorised disclosure. Further information as to these matters would assist in determining whether the limitation on the right to privacy is proportionate.

9 See section 12(2) and (3) of the Reportable Incidents Rules.

10 Section 12(4) and (5) of the Reportable Incidents Rules.

11 SOC to the Reportable Incident Rules, p. 10.

12 SOC to the Complaints Management Rules, p. 10.

13 SOC to the Complaints Management Rules, p. 11; SOC to the Reportable Incidents Rules, p. 12.

1.90 Further, in relation to the collection of statistical and 'other information', this appears to be very broad and, according to the explanatory statement to the Reportable Incidents Rules, would allow disclosure of 'who is involved in incidents (for example, whether particular workers and/or people with disability are involved in multiple incidents)'.¹⁴ No information is provided in the explanatory statements or statements of compatibility as to the safeguards that would apply to protect the right to privacy of those persons whose information is disclosed pursuant to the statistical collection requirements.

Committee comment

1.91 The preceding analysis indicates that the record keeping requirements relating to incident management and complaints management may engage and limit the right to privacy.

1.92 The committee seeks the advice of the minister as to the proportionality of the limitation on the right to privacy. In particular, the committee seeks information as to the safeguards that would apply to protect the right to privacy.

Inquiry powers and procedural fairness requirements relating to complaints and incident management

1.93 Section 9 of the Complaints Management Rules provides that the complaints management and resolution system of a registered NDIS provider must ensure that people are afforded procedural fairness when a complaint is dealt with by a provider. Similarly, section 11 of the Reportable Incidents Rules provides that incident management systems of registered NDIS providers must require that people are afforded procedural fairness when an incident is dealt with by a provider. The Commissioner must have due regard to the rules of procedural fairness when taking action in relation to a reportable incident,¹⁵ and must give due regard to procedural fairness when considering any complaints.¹⁶ For each of these provisions, the Commissioner may make guidelines relating to procedural fairness.¹⁷

1.94 The Complaints Management Rules also give the Commissioner powers to authorise inquiries in relation to issues connected with complaints, a series of complaints or about support or services provided by NDIS providers.¹⁸ The

14 ES to the Reportable Incidents Rules, p. 12.

15 Section 28 of the Reportable Incident Rules.

16 Section 30 of the Complaints Management Rules.

17 Section 9(2) of the Complaints Management Rules; Section 11(2) of the Reportable Incidents Rules; see also the note to section 28 of the Reportable Incidents Rules and section 30 of the Complaints Management Rules.

18 Section 29 of the Complaints Management Rules.

Reportable Incidents Rules allow for the Commissioner to authorise inquiries in relation to reportable incidents.¹⁹

Compatibility of the measure with the right to a fair hearing

1.95 Article 14(1) of the ICCPR requires that in the determination of a person's rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. Australia also has obligations to ensure effective access to justice for persons with disabilities on an equal basis with others.²⁰

1.96 The concept of 'suit at law' encompasses judicial procedures aimed at determining rights and obligations, equivalent notions in the area of administrative law and also extends to other procedures assessed on a case-by-case basis in light of the nature of the right in question.²¹

1.97 It is not clear from the information provided the extent to which the processes in relation to incident and complaints management by NDIS providers and the Commissioner would involve the determination of rights and obligations of persons subject to the complaints (such as persons employed or engaged by NDIS providers) such as to constitute a 'suit at law'. However, it is noted that some of the outcomes of resolving incidents by NDIS providers appear to include corrective action,²² the Commissioner may refer incidents to authorities with responsibility in relation to incidents (such as child protection authorities),²³ or 'take any other action that the Commissioner considers reasonable in the circumstances'.²⁴ In relation to complaints management, the Commissioner must undertake a resolution process in relation to complaints which appears to include the ability to make adverse findings against persons employed or engaged by NDIS providers.²⁵ Similarly in relation to inquiries the Commissioner may 'prepare and publish a report setting out his or her findings in relation to the inquiry'.²⁶

1.98 To the extent that these processes may involve the determination of rights and obligations, fair hearing rights may apply. This matter was not addressed in the

19 Section 27 of the Reportable Incidents Rules; pursuant to section 73Z of the NDIS Act.

20 Article 13 of the CRPD.

21 See UN Human Rights Committee, *General Comment 32: Article 14, Right to Equality before Courts and Tribunals and to Fair Trial* (2007) [16].

22 Section 10(1)(g) of the Reportable Incidents Rules.

23 Section 26(1)(a) of the Reportable Incidents Rules.

24 Section 26(1)(f) of the Reportable Incidents Rules.

25 Section 16(3) and (5) of the Complaints Management Rules.

26 Section 24(6) of the Reportable Incidents Rules; section 29 of the Complaints Management Rules.

statement of compatibility. The instruments and the explanatory statement refer to the development of the National Disability Insurance Scheme (Procedural Fairness) Guidelines 2018. A copy of these guidelines would assist in determining whether the procedural fairness requirements afforded are consistent with fair hearing rights.

1.99 Another relevant factor in determining compatibility with fair hearing rights is the availability of independent review of decisions. The explanatory statement states that decisions of the Commissioner may be the subject of complaint to the Commonwealth Ombudsman.²⁷ This would be a relevant safeguard. However, further information, including information as to any external review of decisions of the Commissioner (such as merits review), would assist in determining whether these review options are sufficient for the purposes of the right to a fair hearing.

Committee comment

1.100 The preceding analysis raises questions as to the compatibility of the inquiry powers, incident management processes and complaints management processes with fair hearing rights under Article 14 of the ICCPR.

1.101 The committee seeks the advice of the minister as to the compatibility of the measures with this right, including:

- **a copy of the National Disability Insurance Scheme (Procedural Fairness) Guidelines 2018 (or if a copy is not available, a detailed overview of the guidelines having regard to the matters discussed above including any relevant safeguards); and**
- **safeguards to protect fair hearing rights (including information as to any external review of decisions).**

Compatibility of the measure with the right to privacy

1.102 The relevant principles relating to the right to privacy are discussed above.

1.103 The ability of the Commissioner to prepare and publish reports setting out their findings in relation to an inquiry may engage and limit the right to privacy, insofar as those reports may contain personal and confidential information. The privacy implications of the inquiry process were not specifically addressed in the statements of compatibility to either the Reportable Incidents Rules or the Complaints Management Rules.

1.104 The explanatory statements to the Reportable Incidents Rules and the Complaints Management Rules explain that the inquiry function is 'intended to determine or define potential matters including any systemic issues which may be connected with support services provided under the NDIS'. This is likely to be a legitimate objective for the purposes of international human rights law, and the

27 SOC to the Complaints Management Rules, p. 27.

ability to publish reports on such matters appears to be rationally connected to this objective.

1.105 Further information from the minister, including the safeguards in place to protect personal and confidential information, would assist in determining the proportionality of the measure.

Committee comment

1.106 The preceding analysis indicates that the Commissioner's inquiry powers may engage and limit the right to privacy.

1.107 The committee seeks the advice of the minister as to the compatibility of the measure with the right to privacy and, in particular, information as to the safeguards in place to protect personal and confidential information.

National Disability Insurance Scheme (Protection and Disclosure of Information—Commissioner) Rules 2018 [F2018L00635]

Purpose	Provides for the disclosure of information in certain circumstances by the NDIS Quality and Safeguards Commissioner
Portfolio	Social Services
Authorising legislation	<i>National Disability Insurance Scheme Act 2013</i>
Last day to disallow	15 sitting days after tabling (tabled Senate 18 June 2018)
Right	Privacy (see Appendix 2)
Status	Seeking additional information

Background

1.108 The National Disability Insurance Scheme (NDIS) Quality and Safeguards Commission and Commissioner (commissioner) were established by the *National Disability Insurance Scheme Amendment (Quality and Safeguards Commission and Other Measures) Act 2017* (the NDIS Amendment Act). The committee considered the human rights compatibility of the NDIS Amendment Act in *Report 7 of 2017*.¹ In that report, the committee noted that there were questions as to the compatibility of the Act with the right to privacy in light of the broad disclosure power of the commissioner in section 67E(1) of the *National Disability Insurance Scheme Act 2013* (NDIS Act).

1.109 The statement of compatibility for the NDIS Amendment Act explained that the proposed information gathering and disclosure powers were proportionate to achieving a legitimate objective because, amongst other factors, the commissioner would first need to satisfy the relevant NDIS rules,² which would 'enumerate specific bodies and purposes' for which the commissioner could disclose information in the public interest and 'include limitations on the further use and disclosure of such information'.³ The committee noted that without a copy of these rules it was unclear whether the rules would sufficiently constrain the exercise of the commissioner's disclosure powers, such that the disclosure powers would constitute a permissible limitation on the right to privacy. Consequently, the committee advised that it would

1 Parliamentary Joint Committee on Human Rights, *Report 7 of 2017* (8 August 2017) pp. 27-30.

2 NDIS Amendment Bill, Addendum to the explanatory memorandum, p. 2.

3 NDIS Amendment Bill, statement of compatibility (SOC), p. 13.

revisit the matters raised in its assessment when reviewing the rules once they were made.⁴

Information sharing – disclosure powers

1.110 Part 3 of the National Disability Insurance Scheme (Protection and Disclosure of Information—Commissioner) Rules 2018 (Disclosure Rules) prescribe the rules and guidance regarding the commissioner's disclosure powers in section 67E(1) of the NDIS Act.

1.111 Division 1 sets out the rules which the commissioner must follow in disclosing any 'NDIS information',⁵ where:

- the commissioner is satisfied on reasonable grounds that it is in the public interest to do so;⁶ or
- the NDIS information is being disclosed to:
 - the head of a Commonwealth, state or territory department or authority for the purposes of that department or authority;⁷ or
 - a state or territory department or authority with responsibility for matters relating to people with disabilities.⁸

1.112 Subject to a number of exceptions,⁹ in these circumstances the commissioner must:

- de-identify personal information included in NDIS information, where doing so would not adversely affect the purpose for which the information is disclosed;¹⁰
- notify and seek the consent of the affected individual about the proposed disclosure prior to disclosure, and provide them with a reasonable opportunity to comment;¹¹

4 Parliamentary Joint Committee on Human Rights, *Report 7 of 2017* (8 August 2017) p. 30.

5 Section 8 of the Disclosure Rules defines 'NDIS information' as information acquired by a person in the performance of a person's functions or duties or in the exercise of the person's powers under the NDIS Act.

6 NDIS Act, section 67E(1)(a).

7 NDIS Act, section 67E(1)(b)(i), (iv).

8 NDIS Act, section 67E(1)(b)(iii).

9 See discussion at [1.126].

10 Disclosure Rules, section 10.

11 Disclosure Rules, section 11.

- notify the recipient of the NDIS information about the purpose of and limitations on the disclosure, and state that the information may only be used in accordance with the purpose of the disclosure;¹² and
- ensure a record of the disclosure is made, containing prescribed information.¹³

1.113 Division 2 of part 3 of the Disclosure Rules outlines matters to which the commissioner must have regard in determining whether there are reasonable grounds on which to disclose NDIS information in the public interest under section 67E(1) of the NDIS Act. Section 14 of the Disclosure Rules requires the commissioner to have regard to:

- whether the affected individual would be likely to be in a position to seek assistance themselves or notify the proposed recipient of the information of their circumstances;
- the purpose for which the information was collected, including any information provided to the affected individual at that time about how the information would or would not be used or disclosure;
- whether the affected individual would reasonably expect the commissioner to disclose the information for the proposed purpose and to the proposed recipient;
- whether the disclosure would be contrary to a request by a complainant under section 15(3) of the National Disability Insurance Scheme (Complaints Management and Resolution) Rules 2018;
- whether the proposed recipient has 'sufficient interest' in the information;¹⁴
- whether the proposed recipient could reasonably obtain the information from a source other than the commissioner; and
- whether sections 15 to 19 of the Disclosure Rules apply.

1.114 Sections 15 to 19 set out additional matters about which the commissioner must be satisfied if the proposed disclosure is for one of the following purposes:

- enforcement of laws and related circumstances;¹⁵
- briefing the minister;¹⁶

12 Disclosure Rules, section 12.

13 Disclosure Rules, section 13.

14 Under section 14(2) of the Disclosure Rules, a person will have a 'sufficient interest' in the information if the Commissioner is satisfied that they have a 'genuine and legitimate interest' in the information or if they are a Commonwealth, State or Territory Minister.

15 Disclosure Rules, section 15.

- missing or deceased persons;¹⁷
- assisting child welfare agencies;¹⁸ and
- assisting professional bodies;¹⁹

1.115 For example, where the proposed disclosure is to assist a 'professional body',²⁰ the commissioner must be satisfied that:

- the commissioner holds information about a person employed or otherwise engaged by an NDIS provider; and
- the disclosure is necessary to assist a professional body to consider whether the person's conduct meets the standards required to attain or maintain membership of the professional body.²¹

Compatibility of the measure with the right to privacy

1.116 The right to privacy includes respect for private and confidential information, particularly the storing, use and sharing of such information, and the right to control the dissemination of information about one's private life.²²

1.117 Allowing for the disclosure of NDIS information (including personal information) under section 67E of the NDIS Act engages and limits the right to privacy. By setting out the factors that the commissioner must consider in determining whether to disclose NDIS information, the statement of compatibility acknowledges that the Disclosure Rules engage this right.²³

1.118 The right to privacy may be subject to permissible limitations which are provided by law and are not arbitrary. In order for limitations not to be arbitrary, they must seek to achieve a legitimate objective and be rationally connected (that is, effective to achieve) and proportionate to that objective.

1.119 In relation to whether the measure pursues a legitimate objective, the statement of compatibility explains that the objective of permitting the

16 Disclosure Rules, section 16.

17 Disclosure Rules, section 17.

18 Disclosure Rules, section 18.

19 Disclosure Rules, section 19.

20 Section 19(2) of the Disclosure Rules defines 'professional body' as 'an organisation that is responsible, nationally or in one or more States or Territories, for registering members of a particular profession and monitoring their compliance with specified standards of behaviour'.

21 Disclosure Rules, section 19.

22 Article 17 of the International Covenant on Civil and Political Rights; Article 22 of the Convention on the Rights of Persons with Disabilities; article 16 of the Convention on the Rights of the Child (CRC)

23 Statement of compatibility (SOC), p. 13.

commissioner to disclose NDIS information is to enhance system-level oversight of serious incidents involving the abuse, neglect or exploitation of people with disabilities, by facilitating coordination with the family or carers of people with disabilities and relevant professional bodies and government departments and agencies.²⁴ Regarding the importance of this objective, the statement cites three inquiries in 2014-2015 into abuse in the disability sector, which emphasised the need for system-level oversight to adequately identify and address systemic issues in the sector.²⁵

1.120 As acknowledged in the committee's assessment of the primary legislation, this is likely to constitute a legitimate objective for the purposes of international human rights law.²⁶

1.121 The statement of compatibility provides further information about the individual measures in division 2 of part 3 (summarised at [1.113] above), which assists in determining how each disclosure power is effective to achieve (that is, rationally connected to) the stated objective. For example, the statement of compatibility notes that section 16, which permits disclosures to brief the minister, is designed 'to enable matters to be escalated and managed appropriately' by the relevant minister.²⁷ In light of the minister's oversight role, the escalation and management of issues by the minister is likely to be rationally connected to the legitimate objective of promoting effective system-level oversight of, and response to, the abuse of people with disabilities. For this reason, and having regard to the committee's previous conclusions in relation to the primary legislation, the measures appear to be rationally connected to this objective.

1.122 As noted by the committee in its analysis of the NDIS Amendment Act,²⁸ the extent to which the Disclosure Rules constrain the commissioner's exercise of the disclosure powers in section 67E(1) of the NDIS Act is key to determining whether the disclosure powers are a proportionate limitation on the right to privacy.

1.123 The statement of compatibility highlights a number of provisions in division 2 of the Disclosure Rules which are intended to 'limit the scope of the exercise of the [commissioner's] decision making power'.²⁹ For example, amongst other factors, the statement of compatibility notes that the commissioner must consider whether the proposed recipient of the information could reasonably obtain the information from

24 SOC, p. 15.

25 SOC, p. 15.

26 Parliamentary Joint Committee on Human Rights, *Report 7 of 2017* (8 August 2017) p. 28.

27 SOC, p. 16.

28 Parliamentary Joint Committee on Human Rights, *Report 7 of 2017* (8 August 2017), p. 29.

29 Disclosure Rules, SOC, p. 15.

another source,³⁰ and whether the person requesting the information has 'sufficient interest' in the information.³¹ Section 14(2) of the Disclosure Rules imposes an additional limitation on this threshold by prescribing that a person has a 'sufficient interest' if they have a 'genuine and legitimate interest in the information', or are a Commonwealth, state or territory minister. Section 14 also requires the commissioner to consider whether a person about whom information would be disclosed is likely to be in a position to seek assistance themselves or give notice to the proposed recipient of the information, where the information concerns their life, health or safety.³² The statement of compatibility explains that this provision is:

...intended to insure that, as far as possible, the Commissioner takes into account the interests of the person concerned and...is a further protection against arbitrary interference with the privacy of a person...³³

1.124 The statement of compatibility also identifies some specific further restrictions on the disclosure of information for the purposes defined in sections 15 to 19 of the Disclosure Rules, summarised above at [1.114]. For example, disclosure of information to brief the minister is limited to the prescribed purposes of enabling the minister to consider complaints, incidents or issues, and if necessary respond to the affected person; informing the minister about an error or delay on the part of the Commission; or alerting the minister to an anomalous or unusual operation of the Act, regulations or rules.³⁴ Such restrictions are relevant to the proportionality of the measure and assist to ensure that disclosure is sufficiently circumscribed.

1.125 However, sections 15, 17, 18 and 19 of the Disclosure Rules may permit the disclosure of personal information to bodies that are not constrained by the *Privacy Act 1988* (Privacy Act). While compliance with the Privacy Act is not a complete answer to concerns about the right to privacy, it may provide relevant safeguards that assist in determining whether a limitation on the right to privacy is proportionate. Noting this potential gap in coverage, the relevant sections do not require the commissioner to be satisfied of how bodies that are not subject to the Privacy Act will collect, store and disclose personal information that is disclosed to them. The statement of compatibility does not provide any additional information about this issue. The potential for information to be disclosed to bodies that are not constrained by the Privacy Act raises a question as to whether there are other, relevant safeguards in place to protect the right to privacy.

30 Disclosure Rules, section 14(1)(f).

31 Disclosure Rules, section 14(1)(e).

32 Disclosure Rules, section 14(1)(a).

33 Disclosure Rules, SOC, p. 16.

34 Disclosure Rules, section 16.

1.126 There are also a number of exceptions to the safeguards in division 1, which may restrict the effectiveness of the safeguards. For example, under section 10(3)(b), the commissioner is not required to de-identify personal information if they are satisfied that to do so would result in an unreasonable delay. A similar exception applies to the consent and consultation requirements in section 11.³⁵ Neither the Disclosure Rules nor the statement of compatibility explain what constitutes an 'unreasonable delay' or how this is determined. Further information as to how this threshold is determined would assist the committee to assess whether the limitation on the right to privacy is proportionate to the legitimate objective sought.

1.127 Finally, the Disclosure Rules do not appear to make decisions made by the commissioner under part 3 of the rules reviewable, nor does the NDIS Act make decisions under section 67E reviewable. This raises concerns about the sufficiency of the safeguards in place to protect the right to privacy. These matters were not fully addressed in the statement of compatibility for the Disclosure Rules.

1.128 Accordingly, while part 3 of the Disclosure Rules significantly constrains the commissioner's disclosure powers under section 67E(1) of the NDIS Act, some questions remain as to the proportionality of the measures, such as whether the exceptions to the safeguards in division 1 are the least rights restrictive approach to achieving the legitimate objective and whether the safeguards in division 2 for public interest disclosures are sufficient to constitute a proportionate limitation on the right to privacy.

Committee comment

1.129 The preceding analysis raises questions as to whether the Disclosure Rules are a proportionate limitation on the right to privacy.

1.130 The committee seeks the advice of the minister as to whether the Disclosure Rules ensure that the limitation on the right to privacy in section 67E(1) of the NDIS Act is proportionate to achieve the objective, in particular:

- **whether information may be disclosed to organisations that are not covered by the Privacy Act and, if so, the sufficiency of other relevant safeguards to protect the right to privacy;**
- **whether the exceptions to the safeguards on the commissioner's disclosure powers in division 1 are the least rights restrictive approach to pursue the legitimate objective; and**
- **whether decisions made by the commissioner in part 3 of the Disclosure Rules are reviewable.**

35 Disclosure Rules, section 11(7)(b).

National Disability Insurance Scheme (Restrictive Practice and Behaviour Support) Rules 2018 [F2018L00632]

Purpose	Provides oversight relating to behaviour support, monitoring the use of restrictive practices within the National Disability Insurance Scheme (NDIS)
Portfolio	Social Services
Authorising legislation	<i>National Disability Insurance Scheme Act 2013</i>
Last day to disallow	15 sitting days after tabling (tabled Senate 18 June 2018)
Rights	Torture, cruel, inhuman and degrading treatment or punishment; liberty; rights of persons with disabilities (see Appendix 2)
Status	Seeking additional information

Conditions relating to the use of regulated restrictive practices by NDIS providers

1.131 The National Disability Insurance Scheme (Restrictive Practice and Behaviour Support) Rules 2018 (rules) sets out the conditions of registration that apply to all registered National Disability Insurance Scheme (NDIS) providers who use 'regulated restrictive practices' in the course of delivering NDIS support. A 'regulated restrictive practice' involves any of the following:

- (a) seclusion, which is the sole confinement of a person with disability in a room or a physical space at any hour of the day or night where voluntary exit is prevented, or not facilitated, or it is implied that voluntary exit is not permitted;
- (b) chemical restraint, which is the use of medication or chemical substance for the primary purpose of influencing a person's behaviour. It does not include the use of medication prescribed by a medical practitioner for the treatment of, or to enable treatment of, a diagnosed mental disorder, a physical illness or a physical condition;
- (c) mechanical restraint, which is the use of a device to prevent, restrict, or subdue a person's movement for the primary purpose of influencing a person's behaviour but does not include the use of devices for therapeutic or non-behavioural purposes;
- (d) physical restraint, which is the use or action of physical force to prevent, restrict or subdue movement of a person's body, or part of their body, for the primary purpose of influencing their behaviour. Physical restraint does not include the use of a hands-on technique

in a reflexive way to guide or redirect a person away from potential harm/injury, consistent with what could reasonably be considered the exercise of care towards a person.

- (e) environmental restraint, which restricts a person's free access to all parts of their environment, including items or activities.¹

1.132 The rules prescribe different conditions of registration of NDIS providers depending on the regulation of restrictive practices in a state or territory. Broadly, for those states and territories that prohibit the use of a restrictive practice, it is a condition of registration of the NDIS provider that the provider must not use the restrictive practice in relation to a person with a disability.² However, where the practice is not prohibited but rather is regulated by an authorisation process,³ registration is conditional upon the use of the regulated restrictive practice being authorised (other than a 'single emergency use'⁴), and the provider must lodge with the NDIS Quality and Safeguards Commissioner (Commissioner) evidence of that authorisation as soon as reasonably practicable after the use of the regulated restrictive practice.⁵

1.133 The rules also prescribe the conditions of registration where a 'behaviour support plan' is used in relation to a regulated restrictive practice. Behaviour support plans may only be developed by a NDIS behaviour support practitioner⁶ and are subject to certain conditions, including the requirement that all reasonable steps be taken to reduce and eliminate the need for the use of regulated restrictive practices.⁷ In particular, section 21 of the rules sets out the minimum content of behaviour support plans containing regulated restrictive practices, and provides that

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- 1 Section 6 of the National Disability Insurance Scheme (Restrictive Practice and Behaviour Support) Rules 2018 (rules).
 - 2 Section 8 of the rules.
 - 3 The rules note that an authorisation process may, for example, be a process under relevant State or Territory legislation or policy or involve obtaining informed consent from a person and/or their guardian, approval from a guardianship board or administrative tribunal or approval from an authorised state or territory officer.
 - 4 'Single emergency use' is not defined in the instrument but is described in the explanatory statement (ES) as 'the use of a regulated restrictive practice in relation to a person with disability, in an emergency, where the use of a regulated restrictive practice has not previously been identified as being required in response to behaviour of that person with disability previously'. See, ES, p. 9.
 - 5 Section 9 of the rules.
 - 6 'Behaviour support practitioner' is defined in section 5 of the rules to mean a person the Commissioner considers is suitable to undertake behaviour support assessments (including functional behavioural assessments) and to develop behaviour support plans that may contain the use of restrictive practices.
 - 7 See sections 18-20.

the registration of specialist behaviour support providers⁸ is subject to the condition a regulated restrictive practice must:

- be clearly identified in the behaviour support plan;
- if the state or territory in which the regulated restrictive practice is to be used has an authorisation process – be authorised in accordance with that process;
- be used only as a last resort in response to risk of harm to the person with disability or others, and after the provider has explored and applied evidence-based, person-centred and proactive strategies; and
- be the least restrictive response possible in the circumstances to ensure the safety of the person and others; and
- reduce the risk of harm to the person with disability or others; and
- be in proportion to the potential negative consequence or risk of harm; and
- be used for the shortest possible time to ensure the safety of the person with disability or others.⁹

1.134 Where an NDIS provider provides support or services in accordance with a behaviour support plan that includes the use of a restrictive practice, registration as a provider is conditional on the regulated restrictive practice being used in accordance with the behaviour support plan.¹⁰

1.135 The rules also set out registration requirements where the use of a regulated restrictive practice may be unauthorised by state or territory law but be in accordance with a behaviour support plan, and vice versa. In particular:

- where the NDIS provider uses a regulated restrictive practice pursuant to an authorisation process but not in accordance with a behaviour support plan (described as the 'first use' in the rules), and the use of such practices will or is likely to continue, the NDIS provider must take all steps to develop an interim behaviour support plan within one month after the use of the regulated restrictive practice and a comprehensive behaviour support plan within six months;¹¹
- where the NDIS provider uses a regulated restrictive practice that is not authorised pursuant to an authorisation *and* is not in accordance with a

8 A specialist behaviour support provider is defined in section 5 of the rules to mean a registered NDIS provider whose registration includes the provision of specialist behaviour support services.

9 Section 21(3) of the rules.

10 Section 10 of the rules.

11 Section 11 of the rules.

behaviour support plan, and the use of such practices will or is likely to continue, the NDIS provider must (relevantly) obtain authorisation for the ongoing use of the regulated restrictive practice and take all reasonable steps to develop an interim behaviour support plan within one month and a comprehensive behaviour support plan within six months;¹² and

- where the NDIS provider uses a regulated restrictive practice that is not in accordance with a behaviour support plan but authorisation is not required in the state or territory, and the use will or is likely to continue, the NDIS provider must take all reasonable steps to develop an interim behaviour support plan within one month and a comprehensive behaviour support plan within six months that covers the use of the regulated restrictive practice.¹³

Compatibility of the measure with the prohibition on torture, cruel, inhuman or degrading treatment or punishment

1.136 Australia has an obligation not to subject any person to torture or to cruel, inhuman or degrading treatment or punishment.¹⁴ The prohibition on torture, cruel, inhuman and degrading treatment or punishment is absolute and may never be subject to any limitations. The UN Committee on the Rights of Persons with Disabilities (UNCRPD) has stated that Australia's use of restrictive practices may raise concerns in relation to freedom from torture and cruel, inhuman or degrading treatment or punishment, and has recommended that Australia take immediate steps to end such practices.¹⁵

1.137 The statement of compatibility acknowledges that the rules engage the prohibition on torture, cruel, inhuman or degrading treatment or punishment,¹⁶ and also acknowledges the concerns raised by the UNCRPD about the unregulated use of restrictive practices.¹⁷

1.138 The statement of compatibility emphasises the minimum requirements in behaviour support plans that include the use of regulated restrictive practices (summarised above at [1.133]) and also emphasises that behaviour support plans

12 Section 12 of the rules.

13 Section 13 of the rules.

14 Article 7 of the International Covenant on Civil and Political Rights; article 15 of the Convention on the Rights of Persons with Disabilities; articles 3-5 Convention against Torture and other Cruel, Inhuman, Degrading Treatment or Punishment; article 37 of the Convention on the Rights of the Child.

15 Committee on the Rights of Persons with Disabilities, *Concluding observations on the initial report of Australia, adopted by the committee at its tenth session*, CRPD/C/AUS/CO1(2013) [35]-[36].

16 Statement of compatibility (SOC) p. 29.

17 SOC, p. 28.

'must contain strategies that aim to reduce and eliminate the use of restrictive practices, both in the long-term and in the short-term'.¹⁸ It also states that the oversight of behaviour support plans (including lodging the plans with the Commissioner and reviewing the plans every 12 months) and the obligations on behaviour support providers 'act as a safeguard against inhumane treatment'.¹⁹ However, while the safeguards that ensure regulated restrictive practices are (for example) 'proportionate' or the 'least restrictive response' are important, they would not be of assistance where the practice amounted to torture, cruel, inhuman or degrading treatment or punishment. This is because, as noted earlier, Australia's obligations in relation to torture, cruel, inhuman or degrading treatment or punishment are absolute.

1.139 There are also particular questions in circumstances where the regulated restrictive practice may be used against a disabled person not in accordance with a behaviour support plan and/or without authorisation. It is possible that a disabled person could be subject to a regulated restrictive practice without authorisation or a behaviour support plan (and the accompanying safeguards), and the NDIS provider could still obtain registration as a provider so long as the provider is subsequently authorised and develops a behaviour support plan.²⁰ There is limited information provided in the statement of compatibility that specifically addresses how the NDIS provider registration scheme will ensure that the regulated restrictive practices used without authorisation or a behaviour support plan do not amount to torture, cruel, inhuman or degrading treatment or punishment. Further information as to the safeguards to prevent such practices in breach of Australia's obligations occurring in the first instance, rather than requirements imposed after the practice has occurred, would be of assistance in determining human rights compatibility.

1.140 Questions also arise in circumstances where an NDIS provider engages in a 'single emergency use' of the regulated restrictive practice without authorisation.²¹ 'Single emergency use' is not defined in the rules. The explanatory statement indicates that 'single emergency use' refers to a practice 'that has not previously been identified as being required in response to behaviour of that person with a disability previously'.²² The explanatory statement provides the following example:

For example, if a person suddenly presents with behaviour that poses a risk of harm to themselves and immediate steps have to be taken to protect them from that harm, the emergency use of a restrictive practice may be required. An example would be where a person receives

18 SOC, p. 30.

19 SOC, pp. 30-31.

20 See section 12 of the rules.

21 Section 9 of the rules.

22 ES, p. 9.

unexpected news causing them distress and in their distress they are about to run out onto a busy highway and the disability worker has to stand in front of him and physically restrain him by grabbing his wrists to prevent him from running onto the road.²³

1.141 While the explanatory statement appears to indicate that a 'single emergency use' is restricted to certain circumstances (such as where immediate steps need to be taken to protect a person from harm), those restrictions and safeguards do not appear in the rules. It is not clear from the information provided what safeguards there are in place to prevent the 'single emergency use' occurring in circumstances where that practice may amount to torture, cruel, inhuman or degrading treatment or punishment.

Committee comment

1.142 The preceding analysis indicates that the use of regulated restrictive practices may engage Australia's absolute obligation not to subject persons to torture, cruel, inhuman or degrading treatment or punishment.

1.143 The committee seeks the advice of the minister as to the compatibility of the rules with this right, including:

- **safeguards to prevent regulated restrictive practices (including 'first use' of a regulated restrictive practice and 'single emergency use' of a regulated restrictive practice) amounting to torture, cruel, inhuman or degrading treatment or punishment; and**
- **whether the rules could be amended to include safeguards to prevent regulated restrictive practices (in particular 'first use' regulated restrictive practices and 'single emergency use' regulated restrictive practices) amounting to torture, cruel, inhuman or degrading treatment or punishment.**

Compatibility of the measure with multiple other rights relating to the protection of persons with disabilities

1.144 The statement of compatibility also acknowledges that the use of regulated restrictive practices engages the following rights in the Convention on the Rights of Persons with Disabilities (see Appendix 2):

- the right to equal recognition before the law and to exercise legal capacity;²⁴
- the right of persons with disabilities to physical and mental integrity on an equal basis with others;²⁵

23 ES, p. 9.

24 CRPD, Article 12.

25 CRPD, Article 17.

- the right to liberty and security of the person;²⁶
- the right to freedom from exploitation, violence and abuse;²⁷ and
- the right to freedom of expression and access to information.²⁸

1.145 Each of these rights may be subject to permissible limitations provided the limitation addresses a legitimate objective, is effective to achieve (that is, rationally connected to) that objective and is a proportionate means to achieve that objective.

1.146 The objective of the rules is stated to be to oversee behaviour support and 'the reduction and elimination of restrictive practices in the NDIS'.²⁹ While this is capable of being a legitimate objective for the purposes of international human rights law, the statement of compatibility provides limited information as to the importance of these objectives in the context of the particular measure. This is particularly significant given that the rules regulate the use of restrictive practices, that is, are directed toward oversight of their use rather than explicitly eliminating their use. Further information as to whether regulating the use of restrictive practices is a legitimate objective in circumstances where the ultimate objective is to eliminate such practices would therefore be of assistance. The same information would assist in determining whether the measures are rationally connected to the objective.

1.147 As to proportionality, the statement of compatibility identifies several safeguards, including the minimum requirements for the use of regulated restrictive practices in behaviour support plans, and reporting and monitoring requirements. All of these safeguards are relevant in determining the proportionality of the measure. The requirement that the use of any regulated restrictive practice pursuant to a behaviour support plan be the 'least restrictive', as a matter of last resort and proportionate are particularly relevant. However, it is not clear from the information provided who determines whether a measure is the 'least restrictive' and 'proportionate', the criteria that are relevant to making such a determination, and whether there is any oversight of such a determination.

1.148 There are also questions as to proportionality in circumstances where the use of the regulated restrictive practice occurs not in accordance with a behaviour support plan or without authorisation. In that circumstance, it is not clear what safeguards would be in place to ensure that use of the regulated restrictive practice occurs in a manner compatible with the human rights outlined above. This includes what safeguards would be in place to ensure that any use of the restrictive practice

26 CRPD, article 14; ICCPR, article 9; CRC, article 37.

27 CRPD, article 16.

28 CRPD, article 21.

29 ES, p. 1; SOC, p. 32.

(including but not limited to the 'first use' and a 'single emergency use') occurs in the least rights restrictive manner possible. It would appear that there would be other, less rights restrictive, approaches which could be taken by the rules, such as requiring *all* use (including 'first use' and 'single emergency use' practices) to be the subject of authorisation and behaviour support plans.

Committee comment

1.149 The preceding analysis indicates that the use of regulated restrictive practices engages the right to equal recognition before the law and to exercise legal capacity, the right of persons with disabilities to physical and mental integrity on an equal basis with others, the right to liberty and security of the person, the right to freedom from exploitation, violence and abuse, and the right to freedom of expression and access to information.

1.150 The committee seeks the advice of the minister as to the compatibility of the use of regulated restricted practices with these rights, including:

- whether the measure is aimed at achieving a legitimate objective for the purposes of human rights law;
- how the measure is effective to achieve (that is, rationally connected to) that objective;
- whether the limitation is a reasonable and proportionate measure to achieve the stated objective;
- information as to safeguards to ensure that the 'first use' of a regulated restrictive practice and any 'single emergency use' occurs in a manner that is compatible with human rights;
- whether the rules could be amended to include safeguards to ensure regulated restrictive practices (in particular 'first use' regulated restrictive practices and 'single emergency use' regulated restrictive practices) occur in a manner that is compatible with the human rights discussed in the preceding analysis.

Record keeping requirements

1.151 The rules also prescribe record keeping requirements in relation to the use of regulated restrictive practices, including a requirement to record the details of the names and contact details of the persons involved in the use of the regulated restrictive practice and of any witnesses.

Compatibility of the measure with the right to privacy

1.152 Article 22 of the CRPD guarantees that no person with disabilities shall be subjected to arbitrary or unlawful interference with their privacy.³⁰ The right to

30 See also article 17 of the International Covenant on Civil and Political Rights.

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

1.153 As the record keeping requirements relate to the storing and use of information (including personal information) the measures engage and limit the right to privacy. The right to privacy is not addressed in the statement of compatibility.

1.154 The statement of compatibility explains that the reporting and record keeping requirements 'allow appropriate action to be taken in response to any issues raised and to inform future policy development, education and guidance to providers, participants and their support networks'.³¹ The record keeping requirements appear to be rationally connected to this objective.

1.155 As to proportionality, limitations on the right to privacy must be accompanied by adequate safeguards. There is limited information in the explanatory statement or statement of compatibility as to the safeguards that apply to the information stored pursuant to the record keeping requirements, such as requirements to keep records secure and confidential, or penalties for unauthorised disclosure. Further information as to these matters would assist in determining whether the limitation on the right to privacy is proportionate.

Committee comment

1.156 The preceding analysis indicates that the record keeping requirements relating to the use of regulated restrictive practices may engage and limit the right to privacy.

1.157 The committee seeks the advice of the minister as to the proportionality of the limitation on the right to privacy. In particular, the committee seeks information as to the safeguards that would apply to protect the right to privacy.

31 SOC, p. 28.

Office of National Intelligence Bill 2018

Office of National Intelligence (Consequential and Transitional Provisions) Bill 2018

Purpose	<p>Seeks to establish the Office of National Intelligence as an independent statutory agency within the prime minister's portfolio, subsuming the role, functions and staff of the Office of National Assessments.</p> <p>Seeks to repeal the <i>Office of National Assessments Act 1977</i>, make consequential amendments to a range of Acts and provide for transitional arrangements</p>
Portfolio	Prime Minister
Introduced	House of Representatives, 28 June 2018
Rights	Freedom of expression; presumption of innocence; privacy; equality and non-discrimination; life; torture, cruel, inhuman and degrading treatment or punishment (see Appendix 2)
Status	Seeking additional information

Offences for unauthorised use or disclosure of information

1.158 The Office of National Intelligence Bill 2018 (the bill) seeks to create a number of offences related to the unauthorised communication, use or recording of information or matters acquired or prepared by or on behalf of the Office of National Intelligence (ONI) in connection with its functions or that relates to the performance by ONI of its functions (ONI information).

1.159 Proposed section 42 would create an offence for persons to communicate ONI information or matters in circumstances where the person is or was a staff member of ONI, is otherwise engaged by ONI, or is an employee or agent of a person engaged by ONI (in other words, an ONI 'insider').¹ The offence carries a maximum penalty of 10 years' imprisonment.

1.160 Proposed section 43 would create an offence for the subsequent disclosure of ONI information or matters which come to the knowledge or into the possession

1 See subsection 42(1)(b).

of a person other than due to their employment or association with ONI² (in other words, an ONI 'outsider'), in circumstances where the person intends that the communication cause harm to national security or endanger the health or safety of another person, or where the person knows that the communication will or is likely to cause harm to national security or endanger the health or safety of another person. The offence carries a maximum penalty of 5 years' imprisonment.

1.161 Proposed section 44 would create offences for the unauthorised 'dealing with'³ or making records of ONI information where the person is an ONI 'insider'. The offences carry a maximum penalty of 3 years' imprisonment.

Defences and exceptions

1.162 There are specific exemptions to the offences in proposed sections 42 and 44 where the communication is made:

- to the Director-General⁴ or a staff member by the person in the course of their duties as a staff member or in accordance with a contract, agreement or arrangement; or
- within the limits of authority conferred on the person by the Director-General or with the approval of the Director-General or a staff member having the authority of the Director-General to give such an approval.

1.163 The bill also provides for a number of defences to each of the offences in proposed sections 42, 43, and 44, including where:

- the information or matter is already publicly available with the authority of the Commonwealth;⁵
- the information is communicated to an Inspector-General of Intelligence and Security (IGIS) official for the purpose of the official exercising a power or performing a function or duty as an IGIS official;⁶

2 Under proposed subsection 43(1)(a) these associations include 'that the person is or was a staff member of ONI, that the person has entered into any contract, agreement or arrangement with ONI or that the person has been an employee or agent of a person who has entered into a contract, agreement or arrangement with ONI'. See explanatory memorandum (EM), p. 38.

3 Under proposed subsection 44(1)(a) 'dealing with' information includes copying a record, transcribing a record, retaining a record, removing a record, or dealing with a record in any other manner.

4 Under the bill, Director-General means the Director-General of National Intelligence, whose functions include overseeing and managing ONI. See division 1 of part 3 of the bill.

5 See proposed subsections 42(2), 43(2) and 44(3).

6 See proposed subsections 42(3) and 43(3).

- the person deals with, or makes, a record for the purpose of an IGIS official exercising a power or performing a function or duty as an IGIS official;⁷ and
- the subsequent communication is in accordance with any requirement imposed by law or for the purposes of relevant legal proceedings or any report of such proceedings.⁸

1.164 The defendant bears an evidential burden in relation to these matters.

Compatibility of the measures with the right to freedom of expression

1.165 The right to freedom of expression requires the state not to arbitrarily interfere with freedom of expression, particularly restrictions on political debate. By criminalising the disclosure of certain information, as well as particular forms of use of such information, the proposed secrecy provisions engage and limit the right to freedom of expression.

1.166 The committee has previously raised concerns in relation to limitations on the right to freedom of expression relating to secrecy offences introduced or amended by the National Security Legislation Amendment (Espionage and Foreign Interference) Bill 2018; the Australian Border Force Amendment (Protected Information) Bill 2017; the Counter-Terrorism Legislation Amendment Bill (No. 1) 2016; and the National Security Legislation Amendment Bill (No. 1) 2014 (all now Acts).⁹ The secrecy offences examined in this report raise similar concerns.

1.167 Measures limiting the right to freedom of expression may be permissible where the measures pursue a legitimate objective, are rationally connected to that objective, and are a proportionate way to achieve that objective.¹⁰

1.168 The statement of compatibility for the bill acknowledges that the secrecy offences engage and limit the right to freedom of expression but argues that the measures are reasonable, necessary and proportionate to achieve the objectives of protecting national security; protecting the right to privacy of individuals whose personal information may be provided to ONI; and enabling ONI to perform its functions, including promoting a well-integrated intelligence community.¹¹ While

7 See proposed subsection 44(4).

8 See proposed subsection 43(3).

9 See, respectively, Parliamentary Joint Committee on Human Rights, *Report 3 of 2018* (27 March 2018) pp. 213-279; *Report 11 of 2017* (17 October 2017) pp. 72-83; *Report 7 of 2016* (11 October 2016) pp. 64-83; and *Sixteenth Report of the 44th Parliament* (25 November 2014) pp. 33-60.

10 See, generally, Human Rights Committee, *General comment No 34 (Article 19: Freedoms of opinion and expression)*, CCPR/C/GC/34, [21]-[36] (2011). The right to freedom of expression may be subject to limitations that are necessary to protect the rights or reputations of others, national security, public order, or public health or morals.

11 EM, Statement of compatibility (SOC), p. 13.

generally these matters are likely to constitute legitimate objectives for the purposes of international human rights law, it would have been useful if the statement of compatibility provided further information as to the importance of these objectives in the specific context of the secrecy measures.

1.169 As to whether the measures are rationally connected to the stated objective, the statement of compatibility explains that:

By providing a deterrent against the disclosure or handling of information without authorisation, the risk of national security being prejudiced through that disclosure or inappropriate handling is minimised, the risk of a person's privacy being breached is lowered, and agencies will be more willing to provide information to ONI in the knowledge that there are strict penalties for unauthorised disclosure of that information.¹²

1.170 It is acknowledged that, to the extent that the type of information or matters prohibited from unauthorised use or disclosure under the bill may prejudice national security or contain an individual's personal information, the measures may be capable of being rationally connected to the objectives stated above. However, the breadth of information or matters that the proposed offences may apply to raises questions as to whether the measures would in all circumstances be rationally connected to the stated objectives.

1.171 Similar questions arise in relation to the proportionality of the measures as drafted.

Breadth of information

1.172 As set out at [1.158], the proposed offences apply to information or matters acquired or prepared by or on behalf of ONI in connection with its functions or that relate to the performance by ONI of its functions. ONI's functions are extensive and include leading and evaluating the activities of the 'national intelligence community' (NIC);¹³ collecting information and preparing assessments on matters of political, strategic or economic significance to Australia, including of a domestic or international nature; and providing advice to the Prime Minister on national intelligence priorities, requirements and capabilities and other matters relating to the NIC. Under the bill, ONI may receive information on matters of political, strategic or economic significance to Australia from a Commonwealth authority, an

12 EM, SOC, p. 13.

13 This includes the Australian Security Intelligence Organisation (ASIO), Australian Secret Intelligence Service (ASIS), Defence Intelligence Organisation (DIO), Australian Signals Directorate (ASD) and the Australian Geospatial-Intelligence Organisation (AGO), the Australian Criminal Intelligence Commission (ACIC); and the intelligence functions of the Department of Home Affairs, the Australian Federal Police (AFP), the Australian Transaction Reports and Analysis Centre (AUSTRAC) and the Department of Defence.

intelligence agency or agency with an intelligence role, and may request such information subject to certain restrictions.¹⁴

1.173 In relation to the type of information prohibited from unauthorised use or disclosure under the bill, the statement of compatibility explains that:

Such information is likely to be sensitive, and unauthorised disclosure or handling could threaten Australia's national security. The provisions also provide for NIC agencies to give ONI documents or things that relate to ONI's functions. This information is likely to relate to highly sensitive information that could prejudice national security if disclosed – for example, information relating to intelligence workforce information, intelligence capabilities or national intelligence priorities.¹⁵

1.174 While it is acknowledged that the disclosure of some types of ONI information may potentially harm national security, as noted above, proposed section 42 of the bill prohibits the unauthorised disclosure of ONI information or matters generally, regardless of the material's security classification or whether it concerns national security or is otherwise deemed to be potentially harmful. It therefore appears that the 'insider' offence set out in proposed section 42 would criminalise the unauthorised communication of information that is not necessarily harmful to national security, to Australia's interests or to a particular individual, and is not intended to cause harm. This raises concerns that the measures may not be the least rights restrictive way of achieving the stated objectives and may be overly broad.

Breadth of application and definition of 'national security'

1.175 In this context, the breadth of the proposed 'insider' offence in section 44, which prohibits the unauthorised 'dealing with'¹⁶ or recording of ONI information or matters, is also a concern. It appears that a person does not have to publicly communicate the information or matter, or intend to do so, in order to commit an offence. It is unclear whether criminalising unauthorised 'dealing with' all information or matters classified as ONI information, including where the information is not otherwise harmful or sensitive and is not communicated publicly, is rationally connected or proportionate to achieve the legitimate objectives.

1.176 The proposed 'outsider' offence in section 43 relating to the subsequent communication of information or matters by persons other than, for example, ONI employees or contractors, applies to the same broad range of information. However, the offence only applies where the person intends that the communication cause

14 See division 1 of part 4 of the bill.

15 EM, SOC, p. 13.

16 As stated above, under proposed subsection 44(1)(a) 'dealing with' information includes copying a record, transcribing a record, retaining a record, removing a record, or dealing with a record in any other manner.

harm to national security or endanger the health or safety of another person, or knows that it will or is likely to. While this may potentially assist with the proportionality of the limitation on the right to freedom of expression, concerns remain that the offence is overly broad with respect to the stated objectives.

1.177 In particular, the scope of information or matters that may be considered as causing harm to Australia's national security if publicly disclosed is potentially broad. Under the bill, national security has the same meaning as in the *National Security Information (Criminal and Civil Proceedings) Act 2004* (NSI Act), which provides that 'national security means Australia's defence, security, international relations or law enforcement interests'.¹⁷ International relations is in turn defined in the NSI Act as the 'political, military and economic relations with foreign governments and international organisations'.¹⁸ In light of these definitions, it appears that the proposed offence in section 43 would apply to a journalist who publishes an article containing ONI information that they know will likely cause harm to Australia's political relations with an international organisation, notwithstanding that the communication may be in the course of reporting on an issue considered to be in the public interest. It would also appear possible that the public disclosure of certain information may endanger the health or safety of another person — for example, a person held in immigration detention — and therefore constitute an offence despite the information being in the public interest, including in circumstances where the affected person consents to the information being made public. It is therefore not clear whether the measure, as drafted, is sufficiently circumscribed in order to be a proportionate limitation on the right to freedom of expression.

1.178 Further, it may not be clear to a person as to whether information or matters that they come to know or possess constitutes ONI information and is therefore protected from subsequent disclosure subject to the exceptions set out above. As noted at [1.172], ONI information may potentially include a very broad range of documents or other matters that may initially have been produced by a range of Commonwealth agencies, including non-intelligence agencies. It is possible that a person may receive information that was originally produced by, for example, the Department of Home Affairs, but may be unaware that the information has also become ONI information by reason of it having been acquired by ONI. Under proposed section 43, the prosecution is only required to prove that the defendant was reckless as to whether information or a matter is ONI information.¹⁹

Safeguards and penalties

17 See section 8 of division 2 of part 2 of the *National Security Information (Criminal and Civil Proceedings) Act 2004*.

18 See section 10 of division 2 of the *National Security Information (Criminal and Civil Proceedings) Act 2004*.

19 See EM, SOC, p. 38.

1.179 There are also questions about whether the defences (set out at [1.163]) act as adequate safeguards in respect of the right to freedom of expression. For example, the defences may not sufficiently protect the disclosure of information that is in the public interest or in aid of government accountability and oversight. There is no general defence related to public reporting in the public interest or general protections for whistleblowers, other than for the communication of information to the IGIS. This raises further questions about the proportionality of the limitation on the right to freedom of expression.

1.180 Further, the severity of the penalties is also relevant to whether the limitation on the right to freedom of expression is proportionate. In this case, it is noted that the proposed penalties are serious and range from 3 to 10 years' imprisonment.

Committee comment

1.181 The measures engage and limit the right to freedom of expression.

1.182 The preceding analysis raises questions about whether the measures are compatible with this right.

1.183 The committee therefore seeks the advice of the Prime Minister and the Attorney-General as to:

- **how the measures are effective to achieve (that is, rationally connected to) the stated objectives of the bill; and**
- **whether the limitations are reasonable and proportionate to achieve the stated objectives (including in relation to the breadth of information subject to secrecy provisions; the range of information or matters that may be considered as causing harm to Australia's national security or the health and safety of another person; the adequacy of safeguards; and the severity of the criminal penalties).**

1.184 In relation to the proportionality of the measures, in light of the information requested above, advice is also sought as to whether it would be feasible to amend the secrecy offences to:

- **appropriately circumscribe the scope of information subject to the prohibition on unauthorised disclosure or use under proposed sections 42 and 44 (by, for example, introducing a harm element or otherwise restricting the offences to defined categories of information);**
- **appropriately circumscribe the definition of what causes harm to national security for the purposes of proposed section 43;**
- **expand the scope of safeguards and defences (including, for example, a general 'public interest' defence); and**
- **reduce the severity of the penalties which apply.**

Compatibility of the measures with the right to be presumed innocent

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

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

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

1.188 As set out at [1.163] above, proposed sections 42, 43 and 44 include offence-specific defences to the various secrecy 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.

1.189 While the objectives of the secrecy provisions are stated generally as being to protect national security and individual privacy, the statement of compatibility does not expressly explain how reversing the evidential burden in the offences pursues a legitimate objective or is rationally connected to this objective.

1.190 The statement of compatibility acknowledges that the offence-specific defences engage and limit the presumption of innocence but argues that the measures are reasonable, necessary and proportionate.²⁰ The justification provided in the explanatory memorandum and statement of compatibility is, generally, that the relevant evidence 'should be readily available to the accused'²¹ or that it is 'far more reasonable' to require a defendant to point to the relevant evidence than to

20 EM, SOC, p. 12.

21 EM, SOC, p. 12.

require the prosecution to demonstrate that such evidence does not exist.²² However, this does not appear to be a sufficient basis to constitute a proportionate limitation on human rights.

1.191 It is unclear that reversing the evidential burden, as opposed to including additional elements within the offence provisions themselves, is necessary. For example, it is a defence for a person to provide ONI information to an IGIS official for the purpose of the official exercising a power or performing a function or duty as an IGIS official. This would appear to leave individuals who provide information to the IGIS open to a criminal charge and then place the evidential burden of proof on them to raise evidence to demonstrate that they were in fact acting appropriately. In this context, the approach of including the fact that the information was not provided to an IGIS official as described above as an element of the offence provisions themselves, would seem to be a less rights restrictive alternative. This raises questions as to whether the current construction of the offences is a proportionate limitation on the right to be presumed innocent.

Committee comment

1.192 The preceding analysis raises questions as to the compatibility of the reverse burden offences with the right to be presumed innocent. The committee therefore requests the advice of the Prime Minister and the Attorney-General 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 rationally connected to (that is, effective to achieve) this 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 offences 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.**

Information gathering powers

1.193 The bill would provide ONI with a number of information gathering powers. Under proposed section 7 ONI will have broad statutory functions, including to:

22 EM, p. 37.

- assemble, correlate and analyse information related to international and other matters that are of political, strategic or economic significance to Australia and prepare assessments and reports (section 7(1)(c)-(d)); and
- collect, interpret and disseminate information relating to matters of political, strategic or economic significance to Australia that is accessible to any section of the public (section 7(1)(g)).

1.194 Under proposed section 37, for the purpose of ONI performing its function under section 7(1)(c), the Director-General of ONI may make a written request that a Commonwealth authority provide information, documents or things in its possession that relate to international matters of political, strategic or economic significance to Australia; or domestic aspects relating to such international matters.

1.195 Proposed section 38 provides that a Commonwealth authority may provide to ONI information, documents or things that the head of the authority considers relate to matters of political, strategic or economic significance to Australia.

1.196 Proposed section 39 provides that an intelligence agency or agency with an intelligence role or function may provide to ONI information, documents or things that relate to any of ONI's functions.

Compatibility of the measures with the right to privacy

1.197 The right to privacy includes respect for private and confidential information, particularly the collection, storing, use and sharing of such information, and the right to control the dissemination of information about one's private life.²³ The statement of compatibility acknowledges that the above measures, by enabling ONI to obtain, and in some cases compel, information, including personal information, engage and limit the right to privacy.²⁴

1.198 The right to privacy may be subject to permissible limitations which are provided by law and are not arbitrary. In order for limitations not to be arbitrary, they must seek to achieve a legitimate objective and be rationally connected (that is, effective to achieve) and proportionate to that objective. In this respect, the statement of compatibility states that the measures constitute a permissible limitation on the right to privacy and are aimed at two legitimate objectives:

...firstly, to ensure national security, by collecting, interpreting and disseminating open source intelligence on matters of significance to Australia, and by promoting the collective performance of the NIC agencies through its leadership and enterprise management functions; and secondly, to promote well-informed and rigorous policy making by the

23 Article 17 of the International Covenant on Civil and Political Rights.

24 SOC, p. 8.

Australian government through preparing and communicating assessments on matters of significance.²⁵

1.199 These are likely to constitute a legitimate objective for the purposes of international human rights law. Collecting relevant information is likely to be rationally connected to (that is, effective to achieve) these stated objectives.

1.200 In order to be a proportionate limitation on the right to privacy, a measure must be no more extensive than is strictly necessary to achieve its stated objective and must be accompanied by adequate and effective safeguards. In this respect, in relation to the proportionality of the limitation, the statement of compatibility provides relevant information. It acknowledges that proposed sections 37 and 38 provide a requirement or authorisation under Australian law for the purposes of the *Privacy Act 1988* (Privacy Act). As such, this requirement or authorisation operates as an exception to the prohibition on the disclosure of personal information by a Commonwealth entity for a secondary purpose and allows information to be disclosed to ONI. This means the Privacy Act will not act as a safeguard in the context of the measures. However, the statement of compatibility argues that the measures are nevertheless sufficiently circumscribed. In relation to the compulsory evidence gathering power in proposed section 37, it states:

...section 37 is broad, but it is not unconstrained. It can only be exercised for the purposes of ONI's international assessments function under paragraph 7(1)(c). The Director-General is also obliged to consider any privacy concerns raised by the relevant Commonwealth authority before making the request to compel information. This ensures that requests will not be made unless the Director-General considers that the importance of obtaining the information outweighs the importance of preserving the right to privacy.²⁶

1.201 The statement of compatibility further explains that section 37 does not override any existing secrecy provisions and ONI will have express obligations in relation to the use and protection of such information.²⁷ While these matters are relevant to the proportionality of the limitation, it is noted that the breadth of the power remains broad.

1.202 In relation to proposed section 38, the statement of compatibility acknowledges that the provision provides a permissive authority for Commonwealth authorities to disclose information to ONI even if doing so would not otherwise fall within the scope of the authority's statutory functions. However, the statement of compatibility explains that these disclosure powers are also limited to material

25 SOC, p. 8.

26 SOC, p. 8.

27 SOC, p. 9.

related to ONI's assessment functions.²⁸ While this may be the case, it is noted that the assessment functions are broad and so may permit disclosure of a very extensive range of information to ONI.

1.203 In relation to proposed section 39, the statement of compatibility explains that while this provides a broad power of voluntary disclosure from NIC agencies, the broader power is reasonable as NIC agencies will hold far greater information that is relevant to ONI's functions than Commonwealth agencies more generally. The statement of compatibility further outlines some relevant safeguards in relation to the handling of disclosed information.²⁹ While there are relevant safeguards, it is unclear from the information provided that the scope of the power is sufficiently circumscribed. This is because while NIC agencies may hold information relevant to ONI's functions, it is unclear whether the disclosure of information from NIC agencies would be proportionate in each case.

1.204 In relation to ONI's proposed power to collect 'identifiable information'³⁰ under ONI's open source function, the statement of compatibility explains that the Prime Minister will be required to make privacy rules governing ONI's collection, communication, handling and retention of such information.³¹ Such rules may operate as a safeguard in relation to the right to privacy. However, the likely content of these rules is not described in the statement of compatibility and it is therefore difficult to assess whether the rules will be sufficient to ensure that the limitation on the right to privacy is proportionate.

1.205 Further, in relation to the scope of the rules as a potential safeguard, it is noted that the requirement to make rules regarding 'identifiable information' will only apply in respect of Australian citizens and permanent residents rather than all persons in Australia or subject to Australian jurisdiction. This is of concern as Australia owes human rights obligations to all persons within Australia.

1.206 In explaining the scope of the requirement to make privacy rules, the statement of compatibility nevertheless states that:

...the provision does not limit the matters in relation to which the Prime Minister may make rules. It remains open to the Prime Minister to extend these rules, or to make additional rules, to protect the personal information of others, including foreign nationals.³²

28 SOC, p. 9.

29 SOC, p. 9.

30 'Identifiable information' means information about an Australian citizen or permanent resident, who is identified or reasonably identifiable: section 4.

31 SOC, p. 9. See, section 53 of the bill.

32 SOC, p. 9.

1.207 While it is possible that the Prime Minister may decide to make rules to protect the privacy of people who are not Australian citizens or permanent residents, there is no requirement to make such rules. Accordingly, it is unclear what other safeguards are in place to protect the right to privacy of non-nationals or whether the measure is the least rights restrictive approach. In this respect, there may also be concerns about the compatibility of the measure with the right to equality and non-discrimination.

Committee comment

1.208 The preceding analysis raises questions as to whether the information gathering powers are a proportionate limitation on the right to privacy.

1.209 The committee seeks the advice of the Prime Minister and the Attorney-General as to whether the measures are reasonable and proportionate to achieve the stated objectives, including:

- **whether each of the information gathering powers are sufficiently circumscribed and accompanied by adequate and effective safeguards;**
- **how the measures constitute the least rights restrictive approach;**
- **in relation to the power to collect open source information, whether a copy of the proposed rules could be provided; and**
- **what safeguards will be in place in relation to the power to collect open source information from people who are not Australian citizens or permanent residents.**

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

1.210 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 equal and non-discriminatory protection of the law.

1.211 'Discrimination' under articles 2 and 26 of the ICCPR includes both measures that have a discriminatory intent (direct discrimination) and measures that have a discriminatory effect on the enjoyment of rights (indirect discrimination).³³ The UN Human Rights Committee has explained indirect discrimination as 'a rule or measure that is neutral at face value or without intent to discriminate', but which exclusively

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

or disproportionately affects people with a particular personal attribute (for example, nationality or national origin).³⁴

1.212 In this respect, while Australia maintains some discretion under international law with respect to its treatment of non-nationals, Australia has obligations not to discriminate on the grounds of nationality or national origin.³⁵ As acknowledged in the statement of compatibility, by providing that the proposed privacy rules (see above, [1.204]) are only required to apply to Australian citizens and permanent residents, the measure engages the right to equality and non-discrimination on the basis of nationality. That is, the measure allows for Australian citizens and permanent residents to be treated differently to people who do not fall into these categories.

1.213 Differential treatment (including the differential effect of a measure that is neutral on its face) will not constitute unlawful discrimination if the differential treatment is based on reasonable and objective criteria such that it serves a legitimate objective, is rationally connected to that legitimate objective and is a proportionate means of achieving that objective.

1.214 In relation to the objective of the differential treatment, the statement of compatibility states it:

...is to provide protections for Australians while facilitating the performance of ONI's functions in the interests of national security and for Australia's economic, strategic and political benefit.³⁶

1.215 However, the statement of compatibility does not explain the importance of this objective in the context of the measure nor how the measure is rationally connected to that objective. The statement of compatibility instead states that 'special protection for Australians is a long-standing, core principle of accountability for intelligence agencies'.³⁷ While privacy protections for Australians may assist to ensure the accountability of intelligence agencies, it is unclear from the information provided why there needs to be differential treatment in the form of less protection of the right to privacy for those who are within Australia but are not Australian citizens or permanent residents.

1.216 In relation to proportionality, the statement of compatibility provides some information as to how the information collection powers of intelligence agencies are circumscribed. While this is relevant to the question of proportionality, it is unclear

34 *Althammer v Austria*, Human Rights Committee Communication no. 998/01 (8 August 2003) [10.2].

35 UN Committee on the Elimination of Racial Discrimination, *General Recommendation 30: Discrimination against non-citizens* (2004).

36 SOC, p. 6.

37 SOC, p. 6.

from the information provided whether excluding non-nationals from additional privacy protections is based on reasonable and objective criteria or represents the least rights restrictive approach. Accordingly, this raises questions as to whether the measure is compatible with the right to equality and non-discrimination.

Committee comment

1.217 The preceding analysis raises questions as to whether the differential treatment is compatible with the right to equality and non-discrimination.

1.218 Accordingly, the committee requests the advice of the Prime Minister and the Attorney-General 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 measures are effective to achieve (that is, rationally connected to) that objective; and
- whether the measures are reasonable and proportionate to achieving the stated objective of the bill (including how the measures are based on reasonable and objective criteria, whether the measures are the least rights-restrictive way of achieving the stated objective and the existence of any safeguards).

Cooperation with entities in connection with ONI's performance of functions

1.219 Proposed section 13 provides that, subject to relevant approvals, ONI may cooperate with an authority of another country approved by an instrument, or any other person or entity, within or outside Australia.

Compatibility of the measure with the right to privacy

1.220 As set out above, the right to privacy includes respect for informational privacy, including the right to respect for private and confidential information, particularly the use and sharing of such information and the right to control the dissemination of information about one's private life. By providing that the ONI may cooperate with an authority or person outside Australia, this measure appears to allow for the sharing of personal or confidential information. As such, the measure may engage and limit the right to privacy. While the right to privacy may be subject to permissible limitations in certain circumstances, this issue is not addressed in the statement of compatibility.

Committee comment

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

1.222 The committee requests the advice of the Prime Minister and the Attorney-General as to:

- **whether the measure is aimed at achieving a legitimate objective for the purposes of international human rights law;**
- **how the measure is effective to achieve (that is, rationally connected to) that objective; and**
- **whether the limitation is a reasonable and proportionate measure to achieve the stated objective (including whether the measure is sufficiently circumscribed and whether there are adequate and effective safeguards in relation to the operation of the measure).**

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

1.223 Under international human rights law every human being has the inherent right to life, which should be protected by law. The right to life imposes an obligation on state parties to protect people from being killed by others or from identified risks. While the ICCPR does not completely prohibit the imposition of the death penalty, international law prohibits states which have abolished the death penalty (such as Australia) from exposing a person to the death penalty in another nation state.

1.224 The United Nations (UN) Human Rights Committee has made clear that international law prohibits the provision of information to other countries that may be used to investigate and convict someone of an offence to which the death penalty applies. In this context, the UN Human Rights Committee stated in 2009 its concern that Australia lacks 'a comprehensive prohibition on the providing of international police assistance for the investigation of crimes that may lead to the imposition of the death penalty in another state', and concluded that Australia should take steps to ensure it 'does not provide assistance in the investigation of crimes that may result in the imposition of the death penalty in another State'.³⁸

1.225 By providing that the ONI may cooperate with an authority or person outside Australia, this measure appears to allow for the sharing of personal or confidential information overseas. Such sharing of information internationally could accordingly engage the right to life. This issue was not addressed in the statement of compatibility.

1.226 A related issue raised by the measure is the possibility that sharing of information may result in torture, or cruel, inhuman or degrading treatment or punishment. Under international law the prohibition on torture is absolute and can

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

never be subject to permissible limitations.³⁹ This issue was also not addressed in the statement of compatibility.

Committee comment

1.227 The preceding analysis raises questions as to whether the measure is compatible with the right to life and the prohibition on torture, or cruel, inhuman and degrading treatment or punishment.

1.228 In relation to the right to life, the committee seeks the advice of the Prime Minister and the Attorney-General on the compatibility of the measure with this right (including the existence of relevant safeguards or guidelines).

1.229 In relation to the prohibition on torture, or cruel, inhuman or degrading treatment or punishment, the committee seeks the advice of the Prime Minister and the Attorney-General in relation to the compatibility of the measure with this right (including any relevant safeguards or guidelines).

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

Unexplained Wealth Legislation Amendment Bill 2018

Purpose	Seeks to: extend the scope of commonwealth unexplained wealth restraining orders and unexplained wealth orders under the <i>Proceeds of Crime Act 2002</i> (POC Act) to state and territory offences; allow participating state and territory agencies to access commonwealth information gathering powers under the POC Act for the investigation or litigation of unexplained wealth matters under state or territory unexplained wealth legislation; amend the way in which recovered proceeds are shared between the Commonwealth, states and territories and foreign law enforcement entities; also seeks to amend the <i>Telecommunications (Interception and Access) Act 1979</i> to facilitate information-sharing on unexplained wealth between commonwealth, participating state and territory agencies
Portfolio	Home Affairs
Introduced	House of Representatives, 20 June 2018
Rights	Fair trial; fair hearing; privacy (see Appendix 2)
Status	Seeking additional information

Background – unexplained wealth orders

1.230 Part 2-6 of the *Proceeds of Crime Act 2002* (POC Act) enables certain orders to be made relating to 'unexplained wealth':¹

- unexplained wealth restraining orders, which are interim orders that restrict a person's ability to dispose of, or otherwise deal with, property;²
- preliminary unexplained wealth orders, which require a person to appear before a court to enable the court to determine whether or not to make an unexplained wealth order against the person;³ and
- unexplained wealth orders, which require a person to pay an amount to the commonwealth where the court is not satisfied that the whole or any part of the person's wealth was not derived or realised, directly or indirectly, from an offence against the law of the commonwealth, a foreign indictable offence or a state offence that has a federal aspect. The amount to be paid

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

2 Section 20A of the POC Act.

3 Section 179B of the POC Act.

(the unexplained wealth) is the difference between a person's total wealth and the wealth shown to have been derived lawfully.⁴

Compatibility of unexplained wealth orders with human rights

1.231 The committee has previously commented on the human rights compatibility of the unexplained wealth regime. In those reports, the committee raised concerns that the unexplained wealth provisions may involve the determination of a criminal charge for the purposes of international human rights law.⁵ Similar concerns have been discussed in the context of the broader underlying regime established by the POC Act for the freezing, restraint or forfeiture of property.⁶

1.232 The committee has previously noted that the POC Act was introduced prior to the establishment of the committee and therefore before the requirement for bills to contain a statement of compatibility with human rights.⁷ The committee has therefore previously recommended that the minister undertake a detailed assessment of the POC Act to determine its compatibility with the right to a fair trial and right to a fair hearing.

Expansion of the unexplained wealth orders regime – Schedules 2 and 3

1.233 The bill extends the scope of the commonwealth unexplained wealth restraining orders and unexplained wealth orders (defined in the bill as the 'main unexplained wealth provisions'⁸) under the POC Act to territory offences as well as 'relevant offences'⁹ of 'participating states'.¹⁰ Currently, existing provisions of the

4 Section 179E of the POC Act.

5 See, Parliamentary Joint Committee on Human Rights, *Report 1 of 2018* (6 February 2018) p. 121; *Report 12 of 2017* (28 November 2017); *Ninth Report of the 44th Parliament* (July 2014) p. 133; *Fourth Report of the 44th Parliament* (March 2014) p. 1; *Sixth Report of 2013* (May 2013) pp. 189-191; *Third Report of 2013* (March 2013) p. 120; *First Report of 2013* (February 2013) p. 27.

6 See, Parliamentary Joint Committee on Human Rights, *Report 1 of 2018* (6 February 2018) p. 121; *Report 12 of 2017* (28 November 2017); *Report 4 of 2017* (9 May 2017) pp. 92-93; *Report 2 of 2017* (21 March 2017); *Report 1 of 2017* (16 February 2017); *Thirty-First Report of the 44th Parliament* (24 November 2015) pp. 43-44; *Twenty-Sixth Report of the 44th Parliament* (18 August 2015).

7 Parliamentary Joint Committee on Human Rights, *Thirty-First Report of the 44th Parliament* (24 November 2015) pp. 43-44.

8 See proposed section 14B(3) of Schedule 1 of the bill.

9 A 'relevant offence' of a participating state is defined to mean an offence of a kind that is specified in the referral Act or adoption Act of the state: see proposed amendment to section 338 in item 2, Schedule 2 of the bill.

10 A 'participating state' is one which refers powers to the commonwealth parliament (for the purposes of paragraph 51(xxxvii) of the Constitution) so as to participate in the national unexplained wealth scheme: see proposed section 14C in Schedule 1 of the bill.

POC Act allow unexplained wealth restraining orders and unexplained wealth orders to be made in relation to commonwealth offences, foreign indictable offences and state offences that have a federal aspect. The effect of these amendments is to expand the scope of the unexplained wealth regime to provide that:

- unexplained wealth restraining orders must be made by a court if, relevantly, there are reasonable grounds to suspect that a person has committed a territory offence or a relevant offence of a participating state, or where there are reasonable grounds to suspect that the whole or any part of a person's wealth was derived from a territory offence or relevant offence of a participating state;¹¹ and
- unexplained wealth orders must be made by a court if, relevantly, the court is not satisfied that the whole or any part of the person's wealth was not derived from a territory offence or relevant offence of a participating state.¹²

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

1.234 The right to a fair trial and fair hearing is protected by articles 14 and 15 of the International Covenant on Civil and Political Rights (ICCPR). These rights are concerned with procedural fairness, and encompass notions of equality in proceedings, the right to a public hearing and the requirement that hearings be conducted by an independent and impartial body. Specific guarantees of the right to a fair trial in relation to a criminal charge include the presumption of innocence,¹³ the right not to incriminate oneself,¹⁴ and the guarantee against retrospective criminal laws.¹⁵

Minimum guarantees in criminal proceedings

1.235 As noted earlier, the committee has previously raised concerns that the unexplained wealth provisions may be considered 'criminal' for the purposes of international human rights law. The committee considered that if the provisions were considered to be 'criminal' for the purposes of international human rights law, there would be concerns as to the compatibility of the measures with the right to a fair trial and the right to a fair hearing, in particular the right to be presumed innocent until proven guilty.¹⁶ By broadening the circumstances in which unexplained

11 See items 1 and 2 of Schedule 2 and 3, proposed amendments to sections 20A(1)(g)(i) and 20A(1)(g)(ii) of the bill.

12 See item 5 of Schedule 2 and 3, proposed amendment to section 179E(1)(b)(ii) of the bill.

13 Article 14(2) of the ICCPR.

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

15 Article 15(1) of the ICCPR.

16 Parliamentary Joint Committee on Human Rights, *Report 1 of 2018* (6 February 2018) p. 121.

wealth restraining orders and unexplained wealth orders can be made, those matters raised in previous analyses are of equal relevance to this bill.

1.236 As set out in the committee's *Guidance Note 2*, the term 'criminal' has an autonomous meaning in international human rights law, such that even if a penalty is classified as civil in character domestically it may nevertheless be considered 'criminal' for the purposes of international human rights law.

1.237 The statement of compatibility acknowledges that the minimum guarantees in criminal proceedings in Articles 14(2)-(7) and 15 of the ICCPR may extend to acts regarded as penal or criminal regardless of their qualification under domestic law.¹⁷ However, the statement of compatibility explains that the unexplained wealth proceedings and other proceedings under the POC Act should not be characterised as criminal for the following reasons:

Unexplained wealth proceedings and other proceedings under the POC Act are brought by a public authority for the purpose of determining and punishing breaches of Commonwealth law. However, these proceedings are civil proceedings only and are not criminal in nature – unexplained wealth orders imposed via unexplained wealth proceedings cannot create criminal liability, do not result in any finding of criminal guilt and do not expose people to any criminal sanctions. Proceedings on an application for a restraining order or an unexplained wealth order are also explicitly characterised as civil in section 315 of the POC Act and the rules of statutory construction and evidence applicable only in relation to criminal law do not apply in proceedings under the Act.¹⁸

1.238 In addition to the domestic classification of the offence, the committee's *Guidance Note 2* explains that there are two other relevant tests in determining whether provisions may be characterised as 'criminal' in character. These concern the nature and purpose of the measure and the severity of the penalty. The statement of compatibility states that the purpose of the bill is to enable closer coordination between Commonwealth, states and territories to target criminal assets and use 'unexplained wealth laws to undermine criminal gangs and prevent them reinvesting their profits to support further criminal activity'.¹⁹ This would indicate that the unexplained wealth provisions may have a preventative purpose. Preventative measures have not generally been characterised as 'criminal charges' or 'penalties' in international human rights law.²⁰ However, the characterisation will

17 SOC, [61].

18 SOC, [62].

19 SOC, [51].

20 See *Gogitdze & Ors v Georgia*, European Court of Human Rights App No.36862/05 (2015) [126]; *Butler v United Kingdom*, European Court of Human Rights App No.41661/98 (2002).

ultimately depend on the particular facts of a case in question,²¹ including whether the degree of culpability of the offender impacts the amount of the order,²² and whether proceedings are initiated after the relevant criminal proceedings have ended with an outcome other than conviction (such as acquittal or discontinuation of criminal proceedings as being statute-barred).²³ It is also noted that the broader purpose of the POC Act (including unexplained wealth provisions) is outlined in section 5 of the Act and includes to punish and deter persons from breaching laws. Proceeds of crime measures which have a deterrent purpose are more likely to be considered 'criminal'.²⁴ The committee has previously noted that these purposes raise concerns that the proceeds of crime proceedings (including unexplained wealth proceedings) may be characterised as a form of punishment.²⁵ The unexplained wealth provisions also appear to apply to the public in general. This is relevant in determining whether the measures are 'criminal' in nature, as measures are more likely to be criminal if they apply to the public in general.

1.239 As to severity, the unexplained wealth restraining orders and unexplained wealth orders can involve significant sums of money, which raises concerns that the cumulative effect of the purpose and severity of the measures would lead to the provisions being characterised as criminal.

1.240 If the provisions were characterised as 'criminal' for the purposes of human rights law, this means that the provisions in question must be shown to be consistent with criminal process guarantees set out in Articles 14 and 15 of the ICCPR, including any justifications for any limitations on these rights where applicable.

1.241 As noted earlier, the committee has previously raised particular concerns in relation to the compatibility of the unexplained wealth provisions with the presumption of innocence, if the measures are characterised as 'criminal'. This is because, where the court is considering whether to make an unexplained wealth order, the burden of proving that a person's wealth is not derived, directly or indirectly, from one or more of the relevant offences would lie on the person against which an order is being sought.²⁶ The committee has previously raised concerns that

21 See, for example, *Welch v United Kingdom*, European Court of Human Rights App No.17440/90 (1995).

22 *Dassa Foundation v Lichtenstein*, European Court of Human Rights Application No.696/05 (2007); *Butler v United Kingdom*, European Court of Human Rights App No.41661/98 (2002).

23 *Gogitdze & Ors v Georgia*, European Court of Human Rights App No.36862/05 (2015) [125]; *Allen v United Kingdom*, European Court of Human Rights (Grand Chamber) App No. 25424/09 (2013) [103]-[104].

24 *Welch v United Kingdom*, European Court of Human Rights App No.17440/90 (1995) [28].

25 See, Parliamentary Joint Committee on Human Rights, *Report 1 of 2018* (6 February 2018) p. 115.

26 Section 179E of the POC Act.

this reverse burden placed on a respondent effectively gives rise to a presumption of unlawful conduct.²⁷

Fair hearing

1.242 The committee has also previously raised concerns insofar as a preliminary unexplained wealth order or unexplained wealth restraining order may be made against a person who does not appear at the hearing, and so may not have an opportunity to be heard.²⁸ The POC Act also provides that a court may make an unexplained wealth order even when the person failed to appear as required by the preliminary unexplained wealth order.²⁹ As the amendments to the bill expand the operation of the unexplained wealth regime, these concerns apply equally to the amendments introduced by the bill.

1.243 The statement of compatibility acknowledges that the ability to make orders without notice being given to the person who is the subject of the application may engage the right to a fair hearing.³⁰ However, it further states that the laws 'serve the justifiable and reasonable purpose of preventing a person from dispersing his or her assets during the time between an order being sought and an order being made' and prevent persons 'from frustrating unexplained wealth proceedings by simply failing to appear when ordered to do so'.³¹ These would appear to be legitimate objectives and the measures would appear to be rationally connected to this objective.

1.244 However, there are questions as to the proportionality of the limitation on the right to a fair hearing. The statement of compatibility states that where such orders are made without notice, the POC Act provides mechanisms which allow a person to contest these orders.³² However, it is not clear whether such safeguards would be sufficient for the purposes of international human rights law. For example, once an unexplained wealth restraining order has been made, if a person was notified of the application for the restraining order but did not appear at the hearing of that application, a person cannot apply for an order excluding property from a restraining order unless the court gives leave.³³ A court may give leave if satisfied that the person had a good reason for not appearing,³⁴ but this is discretionary. This raises concerns that the safeguards would not be sufficient from a human rights law

27 Parliamentary Joint Committee on Human Rights, *Report 1 of 2018* (6 February 2018) p. 121.

28 Parliamentary Joint Committee on Human Rights, *Fourth Report of the 44th Parliament* (March 2014) p. 6.

29 Section 179E(4) of the POC Act.

30 SOC, [55]-[60].

31 SOC, [57]-[58].

32 SOC, [59]; sections 29, 31 and 179C of the POC Act.

33 Section 31(2)(a) of the POC Act.

34 Section 31(3)(a) of the POC Act.

perspective and that there may be other, less rights restrictive means of achieving the legitimate objective.

Committee comment

1.245 The preceding analysis of the proposed amendments to the unexplained wealth provisions in schedules 2 and 3 of the bill raise questions as to whether expanding the application of the POC Act is compatible with the right to a fair trial and the right to a fair hearing.

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

- whether the unexplained wealth provisions (as expanded by the bill) may be characterised as 'criminal' for the purposes of international human rights law, having regard in particular to the nature, purpose and severity of the measures;
- the extent to which the provisions are compatible with the criminal process guarantees in articles 14 and 15 of the ICCPR, including any justification for any limitations on these rights where applicable; and
- the extent to which the provisions are compatible with the right to a fair hearing (including whether there are other, less rights restrictive, means of achieving the objectives of the bill).

1.247 As the POC Act was introduced prior to the establishment of the committee, the committee recommends that the minister undertake a detailed assessment of the POC Act to determine its compatibility with the right to a fair trial and right to a fair hearing. This would inform the committee's consideration of the compatibility of the amendments in the context of the legislative scheme as a whole.

Compatibility of the measure with the right to privacy

1.248 The right to privacy includes the right not to be subject to arbitrary or unlawful interference with one's privacy, family, home or correspondence. As acknowledged in the statement of compatibility, the bill engages and limits the right not to be subject to arbitrary or unlawful interference with a person's home, as unexplained wealth restraining orders can be used to restrain real property, and the amount a person has to repay pursuant to an unexplained wealth order is determined in part by reference to property (including real property) owned by a person, and that property may be ordered to be available to authorities to satisfy the unexplained wealth order.³⁵

35 See the definition of 'property' in section 338 of the POC Act; see also SOC, [80]; see also section 179S of the POS Act.

1.249 A limitation on the right to privacy will be permissible under international human rights law where it addresses a legitimate objective, is rationally connected to that objective and is a proportionate means of achieving that objective.

1.250 The statement of compatibility states that the amendments in schedules 2 and 3 support 'the important objective of ensuring that criminals are not able to profit from their crimes and are deterred from further criminal activity'.³⁶ This would appear to be a legitimate objective for the purposes of international human rights law. However, insofar as unexplained wealth restraining orders and unexplained wealth orders may apply in circumstances where a person has not been convicted of any crime, it is not clear whether the measures are rationally connected to this objective.

1.251 As to proportionality, the statement of compatibility identifies the following safeguards:

- courts may refuse to make an unexplained wealth restraining order, a preliminary unexplained wealth order or an unexplained wealth order if there are not reasonable grounds to suspect that a person's total wealth exceeds by \$100,000 or more the value of their wealth that was 'lawfully acquired';³⁷
- a court may refuse to make an unexplained wealth restraining order or unexplained wealth order if the court is satisfied that it is not in the public interest to make the order;³⁸
- courts may also exclude property from the scope of some of these orders or revoke these orders in a range of situations, including where it is in the public interest or the interests of justice to do so;³⁹ and
- courts may also make orders relieving dependents from hardship caused by unexplained wealth orders⁴⁰ and allow for reasonable expenses to be paid out of funds restrained under unexplained wealth restraining orders.⁴¹

36 SOC, [80].

37 Sections 20A(4); 179B(4) and 179E(6) of the POC Act.

38 Sections 20A(4) and 179E(6) of the POC Act.

39 Sections 24A, 29A, 42 and 179C of POC Act.

40 Section 179L of the POC Act.

41 Section 24 of the POC Act.

1.252 The statement of compatibility also emphasises that proceeds of crime authorities are bound by an obligation to act as model litigants, which requires the authorities to act honestly and fairly in handling litigation under the POC Act.⁴²

1.253 Notwithstanding these safeguards, questions remain as to the proportionality of the measure in circumstances where a person has not been convicted of a criminal offence. It is also noted that some of the safeguards identified in the statement of compatibility, such as the ability to allow reasonable expenses to be paid out of funds restrained pursuant to unexplained wealth restraining orders, and the ability to refuse to make orders if the court is satisfied it is not in the public interest to do so, are discretionary.⁴³ This raises questions as to whether there may be other, less rights restrictive, means of achieving the objective. For example, a mandatory rather than discretionary requirement for a court to refuse to make an unexplained wealth order when particular circumstances apply would appear to be a less rights restrictive approach.

Committee comment

1.254 The preceding analysis indicates that the measures in schedules 2 and 3 of the bill may engage and limit the right to privacy.

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

- **whether the measures in schedules 2 and 3 are rationally connected (that is, effective to achieve) the legitimate objective of the measures; and**
- **the proportionality of the limitation on the right to privacy (including whether the safeguards in the POC Act referred to in the statement of compatibility are the least rights restrictive means of achieving the objective).**

Information gathering powers under the national cooperative scheme on unexplained wealth – Schedule 4

1.256 Schedule 4 of the bill allows specified officers in territories and participating states to apply for production orders, which would require a person to produce or make available documents relevant to identifying, locating or quantifying property of a person for the purposes of unexplained wealth proceedings that have commenced or deciding whether to institute such proceedings.⁴⁴ Such orders can only require

42 SOC, [82].

43 Section 24(1) of the POC Act. In contrast, the court *must* relieve certain dependants from hardship caused by unexplained wealth orders if certain criteria are satisfied: section 179L(1).

44 See Schedule 4, section 1 of proposed Part 1 of Schedule 1 of the POC Act. Documents relevant to identifying or locating any document necessary for the transfer of property and documents that would assist in the reading or interpretation of documents referred to in section 1(6)(a) and (b) would also be subject to production orders: section 1(6)(c).

production of documents that are in the possession, or under the control, of a corporation or are used, or intended to be used, in the carrying on of a business.⁴⁵

1.257 A person is not excused from producing or making available a document made under such an order on the ground that producing the document would tend to incriminate the person or expose the person to a penalty.⁴⁶ In this respect, a 'use immunity' is provided, such that any document produced or made available is not admissible in evidence in a criminal proceeding against the person except for the offences of giving false or misleading information or documents under the *Criminal Code*.⁴⁷ However, no derivative use immunity is provided.⁴⁸

1.258 A person who obtains information as a direct result of the exercise of the production order power or function may disclose the information to a number of specified authorities for a number of specified purposes, if the person believes on reasonable grounds that the disclosure will serve that purpose and a court has not made an order prohibiting disclosure.⁴⁹ This includes disclosure to authorities of a state or territory for the purposes of engaging in proceedings under the state or territory law; disclosure to an 'authority of the Commonwealth with one or more functions under [the POC] Act' for the purpose of 'facilitating the authority's performance of its functions under this Act'; disclosure to authorities of the commonwealth, state or territory to assist in the prevention, investigation or prosecution of an offence against that law that is punishable on conviction by imprisonment for at least three years; and disclosure to the Australian Taxation Office for the purpose of protecting public revenue.⁵⁰

Compatibility of the measures with the right not to incriminate oneself

1.259 As noted earlier, 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.⁵¹

1.260 The statement of compatibility does not acknowledge that the proposed production orders powers engage and limit the right not to incriminate oneself. Instead, the statement of compatibility states in general terms that the proceeds are

45 See Schedule 4, section 1(3)(b)-(c) of proposed Part 1 of Schedule 1 of the POC Act.

46 See Schedule 4, section 5(1)(a) of proposed Part 1 of Schedule 1 of the POC Act.

47 See Schedule 4, section 5(2) of proposed Part 1 of Schedule 1 of the POC Act; see also proposed section 18(3) and (4) of Part 3 of Schedule 1 of the POC Act.

48 See Schedule 4, section 18(3) and (4) of proposed Part 3 of Schedule 1 of the POC Act. A derivative use immunity would prevent information or evidence indirectly obtained from being used in criminal proceedings against the person.

49 See Schedule 4, section 18 of proposed Part 3 of Schedule 1 of the POC Act.

50 See Schedule 4, section 18(2) of proposed Part 3 of Schedule 1 of the POC Act.

51 International Covenant on Civil and Political Rights, Article 14(3)(g).

civil proceedings only and are not criminal in nature, with the result that the bill does not engage the specific guarantees relating to the determination of criminal charges in the ICCPR.⁵² However, by requiring a person to produce or make available documents notwithstanding that to do so might tend to incriminate that person, schedule 4 engages and limits the right not to incriminate oneself.

1.261 The right not to incriminate oneself may be subject to permissible limitations where the limitation pursues a legitimate objective, is rationally connected to that objective and is a proportionate way of achieving that objective.

1.262 The explanatory memorandum explains that overriding the privilege against self-incrimination is appropriate because 'criminals regularly seek to hide their ill-gotten gains behind a web of complex legal, contractual and business arrangements'.⁵³ The measure therefore appears to address a substantial and pressing concern and is likely to be a legitimate objective for the purposes of international human rights law. The explanatory memorandum also states that requiring the production of documents is 'necessary to enable law enforcement to effectively trace, restrain and confiscate unexplained wealth amounts'. This suggests the measure is also rationally connected to this objective.

1.263 The availability of use and derivative use immunities can be one important factor in determining whether the limitation on the right not to incriminate oneself is proportionate. While a 'use' immunity is provided in the bill, no 'derivative use' immunity is provided (which would prevent information or evidence indirectly obtained from being used in criminal proceedings against the person). The lack of a 'derivative use' immunity raises questions about whether the measure is the least rights restrictive way of achieving its objective.

1.264 The explanatory memorandum emphasises that the production orders can only require the production of documents that are in the possession, or under the control, of a corporation, or are used, or intended to be used, in the carrying on of a business. That is, they do not require production of documents in the custody of an individual which relate to the affairs of an individual.⁵⁴ The explanatory memorandum explains that the bill does not compel production of documents in the custody of an individual which relate to the affairs of the individual because no derivative use immunity has been conferred.⁵⁵ While this information provided in the explanatory memorandum is useful and may constitute a relevant safeguard in relation to the scope of the powers, it is not sufficient as it does not provide an assessment of whether the limitation on human rights is permissible. As set out in

52 SOC, [62].

53 Explanatory memorandum (EM), [205]-[206].

54 EM, [190]-[191].

55 EM, [191].

the committee's *Guidance Note 1*, the committee's expectation is that statements of compatibility read as stand-alone documents, as the committee relies on the statement as the primary document that sets out the legislation proponent's analysis of the compatibility of the bill with Australia's international human rights obligations.

Committee comment

1.265 The preceding analysis raises questions as to the compatibility of the abrogation of the privilege against self-incrimination with the right not to incriminate oneself in Article 14(3)(g) of the ICCPR.

1.266 The committee seeks the advice of the minister as to whether the measures are a proportionate means of achieving the stated objective. This includes information as to whether a 'derivative use' immunity is reasonably available as a less rights restrictive alternative.

1.267 The committee reiterates its position set out in *Guidance Note 1* that a statement of compatibility should read as a stand-alone document and that all issues relating to compatibility with human rights should be addressed in the statement of compatibility.

Compatibility of the measure with the right to privacy

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

1.269 As noted above, the documents that can be subject to the production orders are limited to those documents in possession of a corporation that are used in the carrying on of a business. However, it appears possible that such documents may involve the disclosure of personal information about a person in relation to, for example, the carrying on of a business. If the disclosure to authorities of documents that are produced as a result of compulsory production orders involves the disclosure of personal information, this would engage and limit the right to privacy.

1.270 The statement of compatibility acknowledges that the power to compel persons to produce documents and power to disclose those documents to specified authorities engages the right to privacy.⁵⁶ Limitations on the right to privacy will be permissible where they are not arbitrary such that they pursue a legitimate objective, are rationally connected to that objective and are a proportionate means of achieving that objective.

1.271 The statement of compatibility explains that the limitation on the right to privacy 'is aimed at disrupting and combating serious and organised crime'.⁵⁷ This is

56 SOC, [67].

57 SOC, [68].

likely to be a legitimate objective for the purposes of international human rights law. The statement of compatibility also explains that the measure would facilitate information sharing programs between commonwealth, state and territory agencies whose functions relate to unexplained wealth, which would appear to be rationally connected to this objective.

1.272 As to proportionality, the statement of compatibility explains that information obtained from the orders is protected by a use (but not derivative use) immunity, such that evidence obtained from a production order against a person will not be admissible in criminal proceedings against a person. This is a relevant but limited safeguard in relation to the right to privacy. The statement of compatibility further notes that information obtained from production orders can only be disclosed to specific authorities where a person believes on reasonable grounds that the disclosure will serve a specified purpose, and will be overseen by the Parliamentary Joint Committee on Law Enforcement.⁵⁸

1.273 However, in order to constitute a proportionate limitation on the right to privacy, a limitation must only be as extensive as is strictly necessary. Notwithstanding the safeguards described in the previous paragraph, questions remain as to the breadth of the purposes for which information may be disclosed by a person to authorities. For example, information may be disclosed to an 'authority of the commonwealth with one or more functions under [the POC] Act' for the broad purpose of 'facilitating the authority's performance of its functions under this Act'.⁵⁹ It is not clear from the information provided what this may entail, and whether it is strictly necessary to include such a broad purpose of disclosure. It is also unclear what safeguards are in place with respect to the use, storage and retention of information obtained pursuant to production orders.

Committee comment

1.274 The preceding analysis raises questions as to the compatibility of the information gathering powers with the right to privacy.

1.275 The committee seeks the advice of the minister as to the proportionality of the limitation on the right to privacy (including whether the measure is sufficiently circumscribed and whether there are safeguards in place with respect to the use, disclosure, storage and retention of information obtained pursuant to production orders).

Information sharing provisions – amendments to TIA Act – Schedule 6

1.276 Currently, lawfully intercepted information and interception warrant information may be used in unexplained wealth proceedings only where the

58 SOC, [69-[71].

59 See Schedule 4, section 18(2) of proposed Part 3 of Schedule 1 of the POC Act.

proceedings are 'in connection with the commission of a prescribed offence'.⁶⁰ Similarly, agencies may only 'deal' in interception information for certain prescribed purposes and proceedings, which does not currently include unexplained wealth provisions or proceedings.⁶¹ Schedule 6 of the bill would allow officers in Commonwealth, territory and participating state agencies to use, record or communicate lawfully intercepted information or interception warrant information under the *Telecommunications (Interception and Access) Act 1979* (TIA Act) for purposes connected with unexplained wealth proceedings, without having to show a link to a prescribed offence. This amendment would override the general prohibition in the TIA Act on using, disclosing, recording and giving in evidence lawfully intercepted information.⁶²

1.277 It would also amend section 68 of the TIA Act to allow the chief officer of an agency to communicate lawfully intercepted information to the relevant Commissioner of Police if it relates to the unexplained wealth provisions of that jurisdiction.⁶³

Compatibility of the measure with the right to privacy

1.278 As the TIA Act was legislated prior to the establishment of the committee, the scheme has never been required to be subject to a foundational human rights compatibility assessment in accordance with the terms of the *Human Rights (Parliamentary Scrutiny) Act 2011*. A full human rights assessment of proposed measures which extend or amend existing legislation requires an assessment of how such measures interact with the existing legislation. The committee is therefore faced with the difficult task of assessing the human rights compatibility of an amendment to the TIA Act without the benefit of a foundational human rights assessment of the Act.

1.279 As noted earlier, the right to privacy includes the right to respect for private and confidential information, particularly the storing, use and sharing of such information. It also includes the right to control the dissemination of information about one's private life. As acknowledged in the statement of compatibility, schedule 6 of the bill engages and limits the right to privacy by allowing officers in Commonwealth, territory and participating state agencies to use, record or communicate lawfully intercepted information or interception warrant information

60 See section 5B(1)(b) of the *Telecommunications (Interception and Access) Act 1979*.

61 'Dealing' for permitted purposes in relation to an agency allows an officer or staff member of an agency, for a permitted purpose, or permitted purposes, in relation to the agency and for no other purpose, to communicate to another person, make use of, or make a record of specified information: see section 67 of the TIA Act.

62 See item 2 of Schedule 6, proposed sections 5B(1)(be) and (bf) of the bill.

63 See item 7 and 8 of Schedule 6, proposed section 68(c)(ia) of the bill.

for a purpose connected with unexplained wealth proceedings.⁶⁴ This may include private communications, including potentially the content of private telephone conversations and emails.

1.280 The statement of compatibility explains that the legitimate objective of the amendments is to ensure 'law enforcement authorities are in a position to effectively combat serious and organised crime' in circumstances where covert movement of funds often occurs across state and territory borders.⁶⁵ While this may be capable of constituting a legitimate objective for the purposes of international human rights law, further information is required as to how it addresses a pressing and substantial concern in the context of the proposed measure. In this respect, the statement of compatibility does not fully address whether there is a gap in existing abilities to combat serious or organised crime or why the expanded powers are needed. It is also unclear from the information provided how the expanded information-sharing arrangements between law enforcement agencies will be effective to achieve (that is, rationally connected) to the stated objective.

1.281 As to proportionality, the statement of compatibility identifies safeguards in the TIA Act relating to disclosure and other protections under that Act. The statement of compatibility identifies the following safeguards:

- restrictions that prevent Australian law enforcement, anti-corruption, and national security agencies from accessing communications⁶⁶ and telecommunications data⁶⁷ except for proper purposes under a warrant or authorisation;
- prohibitions on a range of people associated with the telecommunications industry, such as employees of carriers and emergency call service people, from disclosing any information or document relating to a communication, which includes telecommunications data; and
- requirements that an authorised officer must consider the privacy of a person before authorising disclosure of particular information, or that

64 SOC, [72]-[75].

65 SOC, [73].

66 'Communication' is defined in section 5 of the TIA Act as 'conversation and a message, and any part of a conversation or message, whether: (a) in the form of: (i) speech, music or other sounds; (ii) data; (iii) text; (iv) visual images, whether or not animated; or (v) signals; or (b) in any other form or in any combination of forms.' See also, TIA Act section 46.

67 'Telecommunications data' refers to metadata rather than information that is the content or substance of a communication: see section 172 of the TIA Act

persons who issue warrants must consider the privacy of persons affected by those warrants.⁶⁸

1.282 The statement of compatibility also states that the TIA Act already allows for the communication of lawfully intercepted information or interception warrant information relevant to certain forfeiture matters, and that the amendments in the bill 'merely extend the existing disclosure laws to ensure that they cover information relevant to unexplained wealth proceedings'.⁶⁹

1.283 However, there are questions as to whether the safeguards identified in the statement of compatibility are sufficient for the purposes of international human rights law. The safeguards identified in the statement of compatibility relating to warranted access to information are found in Chapters 2 and 3 of the TIA Act. The committee has not previously considered chapters 2 and 3 of the TIA Act in detail. The committee has previously noted, however, that while the warrant regime may assist to ensure that access to private communications is sufficiently circumscribed, the use of warrants does not provide a complete answer as to whether chapters 2 and 3 of the TIA Act constitute a proportionate limit on the right to privacy, as questions arise as to the proportionality of the broad access that may be granted in relation to 'services' or 'devices' under these chapters of the TIA Act.⁷⁰ This would be of particular relevance in the context of the present amendments as there would be no requirement to show a link to a prescribed offence before using the information.

1.284 Accordingly, further information from the minister in relation to the human rights compatibility of the TIA Act would assist a human rights assessment of the proposed measures in the context of the TIA Act.

1.285 Further, as noted above, in order for a limitation on the right to privacy to be proportionate, it must be no more extensive than is strictly necessary. In this respect, the statement of compatibility does not fully address why the expanded information sharing powers are necessary or why the current law is insufficient to address the stated object of the measure. This raises concerns that the measure may not be sufficiently circumscribed such as to constitute a proportionate limitation on the right to privacy.

Committee comment

1.286 The committee notes that the *Telecommunications (Interception and Access) Act 1979* (TIA Act) was legislated prior to the establishment of the committee and has not been the subject of a foundational human rights analysis.

68 SOC, [76].

69 SOC, [77].

70 See Parliamentary Joint Committee on Human Rights, *Report 9 of 2016* (22 November 2016) p. 5; *Report 1 of 2017* (16 February 2017) pp. 35-44.

1.287 In light of the human rights concerns regarding the scope of powers under the TIA Act, the preceding analysis raises questions as to whether the amendments to the TIA Act introduced by the bill are compatible with the right to privacy.

1.288 The committee therefore seeks the advice of the minister as to the compatibility with the right to privacy of allowing officers in Commonwealth, territory and participating state agencies to use, record or communicate lawfully intercepted information or interception warrant information under the TIA Act in an unexplained wealth proceeding without having to show a link to a prescribed offence, including:

- 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 for the achievement of that objective (including whether the measure is necessary and sufficiently circumscribed and whether it is accompanied by adequate and effective safeguards); and
- whether an assessment of the TIA Act could be undertaken to determine its compatibility with the right to privacy (including in respect of matters previously raised by the committee).

Advice only

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

Banking System Reform (Separation of Banks) Bill 2018

Purpose	Seeks to make a range of reforms to the banking sector, including to limit the activities of banks and to establish a joint parliamentary committee to oversee the Australian Prudential Regulation Authority
Legislation proponent	The Hon Bob Katter MP
Introduced	House of Representatives, 25 June 2018
Rights	Privacy; liberty; quality of law (see Appendix 2)
Status	Advice only

Offence provisions

1.290 A number of provisions in the bill seek to introduce offences that each carry a maximum penalty of five years' imprisonment or 1,190 penalty units (\$249,900), or both.¹ These offences may apply to individuals.

Compatibility of the measure with human rights

1.291 Article 9 of the International Covenant on Civil and Political Rights (ICCPR) protects the right to liberty, including the right not to be arbitrarily detained. The prohibition on arbitrary detention requires that the state should not deprive a person of their liberty except in accordance with law. The notion of 'arbitrariness' includes elements of inappropriateness, injustice and lack of predictability. The UN Human Rights Committee has noted that any substantive grounds for detention 'must be prescribed by law and should be defined with sufficient precision to avoid overly broad or arbitrary interpretation or application'.²

1.292 As the offence provisions in the bill provide for a term of imprisonment, they engage and limit the right to liberty. Under international human rights law, limitations on the right to liberty may be permissible where they are reasonable, necessary and proportionate in the individual case. In these circumstances, deprivation of liberty will not generally constitute arbitrary detention.

1 See proposed subsections 10(2); 12(2); 14(14) and 14(16).

2 United Nations Human Rights Committee, *General Comment No. 35: Article 9 (Liberty and Security of persons)*, (16 December 2014) [22].

1.293 However, human rights standards require that interferences with rights must have a clear basis in law. This principle includes the requirement that laws must satisfy the 'quality of law' test, which means that any measures which interfere with human rights must be sufficiently certain and accessible, such that people are able to understand when an interference with their rights will be justified.

1.294 As drafted, the offence provisions in the bill, which carry potential terms of imprisonment, may lack sufficient certainty. It is unclear from the proposed offences the scope of conduct that may be captured by the offence provisions.³

1.295 However, the statement of compatibility does not identify that the proposed offences engage and limit the right to liberty and instead states that the bill 'does not engage any of the applicable rights or freedoms'.⁴ The statement therefore does not provide an assessment as to whether the measure is compatible with the right to liberty in accordance with the committee's *Guidance Note 1*.

Requirement for APRA to provide documents

1.296 Subsection 14(15) of the bill provides that the Australian Prudential Regulation Authority (APRA) shall provide to the Australian Federal Police, state police and law enforcement bodies any documents, information or data requested by such bodies regarding any bank under APRA's regulatory supervision or which may come to the attention of APRA and which may evidence a breach of Australian law. A person commits an offence if they evade or attempt to evade subsection 14(15) or the person is an officer, employee or agent of APRA and knowingly participates in such a violation.⁵

Compatibility of the measure with the right to privacy

1.297 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. To the extent that the requirement to provide documents extends to APRA providing information or documents, which may include personal or confidential information, the proposed measure engages and may limit the right to privacy.

1.298 The right to privacy may be subject to permissible limitations which are provided by law and are not arbitrary. In order for limitations not to be arbitrary, they must seek to achieve a legitimate objective and be rationally connected (that is, effective to achieve) and proportionate to that objective. As noted above, the statement of compatibility does not acknowledge that any human rights are engaged

3 See, for example, proposed subsection 10(2) and subsection 12(2).

4 Explanatory memorandum, statement of compatibility, p. [10].

5 See subsection 14(16) of the bill.

by the bill and accordingly does not provide an assessment as to the compatibility of the measure with the right to privacy.

Committee comment

1.299 The committee draws the human rights implications of the bill in respect of the right to liberty, the right to privacy and the quality of law test to the attention of the legislation proponent and the parliament.

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

Freedom of Speech Legislation Amendment (Censorship) Bill 2018

Freedom of Speech Legislation Amendment (Insult and Offend) Bill 2018

Freedom of Speech Legislation Amendment (Security) Bill 2018

Purpose	Repeal and amend certain restrictions on communication in Commonwealth laws in relation to broadcasting and online services; the classification of films, publications and computer games; offensive or insulting conduct; and the disclosure of information
Legislation Proponent	Senator Leyonhjelm
Introduced	Senate, 25 June 2018
Rights	Freedom of expression; equality and non-discrimination; rights of the child; privacy (see Appendix 2)
Status	Advice only

Amending and removing certain restrictions on communication

1.301 The Freedom of Speech Legislation Amendment (Censorship) Bill 2018 (censorship bill), Freedom of Speech Legislation Amendment (Insult and Offend) Bill 2018 (insult and offend bill) and the Freedom of Speech Legislation Amendment (Security) Bill 2018 (security bill) (the bills) are part of a suite of four bills which seek to repeal or amend various provisions in Commonwealth laws which restrict communication.¹ The proposed amendments include:

1 The committee previously addressed the human rights compatibility of the fourth bill, namely, the Racial Discrimination Law Amendment (Free Speech) Bill 2016, in its *Report 2 of 2017*, by reference to its comments in its inquiry into freedom of speech in Australia: Parliamentary Joint Committee on Human Rights, *Report 2 of 2017* (21 March 2017) p. 1; Parliamentary Joint Committee on Human Rights, *Freedom of speech in Australia: Inquiry into the operation of Part IIA of the Racial Discrimination Act 1975 (Cth) and related procedures under the Australian Human Rights Commission Act 1986 (Cth)* (28 February 2017). For more information on this inquiry, see the inquiry website at: http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights_inquiries/FreedomspeechAustralia.

- removing provisions in 23 Commonwealth Acts which prohibit 'offensive or insulting' language and conduct;²
- restricting the scope and operation of the disclosure offences in the *Australian Security Intelligence Organisation Act 1979*, *Crimes Act 1914* and *Criminal Code Act 1995*;³
- excluding from the 'Refused Classification' (RC)⁴ category publications, films or computer games which advocate terrorism;⁵
- restricting the RC classification to publications, films and computer games which:
 - depict or describe, in a way that is likely to cause offence to a reasonable adult, a person who is, or appears to be, a minor engaged in sexual activity; or
 - promote crime, or incite or instruct in matters of crime;⁶
- repealing the prohibition on the possession, control and supply of certain materials in certain areas of the Northern Territory in part 10 of the Classification (Publications, Films and Computer Games) Act 1995 (Classification Act);⁷

2 Insult and Offend Bill.

3 Security Bill.

4 Under the National Classification Code, publications, films and computer games that are classified as RC depict, express or otherwise deal with matters of sex, drug misuse or addiction, crime, cruelty, violence or revolting or abhorrent phenomena in such a way that they offend against the standards of morality, decency and propriety generally accepted by reasonable adults to the extent that they should not be classified; or describe or depict in a way that is likely to cause offence to a reasonable adult, a person who is, or appears to be, a child under 18 (whether the person is engaged in sexual activity or not); or promote, incite or instruct in matters of crime or violence: National Classification Code, section 2, item 1; section 3, item 1; section 4, item 1. In addition, section 9A of the Classification Act requires publications, films or computer games that advocate terrorism to be classified as RC. Materials that are classified as RC cannot be sold, hired, advertised or legally imported in Australia. See Department of Communications and the Arts, *Refused Classification (RC)* at <http://www.classification.gov.au/Guidelines/Pages/RC.aspx>.

5 Censorship Bill, schedule 1, item 4.

6 Censorship Bill, schedule 1, item 2.

7 Censorship Bill, schedule 1, clause 7.

- permitting subscription television broadcasting licensees and online content services to facilitate access to content classified as Restricted (X 18+),⁸ and, in relation to online services, 'Category 1 Restricted'⁹ and 'Category 2 Restricted' material,¹⁰ provided access is subject to a restricted access system;¹¹ and
- removing the ban on broadcasting electoral advertising immediately prior to elections.¹²

Compatibility of the measures with human rights

1.302 The right to freedom of expression protects the communication of information or ideas through any medium, including written and oral communications, the media, public protest, broadcasting, artistic works and commercial advertising.¹³ As acknowledged by the statements of compatibility, the measures in all three bills engage the right to freedom of expression.¹⁴

1.303 The committee has previously examined the compatibility of particular disclosure offences and particular provisions prohibiting offensive or insulting conduct with human rights, and has considered that such provisions engage and limit

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- 8 National Classification Code, section 3, item 2. Under the code, films that are classified as X 18+ are unsuitable for minors to see and contain real depictions of actual sexual activity between consenting adults in which there is no violence, sexual violence, sexualised violence, coercion, sexually assaultive language, or fetishes or depictions which purposefully demean anyone involved in that activity for the enjoyment of viewers, in a way that is likely to cause offence to a reasonable adult. X 18+ films are currently only available for sale or hire in the ACT and Northern Territory: Department of Communications and the Arts, *Restricted (X 18+)* at <http://www.classification.gov.au/Guidelines/Pages/X18+.aspx>.
- 9 National Classification Code, section 2, item 3. Under the code, Category 1 Restricted publications explicitly depict nudity, or describe or impliedly depict sexual or sexually related activity between consenting adults, in a way that is likely to cause offence to a reasonable adult, or describe or express in detail violence or sexual activity between consenting adults that is likely to cause offence to a reasonable adult, or are unsuitable for a minor to see or read.
- 10 National Classification Code, section 2, item 2. Under the code, Category 2 Restricted publications explicitly depict sexual or sexually related activity between consenting adults in a way that is likely to cause offence to a reasonable adult, or depict, describe or express revolting or abhorrent phenomena in a way that is likely to cause offence to a reasonable adult and are unsuitable for a minor to see or read.
- 11 Censorship Bill, schedule 2, clause 2.
- 12 Censorship Bill, schedule 3.
- 13 International Covenant on Civil and Political Rights, article 19(2).
- 14 Censorship Bill, statement of compatibility (SOC), p. 13; Insult and Offend Bill, SOC, p. 14; Security Bill, SOC, p. 23.

the right to freedom of expression.¹⁵ While the right to freedom of expression may be subject to permissible limitations providing particular criteria are met, measures which remove or limit provisions which restrict communication, such as those contained in these bills, engage and may promote the right to freedom of expression.

1.304 However, the statements of compatibility do not address other rights potentially engaged by the bills, including the rights of children, the right to privacy and the right to equality and non-discrimination, and accordingly do not provide an assessment as to whether the measures in each bill are compatible with these rights. For example, in relation to the Censorship Bill:

- the proposed repeal of part 10 of the Classification Act engages a number of human rights, including the right to equality and non-discrimination to the extent that the current measures disproportionately affect Aboriginal and Torres Strait Islander people;¹⁶ and
- the proposed narrowing of the RC classification for films, publications and computer games may engage the rights of children and the obligation on states to take all appropriate legislative measures to protect children from all forms of physical or mental violence, injury or abuse,¹⁷ to the extent that the

15 Regarding disclosure offences see, for example, Parliamentary Joint Committee on Human Rights, National Security Legislation (Amendment (Espionage and Foreign Interference) Bill) 2017, *Report 2 of 2018* (13 February 2018) pp. 2-11; and *Report 3 of 2018* (27 March 2018) pp. 213-236; Australian Border Force Amendment (Protected Information Bill) 2017, *Report 9 of 2017* (5 September 2017) pp. 6-12; and *Report 11 of 2017* (17 October 2017) pp. 72-83; Australian Border Force Bill 2015, *Twenty-second Report of the 44th Parliament* (13 May 2015) pp. 18-23; and *Thirty-seventh Report of the 44th Parliament* (19 April 2016) pp. 34-35; National Security Legislation Amendment Bill (No 1) 2014, *Thirteenth Report of the 44th Parliament*, pp. 6-13; and *Sixteenth Report of the 44th Parliament* (November 2014) pp. 55-57. In relation to provisions prohibiting offensive or insulting conduct see, for example, Parliamentary Joint Committee on Human Rights, National Integrity Commission Bill 2017, *Report 12 of 2017* (28 November 2017) pp. 94-95, National Integrity Commission Bill 2013, *First Report of the 44th Parliament* (10 December 2013) pp. 44-45 and *Report 8 of 2016* (9 November 2016), pp. 45-46; Veterans' Affairs Legislation Amendment (Mental Health and Other Measures) Bill 2014, *Sixth Report of the 44th Parliament* (May 2014) pp. 33-36; *Ninth Report of the 44th Parliament* (July 2014) pp. 110-112; and *Eleventh Report of 44th Parliament* (September 2014), pp. 38-39.

16 In the committee's examinations of the Stronger Futures in the Northern Territory Act 2012 in 2013 and 2016, it considered that the legislation could not properly be characterised as 'special measures' under the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), because the measures criminalised the conduct of some members of the group to be benefitted: Parliamentary Joint Committee on Human Rights, *Eleventh Report of 2013* (June 2013) pp. 21-28; *2016 Review of Stronger Futures Measures* (16 March 2016) pp. 3, 22.

17 Convention on the Rights of the Child (CRC), article 19(1).

current RC classification deters the production and distribution of material involving the abuse of children.¹⁸

Committee comment

1.305 The committee draws the human rights implications of the bills to the attention of the legislation proponent and the parliament.

1.306 If the bills proceed to further stages of debate, the committee may request information from the legislation proponent with respect to the compatibility of each bill with human rights.

18 Censorship Bill, schedule 1, item 2.

Bills not raising human rights concerns

1.307 Of the bills introduced into the Parliament between 25 and 28 June, the following did not raise human rights concerns (this may be because the bill does not engage or promotes human rights, and/or permissibly limits human rights):

- Commonwealth Inscribed Stock Amendment (Restoring the Debt Ceiling) Bill 2018;
- Customs Tariff Amendment (Incorporation of Proposals) Bill 2018;
- Export Control Amendment (Equine Live Export for Slaughter Prohibition) Bill 2018;
- Fair Work Amendment (A Living Wage) Bill 2018;
- Fair Work Amendment (Restoring Penalty Rates) Bill 2018;
- Family Law Amendment (Family Violence and Cross-examination of Parties) Bill 2018;
- Legislation Amendment (Sunsetting Review and Other Measures) Bill 2018;
- Regional, Rural and Remote Education Commissioner Bill 2018;
- Telecommunications Amendment (Giving the Community Rights on Phone Towers) Bill 2018;
- Telecommunications Legislation Amendment Bill 2018;
- Therapeutic Goods Amendment (2018 Measures No. 1) Bill 2018; and
- Treasury Laws Amendment (Financial Sector Regulation) Bill 2018.

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**.

Defence (Inquiry) Regulations 2018 [F2018L00316]

Purpose	Prescribes matters providing for, and in relation to, inquiries concerning the Defence Force. This includes two flexible inquiry formats: Commission of Inquiry and Inquiry Officer Inquiry. These formats consolidate and replace the five forms of inquiry allowed under the previous <i>Defence Force (Inquiry) Regulations 1985</i>
Portfolio	Defence
Authorising legislation	<i>Defence Act 1903</i>
Last day to disallow	15 sitting days after tabling (tabled House of Representatives 26 March 2018; tabled Senate 21 March 2018)
Rights	Privacy; fair trial; not to incriminate oneself; presumption of innocence (see Appendix 2)
Previous report	5 of 2018
Status	Concluded examination

Background

2.3 The committee first reported on the regulations in its *Report 5 of 2018*, and requested a response from the Minister for Defence by 4 July 2018.¹

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

Coercive evidence-gathering powers

2.5 Sections 30 and 32 of the regulations provide that a person who fails or refuses to attend as a witness to give evidence before a commission of inquiry (COI),²

1 Parliamentary Joint Committee on Human Rights, *Report 5 of 2018* (19 June 2018) pp. 2-10.

or fails or refuses to answer questions before a COI, commits an offence punishable by 20 penalty units.³ Similarly, a person commits an offence punishable by 20 penalty units if a person fails to comply with a notice to produce documents or things relevant to a COI.⁴ Similar offence provisions are introduced for members of the Defence Force who fail or refuse to comply with a notice to attend as a witness to give evidence, who fail or refuse to produce a document or thing, or who refuse to answer questions, in relation to an inquiry officer (IO) inquiry.⁵

2.6 Subsections 38(1) and 67(1) respectively provide that an individual appearing as a witness before a COI or IO is not excused from answering a question on the ground that the answer to the question might tend to incriminate the individual.⁶

2.7 However, an individual is not required to answer a question if the answer might tend to incriminate the individual in respect of an offence with which the individual has been charged, where the relevant charge has not been finally dealt with by a court or otherwise disposed of.⁷ Additionally, section 124(2C) of the *Defence Act 1903* (Defence Act) provides that a statement or disclosure made by a witness in the course of giving evidence before an inquiry is not admissible in evidence against the witness other than in proceedings relating to the giving of false testimony.⁸

Compatibility of the measure with the right not to incriminate oneself

2.8 Specific guarantees of the right to fair trial in the determination of a criminal charge, guaranteed by article 14 of the International Covenant on Civil and Political Rights (ICCPR), include the right not to incriminate oneself (article 14(3)(g)). Subsections 38(1) and 67(1) of the regulations engage and limit this right by requiring

2 Commissions of Inquiry are a consolidation of the four higher-level inquiry formats under the former Defence (Inquiry) Regulations 1985 – General Courts of Inquiry, Boards of Inquiry, Combined Boards of Inquiry and Chief of the Defence Force (CDF) Commissions of Inquiry: see Explanatory Statement (ES) p.8. COIs are used for higher level matters that are particularly complex and sensitive: see ES p.1.

3 Persons can be required to attend to give evidence following a written notice from the president of the commission of inquiry, if the president reasonably believes that a person has information that is relevant to the commission's inquiry: section 19 of the regulations.

4 Pursuant to a notice issued under section 18 of the regulations.

5 Sections 53, 61 and 62 of the regulations. 'Inquiry officer' inquiries are used to inquire into more routine matters. See ES p.1.

6 It is noted that this applies to oral testimony only, and the privilege against self-incrimination applies to the provision of documents: see sections 124(2A) and (2C) of the *Defence Act 1903*. See also p. 29 of the ES.

7 Sections 38(2) and 67(2) of the regulations.

8 Section 124(2C) of the *Defence Act 1903* (Defence Act); see the note to sections 38 and 67 of the regulations.

that a person answer questions notwithstanding that to do so might tend to incriminate that person.

2.9 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 means of achieving that objective.

2.10 As noted in the initial human rights analysis, the statement of compatibility acknowledges that the measure engages and limits the right not to incriminate oneself and states that:

The purpose of statutory inquiries under the Regulations is to facilitate command decision-making concerning the Defence Force. Ascertaining the true causes of significant events involving Defence Force members is frequently more important than possible prosecution of, or civil suit against, individuals. Compelling witnesses to provide information about an event, even though it could implicate them in wrongdoing, while also protecting the information from subsequent use in criminal or civil proceedings, is an important mechanism to obtain information.⁹

2.11 The initial analysis stated that ascertaining the true causes of significant events involving Defence Force members, and facilitating command decision-making, are likely to be legitimate objectives for the purposes of international human rights law. Compelling witnesses to attend hearings and to provide information, irrespective of whether doing so could implicate them in wrongdoing, appears to be rationally connected to that objective.

2.12 However, questions arose as to the proportionality of the measures. The statement of compatibility states that the abrogation of the privilege against self-incrimination 'is accompanied by significant protections against the use of information obtained in subsequent criminal, disciplinary and civil tribunals'.¹⁰ In this respect, a 'use' immunity is provided by subsection 124(2C) of the Defence Act, such that where a person has been required to give incriminating evidence, the statement or disclosure cannot be used directly against the person in any civil or criminal proceedings, or in any proceedings before a service tribunal.

2.13 However, no 'derivative use' immunity is provided either by the regulations or the Defence Act. This means that information or evidence obtained indirectly as a result of the person's incriminating evidence may be used in criminal proceedings against the person. While not specifically addressed in the statement of compatibility, the explanatory statement acknowledges that there is no 'derivative use' immunity available.¹¹

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

10 SOC, p.4.

11 ES, p.29; p. 47.

2.14 However, the statement of compatibility discusses in general terms why the limitation on the privilege against self-incrimination is proportionate:

The requirement that hearings of Commissions of Inquiry be held in private, and the prohibitions against the use and disclosure of certain information and documents that apply in both types of inquiries (including the application of the exemption under section 38 of the *Freedom of Information Act 1982*), constitute additional levels of protection in respect of the abrogation of the privilege against self-incrimination. For example, where an individual gives oral testimony containing incriminating evidence, subsequent use or publication of that testimony can be prohibited.¹²

2.15 These safeguards are important and relevant in determining the proportionality of the measure. However, it remained unclear why it would not be appropriate also to include a 'derivative use' immunity. In this respect, 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). Further, the availability or lack of availability of a 'derivative use' immunity needs to be considered in the regulatory context of the relevant measures. The extent of interference with the privilege against self-incrimination that may be permissible as a matter of international human rights law may, for example, be greater in contexts where there are difficulties regulating specific conduct, persons subject to the powers are not particularly vulnerable, or the powers are otherwise circumscribed with respect to the scope of information which may be sought. That is, there are a range of matters which influence whether the limitation is proportionate.

2.16 The committee therefore sought the advice of the minister as to whether the measures are a proportionate means of achieving the stated objective (including any relevant safeguards that exist in relation to ADF personnel). This included information as to whether a 'derivative use' immunity is reasonably available as a less rights restrictive alternative to ensure information or evidence indirectly obtained from a person compelled to answer questions cannot be used in evidence against that person.

Minister's response

2.17 In relation to the proportionality of the measure, the minister's response states that, while a 'derivative use' immunity is not available, there are other safeguards in the regulations that would ensure the coercive evidence-gathering powers are a proportionate means of achieving their objective. The response states that these include the requirement that inquiry hearings are conducted in private, and prohibitions on the use and disclosure of certain information and documents.

12 SOC, p. 5, this same point is made in the ES at pp. 29 and 47-48.

2.18 The response also argues that these safeguards would ensure that if a person gives evidence that may tend to incriminate them, subsequent use or publication of that evidence can be prohibited, thereby reducing the risk that the evidence could be used for other purposes (for example, by Commonwealth prosecutors and law enforcement personnel).

2.19 This information may assist the proportionality of the measures. However, it is noted that the prohibitions on the use and disclosure of evidence may be overridden by other provisions of the regulations.¹³ As discussed in more detail at [2.42]-[2.72], the regulations contain relatively broad authorisations for the use, disclosure and copying of information and documents contained in COI and IO records and reports. Consequently, the prohibitions on the use and disclosure of evidence may be insufficient, in and of themselves, to ensure that the limitation on the right to incriminate oneself is proportionate in every circumstance.

2.20 The minister's response also provides information regarding the regulatory context in which the coercive evidence-gathering powers operate, and regarding other applicable safeguards:

...an inquiry official is only empowered to gather information that is within the scope of their inquiry. The Instrument of Appointment which appoints an inquiry official will contain 'terms of reference' setting out the scope of the inquiry. An inquiry official has no power to gather incriminating evidence or information which is not relevant to, or falls outside, the scope of the inquiry, and may have their appointment terminated if they attempt to do so. Further, potentially adversely affected persons in a Commission of Inquiry have an entitlement to legal representation at Commonwealth expense. In an Inquiry Officer Inquiry, Australian Defence Force (ADF) members (who are the only individuals compellable under Part 3) have a general right of access to legal assistance at Commonwealth expense, and may request the presence of a legal officer at interviews. This enables witnesses to seek legal advice on their participation in inquiries.

2.21 This assists the proportionality of the measure, as it indicates that the information that may be obtained under the coercive evidence-gathering powers would be restricted to the terms of reference of the relevant inquiry, and that persons required to answer questions would have access to legal assistance.

2.22 Finally, the minister's response provides a brief explanation as to why a 'derivative use' immunity is not considered reasonably available as a less rights restrictive alternative:

13 For example, section 37(1) of the regulations provides that a person who is an employee of the Commonwealth or member of the Defence Force commits an offence if the person discloses certain information contained in a COI record or report. Sections 37(2) and (3) provide that this offence does not apply if the person is permitted to disclose the information under section 26, or authorised to disclose the information under section 27.

[s]ubsection 124(2C) of the *Defence Act 1903* contains the power to make regulations conferring a 'use' immunity. It does not contain the power to make regulations conferring a 'derivative use' immunity. Therefore, a 'derivative use' immunity is not currently reasonably available as a less restrictive alternative to ensure that information or evidence cannot be used indirectly against the person.

2.23 While this explains why the regulations do not currently contain a 'derivative use' immunity, it does not explain why such an immunity would not be reasonably available (that is, why such an immunity would not be appropriate in the context of the inquiry regime). This explanation is therefore insufficient to justify a limitation on the right not to incriminate oneself for the purposes of international human rights law. In this respect, it is noted that it would have been useful if the minister had addressed whether it would be possible to amend the *Defence Act* either to permit the making of regulations conferring a 'derivative use' immunity, or to include such an immunity in primary legislation.

2.24 However, there are a range of other 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 regulatory context of the proposed measures, as well as on the scope of the information that may be subject to compulsory disclosure. The minister has also provided an explanation as to the safeguards against the unauthorised use or disclosure of information obtained under the coercive evidence-gathering powers.

2.25 On balance, having particular regard to the regulatory context of the measures and the scope of the information that may be subject to compulsory disclosure, the coercive evidence-gathering powers may constitute a reasonable and proportionate limitation on the right not to incriminate oneself. However, it is noted that much may depend on the adequacy of the applicable safeguards in practice.

Committee response

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

2.27 Based on the further information provided and the above analysis, the committee considers that the measure may be compatible with the right not to incriminate oneself. However, it is noted that much may depend on the adequacy of the applicable safeguards in practice.

2.28 The committee also notes that it would have been useful if the information provided in the minister's response had been included in the statement of compatibility.

Compatibility of the measure with the right to privacy

2.29 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.

2.30 By imposing a penalty for failing to appear as a witness, or failing or refusing to answer questions, in circumstances where the witness is not afforded the privilege against self-incrimination, the measure may engage and limit the right to privacy. This is because a person may be required to disclose personal information in the course of any inquiry.

2.31 While the right to privacy may be subject to permissible limitations in a range of circumstances, the statement of compatibility does not acknowledge that the coercive evidence gathering powers may engage and limit the right to privacy. Assuming the purpose of limiting the right to privacy in this context is the same as that discussed above at [2.10] and [2.11], the initial analysis stated that this would appear to be a legitimate objective and to be rationally connected to this objective. However, further information, including information as to the extent to which a person may be required to disclose personal information as part of the coercive evidence gathering process, would assist in determining the compatibility of the measures with this right. In this respect, it was noted that the use and disclosure provisions of the regulations, discussed further below, would be relevant in determining the proportionality of the limitation on the right to privacy.

2.32 The committee therefore sought the advice of the minister as to whether the measure is a proportionate limitation on the right to privacy (including the extent to which a person may be required to disclose personal information as part of the coercive evidence gathering process, and any applicable safeguards).

Minister's response

2.33 In relation to whether the measure is a proportionate limitation on the right to privacy, the minister's response states that:

...a person would only be required to disclose personal information as part of a coercive evidence-gathering process if that information is relevant to the inquiry and within the scope of the inquiry's terms of reference. In some inquiries, such as those involving sensitive personnel matters, it is foreseeable that personal information will be relevant and may be obtained. In other inquiries, such as one following a safety incident, personal information beyond the names, ranks and locations of individuals is unlikely to be relevant and, therefore, could not be obtained.

2.34 This information assists the proportionality of the measure, as it indicates that the information that may be obtained under the coercive evidence-gathering powers would be restricted to the scope of the relevant inquiry. Additionally, and as noted above at [2.20], inquiry officials may have their appointment terminated if they attempt to gather information that falls outside that scope.

2.35 The minister's response further states that, where personal information is obtained through coercive powers, it will be subject to a number of safeguards in

relation to its subsequent use and disclosure. While these safeguards (which would appear to include the prohibitions on the use and disclosure of evidence) potentially assist with the proportionality of the measure, as noted above at [2.19] there are concerns regarding their adequacy. In particular, it is noted that the prohibitions on the use and disclosure of information may be overridden by authorisations contained elsewhere in the regulations.

2.36 The minister has also provided a copy of Chief of the Defence Force Directive 08/2014 (Directive) with her response, which provides an overview of the circumstances in which the disclosure of information may be permitted. The Directive suggests that disclosure would only be permitted in circumstances that are directly or incidentally related to the performance of a person's duties, and that wide or public disclosure would only occur in limited circumstances. Further and as outlined at [2.58] below, the minister states in her response that the Directive constitutes a general order to Defence Force members for the purposes of the *Defence Force Discipline Act 1982* (Discipline Act)—meaning that unauthorised public disclosure of inquiry records by Defence Force members may result in administrative or disciplinary action. This is likely to assist with the proportionality of the measure.

2.37 The minister's response also states that there may be circumstances where it is necessary to transmit information quickly across the defence organisation, and that in those circumstances steps would be taken to protect the privacy of individuals as far as practicable. This may potentially be relevant to the proportionality of the measure. However, the response does not identify the relevant steps which would be taken, nor does it clarify whether these steps would be based upon policies or procedures or legal requirements. To assist with the assessment as to whether the limitation on the right to privacy is permissible, it would have been useful if the minister's response had identified these steps.

2.38 On balance, noting the scope of the information that may be gathered under the coercive evidence-gathering powers, the regulatory context in which the powers would be used, and potential safeguards, it appears that the measures may constitute a reasonable and proportionate limitation on the right to privacy. However, it is noted that much may depend on the adequacy of the applicable safeguards in practice.

Committee response

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

2.40 Based on the further information provided and the above analysis, the committee considers that, on balance, the measure may be compatible with the right to privacy. However, it is noted that much may depend on the adequacy of the operation of relevant safeguards in practice.

2.41 The committee also notes that it would have been useful if the information provided in the minister's response had been included in the statement of compatibility.

Authorisations to use, disclose and copy information and documents

2.42 Section 25 provides that the president of the COI may direct that information collected in oral evidence or documents given during evidence may be prohibited from disclosure where the president is satisfied that it is necessary to do so in the interests of: the defence, security or international relations of the Commonwealth; fairness to a person who may be affected by the inquiry; or the effective conduct of the inquiry.¹⁴ It is an offence for a person to disclose information where it has been prohibited by a direction of the president.¹⁵

2.43 However, section 26 provides that a Commonwealth employee or member of the Defence Force may use, disclose and copy information and documents contained in COI records and reports in the performance of the person's duties.

2.44 Section 27 additionally provides that the minister may authorise a Commonwealth employee or a member of the Defence Force to use information and documents in COI records and reports for a specified purpose, and disclose or copy inquiry documents, records and reports.¹⁶

2.45 Section 28 provides that the minister may use, disclose and copy information and documents contained in COI records and reports. Each of these provisions (sections 26-28) apply regardless of any direction given by the president prohibiting disclosure of information under section 25.¹⁷

2.46 Sections 58, 59 and 60 set out equivalent use and disclosure provisions in relation to IO inquiries.¹⁸ However, it is noted that there is no power corresponding to section 25 to give directions prohibiting the disclosure of information in relation to IO inquiries.

Compatibility of the measure with the right to privacy

2.47 As set out above, the right to privacy includes the right to respect for private and confidential information, particularly the storing, use and sharing of such

14 Section 25 of the regulations.

15 Section 36 of the regulations.

16 Persons who are permitted to disclose information or documents pursuant to sections 26 and 27 will not commit an offence: see section 37(2) and (3) of the regulations.

17 Section 26(2), section 27(3) and section 28 of the regulations.

18 Sections 58 (use, disclosure and copying of certain information and documents as an employee of the Commonwealth or member of the Defence Force), 59 (minister may authorise use, disclosure and copying of certain information) and 60 (minister may use, disclose and copy certain information and documents) of the regulations.

information; and the right to control the dissemination of information about one's private life.

2.48 Information and documents contained in COI and IO records and reports may contain personal and sensitive information. By permitting the use, disclosure and copying of information and documents contained in COI and IO records and reports, the measures engage and limit the right to privacy. The statement of compatibility does not acknowledge that the provisions authorising the use, disclosure and copying of information and documents engage the right to privacy.

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

2.50 In particular, regarding the proportionality of the measure, there were concerns in relation to the breadth of the use and disclosure provisions, and whether they are sufficiently circumscribed. For each of the provisions, it was unclear what the extent of disclosure is. For example, providing certain conditions are met, the regulations would appear to extend to permitting public disclosure. Similarly, in relation to sections 26, 27, 58 and 59 of the regulations, the authorisation to disclose information in the course of their duties extends to an 'employee of the Commonwealth' or a 'member of the Defence Force'. This may capture a broad number of people at varying levels of rank within the public service and Defence Force. In relation to sections 27 and 59 of the regulations, it was not clear whether there are any limitations to the types of 'specified purposes' for which the minister may authorise use and disclosure of information. In relation to section 28 and 60, there did not appear to be any limit on the extent to which the minister may use, disclose or copy information and documents contained in COI records and reports.

2.51 In relation to section 26 of the regulations, it was noted that the explanatory statement explains that use, disclosure and copying occur 'in the performance of the person's duties', which provides a significant safeguard against improper use, disclosure and copying of information contained in COI records and COI reports. The explanatory statement also states that if a person were to disclose a COI record or COI report outside of their duties, that person may be subject to internal administrative or disciplinary action and the conduct may also constitute an offence under section 37 of the regulations, as well as an unauthorised disclosure for the purposes of the *Privacy Act 1988* and section 70 of the *Crimes Act 1914*. In addition, unauthorised public disclosure of a COI record or COI report may result in internal administrative or disciplinary action.¹⁹ The explanatory statement further states that the Chief of Defence Force Directive 08/2014 further enhances the safeguards in relation to sections 26 and 58, as it restricts the types of disclosures that validly fall

19 ES, p. 21.

within the scope of a person's official duties. The previous analysis stated that it would be of assistance if a copy of this directive could be provided in order to assess the human rights compatibility of the measures.

2.52 More generally, the initial analysis stated that the information provided in the explanatory statement is not sufficient as it does not provide an assessment of whether the limitation on the right to privacy is permissible. As set out in the committee's *Guidance Note 1*, the committee's expectation is that statements of compatibility read as stand-alone documents, as the committee relies on the statement as the primary document that sets out the legislation proponent's analysis of the compatibility of the bill with Australia's international human rights obligations.

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

- whether the measures pursue a legitimate objective for the purposes of international human rights law;
- whether the measures are rationally connected to (that is, effective to achieve) that objective;
- whether the measures are proportionate to achieve the stated objective, having regard to the matters addressed in [2.50] to [2.52] above; and
- whether a copy of Chief of Defence Force Directive 08/2014 as it relates to the use and disclosure provisions could be provided to the committee.

Minister's response

2.54 The minister's response provides a range of information as to the human rights compatibility of the provisions permitting the use, disclosure and copying of information and documents contained in COI and IO records and reports. The minister has also usefully provided the committee a copy of the Chief of Defence Force Directive 08/2014 (directive) as well as a replacement explanatory memorandum.

Use and disclosure in the course of a person's duties

2.55 As noted above, within their duties, Commonwealth employees and members of the Defence Force can use, disclose and copy information and documents contained in or forming part of COI and IO records and reports.²⁰ The minister's response does not specifically identify whether the measures pursue a legitimate objective for the purposes of international human rights law. However, the response provides some examples of the circumstances in which the use, disclosure and copying of information and documents may fall within the scope of a person's duties (including being incidental to the performance of those duties). These circumstances include:

20 Sections 26 and 58 of the regulations.

- a commanding officer maintaining the welfare of his or her subordinates;
- a legal officer giving legal advice to command;
- the implementation of inquiry outcomes;
- the development of certain material (for example, designing training, policy, procedures, instructions or orders);
- affording procedural fairness; and
- providing inquiry records to the Department of Veterans' Affairs to enable that department to consider a compensation claim.

2.56 These may be capable of constituting legitimate objectives for the purpose of international human rights law. However, it would have been useful if the minister's response had specifically addressed the objectives of the measure.

2.57 Insofar as it may be relevant to the performance of particular functions, authorising the use, disclosure and copying of information and documents may also be rationally connected to the particular objective.

2.58 In relation to the proportionality of the measures, the minister's response reiterates that the use, disclosure and copying of information and documents must fall within the scope of the person's duties, emphasising that this will depend on the nature of the person's position and the role of the person seeking to disclose the information. The response further states that:

[g]uidance contained in Chief of the Defence Force Directive 08/2014 (the relevant extract of which has been enclosed for the Committee's reference) states that disclosure to the public or wide disclosure within Defence is unlikely to be part of, or incidental to, a person's duties. The Directive provides general examples of different roles and functions within the ADF. A commanding officer in the ADF has functions associated with the welfare of his or her subordinates, so their performance of duties includes matters incidental to maintaining the welfare of his or her subordinates. A legal officer in the ADF has functions associated with giving legal advice to command, so their performance of duties includes matters incidental to giving the legal advice. The Directive also provides common examples of disclosures internally within and externally to Defence that may fall within the performance of a person's duties. These include internal disclosures of inquiry records to other Defence staff for the purpose of implementing inquiry outcomes, dealing with complaints, designing training, policy, procedures, instructions and orders; and affording procedural fairness.

2.59 The minister's response also states that external disclosures (that is, to entities outside of the Department of Defence or the ADF) would generally be within the duties of a dedicated liaison officer of the relevant external department or agency, and that it is unlikely that many external disclosures would be made. The response indicates that the most likely scenario is where records concerning a safety

incident are provided to the Department of Veterans' Affairs to enable consideration of compensation claims. The response further states that if an Australian Public Service employee outside the department is provided with inquiry records, that employee will also be prohibited from using, disclosing or copying inquiry records unless to do so is within the course of their employment.

2.60 This information assists with the proportionality of the measures, as it indicates that the use, disclosure and copying of documents under sections 26 and 58 would be restricted to where such actions are within the scope of or incidental to the performance of a person's functions. The information also suggests that external disclosure (including public disclosure) would only occur in limited circumstances.

2.61 The extract of the directive provided with the minister's response also contains further information regarding the protection of information and documents disclosed under sections 26 and 58 from further disclosure. For example, the Directive indicates that:

- where inquiry documents are to be disclosed to other Commonwealth, State or Territory agencies, any potential for further disclosure of sensitive information should be discussed with the agency and appropriate measures taken to mitigate risks;
- where the person receiving the inquiry documents is a serving ADF member or Commonwealth employee, the person may be given an order or direction not to disclose the inquiry records or reports; and
- where inquiry documents include sensitive information (including personal information), such information may need to be redacted before the documents are disclosed.²¹

2.62 As noted above, the response also states that the directive constitutes a general order to Defence Force members for the purposes of the Discipline Act, meaning that unauthorised public disclosure of inquiry records by Defence Force members (who for the most part would be handling such records) may result in administrative or disciplinary action. This assists the proportionality of the measure.

2.63 The minister's response also explains the safeguards against unauthorised use and disclosure of information contained in COI and IO records and reports. The response states that these safeguards include the offences and provisions in sections 37 and 66 of the regulations, the *Privacy Act 1988* (Privacy Act) and section 70 of the *Crimes Act 1914* (which relates to unauthorised disclosures).

21 Chief of the Defence Force Directive 08/2014 Attachment 2: *Guidance on Disclosure of Inquiry Documents in the Performance of Duties*, 3. It is noted that Attachment 3 to the Directive outlines how inquiry documents should be redacted to protect sensitive information. Attachment 3 was not provided to the committee.

2.64 On balance, noting the information provided on potential safeguards, as well as on the circumstances in which information may be used, disclosed or copied, the provision for use and disclosure in the course of a person's duties may constitute a proportionate limitation on the right to privacy.

Use and disclosure authorised by the minister

2.65 As noted above, the minister may authorise an employee of the Commonwealth or a member of the Defence Force to use, disclose and copy information contained in COI and IO records and reports for purposes specified in the authorisation.²² In relation to whether these measures pursue a legitimate objective for the purposes of international human rights law, the minister's response states:

[t]he purpose of sections 27 and 59 is to allow use, disclosure or copying of inquiry records in circumstances where [...] there is a legitimate objective for the purposes of human rights law, but where such would not ordinarily be within the course of an APS employee or ADF member's employment. For example, it may be legitimate for the family of a deceased ADF member to be provided with information surrounding the ADF member's death. Providing them with a copy of the report would be rationally connected to that objective, but doing so would not ordinarily be within the scope of a person's duties and therefore not within the scope of sections 27 and 58. In this instance, the Minister could authorise the Chief of the Defence Force under section 27 and 59 to disclose a copy of an inquiry report to the family.

2.66 While pointing to some examples of how the disclosure of information in some circumstances may pursue a legitimate objective, the minister's response does not specifically articulate how the broad disclosure power itself addresses a pressing and substantial concern. Based on this information, it appears the intention is that the minister would only grant an authorisation in circumstances where a legitimate objective exists. However, the regulations do not place any limits on the purpose for which the minister's powers may be exercised. As such, it is unclear from the information provided that the measure pursues a legitimate objective or is rationally connected to that objective.

2.67 In relation to the proportionality of the measures, the minister's response states that:

Sections 27 and 59...provide a mechanism for using or disclosing inquiry records containing personal information in a way that is the least restrictive of the right to privacy. Consistent with Defence and privacy policies, the Minister may impose conditions, such as that the personal information of individuals be redacted prior to the report being disclosed. The requirement that the Minister identifies the specific purpose for which the use or disclosure is being authorised limits the use and disclosure of

22 Sections 27 and 59 of the regulations.

inquiry records to the specific purpose which the Minister has turned his or her mind to, and not some other broader purpose.

2.68 It is accepted that the minister's powers provide some scope for ensuring that the use and disclosure of inquiry records does not unduly interfere with the right to privacy. However, the regulations do not appear to set any limits on the exercise of the minister's powers, beyond requiring that the purpose for which the use, disclosure and copying of COI and IO records and reports be specified in the relevant authorisation. In the absence of any further statutory restrictions on the exercise of the minister's powers, there remains a risk that the powers could be exercised in a manner that is incompatible with human rights.

Power for the minister to use, disclose and copy information and documents

2.69 As noted above, the minister may use information contained in COI records and reports for purposes relating to the Defence Force, and may (more generally) disclose or copy information and documents contained in COI and IO records and reports.²³ In relation to those measures, the minister's response states that:

[a]s the Minister for Defence has general control and administration of the Defence Force under the *Defence Act 1903*, and the purpose of inquiries under the Defence (Inquiry) Regulations 2018 is to facilitate the making of decisions relating to the Defence Force, it is essential that the Minister retains this broad power ... using or disclosing inquiry records or reports which may contain personal information is rationally connected to that objective.

2.70 Facilitating the making of decisions relating to the Defence Force appears to be a legitimate objective for the purposes of international human rights law. The minister's use or disclosure of inquiry reports and records appears to be rationally connected to that objective noting that the minister is responsible for the control and administration of the Defence Force.

2.71 In relation to the proportionality of the measures, the minister's response states that use or disclosure may only occur where it is necessary to facilitate decision-making. The response also emphasises that the power is only held by the minister, who will remain accountable to parliament with respect to its exercise.

2.72 The information provided indicates that the minister's powers are intended only to be exercised to facilitate the making of decisions relating to the Defence Force. While this may be the intention, the regulations do not appear to set any limits on the minister's powers, beyond requiring that information and documents be *used* (as opposed to copied or disclosed) for purposes relating to the Defence Force. In the absence of any further statutory restrictions on the exercise of the minister's

23 Sections 28 and 60 of the regulations.

powers, there remains a risk that these powers may be exercised in a manner that is incompatible with human rights.

Committee response

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

2.74 Based on the information provided and the above analysis, the use, disclosure and copying of information and documents in accordance with a person's duties may be compatible with the right to privacy.

2.75 However, noting the absence of relevant safeguards, there appears to be a risk that the following measures may be incompatible with the right to privacy:

- the power for the minister to authorise the use, disclosure and copying of information and documents; and
- the power for the minister himself or herself to use, disclose and copy information and documents.

Reversal of the evidential burden of proof

2.76 The regulations create a number of offences in relation to the use and disclosure of information in relation to a COI. A number of these offences provide exceptions (offence-specific defences) in certain circumstances. For each of these defences, the defendant bears an evidential burden.²⁴ Similar offence-specific defences for which the defendant bears the evidential burden apply in the context of the offence provisions in relation to an IO Inquiry.²⁵

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

2.77 Article 14(2) of the ICCPR protects the right to be presumed innocent until proven guilty according to law. Generally, consistency with the presumption of innocence requires the prosecution to prove each element of a criminal offence beyond reasonable doubt. Provisions that reverse the burden of proof and require a defendant to raise evidence to disprove one or more elements of an offence engage and limit this right.

2.78 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 of achieving that objective.

24 Sections 29(2), 30(2), 32(3), 36(2) and (3) and 37(2) and (3) of the regulations.

25 Sections 61(2) and (4), 62(2) and 66(2) and (3) of the regulations.

2.79 The statement of compatibility does not identify that the reverse burden offences in the regulations engage and limit the presumption of innocence. Further, while information is provided in the explanatory statement as to the rationale for reversing the evidential burden of proof,²⁶ this information does not provide an assessment of whether the limitation on the right to the presumption of innocence is permissible.

2.80 The committee drew the attention of the minister to the committee's *Guidance Note 2*, which sets out the key human rights compatibility issues in relation to reverse burden offences, and requested the advice of the minister as to:

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

Minister's response

2.81 The minister's response provides a range of information as to the human rights compatibility of the reverse burden offences.

Reverse burden offences for refusing to attend as a witness, produce documents or answer a question

2.82 As noted above, these offences are subject to statutory exceptions which reverse the evidential burden of proof including where:

- compliance would be unduly onerous;²⁷
- the person believes on reasonable grounds that compliance is likely to cause damage to the defence, security or international relations of the Commonwealth.²⁸

2.83 The minister's response explains that the purpose of the offences is to ensure that inquiry officials obtain the best information or evidence available on which to base their findings, which will then be used to facilitate decision-making and ensure that the best decisions are made. In view of the regulatory context, this is capable of constituting a legitimate objective for the purposes of international human rights law.

26 See, for example, ES pp. 23, 25, 43 and 46.

2.84 The response also states that the offences and the associated reversal of the evidential burden are rationally connected to this objective. In this respect, it is accepted that criminalising failures or refusals to provide information in relation to defence inquiries is likely to be effective to obtain appropriate information. It is also accepted that reversing the evidential burden may be effective to achieve this objective, given that to do so may assist with the enforcement of the offences. However, it would have been useful for the minister's response to more directly address the connection between obtaining appropriate information and reversing the evidential burden of proof.

2.85 In relation to the proportionality of the measures generally, the minister's response states that the existence of relevant matters can be readily and cheaply established by the defendant, whereas these matters would be significantly more difficult and costly for the prosecution to disprove beyond reasonable doubt. While this difficulty is acknowledged, it is noted that the prosecution ordinarily carries a heavy burden of proof in relation to criminal offences, and consequently this justification is not, of itself, likely to be sufficient for reversing the burden of proof for the purposes of international human rights law.

2.86 However, the minister's response further states that:

...the belief of the person that compliance is likely to cause damage to Defence, or that the circumstances made compliance unduly onerous, requires consideration of factors which are peculiarly within the knowledge of the defendant. For example, in relation to whether compliance is unduly burdensome, the volume of information to be provided and the personal circumstances of the person vis a vis the requirements of the order or notice would only be known by the person.

2.87 Based on this information, it may be accepted that the matters to which the measures relate would be peculiarly if not exclusively within the knowledge of the defendant. This indicates that the reversal of the evidential burden of proof in the relevant provisions is likely to constitute a proportionate limitation on the presumption of innocence. The fact that the defences or exceptions reverse the evidential rather than the legal burden also supports a conclusion that the measures are likely to be a proportionate limitation on that right.

Reverse burden offences for unauthorised use or disclosure of information

2.88 As noted above, these offences are subject to statutory exceptions where the disclosure is authorised under other provisions of the regulations.²⁹ The minister's response indicates that the offences, and the associated defences or exceptions which reverse the evidential burden, pursue the same objective as the other offences identified in the response (that is, ensuring that inquiry officials obtain the best available information, and ensuring effective decision-making). As

29 Sections 36(2) and (3), 37(2) and (3), and 66(2) and (3) of the regulations.

noted above at [2.82], this is likely to be a legitimate objective for the purposes of international human rights law. However, the minister's response does not explain the importance of this objective in the context of these specific measures.

2.89 The minister's response also argues that the measures are effective to achieve (that is, rationally connected) to that objective. However, it is unclear how criminalising the unauthorised use and disclosure of information and documents would be effective to ensure that inquiry officers obtain the best information available. It may be that having such restrictions allows individuals to provide information more freely; however, this argument was not advanced in the minister's response. It is similarly unclear that reversing the evidential burden would be effective to achieve this objective, noting that reversing the evidential burden is likely only to assist with the enforcement of the relevant offences.

2.90 The minister's more general arguments regarding proportionality also appear to apply to these measures. However, as noted above at [1.82], these factors alone are unlikely to be sufficient to justify reversing the burden of proof for the purposes of international human rights law.

2.91 The minister's response also specifically addresses the proportionality of reversing the evidential burden in relation to whether the disclosure of information and documents is authorised. The response argues that a prosecution for disclosure of inquiry records without authorisation would require a reasonable belief that there was no authorisation or permission, which would be difficult for the prosecution to establish. However, as noted above at [2.85] and [2.90], difficulties of this kind are unlikely, on their own, to sufficiently justify reversing the evidential burden of proof for the purposes of international human rights law.

2.92 Additionally, it is not clear that establishing the relevant defences would require a 'reasonable belief' as to the existence of an authorisation or permission. The defences appear only to require that disclosure is permitted under section 26 of the regulations, or authorised (by the minister) under section 27. These matters do not appear to be peculiarly within the knowledge of the defendant. Rather, it appears that they could be established by considering the nature of the relevant disclosure in light of the person's duties, or by making inquiries of the minister. Consequently, it is not clear that reversing the evidential burden of proof is the least rights-restrictive means of achieving the objectives of the measures. As such, it is not possible to conclude that the measures constitute a reasonable and proportionate limitation on the right to be presumed innocent.

Committee response

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

2.94 The committee considers that the reverse burden offences for refusing to attend as a witness, produce documents or answer a question are likely to be compatible with the right to be presumed innocent.

2.95 However, based on the information provided and the above analysis, in relation to the offences of unauthorised use or disclosure of information, the committee is unable to conclude that the reversal of the evidential burden of proof is compatible with the right to be presumed innocent.

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

Purpose	Amends the <i>Intelligence Services Act 2001</i> to establish the Australian Signals Directorate (ASD) as an independent statutory agency within the Defence portfolio reporting directly to the Minister for Defence; amend ASD's functions to include providing material, advice and other assistance to prescribed persons or bodies, and preventing and disrupting cybercrime; and give the Director-General powers to employ persons as employees of ASD. Also makes a range of consequential amendments to other Acts, including to the <i>Anti-Money Laundering and Counter-Terrorism Financing Act 2006</i> to provide that the Director-General of ASD may communicate AUSTRAC information to a foreign intelligence agency if satisfied of certain matters
Portfolio	Defence
Introduced	House of Representatives, 15 February 2018
Rights	Privacy; life; freedom from torture, cruel, inhuman or degrading treatment or punishment; just and favourable conditions at work (see Appendix 2)
Previous reports	3 & 4 of 2018
Status	Concluded examination

Background

2.96 The committee first reported on the bill in its *Report 3 of 2018*, and requested a response from the Minister for Defence by 11 April 2018.¹ The minister's response to the committee's inquiries was received on 20 April 2018 and discussed in *Report 4 of 2018*.² The committee requested a further response from the minister by 23 May 2018.

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

2 Parliamentary Joint Committee on Human Rights, *Report 4 of 2018* (8 May 2018) pp. 47-57. The initial human rights analysis raised questions as to whether a proposal in the bill that the Australian Signals Directorate would operate outside the *Public Service Act 1999* was compatible with the right to just and favourable conditions at work. However, based on further information from the minister, including as to the safeguards in place to protect just and favourable conditions at work, the committee concluded that the measure was likely to be compatible with the right to just and favourable conditions at work. See, *Report 4 of 2018*, p. 57.

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

2.98 No further response was received at the time of finalising this report. Accordingly, the committee's concluding remarks on the bill are made in the absence of further information from the minister.³

Communicating AUSTRAC information to foreign intelligence agencies

2.99 Proposed section 133BA of the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (AMLCT Act) provides that the Director-General of the Australian Signals Directorate (ASD) may communicate Australian Transaction Reports and Analysis Centre (AUSTRAC) information⁴ to a foreign intelligence agency if satisfied of certain matters and may authorise an ASD official to communicate such information on their behalf. The matters in respect of which the Director-General is to be satisfied before communicating AUSTRAC information are:

- (a) the foreign intelligence agency has given appropriate undertakings for:
 - (i) protecting the confidentiality of the information; and
 - (ii) controlling the use that will be made of it; and
 - (iii) ensuring that the information will be used only for the purpose for which it is communicated to the foreign country; and
- (b) it is appropriate, in all the circumstances of the case, to do so.⁵

Compatibility of the measure with the right to privacy

2.100 The right to privacy includes respect for informational privacy, including the right to respect for private and confidential information, particularly the use and sharing of such information and the right to control the dissemination of information about one's private life. The initial human rights analysis stated that, as AUSTRAC information may include a range of personal and financial information, the disclosure of this information to foreign intelligence agencies engages and limits the right to privacy.

3 See Parliamentary Joint Committee on Human Rights, Correspondence register, https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Correspondence_register.

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

5 Section 133BA(1) of the bill.

2.101 The right to privacy may be subject to permissible limitations which are provided by law and are not arbitrary. In order for limitations not to be arbitrary, the measure must pursue a legitimate objective and be rationally connected and proportionate to achieving that objective. However, the statement of compatibility for the bill did not acknowledge this limitation on the right to privacy and therefore did not provide information on these matters. Accordingly, the committee requested the advice of the minister as to:

- whether the measure is aimed at achieving a legitimate objective for the purposes of international human rights law;
- how the measure is effective to achieve (that is, rationally connected to) that objective; and
- whether the limitation is a reasonable and proportionate measure to achieve the stated objective (including whether the measure is sufficiently circumscribed and whether there are adequate and effective safeguards in relation to the operation of the measure).

Minister's response

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

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

2.103 As noted in the initial human rights analysis, the right to privacy may be subject to permissible limitations and thus the purpose of the measure is relevant in determining whether these limitations are permissible.⁶ Combating terrorism, online espionage, transnational crime, cybercrime and cyber-related crime is likely to be a legitimate objective for the purpose of international human rights law, and the information sharing for this purpose appears to be rationally connected to this objective.

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

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

As the committee would be aware, the Australian Transaction Reports and Analysis Centre (AUSTRAC) has made successive statements and provided advice to the parliament in relation to the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006*, including specifically regarding the sharing of information with foreign partners, and provided assurances that while the Act does engage a range of human rights, to the extent that it limits some rights, those limitations are reasonable, necessary and proportionate in achieving a legitimate objective.

...

This amendment to the Act does not extend or alter the current arrangement ASD receives by being part of the Department of Defence. Similarly, it is consistent with arrangements provided for all other intelligence and security agencies that require this function. This amendment is not, in effect, creating a new arrangement for ASD. These provisions reflect longstanding arrangements for agencies in the intelligence and security community, and there are strong safeguards in place to ensure the function is appropriately exercised.

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

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

2.106 It was acknowledged that the amendment is not creating a new arrangement for ASD, and that the amendments reflect current arrangements for agencies in the intelligence and security community. However, scrutiny committees consistently note that the fact that provisions replicate existing arrangements does not, of itself, address the committee's concerns. Further information was therefore required from the minister as to what safeguards are in place to ensure the function is appropriately exercised. This included information as to what constitutes an 'appropriate undertaking' for the purpose of section 133BA of the bill (described at [2.99] above), including what is considered appropriate protection of confidential information by the foreign intelligence agency (section 133BA(1)(a)(i)). It was unclear from the information provided that the measure is a proportionate limitation on the right to privacy.

2.107 The committee therefore sought further information from the minister as to the compatibility of the measure with the right to privacy including:

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

Committee comment

2.108 As noted above, a further response from the minister was not received at the time of finalising this report.

2.109 The initial human rights analysis stated that, as AUSTRAC information may include a range of personal and financial information, the disclosure of this information to foreign intelligence agencies engages and limits the right to privacy. The minister's first response to the committee provided some general information relevant to assessing the proportionality of the measure. However, further information was required from the minister as to what safeguards are in place to ensure the measure is appropriately circumscribed.

2.110 In the absence of further information, it is not possible to conclude that the measure is a proportionate limitation on the right to privacy.

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

2.111 Under international human rights law every human being has the inherent right to life, which should be protected by law. The right to life imposes an obligation on state parties to protect people from being killed by others or from identified risks. While the International Covenant on Civil and Political Rights (ICCPR) does not completely prohibit the imposition of the death penalty, international law prohibits states which have abolished the death penalty (such as Australia) from exposing a person to the death penalty in another nation state.

2.112 The United Nations (UN) Human Rights Committee has made clear that international law prohibits the provision of information to other countries that may be used to investigate and convict someone of an offence to which the death penalty applies. In this context, the UN Human Rights Committee stated in 2009 its concern that Australia lacks 'a comprehensive prohibition on the providing of international police assistance for the investigation of crimes that may lead to the imposition of the death penalty in another state', and concluded that Australia should take steps to

ensure it 'does not provide assistance in the investigation of crimes that may result in the imposition of the death penalty in another State'.⁷

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

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

2.115 A related issue raised by the measure is the possibility that sharing of information may result in torture, or cruel, inhuman or degrading treatment or punishment. Under international law the prohibition on torture is absolute and can never be subject to permissible limitations.⁸ This issue was also not addressed in the statement of compatibility.

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

Minister's response

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

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

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

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

the AFP National Guideline on offshore situations involving potential torture or cruel, inhuman or degrading treatment or punishment. This allowed the committee to assess whether information sharing powers were compatible with human rights in the context of these guidelines.⁹

2.119 The minister's response noted that the relevant information sharing powers were pre-existing and simply reflected current arrangements for agencies in the intelligence and security community. The minister also noted that there has been reporting to parliament in relation to similar arrangements. However, this does not address the relevant human rights concerns. Indeed, as the prohibition on torture is absolute and cannot be subject to limitations, the minister's reference in the response to previous assessments of proportionality does not assist. While proportionality is relevant to an assessment of the compatibility of the measure with the right to life, in the context of the information sharing powers it is essential that there are effective safeguards in place. In relation to whether there are adequate safeguards in place, information as to what constitutes an 'appropriate undertaking' for the purpose of section 133BA of the bill (described at [2.99] above) is relevant. This includes advice as to what is considered appropriate protection of confidential information by the foreign intelligence agency (section 133BA(1)(a)(i)), and whether it would include an undertaking that information shared with the foreign intelligence agency would not result in persons being subject to the death penalty, torture or ill-treatment. Any further information, such as any policies about information sharing from the Director-General to a foreign intelligence agency, and what matters are taken into account when considering such communications, would also be of assistance.

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

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

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

2.122 In relation to the right to life, the committee sought from the minister specific information as to any safeguards in place to protect the right to life, including information as to:

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

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

- whether there are any guidelines about information sharing in situations involving potential torture or cruel, inhuman or degrading treatment or punishment and whether the committee could be provided with a copy of any such guidelines;
- whether there is a prohibition on sharing information where that information may result in a person being subject to torture, or cruel, inhuman or degrading treatment or punishment; and
- whether the requirement that the Director-General receive 'appropriate undertakings' from the foreign intelligence agency in order to share information pursuant to section 133BA(1) includes undertakings in relation to this matter and, if so, what constitutes an 'appropriate undertaking'.

2.124 In relation to each of these rights:

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

Committee comment

2.125 As noted above, a further response from the minister was not received at the time of finalising this report.

2.126 The initial analysis stated that the sharing of information internationally with foreign intelligence agencies may engage the right to life and the prohibition on torture, or cruel, inhuman or degrading treatment or punishment. The minister's first response did not substantively respond to the committee's inquiries as to the compatibility of the measure with these rights.

2.127 In the absence of further information, it is not possible to conclude that the measure is compatible with the right to life and the prohibition on torture or cruel, inhuman and degrading treatment or punishment. Accordingly, there is a risk that the measure may be incompatible with these rights.

Migration Legislation Amendment (Temporary Skill Shortage Visa and Complementary Reforms) Regulations 2018 [F2018L00262]

Purpose	Repeals the Temporary Work (Skilled)(Subclass 457) visa and introduces new Temporary Skill Shortage (Subclass 482) visa; implements complementary measures for the Employer Nomination Scheme (Subclass 186) visa and the Regional Sponsored Migration Scheme (Subclass 187) visa
Portfolio	Home Affairs
Authorising legislation	<i>Migration Act 1958</i>
Last day to disallow	15 sitting days after tabling (tabled Senate 19 March 2018)
Right	Freedom of association (see Appendix 2)
Previous report	5 of 2018
Status	Concluded examination

Background

2.128 The committee first reported on the regulations in its *Report 5 of 2018*, and requested a response from the Minister for Home Affairs by 4 July 2018.¹

2.129 A response from the Minister for Citizenship and Multicultural Affairs was received on 10 July 2018. The response is discussed below and is reproduced in full at **Appendix 3**.

Criteria for nomination – associated persons

2.130 Section 2.72 of the regulations sets out the criteria which apply to persons sponsoring or nominating a proposed occupation for persons holding or applying for a Subclass 482 (Temporary Skills Shortage) Visa (TSS visa).² Section 2.72(4) requires that, to approve a nomination, the minister must be satisfied that either:

- (a) there is no adverse information known to Immigration about the person or a person associated with the person; or

1 Parliamentary Joint Committee on Human Rights, *Report 5 of 2018* (19 June 2018) pp. 11-15.

2 Section 2.72 also applies to holders of the Subclass 457 (Temporary Work (Skilled) Visa) visa. That visa is repealed by the regulation, however, the reference is included in section 2.72 because, although the visa has been repealed, holders of 457 visas will require a new nomination if they change employer: Explanatory statement to the Migration Legislation Amendment (Temporary Skill Shortage Visa and Complementary Reforms) Regulations 2018 (regulations), p.28.

(b) it is reasonable to disregard any adverse information known to Immigration about the person or a person associated with the person.

2.131 It is also one of the criteria for obtaining a TSS visa that there is no adverse information known to Immigration about the person who nominated the nominated occupation³ or a person 'associated with' that person.⁴

2.132 Section 5.19(4) of the regulations introduces the same requirement for persons nominating skilled workers under the Subclass 186 and Subclass 187 visas.⁵

2.133 'Adverse information' is defined in section 1.13A of the regulations to mean information that the person:

(a) has contravened a law of the Commonwealth, a State or a Territory; or

(b) is under investigation, subject to disciplinary action or subject to legal proceedings in relation to a contravention of such a law; or

(c) has been the subject of administrative action (including being issued with a warning) for a possible contravention of such a law by a Department or regulatory authority that administers or enforces the law; or

(d) has become insolvent (within the meaning of section 95A of the Corporations Act 2001); or

(e) has given, or caused to be given, to the Minister, an officer, the Tribunal or an assessing authority a bogus document, or information that is false or misleading in a material particular.

2.134 Section 1.13B provides that persons are 'associated with' each other if:

(a) they:

(i) are or were spouses or de facto partners; or

(ii) are or were members of the same immediate, blended or extended family; or

(iii) have or had a family-like relationship; or

(iv) belong or belonged to the same social group, unincorporated association or other body of persons; or

(v) have or had common friends or acquaintances; or

3 'Nominated occupation' refers to the proposed occupation of the applicant for the visa: see clause 482.111 in Schedule 2 of the regulations.

4 See clause 482.216, clause 482.316 of Schedule 2 of the regulations.

5 These visas allow employers to nominate skilled workers for permanent residence to fill genuine vacancies in their business. Subclass 186 visa is available nationally, while the Subclass 187 visa is for skilled workers who want to work in regional Australia: see Statement of compatibility (SOC) to the regulations, p. 8.

(b) one is or was a consultant, adviser, partner, representative on retainer, officer, employer, employee or member of:

(i) the other; or

(ii) any corporation or other body in which the other is or was involved (including as an officer, employee or member); or

(c) a third person is or was a consultant, adviser, partner, representative on retainer, officer, employer, employee or member of both of them; or

(d) they are or were related bodies corporate (within the meaning of the Corporations Act 2001); or

(e) one is or was able to exercise influence or control over the other; or

(f) a third person is or was able to exercise influence or control over both of them.

Compatibility of the measure with the right to freedom of association

2.135 The right to freedom of association protects the right of all persons to group together voluntarily for a common goal and to form and join an association.⁶ This right supports many other rights, such as freedom of expression, religion, assembly and political rights. Without freedom of association, the effectiveness and value of these rights would be significantly diminished.

2.136 The initial human rights analysis stated that introducing a requirement that the minister may refuse nomination where there is adverse information about a person associated with the person nominating engages and limits the right to freedom of association, as it has the potential for the measure to restrict a person's ability to freely associate. The statement of compatibility does not acknowledge that the right to freedom of association is engaged by the measure.

2.137 Limitations on the right to freedom of association are only permissible where they are 'prescribed by law' and 'necessary in a democratic society in the interests of national security or public safety, public order, the protection of public health or morals, or the protection of the rights and freedoms of others'.⁷ This requires an assessment of whether the measure pursues one of these legitimate objectives, is rationally connected to that objective and is a proportionate means of achieving the objective.

2.138 No information is provided in the statement of compatibility as to the objective of the measure. However, the explanatory statement provides the following information as to why it is necessary to have a broad definition of 'associated with' in the regulations:

6 Article 22 of the International Covenant on Civil and Political Rights

7 Article 22(2).

The definition has been drafted in terms which encompass the wide range of associations among family, friends and associates which can be used to continue unacceptable or unlawful business practices via different corporate entities.

The breadth of these provisions is necessary to maintain the integrity of Australia's sponsored worker programs. There are two safeguards against inappropriate reliance on the provisions. The Minister always has a discretion to disregard adverse information and associations if it is reasonable to do so. That discretion would be exercised to disregard information which did not have serious bearing on the suitability of the business to sponsor overseas workers. Further, if the decision relates to a business operating in Australia, all relevant decisions – refusal to approve a person as a sponsor, refusal to approve a nomination, and refusal to grant a visa to the nominated employee – are subject to independent merits review by the Administrative Appeals Tribunal. The Government considers that these provisions strike an appropriate balance between the need to uphold the integrity of the sponsored worker program and the need to ensure consistent and fair decision making.⁸

2.139 A measure is likely to be rationally connected if it can be shown that the measure is likely to be effective in achieving that objective. In this case, it was unclear whether merely being associated with a person who may have engaged in a range of specified conduct ('adverse information') has specific relevance to a person's suitability as a sponsor or nominator. In addition, it was noted that the definition of 'associated with' is very broad, extending to persons who 'belong or belonged to the same social group, unincorporated association or other body of persons'. Taking into account the potential breadth of its application, there were concerns that the definition of 'associated with' may not be sufficiently circumscribed such that the measure may not be a proportionate way to achieve that objective. In this respect, it was noted that there is ministerial discretion to disregard any adverse information about the person or a person associated with the person.⁹ It was unclear that the ministerial discretion to disregard the adverse information of the associated person, in and of itself, offers sufficient protection such that the measure may be regarded as proportionate to its objective.

2.140 The committee therefore sought the advice of the minister as to the compatibility of the measure with the right to freedom of association, including:

- 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;

8 Explanatory statement, pp. 19-20.

9 See section 2.72(4) and 5.19(4) of the regulation.

- whether the measure is rationally connected (that is, effective to achieve) that objective; and
- whether the measure is a proportionate means of achieving its objective (including whether the definition of 'associated with' is sufficiently circumscribed).

Minister's response

2.141 In relation to whether the measure pursues a pressing and substantial concern, the minister's response provides the following information:

With the introduction of the Temporary Skill Shortage (TSS) visa in March 2018, the Department expanded the definition of 'associated with' at Regulation 1.13B due to integrity concerns in the previous subclass 457 visa program. The previous definitions were inadequate to deal with some abuses within the subclass 457 visa program. This was particularly in situations where previously sanctioned/cancelled sponsors closed the operations of one company, and then created a new legal entity to continue using the 457 /TSS program to sponsor overseas workers.

2.142 Preventing the abuse of certain classes of visas and preserving the integrity of the sponsored work program is likely to constitute a legitimate objective for the purposes of international human rights law. In this respect, the measure may also be aimed at protecting the rights and freedoms of others.

2.143 The minister's response also provides information about how the measure is effective to achieve (that is, rationally connected to) the objective:

The expanded definition of 'associated with' under Regulation 1.13B allows the Department to address, among other issues, phoenixing activities by companies and networks of non-compliant entities (for example, brothers running two separate companies engaged in visa fraud).

2.144 In addition, the case study in the minister's response provides a practical example of how, in certain circumstances, an association with particular individuals or companies that are engaged in conduct that would constitute 'adverse information' directly affects the suitability of a sponsor or nominator who is associated with the individual or company, especially where the associated person has engaged in conduct that is non-compliant with the Migration Act. This information addresses concerns raised in the initial human rights analysis about the extent of the connection between a nominator's association with another person about whom Immigration has 'adverse information', and efforts to prevent the abuse of certain visa classes and preserve the integrity of the sponsored work program. In light of this information, it appears that the measure is likely to be effective to achieve the stated objective.

2.145 In relation to the proportionality of the measure, the minister's response also provides information about whether less rights-restrictive approaches are reasonably available to achieve the legitimate objective. In this respect, the case study provided

by the minister indicates that the previous measure was inadequate to address the stated objective as it enabled company directors of sponsoring businesses that were non-compliant with the Migration Act to reduce the risk of future identification and sanction by the Department by setting up multiple companies to take over the operations of the initial company and become sponsors. The minister explains that the 'added benefit' of this approach was that each sponsor from the new company would be considered low risk to the Department, due to the low number of visa holders nominated per company. In essence, the measure is designed to look behind the 'corporate veil' to capture instances of non-compliance or abuse.

2.146 The case study also indicates that the breadth of the definition of 'associated with' may be necessary to capture some circumstances which the measure is designed to address; namely, the use of extended networks and companies by non-compliant entities to continue to sponsor overseas workers. However, at the same time, it is noted that 'associated with' is defined very broadly to include a range of relationships. This raises concerns that the measure, as drafted, may not constitute the least rights restrictive approach to achieving the objective sought. However, the minister's response reiterates that 'there are limits to what is relevant for the purposes of taking into account "adverse information"'. As outlined in paragraph 2.133, 'adverse information' is limited to information that is known to Immigration and relates to whether a person has contravened Australian law, whether they are insolvent, and whether they have given a prescribed official a bogus document or false or misleading information.¹⁰

2.147 Additionally, the minister's response notes that most of the sponsors affected by the regulations will be companies, rather than individuals. People who are affected by the regulations will have the ability to seek independent merits review of the minister's decision regarding the presence of 'adverse information' known to Immigration about them or their associate, or the reasonableness of disregarding any adverse information known to Immigration about them or their associate.¹¹

2.148 In combination, these safeguards support a conclusion that the measure may be a proportionate limitation on the right to freedom of association.

Committee response

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

2.150 In light of the information provided in the minister's response, the measure may be a proportionate limitation on the right to freedom of association.

10 Section 1.13A of the regulation.

11 Explanatory statement, pp. 19-20.

Social Security (Assurances of Support) Determination 2018 [F2018L00425]

Social Security (Assurances of Support) Amendment Determination 2018 [F2018L00650]

Purpose	Introduces requirements for individuals or bodies to give assurances of support for visa entrants
Portfolio	Social Services
Authorising legislation	<i>Social Security Act 1991</i>
Last day to disallow	F2018L00425: 15 sitting days after tabling (tabled House of Representatives and Senate 8 May 2018) F2018L00650: 15 sitting days after tabling (tabled House of Representatives 24 May 2018)
Right	Protection of the family (see Appendix 2)
Previous report	5 of 2018
Status	Concluded examination

Background

2.151 The committee first reported on the determinations in its *Report 5 of 2018*, and requested a response from the Minister for Social Services by 4 July 2018.¹

2.152 The minister's response to the committee's inquiries was received on 10 July 2018. The response is discussed below and is reproduced in full at **Appendix 3**.

Requirements for persons to give assurances of support

2.153 The determination (as amended by the amended determination)² seeks to introduce requirements that must be met for an individual or body (an assurer) to be permitted to give an 'assurance of support' for migrants seeking to enter Australia on

1 Parliamentary Joint Committee on Human Rights, *Report 5 of 2018* (19 June 2018) pp. 41-46.

2 The Social Security (Assurances of Support) Determination 2018 [F2018L00425] (the determination) was amended by the Social Security (Assurances of Support) Amendment Determination 2018 [F2018L00650] (the amended determination) on 24 May 2018.

certain visa subclasses (assurees).³ An assurance of support is a legally binding commitment by the assurer to financially support the assuree for the duration of the assurance period,⁴ including assuming responsibility for repayment of any recoverable social security payments received by the assuree during the assurance period.⁵

2.154 Individuals who give an assurance of support must meet an income requirement in order to be an assurer.⁶ Section 15(2) of the amended determination provides that an individual giving an assurance of support as a single assurer meets the income requirement for a financial year if the amount of the individual's assessable income for the year is at least the total of:

- (a) the applicable rate of newstart allowance multiplied by the total of:
 - (i) one (representing the individual giving the assurance of support); and
 - (ii) the total number of adults receiving assurance under an assurance of support given by the person; and
- (b) the amount obtained by adding together, for each child of the person giving assurance under an assurance of support:
 - (i) the base FTB child rate⁷ as at 1 July in the financial year; and
 - (ii) the applicable supplement amount⁸ as at 1 July in the financial year.⁹

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- 3 Visa subclasses for which it is a mandatory condition of grant of the visa to have an assurance of support include the visa subclass 103 (parent), subclass 143 (contributory parent), subclass 864 (contributory aged parent); subclass 114 (aged dependent relative); subclass 115 (remaining relative). There are also several visa subclasses for which the Minister for Home Affairs may request an assurance of support as a condition of the grant, including subclass 117 (orphan relative); subclass 101 (child); subclass 102 (adoption); subclass 151 (former resident); subclass 202 (global humanitarian visa – community support programme entrants).
 - 4 The length of the assurance period depends on the type of visa. For example, for a contributory parent visa, the period of assurance may be 10 years; for a community support programme entrant, the period is 12 months: explanatory statement to the determination, p. 2.
 - 5 Section 1061ZZGA(a) of the *Social Security Act 1991*; Statement of compatibility (SOC) to the amended determination, pp. 1,3. Recoverable social security payments for the purpose of assurances of support includes widow allowance, parenting payment, youth allowance, austudy payment, newstart allowance, mature age allowance, sickness allowance, special benefit and partner allowance.
 - 6 Section 14(1) of the determination.
 - 7 'Base FTB child rate' refers to the base Family Tax Benefit rate. The rate has the meaning and is determined by clause 8 of Schedule 1 to the *A New Tax System (Family Assistance) Act 1999*. See further the explanation at [2.155] below.

2.155 The amended determination provides an example of how this provision is designed to operate:

If a person with 2 children applies to give an assurance of support for a migrating family of 2 parents and 2 children on 1 July 2017, the minimum required income amount of the person is the total of:

- \$45 186 (the applicable newstart allowance of \$15 062 multiplied by the total number of adult assurers and adult assurees (3)); and
- the base FTB [(family tax benefit)] child rate and the applicable supplement amount for each of the assurer's children.

The base FTB child rate and the applicable supplement are only added to the income requirement for the assurer's children. They do not apply to the children of the assurees.¹⁰

2.156 For an individual that gives an assurance of support jointly with another individual or other individuals, the individual assurer meets the income requirement for a financial year if the combined amount of assessable income of the assurers for the year is at least the total of the following amounts:

- (a) the applicable rate of newstart allowance multiplied by the total of:
 - (i) the total number of individuals giving assurance under the assurance of support; and
 - (ii) the total number of adults receiving assurance under an assurance of support given by the individual; and

8 'Applicable supplement amount' has the meaning and is determined by clause 38A(2) of Schedule 1 to the *A New Tax System (Family Assistance) Act 1999*. See further the explanation at [2.155].

9 Section 15(2) of the amended determination. The determination before amendment required a higher level of income in order to meet the income requirement, namely the newstart income cut-off amount multiplied by the total of: (i) one (representing the individual giving the assurance of support); and (ii) the total number of adults receiving assurance under the assurance of support given by the person; and (iii) if the individual giving assurance under the assurance of support has a partner – one; and (b) 10% of the newstart income cut-off amount multiplied by: (i) the number of children of the individual giving assurance under the assurance of support; and (ii) the number of children of any adults receiving assurance under the assurance of support.

10 Section 15(2) of the amended determination. Before the amendment, the determination required that if a partnered individual with one child applied to give an assurance of support for a migrating family of two parents and two children, the minimum required income amount of the individual would have been the total of: (a) \$115 476 (the newstart income cut-off amount of \$28 869 multiplied by the total number of individuals giving assurance, persons receiving an assurance, and the partner of the individual giving assurance (4)); and (b) \$8 661 (10% of the newstart income cut-off amount of \$28 869 multiplied by the total number of children of both the individual giving assurance, and the persons receiving assurance (3)).

(b) the amount obtained by adding together, for each child of an individual giving assurance under the assurance of support:

- (i) the base FTB child rate as at 1 July in the financial year; and
- (ii) the applicable supplement amount as at 1 July in the financial year.¹¹

2.157 The amended determination provides an example of how this provision is designed to operate:

If a joint assurer (who has a partner and 2 children) gives an assurance of support with the partner for a migrating family of 2 parents and 2 children on 1 July 2017, the combined minimum required income of both assurers is the total of:

- \$60 248 (the applicable newstart allowance of \$15 062 multiplied by the total number of adult assurers and adult assurees (4)); and
- the base FTB child rate and the applicable supplement amount for each of the assurers' children.

The base FTB child rate and the applicable supplement are only added to the income requirement for the assurers' children. They do not apply to the children of the assurees.¹²

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

2.158 The right to respect for the family is protected by articles 17 and 23 of the International Covenant on Civil and Political Rights (ICCPR) and article 10 of the International Covenant on Economic, Social and Cultural Rights (ICESCR). Under these articles, the family is recognised as the natural and fundamental group unit of society and, as such, is entitled to protection. An important element of protection of the

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- 11 Section 16(2) of the amended determination. The determination before amendment required a higher level of income in order to meet the income requirement, namely (a) the newstart income cut-off amount multiplied by the total of: (i) the total number of individuals giving assurance under the assurance of support; and (ii) the total number of adults receiving assurance under an assurance of support given by the individual; and (iii) the total number of partners of the individuals that are jointly giving assurance under the assurance of support; and (b) 10% of the newstart income cut-off amount multiplied by (i) the number of children of the individuals giving assurance under the assurance of support; and (ii) the number of children of any adults receiving assurance under the assurance of support.
- 12 Section 16(2) of the amended determination. Before the amendment, the determination required that for two joint assurers (who each have a partner and two children) give an assurance of support for a migrating family of two parents and three children, the combined minimum required income amount of both assurers is the total of: (a) \$173 214 (the newstart income cut-off amount of \$28 869 multiplied by the total number individuals giving assurance, persons receiving an assurance, and the partners of the individuals giving assurance (6)); and (b) \$20 208 (10% of the newstart income cut-off amount of \$28 869 multiplied by the total number of children of both the individuals giving the assurance, and the persons receiving assurance (7)).

family is to ensure family members are not involuntarily separated from one another. Laws and measures which prevent family members from being together will engage this right.

2.159 Additionally, under article 3(1) of the Convention on the Rights of the Child (CRC), Australia is required to ensure that, in all actions concerning children, the best interests of the child are a primary consideration. It requires legislative, administrative and judicial bodies and institutions to systematically consider how children's rights and interests are or will be affected directly or indirectly by their decisions and actions.¹³ Under article 10 of the CRC, Australia is required to treat applications by minors for family reunification in a positive, humane and expeditious manner.

2.160 A measure which limits the ability of certain family members to join others in a country is a limitation on the right to protection of the family.¹⁴ As noted in the initial human rights analysis, by requiring individuals (relevantly, including family members) to meet certain income requirements in order to sponsor family members to come to Australia, the measure creates a financial barrier for family members to join others in a country and therefore may limit the right to protection of the family.

2.161 Limitations on the right to protection of the family will be permissible where the limitation is in pursuit of a legitimate objective, and is rationally connected and proportionate to the pursuit of that objective.

2.162 The statement of compatibility to the determination and the amended determination do not acknowledge that this right is engaged by the measure. However, the statement of compatibility describes the objective of the determination as 'protecting social security outlays by the Commonwealth while allowing the migration of people who might not otherwise be permitted to come to Australia'.¹⁵ While this may be capable of constituting a legitimate objective, further information was required to determine whether the objective is legitimate in the context of this specific measure. In this context, the committee's usual expectation where a measure may limit a human right is that the accompanying statement of compatibility provides a reasoned and evidence-based explanation of how the measure supports a legitimate objective for the purposes of international human rights law.

2.163 Additionally, as noted above, a limitation must be rationally connected to, and a proportionate way to achieve, its legitimate objective in order to be justifiable

13 UN Committee on the Rights of Children, *General Comment 14 on the right of the child to have his or her best interest taken as primary consideration* (2013).

14 See, for example, *Sen v the Netherlands* (Application no. 31465/96) (2001) ECHR; *Tuquabo-Tekle And Others v The Netherlands* (Application no. 60665/00) (2006) ECHR [41]; *Maslov v Austria* (Application no. 1638/03) (2008) ECHR [61]-[67].

15 SOC to the amended determination, p.1.

in international human rights law. As to proportionality, while it was noted that the income requirement for assurers is significantly lower in the amended determination than the original determination,¹⁶ the income requirement in the amended determination is nonetheless substantial. Further information was required to determine whether the measure is rationally connected and proportionate to the stated objective of the measure.

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

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

Minister's response

2.165 In relation to whether the measure is aimed at achieving a legitimate objective for the purposes of international human rights law, the minister's response notes that the purpose of the determination is to continue existing requirements under the Assurances of Support (AoS) scheme following the sunset of the previous determination. The minister also reiterates that the amended determination reduces the AoS income requirements in the original determination and accordingly:

...enhance[s] the prospects of families joining each other and the right to protection of families for the purposes of international human rights law.

2.166 This is positive from the perspective of the right to the protection of the family. However, as noted in the initial human rights analysis, 'the income requirement in the amended determination is nonetheless substantial', and this limits the right to protection of the family, because it continues to restrict the ability of certain family members to join others. The information from the minister, while useful, does not appear to identify the legitimate objective sought to be achieved by this limitation on the right to protection of the family.

2.167 As noted above at [2.162], the statement of compatibility to the amended determination describes the objective of the determination as 'protecting social security outlays by the Commonwealth while allowing the migration of people who might not otherwise be permitted to come to Australia'.¹⁷ The initial human rights analysis noted that protecting the sustainability of the social security system could be capable of constituting a legitimate objective; however, further reasoning or

16 See above at [2.154] to [2.157] and accompanying footnotes.

17 SOC to the amended determination, p. 1.

evidence would be required to determine whether this objective was legitimate in the context of the specific measure.¹⁸ It is acknowledged that the measure may lead to fewer potential costs to the social security system. However, it would have been useful if the minister's response had provided additional information as to why the measure is needed from a fiscal perspective or how the proposed measure will ensure the sustainability of the social welfare system. While not specifically put in these terms, it appears that, in the context of existing restrictions on access to social security for new migrants and the information provided by the minister, the measure may also pursue the objective of assisting to ensure an adequate standard of living for newly arrived migrants. Taken together, these objectives may be capable of constituting a legitimate objective for the purposes of international human rights law. However, further information from the minister would have been useful in this respect.

2.168 In relation to how the measure is effective to achieve (that is, rationally connected to) the objective, the minister's response explains that:

the requirements under the AoS scheme ensures an assurer has the potential to provide the level of financial support required by a visa entrant.

2.169 A measure which ensures that a person can access financial support from a source other than the social security system is rationally connected to ensuring the sustainability of the social security system, because it reduces the amount of potential future social security outlays by the Commonwealth. In this respect, such a measure is also rationally connected to ensuring an adequate standard of living for newly arrived migrants as it seeks to guarantee access to financial support for these migrants from a source other than social security.

2.170 Regarding the proportionality of the proposed measure, the minister's response identifies the following safeguards for visa entrants to protect families in the event that an assurer is not able to provide them with adequate support:

If a potential assurer does not meet the AoS income requirements, the option of entering into a joint AoS arrangement is available.

2.171 These features insert a degree of flexibility into the scheme to safeguard the right to the protection of the family, where a potential assurer does not meet income requirements or is otherwise unable to provide adequate support. This information indicates that the measure may be proportionate to the objective being sought.

Committee response

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

18 See above at [2.164].

2.173 In light of the information provided by the minister and the preceding analysis, the committee considers that the measure may be compatible with the right to protection of family.

Various Parks Management Plans¹

Purpose	Provides management plans for particular parks
Portfolio	Environment and Energy
Authorising legislation	<i>Environment Protection and Biodiversity Conservation Act 1999</i>
Last day to disallow	15 sitting days after tabling (tabled Senate 21 March 2018, House 26 March 2018). F2018L00327: subject to a motion to disallow by Senator Pratt on 28 March 2018
Right	Freedom of expression (see Appendix 2)
Previous report	5 of 2018
Status	Concluded examination

Background

2.174 The committee first reported on the plans in its *Report 5 of 2018*, and requested a response from the Minister for the Environment and Energy by 4 July 2018.²

2.175 The minister's response to the committee's inquiries was received on 25 July 2018. The response is discussed below and is reproduced in full at **Appendix 3**.

Regulation of commercial media within the parks

2.176 Each of the park management plans include rules for commercial media to operate in the parks. The plans provide that news of the day reporting may be undertaken on terms determined by the Director and subject to the Director being notified. Commercial media activities other than news of the day reporting are subject to further conditions including a permit being issued.³

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- 1 Coral Sea Marine Park Management Plan 2018 [F2018L00327]; Temperate East Marine Parks Network Management Plan 2018 [F2018L00321]; North-West Marine Parks Network Management Plan 2018 [F2018L00322]; North Marine Parks Network Management Plan 2018 [F2018L00324]; South-West Marine Parks Network Management Plan 2018 [F2018L00326].
 - 2 Parliamentary Joint Committee on Human Rights, *Report 5 of 2018* (19 June 2018) pp. 47-48.
 - 3 North Marine Parks Network Management Plan 2018 [F2018L00324] p. 51, [4.2.6]; Temperate East Marine Parks Network Management Plan 2018 [F2018L00321] p. 51 [4.2.5]; North-West Marine Parks Network Management Plan 2018 [F2018L00322] p. 54 [4.2.6]; South-West Marine Parks Network Management Plan 2018 [F2018L00326] p. 50 [4.2.4]; Coral Sea Marine Park Management Plan 2018 [F2018L00327] p. 43, [4.2.5].

Compatibility of the measure with the right to freedom of expression

2.177 The right to freedom of expression includes the communication of information or ideas through the media. Providing that news of the day reporting is to be on the terms determined by the Director engages and may limit the right to freedom of expression. The requirement that other commercial media activities are subject to further conditions including the issuing of a permit also engages and limits this right.

2.178 While the right to freedom of expression may be subject to permissible limitations in a number of circumstances,⁴ the statements of compatibility provide no assessment of this right. Accordingly, it was unclear from the information provided the extent of any limitation on the right to freedom of expression and whether that limitation is permissible.

2.179 The committee therefore sought the advice of the minister as to the compatibility of the measure with the right to freedom of expression including information as to:

- the extent of the limitation the measure imposes on the right to freedom of expression (such as, information about the terms determined by the Director in relation to news of the day reporting and the process for the issue of a permit or permission for other reporting);
- whether the measure is aimed at achieving a legitimate objective for the purposes of human rights law;
- how the measure is effective to achieve (that is, rationally connected to) that objective; and
- whether the limitation is a reasonable and proportionate measure to achieve the stated objective (including the existence of any safeguards).

Minister's response

2.180 The minister's response provides additional information about the nature and extent of the limitation that the measures impose on the right to freedom of expression. For example, in relation to the authorisation required for commercial media activities other than news of the day reporting, the minister explains that:

...the assessment of permit/licence applications and the conditions placed on those authorisations relates only to the impact on park values and other park users. It does not consider the manner in which images or sounds will be used or place conditions on their use.

4 Limitations must be prescribed by law, pursue a legitimate objective, and be rationally connected and proportionate to that objective. Additionally, the right may only be limited for certain prescribed purposes, that is, where it is necessary to respect the rights of others, or to protect national security, public safety, public order, public health or morals.

2.181 In this respect, the minister's response states that the relevant measures 'do not control how images or sounds are used and thereby place no restriction on the right to freedom of expression'. The minister's response also explains that the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act) currently prohibits actions for commercial purposes, including photography, filming or sound recording for commercial purposes, unless the activities are conducted in accordance with the relevant management plan. On this basis, the response states that 'the management plans do not create a restriction on media activities – they relieve one'.

2.182 While this is positive from the perspective of the right to freedom of expression, the management plans nevertheless engage and limit the right to freedom of expression, by enabling the Director to impose terms or conditions on the access of commercial media to parks. Accordingly, the relevant question is whether the limitation on the right to freedom of expression is permissible as a matter of international human rights law.

2.183 In relation to whether the measure is aimed at achieving a legitimate objective for the purposes of international human rights law, the minister's response states that 'the management plan objective [is to] protect the natural, cultural and heritage values of marine parks'. This is likely to constitute a legitimate objective for the purposes of international human rights law.

2.184 The minister's response provides the following information about how the measure is effective to achieve (that is, rationally connected to) the stated objective:

...the terms determined by the Director or the conditions of authorisations specifically aim to avoid or mitigate impacts and risks of commercial media activities within marine parks, to as low as reasonably practicable.

2.185 The minister notes, for example, that a condition may be 'placed on a licenced or permitted commercial media activity in a marine park related to the use of a chemical in the water to alter marine bird behaviour'. As such, a measure which reduces or mitigates the negative impact of certain activities on a marine park would appear to be rationally connected to (that is, effective to achieve) the protection and conservation of the natural, cultural and heritage value of marine parks.

2.186 Regarding the proportionality of the proposed measure, the minister's response states that the director's powers to determine the terms or conditions upon which commercial media carry out their activities are limited by reference to the Director's functions under section 514D of the EPBC Act. Under this section, the Director's functions 'are to protect, conserve and manage biodiversity and heritage in Commonwealth reserves'. Consequently, the terms or conditions imposed by the Director are significantly circumscribed, because they can only be directed towards the Director's prescribed functions.

2.187 In addition, the minister's response explains that guidance and policies will be made available to commercial media to explain the basis upon which terms will be determined or applications assessed. For example, in relation to commercial media

activities for reporting news of the day, the minister's response states that 'guidance on the "terms determined by the Director" will be prepared for these activities and made available on the Parks Australia website'. For commercial media activities other than reporting the news of the day, the minister's response explains that:

Following receipt of the application [for a permit or licence], decisions about activities will be consistent with the plan and zone objectives and take into account the impacts and risks of the activity on the park values. The assessment is not based on how the images/sounds will be used or what the applicant intends to convey through those images/sounds. The impacts and risks will be assessed in accordance with policies established under the assessments and authorisations program outlined in the management plans.

2.188 The minister's response also provides the following information about why commercial activities other than news of the day reporting are subject to greater restrictions:

Activities for news of the day reporting are likely to be time sensitive to capture breaking news or an event of the moment and are typically small scale and less likely to impact park values. The number of crew, amount of equipment and duration of filming are considered in assessing the risk to values. These activities don't require individual authorisation as opposed to other commercial media activities such as a film or documentary which are better managed by permit or licence, given the greater risk they may pose to park values (such as larger crew and equipment needs and more time for filming).

...

The difference in approach reflects that permitted or licensed projects typically pose greater impacts and risks to park values.

2.189 This information further indicates that the measure is sufficiently circumscribed and is only as extensive as necessary to achieve the stated objective of protecting and conserving the natural, cultural and heritage value of marine parks.

Committee response

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

2.191 In light of the information provided by the minister and the preceding analysis, the committee considers that the measure is likely to be compatible with the right to freedom of expression.

Mr Ian Goodenough MP
Chair

Appendix 1

Deferred legislation

3.1 The committee has deferred its consideration of the following legislation for the reporting period:

- Defence Amendment (Call Out of the Australian Defence Force) Bill 2018;
- Migration (IMMI 18/015: English Language Tests and Evidence Exemptions for Subclass 500 (Student) Visa) Instrument 2018 [F2018L00713];
- Migration (IMMI 18/019: Fast Track Applicant Class) Instrument 2018 [F2018L00672]; and
- Modern Slavery Bill 2018.

Appendix 2

Short guide to human rights

4.1 The following guide contains short descriptions of human rights regularly considered by the committee. State parties to the seven principal human rights treaties are under a binding obligation to respect, protect and promote each of these rights. For more detailed descriptions please refer to the committee's *Guide to human rights*.¹

4.2 Some human rights obligations are absolute under international law, that is, a state cannot lawfully limit the enjoyment of an absolute right in any circumstances. The prohibition on slavery is an example. However, in relation to most human rights, a necessary and proportionate limitation on the enjoyment of a right may be justified under international law. For further information regarding when limitations on rights are permissible, please refer to the committee's *Guidance Note 1* (see Appendix 4).²

Right to life

Article 6 of the International Covenant on Civil and Political Rights (ICCPR); and article 1 of the Second Optional Protocol to the ICCPR

4.3 The right to life has three core elements:

- it prohibits the state from arbitrarily killing a person;
- it imposes an obligation on the state to protect people from being killed by others or identified risks; and
- it imposes on the state a duty to undertake an effective and proper investigation into all deaths where the state is involved (discussed below, [4.5]).

4.4 Australia is also prohibited from imposing the death penalty.

Duty to investigate

Articles 2 and 6 of the ICCPR

4.5 The right to life requires there to be an effective official investigation into deaths resulting from state use of force and where the state has failed to protect life. Such an investigation must:

- be brought by the state in good faith and on its own initiative;
- be carried out promptly;

1 Parliamentary Joint Committee on Human Rights, *Guide to Human Rights* (June 2015).

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

- be independent and impartial; and
- involve the family of the deceased, and allow the family access to all information relevant to the investigation.

Prohibition against torture, cruel, inhuman or degrading treatment

Article 7 of the ICCPR; and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)

4.6 The prohibition against torture, cruel, inhuman or degrading treatment or punishment is absolute. This means that torture or cruel, inhuman or degrading treatment or punishment is not permissible under any circumstances.

4.7 The prohibition contains a number of elements:

- it prohibits the state from subjecting a person to torture or cruel, inhuman or degrading practices, particularly in places of detention;
- it precludes the use of evidence obtained through torture;
- it prevents the deportation or extradition of a person to a place where there is a substantial risk they will be tortured or treated inhumanely (see also non-refoulement obligations, [4.9] to [4.11]); and
- it requires an effective investigation into any allegations of such treatment and steps to prevent such treatment occurring.

4.8 The aim of the prohibition against torture, cruel, inhuman or degrading treatment is to protect the dignity of the person and relates not only to acts causing physical pain but also acts causing mental suffering. The prohibition is also an aspect of the right to humane treatment in detention (see below, [4.18]).

Non-refoulement obligations

Article 3 of the CAT; articles 2, 6(1) and 7 of the ICCPR; and Second Optional Protocol to the ICCPR

4.9 Non-refoulement obligations are absolute and may not be subject to any limitations.

4.10 Australia has non-refoulement obligations under both the ICCPR and the CAT, as well as under the Convention Relating to the Status of Refugees and its Protocol (**Refugee Convention**). This means that Australia must not under any circumstances return a person (including a person who is not a refugee) 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.

4.11 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.

Prohibition against slavery and forced labour

Article 8 of the ICCPR

4.12 The prohibition against slavery, servitude and forced labour is a fundamental and absolute human right. This means that slavery and forced labour are not permissible under any circumstances.

4.13 The prohibition on slavery and servitude is a prohibition on 'owning' another person or exploiting or dominating another person and subjecting them to 'slavery-like' conditions.

4.14 The right to be free from forced or compulsory labour prohibits requiring a person to undertake work that they have not voluntarily consented to, but which they do because of either physical or psychological threats. The prohibition does not include lawful work required of prisoners or those in the military; work required during an emergency; or work or service that is a part of normal civic obligations (for example, jury service).

4.15 The state must not subject anyone to slavery or forced labour, and ensure adequate laws and measures are in place to prevent individuals or companies from subjecting people to such treatment (for example, laws and measures to prevent trafficking).

Right to liberty and security of the person

Article 9 of the ICCPR

Right to liberty

4.16 The right to liberty of the person is a procedural guarantee not to be arbitrarily and unlawfully deprived of liberty. It applies to all forms of deprivation of liberty, including detention in criminal cases, immigration detention, forced detention in hospital, detention for military discipline and detention to control the spread of contagious diseases. Core elements of this right are:

- the prohibition against arbitrary detention, which requires that detention must be lawful, reasonable, necessary and proportionate in all the circumstances, and be subject to regular review;
- the right to reasons for arrest or other deprivation of liberty, and to be informed of criminal charge;
- the rights of people detained on a criminal charge, including being promptly brought before a judicial officer to decide if they should continue to be detained, and being tried within a reasonable time or otherwise released (these rights are linked to criminal process rights, discussed below);
- the right to challenge the lawfulness of any form of detention in a court that has the power to order the release of the person, including a right to have

access to legal representation, and to be informed of that right in order to effectively challenge the detention; and

- the right to compensation for unlawful arrest or detention.

Right to security of the person

4.17 The right to security of the person requires the state to take steps to protect people from others interfering with their personal integrity. This includes protecting people who may be subject to violence, death threats, assassination attempts, harassment and intimidation (for example, protecting people from domestic violence).

Right to humane treatment in detention

Article 10 of the ICCPR

4.18 The right to humane treatment in detention provides that all people deprived of their liberty, in any form of state detention, must be treated with humanity and dignity. The right complements the prohibition on torture and cruel, inhuman or degrading treatment or punishment (see above, [4.6] to [4.8]). The obligations on the state include:

- a prohibition on subjecting a person in detention to inhumane treatment (for example, lengthy solitary confinement or unreasonable restrictions on contact with family and friends);
- monitoring and supervision of places of detention to ensure detainees are treated appropriately;
- instruction and training for officers with authority over people deprived of their liberty;
- complaint and review mechanisms for people deprived of their liberty; and
- adequate medical facilities and health care for people deprived of their liberty, particularly people with disability and pregnant women.

Freedom of movement

Article 12 of the ICCPR

4.19 The right to freedom of movement provides that:

- people lawfully within any country have the right to move freely within that country;
- people have the right to leave any country, including the right to obtain travel documents without unreasonable delay; and
- no one can be arbitrarily denied the right to enter or remain in his or her own country.

Right to a fair trial and fair hearing

Articles 14(1) (fair trial and fair hearing), 14(2) (presumption of innocence) and 14(3)-(7) (minimum guarantees) of the ICCPR

4.20 The right to a fair hearing is a fundamental part of the rule of law, procedural fairness and the proper administration of justice. The right provides that all persons are:

- equal before courts and tribunals; and
- entitled to a fair and public hearing before an independent and impartial court or tribunal established by law.

4.21 The right to a fair hearing applies in both criminal and civil proceedings, including whenever rights and obligations are to be determined.

Presumption of innocence

Article 14(2) of the ICCPR

4.22 This specific guarantee protects the right to be presumed innocent until proven guilty of a criminal offence according to law. Generally, consistency with the presumption of innocence requires the prosecution to prove each element of a criminal offence beyond reasonable doubt (the committee's *Guidance Note 2* provides further information on offence provisions (see Appendix 4)).

Minimum guarantees in criminal proceedings

Article 14(2)-(7) of the ICCPR

4.23 These specific guarantees apply when a person has been charged with a criminal offence or are otherwise subject to a penalty which may be considered criminal, and include:

- the presumption of innocence (see above, [4.22]);
- the right not to incriminate oneself (the ill-treatment of a person to obtain a confession may also breach the prohibition on torture, cruel, inhuman or degrading treatment (see above, [4.6] to [4.8]));
- the right not to be tried or punished twice (double jeopardy);
- the right to appeal a conviction or sentence and the right to compensation for wrongful conviction; and
- other specific guarantees, including the right to be promptly informed of any charge, to have adequate time and facilities to prepare a defence, to be tried in person without undue delay, to examine witnesses, to choose and meet with a lawyer and to have access to effective legal aid.

Prohibition against retrospective criminal laws

Article 15 of the ICCPR

4.24 The prohibition against retrospective criminal laws provides that:

- no-one can be found guilty of a crime that was not a crime under the law at the time the act was committed;
- anyone found guilty of a criminal offence cannot be given a heavier penalty than one that applied at the time the offence was committed; and
- if, after an offence is committed, a lighter penalty is introduced into the law, the lighter penalty should apply to the offender. This includes a right to benefit from the retrospective decriminalisation of an offence (if the person is yet to be penalised).

4.25 The prohibition against retrospective criminal laws does not apply to conduct which, at the time it was committed, was recognised under international law as being criminal even if it was not a crime under Australian law (for example, genocide, war crimes and crimes against humanity).

Right to privacy

Article 17 of the ICCPR

4.26 The right to privacy prohibits unlawful or arbitrary interference with a person's private, family, home life or correspondence. It requires the state:

- not to arbitrarily or unlawfully invade a person's privacy; and
- to adopt legislative and other measures to protect people from arbitrary interference with their privacy by others (including corporations).

4.27 The right to privacy contains the following elements:

- respect for private life, including information privacy (for example, respect for private and confidential information and the right to control the storing, use and sharing of personal information);
- the right to personal autonomy and physical and psychological integrity, including respect for reproductive autonomy and autonomy over one's own body (for example, in relation to medical testing);
- the right to respect for individual sexuality (prohibiting regulation of private consensual adult sexual activity);
- the prohibition on unlawful and arbitrary state surveillance;
- respect for the home (prohibiting arbitrary interference with a person's home and workplace including by unlawful surveillance, unlawful entry or arbitrary evictions);

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- respect for family life (prohibiting interference with personal family relationships);
 - respect for correspondence (prohibiting arbitrary interception or censoring of a person's mail, email and web access), including respect for professional duties of confidentiality; and
 - the right to reputation.

Right to protection of the family

Articles 17 and 23 of the ICCPR; and article 10 of the International Covenant on Economic, Social and Cultural Rights (ICESCR)

4.28 Under human rights law the family is recognised as the natural and fundamental group unit of society and is therefore entitled to protection. The right requires the state:

- not to arbitrarily or unlawfully interfere in family life; and
- to adopt measures to protect the family, including by funding or supporting bodies that protect the family.

4.29 The right also encompasses:

- the right to marry (with full and free consent) and found a family;
- the right to equality in marriage (for example, laws protecting spouses equally) and protection of any children on divorce;
- protection for new mothers, including maternity leave; and
- family unification.

Right to freedom of thought and religion

Article 18 of the ICCPR

4.30 The right to hold a religious or other belief or opinion is absolute and may not be subject to any limitations.

4.31 However, the right to exercise one's belief may be subject to limitations given its potential impact on others.

4.32 The right to freedom of thought, conscience and religion includes:

- the freedom to choose and change religion or belief;
- the freedom to exercise religion or belief publicly or privately, alone or with others (including through wearing religious dress);
- the freedom to exercise religion or belief in worship, teaching, practice and observance; and
- the right to have no religion and to have non-religious beliefs protected (for example, philosophical beliefs such as pacifism or veganism).

4.33 The right to freedom of thought and religion also includes the right of a person not to be coerced in any way that might impair their ability to have or adopt a religion or belief of their own choice. The right to freedom of religion prohibits the state from impairing, through legislative or other measures, a person's freedom of religion; and requires it to take steps to prevent others from coercing persons into following a particular religion or changing their religion.

Right to freedom of opinion and expression

Articles 19 and 20 of the ICCPR; and article 21 of the Convention on the Rights of Persons with Disabilities (CRPD)

4.34 The right to freedom of opinion is the right to hold opinions without interference. This right is absolute and may not be subject to any limitations.

4.35 The right to freedom of expression relates to the communication of information or ideas through any medium, including written and oral communications, the media, public protest, broadcasting, artistic works and commercial advertising. It may be subject to permissible limitations.

Right to freedom of assembly

Article 21 of the ICCPR

4.36 The right to peaceful assembly is the right of people to gather as a group for a specific purpose. The right prevents the state from imposing unreasonable and disproportionate restrictions on assemblies, including:

- unreasonable requirements for advance notification of a peaceful demonstration (although reasonable prior notification requirements are likely to be permissible);
- preventing a peaceful demonstration from going ahead or preventing people from joining a peaceful demonstration;
- stopping or disrupting a peaceful demonstration;
- punishing people for their involvement in a peaceful demonstration or storing personal information on a person simply because of their involvement in a peaceful demonstration; and
- failing to protect participants in a peaceful demonstration from disruption by others.

Right to freedom of association

Article 22 of the ICCPR; and article 8 of the ICESCR

4.37 The right to freedom of association with others is the right to join with others in a group to pursue common interests. This includes the right to join political parties, trade unions, professional and sporting clubs and non-governmental organisations.

4.38 The right prevents the state from imposing unreasonable and disproportionate restrictions on the right to form associations and trade unions, including:

- preventing people from forming or joining an association;
- imposing procedures for the formal recognition of associations that effectively prevent or discourage people from forming an association;
- punishing people for their membership of a group; and
- protecting the right to strike and collectively bargain.

4.39 Limitations on the right are not permissible if they are inconsistent with the guarantees of freedom of association and the right to organise as contained in the International Labour Organisation Convention of 1948 concerning Freedom of Association and Protection of the Right to Organize (ILO Convention No. 87).

Right to take part in public affairs

Article 25 of the ICCPR

4.40 The right to take part in public affairs includes guarantees of the right of Australian citizens to stand for public office, to vote in elections and to have access to positions in public service. Given the importance of free speech and protest to the conduct of public affairs in a free and open democracy, the realisation of the right to take part in public affairs depends on the protection of other key rights, such as freedom of expression, association and assembly.

4.41 The right to take part in public affairs is an essential part of democratic government that is accountable to the people. It applies to all levels of government, including local government.

Right to equality and non-discrimination

Articles 2, 3 and 26 of the ICCPR; articles 2 and 3 of the ICESCR; International Convention on the Elimination of All Forms of Racial Discrimination (CERD); Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW); CRPD; and article 2 of the Convention on the Rights of the Child (CRC)

4.42 The right to equality and non-discrimination is a fundamental human right that is essential to the protection and respect of all human rights. The human rights treaties provide that everyone is entitled to enjoy their rights without discrimination of any kind, and that all people are equal before the law and entitled to the equal and non-discriminatory protection of the law.

4.43 'Discrimination' under the ICCPR encompasses both measures that have a discriminatory intent (direct discrimination) and measures which have a

discriminatory effect on the enjoyment of rights (indirect discrimination).³ The UN Human Rights Committee has explained indirect discrimination as 'a rule or measure that is neutral on its face or without intent to discriminate', which exclusively or disproportionately affects people with a particular personal attribute.⁴

4.44 The right to equality and non-discrimination requires that the state:

- ensure all laws are non-discriminatory and are enforced in a non-discriminatory way;
- ensure all laws are applied in a non-discriminatory and non-arbitrary manner (equality before the law);
- have laws and measures in place to ensure that people are not subjected to discrimination by others (for example, in areas such as employment, education and the provision of goods and services); and
- take non-legal measures to tackle discrimination, including through education.

Rights of the child

CRC

4.45 Children have special rights under human rights law taking into account their particular vulnerabilities. Children's rights are protected under a number of treaties, particularly the CRC. All children under the age of 18 years are guaranteed these rights, which include:

- the right to develop to the fullest;
- the right to protection from harmful influences, abuse and exploitation;
- family rights; and
- the right to access health care, education and services that meet their needs.

Obligation to consider the best interests of the child

Articles 3 and 10 of the CRC

4.46 Under the CRC, states are required to ensure that, in all actions concerning children, the best interests of the child are a primary consideration. This requires active measures to protect children's rights and promote their survival, growth and wellbeing, as well as measures to support and assist parents and others who have

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

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

day-to-day responsibility for ensuring recognition of children's rights. It requires legislative, administrative and judicial bodies and institutions to systematically consider how children's rights and interests are or will be affected directly or indirectly by their decisions and actions.

4.47 Australia is required to treat applications by minors for family reunification in a positive, humane and expeditious manner. This obligation is consistent with articles 17 and 23 of the ICCPR, which prohibit interference with the family and require family unity to be protected by society and the state (see above, [4.29]).

Right of the child to be heard in judicial and administrative proceedings

Article 12 of the CRC

4.48 The right of the child to be heard in judicial and administrative proceedings provides that states assure to a child capable of forming his or her own views the right to express those views freely in all matters affecting them. The views of the child must be given due weight in accordance with their age and maturity.

4.49 In particular, this right requires that the child is provided the opportunity to be heard in any judicial and administrative proceedings affecting them, either directly or through a representative or an appropriate body.

Right to nationality

Articles 7 and 8 of the CRC; and article 24(3) of the ICCPR

4.50 The right to nationality provides that every child has the right to acquire a nationality. Accordingly, Australia is required to adopt measures, both internally and in cooperation with other countries, to ensure that every child has a nationality when born. The CRC also provides that children have the right to preserve their identity, including their nationality, without unlawful interference.

4.51 This is consistent with Australia's obligations under the Convention on the Reduction of Statelessness 1961, which requires Australia to grant its nationality to a person born in its territory who would otherwise be stateless, and not to deprive a person of their nationality if it would render the person stateless.

Right to self-determination

Article 1 of the ICESCR; and article 1 of the ICCPR

4.52 The right to self-determination includes the entitlement of peoples to have control over their destiny and to be treated respectfully. The right is generally understood as accruing to 'peoples', and includes peoples being free to pursue their economic, social and cultural development. There are two aspects of the meaning of self-determination under international law:

- that the people of a country have the right not to be subjected to external domination and exploitation and have the right to determine their own political status (most commonly seen in relation to colonised states); and

- that groups within a country, such as those with a common racial or cultural identity, particularly Indigenous people, have the right to a level of internal self-determination.

4.53 Accordingly, it is important that individuals and groups, particularly Aboriginal and Torres Strait Islander peoples, should be consulted about decisions likely to affect them. This includes ensuring that they have the opportunity to participate in the making of such decisions through the processes of democratic government, and are able to exercise meaningful control over their affairs.

Rights to and at work

Articles 6(1), 7 and 8 of the ICESCR

Right to work

4.54 The right to work is the right of all people to have the opportunity to gain their living through decent work they freely choose, allowing them to live in dignity. It provides:

- that everyone must be able to freely accept or choose their work, including that a person must not be forced in any way to engage in employment;
- a right not to be unfairly deprived of work, including minimum due process rights if employment is to be terminated; and
- that there is a system of protection guaranteeing access to employment.

Right to just and favourable conditions of work

4.55 The right to just and favourable conditions of work provides that all workers have the right to just and favourable conditions of work, particularly adequate and fair remuneration, safe working conditions, and the right to join trade unions.

Right to social security

Article 9 of the ICESCR

4.56 The right to social security recognises the importance of adequate social benefits in reducing the effects of poverty and plays an important role in realising many other economic, social and cultural rights, in particular the right to an adequate standard of living and the right to health.

4.57 Access to social security is required when a person lacks access to other income and is left with insufficient means to access health care and support themselves and their dependents. Enjoyment of the right requires that sustainable social support schemes are:

- available to people in need;
- adequate to support an adequate standard of living and health care;

- accessible (providing universal coverage without discrimination; and qualifying and withdrawal conditions that are lawful, reasonable, proportionate and transparent); and
- affordable (where contributions are required).

Right to an adequate standard of living

Article 11 of the ICESCR

4.58 The right to an adequate standard of living requires that the state take steps to ensure the availability, adequacy and accessibility of food, clothing, water and housing for all people in its jurisdiction.

Right to health

Article 12 of the ICESCR

4.59 The right to health is the right to enjoy the highest attainable standard of physical and mental health. It is a right to have access to adequate health care (including reproductive and sexual healthcare) as well as to live in conditions that promote a healthy life (such as access to safe drinking water, housing, food and a healthy environment).

Right to education

Articles 13 and 14 of the ICESCR; and article 28 of the CRC

4.60 This right recognises the right of everyone to education. It recognises that education must be directed to the full development of the human personality and sense of dignity, and to strengthening respect for human rights and fundamental freedoms. It requires that primary education shall be compulsorily and freely available to all; and the progressive introduction of free secondary and higher education.

Right to culture

Article 15 of the ICESCR; and article 27 of the ICCPR

4.61 The right to culture provides that all people have the right to benefit from and take part in cultural life. The right also includes the right of everyone to benefit from scientific progress; and protection of the moral and material interests of the authors of scientific, literary or artistic productions.

4.62 Individuals belonging to minority groups have additional protections to enjoy their own culture, religion and language. The right applies to people who belong to minority groups in a state sharing a common culture, religion and/or language.

Right to an effective remedy

Article 2 of the ICCPR

4.63 The right to an effective remedy requires states to ensure access to an effective remedy for violations of human rights. States are required to establish

appropriate judicial and administrative mechanisms for addressing claims of human rights violations under domestic law. Where public officials have committed violations of rights, states may not relieve perpetrators from personal responsibility through amnesties or legal immunities and indemnities.

4.64 States are required to make reparation to individuals whose rights have been violated. Reparation can involve restitution, rehabilitation and measures of satisfaction—such as public apologies, public memorials, guarantees of non-repetition and changes in relevant laws and practices—as well as bringing to justice the perpetrators of human rights violations. Effective remedies should be appropriately adapted to take account of the special vulnerability of certain categories of persons including, and particularly, children.

Appendix 3

Correspondence



Senator the Hon Marise Payne
Minister for Defence

MS18-002063

Mr Ian Goodenough MP
Chair
Parliamentary Joint Committee on Human Rights
Parliament House
CANBERRA ACT 2600

Dear Mr Goodenough 

Thank you for your email of 20 June 2018 seeking a response to the Parliamentary Joint Committee on Human Rights assessment of the Defence (Inquiry) Regulations 2018.

Coercive evidence-gathering powers

The Defence (Inquiry) Regulations 2018 contain coercive evidence-gathering powers, with associated offences in the event of non-compliance, in order to ensure that all necessary information can be obtained in order to facilitate the making of decisions relating to the Australian Defence Force. Noting that the purpose of the Defence (Inquiry) Regulations 2018 is not to punish individuals, there are corresponding provisions which protect the use of information gathered through such coercive powers.

The Committee seeks advice whether the coercive evidence-gathering powers and abrogation of the privilege against self-incrimination are a proportionate means of achieving the stated objective. This includes whether the 'derivative use' immunity is reasonably available as a less restrictive rights alternative.

Subsection 124(2C) of the *Defence Act 1903* contains the power to make regulations conferring a 'use' immunity. It does not contain the power to make regulations conferring a 'derivative use' immunity. Therefore, a 'derivative use' immunity is not currently reasonably available as a less restrictive alternative to ensure that information or evidence cannot be used indirectly against the person.

In any case, the 'use' immunity is considered to be a proportionate means of achieving the objectives of Defence inquiries. Given the absence of a 'derivative use' immunity it is possible that information obtained through coercive powers could be used indirectly, such as to gather other evidence against that individual in other investigations or proceedings, however there are other appropriate and proportionate safeguards contained in the Defence (Inquiry) Regulations 2018. These include the requirement that hearings of Commissions of Inquiry in Part 2 and Inquiry Officer Inquiries in Part 3 be held in private, and the prohibitions against the use and disclosure of certain information and documents (including the application of the exemption under section 38 of the *Freedom of Information Act 1982*). Thus, if a person gives evidence that may tend to incriminate the person, subsequent use or publication of that evidence can be prohibited. This reduces the risk that the evidence could be used for other purposes, such as by Commonwealth prosecutors and law enforcement personnel.

In relation to the regulatory context of inquiries, an inquiry official is only empowered to gather information that is within the scope of their inquiry. The Instrument of Appointment which appoints an inquiry official will contain 'terms of reference' setting out the scope of the inquiry. An inquiry official has no power to gather incriminating evidence or information which is not relevant to, or falls outside, the scope of the inquiry, and may have their appointment terminated if they attempt to do so. Further, potentially adversely affected persons in a Commission of Inquiry have an entitlement to legal representation at Commonwealth expense. In an Inquiry Officer Inquiry, Australian Defence Force (ADF) members (who are the only individuals compellable under Part 3) have a general right of access to legal assistance at Commonwealth expense, and may request the presence of a legal officer at interviews. This enables witnesses to seek legal advice on their participation in inquiries.

While the concerns of the Committee are noted, it is considered that the benefits in abrogating the privilege against self-incrimination, coupled with the use immunity in subsection 124(2C) of the *Defence Act 1903* and other safeguards, outweigh any potential harm to personal liberty in this instance. The purpose of inquiries under the Defence (Inquiry) Regulations 2018 is to determine the facts and circumstances surrounding an incident so that informed decisions can be made about what actions are required to address the immediate danger or issue, or to avoid repetition of the incident in the future. These inquiries are intended to protect the organisation and not to punish individuals.

In terms of the right to privacy, an individual would only be required to disclose personal information as part of a coercive evidence-gathering process if that information is relevant to the inquiry and within the scope of the inquiry's terms of reference. In some inquiries, such as those involving sensitive personnel matters, it is foreseeable that personal information will be relevant and therefore may be obtained. In other inquiries, such as one following a safety incident, personal information beyond the names, ranks and locations of individuals is unlikely to be relevant and, therefore, could not be obtained.

If personal information is obtained through coercive powers, it will be subject to a number of safeguards against the subsequent use and disclosure of that information, as discussed below. While there may be a requirement to transmit information quickly across the Defence organisation in order for necessary steps to be taken immediately (such as to mitigate risks to individuals where a report contains safety critical information which need to be actioned quickly to prevent further safety incidents from occurring), in such instances steps will be taken to protect the privacy of individuals referred to in the records where practicable. Where time or other factors do not permit this action, the risk to safety will outweigh any risks associated with breach of a person's privacy.

Authorisations to use, disclose and copy information and documents

The Committee has expressed concern about the compatibility of the use and disclosure provisions with the right to privacy.

Sections 26 and 58 do not operate to allow any employee of the Commonwealth or member of the Defence Force to make any information in inquiry records publicly available. Disclosure of inquiry records to the public would only be permitted if the disclosure were within the course of the person's duties or authorised by the Minister in accordance with sections 27 or 59.

Whether disclosure is within the scope of a person's duties will depend on the nature of the person's position and the role of the individual seeking to disclose the information. Guidance contained in Chief of the Defence Force Directive 08/2014 (the relevant extract of which has been enclosed for the Committee's reference) states that disclosure to the public or wide disclosure within Defence is unlikely to be part of, or incidental to, a person's duties. The Directive provides general examples of different roles and functions within the ADF. A commanding officer in the ADF has functions associated with the welfare of his or her subordinates, so their performance of duties includes matters incidental to maintaining the welfare of his or her subordinates. A legal officer in the ADF has functions associated with giving legal advice to command, so their performance of duties includes matters incidental to giving the legal advice. The Directive also provides common examples of disclosures internally within and externally to Defence that may fall within the performance of a person's duties. These include internal disclosures of inquiry records to other Defence staff for the purpose of implementing inquiry outcomes, dealing with complaints, designing training, policy, procedures, instructions and orders; and affording procedural fairness.

The Directive states that external disclosures would usually be within the duties of a dedicated liaison officer of the relevant external Department or agency. Given that the purpose of inquiries under the Defence (Inquiry) Regulations 2018 is to facilitate the making of decisions relating to the Defence Force, few inquiry records would need to be made available outside the Defence organisation. The most likely scenario is where inquiry records concerning a safety incident are provided to the Department of Veterans' Affairs to enable that Department to consider an ADF member's compensation claim. In the event that an Australian Public Service (APS) employee outside the Department is provided with inquiry records under section 26 or 58, then that APS employee will be also bound by the legislative restrictions. That is, they will equally not be permitted to use, disclose or copy inquiry records unless it is within the course of their employment.

In the above examples, a commanding officer maintaining the welfare of his or her subordinates, a legal officer giving legal advice to command, the implementation of inquiry outcomes, development of certain material, affording procedural fairness, or providing inquiry records to the Department of Veterans' Affairs to enable it to consider a compensation claim, are legitimate objectives for the purposes of international human rights law. Using or disclosing inquiry records or reports which may contain personal information is rationally connected to that objective.

When considered in the context of the various safeguards contained in both the Defence (Inquiry) Regulation 2018 and the supporting policy, the use and disclosure provisions are proportionate to achieve that objective. Those safeguards include the offences and provisions contained in section 37 or 66 of the Defence (Inquiry) Regulations 2018, the *Privacy Act 1988* and section 70 of the *Crimes Act 1914* for unauthorised disclosures. In addition, the current content in Chief of the Defence Force Directive 08/2014 (discussed above) constitutes a general order to ADF members for the purposes of the *Defence Force Discipline Act 1982*, meaning that unauthorised public disclosure of inquiry records by ADF members, who for the most part will be handling such records, may result in internal administrative or disciplinary action. I am advised by Defence that the intention is that the Chief of the Defence Force Directive 08/2014 will be updated.

Sections 27 and 59 provide a broader mechanism for inquiry records to be used, disclosed or copied in any circumstances. The purpose of sections 27 and 59 is to allow use, disclosure or copying of inquiry records in circumstances where there is a legitimate objective for the purposes of human rights law, but where such would not ordinarily be within the course of an APS employee or ADF member's employment. For example, it may be legitimate for the family of a deceased ADF member to be provided with information surrounding the ADF member's death. Providing them with a copy of the report would be rationally connected to that objective, but doing so would not ordinarily be within the scope of a person's duties and therefore not within the scope of sections 27 and 58. In this instance, the Minister could authorise the Chief of the Defence Force under section 27 or 59 to disclose a copy of an inquiry report to the family.

Sections 27 and 59 are proportionate to their objective, as they provide a mechanism for using or disclosing inquiry records containing personal information in a way that is the least restrictive of the right to privacy. Consistent with Defence and privacy policies, the Minister may impose conditions, such as that the personal information of individuals be redacted prior to the report being disclosed. The requirement that the Minister identifies the specific purpose for which the use or disclosure is being authorised limits the use and disclosure of inquiry records to the specific purpose which the Minister has turned his or her mind to, and not some other broader purpose.

Sections 28 and 60 provide a broad power for the Minister to use, disclose and copy inquiry records for purposes relating to the Defence Force. As the Minister for Defence has general control and administration of the Defence Force under the *Defence Act 1903*, and the purpose of inquiries under the Defence (Inquiry) Regulations 2018 is to facilitate the making of decisions relating to the Defence Force, it is essential that the Minister retains this broad power. These provisions, therefore, serve legitimate objectives for the purposes of international human rights law, and using or disclosing inquiry records or reports which may contain personal information is rationally connected to that objective. It is also proportionate to achieve the objective, noting that the use or disclosure may only occur where it is necessary to facilitate decision-making and that this broad power is only held by the Minister who, as with the exercise of other statutory powers, will remain accountable to Parliament.

Following its publication, the Explanatory Statement to the Defence (Inquiry) Regulations 2018 was updated to include additional information on disclosure under sections 26, 27 and 58.

Reversal of the evidential burden of proof

The Defence (Inquiry) Regulations 2018 contain a number of offences associated with failing to comply with a notice or order to appear or provide documents or answer questions, and disclosing inquiry records without permission or authorisation. The offences also provide express matters that could be considered as defences for complying with notices or orders. This means that a defendant who wishes to rely on the relevant matter bears an evidential burden of adducing or pointing to evidence that suggests a reasonable possibility that the matter exists. This amounts to a reversal of the burden of proof. The Committee seeks advice on the compatibility of the reverse burden with the right to the presumption of innocence.

To rely on the relevant matter in relation to the offence provisions, the defendant would be required to adduce or point to evidence that they held the relevant belief, that the circumstances made compliance unduly onerous for them, or that they had the relevant permission or authorisation. Once they have done this, the prosecution would need to disprove the existence of the belief, circumstances, permission or authorisation in order to prove the offence.

The purpose of the offences is to ensure that the inquiry official is able to obtain the best information or evidence available on which to base his or her findings, which will then be used to facilitate decision-making. The best information or evidence ensures that the best decisions are made. This is a legitimate objective for the purposes of international human rights law. The offences, and the reverse evidential burden as discussed above, are effective to achieve that objective. The penalties for these offences are relatively low.

The reverse evidential burden is reasonable and proportionate to achieve that legitimate objective. The existence of the relevant circumstances referred to in the offences can be readily and cheaply established by the defendant, while it would be significantly more difficult and costly for the prosecution to positively disprove the existence of these matters beyond reasonable doubt as a matter of course. For example, a prosecution for disclosure of inquiry records without authorisation would require a reasonable belief that there was no authorisation or permission, which would be difficult for a prosecutor to establish. Additionally, the belief of the person that compliance is likely to cause damage to Defence, or that the circumstances made compliance unduly onerous, requires consideration of factors which are peculiarly within the knowledge of the defendant. For example, in relation to whether compliance is unduly burdensome, the volume of information to be provided and the personal circumstances of the person vis a vis the requirements of the order or notice would only be known by the person.

Following its publication, the Explanatory Statement to the Defence (Inquiry) Regulations 2018 was reissued to include additional information on the justification for the reverse burden of proof in sections 29, 30, 32, 36, 37, 61, 62 and 66.

I trust that this response addresses the Committee's concerns. The Committee's comments on the content of statements of compatibility are noted, and we will endeavour to address the guidance you have referred to in future explanatory material. Should the Committee wish to publish the extract of the Chief of the Defence Force Directive 08/2014 provided with this response, I request that my Department is advised accordingly to provide comment, as required. I have also enclosed a copy of the current version of the Explanatory Statement to the Defence (Inquiry) Regulations 2018 for the Committee's reference, which was reissued with additional information in May 2018 at the request of the Senate Standing Committee on Regulations and Ordinance.

Yours sincerely

MARISE PAYNE

Encl



The Hon Alan Tudge MP
Minister for Citizenship and Multicultural Affairs

Ref No: MS18-002317

Mr Ian Goodenough MP
Chair
Parliamentary Joint Committee on Human Rights
S1.111
Parliament House
CANBERRA ACT 2600

Dear Mr Goodenough *Ian*

Thank you for your letter of 20 June 2018 in which further information was requested on the *Migration Legislation Amendment (Temporary Skill Shortage Visa and Complementary Reforms) Regulations 2018*.

I have attached the response to the *Parliamentary Joint Committee on Human Rights' Report 5 of 2018* as requested in your letter.

Thank you for raising this matter.

Yours sincerely

Alan Tudge

09/07/2018

Department of Home Affairs response to Parliamentary Joint Committee on Human Rights regarding the Migration Legislation Amendment (Temporary Skill Shortage Visa and Complementary Reforms) Regulations 2018

Committee comment:

1.50 The preceding analysis indicates that the measure engages the right to freedom of association.

1.51 The committee seeks the advice of the minister as to the compatibility of the measure with this right, including:

- 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;
- whether the measure is rationally connected (that is, effective to achieve) that objective; and
- whether the measure is a proportionate means of achieving its objective (including whether the definition of 'associated with' is sufficiently circumscribed).

Department of Home Affairs response:

With the introduction of the Temporary Skill Shortage (TSS) visa in March 2018, the Department expanded the definition of 'associated with' at Regulation 1.13B due to integrity concerns in the previous subclass 457 visa program. The previous definitions were inadequate to deal with some abuses within the subclass 457 visa program. This was particularly in situations where previously sanctioned/cancelled sponsors closed the operations of one company, and then created a new legal entity to continue using the 457/TSS program to sponsor overseas workers.

The expanded definition of 'associated with' under Regulation 1.13B allows the Department to address, among other issues, phoenixing activities by companies and networks of non-compliant entities (for example, brothers running two separate companies engaged in visa fraud). In applying this definition, the association must be clear – that is, the 'associated with' person must be engaged in behaviour that falls within the definition of 'adverse information' at Regulation 1.13A. Given that most sponsors are companies, not individuals, Regulation 1.13B allows the Department to consider relevant linkages between companies that may have the same directors, majority shareholders, office holders, managers or people closely related to these positions of authority. There are limits to what is relevant for the purposes of taking into account 'adverse information'. Therefore, the expanded definition of 'associated with' is applied to ensure relevant linkages between companies who have adverse information against them can be identified to prevent further activities that contravene Australian law, including non-compliance with the *Migration Act 1958 (Cth)* (the Migration Act).

Case Study:

In 2012, Company A was approved as a standard Business Sponsor and sponsored approximately 27 workers holding 457 visas to work across seven different business locations under the control of the one sponsorship agreement. Company A was under the control of a single Director A. Allegations from 2012 to 2017 identified that Director A was engaging in payment for visa sponsorship, which is an offense under Sections 245AR and 245AS of the Migration Act. Monitoring by the Australia Border Force (ABF) in 2014 resulted in a sanction bar of two years for provision of false or misleading information (regulation 2.90).

Shortly thereafter, multiple companies were set up that took over the operations of each of the business locations formerly operated by Company A. By 2017, this resulted in 22 additional companies being created, all of which lodged applications for standard business sponsors. Most of these companies were approved as sponsors and subsequently nominated overseas workers for 457 visas.

In 2017, an assessment of the cohort of 23 companies identified that Director A is only listed as Director for two of the 23 companies. Each of the 23 companies had a single Director who the ABF identified were either Director A's elderly parents, his current and former wife or former visa holders who were granted permanent residence or citizenship via Company A. Evidence collected by the ABF found that Director A was the controlling entity for most of the 23 companies, was account signatory for business accounts or identified as the 'boss' by the employees.

In 2017, the Department and the ABF identified that 17 of the companies had provided false or misleading information to the Department in support of applications to become standard business sponsors.

The identified shortfalls of the monitoring legislation at the time identified that Director A was able to spread his risk that if one company was identified by the Department and sanctioned, that the remaining companies (and visa holders) would continue to remain as sponsors. The added benefit of this was that each sponsor was considered low risk to the Department due to the low number of visa holders nominated per company. When a company was identified by the Department or ABF as having adverse information against it, Director A simply transferred its operations to a new company that then applied to become a sponsor, thereby ensuring that the new company had a clean record with the Department.

In 2017, the Department sanctioned 12 of the companies for provision of false or misleading information, and refused visa applications lodged by the remaining 11 companies.

This case study shows that being associated with certain individuals or companies engaged in conduct that would be considered 'adverse information', can affect the suitability of a sponsor or nominator who is associated with that individual or company. This is particularly the case when the associated person has engaged in conduct that is non-compliant with the Migration Act. Therefore, the definition is applied to achieve the legitimate objective of preventing non-compliant conduct.



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MC18-004623

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10 JUL 2018

Dear Mr Goodenough

kan,

Thank you for your email of 20 June 2018 regarding the Social Security (Assurances of Support) Determination 2018 and Social Security (Assurances of Support) Amendment Determination 2018 regarding the compatibility of these two Determinations to the right to the protection of the family.

You asked whether there is reasoning or evidence that establishes that the stated objective addresses a pressing or substantial concern or whether the proposed changes are otherwise aimed at achieving a legitimate objective for the purposes of international human rights law.

Regarding this issue, it is worth noting that the purpose of the Social Security (Assurances of Support) Determination 2018 and Social Security (Assurances of Support) Amendment Determination 2018 is to continue existing requirements under the Assurance of Support (AoS) Scheme as the previous determination sunset on 1 April 2018.

The Social Security (Assurances of Support) Amendment Determination 2018 revises certain requirements of the Social Security (Assurances of Support) Determination 2018.

These changes:

- reduce the income threshold for individual assurers to the level that were in place immediately prior to 1 April 2018
- remove the requirement that an assurer needs to be in Australia when lodging their application
- remove the requirement that an applicant must not have a debt owing to the Australian Government (for example, a debt owed to the Australian Taxation Office).

These amendments reduce the AoS requirements for assurers and therefore enhance the prospect of families joining each other and the right to protection of families for the purposes of international human rights law.

The AoS scheme is a proportionate means of achieving its objective as it allows migrants who have a higher likelihood of requiring income support to come to Australia. The requirements under the AoS scheme ensures an assurer has the capacity to provide the level of financial support required by a visa entrant. If a potential assurer does not meet the AoS income requirements, the option of entering into a joint AoS arrangement is available.

The AoS scheme also allows the visa entrant access to social security payments, subject to meeting waiting periods and other eligibility criteria, if the assurer is not able to provide adequate support to the visa entrants during the assurance period. The assurer is responsible for repayment of any recoverable social security payments received by the visa entrants during the assurance period.

Should you have any questions regarding this response please contact Ms Anita Davis, Branch Manager, International Policy and Payment Support Branch on 02 6146 4246.

Thank you again for raising this matter with me.

Yours sincerely

DAN TEHAN



THE HON JOSH FRYDENBERG MP
MINISTER FOR THE ENVIRONMENT AND ENERGY

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MC18-009812

23 JUL 2018

Dear Mr Goodenough *Ivan*

Thank you for your email on behalf of the Parliamentary Joint Committee on Human Rights (the Committee) requesting advice on the human rights compatibility of the five Australian marine park management plans before Parliament, in its Scrutiny Report 5 of 2018.

The Committee sought my clarification on the regulation of commercial media under marine park management plans. I understand the concerns raised relate to the right to freedom of expression through the communication of information and ideas through the media. In question is the compatibility of this right with measures in the plans whereby: news of the day reporting may be undertaken on terms determined by the Director of National Parks (the Director), and subject to the Director being notified; and other commercial media activities other than news of the day reporting can be carried out in accordance with a permit issued by the Director.

In particular, the Committee seeks clarification on:

- the extent of the limitation the measure imposes on the right to freedom of expression (such as, information about the terms determined by the Director in relation to news-of-the day reporting, and the process for the issue of a permit or permission for other reporting);
- whether the measure is aimed at achieving a legitimate objective for the purposes of human rights law;
- how the measure is effective to achieve (that is, rationally connected to) that objective; and
- whether the limitation is a reasonable and proportionate measure to achieve the stated objective (including the existence of any safeguards).

The authorisation of commercial media by the Director of National Parks is done in accordance with the management plan objective to protect the natural, cultural and heritage values of marine parks.

Commercial news agencies may carry out activities within the marine parks for the purpose of reporting news of the day, without obtaining individual authorisation from the Director but must comply with terms determined by the Director, while doing so to protect park values.

While commercial media, other than reporting of news of the day, requires authorisation from the Director, the assessment of permit/licence applications and the conditions placed on those authorisations relates only to the impact on park values and other park users. It does not consider the manner in which images or sounds will be used or place conditions on their use.

The measures outlined, do not control how images or sounds are used and thereby place no restriction on the right to freedom of expression. They are considered proportionate to achieving the objective of the management plans to protect natural, cultural and heritage values of marine parks. The following provides a more detailed explanation of the legislative context and process by which news of the day reporting can be carried out under the management plans, and by which the Director can authorise other commercial media activities in marine parks.

Legislative context

Sections 354 and 354A of the Environment Protection and Biodiversity Conservation Act 1999 (Cth) (EPBC Act) prohibit certain activities in Commonwealth reserves (including Australian marine parks) unless they are done in accordance with a management plan. The purpose of a management plan is to set out how activities prohibited by the EPBC Act may be undertaken in Commonwealth reserves, while protecting the reserve's environmental, cultural and heritage values and managing the impact of activities on those values and other park visitors.

The prohibitions in the EPBC Act include taking actions for a commercial purpose. Photography, filming or sound recording for commercial purposes, including for example in-water filming and recording by documentary makers or feature film makers and reporting by commercial news agencies, is therefore prohibited by the EPBC Act in Australian marine parks unless done in accordance with a management plan in effect for that park. The management plans do not create a restriction on media activities - they relieve one.

Authorising and regulating commercial media activities in Australian marine park management plans

Australian marine park management plans pursue the objective of the EPBC Act to promote the conservation of biodiversity and to provide for the protection and conservation of heritage. Part 4 of the Australian marine park management plans set out how commercial media activities may be carried out in the marine parks. The term 'commercial media' is used in the management plans to describe all image capture or sound recording for commercial purposes.

Commercial media activities for the purposes of reporting news of the day is allowed under the management plan, but must comply with terms determined by the Director. Guidance on the 'terms determined by the Director' will be prepared for these activities and made available on the Parks Australia website. Activities for news of the day reporting are likely to be time sensitive to capture breaking news or an event of the moment and are typically small scale and less likely to impact park values. The number of crew, amount of equipment and duration of filming are considered in assessing the risk to values. These activities don't require individual authorisation as opposed to other commercial media activities such as a film or documentary which are better managed by permit or licence, given the greater risk they may pose to park values (such as larger crew and equipment needs and more time for filming).

For commercial media activities that include image capture and sound recording, other than reporting news of the day, the management plan requires the Director to issue an authorisation by permit or licence. Applicants apply online through a portal on the Parks Australia website. Following receipt of the application, decisions about activities will be consistent with the plan and zone objectives and take into account the impacts and risks of the activity on the park values. The assessment is not based on how the images/sounds will be used or what the applicant intends to convey through those images/sounds. The impacts and risks will be assessed in accordance with policies established under the assessments and authorisations program outlined in the management plans. The difference in approach reflects that permitted or licensed projects typically pose greater impacts and risks to park values.

The Director can only determine terms for the carrying out of activities for the purpose of reporting news of the day, and impose conditions on the authorisation of other commercial media activities, which are within the Director's powers and functions under the EPBC Act. Relevantly, the Director's functions under s.514D of the EPBC Act are to protect, conserve and manage biodiversity and heritage in Commonwealth reserves. Accordingly, the terms determined by the Director or the conditions of authorisations specifically aim to avoid or mitigate impacts and risks of commercial media activities within marine parks, to as low as reasonably practicable. For example, a condition that has been placed on a licenced or permitted commercial media activity in a marine park related to the use of a chemical in the water to alter marine bird behaviour.

As such, the assessment, approval and conditions on commercial media under marine park management plans and the terms for reporting news of the day do not extend to restricting the right to freedom of expression in any medium, including written and oral communications, the media, public protest, broadcasting, artistic works or advertising, and is consistent with article 19 of the International Covenant on Civil and Political Rights.

Thank you for raising this matter with me.

Yours sincerely

JOSH FRYDENBERG

CC: Assistant Minister for the Environment, the Hon Melissa Price MP

Appendix 4

Guidance Note 1 and Guidance Note 2

GUIDANCE NOTE 1: Drafting statements of compatibility

December 2014

This note sets out the committee's approach to human rights assessments and its requirements for statements of compatibility. It is designed to assist legislation proponents in the preparation of statements of compatibility.

Background

Australia's human rights obligations

Human rights are defined in the *Human Rights (Parliamentary Scrutiny) Act 2011* as the rights and freedoms contained in the seven core human rights treaties to which Australia is a party. These treaties are:

- International Covenant on Civil and Political Rights
- International Covenant on Economic, Social and Cultural Rights
- International Convention on the Elimination of All Forms of Racial Discrimination
- Convention on the Elimination of All Forms of Discrimination against Women
- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
- Convention on the Rights of the Child
- Convention on the Rights of Persons with Disabilities

Australia has voluntarily accepted obligations under these seven core UN human rights treaties. Under international law it is the state that has an obligation to ensure that all persons enjoy human rights. Australia's obligations under international human rights law are threefold:

- **to respect** – requiring government not to interfere with or limit human rights;
- **to protect** – requiring government to take measures to prevent others (for example individuals or corporations) from interfering with human rights;
- **to fulfil** – requiring government to take positive measures to fully realise human rights.

Where a person's rights have been breached, there is an obligation to ensure accessible and effective remedies are available to that person.

Australia's human rights obligations apply to all people subject to Australia's jurisdiction, regardless of whether they are Australian citizens. This means Australia owes human rights obligations to everyone in Australia, as well as to persons outside Australia where Australia is exercising effective control over them, or they are otherwise under Australia's jurisdiction.

The treaties confer rights on individuals and groups of individuals and not companies or other incorporated bodies.

Civil and political rights

Australia is under an obligation to respect, protect and fulfil its obligations in relation to all civil and political rights. It is generally accepted that most civil and political rights are capable of immediate realisation.

Economic, social and cultural rights

Australia is also under an obligation to respect, protect and fulfil economic, social and cultural rights. However, there is some flexibility allowed in the implementation of these rights. This is the obligation of progressive realisation, which recognises that the full realisation of economic, social and cultural rights may be achieved progressively. Nevertheless, there are some obligations in relation to economic, social and cultural rights which have immediate effect. These include the obligation to ensure that people enjoy economic, social and cultural rights without discrimination.

Limiting a human right

It is a general principle of international human rights law that the rights protected by the human rights treaties are to be interpreted generously and limitations narrowly. Nevertheless, international human rights law recognises that reasonable limits may be placed on most rights and freedoms – there are very few absolute rights which can never be legitimately limited.¹ For all other rights, rights may be limited as long as the limitation meets certain standards. In general, any measure that limits a human right has to comply with the following criteria (*The limitation criteria*) in order for the limitation to be considered justifiable.

Prescribed by law

Any limitation on a right must have a clear legal basis. This requires not only that the measure limiting the right be set out in legislation (or be permitted under an established rule of the common law); it must also be accessible and precise enough so that people know the legal consequences of their actions or the circumstances under which authorities may restrict the exercise of their rights.

Legitimate objective

Any limitation on a right must be shown to be necessary in pursuit of a legitimate objective. To demonstrate that a limitation is permissible, proponents of legislation must provide reasoned and evidence-based explanations of the legitimate objective being pursued. 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. In addition, there are a number of rights that may only be limited for a number of prescribed purposes.²

Rational connection

It must also be demonstrated that any limitation on a right has a rational connection to the objective to be achieved. To demonstrate that a limitation is permissible, proponents of legislation must provide reasoned and evidence-based explanations as to how the measures are likely to be effective in achieving the objective being sought.

Proportionality

To demonstrate that a limitation is permissible, the limitation must be proportionate to the objective being sought. In considering whether a limitation on a right might be proportionate, key factors include:

- whether there are other less restrictive ways to achieve the same aim;
- whether there are effective safeguards or controls over the measures, including the possibility of monitoring and access to review;

¹ Absolute rights are: the right not to be subjected to torture, cruel, inhuman or degrading treatment; the right not to be subjected to slavery; the right not to be imprisoned for inability to fulfil a contract; the right not to be subject to retrospective criminal laws; the right to recognition as a person before the law.

² For example, the right to association. For more detailed information on individual rights see Parliamentary Joint Committee on Human Rights, Guide to Human Rights (March 2014), available at <http://www.aph.gov.au/~media/Committees/Joint/PJCHR/Guide%20to%20Human%20Rights.pdf>.

- the extent of any interference with human rights – the greater the interference the less likely it is to be considered proportionate;
- whether affected groups are particularly vulnerable; and
- whether the measure provides sufficient flexibility to treat different cases differently or whether it imposes a blanket policy without regard to the merits of an individual case.

Retrogressive measures

In respect of economic, social and cultural rights, as there is a duty to realise rights progressively there is also a corresponding duty to refrain from taking retrogressive measures. This means that the state cannot unjustifiably take deliberate steps backwards which negatively affect the enjoyment of economic, social and cultural rights. In assessing whether a retrogressive measure is justified the limitation criteria are a useful starting point.

The committee's approach to human rights scrutiny

The committee's mandate to examine all existing and proposed Commonwealth legislation for compatibility with Australia's human rights obligations, seeks to ensure that human rights are taken into account in the legislative process.

The committee views its human rights scrutiny tasks as primarily preventive in nature and directed at minimising risks of new legislation giving rise to breaches of human rights in practice. The committee also considers it has an educative role, which includes raising awareness of legislation that promotes human rights.

The committee considers that, where relevant and appropriate, the views of human rights treaty bodies and international and comparative human rights jurisprudence can be useful sources for understanding the nature and scope of the human rights referred to in the Human Rights (Parliamentary Scrutiny) Act 2011. Similarly, there are a number of other treaties and instruments to which Australia is a party, such as the International Labour Organization (ILO) Conventions and the Refugee Convention which, although not listed in the *Human Rights (Parliamentary Scrutiny) Act 2011*, may nonetheless be relevant to the interpretation of the human rights protected by the seven core human rights treaties. The committee has also referred to other non-treaty instruments, such as the United Nations Declaration on the Rights of Indigenous Peoples, where it considers that these are relevant to the interpretation of the human rights in the seven treaties that fall within its mandate. When the committee relies on regional or comparative jurisprudence to support its analysis of the rights in the treaties, it will acknowledge this where necessary.

The committee's expectations for statements of compatibility

The committee considers statements of compatibility as essential to the examination of human rights in the legislative process. The committee expects statements to read as stand-alone documents. The committee relies on the statement as the primary document that sets out the legislation proponent's analysis of the compatibility of the bill or instrument with Australia's international human rights obligations.

While there is no prescribed form for statements under the *Human Rights (Parliamentary Scrutiny) Act 2011*, the committee strongly recommends legislation proponents use the current templates provided by the Attorney-General's Department.³

The statement of compatibility should identify the rights engaged by the legislation. Not every possible right engaged needs to be identified in the statement of compatibility, only those that are substantially engaged. The committee does not expect analysis of rights consequentially or tangentially engaged in a minor way.

³ The Attorney-General's Department guidance may be found at <https://www.ag.gov.au/RightsAndProtections/HumanRights/Human-rights-scrutiny/Pages/Statements-of-Compatibility.aspx>.

Consistent with the approach set out in the guidance materials developed by the Attorney-General's department, where a bill or instrument limits a human right, the committee requires that the statement of compatibility provide a detailed and evidence-based assessment of the measures against the limitation criteria set out in this note. Statements of compatibility should provide analysis of the impact of the bill or instrument on vulnerable groups.

Where the committee's analysis suggests that a bill limits a right and the statement of compatibility does not include a reasoned and evidence-based assessment, the committee may seek additional/further information from the proponent of the legislation. Where further information is not provided and/or is inadequate, the committee will conclude its assessment based on its original analysis. This may include a conclusion that the bill or instrument (or specific measures within a bill or instrument) are incompatible with Australia's international human rights obligations.

This approach is consistent with international human rights law which requires that any limitation on a human right be justified as reasonable, necessary and proportionate in pursuit of a legitimate objective.

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GUIDANCE NOTE 2: Offence provisions, civil penalties and human rights

December 2014

This guidance note sets out some of the key human rights compatibility issues in relation to provisions that create offences and civil penalties. It is not intended to be exhaustive but to provide guidance on the committee's approach and expectations in relation to assessing the human rights compatibility of such provisions.

Introduction

The right to a fair trial and fair hearing are protected by article 14(1) of the International Covenant on Civil and Political Rights (ICCPR). The right to a fair trial and fair hearing applies to both criminal and civil proceedings.

A range of protections are afforded to persons accused and convicted of criminal offences under article 14. These include the presumption of innocence (article 14(2)), the right to not incriminate oneself (article 14(3)(g)), the right to have a sentence reviewed by a higher tribunal (article 14(5)), the right not to be tried or punished twice for the same offence (article 14(7)), a guarantee against retrospective criminal laws (article 15(1)) and the right not to be arbitrarily detained (article 9(1)).¹

Offence provisions need to be considered and assessed in the context of these standards. Where a criminal offence provision is introduced or amended, the statement of compatibility for the legislation will usually need to provide an assessment of whether human rights are engaged and limited.²

The *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* provides a range of guidance in relation to the framing of offence provisions.³ However, legislation proponents should note that this government guide is neither binding nor conclusive of issues of human rights compatibility. The discussion below is intended to assist legislation proponents to identify matters that are likely to be relevant to the framing of offence provisions and the assessment of their human rights compatibility.

Reverse burden offences

Article 14(2) of the ICCPR protects the right to be presumed innocent until proven guilty according to law. Generally, consistency with the presumption of innocence requires the prosecution to prove each element of a criminal offence beyond reasonable doubt.

¹ For a more comprehensive description of these rights see Parliamentary Joint Committee on Human Rights, *Guide to Human Rights* (March 2014), available at <http://www.aph.gov.au/~media/Committees/Join/PJCHR/Guide%20to%20Human%20Rights.pdf>.

² The requirements for assessing limitations on human rights are set out in *Guidance Note 1: Drafting statements of compatibility* (December 2014).

³ See *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, September 2011 edition, available at <http://www.ag.gov.au/Publications/Documents/GuidetoFramingCommonwealthOffencesInfringementNoticesandEnforcementPowers/A%20Guide%20to%20Framing%20Cth%20Offences.pdf>.

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. Where a statutory exception, defence or excuse to an offence is provided in proposed legislation, these defences or exceptions 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.

Reverse burden offences will be likely to be compatible with the presumption of innocence where they are shown by legislation proponents to be reasonable, necessary and proportionate in pursuit of a legitimate objective. Claims of greater convenience or ease for the prosecution in proving a case will be insufficient, in and of themselves, to justify a limitation on the defendant's right to be presumed innocent.

It is the committee's usual expectation that, where a reverse burden offence is introduced, legislation proponents provide a human rights assessment in the statement of compatibility, in accordance with Guidance Note 1.

Strict liability and absolute liability offences

Strict liability and absolute liability offences engage and limit the presumption of innocence. This is because they allow for the imposition of criminal liability without the need to prove fault.

The effect of applying strict liability to an element or elements of an offence therefore means that the prosecution does not need to prove fault. However, the defence of mistake of fact is available to the defendant. Similarly, the effect of applying absolute liability to an element or elements of an offence means that no fault element needs to be proved, but the defence of mistake of fact is not available.

Strict liability and absolute liability offences will not necessarily be inconsistent with the presumption of innocence where they are reasonable, necessary and proportionate in pursuit of a legitimate objective.

The committee notes that strict liability and absolute liability may apply to whole offences or to elements of offences. It is the committee's usual expectation that, where strict liability and absolute liability criminal offences or elements are introduced, legislation proponents should provide a human rights assessment of their compatibility with the presumption of innocence, in accordance with Guidance Note 1.

Mandatory minimum sentencing

Article 9 of the ICCPR protects the right to security of the person and freedom from arbitrary detention. An offence provision which requires mandatory minimum sentencing will engage and limit the right to be free from arbitrary detention. The notion of 'arbitrariness' under international human rights law includes elements of inappropriateness, injustice and lack of predictability. Detention may be considered arbitrary where it is disproportionate to the crime that has been committed (for example, as a result of a blanket policy).⁴ Mandatory sentencing may lead to disproportionate or unduly harsh outcomes as it removes judicial discretion to take into account all of the relevant circumstances of a particular case in sentencing.

Mandatory sentencing is also likely to engage and limit article 14(5) of the ICCPR, which protects the right to have a sentence reviewed by a higher tribunal. This is because mandatory sentencing prevents judicial review of the severity or correctness of a minimum sentence.

The committee considers that mandatory minimum sentencing will be difficult to justify as compatible with human rights, given the substantial limitations it places on the right to freedom

⁴ See, for example, *A v Australia* (1997) 560/1993, UN Doc. CCPR/C/59/D/560/1993, [9.4]; Concluding Observations on Australia in 2000 (2000) UN doc A/55/40, volume 1, [522] (in relation to mandatory sentencing in the Northern Territory and Western Australia).

from arbitrary detention and the right to have a sentence reviewed by a higher tribunal (due to the blanket nature of the measure). Where mandatory minimum sentencing does not require a minimum non-parole period, this will generally be insufficient, in and of itself, to preserve the requisite judicial discretion under international human rights law to take into account the particular circumstances of the offence and the offender.⁵

Civil penalty provisions

Many bills and existing statutes contain civil penalty provisions. These are generally prohibitions on particular forms of conduct that give rise to liability for a 'civil penalty' enforceable by a court. As these penalties are pecuniary and do not include the possibility of imprisonment, they are said to be 'civil' in nature and do not constitute criminal offences under Australian law.

Given their 'civil' character, applications for a civil penalty order are dealt with in accordance with the rules and procedures that apply in relation to civil matters. These rules and procedures often form part of a regulatory regime which provides for a graduated series of sanctions, including infringement notices, injunctions, enforceable undertakings, civil penalties and criminal offences.

However, civil penalty provisions may engage the criminal process rights under articles 14 and 15 of the ICCPR where the penalty may be regarded as 'criminal' for the purpose of international human rights law. The term 'criminal' has an 'autonomous' meaning in human rights law. In other words, a penalty or other sanction may be 'criminal' for the purposes of the ICCPR even though it is considered to be 'civil' under Australian domestic law.

There is a range of international and comparative jurisprudence on whether a 'civil' penalty is likely to be 'criminal' for the purpose of human rights law.⁶ This criteria for assessing whether a penalty is 'criminal' for the purposes of human rights law is set out in further detail on page 4. The following steps (one to three) may assist legislation proponents in understanding whether a provision may be characterised as 'criminal' under international human rights law.

- **Step one:** *Is the penalty classified as criminal under Australian Law?*

If so, the penalty will be considered 'criminal' for the purpose of human rights law. If not, proceed to step two.

- **Step two:** *What is the nature and purpose of the penalty?*

The penalty is likely to be considered criminal for the purposes of human rights law if:

- a) the purpose of the penalty is to punish or deter; **and**
- b) the penalty applies to the public in general (rather than being restricted to people in a specific regulatory or disciplinary context.)

If the penalty does not satisfy this test, proceed to step three.

- **Step three:** *What is the severity of the penalty?*

The penalty is likely to be considered criminal for the purposes of human rights law if the civil penalty provision carries a penalty of imprisonment or a substantial pecuniary sanction.

Note: even if a penalty is not considered 'criminal' separately under steps two or three, it may still be considered 'criminal' where the nature and severity of the penalty are cumulatively considered.

⁵ This is because the mandatory minimum sentence may be seen by courts as a 'sentencing guidepost' which specifies the appropriate penalty for the least serious case. Judges may feel constrained to impose, for example, what is considered the usual proportion for a non-parole period (approximately 2/3 of the head sentence).

⁶ The UN Human Rights Committee, while not providing further guidance, has determined that 'civil' penalties may be 'criminal' for the purpose of human rights law, see, for example, *Osiyuk v Belarus* (1311/04); *Sayadi and Vinck v Belgium* (1472/06).

When a civil penalty provision is 'criminal'

In light of the criteria described at pages 3-4 above, the committee will have regard to the following matters when assessing whether a particular civil penalty provision is 'criminal' for the purposes of human rights law.

a) Classification of the penalty under domestic law

The committee considers that in accordance with international human rights law, the classification of the penalty as 'civil' under domestic law will not be determinative. However, if the penalty is 'criminal' under domestic law it will also be 'criminal' under international law.

b) The nature of the penalty

The committee considers that a civil penalty provision is more likely to be considered 'criminal' in nature if it contains the following features:

- the penalty is intended to be punitive or deterrent in nature, irrespective of its severity;
- the proceedings are instituted by a public authority with statutory powers of enforcement;
- a finding of culpability precedes the imposition of a penalty; and
- the penalty applies to the public in general instead of being directed at people in a specific regulatory or disciplinary context (the latter being more likely to be viewed as 'disciplinary' or regulatory rather than as 'criminal').

c) The severity of the penalty

In assessing whether a pecuniary penalty is sufficiently severe to amount to a 'criminal' penalty, the committee will have regard to:

- the amount of the pecuniary penalty that may be imposed under the relevant legislation with reference to the regulatory context;
- the nature of the industry or sector being regulated and relative size of the pecuniary penalties and the fines that may be imposed (for example, large penalties may be less likely to be criminal in the corporate context);
- the maximum amount of the pecuniary penalty that may be imposed under the civil penalty provision relative to the penalty that may be imposed for a corresponding criminal offence; and
- whether the pecuniary penalty imposed by the civil penalty provision carries a sanction of imprisonment for non-payment, or other very serious implications for the individual in question.

The consequences of a conclusion that a civil penalty is 'criminal'

If a civil penalty is assessed to be 'criminal' for the purposes of human rights law, this does not mean that it must be turned into a criminal offence in domestic law. Human rights law does not stand in the way of decriminalisation. Instead, it simply means that the civil penalty provision in question must be shown to be consistent with the criminal process guarantees set out in articles 14 and 15 of the ICCPR.

By contrast, if a civil penalty is characterised as not being 'criminal', the specific criminal process guarantees in articles 14 and 15 will not apply. However, such provisions must still comply with the right to a fair hearing before a competent, independent and impartial tribunal contained in article 14(1) of the ICCPR. The Senate Standing Committee for the Scrutiny of Bills may also comment on whether such provisions comply with accountability standards.

As set out in Guidance Note 1, sufficiently detailed statements of compatibility are essential for the effective consideration of the human rights compatibility of bills and legislative instruments. Where

a civil penalty provision could potentially be considered 'criminal' the statement of compatibility should:

- explain whether the civil penalty provisions should be considered to be 'criminal' for the purposes of human rights law, taking into account the criteria set out above; and
- if so, explain whether the provisions are consistent with the criminal process rights in articles 14 and 15 of the ICCPR, including providing justifications for any limitations of these rights.

It will not be necessary to provide such an assessment in the statement of compatibility on every occasion where proposed legislation includes civil penalty provisions or draws on existing civil penalty regimes. For example, it will generally not be necessary to provide such an assessment where the civil penalty provision is in a corporate or consumer protection context and the penalties are small.

Criminal process rights and civil penalty provisions

The key criminal process rights that have arisen in the committee's scrutiny of civil penalty provisions include the right to be presumed innocent (article 14(2)) and the right not to be tried twice for the same offence (article 14 (7)). For example:

- 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. This requires that the case against the person be demonstrated on the criminal standard of proof, that is, it must be proven beyond reasonable doubt. The standard of proof applicable in civil penalty proceedings is the civil standard of proof, requiring proof on the balance of probabilities. In cases where a civil penalty is considered 'criminal', the statement of compatibility should explain how the application of the civil standard of proof for such proceedings is compatible with article 14(2) of the ICCPR.
- article 14(7) of the ICCPR provides that no-one is to be liable to be tried or punished again for an offence of which she or he has already been finally convicted or acquitted. If a civil penalty provision is considered to be 'criminal' and the related legislative scheme permits criminal proceedings to be brought against the person for substantially the same conduct, the statement of compatibility should explain how this is consistent with article 14(7) of the ICCPR.

Other criminal process guarantees in articles 14 and 15 may also be relevant to civil penalties that are viewed as 'criminal', and should be addressed in the statement of compatibility where appropriate.

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