Chapter 2

Concluded matters

2.1 This chapter considers the responses of ministers and legislation proponents to matters raised previously by the committee. The committee has concluded its examination of these matters following receipt of these responses.

2.2 Correspondence relating to these matters is available on the committee's website.[1]

Emergency Response Fund (Consequential Amendments) Bill 2019[2]

Purpose	The bill seeks to make a number of consequential amendments to several Acts to enable the operation of the Emergency Response Fund The bill also seeks to repeal the *Nation-building Funds Act 2008* and the Education Investment Fund
Portfolio	Finance
Introduced	House of Representatives, 11 September 2019
Right	Right to education
Previous report	Report 5 of 2019
Status	Concluded examination

2.3 The committee requested a response on the Emergency Response Fund (Consequential Amendments) Bill 2019 (the bill) in *Report 5 of 2019*,[3] and the full initial human rights analysis is set out in that report.

1 See https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Scrutiny_reports.

2 This entry can be cited as: Parliamentary Joint Committee on Human rights, Emergency Response Fund (Consequential Amendments) Bill 2019, *Report 6 of 2019*; [2019] AUPJCHR 101.

3 Parliamentary Joint Committee on Human Rights, *Report 5 of 2019* (17 September 2019) pp. 2-3.

Repeal of the Education Investment Fund

2.4 The bill seeks to make a number of consequential amendments to other legislation to enable the operation of the Emergency Response Fund. The Emergency Response Fund is sought to be established by the Emergency Response Fund Bill 2019, and it would provide for a revenue stream to be used for emergency response and recovery from natural disasters that have a significant or catastrophic impact.

2.5 Schedule 2, Part 1 of the bill seeks to repeal the *Nation-building Funds Act 2008* and the Education Investment Fund. The Emergency Response Fund will be established with an initial balance (money and investments) equal to the balance of the Education Investment Fund immediately before the establishment of the Emergency Response Fund.

Right to education: committee's initial analysis

2.6 In its initial analysis, the committee noted that the investment mandates of the Education Investment Fund included payments in relation to transitional Higher Education Endowment Fund payments and the creation or development of: higher education infrastructure; research infrastructure; vocational education and training infrastructure; and eligible education infrastructure.[4] The committee considered it is unclear from the explanatory materials whether the repeal of the Education Investment Fund and its investment mandates might result in reduced availability of funds for higher education, and therefore limit the right to education.

2.7 The statement of compatibility states that the measures in the bill are administrative or machinery in nature, and do not directly advance or limit a relevant human right or freedom.[5] As such, the statement of compatibility does not clarify whether repealing the Education Investment Fund and transferring its balance into the proposed Emergency Response Fund would result in a reduced availability of funds for higher education and, as such, may engage or limit the right to education.

2.8 The committee therefore sought the advice of the minister as to the compatibility of the measure with the right to education.

4 See *Nation-Building Funds Act 2008*.

5 Statement of compatibility, p. 5.

Minister's response[6]

2.9 The minister advised:

> The Emergency Response Fund Bill 2019 and the Emergency Response Fund (Consequential Amendments) Bill 2019 (together, the Emergency Response Fund legislation) would close the Education Investment Fund
>
> (EIF) and transfer its balance (approximately $4 billion as at 30 June 2019) to the Emergency Response Fund upon establishment.
>
> The repeal of the EIF and the transfer of its balance into the proposed Emergency Response Fund will not reduce the availability of funding for higher education and is compatible with the right to education.
>
> The Government has not entered into any new spending commitments from the EIF since 2013 and all commitments from the EIF have been paid. No credits have been made to the EIF since its initial credit of $6.5 billion upon establishment in January 2009.
>
> The EIF was not designed to be a perpetual fund. The EIF legislation provided for both the capital and the earnings to be used to fund education infrastructure projects. This intention was made clear in the Explanatory Memorandum to the Nation-building Funds Bill 2008[7]:
>
> *"It is intended that that both the capital contributions and the earnings of the [Building Australia Fund], EIF and [Health and Hospitals Fund} will be available over time to finance specific infrastructure projects"*
>
> The Government's economic and fiscal management has delivered a strong and improving budget position, which means that the Budget process can be used to support significant and ongoing investments into the education sector. The Government has decided that the Budget process should be used to fund higher education projects rather than the EIF.
>
> In the 2019-20 Budget, the Government announced it is investing a record $17.7 billion in the university sector in 2019, with this figure projected to grow to more than $20 billion[8] by 2024[9]. In addition, in the 2018-19 Budget, the Government announced funding of $1.9 billion (to 2028-29) as

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6 The minister's response to the committee's inquiries was received on 2 October 2019. The response is available in full on the committee's website at: https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Scrutiny_reports.

7 Explanatory Memorandum to the Nation-building Funds Bill 2008, page 8.

8 The minister's response on 2 October 2019 stated this figure as $19 billion, however an email received from the department on 10 October 2019 amended this figure to $20 billion.

9 Higher Education Expenditure Report - Budget 2019-20: https://www.budget.gov.au/ 2019-20/ content/ business.htm.

part of its Research Infrastructure Investment Plan[10]. This funding is being provided through the National Collaborative Research Infrastructure Strategy (NCRIS) to refresh the nationally significant research infrastructure that researchers from universities, Publicly Funded Research Agencies and industry use.

This funding is in addition to operational funding of $150 million per annum (indexed, ongoing) for NCRIS projects, which was announced as part of the National Innovation and Science Agenda in December 2015. This funding supports a range of national research infrastructure that is separate to research infrastructure funded at an institutional level and was previously supported and enabled through the EIF.

As NCRIS supports an estimated 65,000 academic and industry researchers each year, it is a critical component of the Government's support for research in Australia. As a result, in addition to funding being provided, the policy framework to direct NCRIS funding will continue to ensure that the research infrastructure being supported is what is required by researchers for their future work. This will be done through the development of National Research Infrastructure Road maps every five years, and Research Infrastructure Investment Plans every two years.

Committee comment

2.10 The committee thanks the minister for this response and notes the minister's advice that the repeal of the Education Investment Fund and the transfer of its balance into the proposed Emergency Response Fund will not reduce the availability of funding for higher education projects. The committee notes the minister's explanation that a range of national research infrastructure which was previously supported and enabled through the Education Investment Fund is now supported by budget funding through the National Collaborative Research Infrastructure Strategy.

2.11 The committee thanks the minister for this response. In light of the information provided that the bill will not reduce the availability of funding for higher education projects, the committee has concluded its examination of the bill.

10 *Stronger and smarter economy* page 19 of the Budget Overview, Budget 2018-19: https:ljarchive.budget.gov.au/ 2018-19/ additional/budget overview.pdf.

Migration Amendment (Repairing Medical Transfers) Bill 2019[1]

Purpose	Amends the *Migration Act 1958* to: remove provisions inserted by the *Home Affairs Legislation Amendment (Miscellaneous Measures) Act 2019* (the medical transfer provisions) which created a framework for the transfer of transitory persons (and their family members, and other persons recommended to accompany the transitory person) from regional processing countries to Australia for the purposes of medical or psychiatric assessment or treatment; and provide for the removal from Australia, or return to a regional processing country, of transitory persons who are brought to Australia under the medical transfer provisions, once the temporary purpose for which they were brought to Australia is complete
Portfolio	Home Affairs
Introduced	House of Representatives, 4 July 2019
Rights	Non-refoulement; effective remedy; health
Previous reports	Report 4 of 2019
Status	Concluded examination

2.12 The committee requested a response on the Migration Amendment (Repairing Medical Transfers) Bill 2019 (the bill) in *Report 4 of 2019*,[2] and the full initial human rights analysis is set out in that report.

Repeal of the medical transfer provisions

2.13 Currently, the medical transfer provisions of the *Migration Act 1958* (Migration Act)[3] allow two treating doctors to recommend that a person, held under regional processing arrangements[4] be transferred to Australia for medical treatment or assessment.[5] Within 72 hours, the minister must approve the transfer unless the

1 This entry can be cited as: Parliamentary Joint Committee on Human rights, Migration Amendment (Repairing Medical Transfers) Bill 2019, *Report 6 of 2019*; [2019] AUPJCHR 102.

2 Parliamentary Joint Committee on Human Rights, *Report 4 of 2019* (10 September 2019) pp. 2-9.

3 As amended by the *Home Affairs Legislation Amendment (Miscellaneous Measures) Act 2019.*

4 Nauru and Papua New Guinea are 'regional processing countries' for the purpose of the *Migration Act 1958*.

5 *Migration Act 1958*, section 198E.

minister reasonably believes or suspects there are medical,[6] security or character grounds for refusal.[7] If the minister's ground for refusing a transfer is medical, the matter is reviewed by the Independent Health Advice Panel. If the panel recommends the transfer be approved, the minister must approve the transfer unless there remain security or character grounds for refusal.[8]

2.14 The bill seeks to repeal these medical transfer provisions.[9] Additionally, the bill seeks to apply the requirement under section 198(1A) of the Migration Act that persons transferred to Australia under the medical transfer provisions are to be removed from Australia or returned to a regional processing country, as soon as reasonably practicable, unless a specified exemption applies.[10]

The obligation of non-refoulement and the right to an effective remedy: committee's initial analysis

2.15 As noted in the committee's initial analysis, sending someone back to a regional processing country may engage Australia's 'non-refoulement' obligations under the International Covenant on Civil and Political Rights (ICCPR) and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT). These obligations provide that Australia must not return any person to a country where there is a real risk that they would face persecution, torture or other serious forms of harm, such as the death penalty; arbitrary deprivation of life; or cruel, inhuman or degrading treatment or punishment.[11] Non-refoulement obligations are absolute and may not be subject to any limitations.

2.16 As a matter of international law, the obligation of non-refoulement in this bill does not involve the extraterritorial application of obligations. This is because the persons who may be removed from Australia as a result of these amendments are currently present in Australian territory. Australia therefore owes human rights obligations to them, including an obligation not to send them to a country where there is a real risk of that they would face persecution, arbitrary deprivation of life, torture or cruel, inhuman or degrading treatment or punishment.

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6 Except in cases of children under 18 years of age: *Migration Act 1958*, sections 198D.

7 *Migration Act 1958*, sections 198D; 198E (3), (3A), (4).

8 *Migration Act 1958*, section 198F.

9 Schedule 1.

10 Schedule 1, items 3-8. The explanatory memorandum also notes, at page 6, that section 198AD of the *Migration Act 1958* (the power to take an unauthorised maritime arrival to a regional processing country) would apply in relation to persons covered by subsections 198AH(1A) and (1B). Subsection 198AH(1B) provides that a child, who has been born in Australia to an unauthorised maritime arrival who was brought to Australia for a temporary purpose, is subject to removal pursuant to section 198AD.

11 UN Committee against Torture, *General Comment No.4 (2017) on the implementation of article 3 in the context of article 22* (2018).

2.17 However, the statement of compatibility does not specifically address the issue of whether sending someone back to a regional processing country complies with Australia's non-refoulement obligations in the context of the reported conditions for individuals in regional processing countries.

2.18 The obligation of non-refoulement and the right to an effective remedy also require an opportunity for independent, effective and impartial review of decisions to deport or remove a person.[12] On a number of previous occasions, the committee has raised serious concerns about the adequacy of protections against the risk of refoulement in the context of the existing legislative regime.[13] It is unclear from the statement of compatibility whether there is sufficient scope for independent and effective review of such a removal.[14] More generally, it is unclear whether there are sufficient legislative and procedural mechanisms to guard against the consequence of a person being sent to a regional progressing country even in circumstances where there may be a risk that the conditions could amount to torture or cruel, inhuman or degrading treatment or punishment.

2.19 The committee therefore sought the advice of the minster as to the compatibility of the measure with the obligation of non-refoulement and the right to an effective remedy, in particular:

- what are the conditions for such individuals in regional processing countries and is there a risk that such conditions could amount to torture or cruel, inhuman or degrading treatment or punishment;

12 International Covenant on Civil and Political Rights, article 2 (the right to an effective remedy).

13 See, for example, the committee's analysis of the Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014 in Parliamentary Joint Committee on Human Rights, *Fourteenth Report of the 44th Parliament* (October 2014) pp. 77-78. The UN Human Rights Committee in its Concluding observations on Australia recommended '[r]epealing section 197(c) of the *Migration Act 1958* and introducing a legal obligation to ensure that the removal of an individual must always be consistent with the State party's non-refoulement obligations': CCPR/C/AUS/CO/6 (2017), [34]. See, also, Parliamentary Joint Committee on Human Rights*, Report 1 of 2019* (12 February 2019) pp. 14-17; *Report 12 of 2018* (27 November 2018) pp. 2-22; *Report 11 of 2018* (16 October 2018) pp. 84-90; *Thirty-sixth report of the 44th Parliament* (16 March 2016) pp. 196-202; *Report 12 of 2017* (28 November 2017) p. 92 and *Report 8 of 2018* (21 August 2018) pp. 25-28.

14 In relation to the requirement for independent, effective and impartial review, see *Agiza v Sweden*, UN Committee against Torture Communication No.233/2003 (2005) [13.7]; *Singh v Canada*, UN Committee against Torture Communication No.319/2007 (2011) [8.8]-[8.9]; *Josu Arkauz Arana v France*, UN Committee against Torture Communication No.63/1997 (2000); *Alzery v Sweden*, UN Human Rights Committee Communication No.1416/2005 (2006) [11.8]. For an analysis of this jurisprudence, see Parliamentary Joint Committee on Human Rights, *Thirty-sixth report of the 44th Parliament* (16 March 2016) pp. 182-183.

- what safeguards are in place to ensure that a person is not removed from Australia to a regional processing country in contravention of Australia's non-refoulement obligations; and
- is there independent, impartial and effective review of any decision to remove the person from Australia.

Minister's response[15]

2.20 The minister advised:

> Under existing memoranda of understanding with Australia, both Nauru and PNG have committed to treat transferees with respect and dignity and in accordance with relevant human rights standards. Nauru and PNG are parties to various relevant treaties:
>
> - PNG is a party to the International Covenant on Civil and Political Rights (ICCPR), which prohibits torture and other cruel, inhuman or degrading treatment or punishment, and to the International Covenant on Economic, Social and Cultural Rights.
> - Nauru is a party to the Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment and has signed but not ratified the ICCPR.
> - Both Nauru and PNG are party to the Convention on the Rights of the Child and the Convention relating to the Status of Refugees.
>
> The Australian Government works closely with the governments of Nauru and PNG to ensure transferees have access to a range of health, welfare and support services, including extensive physical and mental healthcare, free accommodation and utilities, and allowances. Transferees are accommodated in the Nauruan and PNG communities and are not detained. They are free to move about without restriction. Australia has supported regional processing countries to put various structures in place to support transferees residing in Nauru and PNG:
>
> - Contracted health services providers to deliver health care to transferees, including comprehensive mental health and wellbeing programs.
> - All transferees reside in community-based accommodation – no one is in detention.
> - Transferees have access to education and a range of welfare support programs.
> - Refugees have access to work rights, subject to visa conditions.

15 The minister's response to the committee's inquiries was received on 1 October 2019. The response is available in full on the committee's website at: https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Scrutiny_reports.

- Further details of available health services are outlined in the response below to the Committee's question about the right to health.

Prior to transfer to a regional processing country, Australia considers the individual circumstances of each transferee, including whether transfer could put them at risk of torture or cruel, inhuman or degrading treatment or punishment. This is explained further in response to the Committee's next question.

What safeguards are in place to ensure that a person is not removed from Australia to a regional processing country in contravention of Australia's non-refoulement obligations?

The Department of Home Affairs undertakes a pre-transfer assessment prior to a person being taken from Australia to a regional processing country. These assessments are undertaken to determine whether it is practical to transfer a person to a regional processing country considering operational and individual circumstances.

The pre-transfer assessment considers whether obstacles exist that could prevent or delay transfer. The pre-transfer assessment is undertaken in consultation with the transferee and allows the individual the opportunity to raise any concerns about the transfer, including claims against regional processing countries. Various factors are considered when making an assessment whether obstacles exist impacting transfer, including the conditions in which people reside, access to health services and welfare supports, child-specific services, and security and safety issues.

Where claims are raised, the Department undertakes an assessment to determine whether transfer would contravene Australia's non-refoulement obligations. The *Migration Act 1958* (Migration Act) provides the Minister with the power to exempt a transferee from being taken to a regional processing country (section 198AE(1)) if it is in the public interest to do so.

Is there independent, impartial and effective review of any decision to remove the person from Australia?

Decisions to take transferees to a regional processing country are done a case by case basis and in accordance with departmental procedure. As discussed, a pre-transfer assessment is undertaken on each person ahead of transfer to explore whether obstacles existing preventing or delaying transfer. While this process does not include an independent review process, it does require officers exercising powers under the Migration Act to ensure all necessary considerations have been taken into account when conducting a transfer.

Consideration of non-refoulement obligations under the Ministerial intervention powers, such as the power in section 198AE mentioned above, takes place in good faith and allows for consideration of a person's

individual circumstances. These powers allow the Minister to consider non-refoulement obligations before the point of removal or transfer.

Persons who wish to challenge their removal from Australia or return to a regional processing country are not precluded from seeking judicial review.

Committee comment

2.21 The committee thanks the minister for this response and welcomes the minister's advice that Nauru and Papua New Guinea (PNG) have committed to treat transferees with respect and dignity and in accordance with relevant human rights standards, and that both countries are parties to a number of relevant human rights treaties. The committee also welcomes the minister's advice that the Australian Government works with the governments of Nauru and PNG to provide health, welfare and support services to transferees.

2.22 However, the committee notes that reported conditions for individuals in regional processing countries raise concerns as to the adequacy of these undertakings and arrangements. As noted in its initial analysis, in 2013 the committee itself raised human rights concerns about such transfers and about the conditions in regional processing countries. This included concerns in relation to the right to humane treatment in detention; the right not to be arbitrarily detained; the right to health and the rights of the child.[16] The United Nations (UN) Committee Against Torture has also expressed concerns about the transfer of individuals to regional processing centres in PNG and Nauru in view of reports of 'harsh conditions' and 'serious physical and mental pain and suffering'.[17] Similarly, the UN Special Rapporteur on the human rights of migrants has raised concerns about 'systemic human rights violations' and recommended the closure of regional processing centres.[18] In relation to the conditions on Nauru and Manus Island, the UN Special Rapporteur has specifically stated that '[t]he forced offshore confinement (although not necessarily detention anymore) in which asylum seekers and refugees are maintained constitutes cruel, inhuman and degrading treatment or punishment

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

17 UN Committee Against Torture, *Concluding observations on the combined fourth and fifth periodic reports of Australia*, CAT/C/AUS/CO/4-5 (2014) [17]. See, also, UN Committee on Economic, Social and Cultural Rights, *Concluding observations on the fifth periodic report of Australia*, E/C.12/AUS/CO (2017) [17].

18 UN Human Rights Council, François Crépeau, *Report of the Special Rapporteur on the human rights of migrants on his mission to Australia and the regional processing centres in Nauru*, A/HRC/35/25/Add.3 (2017) [77]–[79],[82] and [118].

according to international human rights law standards.'[19] The UN High Commissioner for Refugees (UNCHR) has likewise urged immediate action by Australia to address what it describes as a 'collapsing health situation', and called for all refugees and asylum seekers to be immediately moved to Australia.[20] It has described offshore processing itself as the cause behind severe and negative health impacts, 'which are as acute as they are predictable'.[21]

2.23 There have been a number of inquiries into allegations of abuse, self-harm and neglect in relation to the regional processing centres over a number of years, with the Senate Legal and Constitutional Affairs Committee finding in 2017 that refugees and asylum seekers living in regional processing centres are 'living in an unsafe environment'.[22] More recently, Médecins Sans Frontières Australia (MSF) recently reported that 65 per cent of refugee and asylum seeker patients seen by MSF on Nauru had suicidal ideation and/or engaged in self-harm or suicidal acts.[23] MSF also reported that 'curative treatment for the overwhelming majority of cases was not possible whilst the key stressors of uncertainty, isolation and family separation on Nauru was present.'[24] UNHCR similarly report that conditions for refugees and asylum-seekers on Nauru and PNG have 'led to the deterioration of the

19 UN Human Rights Council, François Crépeau, *Report of the Special Rapporteur on the human rights of migrants on his mission to Australia and the regional processing centres in Nauru*, A/HRC/35/25/Add.3 (2017) [80].

20 See UN High Commissioner for Refugees, 'UNHCR urges Australia to evacuate off-shore facilities as health situation deteriorates', 12 October 2018 at: https://www.unhcr.org/en-au/news/briefing/2018/10/5bc059d24/unhcr-urges-australia-evacuate-off-shore-facilities-health-situation-deteriorates.html.

21 See also a joint communication from the Mandates of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health; the Working Group on the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination; the Special Rapporteur on the human rights of migrants; and the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, to Australia in April 2019 seeking a response to a range of human rights concerns associated with the regional processing centres at: https://spcommreports.ohchr.org/TMResultsBase/DownLoadPublicCommunicationFile?gId=24482.

22 See Senate Standing Committee on Legal and Constitutional Affairs, *Serious allegations of abuse, self-harm and neglect of asylum seekers in relation to the Nauru Regional Processing Centre, and any like allegations in relation to the Manus Regional Processing Centre*, 21 April 2017, paragraph [7.14].

23 Médecins Sans Frontières (MSF), *Submission 44*, Legal and Constitutional Affairs Legislation Committee Inquiry into Migration Amendment (Repairing Medical Transfers) Bill 2019 [Provisions], August 2019.

24 Médecins Sans Frontières (MSF), *Submission 44*, Legal and Constitutional Affairs Legislation Committee Inquiry into Migration Amendment (Repairing Medical Transfers) Bill 2019 [Provisions], August 2019.

health of the vast majority… [and] to significant risks of irreparable harm and loss of life.'[25]

2.24 Notwithstanding the human rights concerns which have been raised about the conditions on both Manus and Nauru, the committee notes that many of these concerns were raised at a time when transferees living on Nauru and Manus were confined to detention. This is no longer the case. All transferees are now living in the community: children are attending school and some transferees have even started local businesses. Accordingly, the living conditions of transferees have very much improved. We also welcome the minister's advice that 'contracted health services providers [to] deliver health care to transferees, including comprehensive mental health and wellbeing programs; All transferees reside in community-based accommodation – no one is in detention; Transferees have access to education and a range of welfare support programs [and] Refugees have access to work rights, subject to visa conditions.'[26]

2.25 In relation to the existence of sufficient safeguards to ensure that a person is not removed from Australia to a regional processing country in contravention of Australia's non-refoulement obligations, the committee welcomes the Department's routine practice of considering non-refoulement obligations prior to a person being transferred from Australia to a regional processing country. The committee also notes the advice that the minister has the power under section 198AE(1) of the Migration Act to exempt an individual from being removed from Australia to a regional processing country if it is in the public interest to do so. The committee is satisfied that administrative arrangements and ministerial discretion exercised in accordance with the legislative framework of the Migration Act operate to protect against refoulement, appreciating that the discretion can only be exercised where the minister considers it in the public interest to do so, and not on the basis of a risk to an individual. Further, the committee notes that, for the purposes of exercising removal powers, the Migration Act provides it is irrelevant whether Australia has non-refoulement obligations in respect of an unlawful non-citizen[27] and there is no statutory protection available to ensure that an unlawful non-citizen to whom Australia owes protection obligations will not be removed from Australia.

2.26 In relation to the availability of independent, impartial and effective review of any decision to remove a person from Australia, the committee notes the

25 The Office of the United Nations High Commissioner for Refugees (UNHCR), *Submission 7*, Legal and Constitutional Affairs Legislation Committee Inquiry into Migration Amendment (Repairing Medical Transfers) Bill 2019 [Provisions], August 2019.

26 See minister's advice to the committee received on 1 October 2019. The response is available in full on the committee's website at: https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Scrutiny_reports

27 See section 197C of the *Migration Act 1958*.

minister's advice that 'persons who wish to challenge their removal from Australia or return to a regional processing country are not precluded from seeking judicial review.' The committee notes that judicial review in Australia is governed by the *Administrative Decisions (Judicial Review) Act 1977* and the common law, and represents a limited form of review in that it allows a court to consider only whether the decision was lawful (that is, within the power of the relevant decision maker). The court cannot undertake a full review of the facts (that is, the merits), as well as the law and policy aspects of the original decision to determine whether the decision is the correct or preferable decision.

2.27 The jurisprudence of the UN Human Rights Committee and the UN Committee against Torture establish the proposition that there is a strict requirement for 'effective review' of non-refoulement decisions. The purpose of an 'effective' review is to 'avoid irreparable harm to the individual'. In particular, in *Singh v Canada*, the UN Committee against Torture considered a claim in which the complainant stated that he did not have an effective remedy to challenge the decision of deportation because the judicial review available in Canada was not an appeal on the merits. In this case, the Committee against Torture concluded that judicial review was insufficient for the purposes of ensuring persons have access to an effective remedy.

2.28 The committee thanks the minister for this response. The committee appreciates concerns that the bill, in providing for the return to a regional processing country of all persons brought to Australia under the medical transfer provisions, may engage Australia's 'non-refoulement' obligation not to return any person to a country where there is a real risk they would face persecution or other serious forms of harm, including cruel, inhuman or degrading treatment. The committee, however, notes the minister's advice that 'Where claims are raised, the Department undertakes an assessment to determine whether transfer would contravene Australia's non-refoulement obligations. The *Migration Act 1958* (Migration Act) provides the Minister with the power to exempt a transferee from being taken to a regional processing country (section 198AE(1)) if it is in the public interest to do so.' Accordingly, the committee is of the view that the return of such persons to a regional processing country in the manner envisaged by the bill does not engage Australia's non-refoulement obligations.

2.29 The committee welcomes the minister's advice that Nauru and Papua New Guinea have committed to treat refugees and asylum seekers in accordance with relevant human rights standards, and that health, welfare and support services are provided to transferees.

2.30 The committee notes the minister's advice that an individual assessment is made prior to a person being taken from Australia to a regional processing country, including consideration of whether the transfer would contravene Australia's non-refoulement obligations. However, the committee notes there is no statutory

requirement[28] to consider these obligations, and discretionary or administrative safeguards alone are less stringent than the protection of statutory processes.

2.31 In addition, the committee notes the minister's advice that judicial review is available to individuals who wish to challenge their removal from Australia to a regional processing country. However, the obligation of non-refoulement and the right to an effective remedy requires an opportunity for independent, effective and impartial review of decisions to remove a person. Judicial review, without the availability of merits review, is not likely to be sufficient to fulfil the international standard required of 'effective review' as it is only available on a number of restricted grounds of review.

2.32 As such, the committee does not consider there is a risk that repealing the current medical transfer provisions could lead to the return of persons to regional processing countries in circumstances that may not be consistent with Australia's non-refoulement obligations and the right to an effective remedy.

Right to health: committee's initial analysis

2.33 By repealing the medical transfer provisions, the measure engages and may limit the right to health. This is because restricting access to a type of medical transfer to Australia may in turn restrict access to appropriate health care for those held under regional processing arrangements (in circumstances where Australia may owe human rights protection obligations).[29] The right to health is understood as the right to enjoy the highest attainable standard of physical and mental health, and requires available, accessible, acceptable and quality health care.

2.34 The committee raised concerns that the repeal of the medical transfer provisions may constitute a backward step, that is, a retrogressive measure with respect to the level of attainment of right to health including access to health care. While the statement of compatibility points to the ongoing availability of section 198B of the Migration Act to allow for medical transfers, there is a serious concern that section 198B is likely to provide a lower level of attainment of the right to health and access to health care than the medical transfer provisions which are

28 In fact, section 197C of the *Migration Act 1958* specifically states that for the purposes of exercising removal powers, it is irrelevant whether Australia has non-refoulement obligations in respect of an unlawful non-citizen.

29 See the committee's initial analysis, Parliamentary Joint Committee on Human Rights, *Report 4 of 2019* (10 September 2019) pp. 7-8. Note that the minister's response did not address the committee's conclusion that Australia exercises effective control over the regional processing centres and that Australia owes human rights obligations to those transferred to, and held in, regional processing countries, including in relation to the right to health.

proposed to be repealed.[30] This is because the use of section 198B to bring a person requiring treatment to a third country including Australia is discretionary and may or may not be exercised. Further, it could potentially be used to transfer a person requiring medical attention to a third country that has a lower standard of health care than Australia.[31] Retrogressive measures, as a type of limitation, may be permissible under international human rights law provided that they address a legitimate objective and are rationally connected and proportionate to achieve that objective.

2.35 As such, the committee sought further information from the minister to assist it in completing its assessment of the compatibility of the measure with the right to health, including:

- to what extent the repeal of the medical transfer provisions will restrict access to health care for those held on Nauru and Manus Island; and
- the adequacy and effectiveness of the remaining discretionary transfer provisions under section 198B of the *Migration Act 1958* in protecting the right to health.

Minister's response

2.36 The minister advised:

> <u>To what extent the repeal of the medical transfer provisions will restrict access to health care for persons in Nauru and Papua New Guinea under regional processing arrangements</u>
>
> Repeal of the medevac legislation does not prevent or restrict transferees from accessing health care or medical treatment, including treatment in a third country.
>
> Consistent with Australia's commitment under respective memoranda of understanding with PNG and Nauru, Australia has contracted health services to support the delivery of health care to transferees in regional processing countries. Health services are provided by the Pacific International Hospital in PNG and the International Health and Medical Services in Nauru. Health services are provided by a range of registered healthcare professionals including general practitioners, psychiatrists, psychologists, counsellors, dentists, radiographers, pharmacists, mental

30 Section 198B of the *Migration Act 1958* provides that 'an officer may, for a temporary purpose, bring a transitory person to Australia from a country or place outside Australia'.

31 For a discussion of the Commonwealth's duty of care relating to offshore medical transfers under section 198B, see *Plaintiff S99/2016 v Minister for Immigration and Border Protection* [2016] FCA 483. By contrast, for a discussion of the new medical transfer provisions that this bill proposes to repeal, see *CEU19 v Minister for Immigration, Citizenship and Multicultural Affairs* [2019] FCA 1050.

health nurses and specialists who provide clinical assessment and treatment.

- Pacific International Hospital provides primary and tertiary medical services to transferees in Port Moresby and facilitates medical access to refugees in other locations throughout PNG.
- Transferees in Nauru receive health care through the Nauru Settlement Health Clinic at the Republic of Nauru Hospital. Health services can also be accessed through the Republic of Nauru Hospital and the Medical Centre at the Regional Processing Centre.

Where a transferee requires medical treatment not available in a regional processing country, they may be transferred to a third country (including Australia) for assessment or treatment, in line with existing transfer mechanisms under section 198B of the Migration Act.

- Such transfers are managed on a case-by-case basis according to clinical need.
- Third country options include Taiwan and PNG (for transferees in Nauru) and Australia.

Since September 2017, transitory persons in Nauru who require medical treatment not available in Nauru, can access medical services in Taiwan. Taiwan has a global reputation for high-quality medical care and this arrangement is in line with Taiwan's existing health cooperation with Nauru, under which Taiwan provides technical assistance to the Republic of Nauru Hospital.

- As at 19 September 2019, 33 transitory persons have transferred to Taiwan for medical treatment.

<u>The adequacy and effectiveness of the remaining discretionary transfer provisions under section 198B of the Migration Act 1958 in protecting the right to health</u>

Repeal of the medevac provisions does not compromise the integrity of existing medical transfer processes under section 198B of the Migration Act. All transfers under section 198B are based on clinical assessment and recommendation from treating medical practitioners. A medical officer of the Commonwealth also provides assessment.

Section 198B provides for the transfer of transitory persons to Australia for a temporary purpose including for medical treatment. This is supported by the fact that during the period November 2012 to 31 July 2019, 1,343 individuals (717 medical and 626 accompanying family transfers) were transferred to Australia for medical treatment utilising existing powers under section 198B of the Migration Act. Of the 1,343 individuals transferred, 39 cases, involving 96 individuals, were court ordered. The remaining 1,247 transfers were facilitated utilising the existing power in the Migration Act.

As noted earlier, in addition to this transfer provision, the Australian Government maintains third country medical transfer arrangements with PNG and Taiwan. These arrangements provide alternative medical transfer options outside Australia.

Committee comment

2.37 The committee thanks the minister for this response and notes the minister's advice that Australia has contracted health services to support the delivery of health care to transferees in regional processing countries. The committee notes the reported conditions and that there are ongoing concerns around whether the quality of healthcare available to refugees and asylum seekers in regional processing countries is sufficient to meet their complex health needs. As noted in the committee's initial analysis in 2013 the committee raised concerns about the adequacy of access to health care and the right to health for those held under regional processing arrangements.[32] The UN Committee on Economic, Social and Cultural Rights has expressed serious concerns about 'harsh conditions' in regional processing centres and 'limited access to basic services, including health care.'[33] It has called on Australia to halt its policy of offshore processing of asylum claims.[34] The UN Special Rapporteur on the human rights of migrants has also raised concerns about the health and health care of those held in regional processing countries including that 'protracted periods of closed detention and the uncertainty about the future reportedly creates serious physical and mental anguish and suffering'.[35]

2.38 More recently, the Office of the United Nations High Commissioner for Refugees reports that despite efforts in PNG and Nauru that have led to isolated improvements in the provision of care in some circumstances, 'locally-available services continue to be inadequate' and the 'deteriorating health situation in both countries has led to significant risks of irreparable harm and loss of life'.[36] *Médecins Sans Frontières* Australia have also raised concerns around the adequacy of available health care services to meet the needs of refugees and asylum seekers on Nauru,

32 See, Parliamentary Joint Committee on Human Rights, *Migration Legislation Amendment (Regional Processing and Other Measures) Act 2012 and related legislation: Ninth Report of 2013* (19 June 2013) p. 83.

33 UN Committee on Economic, Social and Cultural Rights, *Concluding observations on the fifth periodic report of Australia*, E/C.12/AUS/CO (2017) [17].

34 UN Committee on Economic, Social and Cultural Rights, *Concluding observations on the fifth periodic report of Australia*, E/C.12/AUS/CO (2017) [17].

35 UN Human Rights Council, François Crépeau, *Report of the Special Rapporteur on the human rights of migrants on his mission to Australia and the regional processing centres in Nauru*, A/HRC/35/25/Add.3 (2017) [73] and [77].

36 The Office of the United Nations High Commissioner for Refugees (UNHCR), *Submission 7*, p. 5, Legal and Constitutional Affairs Legislation Committee Inquiry into Migration Amendment (Repairing Medical Transfers) Bill 2019 [Provisions], August 2019.

especially in relation to the 'dangerous mental health crisis developing on Nauru', and the lack of 'therapeutic solutions' under existing conditions.[37]

2.39 The committee also notes the minister's advice that where a transferee requires medical treatment not available in a regional processing country, they may be transferred to a third country (including Australia) for assessment or treatment, in line with the transfer mechanisms set out in section 198B of the Migration Act, which allows a person to be brought to Australia for a temporary purpose (including for medical or psychiatric assessment or treatment). The committee notes the minister's advice that the repeal of the medical transfer provisions would not compromise the integrity of these existing medical transfer processes and that all section 198B transfers are based on clinical assessment and recommendation from treating medical practitioners.

2.40 The committee also notes that section 198B transfers are discretionary as there is no requirement that a person be transferred for medical treatment if it cannot be provided in the regional processing country. As such there is no timeframe for making a decision on whether to transfer a person. In contrast, the medical transfer provisions sought to be repealed require the minister to approve or refuse to approve a person's transfer to Australia within 72 hours after being notified by two or more treating doctors that they are of the opinion the person requires medical or psychiatric assessment that is not being received in the regional processing country and it is necessary to remove them to do so.[38] If the minister refuses to approve a person's transfer to Australia, the Independent Health Advice Panel[39] must conduct a further clinical assessment of the person, and if their advice is that the transfer be approved, the minister must approve the transfer (except where the transfer would be prejudicial to Australia's security or the person has a substantial criminal record).[40]

2.41 The committee notes that a number of organisations have recently raised concerns about the frequency of delays in the administration of urgent medical

37 Médecins Sans Frontières (MSF), *Submission 44*, Legal and Constitutional Affairs Legislation Committee Inquiry into Migration Amendment (Repairing Medical Transfers) Bill 2019 [Provisions], August 2019; Médecins Sans Frontières (MSF), Indefinite Despair: The tragic mental health consequences of offshore processing on Nauru (December 2018) p. 7.

38 Section 198E of the *Migration Act 1958*.

39 The panel consists of a person occupying the positions of Chief Medical Officer of the Department and the Surgeon-General of the Australian Border Force; the person occupying the position of Commonwealth Chief Medical Officer; and not less than 6 other members, including: at least one person nominated by the President of the Australian Medical Association; one by the Royal Australian and New Zealand College of Psychiatrists; one by the Royal Australasian College of Physicians; and one who has expertise in paediatric health. See section 199B of the *Migration Act 1958*.

40 Section 198F of the *Migration Act 1958*.

transfers under the discretionary transfer system available under section 198B of the Migration Act and the negative health implications of these delays.[41]

2.42 The committee thanks the minister for this response and notes the minister's advice that Australia has contracted health services to support the delivery of health care to refugees and asylum seekers in regional processing countries, and that where an individual requires medical treatment not available in a regional processing country, they may be transferred to a third country (including Australia) for assessment or treatment under section 198B of the *Migration Act 1958* (Migration Act).

2.43 The committee also notes there are concerns as to whether the healthcare available to refugees and asylum seekers in regional processing countries is sufficient to meet their complex health needs, particularly in relation to the treatment of serious mental health issues. There are also concerns as to whether the discretionary transfer system available under section 198B of the Migration Act adequately protects the right to health for those needing urgent medical care.

2.44 The committee does not consider that the medical transfer provisions sought to be repealed by this bill provide a higher degree of access to healthcare. We note recent public statements by the minister that of the 179 people transferred to Australia under the medical transfer provisions, only a small number have been hospitalised and, once here, 55 people have refused tests or medical treatment.[42] The committee remains concerned that the implementation of the medical transfer provisions were motivated by an intention to undermine the government's border protection policies and provide a 'backdoor' entry to Australia under circumstances where such entry would otherwise not be permitted.

2.45 As the minister has reiterated publicly on numerous occasions, the committee also expresses it concern that the medical transfer provisions do not expressly provide for the removal of persons, transferred to Australia under the medical transfer provisions, from detention. The committee also considers there is a risk that the medical transfer provisions, if not repealed, may give rise to incentives whereby asylum seekers or other persons once again seek to travel to Australia in a manner which may put their own lives and the lives of others at risk.

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41 The Office of the United Nations High Commissioner for Refugees (UNHCR), *Submission 7*, Legal and Constitutional Affairs Legislation Committee Inquiry into Migration Amendment (Repairing Medical Transfers) Bill 2019 [Provisions], August 2019, citing Coroners Court of Queensland, Inquest into the death of Hamid Khazaei, Findings of Inquest, 30 July 2018; Médecins Sans Frontières Australia (MSF), *Submission 44*, Legal and Constitutional Affairs Legislation Committee Inquiry into Migration Amendment (Repairing Medical Transfers) Bill 2019 [Provisions], August 2019.

42 Interview with the Hon Peter Dutton MP, Minister for Home Affairs, *Sky News*, 26 November 2019.

2.46 Accordingly, and given the safeguards which are in place as detailed by the minister in his response, the committee does not consider that repealing this bill represents an unjustified or retrogressive step in relation to the realisation of the right to health for refugees and asylum seekers in regional processing countries.

National Integrity Commission Bill 2018 (No. 2)[1]

Purpose	The bill seeks to establish the Australian National Integrity Commission as an independent public sector anti-corruption commission for the Commonwealth
Portfolio	Senator Larissa Waters
Introduced	Senate, 29 November 2018 (and restored to the notice paper)
Rights	Privacy and reputation; not to incriminate oneself; freedom of expression and assembly; liberty; freedom of movement; effective remedy
Previous reports	Report 5 of 2019
Status	Concluded examination

2.47 The committee requested a response on the National Integrity Bill 2018 (No. 2) (the bill) in *Report 5 of 2019*,[2] and the full initial human rights analysis is set out in that report.

2.48 The bill seeks to establish the Australian National Integrity Commission (the Commission), consisting of the National Integrity Commissioner (the Commissioner), the Law Enforcement Integrity Commissioner and the Whistleblower Protection Commissioner. It also seeks to establish the appointment of the Parliamentary Joint Committee on the Australian National Integrity Commission and the Parliamentary Inspector of the Australian National Integrity Commission, as an independent officer of the Parliament. The purpose of the Commission is to promote integrity and accountability and investigate corruption in relation to Commonwealth public administration.[3]

Broad coercive evidence gathering powers

2.49 The bill proposes to confer wide-ranging coercive powers on the Commissioner to inquire into and report on matters relating to alleged or suspected corruption involving a public official or Commonwealth agency.[4] The Commissioner

1 This entry can be cited as: Parliamentary Joint Committee on Human Rights, National Integrity Commission Bill 2018 (No. 2), *Report 6 of 2019*; [2019] AUPJCHR 103.

2 Parliamentary Joint Committee on Human Rights, *Report 5 of 2019* (17 September 2019) pp. 4-14. Note, that report also considered the identical National Integrity Commission Bill 2019. A response has not been received in relation to this bill.

3 Statement of compatibility, p. 88.

4 Clauses 12 and 24.

may undertake an inquiry on their own initiative or at the request of a member of parliament.[5] An inquiry may relate to the integrity of public officials, corruption or the prevention of corruption generally in Commonwealth agencies, or corruption generally, or the prevention of corruption, in or affecting Australia.[6] 'Corrupt conduct' is defined broadly by clause 9 in each bill, and applies to 'corruption issues' arising no more than 10 years prior to the day the bill would commence.[7]

2.50 The Commissioner's powers would include the power to compel a person to provide information or to produce documents or things;[8] the power to summon a person to attend hearings and require them to produce documents;[9] powers for information sharing between the Commission and head of a Commonwealth agency;[10] the power to order an individual to deliver their passport in certain circumstances;[11] the power to apply to arrest a person and for the purposes of executing an arrest warrant, to break into and enter relevant premises;[12] the power to apply for warrants to enter premises and seize materials;[13] and compulsory assistance powers.[14] The Commission would also have public reporting obligations at the end of investigations and public inquiries,[15] with the Commissioner retaining the discretion to exclude sensitive information from the report.[16] Proposed offences for non-compliance with Commission orders range from 6 months imprisonment[17] to two years imprisonment or 120 penalty units (currently $25,200) or both.[18]

5 Clause 24.

6 Subclause 25(1).

7 Subclause 12(3).

8 Clause 72.

9 Clause 82.

10 Clauses 57, 58 and 61.

11 Clause 103.

12 Clauses 105 and 106.

13 Clauses 113 and 114.

14 Clause 130 would permit the authorised officer executing a search warrant to apply for an order requiring a specified person to assist with access to a computer or computer system in some circumstances.

15 Clauses 64, 70 and 233. The Commission would also be required to produce an annual report under clause 232.

16 Subclauses 64(4) and 156(9).

17 Subclause 130(3), relating to a failure to comply with an order to assist with access to a computer or computer system.

18 Subclause 76(1).

2.51 The bill provides that a person would not be excused from giving information, answering a question or producing a document or thing when given a notice under section 72, or summonsed under section 82, on the ground that to do so might tend to incriminate them.[19] A partial 'use immunity' would apply, which provides that information given, or documents or things produced, by persons compelled to provide them is not admissible in evidence against the person in criminal proceedings or other proceedings for the imposition or recovery of a penalty.[20] However, no 'derivative use immunity' is provided which would prevent information or evidence *indirectly* obtained being used in criminal proceedings against the person. The penalty for non-compliance with an order to give evidence or produce a document or thing under section 72, or a summons under section 82, is imprisonment for up to two years.[21]

2.52 Where the Commissioner seeks to issue an opinion or finding that is critical of a Commonwealth agency or person, the Commissioner must generally provide a reasonable opportunity for the person or agency to be heard or make submissions.[22] However, this opportunity does not have to be provided where the Commissioner is satisfied that a person may have committed a criminal offence, contravened a civil penalty provision, engaged in conduct that could be the subject of disciplinary proceedings or termination of appointment or employment, and that an investigation or any related action would be compromised by giving the person the opportunity to make submissions.[23]

2.53 Part 9 of the bill also seeks to provide for whistleblower protection and clause 178 provides that if the Whistleblower Protection Commissioner is investigating or conducting a public inquiry, Parts 5-7 of the bill would apply to the Whistleblower Protection Commissioner as if a reference to the National Integrity Commissioner were a reference to the Whistleblower Protection Commissioner. As such, all of the coercive powers conferred on the Commissioner are also conferred on the Whistleblower Protection Commissioner. The committee's comments below in relation to the Commissioner therefore apply equally to the powers of the Whistleblower Protection Commissioner.

Right to privacy and reputation: committee's initial analysis

2.54 The committee previously noted that the collection, storing and use of a person's private and confidential information under the Commission's proposed

19 Subclause 79(1) and clause 102.

20 Subclauses 79(3) and 102(4).

21 Subclauses 77(1) and 92(3).

22 Subclause 62(1).

23 Subclause 62(2).

coercive evidence gathering powers engages and limits the right to privacy.[24] More generally, investigation of, and reporting on, individuals may impact on the right to privacy and reputation of these individuals. The right to privacy and reputation is also engaged where a critical finding is made without the person against whom the finding is made first having the opportunity to respond.

2.55 The right to privacy protects against arbitrary and unlawful interference with an individual's privacy and reputation.[25] Limitations on this right will be permissible where they pursue a legitimate objective, are rationally connected to that objective and are a proportionate means of achieving that objective.

2.56 The committee previously noted that while the objective of the measure, to 'prevent, investigate, expose and address corruption issues involving or affecting Commonwealth public administration,'[26] is likely to be a legitimate objective for the purposes of international human rights law, and the proposed powers appear to be rationally connected to this objective, it was unclear whether the safeguards in the bill were adequate to be a proportionate limitation on the right to privacy.

The committee therefore sought the advice of the legislation proponent as to the proportionality of the limitation on the right to privacy, and sought advice as to:

- why it is considered necessary for the scope of the Commission's powers to extend to the investigation of conduct that has occurred in the past, and the rationale for a retrospective period of 10 years;
- why it is considered necessary and appropriate, in clause 145, to allow persons other than police officers to execute search warrants (which include powers to conduct personal searches); and
- why it is considered necessary and appropriate, in subclause 62(2), that the Commission can issue an opinion or finding that is critical of a person without the person first having had the opportunity to respond.

Legislation proponent's response[27]

2.57 The legislation proponent advised, in response to specific questions from the committee:

24 The committee has previously raised concerns as to the compatibility of identical measures with the right to privacy when it first considered the bill in Parliamentary Joint Committee on Human Rights, *Report 2 of 2019* (2 April 2019) pp. 136-145.

25 Statement of compatibility, p. 88.

26 Statement of compatibility, p. 88.

27 Senator Waters' response to the committee's inquiries was received on 7 October 2019. The response is available in full on the committee's website at: https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Scrutiny_reports.

Why is it considered necessary for the scope of the Commission's powers to extend to the investigation of conduct that has occurred in the past? What is the rationale for a retrospective period of 10 years?

The majority of anti-corruption and integrity bodies in Australian states have powers to investigate conduct that has occurred in the past.

The Australian Commission for Law Enforcement Integrity (ACLEI) also provides for the investigation of conduct engaged in prior to the commencement of the *Law Enforcement Integrity Commissioner Act 2006* (section 6(4)). There is no limit on the historical application of the definition of corrupt conduct under that Act, consistent with the approach adopted for other State agencies, such as the Queensland Crime and Corruption Commission.

The capacity to investigate historical allegations has been critical to ensure that past conduct that has had a corrupting influence on decision making and policy development can be brought to light. For example, the CPSU submission to the inquiry into the Bill stated that its ACLEI members were "strongly of the view that the ability to investigate up to a decade before the commencement of the Act is necessary."[28]

Decisions by the National Integrity Commissioner regarding an investigation will be made in the context of the objects of the Bill, the functions of the Commissioner, and the matters set out in clauses 48 and 50 of the Bill. In particular, the Commissioner may decide to take no further action in relation to a complaint regarding past conduct if satisfied that an investigation is not warranted in the circumstances.

The 10-year restriction proposed by the Bill strikes a reasonable balance between the public interest in investigating past conduct that continues to influence current activities, and the need for some certainty as to the historical scope.

Why is it considered necessary and appropriate to allow persons other than police officers to execute search warrants?

As noted by the Committee, the National Integrity Commissioner (the Commissioner) can appoint authorised officers who can apply for and, once granted, execute search warrants. Authorised officers may be AFP officers, or a staff member of the Commission "whom the National Integrity Commissioner considers has suitable qualifications or experience". This would allow the Commissioner to appoint state police officers or others that the Commissioner is satisfied have the necessary expertise to assist the Commission to perform its functions. For example, where the AFP is the subject of a search warrant, the Commissioner may

28 CPSU Submission to the Senate Legal and Constitutional Affairs Committee, dated 22 January 2019 –Submission 8, p. 4.

determine that it is necessary and appropriate for a non-AFP officer to conduct the search.

Any authorised officers must comply with any directions given by the Commissioner (clause 145(4)), and with the terms of the warrant issued by an issuing officer. A warrant will specify the name of the authorised officer, so the issuing officer (a judge or magistrate) must also be satisfied that issuing a warrant allowing the named officer to conduct the relevant search is appropriate.

Given these safeguards, allowing warrants to be executed by authorised officers other than federal police officers is appropriate and necessary to ensure that the Commission's broad investigative powers can be exercised in a manner that best satisfies the objects of the Bill.

Why is it considered necessary and appropriate that the Commission can issue an opinion or finding that is critical of a person without the person first having had the opportunity to respond?

The exception provided in subclause 62(2) applies only where the Commissioner is satisfied that the person subject to the critical opinion or finding may have committed a criminal or civil offence or serious misconduct, and that an investigation or any related action would be compromised by giving the person the opportunity to make submissions.

Corruption often occurs in networks of mutually beneficial relationships of powerful and influential people. Where a finding or opinion of the Commission would reveal information to a member of this network, the information could assist efforts to hide corrupt behaviour and undermine ongoing investigations

Avoiding premature disclosure of information to a person the Commissioner reasonably suspects has committed an offence (or serious misconduct) is appropriate and necessary to ensure the integrity and effectiveness of investigations.

Committee comment

2.58 The committee thanks the legislation proponent for this response. The committee notes the advice that the investigation of conduct that occurred in the past is consistent with other anti-corruption and integrity bodies. However, the committee notes that the existence of similar measures in existing legislation is not, of itself, a justification for the inclusion of such measures in proposed legislation scrutinised by the committee. The committee also notes the advice that the capacity to investigate historical allegations has been critical to ensure that past conduct that has a corrupting influence on decision making and policy development can be brought to light and it is in the public interest to investigate past conduct that continues to influence current activities. While these objectives are likely to be legitimate for the purposes of international human rights law, the committee reiterates that the bill confers numerous coercive powers that raise a number of human rights concerns that call into question whether applying these powers

retrospectively is proportionate to the stated objective. In particular, the definition of 'corrupt conduct' is very broad; it would permit the Commission to investigate a broad range of conduct by public officials as well as conduct by any person who could adversely affect, either directly or indirectly, the honest or impartial exercise of official functions by the Parliament, a Commonwealth agency or public officials.[29]

2.59 In relation to the power to confer search and arrest powers on 'staff members' of the Commissions, the committee notes the legislation proponent's advice that given the safeguards in place, it is appropriate and necessary that persons other than police officers can execute search warrants. The safeguards identified in the advice are that the staff member can only be appointed if the Commissioner considers they have suitable qualifications or experience, any authorised officers must comply with any directions given by the Commissioner and with the terms of the warrant, and that the warrant will specify the name of the authorised officer. The committee notes an authorised person would be empowered to exercise a number of coercive powers, including breaking into premises in order to execute an arrest warrant,[30] searching or frisk searching a person,[31] searching premises,[32] and use force against persons and things.[33] Given the extensive coercive powers that may be conferred on authorised officers the committee considers that such police like powers should only appropriately be conferred on police, or former police, officers. At a minimum the committee considers the bill should set out details of the necessary skills and experience an authorised officer should possess before being authorised to carry out such coercive powers, rather than leaving this to the discretion of the Commissioner.

2.60 In relation to the power of the Commissioner to issue an opinion or finding that is critical of a person without the person first having had the opportunity to respond, the committee notes the legislation proponent's advice that this is appropriate and necessary to ensure the integrity and effectiveness of investigations. The committee also notes the advice that this would only apply where an investigation or any related action would be compromised by giving a person the opportunity to make submissions, and corruption often occurs in networks of mutually beneficial relationships of powerful and influential people and such information could assist efforts to hide corrupt behaviour and undermine ongoing investigations. While the committee notes this advice, the committee reiterates that the bill would allow the Commissioner to make a finding critical of a person, which may have serious implications for a person's reputation and private life, without the

29 Clause 9.

30 Subclause 106(2).

31 Subclauses 114 (3) and (4), clause 117.

32 Subclauses 114(1) and (2), clause 117.

33 Clause 122.

person first having the opportunity to respond. It is not clear that this is the least rights restrictive way to achieve the legitimate objective of investigating corrupt conduct (for example, it would appear to be less rights restrictive to provide that the Commissioner's findings are interim until a person is given a full hearing).

2.61 The committee thanks the legislation proponent for this response. The committee notes that the bill would provide the proposed National Integrity Commission with broad coercive evidence gathering powers, which limits the right to privacy and reputation. The committee remains concerned, given the broad definition of 'corrupt conduct', that these investigatory powers extend to conduct that occurred retrospectively; that coercive powers could be conferred on non-police officers; and that adverse findings which affect a person's reputation could be made public without the person first being given an opportunity to respond.

2.62 As such, the committee considers the measures risk disproportionately limiting the right to privacy. The committee draws these human rights concerns to the attention of the legislation proponent and the Parliament.

Privilege against self-incrimination: committee's initial analysis

2.63 Proposed subclauses 79 and 102 provide that a person is not excused from giving information or producing a document or thing, when served with a notice to do so, or when summoned to attend a hearing, on the ground that doing so would tend to incriminate them or expose them to a penalty. This engages and limits the right not to incriminate oneself. The specific guarantees under international human rights law of the right to a fair trial in relation to a criminal charge include the right not to incriminate oneself.[34] This right may be subject to permissible limitations where the limitation pursues a legitimate objective, is rationally connected to that objective and is a proportionate way of achieving that objective.

2.64 The committee sought the advice of the legislation proponent as to why proposed subclauses 79(3) and 102(4) do not include a 'derivative use immunity', to ensure information, documents or things obtained indirectly as a result of compelling a person to give evidence to the Commission, are not admissible in evidence against them.

Legislation proponent's response

2.65 The legislation proponent advised:

> The direct use immunity allowed for in subclauses 79(3) and 102(4) is consistent with the restricted immunities available under the *Law Enforcement Integrity Commissioner Act 200*6.

34 International Covenant on Civil and Political Rights (ICCPR), article 14(3)(g).

> Providing for a derivative use immunity would prevent further investigation into information revealed to the Commission which could uncover corruption and misconduct. It would also provide an unfair protection against prosecution for anyone implicated by information revealed to the Commission. These outcomes would undermine the purpose of the Bill.
>
> Access and use of information provided without the protection against self-incrimination is reasonable, necessary and appropriate. The Commission does not have power to prosecute civil or criminal wrongdoing, but the Commission's findings can assist law enforcement agencies to further investigate and secure information that would lead to such prosecution.
>
> Increasing the prospects that those engaging in unlawful interference will be rigorously investigated and brought to justice promotes freedom from arbitrary or unlawful interference.

Committee comment

2.66 The committee thanks the legislation proponent for this response. The committee notes the legislation proponent's advice that providing for a derivative use immunity would prevent further investigation into information revealed to the Commission and 'provide an unfair protection' against prosecution for anyone implicated by information revealed to the Commission which would undermine the purpose of the bill.

2.67 The committee reiterates that while investigating corruption in public administration is likely to be a legitimate objective for the purposes of international human rights law, in assessing the proportionality of the measure, the existence of immunities is one relevant factor in determining whether such measures impose a proportionate limitation on the right not to incriminate oneself. Use and derivative use immunities prevent compulsorily disclosed information (or anything obtained as an indirect consequence of making a compulsory disclosure) from being used in evidence against a witness. In this instance the bill provides only a partial 'use immunity' to persons compelled to provide self-incriminating information,[35] but no 'derivative use immunity' would be provided to prevent information or evidence indirectly obtained from being used in criminal proceedings against the person. The 'use' immunities that are provided in subclauses 79(3) and 102(4) are only partial as they would not apply to certain proceedings, including confiscation or disciplinary proceedings. In relation to clause 104 the immunity would also only apply if the person, before providing the required information, first states that doing so may tend to incriminate them or expose them to a penalty (meaning the use immunity may be of limited application for those who do not have legal advice prior to providing the information). The committee notes that the legislation proponent has

35 Subclauses 79(3) and 102(4).

not explained how and why the additional protection afforded by a derivative use immunity would prevent the Commission from investigating corrupt conduct, given clause 72 would compel the person to provide the evidence in question. The provision of a derivative use immunity would instead prevent information obtained indirectly as a result of a compelled witness's evidence from being used against the witness in future prosecutions.

2.68 The committee thanks the legislation proponent for this response. The committee notes that the bill seeks to abrogate the privilege against self-incrimination and therefore limits the right to a fair hearing. The committee considers the bill does not provide appropriate immunities for those compelled to give evidence against themselves, and as such risks disproportionately limiting the right not to incriminate oneself. The committee draws these human rights concerns to the attention of the legislation proponent and the Parliament.

Contempt of Commission

2.69 Paragraph 93(1)(d) provides that it would be a contempt of the Commission to knowingly insult, disturb or use insulting language towards the commissioner while the commissioner is exercising their powers. Paragraph 93(1)(e) provides that a person would commit a contempt if they knowingly create a disturbance in or near a place where a hearing is being held for the purpose of investigating a corruption issue or conducting a public inquiry.

2.70 Clause 96 provides that a person may be detained by a constable or 'authorised officer' for the purposes of bringing them before the relevant court for the hearing of an application to deal with contempt.[36] The court may impose a condition on release including, for example, that they surrender any travel document or passport.[37]

Right to freedom of expression and freedom of assembly: committee's initial analysis

2.71 As the committee previously noted, prohibiting insulting language or communication, or the wilful disturbance or disruption of a hearing of the Commission, engages and may limit the right to freedom of expression and the right to freedom of assembly. The right to freedom of expression includes the freedom to seek, receive and impart information and ideas of all kinds, either orally, in writing or

36 'Authorised officer' is defined in clauses 8 and 145 to mean 'a staff member of the Commission whom the National Integrity Commission considers has suitable qualifications or experience' or a member of the Australian Federal Police. The bill does not explain what qualifications or experience would be necessary for such appointment.

37 Clause 96(4)(a).

print, in the form of art, or through any other media of an individual's choice.[38] The right to freedom of assembly protects the right of individuals and groups to meet and engage in peaceful protest and other forms of collective activity in public.[39] These rights may be subject to permissible limitations that are necessary to protect the rights or reputations of others, national security, public order, or public health or morals and the limitations must be rationally connected and proportionate to such objectives.

2.72 The committee sought the advice of the legislation proponent as to:

- why contempt provisions are necessary to 'protect the rights or reputations of others, national security, public order, or public health or morals'; and
- what safeguards are in place to permit legitimate criticism of, or objection to, the proposed Commission and its activities.

Legislation proponent's response

2.73 The legislation proponent advised:

> The contempt provisions in clauses 93-97 support the Commissioner's power to control the way that hearings proceed and to address improper and threatening behaviour. The provisions will preserve the integrity and due conduct of proceedings by discouraging any attempts to influence the Commissioner or the outcome of any hearing. These protections are consistent with the contempt provisions under the *Law Enforcement Integrity Commissioner Act 2006* (ss 96A – 96E).
>
> Any contempt proceeding will be heard by the Federal Court or relevant Supreme Court. The person who is the subject of the proceeding must be given advance notice of the Commissioner's intention to commence proceedings. The Federal and Supreme Court judges are familiar with the objectives of contempt provisions and balancing this against concerns regarding undue restriction of legitimate criticism. This judicial oversight provides an appropriate safeguard to ensure that contempt proceedings are used cautiously.

Committee comment

2.74 The committee thanks the legislation proponent for this response and notes the advice that the contempt provisions are designed to preserve the integrity and due conduct of proceedings, and to address 'improper and threatening behaviour'. However, as drafted, the contempt provision would operate in relation to a person who insults or disturbs, or uses insulting language towards the Commissioner, even if that language or disturbance did not constitute 'threatening' behaviour. Furthermore, it is unclear whether and how a person who 'insults, disturbs or uses

38 ICCPR, article 19(2).

39 ICCPR, article 21.

insulting language' would prevent the Commissioner from undertaking their functions.

2.75 It would also be a contempt for a person (even someone unconnected to a hearing before the Commission) to knowingly create a disturbance in or near a place where a hearing is being held for the purpose of investigating a corruption issue or conducting a public inquiry. This paragraph is also drafted broadly, meaning that it could capture legitimate protests around buildings within which a hearing was being held, including those which do not prevent the Commissioner from carrying out their functions, and those which are unrelated to the operation of the Commission.

2.76 The committee notes that paragraph 93(1)(f) also provides that it is a contempt of the Commission to obstruct or hinder the Commissioner in the performance of their functions or the exercise of their powers and paragraph (g) would make it a contempt to disrupt a hearing that is being held for the purpose of investigating a corruption issue or conducting a public inquiry. As such, it remains unclear why the proposed contempt provisions need to extend to a person who 'insults, disturbs or uses insulting language' towards the Commissioner, or who creates a general disturbance near where a hearing is being held. As such, while preserving the integrity and due conduct of proceedings may constitute a legitimate objective for the purposes of international human rights law, it is not clear that these provisions are rationally connected to that objective or are proportionate to achieving it, given there would appear to already be provision in the bill that would make it a contempt to obstruct proceedings.

2.77 The committee thanks the legislation proponent for this response. The committee notes that clause 93, in making it a contempt of the Commission to insult the Commissioner or create a disturbance in or near a place where a hearing is being held, limits the right to freedom of expression and assembly.

2.78 The committee considers that these provisions are not the least rights restrictive way to achieve the stated objectives, and therefore risk disproportionately limiting the right to freedom of expression and assembly.

2.79 The committee considers it may be appropriate for the bill to be amended to remove paragraphs 93(d) and (e) (noting that clauses 93(f) and (g) would appear to provide a less rights restrictive way of achieving the same objective).

2.80 The committee draws these human rights concerns to the attention of the legislation proponent and the Parliament.

Right to liberty: committee's initial analysis

2.81 Empowering the Commissioner to authorise the detention of a person, without requiring an application to a court, engages and limits the right to liberty. This right, which prohibits arbitrary detention, requires that the State should not deprive a person of their liberty except in accordance with law. The notion of

'arbitrariness' here includes elements of inappropriateness, injustice and lack of predictability.[40]

2.82 The committee sought the advice of the legislation proponent as to why it is necessary to allow for a person who the Commissioner considers is in contempt to be detained without a court order, and what safeguards are in place to protect against arbitrary detention.

Legislation proponent's response

2.83 The legislation proponent advised:

> The detention powers in clause 96 act as a deterrent against contempt and support the Commissioner's powers to ensure hearings are conducted in a manner that does not undermine the outcome of the proceedings or the protections offered to witnesses. Clause 96 is consistent with powers of detention under the *Law Enforcement Integrity Commissioner Act 2006*.
>
> Clause 96(2) ensures that a person detained under the provision is brought before a court as soon as practicable. The Commissioner must make an application to the court as soon as practicable, and the person detained will be notified of the application and the basis on which it is made prior to the application being filed.

Committee comment

2.84 The committee thanks the legislation proponent for this response. The committee notes the advice that these powers are consistent with existing powers under other legislation, however, the committee notes that the fact that coercive powers exist in other legislation is not a basis for the inclusion of such powers in future legislation.

2.85 The committee notes the advice that these powers are intended to act as a deterrent against contempt, and to ensure that a detained person is brought to a court as soon as possible. However, these justifications do not address why it is considered necessary for the Commissioner to be able to authorise a person's detention without first seeking a court order. Furthermore, given the potential breadth of the contempt provisions, as outlined above, the committee notes the breadth of the Commissioner's power to authorise a person's detention.

2.86 The committee notes that it remains unclear as to what group of people may be authorised to undertake such detention and reiterates its concerns that such powers may be conferred on non-police officers (see paragraph [1.14] above). Furthermore, given that clause 96 would permit the Commissioner to authorise such detention during a hearing, for the purposes of making an application to the Federal Court for a finding of contempt 'as soon as practicable', it is unclear how that detention process would operate in practice, and where a person would be detained.

40 ICCPR, article 9.

Feasibly, a staff member of the Commission could be asked to physically restrain an individual, or to otherwise confine them, and it is unclear what would take place in the intervening period before the application to the Federal Court for an order of contempt. While the provisions propose that the court could subsequently order that person to be released from detention, this would still necessitate an unspecified period of detention. This lack of clarity carries the risk that such detention could be arbitrary.

2.87 The committee thanks the legislation proponent for this response The committee notes that empowering the Commissioner to direct the detention of a witness who the Commissioner considers is in contempt of the Commission limits the right to liberty. The committee considers that the bill does not provide adequate safeguards to protect against arbitrary detention and therefore risks disproportionately limiting the right to liberty. The committee draws these human rights concerns to the attention of the Parliament.

Order for a witness to deliver passport

2.88 Under clause 103, the Commissioner may apply to a judge of the Federal Court for an order that a person deliver their passport to the Commissioner in certain circumstances. These include where a person has appeared at, or been summonsed to attend a hearing, and there are reasonable grounds to believe that the person may be able to give evidence or produce documents or things relevant to the inquiry, and there are reasonable grounds for suspecting that the person has a passport and intends to leave Australia.[41]

Right to freedom of movement: committee's initial analysis

2.89 The right to freedom of movement includes the right to leave a country.[42] As such, where a person is required to surrender their passport this engages and limits the right to freedom of movement. The right to leave a country can permissibly be limited, including where it is rationally connected and proportionate to achieve the legitimate objectives of protecting the rights and freedoms of others, national security, public health or morals, and public order.

2.90 However, as noted by the committee previously, clause 103 would apply to a person who has already appeared at the hearing and who is not subject to a summons to appear, so long as the Commissioner has reasonable grounds for believing they may be able to give further evidence relevant to the investigation or public inquiry. This could potentially restrict such a person from leaving Australia for

41 Clause 103.

42 ICCPR, article 12.

an indefinite period of time pending completion of the Commission's investigation or public inquiry.

2.91 The committee sought the advice of the legislation proponent as to the compatibility of the measure with the right to freedom of movement, in particular:

- why this provision is necessary to 'protect the rights or reputations of others, national security, public order, or public health or morals'; and
- what safeguards are in place to ensure a person who has given evidence (and is not subject to a summons) is not indefinitely prevented from leaving Australia pending completion of the Commission's investigation or inquiry.

Legislation proponent's response

2.92 The legislation proponent advised:

> Corruption and misconduct are complex and are often committed by highly skilled, well-resourced professionals in positions of power. Strong investigative powers are essential to uncover corruption.
>
> Clause 103 is aimed at preserving the evidence of witnesses by assuring their attendance at a hearing to provide information, documents, or oral testimony. Given the complex nature of corruption hearings, evidence may be given after a person has first appeared which the Commissioner may wish to interrogate further, or which indicates that the person has further information relevant to the investigation.
>
> Where there is a reasonable suspicion that a person has been involved in, or is aware of, corrupt conduct and that person presents a flight risk, orders to surrender travel documents are appropriate and necessary to support the Commissioner's investigation and to uncover instances of undue influence.
>
> In deciding to make an order to surrender documents, or to maintain on order if an application is made to vary or revoke the order, the court must be satisfied that the person still has access to evidence relevant to the inquiry and is likely to leave the country. This must be based on sworn or affirmed evidence from the Commissioner to that effect. This safeguards against arbitrary or indefinite restriction of movement.
>
> The powers granted under clause 103 are consistent with existing powers under section 97 of the *Law Enforcement Integrity Commissioner Act 2006*.

Committee comment

2.93 The committee thanks the legislation proponent for this response and notes the advice that it is the court that must make the decision to make an order that a person surrender their passport on the basis that the person still has access to evidence relevant to the inquiry and is likely to leave the country, and that this safeguards against arbitrary or indefinite restriction of movement. The committee considers the fact that it is a court that makes this decision constitutes a safeguard that assists with the proportionality of the measure. However, the committee

considers that the provisions, as drafted, are overly broad. The committee notes that paragraph 104(1)(b) places the onus on the person to show cause as to why they should not be ordered to deliver the passport to the Commission, and it is unclear why this onus is placed on the individual and not on the Commissioner. Further, while the initial order can authorise the Commissioner to retain the passport for up to one month, this can be extended to up to three months on application to the court. To prevent an individual from travelling overseas for potentially up to three months is restrictive, particularly in a context where these individuals are witnesses or may be called on to be a witness, and are not themselves accused or may not be under any suspicion of corrupt conduct.

2.94 The committee thanks the legislation proponent for this response. The committee notes that clause 103, in empowering the Commissioner to apply to a court for an order that a witness surrender their passport, limits the right to freedom of movement. The committee is concerned that this would apply to a person who is not subject to a summons to appear and would put the onus on the potential witness to establish why they should not deliver their passport to the Commissioner, and as such risks disproportionately limiting the right to freedom of movement.

2.95 The committee draws these human rights concerns to the attention of the legislation proponent and the Parliament.

Immunity from civil liability

2.96 Clause 274 seeks to confer immunity from civil proceedings in the following instances:

- on a staff member of the Commission who has done, or omitted to do, something in good faith, in the performance or purported performance, or exercise or purported exercise, of that staff member's functions, powers or duties under, or in relation to, the proposed bill; or
- on a person whom the Commissioner has asked, in writing, to assist a staff member of the Commission, who has done, or omitted to do, an act in good faith for the purpose of assisting that staff member.

2.97 Furthermore, under clause 274(3), if information, evidence, a document or thing has been given or produced to the Commissioner, a person is not liable 'to an action, suit or proceeding in respect of loss, damage or injury of any kind suffered by another person by reason only that the information or evidence was given or the document or thing was produced'.

Right to an effective remedy: committee's initial analysis

2.98 Giving immunity from civil liability to persons means others are not able to bring civil actions to enforce legal rights, which may engage the right to an effective

remedy.[43] This right requires state parties to establish appropriate judicial and administrative mechanisms for addressing claims. While limitations may be placed in particular circumstances on the nature of the remedy provided (judicial or otherwise), state parties must comply with the fundamental obligation to provide a remedy that is effective.[44]

2.99 The committee sought the advice of the legislation proponent as to whether there are any other mechanisms by which a person whose rights are violated may seek a remedy.

Legislation proponent's response

2.100 The legislation proponent advised:

> As is common in many regulatory bodies, staff members are immune from civil proceedings that could arise from actions done in the performance of their roles (clause 274). However, these actions must have been done in good faith, within the proper exercise of their functions, powers and duties and subject to the Bill.
>
> The immunity is not intended to provide broad protection against defamatory or misleading statements made by staff.
>
> Staff are also subject to confidentiality requirements regarding information gathered during investigations, and the Commissioner is a quasi-judicial officer with a duty to the Commission. These obligations are intended to protect against misuse of information or other inappropriate conduct.

Committee comment

2.101 The committee thanks the legislation proponent for this response and notes the advice that this immunity is not intended to provide a broad protection against defamatory or misleading statements by staff, and that staff are only protected where these actions were done in good faith. However, the committee notes that proposed subclause 274(3) does not include a requirement that a person has acted in good faith. As drafted, it would confer a very broad protection to a person who has provided information or produced a document or thing to the Commission, and because of the provision of that information or evidence only, another person has suffered loss, damage or injury of any kind.

2.102 The committee also notes that the legislation proponent has provided no further information as to whether there are other ways for affected persons to seek an effective remedy. As such, it remains unclear whether these measures would operate so as to exclude the right to an effective remedy.

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43 ICCPR, article 2(3).

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

2.103 The committee thanks the legislation proponent for this response. The committee notes that clause 274, in conferring immunity from civil liability on certain persons, may engage the right to an effective remedy.

2.104 It is not clear from the response whether there are other ways for a person whose rights may have been violated to seek an effective remedy. As such, the committee is unable to conclude whether clause 274 would operate so as to exclude the right to an effective remedy.

Senator the Hon Sarah Henderson

Chair