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 *Defence Force (Inquiry) Regulations 1985*
Portfolio	Defence
Authorising legislation	*Defence Act 1903*
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 *Intelligence Services Act 2001* to establish the Australian Signals Directorate (ASD) as an independent statutory agency within the Defence portfolio reporting directly to the Minister for Defence; amend ASD's functions to include providing material, advice and other assistance to prescribed persons or bodies, and preventing and disrupting cybercrime; and give the Director-General powers to employ persons as employees of ASD. Also makes a range of consequential amendments to other Acts, including to the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* to provide that the Director-General of ASD may communicate AUSTRAC information to a foreign intelligence agency if satisfied of certain matters
Portfolio	Defence
Introduced	House of Representatives, 15 February 2018
Rights	Privacy; life; freedom from torture, cruel, inhuman or degrading treatment or punishment; just and favourable conditions at work (see **Appendix 2**)
Previous 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) information[4] 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	*Migration Act 1958*
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 occupation[3] 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	*Social Security Act 1991*
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 rate[7] as at 1 July in the financial year; and

(ii) the applicable supplement amount[8] as at 1 July in the financial year.[9]

---

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 and 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

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 Plans[1]

Purpose	Provides management plans for particular parks
Portfolio	Environment and Energy
Authorising legislation	*Environment Protection and Biodiversity Conservation Act 1999*
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]

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