Parliamentary Joint Committee on Human Rights

Human rights scrutiny report

Report 6 of 2019

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

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Committee information

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

The committee assesses legislation against the human rights contained in the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR); as well as five other treaties relating to particular groups and subject matter.[2] A description of the rights most commonly arising in legislation examined by the committee is available on the committee's website.[3]

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

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

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

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

3 See the committee's *Short Guide to Human Rights* and *Guide to Human Rights*, https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Guidance_Notes_and_Resources

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

More information on the committee's analytical framework and approach to human rights scrutiny of legislation is contained in *Guidance Note 1*, a copy of which is available on the committee's website.[4]

4 See *Guidance Note 1 – Drafting Statements of Compatibility*, https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Guidance_Notes_and_Resources

Chapter 1

New and continuing matters[1]

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

- bills introduced into the Parliament between 16 and 19 September 2019;[2]
- legislative instruments registered on the Federal Register of Legislation between 9 August and 19 September 2019;[3] and
- two bills previously deferred.[4]

1 This section can be cited as: Parliamentary Joint Committee on Human Rights, New and continuing matters, *Report 6 of 2019*; [2019] AUPJCHR 90.

2 See Appendix 1 for a list of legislation in respect of which the committee has deferred its consideration.

3 The committee examines all legislative instruments registered in the relevant period, as listed on the Federal Register of Legislation. To identify all of the legislative instruments scrutinised by the committee during this period, select 'legislative instruments' as the relevant type of legislation, select the event as 'assent/making', and input the relevant registration date range in the Federal Register of Legislation's advanced search function, available at: https://www.legislation.gov.au/AdvancedSearch.

4 The Social Security (Administration) Amendment (Income Management to Cashless Debit Card Transition) Bill 2019 and the Social Services Legislation Amendment (Drug Testing Trial) Bill 2019 were previously deferred in *Report 5 of 2019*.

Response required

1.2 The committee seeks a response from the relevant minister with respect to the following bills and instruments.

Australian Citizenship Amendment (Citizenship Cessation) Bill 2019[1]

Purpose	This bill seeks to amend the *Australian Citizenship Act 2007* to provide that, at the discretion of the Minister for Home Affairs, a person who is a national or citizen of a country other than Australia ceases to be an Australian citizen if the person acts inconsistently with their allegiance to Australia by engaging in terrorist offences. It also seeks to make consequential amendments to the *Independent National Security Legislation Monitor Act 2010* and the *Intelligence Services Act 2001*.
Portfolio	Home Affairs
Introduced	House of Representatives, 19 September 2019
Rights	Obligations of non-refoulement; rights to an effective remedy, fair trial and fair hearing, freedom of movement, liberty, protection of the family; and rights of children
Status	Seeking additional information

Ministerial determination to cease Australian citizenship

1.3 The Australian Citizenship Amendment (Citizenship Cessation) Bill 2019 (the bill) seeks to amend Division 3 of Part 2 of the *Australian Citizenship Act 2007* (the Australian Citizenship Act) to provide the Minister for Home Affairs (the minister) with the discretionary power to determine that a person ceases to be an Australian citizen in certain circumstances. The minister would have this discretionary power where, by doing any of the following, the minister is satisfied a person has demonstrated that they have 'repudiated their allegiance to Australia':

- by engaging in specified terrorism-related conduct (proposed section 36B),[2] or

1 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Australian Citizenship Amendment (Citizenship Cessation) Bill 2019, *Report 6 of 2019*; [2019] AUPJCHR 91.

- by being convicted since 29 May 2003[3] for a specified terrorism offence, for which a sentence of imprisonment of at least three years (or periods totalling at least three years) has been handed down (proposed section 36D).[4]

1.4 Under the bill the minister would not be permitted to make a citizenship cessation determination if the minister is 'satisfied' that the person would, if the minister were to make the determination, 'become a person who is not a national or citizen of any country'.[5] This is in contrast to the existing provisions of the Australian Citizenship Act which states that the determination can only be made if, as a matter of objective fact, 'the person is a national or citizen of a country other than Australia' at the time when the minister makes the determination.[6]

1.5 In all instances, the minister must be satisfied that it would be contrary to the 'public interest' for the person to remain an Australian citizen.[7] Proposed section 36E sets out a range of matters to which the minister must have regard in considering the public interest in this context.[8]

1.6 Under the proposed amendments, the rules of natural justice would not apply in relation to making a decision or exercising a power in relation to a

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2 Proposed sections 36B and 36C would replace existing sections 33AA, 35 and 35AA of the *Australian Citizenship Act 2007* (Australian Citizenship Act), which were introduced in 2015, which provides for the automatic cessation of citizenship for certain conduct. The 2015 changes were introduced by the *Australian Citizenship Amendment (Allegiance to Australia) Act 2015.*

3 Currently, only convictions from 12 December 2015 which resulted in a sentence of six years or more, or convictions in the ten years prior to this date resulting in a sentence of at least 10 years imprisonment, can be considered.

4 Explanatory memorandum, p. 1. Proposed section 36D seeks to replace an existing provision, section 35A of the Australian Citizenship Act, which provides for conviction of the same listed offences as in this bill, but that the person has been sentenced to at least six years imprisonment (or periods totalling six years), and only for convictions from 12 December 2015 (or convictions in the ten years prior this date resulting in a sentence of at least 10 years imprisonment, can be considered).

5 Proposed subsections 36B(2) and 36D(2).

6 Australian Citizenship Act, subsection 33AA(1) and paragraph 35A(1)(c).

7 Proposed subsections 36B(1)(b) and 36D(1)(d).

8 Pursuant to proposed subsection 36E(2), these include: the severity of the conduct to which a determination relates, the sentence or sentences to which the determination relates (if relevant), the degree of threat posed by the person to the Australian community, the person's age (including the best interests of the child as a primary consideration if the person is aged under 18), whether the person is being or likely to be prosecuted in relation to conduct to which the determination relates, the person's connection to the other country of which they are a national or citizen, Australia's international relations, and any other matters of public interest.

citizenship cessation determination.[9] The bill does not provide for merits review of the determinations, leaving only judicial review available. The power to make a determination under proposed section 36B would apply to persons aged 14 or over, while under proposed section 36D it would apply to persons convicted of specified offences, which would apply to anyone over the age of criminal responsibility (10 years of age).[10]

Preliminary international human rights legal advice

1.7 The effect of a citizenship cessation determination is that person cannot return to Australia, or if they are in Australia at the time of the determination, will no longer have a permanent right to reside in Australia. Such persons would acquire an ex-citizen visa as a matter of law, which may be cancelled on character grounds. If the ex-citizen visa were cancelled, the person would become an unlawful non-citizen and may be placed in immigration detention and subject to removal. As such, the bill engages and limits a number of human rights. The key rights engaged and limited are set out below.[11]

Right to freedom of movement

1.8 The right to freedom of movement[12] includes a right to leave a country, and to enter, remain in, or return to one's 'own country'. 'Own country' is a concept which encompasses not only a country where a person has citizenship but also one where a person has strong ties, such as long standing residence, close personal and family ties and intention to remain, as well as the absence of such ties elsewhere.[13]

1.9 For those whose citizenship ceases when they are outside Australia, they will lose the entitlement to return to Australia. If they are in a country in which they do not hold nationality, the right to leave that other country may be restricted in the absence of any valid travel documents. For those who are present in Australia at the time their citizenship ceases, the statement of compatibility notes that these

9 Proposed subsections 36B(11), 36D (9).

10 Under clause 7.2 of the *Criminal Code*, a child aged between 10 and 14 years of age can only be criminally responsible for an offence if the child knows that his or her conduct is wrong.

11 The measure may also engage and limit a number of other rights including the right to a private life; right to take part in public affairs; right to equality and non-discrimination; right to work; and rights to criminal process guarantees and the prohibition against retrospective criminal penalties (if the removal of citizenship could be characterised to involve the imposition of a penalty that is considered 'criminal' in nature for the purposes of international human rights law).

12 International Covenant on Civil and Political Rights (ICCPR), article 12.

13 UN Human Rights Committee, *General Comment No.27: Article 12* (Freedom of Movement) (1999). See also *Nystrom v Australia* (1557/2007), UN Human Rights Committee, 1 September 2011.

individuals will be entitled to an ex-citizen visa.[14] While this visa may allow the person to remain in Australia, in practice, it may operate to restrict any travel from Australia. This is because a person who leaves Australia on an ex-citizen visa loses any entitlement to return to Australia.[15] Further, an ex-citizen visa may be subject to cancellation on character grounds,[16] and in that case the person would become an unlawful non-citizen and be subject to removal.[17] As such, this would limit a person's right to remain in their 'own country' if the person has strong ties to Australia. The statement of compatibility recognises that the bill limits the right to freedom of movement, but argues the limitations on these rights are not arbitrary given the requirements set out in the bill (see further below under the discussion of proportionality).

Right to liberty

1.10 Expanding the circumstances in which the minister may determine that a person's citizenship ceases engages and may limit the right to liberty. As set out above, a person in Australia whose citizenship ceases will automatically be afforded an ex-citizen visa allowing them to reside in Australia. However, an ex-citizen visa may be subject to cancellation on character grounds,[18] including mandatory cancellation in the case of a person with a 'substantial criminal record' (which includes a sentence of imprisonment of 12 months or more).[19] Additionally, where a person has served a period of less than 12 months a visa may still be cancelled on discretionary grounds. Such persons are also prohibited from applying for most other visas.[20] A person whose ex-citizen visa is cancelled would become an unlawful non-citizen and may be subject to mandatory immigration detention pending removal.[21]

1.11 The right to liberty prohibits the arbitrary and unlawful deprivation of liberty.[22] The notion of 'arbitrariness' includes elements of inappropriateness,

14 Statement of compatibility, p. 10.

15 *Migration Act 1958* (Migration Act), subsection 35(1).

16 Migration Act, section 501.

17 Migration Act, sections 189, 198.

18 Migration Act, section 501.

19 Migration Act, subsection 501(7).

20 Migration Act, section 501E. While section 501E(2) provides that a person is not prevented from making an application for a protection visa, that section also notes that the person may be prevented from applying for a protection visa because of section 48A of the Migration Act. Section 48A provides that a non-citizen who, while in the migration zone, has made an application for a protection visa and that visa has been refused or cancelled, may not make a further application for a protection visa while the person is in the migration zone.

21 Migration Act, sections 189, 198.

22 ICCPR, article 9.

injustice and lack of predictability. Accordingly, any detention must not only be lawful, it must also be reasonable, necessary and proportionate in all of the circumstances. The right to liberty applies to all forms of deprivations of liberty, including immigration detention. The UN Human Rights Committee has held that Australia's system of mandatory immigration detention is incompatible with the right to liberty.[23] The statement of compatibility does not acknowledge that the bill engages the right to liberty.

Rights of the child and to protection of the family

1.12 As the power to make a determination under proposed section 36B would apply to persons aged 14 or over, and proposed section 36D could apply to those aged 10 or over, the measures also engage and limit the rights of the child.[24] International human rights law and Australian criminal law recognise that children have different levels of emotional, mental and intellectual maturity than adults, and so are less culpable for their actions.[25] In this context, cessation of a child's citizenship on the basis of their conduct raises questions as to whether this is in accordance with accepted understandings of the capacity and culpability of children under international human rights law and adequately recognises the vulnerabilities of children. International human rights law recognises that a child accused or convicted of a crime should be treated in a manner which takes into account the desirability of promoting his or her reintegration into society.[26] In this respect, the UN Committee on the Rights of the Child has stated that 'a minimum age of criminal responsibility below the age of 12 years is considered by the Committee not to be internationally acceptable' and has encouraged states parties 'to continue to increase it to a higher age level.'[27]

1.13 Children have special rights under human rights law taking into account their particular vulnerabilities. The Convention on the Rights of the Child requires state parties to ensure that, in all actions concerning children, the best interests of the

23 See, *MGC v. Australia,* UN Human Rights Committee Communication No.1875/2009 (2015) [11.6]. See, also UN Human Rights Committee, *Concluding observations on the sixth periodic report of Australia*, CCPR/C/AUS/CO/6 (2017) [37].

24 See, Convention on the Rights of the Child (CRC).

25 United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules), http://www.un.org/documents/ga/res/40/a40r033.htm; Australian Institute of Criminology, *The Age of Criminal Responsibility*, https://aic.gov.au/publications/cfi/cfi106.

26 CRC, article 40. See, also, UN Committee on the Rights of the Child, *General Comment 10: children's rights in juvenile justice* (2007) [10].

27 UN Committee on the Rights of the Child, *General Comment 10: children's rights in juvenile justice* (2007) [32].

child is a primary consideration.[28] Children also have the right to preserve their identity, including their nationality,[29] without unlawful interference.

1.14 A person whose Australian citizenship ceases may be prevented from returning to, or residing in, Australia, or travelling to another country, and thereby be prevented from reuniting with close family members. Children have a right to not be separated from their parents against their will, except where competent authorities determine that such separation is necessary for the best interests of the child,[30] and are to be protected from arbitrary interference with their family.[31] In addition, the enjoyment of a range of rights is tied to citizenship under Australian law, for example, such that the removal of citizenship may have a negative effect on the best interests of any affected children.

1.15 The separation of a person from their family may also engage and limit the right to protection of the family.[32] The family is recognised as the natural and fundamental group unit of society and, as such, is entitled to protection. This right protects family members from being involuntarily and unreasonably separated from one another. Laws and measures which prevent family members from being together, impose long periods of separation, or forcibly remove children from their parents, will therefore engage this right.[33]

Limitations on rights

1.16 Human rights which are not absolute may be subject to permissible limitations providing the measures limiting these rights meet certain 'limitation criteria'; namely, that they are prescribed by law, pursue a legitimate objective, are rationally connected to (that is, effective to achieve) that objective and are a proportionate means of achieving that objective. Set out below is advice as to whether the limitations on the rights to freedom of movement and liberty and the rights of the child and the protection of the family meet these limitation criteria.

Prescribed by law

1.17 The requirement that interferences with rights must be prescribed by law includes the condition that laws must satisfy the 'quality of law' test. This means that any measures which interfere with human rights must be sufficiently certain and

28 CRC, article 3(1).

29 The terms 'nationality' and 'citizenship' are interchangeable as a matter of international law.

30 CRC, article 9.

31 CRC, article 16.

32 CRC; ICCPR, articles 17 and 23; International Covenant on Economic, Social and Cultural Rights (ICESCR), article 10.

33 *Winata v Australia,* UN Human Rights Committee Communication No.930/2000 (26 July 2001) [7.3].

accessible, such that people understand the legal consequences of their actions or the circumstances under which authorities may restrict the exercise of their rights.[34]

1.18 The minister's power to make a determination ceasing a person's citizenship requires the minister to be satisfied that the conduct engaged in 'demonstrates that the person has repudiated their allegiance to Australia'.[35] In contrast, the Australian Citizenship Act currently provides that citizenship will cease if a person engages in specified conduct 'with the intention of advancing a political, religious or ideological cause' and with the intention of coercing or influencing by intimidation the government or the public.[36] It is unclear on the face of the bill what acts would demonstrate that a person has repudiated their allegiance to Australia.

1.19 The explanatory memorandum states that 'allegiance' is a legal concept as referred to by the High Court[37] and the ordinary meaning of allegiance is the dictionary definition, being 'the obligation of a subject or citizen to their sovereign or government; duty owed to a sovereign state'.[38] However, the High Court judgments referred to in the explanatory memorandum clarify that an alien is a person who does not owe allegiance to Australia.[39] They do not set out the legal test for whether someone's conduct could be said to have *repudiated* this allegiance or what exactly this allegiance is. It is not clear, therefore, on the basis of the information in the explanatory materials that the question of whether a person has demonstrated that they have 'repudiated their allegiance to Australia' is sufficiently certain and accessible for people to understand the legal consequences of their actions, such that it would satisfy the 'quality of law' test.

1.20 In addition, under proposed paragraph 36B(5)(j) the minister may make a determination that a person ceases to be a citizen if the person engaged in the conduct of serving in the armed forces of ‘a country at war with Australia.' The explanatory memorandum explains that, unlike other Commonwealth offences, this criterion could be fulfilled even if there has been no 'Proclamation in relation to a country at war with Australia or…Declaration of war'.[40] Without a proclamation or

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34 *Pinkney v Canada,* UN Human Rights Communication No.27/1977 (1981) [34].

35 Item 9, proposed paragraph 36B(1)(b) and 36D(1)(c).

36 Australian Citizenship Act, subsection 33AA(3).

37 The High Court of Australia in *Singh v Commonwealth* (2004) 209 ALR 355 and *Koroitamana v Commonwealth* (2006) 227 CLR 31. These two cases considered the status of children born in Australia to non-citizen parents, and whether they could be treated as 'aliens' under section 51(xix) of the Constitution. The judgments focus on the constitutional concept of 'alienage', and the role of allegiance within that context.

38 Explanatory memorandum, p. 7.

39 The explanatory memorandum states, at page 7, that the judgment in *Koroitamana v Commonwealth* (2006) 227 CLR 31 'demonstrates that an alien is a person who does not owe allegiance to Australia'.

40 Explanatory memorandum, p. 7.

declaration of war it is unclear if how persons serving in the armed forces of another country would know that the country is formally at war with Australia. This also raises the question of whether this measure is sufficiently certain and accessible for people to understand the legal consequences of their actions.

Legitimate objective

1.21 Any limitation on the rights to freedom of movement and liberty and the rights of the child and the protection of the family must demonstrate that the measure limiting the right aims to achieve a legitimate objective. The statement of compatibility states that the purpose of this bill remains the same as when the original terrorism-related citizenship loss provisions were enacted in 2015: recognition that Australian citizenship is a common bond which may, through certain conduct incompatible with the shared values of the Australian community, be severed.[41] It states that persons convicted of serious terrorism offences pose a threat to Australia and its interests, and that engagement in terrorist conduct would be regarded by Australians as a contradiction of the values that define our society.[42] The explanatory memorandum further states that, while the existing terrorism-related citizenship cessation powers have helped to protect Australians, approximately 80 individuals of 'counter-terrorism interest' are believed to be still in Syria and Iraq, 'some of whom may seek to return to Australia' (although it does not explain how many of those 80 are dual-nationals and so likely to be the subject of this bill).[43] It also argues that the measures 'enable optimal decision-making outcomes for Australia's national security' and that the bill builds on, adapts and modernises the citizenship cessation provisions so they are part of a suite of measures that can be applied to manage an Australian of counter-terrorism interest.[44]

1.22 In general terms, national security, public order and the rights and freedoms of others have been recognised as being capable of constituting a legitimate objective for the purposes of international human rights law. It would have been useful if the explanatory materials had provided more evidence or data about the scope of this issue as a pressing and substantial concern. In particular, no evidence was given as to why citizenship should cease after a person is sentenced to three or more years imprisonment (as opposed to the current six years) and what gaps (if any) the amendments seek to capture. All the explanatory materials state is that a sentence of this nature 'reflects the seriousness of a criminal conviction for one of the [listed] terrorism related offences'.[45]

41 Statement of compatibility, p. 1.

42 Statement of compatibility, p. 3.

43 Explanatory memorandum, p. 1.

44 Statement of compatibility, p. 3.

45 Statement of compatibility, p. 3.

1.23 It is noted that the cessation of citizenship can only occur if the minister is satisfied the person is entitled to nationality of another country. While it is welcome that it is intended that this would not apply to those not eligible for citizenship of another country (as to do otherwise would render the person stateless), this raises questions as to whether these measures are strictly necessary. If the threat posed to Australia by citizens who do not possess dual-nationality can be managed without depriving them of citizenship, it is unclear why similar measures could not adequately address the threat posed by dual-citizens. If national security is not adequately established as a legitimate objective, it is noted that the statement of compatibility would appear to rely on the desire to limit citizenship to those 'who embrace and uphold Australian values'.[46] It is not clear that this seeks to address a pressing and substantial concern such that it is a legitimate objective when considering the significant limitations on rights posed by these measures.

Rational connection

1.24 The statement of compatibility posits that the proposed measures are rationally connected with the pursuit of the stated objectives. It states that cessation of a person's formal membership of the Australian community will reduce the possibility of that person engaging in acts that harm the community, and argues that it may also have a deterrent effect by making people aware that their citizenship may be in jeopardy.[47] It also notes that these measures will operate in the context of other anti-terrorism measures, including 'the control order scheme, prosecution of terrorism offences, temporary exclusion orders, the post-sentence preventative detention, and de-radicalisation programs'.[48] The statement of compatibility does not explain how the existing measures, introduced in 2015, have been effective to protect the Australian community nor does it provide evidence to demonstrate that it has had a deterrent effect, other than to state that the provisions have helped to do so.[49] It is not, therefore, possible to assess whether expanding powers to remove citizenship to a broader group of persons will be effective to achieve (that is, rationally connected to) the stated objectives.

Proportionality

1.25 Questions also remain as to whether the minister's discretionary power to determine cessation of citizenship is proportionate to the stated objectives. The statement of compatibility appears to contain two main justifications as to how any limitations on rights are proportionate:

46 Statement of compatibility, p. 3.

47 Statement of compatibility, p. 3.

48 Statement of compatibility, p. 3.

49 Statement of compatibility, p. 3.

- in considering whether to cease a person's citizenship, the bill requires that the minister be satisfied it is not in the public interest for the person to remain an Australian citizen, having regard to factors set out in proposed section 36E. The statement argues that balancing such factors, via this discretionary process, ensures limitations on rights is not arbitrary; [50] and
- the bill contains safeguards to ensure that after a citizenship determination has been made, it can be revoked, including if a court finds that the person never engaged in the specified conduct; was not actually a national or citizen of another country; the relevant sentence has been overturned or reduced; or the declaration that a group is a terrorist organisation is disallowed by Parliament. [51]

1.26 However, questions remain as to whether the measures:

(a) are sufficiently circumscribed, noting in particular the breadth of the minister's discretionary powers;

(b) contain sufficient safeguards, including:

- ensuring adequate consideration is given to the best interests of the child and protection of the family; and
- ensuring adequate rights of review (including in relation to whether a person is entitled to dual nationality); and

(c) are the least rights restrictive approach, noting in particular:

- other methods available to protect national security; and
- the retrospective application of the amendments.

Breadth of ministerial discretionary powers

1.27 As set out above, the proposed measures provide the minister with a broad discretionary power to revoke a person's citizenship on the basis of a wide range of criteria, some elements of which are open to interpretation. International human rights law jurisprudence states that laws conferring discretion or rule-making powers on the executive must indicate with sufficient clarity the scope of any such power or discretion conferred on competent authorities and the manner of its exercise. This is because there is a risk that, without sufficient safeguards, broad powers may be exercised in such a way as to impose unjustifiable limits on human rights.

1.28 As set out above at paragraphs [1.18] to [1.19], there is uncertainty surrounding what it means to have repudiated one's 'allegiance' to Australia. In addition, proposed section 36B would empower the minister to determine that a person's citizenship has ceased on the basis of the minister's 'satisfaction' that a

50 Statement of compatibility, pp. 4, 6, 10, and 11.

51 Statement of compatibility, p. 5.

person has engaged in specified conduct. It is noted that proposed subsection 36B(6) essentially provides that the specified conduct that the minister must be satisfied of, has the same meaning as offences set out in the Criminal Code, but without including any requirement of intent. This essentially means that the minister may determine that a person's citizenship will cease on the basis that he or she is satisfied that the person has committed an offence, without any protections of a criminal trial and without it having been established by a court of law that the person has committed the offence.

1.29 In addition, the breadth of the offences specified in subsection 36D(5), which would empower the minister to cease citizenship following conviction of the listed offences are noted. This includes offences that relate to preparation, assistance or engagement and cover conduct that may be reckless rather than intentional. Some of the offences themselves appear to raise human rights concerns. For example, the offence of entering or remaining in a declared area appears likely to be incompatible with the right to a fair trial and the presumption of innocence, the prohibition against arbitrary detention, the right to freedom of movement and the right to equality and non-discrimination.

Consideration of individual circumstances

1.30 The requirement that the minister consider individual circumstances before ceasing a person's citizenship assists with the proportionality of the measure. Proposed section 36E provides that the minister, in determining whether it is in the public interest to make a determination to cease citizenship, must have regard to the severity of the relevant conduct; the degree of threat posed by the person; the age of the person; if the person is under 18, the best interests of the child as a primary consideration; whether the person is likely to be prosecuted for the relevant conduct; the person's connection to the other country of which they are (or may be) a national; Australia's international relations; and any other matters of public interest. However, this list does not explicitly require the minister to consider the impact of the citizenship loss on the right to protection of the family and the right to freedom of movement. The statement of compatibility states that as cancellation decisions are discretionary 'the impact on family members would be considered' (presumably under the catch-all of 'other matters of public interest').[52] However, while the minister may consider the impact on family members or the right to freedom of movement in determining whether to cease a person's citizenship, there remains no express requirement for them to do so.

1.31 In addition, while proposed section 36E requires the minister to consider, if the person is under 18, the best interests of the child, it specifically states that this is to be 'as a primary consideration'. As the statement of compatibility explains, this means that where the minister is determining whether to cease a child's citizenship,

52 Statement of compatibility, p. 11.

it 'must consider the protection of the Australian community alongside the best interests of the child'.[53] It goes on to state that the minister must be satisfied that cessation of citizenship is in the public interest and 'in considering the public interest, the Minister must have regard to numerous matters, *including* the best interests of the child.[54]

1.32 However, the UN Committee on the Rights of the Child has explained that:

> the expression 'primary consideration' [in article 3(1) of the Convention on the Rights of the Child] means that the child's best interests may not be considered on the same level as all other considerations. This strong position is justified by the special situation of the child.[55]

1.33 It follows that it may be inconsistent with Australia's obligations to treat other considerations as of equal weight to the obligation to consider the best interests of the child.

1.34 Furthermore, there does not appear to be any requirement for the minister to consider the best interests of any children who might be directly affected by a citizenship cessation determination relating to, for example, one or both of their parents. In this regard, the statement of compatibility provides that '[c]essation of a parent's Australian citizenship under these provisions does not result in the cessation of the child's Australian citizenship'.[56] However, this does not provide a complete answer to the question of what impact the cessation of a parent's Australian citizenship will have on the rights of affected children.

Availability of review

1.35 The availability of review rights is also relevant to assessing the proportionality of these measures. The minister's discretionary power to cease citizenship includes express provisions stating that the rules of natural justice do not apply in relation to making a decision or exercising a power under most provisions in the bill.[57] There is no independent merits review available of the minister's decision – only a right to apply to the same person who made the decision (the minister) and ask that the decision be reconsidered.[58] The statement of compatibility notes that individuals will have the right to access judicial review of the determination, and to

53 Statement of compatibility, p. 12.

54 Statement of compatibility, p. 13.

55 UN Committee on the Rights of the Child, *General comment 14 on the right of the child to have his or her best interests taken as a primary consideration* (2013); see also *IAM v Denmark*, UN Committee on the Rights of the Child Communication No.3/2016 (2018) [11.8].

56 Statement of compatibility, p. 13.

57 See proposed subsections 36B(11), 36D(9), 36F(7), 36G(8), and 36J(7).

58 Proposed section 36H.

seek declaratory relief.[59] However, the availability of judicial review may not represent a sufficient safeguard in this context. Judicial review is only available on a number of restricted grounds and represents a limited form of review in that it only allows a court to consider whether the decision was lawful (that is, within the power of the relevant decision maker). Noting the broad discretionary power provided to the minister (and the exclusion of the rules of natural justice), this would likely be difficult to establish. It is also noted that the bill provides that the minister must give a written notice of a determination to cease citizenship, but that notice need not contain certain information (e.g. if it is nationally sensitive or would be contrary to the public interest).[60] This broad power to restrict disclosure of the basis on which the determination was made would likely make review of the decision more difficult.

1.36 Further, the changes proposed by the bill as to whether a person is a dual citizen raises questions as to the proportionality of the measure. As noted above, currently it is a condition precedent for making a determination that a person *is*, as a matter of fact, a national or citizen of a country other than Australia. By proposing that the minister only need be 'satisfied' of this status, this may create a greater risk that a person is not actually a citizen of another country such that they may be unable to obtain travel documents and may be rendered stateless. This is because while the minister may be 'satisfied' about a person's citizenship, they may still be mistaken about this as a factual matter. This is particularly the case noting that questions of dual nationality can be highly complex.

1.37 While judicial review of the minister's decision is available, this is limited by the nature of the powers granted to the minister. In these circumstances, the court may determine that the minister was lawfully 'satisfied' of the relevant matters without being required to determine whether the considerations of the minister were factually correct, and the court would not necessarily be required to make a factual finding as to whether a person is a national or citizen of a foreign country. As such, it is not clear that proposed section 36K, which automatically revokes the minister's determination in certain circumstances (including where a court is satisfied a person did not engage in the relevant conduct or a person was not a dual national at the time the determination was made), is a particularly strong safeguard (as is argued by the statement of compatibility). It applies only after citizenship has already ceased, and only on the application of the affected person who would bear the burden of establishing, on the balance of probabilities, they did not engage in the relevant conduct or were not a national or citizen of another country. In addition, proposed subsection 36K(2) provides that even if the minister's decision was later revoked, the validity of anything done in reliance on the determination before that event would not be affected. This calls into question its effectiveness as a safeguard.

59 Statement of compatibility, p. 9.

60 See proposed subsection 36F(6).

Least rights restrictive approach

1.38 Questions also remain as to whether ceasing a person's citizenship, with all the serious consequences for human rights that flow from such a decision, is the least rights restrictive way to achieve the stated objectives. For example, it is unclear why less rights restrictive approaches such as regular law enforcement techniques or criminal justice processes (e.g. arrest, charge and prosecution including for preparatory acts) are insufficient to protect the community. Further, the ability to impose conditions on an individual under a control order in a range of circumstances is already a coercive tool aimed at addressing such objectives. In addition, as noted above at paragraph [1.23], as such measures are not applied to persons who do not possess, or are not entitled to, dual nationality, and as other measures are presumably applied to such persons as may be necessary to protect the Australian community, it is not clear that these measures are the least rights restrictive approach.

1.39 In addition, the retrospective application of provisions under the bill to conduct occurring over 16 years ago raises further concerns that the measures may not be the least rights restrictive approach. Under the current law, only convictions from 12 December 2015 which resulted in a sentence of six years or more, or convictions in the ten years prior this date resulting in a sentence of at least 10 years imprisonment, are relevant to loss of citizenship. However, the bill would allow a ministerial determination to be made in relation to conduct that is considered to have occurred from 29 May 2003 onwards, as well as to convictions from that date (that result in a sentence of three years imprisonment or more).

1.40 The statement of compatibility argues that it is appropriate to take into account past conduct in order to 'ensure the safety and security of Australia and its people' and to ensure that citizenship is limited to those who continue to 'retain an allegiance to Australia'.[61] It argues that the listed offences in proposed section 36D narrows the retrospective application of the provision because it 'only applies to terrorism offences which target behaviour that is especially harmful to community safety and amounts to a repudiation of allegiance to Australia'.[62] However, it offers no explanation as to why the retrospectivity period has been extended beyond the periods that exist under the current provisions, why 29 May 2003 was chosen and what gaps (if any) the amendments seek to capture.

1.41 The bill would provide the minister with a broad discretion to determine that a person ceases to be an Australian citizen where that person has access to dual nationality and has 'repudiated their allegiance to Australia'. The effect of a citizenship cessation determination is that a person cannot return to Australia, or if they are in Australia at the time of the determination, will have their citizenship

61 Statement of compatibility, p. 10.

62 Statement of compatibility, p. 10.

rights removed and be likely to be an unlawful non-citizen who is liable to mandatory immigration detention and removal from Australia.

1.42 On this basis, these measures engage and limit a number of human rights, including the rights to freedom of movement and liberty, and the rights of the child and to protection of the family. Further information is required in order to assess whether these are permissible limitations under international human rights law. In particular, it would be useful to know:

- whether the criteria that a person has 'repudiated their allegiance to Australia', or has served in the armed forces of a country 'at war with Australia' is sufficiently certain and accessible for people to understand the legal consequences of their actions;
- whether evidence establishes that the measures seek to achieve a legitimate objective, in particular, advice as to the necessity of the measures noting that any threat posed by non-dual national Australians is not proposed to be managed by depriving them of citizenship;
- how the measures are rationally connected to (that is effective to achieve) the stated objectives, in particular any evidence that demonstrates that the 2015 measures have been effective in protecting the community and acting as a deterrent;
- whether the measures are proportionate to achieve the stated objectives, in particular:
    - why proposed section 36E does not include an express requirement for the minister to consider a person's connection to Australia, including any impact on family members, before making a citizenship cessation determination;
    - when consideration is given to making a determination in relation to a person under 18, why the best interests of the chid is to be considered alongside a range of other factors and what 'as a primary consideration' means in this context;
    - why there is no independent merits review of the minister's discretionary powers; and
    - why the discretionary powers apply to conduct or convictions up to 16 years ago; why this date was chosen, and why the period in the existing provisions is insufficient.

Committee view

1.43 The committee notes the legal advice on the bill and makes the following comments as set out below.

Rights engaged

1.44 With respect to the rights of the child and protection of the family, we note that section 36E of the bill requires the minister to have regard to the 'age of the person' and 'the best interests of the child as a primary consideration'.

Prescribed by law

1.45 With respect to the requirement that interferences with rights must be prescribed by law, the committee notes that the minister must be satisfied that the person engaged in specified terrorism conduct or has been convicted of a specified terrorism offence and the conduct engaged in demonstrates that the person has repudiated their allegiance to Australia and the minister is satisfied that it would be contrary to the public interest for the person to remain an Australian citizen.

1.46 In paragraph [1.18], we note concerns about certainty as whether a person has demonstrated that they have 'repudiated their allegiance to Australia.' The committee notes, however, that the minister's discretion is limited by reason that ceasing a person's citizenship to persons is limited to persons who engaged in specified conduct or who have been convicted of a specified offence.

Legitimate objective

1.47 It is clear that cessation of citizenship can only occur if the minister is satisfied that the person is entitled to a nationality of another country. This is a most important limitation of the scope of the proposed law. With respect to the question in paragraph [1.23] as to why the minister could not treat dual citizens is the same manner as those who do not possess dual citizenship, the committee is of the view that removing a person's citizenship, where this is possible, is a legitimate objective in that it ensures that there is less prospect of a person engaging in conduct which harms the Australian community.

Further information required

1.48 The committee considers that these measures may engage and limit a number of human rights, including the rights to freedom of movement and liberty, and the rights of the child and to protection of the family. In order to assess whether these are permissible limitations under international human rights law, the committee seeks the minister's more detailed advice as to the matters set out at paragraph [1.42].

Preliminary international human rights legal advice

Obligations of non-refoulement and right to an effective remedy

1.49 As noted above, a person whose citizenship ceases under the proposed measures, if in Australia, would be granted an ex-citizen visa, which is likely to be cancelled and the person would then be classified as an unlawful non-citizen and

liable for removal from the country.[63] As such, the measures engage Australia's obligations of non-refoulement.

1.50 Pursuant to Australia's non-refoulement obligations under international law,[64] 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.[65] Non-refoulement obligations are absolute and may not be subject to *any* limitations. In addition, the obligation of non-refoulement and the right to an effective remedy require an opportunity for independent, effective and impartial review of decisions to deport or remove a person.[66] The statement of compatibility does not acknowledge that the measures engage Australia's absolute obligations with regard to non-refoulement, or the right to an effective remedy, and so no assessment of this engagement is provided.

1.51 The types of conduct captured by proposed sections 36B and 36D, including engagement with a declared terrorist organisation, or service in the armed forces with a foreign country, may well be the same activities which risk placing an individual at risk of torture or cruel treatment in another country. As such, it would be useful for the statement of compatibility to contain an explanation of how the minister would consider the absolute prohibition against non-refoulement in the context of these determinations, noting that such consideration is not currently included in the matters to which the minister must have regard pursuant to proposed section 36E.

1.52 In relation to additional safeguards against refoulement and to protect the right to an effective remedy, judicial review of the minister's decision to strip a person of citizenship or cancel a person's visa on character grounds remains available. However, there is no right to merits review of a decision that is made personally by the minister to refuse or cancel a person's visa on character grounds, or of the original decision to cancel the person's citizenship.[67] Judicial review in the Australian context is not likely to be sufficient to fulfil the international standard required of 'effective review' of non-refoulement decisions,[68] as judicial review is

63 See statement of compatibility, p. 14.

64 ICCPR; CAT.

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

66 ICCPR, article 2 (the right to an effective remedy). See, for example*, Singh v Canada*, UN Committee against Torture Communication No.319/2007 (30 May 2011) [8.8]-[8.9]; *Alzery v Sweden*, UN Human Rights Committee Communication No. 1416/2005 (20 November 2006) [11.8].

67 Australian Citizenship Act, section 52.

68 See *Singh v Canada*, UN Committee against Torture Communication No.319/2007 (30 May 2011) [8.8]-[8.9].

only available on a number of restricted grounds and represents a limited form of review. Accordingly, the availability of merits review would likely be required to comply with Australia's obligations under international law.

1.53 It is noted that a citizenship cessation determination could cause a person, whose ex-citizen visa would be cancelled on character grounds, to be classified as an unlawful non-citizen and liable for removal from the country. As such, the measures engage Australia's obligations of non-refoulement and the right to an effective remedy.

1.54 Further information is required in order to fully assess the compatibility of these measures with the obligation of non-refoulement and the right to an effective remedy. It would assist with the compatibility of the measure if section 36E included a requirement that the minister must consider whether the person, if removed from Australia following loss of citizenship, would be at risk of persecution or other forms of serious harm.

Committee view

1.55 The committee notes the legal advice on the bill and makes the following comments as set out below.

Availability of review

1.56 The availability of review rights is limited but the committee notes that that this consistent with existing citizenship loss provisions which the bill proposes to amend.

Further information required

1.57 The committee seeks the minister's advice in relation to the matters set out at paragraph [1.54].

Civil Aviation Order 48.1 Instrument 2019 [F2019L01070][1]

Purpose	The instrument provides a new framework for the more effective management of fatigue risk in aviation operations The instrument replaces Part 48 of the Civil Aviation Orders
Portfolio	Infrastructure, Transport, Cities and Regional Development
Authorising legislation	*Civil Aviation Act 1988*
Last day to disallow	15 sitting days after tabling (tabled in the Senate and the House of Representatives on 9 September 2019).
Rights	Privacy
Status	Seeking additional information

Collection, use, storage and disclosure of physiological and other data

1.58 The instrument provides a regulatory framework for the management of fatigue risk in aviation operations. Section 10 of the instrument requires holders of Air Operators' Certificates to comply with a number of limits and requirements for flight crew members,[2] including a requirement, in Appendix 7 of the instrument, to apply to the Civil Aviation Safety Authority for approval to use an individualised Fatigue Risk Management System. This system is to be 'tailored to the specific fatigue-relevant circumstances of an individual pilot'.[3]

1.59 The statement of compatibility further explains that the holder of an Air Operators' Certificate who elects to use a Fatigue Risk Management System:[4]

> assumes an onerous burden that may involve the collection and use of physiological and other data about an individual pilot in order to create a database which, when properly managed, operates scientifically to determine individual fatigue risk.

1 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Civil Aviation Order 48.1 Instrument 2019 [F2019L01070], *Report 6 of 2019*; [2019] AUPJCHR 92.

2 As set out in Table 10.1 of the instrument which includes requiring 'any operation' to comply with Appendix 7.

3 Statement of compatibility, p. 20. See also: https://www.casa.gov.au/safety-management/fatigue-management/casas-approach-fatigue-management.

4 Statement of compatibility, p. 20.

Preliminary international human rights legal advice

Right to privacy

1.60 The potential collection and use of a person's physiological information in compliance with a Fatigue Risk Management System engages and limits the right to privacy. The right to privacy includes respect for informational privacy, including the right to respect for private and confidential information, particularly the storing, use and sharing of such information. It also includes the right to control the dissemination of information about one's private life.[5] 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.

1.61 The statement of compatibility acknowledges that the Fatigue Risk Management System regime, as set out in Appendix 7 of the instrument, may limit the right to privacy; however, it suggests that 'the limitation is lawful and reasonable, and proportionate to the risks and dangers to life that a fatigue management regime must address'.[6]

1.62 The objective of the instrument, as described in the statement of compatibility is 'to address the safety implications of [flight crew members'] fatigue in the interests of the aviation safety'.[7] The maintenance of aviation safety is a legitimate objective for the purposes of international human rights law, and the Fatigue Risk Management System, in creating 'a more accurate and reliable indicator of actual fatigue and fatigue risk',[8] appears to be rationally connected to the objective of addressing fatigue to promote aviation safety.

1.63 In relation to the proportionality of the measure, the statement of compatibility notes that the collection and use of physiological and other data about an individual pilot to create a database to scientifically determine individual fatigue risk might appear to interfere with the right to privacy, but:

> it produces more flexibility for all concerned and creates a more accurate and reliable indicator of actual fatigue and fatigue risk. Also, under the new [Civil Aviation Order], even under an [Fatigue Risk Management System] regime, every pilot has an obligation to self-assess and refuse duty if that assessment indicates unfitness for duty.
>
> Thus, while the new [Civil Aviation Order] may limit the right to privacy, the limitation can only arise in a voluntary employment contractual situation and, as such, the limitation is lawful and reasonable, and

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

6 Statement of compatibility, p. 20.

7 Statement of compatibility, p. 19.

8 Statement of compatibility, p. 20.

> proportionate to the risks and dangers to life that a fatigue risk management regime must address.[9]

1.64 However, in the absence of further information, it is unclear how this separate obligation on pilots to self-assess their fitness for duty might operate to limit the instances in which holders of Air Operators' Certificates might collect and use physiological and other data about an individual pilot. It is also unclear why the fact that 'the limitation can only arise in a voluntary employment contractual situation' necessarily means that the measure is a proportionate limitation on the right to privacy.[10]

1.65 More broadly, neither the statement of compatibility nor the explanatory statement appears to provide any specific information as to the type of 'physiological and other data' that might be collected in compliance with Appendix 7 of the instrument, the method of collection, how such data will be stored, and who such data might be disclosed to. This raises concerns as to whether the measures are sufficiently circumscribed. Further information about the nature and scope of the personal information which is likely to be collected and disclosed under the Fatigue Risk Management System regime is therefore necessary to determine whether this measure constitutes a proportionate limitation on the right to privacy.

1.66 Questions also arise as to the nature and adequacy of any safeguards in place. The statement of compatibility states that 'the statutory protections afforded by the *Privacy Act 1988* continue to apply'.[11] While physiological information is likely to be a type of personal information that is protected by the Australian Privacy Principles (APPs) and the *Privacy Act 1988* (Privacy Act), compliance with the APPs and the Privacy Act does not necessarily provide an adequate safeguard for the purposes of international human rights law. This is because the APPs contain a number of exceptions to the prohibition on use or disclosure of personal information, including where its use or disclosure is authorised under an Australian Law,[12] which may be a broader exception than permitted in international human rights law. Consequently, in the absence of further information about how the Privacy Act applies specifically to holders of Air Operators' Certificates, questions remain as to whether this identified safeguard is sufficient.

1.67 Appendix 7 of the instrument would appear to permit the collection and use of physiological and other data about individual pilots, which engages and limits the right to privacy. In order to assess whether any limitation on this right is proportionate, further information would be required as to:

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9 Statement of compatibility, p. 20.

10 Statement of compatibility, p. 20.

11 Statement of compatibility, p. 20.

12 APP 9; APP 6.2(b).

- what type of 'physiological and other data' might be collected in compliance with Appendix 7 of the instrument, the method of collection, how such data will be stored, and who such data might be disclosed to; and
- the adequacy and effectiveness of any relevant safeguards, including whether the *Privacy Act 1988* (Privacy Act) will act as an adequate and effective safeguard, noting the various exceptions to the collection, use and disclosure of information under the Privacy Act.

Committee view

1.68 The committee notes the legal advice on the bill. The committee notes that Appendix 7 of the instrument would appear to permit the collection and use of physiological and other data about individual pilots, which engages and limits the right to privacy. In order to assess whether any limitation on this right is proportionate, the committee seeks the minister's advice in relation to the matters set out at paragraph [1.67].

Disability Discrimination Regulations 2019 [F2019L01186][85]

Purpose	The regulations set out the exemptions from prohibition of disability discrimination in prescribed Commonwealth and State laws as well as an exemption in relation to combat duties and peacekeeping services
Portfolio	Attorney-General
Authorising legislation	*Disability Discrimination Act 1992*
Last day to disallow	15 sitting days after tabling (tabled in the Senate and House of Representatives on 16 September 2019).
Rights	Equality and non-discrimination; effective remedy; education; work; rights of persons with disabilities
Status	Seeking additional information

Exemptions from disability discrimination law

1.69 The Disability Discrimination Regulations 2019 [F2019L01186] (the regulations) remake the Disability Discrimination Regulations 1996 which sunsetted on 1 October 2019. The *Disability Discrimination Act 1992* (DDA) provides that discrimination on the basis of disability is unlawful in certain identified areas of public life. Section 47(2) of the DDA sets out specific exemptions from the prohibitions on disability discrimination in relation to anything done by a person in direct compliance with a prescribed law.[86]

1.70 Schedule 2 of the regulations prescribes a number of Commonwealth and State laws for the purposes of section 47(2) of the DDA (as set out below). Section 53(1) of the DDA provides an exemption from the prohibition on disability discrimination in relation to combat duties, combat-related duties and peacekeeping services. The terms 'combat duties' and 'combat-related duties' are defined in section 53(2) of the DDA to mean such duties as declared by the regulations. The regulations declare two duties to be combat-related duties (as set out below).

85 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Disability Discrimination Regulations 2019 [F2019L01186], *Report 6 of 2019*; [2019] AUPJCHR 93.

86 *Disability Discrimination Act 1992*, section 47(2).

Preliminary international human rights legal advice

Directions that a child be enrolled at a special school

1.71 The regulations prescribe sections 75(3) and 75A of the *Education Act 1972* (South Australia) (Education Act) for the purposes of section 47(2) of the DDA (thereby exempting these from the prohibitions on disability discrimination under the DDA). These sections provide that where, in the opinion of the Director-General, it is in the best interests of a child that the child be enrolled at a special school, the Director-General may nominate and direct that the child be enrolled at a special school. As acknowledged in the statement of compatibility, by allowing the Director-General to direct that a child be enrolled at a special school,[87] the measure engages and risks limiting a number of rights.[88]

Right to equality and non-discrimination, and the best interests of the child

1.72 By allowing the Director-General to be able to direct that a child be enrolled at a special school and enabling an educational authority to refuse to enrol a student on the basis of disability, the measure engages the right to equality and non-discrimination, as it facilitates the exclusion of children with disabilities from mainstream education rather than promoting inclusion.

1.73 The right to equality and non-discrimination provides that everyone is entitled to enjoy their rights without discrimination of any kind, and that all people are equal before the law and entitled without discrimination to equal and non-discriminatory protection of the law. Discrimination under articles 2 and 26 of the International Covenant on Civil and Political Rights (ICCPR) encompasses a distinction based on a personal attribute, such as, in this case, on the basis of disability,[89] which has either the purpose ('direct' discrimination), or the effect ('indirect' discrimination), of adversely affecting human rights.[90] Article 2(2) of the International Covenant on Economic, Social and Cultural Rights (ICESCR) also prohibits discrimination specifically in relation to the human rights contained in that Convention, such as the right to education.

1.74 The rights to equality and non-discrimination for people with disabilities are also provided for under the Convention on the Rights of Persons with Disabilities (CRPD). The UN Committee on the Rights of Persons with Disabilities has emphasised

87 *Education Act 1972* (SA), sections 75(3) and 75A.

88 Statement of compatibility, p. 9.

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

90 UN Human Rights Committee, *General Comment 18: Non-discrimination* (1989).

that the fundamental principles of equality and non-discrimination interconnect with human dignity and that the Convention on the Rights of Persons with Disabilities is based on the principle of 'inclusive equality'.[91]

1.75 Differential treatment will not constitute unlawful discrimination if the differential treatment is based on reasonable and objective criteria such that it serves a legitimate objective, is rationally connected to that objective and is a proportionate means of achieving that objective.[92] Article 5(4) of the CRPD also provides that specific measures are not to be regarded as discrimination if they can be characterised as positive or affirmative measures that aim to accelerate or achieve de facto equality of persons with disabilities. However, the UN Committee on the Rights of Persons with Disabilities have stated:

> Specific measures adopted by States parties under article 5(4) of the Convention must be consistent with all its principles and provisions. In particular, they must not result in perpetuation of isolation, segregation, stereotyping, stigmatization or otherwise discriminate against persons with disabilities.[93]

1.76 The UN Committee on the Rights of Persons with Disabilities has also emphasised that '[t]he human rights model of disability recognizes that disability is a social construct and impairments must not be taken as a legitimate ground for the denial or restriction of human rights'.[94]

1.77 The statement of compatibility acknowledges that the measure may have the effect of limiting the right to non-discrimination and equality, but argues that the limitations are permissible because the measure ensures 'that children attend a school that is able to cater to their needs and that is most suitable for them' and 'exist to protect the best interests of the child'.[95] It further states that '[p]rescribing these provisions also provides certainty to educational authorities that acting in accordance with a decision of the Director-General to refuse a student's application for enrolment will not attract an unlawful discrimination complaint'.[96]

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91 UN Committee on the Rights of Persons with Disabilities, *General Comment No. 6 (2018) on equality and non-discrimination* [4] and [11].

92 UN Human Rights Committee, *General Comment 18: Non-discrimination* (1989) [13]; see also *Althammer v Austria*, UN Human Rights Committee Communication No. 998/01 (2003) [10.2].

93 UN Committee on the Rights of Persons with Disabilities, *General Comment No. 6 (2018) on equality and non-discrimination* [29].

94 UN Committee on the Rights of Persons with Disabilities, *General Comment No. 6 (2018) on equality and non-discrimination* [9].

95 Statement of compatibility, p. 9.

96 Statement of compatibility, p. 9.

1.78 Protecting the best interests of children is a legitimate objective under international human rights law given that states are required under the Convention on the Rights of the Child (CRC) to ensure that, in all actions concerning children, the best interests of the child are a primary consideration.[97] However, there are questions as to whether separating children with disabilities from the general education system can be legitimately characterised as being in the best interests of the child (and therefore rationally connected to the stated objective). Relevantly, article 23(3) of the CRC states that assistance must be provided to ensure that a child with disability has 'effective access to and receives education…in a manner conducive to the child's achieving the *fullest possible social integration* and individual development'.[98] The UN Committee on the Rights of Persons with Disabilities has also cautioned:

> The concept of the 'best interests of the child' contained in article 3 of the Convention on the Rights of the Child should be applied to children with disabilities with careful consideration of their circumstances. States parties should promote the mainstreaming of disability in general laws and policies on childhood and adolescence.[99]

1.79 Furthermore, in relation to providing greater certainty to educational authorities, reducing administrative burdens or administrative convenience alone will generally be insufficient for the purposes of permissibly limiting a human right under international human rights law.

Right to education

1.80 By allowing the Director-General to direct that a child be enrolled at a special school,[100] the measure also engages the right to education, and risks limiting the right by facilitating the exclusion of children with disabilities from mainstream education rather than promoting inclusion.

1.81 The right to education is guaranteed by article 13 of the ICESCR, under which parties to the Convention recognise the right of everyone to education, and agree that education shall be directed to the full development of the human personality and sense of dignity, and shall strengthen respect for human rights and fundamental freedoms. Article 24 of the CRPD also guarantees the right of persons with disabilities to education through an inclusive education system, at all levels, without discrimination and on the basis of equality of opportunity.[101] Achieving this requires

97 Convention the Rights of the Child (CRC), article 3(1).

98 CRC, article 23(3) [emphasis added].

99 UN Committee on the Rights of Persons with Disabilities, *General Comment No. 6 (2018) on equality and non-discrimination* [37].

100 *Education Act 1972* (SA), sections 75(3) and 75A.

101 Convention on the Rights of Persons with Disabilities (CRPD), article 24.

that persons with disabilities are not excluded from the general education system on the basis of disability.[102]

1.82 In explaining the importance of inclusive education, the UN Committee on the Rights of Persons with Disabilities states that:

> the right to non-discrimination includes the right not to be segregated and to be provided with reasonable accommodation and must be understood in the context of the duty to provide accessible learning environments and reasonable accommodation.[103]

1.83 This is supported by the Office of the High Commissioner on Human Rights, which states that inclusive education fulfils the guarantee of universality and non-discrimination in the right to education.[104]

1.84 Under the ICESCR, Australia has immediate obligations to ensure that people enjoy economic, social and cultural rights without discrimination.[105] It also has obligations to progressively realise the right to education using the maximum of resources available.[106] The UN Committee on the Rights of Persons with Disabilities has stated:

> progressive realisation means that States parties have a specific and continuing obligation "to move as expeditiously and effectively as possible" towards the full realization of article 24. This is not compatible with sustaining two systems of education: mainstream and special/segregated education systems.[107]

1.85 The statement of compatibility acknowledges that, by empowering the Director-General to direct a child to be enrolled in a nominated special school and enabling an educational authority to refuse to enrol a student on the basis of disability, the measure may have the effect of limiting the right to education, but argues that this is a permissible limitation.[108] It states that the measure exists to protect the best interests of the child, by ensuring that the child will attend a school which can cater to their needs.[109] However, as noted at paragraph [1.78], there are

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102 CPRD, article 24(2)(a).

103 UN Committee on the Rights of Persons with Disabilities, *General Comments No. 4, Article 24: Right to inclusive education* (2016) [11] and [13].

104 Office of the High Commissioner on Human Rights, *Thematic Study of the Rights of Persons with Disabilities to Education*, A/HRC/25/29 (2013), para 3.

105 International Covenant on Economic, Social and Cultural Rights (ICESCR), article 2(2).

106 ICESCR, article 2(1); CRPD, article 4(2).

107 UN Committee on the Rights of Persons with Disabilities, *General Comment No. 4, Article 24: Right to inclusive education* (2016) [39].

108 Statement of compatibility, p. 9.

109 Statement of compatibility, p. 9.

questions as to whether a system that separates children with disabilities from the general education system can be legitimately characterised as being in the best interests of the child.

Right to an effective remedy

1.86 Further, by protecting a decision of the Director-General to refuse a student's application for enrolment from an unlawful discrimination claim, the right to an effective remedy may be limited. Article 2(3) of the ICCPR protects the right to an effective remedy for any violation of rights and freedoms recognised by the ICCPR (such as the right to equality and non-discrimination). This includes the right to have such a remedy determined by competent judicial, administrative or legislative authorities or by any other competent authority provided for by the legal system of the state. Effective remedies should be appropriately adapted to take account of the special vulnerabilities of certain categories of persons, including children. While limitations may be placed in particular circumstances on the nature of the remedy provided (judicial or otherwise), states parties must comply with the fundamental obligation to provide a remedy that is effective.[110] It is not permissible to offer no remedy for a violation of the rights protected by the ICCPR.

1.87 The statement of compatibility notes the right to an effective remedy may be limited, but argues that such a limitation here is permissible on the basis of the objective sought to be achieved.[111] It further states that sections 75(3) and 75A of the Education Act does not leave an affected individual without the capacity to dispute a decision, as parents would have the right to appeal a decision through the South Australian Administrative and Disciplinary Division of the District Court,[112] and that this access to a remedy provides an effective safeguard, making the measure proportionate.[113] However, the right to appeal is only available in relation to whether the educational authority has acted in accordance with the Education Act, rather than giving parents the ability to challenge the merits of the Director-General's direction. As such, it is not clear that this right of appeal provides an effective remedy to any potential breach of the right to equality and non-discrimination that may result from an exempted decision made under the Education Act.

Lower rates of pay for persons with disability

1.88 The regulations also provide that regulation 10 of the Fair Work (General) Regulations 2009 (South Australia) is a prescribed law for the purposes of s 47(2) of the DDA. Regulation 10 excludes wages and salaries payable to 'assisted persons'

110 See UN Human Rights Committee, *General Comment 29: States of Emergency (Article 4)* (2001) [14].

111 Statement of compatibility, p. 9.

112 Explanatory statement, p. 15.

113 Statement of compatibility, p. 10.

from award regulations (pursuant to section 113 of the *Fair Work Act 1994* (SA) (Fair Work Act)). By providing for lower rates of pay for individuals with disabilities who are employed by recognised organisations for the purposes of section 113 of the Fair Work Act, this measure engages and potentially limits a number of human rights.

Right to equality and non-discrimination

1.89 By providing for different work conditions for people with disability, these measures engage and limit the right to equality and non-discrimination, see discussion of this right above at paragraphs [1.73] to [1.74].

1.90 The statement of compatibility recognises that this exemption from the DDA limits the right to equality and non-discrimination.[114] However, it argues this is permissible as the measure is designed to achieve the legitimate objective of providing employment to people with disabilities. It explains that the individuals affected 'are unlikely to find work in the wider workforce and need substantial support to maintain paid employment'.[115] The statement of compatibility also explains that the protected 'recognised organisations … are non-profit associations and could not afford to pay their workers with disabilities full wages'[116] and that if this measure was not prescribed 'these organisations would be closed in South Australia, to the detriment of the people employed and their families'.[117]

1.91 Providing employment to people with disabilities is capable of being considered a legitimate objective for the purposes of international human rights law. It is also possible that this measure could be considered rationally connected to the objective of providing employment. However, noting the impact on the rights of just and favourable conditions of work (discussed below at paragraphs [1.92] to [1.97]), in addition to equality and non-discrimination, it is less clear that this measure is a proportionate means of providing employment to people with disabilities, or that it is the least rights restrictive means of achieving this objective. The International Labour Organization (ILO) has emphasised that any measures taken to promote employment opportunities for persons with disabilities should conform to the employment and salary standards applicable to workers generally.[118] It is not clear whether sufficient government subsidies to such organisations to ensure workers are paid equivalent salaries has been considered, which would appear to be a less rights restrictive approach. Furthermore, from the information available, it appears that this limitation on the right to work operates only in South Australia, which may

114 Statement of compatibility, p. 10.

115 Statement of compatibility, p. 10.

116 Statement of compatibility, p. 10.

117 Statement of compatibility, p. 10.

118 International Labour Organization (ILO), Vocational Rehabilitation and Employment (Disabled Persons) Recommendation, 1983 (No. 168).

indicate that less rights restrictive measures have been successfully adopted elsewhere.

Right to work

1.92 By providing for lower rates of pay for individuals with disabilities who are employed by recognised organisations this measure also engages and potentially limits the right to work.

1.93 The rights to work and to just and favourable conditions of work are protected by articles 6(1), 7 and 8(1)(a) of the ICESCR.[119] The right to work requires that parties to the ICESCR provide a system of protection that guarantees access to employment. The UN Committee on Economic, Social and Cultural Rights has stated that the obligations of parties to the ICESCR in relation to the right to just and favourable conditions of work includes the right to decent work providing an income that allows the worker to support themselves and their family, and which provides safe and healthy conditions of work.[120] Under article 2(1) of the ICESCR, Australia has obligations to ensure the right to work is made available in a non-discriminatory manner and to take steps within its available resources to progressively realise the broader enjoyment of the right.

1.94 In relation to the rights to work and to just and favourable conditions of work for persons with disabilities, article 27(1) of the Convention on the Rights of Persons with Disabilities provides that:

> States Parties recognize the right of persons with disabilities to work, on an equal basis with others; this includes the right to the opportunity to gain a living by work freely chosen or accepted in a labour market and work environment that is open, inclusive and accessible to persons with disabilities. States Parties shall safeguard and promote the realization of the right to work … by taking appropriate steps, including through legislation, to … (b) Protect the rights of persons with disabilities, on an equal basis with others, to just and favourable conditions of work, including equal opportunities and equal remuneration for work of equal value…

1.95 Article 27(1) of the CRPD also requires that parties:

> (g) Employ persons with disabilities in the public sector;

119 Related provisions relating to such rights for specific groups are also contained in article 5(i) of the International Convention on the Elimination of All Forms of Racial Discrimination (CERD), articles 11 and 14(2)(e) of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), article 32 of the CRC and article 27 of the CRPD.

120 UN Committee on Economic, Social and Cultural Rights, *General Comment No. 23: on the right to just and favourable conditions of work* (2016).

(h) Promote the employment of persons with disabilities in the private sector through appropriate policies and measures, which may include affirmative action programmes, incentives and other measures; and

(i) Ensure that reasonable accommodation is provided to persons with disabilities in the workplace.

1.96 These obligations are further supported by article 5(3) of the CRPD, which creates a duty to provide reasonable accommodations. Relevantly, the UN Committee on the Rights of Persons with Disabilities has found that the combination of articles 5(3) and 27(1) means that parties to the CRPD should 'ensure that persons with disabilities are paid no less than the minimum wage'.[121]

1.97 The statement of compatibility recognises that this exemption limits the right to work.[122] However, it argues this is permissible as the measure is designed to achieve the legitimate objective of providing employment to people with disabilities. However, considering the impact on the rights of just and favourable conditions of work, in addition to equality and non-discrimination, it is unclear whether this measure is a proportionate means of providing employment to people with disabilities, or that it is the least rights restrictive means of achieving this objective, noting that this exemption operates only in South Australia, which may indicate that less rights restrictive measures have been successfully adopted elsewhere.

Right to an effective remedy

1.98 The statement of compatibility recognises that this measure engages and limits the right to an effective remedy, and argues that any limitation on this right is permissible on the basis of the objective sought to be achieved.[123] However, as noted above at paragraph [1.86], the right to an effective remedy means that parties to the ICCPR must comply with the fundamental obligation to provide a remedy that is effective. It is not permissible to not offer a remedy for rights violations at all. In this regard, it is not clear whether a person discriminated against as a result of these exemptions would have access to any remedy for such discrimination.

Involuntary care and treatment of persons with a mental illness

1.99 The regulations provide that the *Mental Health Act 2007* (New South Wales) (Mental Health Act) and the Mental Health Regulation 2013 (New South Wales) (Mental Health Regulation) are prescribed laws. The Mental Health Act provides, amongst other things, for the involuntary care and treatment of involuntary mental health patients, and the Mental Health Regulation sets out the procedural and administrative requirements for the purposes of the Mental Health Act.

121 UN Committee on the Rights of Persons with Disabilities, *General Comment No. 6 (2018) on equality and non-discrimination* [67].

122 Statement of compatibility, p. 10.

123 Statement of compatibility, p. 10.

Right to equality and non-discrimination

1.100 Prescribing these laws as exempt from the DDA has the effect that the provision of treatment to involuntary mental health patients cannot attract an unlawful discrimination complaint, and so engages and potentially limits the right to equality and non-discrimination, which is outlined above at paragraphs [1.73] to [1.79].

1.101 The statement of compatibility does not acknowledge the limitation on the right to equality and non-discrimination (it only states that it may limit the right to an effective remedy). It states that the measures are permissible limitations (on the right to an effective remedy) as they are necessary to achieve the objective of public safety, and explains that involuntary mental health patients are often unaware of the danger they pose to themselves and to others.[124] It also states that the measures provide a clinician with certainty around the provision of treatment to involuntary mental health patients, without risk that an unlawful discrimination complaint could be made against them.[125]

1.102 The protection of public safety is a legitimate objective for the purposes of international human rights law. However, the statement of compatibility does not explain why a blanket exemption to the DDA is necessary to achieve this objective. Further, in relation to providing greater certainty for clinicians, reducing administrative burdens or administrative convenience alone will generally be insufficient for the purposes of permissibly limiting a human right under international human rights law. The statement of compatibility provides no explanation as to whether there is any less rights restrictive way to achieve the objective of protecting public safety, and provides no information as to any relevant safeguards which are in place. For example, whether there are safeguards to ensure a person's disability is taken into consideration in determining the appropriate treatment to be provided. Furthermore, it appears that this limitation only operates in New South Wales, which may indicate that other less rights restrictive measures have been successfully adopted elsewhere.

Right to an effective remedy

1.103 The statement of compatibility recognises that this measure engages and limits the right to an effective remedy, and argues that any limitation on this right is permissible on the basis of the objective sought to be achieved, noting that the provisions exist to ensure the safety of the patient and the public.[126] However, as noted above at paragraph [1.86], the right to an effective remedy means that parties to the ICCPR must comply with the fundamental obligation to provide a remedy that

124 Statement of compatibility, p. 7.

125 Statement of compatibility, p. 7.

126 Statement of compatibility, p. 7.

is effective, and it is not permissible to not offer a remedy for rights violations at all. In this regard, it is not clear whether a person discriminated against as a result of these exemptions would have access to any remedy for such discrimination.

Issuing, cancelling, suspending or varying drivers' licences

1.104 The regulations also provide that specific regulations in the Road Transport (Driver Licencing) Regulation 2017 (New South Wales) and section 80 of the *Motor Vehicles Act* (South Australia) are prescribed laws for the purposes of section 47(2) of the DDA. These 'licence provisions' cover the circumstances around when a driver's licence can be issued, cancelled, suspended or varied.

Right to equality and non-discrimination

1.105 Prescribing these licence provisions as exempt from the DDA has the effect that a person cannot bring an unlawful discrimination complaint against the Authority in New South Wales, or the Registrar of Motor Vehicles in South Australia, on the basis that they were treated less favourably due to disability. This thereby engages and potentially limits the right to equality and non-discrimination, see discussion of this right above at paragraphs [1.73] to [1.75].

1.106 The statement of compatibility does not acknowledge the limitation on the right to equality and non-discrimination. It states that the measure is a permissible limitation (on the right to an effective remedy) because it is necessary to achieve the objective of public safety.[127] In the case of issuing, cancelling, suspending or varying a driver licence, the statement of compatibility explains that the decision-maker must be satisfied that a person is competent to hold a driver licence to protect safety on the roads.[128] It also states that the measures provide the decision-maker with certainty that they can appropriately make decisions about whether a person is competent to hold a licence without risk that an unlawful discrimination complaint could be made against them.[129]

1.107 While the protection of public safety is a legitimate objective for the purposes of international human rights law, the statement of compatibility does not explain why a blanket exemption to the DDA is necessary to achieve this objective. In relation to providing greater certainty for decision-makers, reducing administrative burdens or administrative convenience alone will generally be insufficient for the purposes of permissibly limiting a human right under international human rights law. The statement of compatibility also provides no explanation as to whether there is any less rights restrictive way to achieve the objective of protecting public safety, and provides no information as to any relevant safeguards which are in place. For example, if a driver's licence is refused on the basis that a person's temporary

127 Statement of compatibility, p. 7.

128 Statement of compatibility, p. 7.

129 Statement of compatibility, p. 7.

disability causes them to be classified as not meeting the requisite medical standards, it is unclear what avenues there are to ensure this does not operate as a permanent licence refusal. In addition, it is not clear if there are avenues by which a person who has a particular medical condition can demonstrate that this does not affect their ability to drive. Furthermore, it appears that this exemption operates only in relation to New South Wales. As such, it may be that less rights restrictive measures have been successfully adopted in other states and territories.

Right to an effective remedy

1.108 The statement of compatibility recognises that this measure engages and limits the right to an effective remedy, and argues that any limitation on this right is permissible on the basis of the objective sought to be achieved, and because the abrogation of this right 'protects the Authority from an unlawful discrimination complaint based on their decision regarding the issue, cancellation, suspension or variation of a driver licence'.[130] However, as stated above at paragraphs [1.86] and [1.98], the right to an effective remedy means that parties to the ICCPR must comply with the fundamental obligation to provide a remedy that is effective, and it is not permissible to not offer a remedy for rights violations at all. In this regard, it is not clear whether a person discriminated against as a result of these exemptions would have access to any remedy for such discrimination.

Combat duties

1.109 The regulations define the terms 'combat duties' and 'combat-related duties' for the purposes of the exemption to the DDA provided under section 53(1). 'Combat duties' are declared to be duties which require, or which are likely to require, a person to commit, or participate directly in the commission of, an act of violence in the event of armed conflict.[131] 'Combat-related duties' are declared to be (a) duties which require, or which are likely to require, a person to undertake training or preparation for, or in connection with, combat duties; and (b) duties which require, or which are likely to require, a person to work in support of a person performing combat duties.[132]

Right to equality and non-discrimination

1.110 These broad declarations that people with disabilities may be excluded from a wide range of roles on the basis of disability, and may not be able to challenge that exclusion under the DDA, engage and potentially limit the right to equality and non-discrimination, see discussion of this right above at paragraphs [1.73] to [1.75].

130 Statement of compatibility, p. 7.

131 Statement of compatibility, p. 5.

132 Statement of compatibility, p. 5.

1.111 The statement of compatibility recognises that this limits a person's right to equality and non-discrimination but states that this measure is necessary 'in order for the Australian Defence Force to maintain an operationally capable force to meet their operational requirements' as individuals undertaking combat-related duty must be 'medically fit to function safely with limited or no medical support and be trained and competent in the use of personal weapons'.[133] Ensuring the Australian Defence Force remains operationally capable is likely to be a legitimate objective for the purposes of international human rights law. It would also appear that by reducing the likelihood that medical treatment will be required by defence force employees engaged in combat duties and combat-related duties, the measure may be rationally connected to achieving this objective.

1.112 However, in relation to the proportionality of the measure, it is unclear why the definitions are so broad as to cover all the duties described. The statement of compatibility states that combat-related duties include 'duties which require a person to work in support of a person performing combat duties such as logistics, administration, intelligence, catering, legal, communications, investigations, health and human resources'.[134] This appears to be far-reaching in scope and no explanation is offered as to why such a blanket exemption from prohibition in these areas is necessary and whether other, less rights-restrictive approaches, have been considered.

Right to work

1.113 The result of these broad declarations is that people with disabilities may be excluded from a wide range of roles on the basis of disability, and may not be able to challenge that exclusion under the DDA, thereby engaging and potentially limiting the right to work. As set out at paragraphs [1.93] to [1.96], the right to work requires that parties to the CRPD provide a system of protection that guarantees access to employment. The statement of compatibility recognises that the declaration of 'combat duties' and 'combat-related duties' limits a person's rights to work but provides the same justification for the limitation as set out at paragraph [1.111]. As such the same concerns as to the proportionality of the measure arise given the broad definition of 'combat duties' and 'combat-related duties'.

Right to an effective remedy

1.114 The statement of compatibility does not recognise that this measure engages the right to an effective remedy, but, as noted above at paragraph [1.86], this right requires that parties to the ICCPR provide a remedy that is effective. It is also not permissible to offer no remedy for rights violations. In this regard, it is not clear

133 Statement of compatibility, p. 5.

134 Statement of compatibility, p. 5.

whether a person discriminated against as a result of these exemptions would have access to any remedy for such discrimination.

Concluding observations

1.115 The regulations exempt a number of acts done under a statutory authority from compliance with the *Disability Discrimination Act 1992* (DDA), in particular:

- enabling the Director-General in South Australia to direct that a child be enrolled at a special school;
- authorising lower rates of pay for persons with disability who are employed by recognised organisations in South Australia;
- the involuntary care and treatment of persons with a mental illness in New South Wales; and
- the circumstances in which a driver's licence can be issued, cancelled, suspended or varied in New South Wales and South Australia.

1.116 The regulations also declare activities which are considered 'combat duties' and 'combat-related duties' and are thereby exempt from the DDA.

1.117 These measures engage and limit the rights to equality and non-discrimination, education and work. In order to assess whether the measures are proportionate to, and likely to achieve, the stated objectives, further information is required as to:

- whether providing a blanket exemption from the DDA for each of these measures is the least rights restrictive way of achieving the stated objectives (noting that other states and territories appear not to have equivalent exemptions);
- what safeguards are in place to ensure that each of the exemptions from the DDA are not disproportionate, including whether there are rights of review of decisions made under the prescribed laws or monitoring of the exercise of these powers; and
- whether a child's right to inclusive education will be considered by the Director-General when determining whether it is in the child's best interest to attend a special school.

1.118 The regulations also engage and may limit the right to an effective remedy, as these exemptions mean that a number of acts are protected from claims of unlawful discrimination. While limitations may be placed in particular circumstances on the nature of the remedy provided (judicial or otherwise), Australia must comply with the fundamental obligation to provide a remedy that is effective.

1.119 Therefore, further information is required as to whether there are other mechanisms by which a person whose rights to equality and non-discrimination are

violated, may seek a remedy, and if not, how is the measure capable of being compatible with the right to an effective remedy.

Committee view

1.120 The committee notes the legal advice on the bill. In order to assess whether the measures are proportionate to, and likely to achieve, the stated objectives, the committee seeks the Attorney-General's advice as to the matters set out at paragraphs [1.117] and [1.119].

Social Security (Administration) Amendment (Income Management to Cashless Debit Card Transition) Bill 2019[1]

Purpose	The bill seeks to extend the end date for existing Cashless Debit Card trial areas by one year, establish the Northern Territory and Cape York areas as Cashless Debit Card trial areas and transition income management participants there to the Cashless Debit Card, remove the cap on the number of Cashless Debit Card trial participants, enable the Secretary to advise a community body where a person has exited the trial, and amend the trial evaluation process
Portfolio	Social Services
Introduced	House of Representatives, 11 September 2019
Rights	Privacy, social security, equality and non-discrimination
Status	Seeking additional information

Cashless welfare trials

1.121 The Social Security (Administration) Amendment (Income Management to Cashless Debit Card Transition) Bill 2019 (the bill) seeks to extend the date for existing Cashless Debit Card trials (currently in Ceduna, East Kimberly, the Goldfields, and the Bundaberg and Hervey Bay region) to 30 June 2021.[2] It also seeks to establish the Northern Territory and Cape York areas as Cashless Debit Card trial areas[3] (transitioning all current income management regime participants in those areas to the Cashless Debit Card scheme).[4]

1.122 The total number of potential participants in the cashless welfare trials is currently capped at 15,000.[5] Item 18 of the bill seeks to remove that cap entirely, so

1 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Social Security (Administration) Amendment (Income Management to Cashless Debit Card Transition) Bill 2019, *Report 6 of 2019*; [2019] AUPJCHR 94.

2 Social Security (Administration) Amendment (Income Management to Cashless Debit Card Transition) Bill 2019 (the bill), item 17.

3 Items 10, 11 and 15 of the bill. The Minister would be granted the power to make a notifiable instrument to exclude any part of the Northern Territory from the trial area, reflecting the power the Minister also has to make such a notifiable instrument in relation to Cape York.

4 The Cashless Debit Card would be trialled in the Northern Territory to 30 June 2021 and in the Cape York area until 31 December 2021, see item 17 of the bill.

5 *Social Security (Administration) Act 1990*, subsection 124PF(3).

that the more than 23,000 income management participants in the Northern Territory and Cape York area could be transitioned to the cashless welfare trial pursuant to these amendments.[6]

1.123 The bill would create, or continue, different eligibility criteria for trial participants in the different trial areas, for example:

- individuals in the Cape York area would be trial participants where they receive a category P welfare payment (which includes most welfare payments such as the age pension, parenting payments and unemployment benefits)[7] and a written notice is given by the Queensland Commission requiring that the person be a trial participant;[8]
- individuals in the Northern Territory would be trial participants[9] where:
    - they receive a category E welfare payment (which includes unemployment benefits and certain parenting payments);[10] or
    - they receive a category P welfare payment and a Northern Territory child protection officer has given the secretary written notice requiring them to be a participant; or
    - they receive a category P welfare payment and are characterised by the secretary as a 'vulnerable welfare payment recipient';[11] and

6 Explanatory memorandum, p. 4. In addition, the bill would permit persons with a welfare payment nominee receiving their payments to also participate in the cashless welfare scheme, provided their payment nominee is also a participant: see items 19, 21, 23, 25, and 27A which would permit participation by an individual with a 'part 3B payment nominee,' defined in section 123TC of the *Social Security (Administration) Act 1990* to include a person to whom another person's payments are made.

7 Being a 'category P' welfare payment which means a social security benefit, or social security pension, or payment under the ABSTUDY scheme that includes an amount identified as living allowance (per *Social Security (Administration) Act 1990,* section 123TC). A 'social security benefit' means widow allowance, youth allowance; Austudy payment; Newstart allowance; sickness allowance; special benefit; partner allowance; a mature age allowance under Part 2.12B; or benefit PP (partnered); or parenting allowance (other than non-benefit allowance). A 'social security pension' means an age pension; disability support pension; wife pension; carer payment; pension PP (single); sole parent pension; bereavement allowance; widow B pension; mature age partner allowance; or a special needs pension: see section 23 of the *Social Security Act 1991*.

8 Item 26, proposed section 124PGD.

9 Item 26, proposed section 124PGE.

10 A category E welfare payment means youth allowance, Newstart allowance, special benefit, pension PP (single) or benefit PP (partnered) (per *Social Security (Administration) Act 1990,* section 123TC).

- individuals in Ceduna, East Kimberley and the Goldfields, would continue to be trial participants if they receive a 'trigger payment'[12] (most unemployment benefits and some pensions, including the disability support pension, but excluding the age pension);[13] and
- individuals in the Bundaberg and Hervey Bay area would continue to be trial participants if they receive a 'trigger payment' and are under 36.[14]

1.124 Under existing cashless welfare arrangement rules, 80 per cent of participants' welfare payments are restricted.[15] Under these amendments, participants in the Cape York area would be subject to a 50 per cent restriction of payments unless the Queensland Commission has otherwise set a restriction in their case.[16] Participants in the Northern Territory would be subject to restrictions of 50 to 70 per cent (those referred by child protection).[17] It is proposed that participants transitioning from income management to the cashless welfare scheme would keep their existing rate at which welfare payments are restricted (which are between 50 to 70 per cent).[18] However, item 39 of the bill provides that the minister may, by notifiable instrument, vary the percentage of restricted welfare payments for a group of participants in the Northern Territory to a rate of up to 100 per cent.[19] The secretary would also have the power to vary the amount up to 100 per cent for individuals.[20]

1.125 The bill also seeks to amend the process by which reviews of the cashless welfare trial are subsequently evaluated, removing the requirement that the

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11 Under section 123UGA of the *Social Security (Administration) Act 1990*, the Secretary may determine that a person is a 'vulnerable welfare payment recipient' for the purposes of Part 3B of the Act. The term is not defined in the Act.

12 A 'trigger payment' means a social security benefit (other than a mature age allowance); an ABSTUDY payment; or a social security pension of the following kind: a carer payment; a bereavement allowance; a disability support pension; a pension PP (single); a widow B pension; or a wife pension;, see definition in section 124PD of the *Social Security (Administration) Act 1999*.

13 *Social Security (Administration) Act 1990*, sections 124PG, 124PGA and 124PGB.

14 *Social Security (Administration) Act 1990*, section 124PGC.

15 *Social Security (Administration) Act 1990*, subsection 124PJ(1).

16 Proposed subsection 124PJ(1A).

17 Proposed subsections 124PJ(1B), (1C) and (1D).

18 Statement of compatibility, p. 21.

19 Proposed subsection 124PJ(2C) clarifies that where the Secretary has made an individual determination that one person's restricted rate of payment will be varied, a broader determination by this Minister varying rates of restriction for cohorts of participants would not impact that individual.

20 See items 41 and 42 of the bill.

evaluation be completed within six months, and be conducted by an independent evaluation expert with significant expertise in the social and economic aspects of welfare policy, who must consult trial participants and make recommendations.[21]

Preliminary international human rights legal advice

Rights to privacy, social security, and equality and non-discrimination

1.126 The cashless welfare arrangements outlined in this bill engage and limit a number of human rights, including the:

- right to privacy;[22]
- right to social security;[23] and
- right to equality and non-discrimination.[24]

1.127 The bill engages and limits the right to privacy and right to social security as it significantly intrudes into the freedom and autonomy of individuals to organise their private and family lives by making their own decisions about the way in which they use their social security payments. The right to privacy is linked to notions of personal autonomy and human dignity. It includes the idea that individuals should have an area of autonomous development; a 'private sphere' free from government intervention and excessive unsolicited intervention by others. The right to social security recognises the importance of adequate social benefits in reducing the effects of poverty and in preventing social exclusion and promoting social inclusion.[25]

1.128 The statement of compatibility recognises that the bill engages the right to a private life and the right to social security but states that the measures in the bill do not detract from the eligibility of a person to receive welfare, or reduce the amount of their social security entitlement. They merely limit how payments can be spent and provide 'a mechanism to ensure that certain recipients of social security entitlements are restricted from spending money on alcohol, gambling and drugs'.[26] The statement of compatibility further states that the transition to the cashless welfare trial will benefit participants due to the improved technology being used

21 Item 51 of the bill.

22 International Covenant on Civil and Political Rights (ICCPR), article 17.

23 International Covenant on Economic, Social and Cultural Rights (ICESCR), article 9.

24 ICCPR, articles 2, 16 and 26 and ICESCR, article 2. It is further protected with respect to persons with disabilities by the Convention on the Rights of Persons with Disabilities, article 2.

25 Committee on Economic, Social and Cultural Rights*, General Comment No. 19: The Right to Social Security* (2008), paragraph 3.

26 Statement of compatibility, p. 21.

with the cashless debit card, and fewer restrictions on purchasers, allowing participants to shop from a wider variety of sellers.[27]

1.129 Finally, the measure also engages the right to equality and non-discrimination. This right provides that everyone is entitled to enjoy their rights without discrimination of any kind, which encompasses both 'direct' discrimination (where measures have a discriminatory *intent*) and 'indirect' discrimination (where measures have a discriminatory *effect* on the enjoyment of rights). Indirect discrimination occurs where 'a rule or measure that is neutral at face value or without intent to discriminate', exclusively or disproportionately affects people with a particular protected attribute.[28]

1.130 The statement of compatibility provides that the right to equality and non-discrimination is not directly limited by these measures, stating that the program 'is not applied on the basis of race or cultural factors' and as anyone residing in the trial locations will be a trial participant 'the trial is therefore not targeted at people of a particular race, but to welfare recipients who meet particular criteria'.[29] However, while the measure may not *directly* limit the right to equality and non-discrimination it would appear to *indirectly* limit this right given the disproportionate impact on Indigenous Australians. At March 2017, 75 per cent of participants in the Ceduna trial area, and 80 per cent of participants in the East Kimberley, were Aboriginal and/or Torres Strait Islander.[30] In 2019, 43 per cent of participants in the Goldfields trial site were Indigenous.[31] In addition, the committee's 2016 report which examined income management in the Northern Territory noted that around 90 per cent of those subject to income management in the Northern Territory are Indigenous.[32]

1.131 Limits on the above rights may be permissible where a measure seeks to achieve a legitimate objective, is rationally connected to (that is effective to achieve) that objective, and is proportionate to that objective.

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27 Statement of compatibility, p. 21.

28 *Althammer v Austria*, UN Human Rights Committee Communication no. 998/01 (2003) [10.2]. The prohibited grounds of discrimination are race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Under 'other status' the following have been held to qualify as prohibited grounds: age, nationality, marital status, disability, place of residence within a country and sexual orientation. The prohibited grounds of discrimination are often described as 'personal attributes'.

29 Statement of compatibility, pp. 23-24.

30 ORIMA, *Cashless Debit Card Trial Evaluation – Final Evaluation Report*, (August 2017) p. 37.

31 University of Adelaide Future of Employment and Skills Research Centre, *Cashless Debit Card Baseline Data Collection in the Goldfields Region: Qualitative Findings*, February 2019, p. 10.

32 Parliamentary Joint Committee on Human Rights, *2016 Review of Stronger Futures measures* (16 March 2016) p. 40.

Legitimate objective

1.132 The statement of compatibility provides that the cashless welfare trial aims to 'support communities where high levels of welfare dependence coexist with high levels of social harm by limiting the amount of welfare payment available as cash in a community', and aims to 'ensure that income support payments are spent in the best interests of welfare payment recipients and their dependents, and in line with community expectations'.[33] It also provides that:

> the Cashless Debit Card trial has the objective of reducing immediate hardship and deprivation, reducing violence and harm, encouraging socially responsible behaviour, and reducing the likelihood that welfare payment recipients will remain on welfare and out of the workforce for extended periods of time.[34]

1.133 These objectives would constitute legitimate objectives for the purposes of international human rights law.[35] It is, however, unclear as to whether the measures in this bill are rationally connected to (that is, effective to achieve) and proportionate to these legitimate objectives.

Rational connection

1.134 In relation to whether the measures are effective to achieve their stated objective, the statement of compatibility cites findings from the first independent evaluation of the cashless welfare trial based on two waves of data collection at two trial locations in the first eighteen months of the trial.[36] The statement of compatibility notes,[37] that the study found that the cashless debit card had had a 'considerable positive impact',[38] been effective in reducing the consumption of alcohol and possibly reducing the use of illegal drugs,[39] reducing gambling at both trial sites, and had some evidence of a consequential reduction in violence and harm related to alcohol consumption, illegal drug use and gambling.[40]

1.135 However, the evaluation also contains some other more nuanced and mixed findings on the operation of the scheme. For example, the evaluation noted there

33 Statement of compatibility, p. 20.

34 Statement of compatibility, p. 19.

35 See also Parliamentary Joint Committee on Human Rights, *Report 11 of 2017* (17 October 2017) pp. 126-137. See also Parliamentary Joint Committee on Human Rights, *2016 Review of Stronger Futures measures* (16 March 2016) p. 48.

36 Statement of compatibility, p. 19.

37 Statement of compatibility, p. 19.

38 ORIMA, *Cashless Debit Card Trial Evaluation – Final Evaluation Report*, (August 2017), p. 7.

39 ORIMA, *Cashless Debit Card Trial Evaluation – Final Evaluation Report*, (August 2017), p. 3.

40 ORIMA, *Cashless Debit Card Trial Evaluation – Final Evaluation Report*, (August 2017), p. 4.

was no statistical decrease in violent crimes at the trial sites,[41] no substantive improvement in peoples' perception of safety at home or on the streets,[42] there were various efforts taken to circumvent the income restriction, including selling purchased goods for cash below their value,[43] and unintended adverse consequences of the trial including perceived stigma and increased humbugging of vulnerable community members.[44] These statistics and findings are not cited in the statement of compatibility. Furthermore, the methodology employed in the course of this 2017 study has been the subject of some criticism.[45]

1.136 The statement of compatibility also cites the 2019 baseline data collection study undertaken in the Goldfields trial site, undertaken by the University of Adelaide.[46] It states that in this report, '[m]any respondents reported a reduction in levels of substance misuse, a decrease in alcohol-related anti-social behaviour and crime, improvements in child welfare, and improvements in financial literacy and management'.[47]

1.137 However, this report also contains some other more mixed findings on the operation of the scheme at the Goldfields trial site, which are not discussed in the statement of compatibility. For example, the report observes that the reductions in substance misuse levels during the time of the study may have been connected with concurrent policing and alcohol management interventions in the region, and so not a direct consequence of cashless welfare.[48] In terms of achieving the goal of reducing alcohol consumption among trial participants, the report notes an increase in 'workarounds' employed to obtain alcohol:

> High levels of alcohol consumption were reported to be continuing through workarounds with the card (e.g. trading the card to purchase alcohol), pooling resources with other participants, and/or resorting to drinking cheaper forms of alcohol such as methylated spirits. Some

41 ORIMA, *Cashless Debit Card Trial Evaluation – Final Evaluation Report*, (August 2017), p. 60.

42 ORIMA, *Cashless Debit Card Trial Evaluation – Final Evaluation Report*, (August 2017), p. 68.

43 ORIMA, *Cashless Debit Card Trial Evaluation – Final Evaluation Report*, (August 2017), p. 86.

44 ORIMA, *Cashless Debit Card Trial Evaluation – Final Evaluation Report*, (August 2017), p. 88.

45 The ORIMA report findings and methodology have been criticised in a review by the Centre for Aboriginal Economic Policy Research at the Australian National University: see J Hunt, *The Cashless Debit Card Evaluation: Does it really prove success?* (CAEPR Topical Issue No.2/2017).

46 Statement of compatibility, p. 19.

47 Statement of compatibility, p. 19.

48 University of Adelaide Future of Employment and Skills Research Centre (University of Adelaide), *Cashless Debit Card Baseline Data Collection in the Goldfields Region: Qualitative Findings*, February 2019, p. 7.

> participants also commented that the card allowed sufficient cash to drink to excess and that people were now making their own alcohol at home.[49]

1.138 The report also notes that trial participants had been unable to participate in the market for second-hand goods, to pool funds for larger purchases, to make small transactions in cash-based settings like canteens or where EFTPOS is otherwise unavailable, or to complete some online transactions.[50] It notes concerns about stigma and cases of direct discrimination.[51] It also states that many respondents were concerned that a lack of access to cash had resulted in greater incidences of elder abuse, because older people on the aged pension remained on their existing Centrelink arrangements and so had greater access to cash.[52] The report also notes feedback from many cashless welfare participants that the trial should be better targeted at those people with alcohol and drug issues, and/or who have neglected their children:

> The [card] was especially considered to be not suitable for people with disability and their carers, as their disability often prevented them from being able to successfully engage with the [cashless welfare] system. The card was also felt to be unsuitable for people with mental health issues as a result of the stress created by [cashless welfare] processes or the stigma associated with being on the card was reported to be adversely exacerbating their condition.[53]

1.139 The report quoted review respondents who describe the widespread application of the cashless welfare trial as 'patronising' and 'racist', and argue that it has an unfair impact on people with a disability by taking away what little independence those participants have.[54] It also noted concerns about the trial being applied without regard to an individual's actual demonstrated issues with drug and alcohol abuse, especially noting that the trial is designed to *reduce* the use of drugs

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49 University of Adelaide Future of Employment and Skills Research Centre (University of Adelaide), *Cashless Debit Card Baseline Data Collection in the Goldfields Region: Qualitative Findings*, February 2019, p. 88.

50 University of Adelaide, *Cashless Debit Card Baseline Data Collection in the Goldfields Region: Qualitative Findings*, February 2019, p. 89.

51 University of Adelaide, *Cashless Debit Card Baseline Data Collection in the Goldfields Region: Qualitative Findings*, February 2019, p. 7.

52 University of Adelaide, *Cashless Debit Card Baseline Data Collection in the Goldfields Region: Qualitative Findings*, February 2019, p. 101.

53 University of Adelaide, *Cashless Debit Card Baseline Data Collection in the Goldfields Region: Qualitative Findings*, February 2019, pp. 112-113.

54 University of Adelaide, *Cashless Debit Card Baseline Data Collection in the Goldfields Region: Qualitative Findings*, February 2019, p. 113.

and alcohol in areas where those substances are highly abused.[55] The University of Adelaide also noted that, in the Goldfields area, gambling was not perceived to be particularly problematic.[56]

1.140 The results of these trial evaluations are a critical component of demonstrating a rational connection between the cashless welfare trial and its intended objectives. The mixed results of these two evaluations raise some significant questions as to the efficacy of the cashless debit card scheme in achieving the objectives (including reducing the amount of payments available to be spent on alcohol, gambling and illegal drugs, and encouraging social responsible behaviour). The statement of compatibility notes that the University of Adelaide is conducting a second impact evaluation in Ceduna, East Kimberley and Goldfields, as well as a baseline data collection in the Bundaberg and Hervey Bay region.[57] However, the statement of compatibility does not explain why the bill proposes expanding the cashless welfare trial prior to those evaluations being completed.

Proportionality

1.141 The existence of adequate and effective safeguards, to ensure that limitations on human rights are the least rights restrictive way of achieving the legitimate objective of the measure, is relevant to assessing the proportionality of these limitations. In assessing whether a measure is proportionate, relevant factors to consider include whether the measure provides sufficient flexibility to treat different cases differently or whether it imposes a blanket policy without regard to the circumstances of individual cases.

1.142 Of particular concern is that the cashless debit card trial is imposed without an assessment of individuals' suitability for the scheme. The trial applies to anyone residing in the trial location who receives specified social security payments. As a result, there are serious concerns as to whether the measure is the least rights restrictive way of achieving the stated objective.

1.143 The statement of compatibility outlines what it describes as 'General safeguards', being two measures which have been incorporated to 'help protect human rights'.[58] Firstly, it notes that the rollout of the cashless debit card 'has been and continues to be the subject of an extensive community consultation and engagement process', advising that:

55 University of Adelaide, *Cashless Debit Card Baseline Data Collection in the Goldfields Region: Qualitative Findings*, February 2019, p. 113.

56 University of Adelaide, *Cashless Debit Card Baseline Data Collection in the Goldfields Region: Qualitative Findings*, February 2019, p. 6.

57 Statement of compatibility, p. 19.

58 Statement of compatibility, p. 20.

> The Department of Social Services (DSS) has held several information sessions throughout the Northern Territory in preparation for the transition and consulted with key community leaders and organisations to provide initial information about the Cashless Debit Card and seek guidance about the most appropriate way to consult with the broader community. The information sessions focused on providing communities with an understanding of the Cashless Debit Card product, how it operates, and how the card is different in both policy and function to the BasicsCard in the Income Management regime.[59]

1.144 However, the process described here does not appear to involve consultation, which denotes a two-way deliberative process of dialogue in advance of a decision to progress the scheme, including a discussion with community leaders about whether the community wants to participate in the scheme. Instead, the process described in the statement of compatibility appears to have primarily involved informing key community leaders and organisations about the fact that the scheme was being rolled-out, and advising those communities about how the cashless welfare will operate. As such, the value of this process as a safeguard appears to be limited.

1.145 The second general safeguard described in the statement of compatibility is the conduct of evaluations of the trial. The statement of compatibility notes that the government is currently conducting a second evaluation of the cashless welfare trial across the first three trial sites in order to 'assess the ongoing effectiveness of the trial', and states that this will 'continue to build on initial results and further develop a rigorous evidence base for the Cashless Debit Card'.[60] It explains that this evaluation will draw on the data and methodology developed as part of the Goldfields baseline data collection, and use data collected through program monitoring. However, as discussed above, the trial reviews conducted to date have elicited a number of mixed findings relating to the success of the cashless welfare trials and it is not clear that the evaluation findings have been considered when the decision was made to expand the existing trials. As such, the value of these trial evaluations as a safeguard may be somewhat limited. Furthermore, the bill seeks to significantly alter the existing legislative requirement that trial reviews be subsequently evaluated by an expert within six months of the trial results being published. The explanatory memorandum states that the current requirement for a minister to cause an evaluation of a review is potentially circular as it may result in ongoing evaluation.[61] It also states that the proposed amendments support a desktop evaluation of the reviews by removing the requirement that the evaluator consult trial participants, which will 'lessen the ethical implication associated with

59 Statement of compatibility, p. 20.

60 Statement of compatibility, p. 20.

61 Explanatory memorandum, p. 5.

avoidable repeat conduct with vulnerable individuals'.[62] However, independent evaluations of any trial reviews in a timely manner would likely add to the value of trial reviews as a safeguard. As it stands, no independent evaluations of the two reviews of the cashless welfare trial have been undertaken.[63]

1.146 Evaluations of the cashless welfare trials and income management have found a number of concerns with the operation of these measures, which may impact on its proportionality. The committee's 2016 review noted that evaluations had found that compulsory income management, rather than encouraging people to take control of their financial wellbeing, may produce negative effects, including feelings of stigmatisation.[64] The 2019 University of Adelaide report into the trial in the Goldfields also noted a number of practical concerns about the workability of the cashless welfare card. These include concerns about a lack of consultation and insufficient provision of information prior to the rollout,[65] technological problems with card processes being dependent on internet use when many participants do not have an email address or telecommunications access,[66] and accessibility issues with cards being declined in businesses including schools.[67] These findings are not discussed in the statement of compatibility, which states only that participants moving from the income management scheme to the cashless welfare trial will benefit from better technology.[68]

1.147 Further, in examining if there are effective safeguards or controls over the measures, it is noted that the bill would enable the minister to vary the percentage of welfare payments that are subject to the cashless welfare trial in the Northern Territory, up to 100 per cent of funds. The minister can make such a variation by way of a notifiable instrument, which is not subject to any form of parliamentary oversight or control.[69] The explanatory memorandum states that this will allow the

62 Explanatory memorandum, p. 5.

63 As section 124PS was only incorporated into the Act in 2018, the first review of the cashless welfare trial was not captured by this legislative requirement for a subsequent independent evaluation of the review.

64 Parliamentary Joint Committee on Human Rights, *2016 Review of Stronger Futures measures* (16 March 2016) pp. 57-59.

65 University of Adelaide, *Cashless Debit Card Baseline Data Collection in the Goldfields Region: Qualitative Findings*, February 2019, p. 68.

66 University of Adelaide, *Cashless Debit Card Baseline Data Collection in the Goldfields Region: Qualitative Findings*, February 2019, pp. 6-7.

67 University of Adelaide, *Cashless Debit Card Baseline Data Collection in the Goldfields Region: Qualitative Findings*, February 2019, p. 7.

68 Statement of compatibility, p. 21.

69 Section 42 of the *Legislation Act 2003* provides that only legislative instruments, not notifiable instruments, are subject to disallowance by the Parliament.

minister to respond to community requests for such variation, or similar requests from recognised State or Territory authorities or child protection officers.[70] However, there is nothing in the bill that would limit the minister to only making a notifiable instrument if requested to do so. As such, under the bill as currently drafted[71] the minister could quarantine 100 per cent of the welfare payments of all trial participants in the Northern Territory, without any parliamentary oversight.

1.148 It is noted that the cashless welfare arrangements outlined in this bill engage and limit the rights to privacy, social security, and equality and non-discrimination.

1.149 In order to fully assess the proportionality and likely effectiveness of the proposed measures,, further information is required as to:

- why these measures propose to expand the cashless welfare trial to the Northern Territory and the Cape York area before the completion of the trial reviews, which are currently in-progress;
- what consultation was undertaken with affected communities, seeking their views as to whether they wanted the trials to continue or the cashless debit cards to be introduced, prior to this bill being presented to Parliament;
- whether consideration has been given to applying the cashless welfare measures trial on a voluntary basis and otherwise only taking into account individual circumstances;
- why the existing legislative requirement for the evaluation of trial reviews under section 124PS of the Act is proposed to be amended, noting that no trial review evaluation has been completed to date; and
- why it is necessary to give the minister the power to alter the component of a restrictable welfare payment up to 100 per cent with no parliamentary oversight and no legislative criteria as to when such a change could be made (and whether the bill could be amended to include legislative criteria as to when such a change may be made and by a disallowable legislative instrument).

Committee view

1.150 The committee notes the legal advice on the bill and makes the following comments as set out below.

Rights engaged

1.151 The committee notes that the rights engaged include the right to privacy, the right to social security and the right to equality and non-discrimination. However, the committee also believes it is important to reiterate the engagement

70 Explanatory memorandum, p. 13.

71 Item 39.

of 'positive human rights' in the bill including the rights of the child, the right to protection of the family, the right to dignity and the right to health.

1.152 It is the convention of this committee to only assess human rights compatibility where there is an *interference* with human rights. While we appreciate this approach, we are concerned that where a bill both interferes with and also promotes human rights, it is important to expressly identify these positive human rights. Accordingly, we consider that the cashless welfare measures contained in the bill include a number of positive human rights by reason that they provide welfare payment recipients with the ability to ensure that a higher portion of their payments are directed to essential living costs such as food and household bills, whilst prohibiting expenditure on alcohol and gambling.

Legitimate objectives

1.153 We note, as set out in in paragraph [1.132], that the statement of compatibility identifies as legitimate objectives of the bill 'reducing immediate hardship and deprivation, reducing violence and harm, encouraging socially responsible behaviour and reducing the likelihood that welfare payment recipients will remain on welfare and out of the workforce for extended periods of time' but that the measures in the bill need to be rationally connected to and proportionate with these legitimate objectives.

Further information required

1.154 In order to fully assess the proportionality and likely effectiveness of the proposed measures, the committee seeks the minister's advice as to the matters set out at paragraphs [1.149].

Collection and disclosure of personal information

1.155 Proposed section 123POA[72] would permit the secretary to disclose that a person has ceased to be a trial participant (or voluntary participant) to a 'relevant community body'.[73] Proposed sections 124POB, 124POC and 124POD would permit the sharing of information between the secretary and the Queensland Commission, child protection officers of the Northern Territory, and an officer or employee of a recognised State/Territory authority of the Northern Territory. These provisions would require the secretary to give those bodies written notice where an individual

72 Item 43.

73 Section 123PE of the *Social Security (Administration) Act 1990* provides that the minister may, by notifiable instrument, authorise a body as a community body. Pursuant to the *Social Security (Administration) (Cashless Welfare Arrangements – Trial Area Exclusion and Community Bodies) Determination 2018*, the Kununurra Community Panel, Wyndham Community Panel and Ceduna Region Community Panel are currently authorised as such community bodies.

ceases to be a trial participant because of a cancellation of their welfare payment while a written notice from one of those bodies requiring that person to be a trial participant remained in force.[74] The bodies would be permitted to give the secretary information about a person if the person is already a trial participant, or the body is considering making a written notice requiring that they become a participant, and the disclosed information would be relevant to the operation of Part 3D of the Act.[75] On disclosure of such information by the above bodies, these proposed provisions would then permit the secretary to disclose information about that person to the bodies where it would be relevant to the performance of their functions, or exercise of their powers.[76]

1.156 Item 46 of the bill would also extend the secretary's existing general power to obtain information under section 192 of the Act, to the operation of Part 3D of the Act (the cashless welfare trial). The effect would be that the secretary may require a person to give information, or produce a document, to the department if the secretary considers that the information or document may be relevant to (among other things) Part 3D of the Act. The explanatory memorandum states that this amendment is:

> essential to allow the Secretary to determine whether a person should not participate in the [Cashless Debit Card] trial on the basis of their mental, physical or emotional wellbeing or where they can demonstrate reasonable or responsible management of their affairs (including their financial affairs).[77]

Preliminary international human rights legal advice

Right to privacy

1.157 These proposed information gathering and sharing powers engage and limit the right to privacy. The right to privacy includes respect for informational privacy, including the right to respect for private and confidential information, particularly the storing, use and sharing of such information. The right to privacy may be subject to permissible limitations which are provided by law and are not arbitrary. This means that the measure must pursue a legitimate objective and be rationally connected to (that is, effective to achieve) and proportionate to achieving that objective. In order to be proportionate, a limitation on the right to privacy should only be as extensive as is strictly necessary to achieve its legitimate objective and must be accompanied by appropriate safeguards.

74 Item 43, proposed subsections 124POB(3), 124POC(3), 124POD(3).

75 Proposed subsections 124POB(1), 124POC(1), 124POD(1).

76 Proposed subsections 124POB(2), 124POC(2), 124POD(2).

77 Explanatory memorandum, p. 15.

1.158 The statement of compatibility does not discuss the privacy implications of the proposed expansion of the secretary's general power to obtain information under section 192 of the Act, despite the fact that section 192 enables the secretary to 'require' a person to give information or produce a document.

1.159 The statement of compatibility provides that proposed sections 123POA to 124POD will expand the existing disclosure provisions under the income management regime to the cashless welfare trial provisions.[78] It states that the purpose of such disclosures 'is to ensure that the Cashless Debit Card trial is properly administered and appropriate information can be shared about a trial participant to provide protective support'.[79] It further states that any limitation on a person's right to privacy in this bill is reasonable and proportionate 'given the extensive social harm discussed' in the statement of compatibility and that there are effective community safeguards over the extent of the restrictions imposed.[80]

1.160 Division 3 of Part 5 of the Act sets out a number of confidentiality provisions relating to information obtained or disclosed under the Act, including offence provisions for gaining unauthorised access to protected information, unauthorised use of protected information etc.[81] The information to be collected or disclosed is limited to matters relevant to the administration of the cashless welfare trials. It would have been useful if the statement of compatibility had provided more detailed advice as to how the limitation on the right to privacy was proportionate to the objectives sought to be achieved.

Committee view

1.161 The committee notes that the information gathering and sharing provisions of this bill engage and limit the right to privacy. The statement of compatibility accompanying the bill does not provide detailed information to justify the limitation on the right to privacy. However, the committee notes there are existing privacy safeguards in place that assist in assessing the proportionality of these measures. On this basis the committee makes no further comment in relation to this matter.

78 Statement of compatibility, p. 23.

79 Statement of compatibility, p. 23.

80 Statement of compatibility, p. 23.

81 See for example section 203 and 204 of the *Social Security (Administration) Act 1991*.

Social Services Legislation Amendment (Drug Testing Trial) Bill 2019[1]

Purpose	Provides for the trialling of mandatory drug testing for new recipients of Newstart Allowance and Youth Allowance in three geographical locations over two years
Portfolio	Social Services
Introduced	House of Representatives, 11 September 2019
Rights	Privacy; social security and adequate standard of living; equality and non-discrimination
Status	Seeking additional information

Drug testing of welfare recipients

1.162 The bill seeks to establish a two year trial of mandatory drug-testing in three regions, involving 5,000 new recipients of Newstart Allowance and Youth Allowance. New recipients will be required to acknowledge in the claim for Newstart Allowance and Youth Allowance that they may be required to undergo a drug test (by providing a sample of their hair, urine or saliva) as a condition of payment, and will then be randomly subjected to drug testing. The committee has commented on substantially similar bills in 2017 and 2018.[2]

1.163 Recipients who test positive would be subject to income management for 24 months and be subject to further random drug tests. Recipients who test positive to more than one test during the 24 month period would be referred to a contracted medical professional for assessment.[3] If the medical professional recommends treatment, the recipient would be required to complete certain treatment activities, such as counselling, rehabilitation or ongoing drug testing, as part of their employment pathway plan.[4]

1 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Social Services Legislation Amendment (Drug Testing Trial) Bill, *Report 6 of 2019*; [2019] AUPJCHR 95.

2 Parliamentary Joint Committee on Human Rights, *Report 8 of 2017* (15 August 2017) pp. 51-61, *Report 11 of 2017* (17 October 2017) pp. 150-170, *Report 3 of 2018* (27 March 2018) pp. 124-128.

3 Explanatory memorandum, p. 29.

4 An employment pathway plan sets out particular activities certain recipients must do in order to receive their Newstart Allowance or Youth Allowance payments.

1.164 Recipients who do not comply with their employment pathway plan, including drug treatment activities, would be subject to a participation payment compliance framework, which may involve the withholding of payments. Recipients would not be exempted from this framework if the reason for their non-compliance is wholly or substantially attributable to drug or alcohol use.[5]

1.165 Recipients who refuse to take the test would have their payment cancelled on the day they refuse, unless they have a reasonable excuse. If they reapply, their payment would not be payable for 4 weeks from the date of cancellation, and they would still be required to undergo random mandatory drug-testing.[6]

Preliminary international human rights legal advice

Rights to privacy, social security, adequate standard of living and equality and non-discrimination

1.166 The mandatory drug testing of social security recipients, and subjecting those who test positive to income management and mandatory treatment activities, engages and limits a number of human rights, including the:

- right to privacy;[7]
- right to social security;[8]
- right to an adequate standard of living;[9] and
- right to equality and non-discrimination.[10]

1.167 The right to privacy is linked to notions of personal autonomy and human dignity. It includes the idea that individuals should have an area of autonomous development; a 'private sphere' free from government intervention and excessive unsolicited intervention by others. It includes the right to physical and psychological integrity which extends to protecting a person's bodily integrity against compulsory procedures. The right to privacy also includes respect for informational privacy, including the right to respect for private and confidential information, particularly the storing, use and sharing of such information.

1.168 The bill appears to engage and limit the right to privacy in four main ways, by:

5 Explanatory memorandum, p. 26.

6 Explanatory memorandum, p. 4.

7 International Covenant on Civil and Political Rights (ICCPR), article 17.

8 International Covenant on Economic, Social and Cultural Rights (ICESCR), article 9.

9 ICESCR, article 11.

10 ICCPR, articles 2, 16 and 26, and ICESCR, article 2. It is further protected with respect to persons with disabilities by the Convention on the Rights of Persons with Disabilities, article 2.

(a) making it mandatory for trial participants to undergo drug testing, requiring them to provide samples of their saliva, urine or hair to a contracted provider;[11]

(b) requiring the collection and storage of samples and drug test results, and the divulging of private medical information to a contracted drug testing provider (as a person may need to provide evidence of their prescriptions and/or medical history to the contracted provider to avoid false positives that, for example, detect prescribed opioids);[12]

(c) imposing income management (which imposes conditions on how welfare payments can be spent) on those who test positive (on the advice of the contractor who carried out the test);[13] and

(d) requiring those who have had two or more positive drug tests to undergo a medical, psychiatric or psychological examination,[14] and requiring those, who have been assessed as needing treatment, to receive that treatment in order to access social security.[15]

1.169 The measure also appears to engage the right to social security and an adequate standard of living. The right to social security recognises the importance of adequate social benefits in reducing the effects of poverty in preventing social exclusion and promoting social inclusion.[16] The right to an adequate standard of living requires state parties to take steps to ensure the availability, adequacy and accessibility of food, clothing, water and housing for all people in Australia.[17] The bill engages and limits these rights by imposing income management on those who test positive to drugs and allowing for welfare payments of those who does not comply with their employment pathway plans to be cut (a measure which would be imposed on those who have had two or more positive drug tests).

11 This is acknowledged in the statement of compatibility, p. 32.

12 Note that Schedule 1, item 3, proposed section 38FA of the *Social Security Act 1991* would enable the minister to make rules providing for the giving and taking samples of persons' saliva, urine or hair; dealing with such samples; carrying out drug tests; confidentiality and disclosure of results of drug test and keeping; and destroying records relating to samples or drug tests.

13 See, *Social Security (Administration) Act 1999, s*chedule 1, item 28, proposed new subsection 123UFAA(1A).

14 In compliance with a notice given under *Social Security (Administration) Act 1999*, subsection 63(4). See Schedule 1, items 4 and 7 of the bill.

15 See Schedule 1, items 4 and 7 of the bill.

16 Committee on Economic, Social and Cultural Rights*, General Comment No. 19: The Right to Social Security* (2008), paragraph 3.

17 ICESCR, article 11.

1.170 Finally, the measure also engages the right to equality and non-discrimination. This right provides that everyone is entitled to enjoy their rights without discrimination of any kind, which encompasses both 'direct' discrimination (where measures have a discriminatory *intent*) and 'indirect' discrimination (where measures have a discriminatory *effect* on the enjoyment of rights). Indirect discrimination occurs where 'a rule or measure that is neutral at face value or without intent to discriminate', exclusively or disproportionately affects people with a particular protected attribute.[18] The statement of compatibility recognises that the drug testing trial may involve a direct or indirect distinction on the basis of disability or illnesses associated with drug or alcohol dependency.[19] It also notes that the trial may have a disproportionate impact on Indigenous people, due to higher levels of drug and alcohol use.[20]

1.171 Limits on the above rights may be permissible where a measure seeks to achieve a legitimate objective, is rationally connected to (that is effective to achieve) that objective, and is proportionate to that objective.

Legitimate objective

1.172 The statement of compatibility provides that the objective of the drug testing trial is twofold:

- [to] maintain the integrity of, and public confidence in, the social security system by ensuring that tax-payer funded welfare payments are not being used to purchase drugs or support substance abuse; [and]
- [to] provide new pathways for identifying recipients with drug abuse issues and facilitating their referral to appropriate treatment where required.[21]

1.173 In support of the need for the measure, the statement of compatibility refers to statistics indicating that a greater number of people used drug and alcohol use in 2016 (compared to 2015) as an exemption to mutual obligation requirements.[22]

18 *Althammer v Austria*, UN Human Rights Committee Communication no. 998/01 (2003) [10.2]. The prohibited grounds of discrimination are race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Under 'other status' the following have been held to qualify as prohibited grounds: age, nationality, marital status, disability, place of residence within a country and sexual orientation. The prohibited grounds of discrimination are often described as 'personal attributes'.

19 Statement of compatibility, p. 30.

20 Statement of compatibility, p. 31.

21 Statement of compatibility, p. 27.

22 Statement of compatibility, p. 27. Mutual obligation requirements are either participation or activity test requirements that a person must meet in order to receive certain social security payments, including Newstart Allowance and Youth Allowance.

Figures from 2017 and 2018 are not presented. The statement of compatibility also argues that the drug testing measure will help direct people into treatment before the drug use becomes too severe and a barrier to employment.[23]

1.174 Pursuing the objectives of the early treatment of harmful drug use to prevent drug dependency, and addressing barriers to employment created by drug dependency, are likely to constitute legitimate objectives under international human rights law.

1.175 There are, however, concerns as to whether the measure is rationally connected to (that is effective to achieve) and proportionate to these legitimate objectives.

Rational connection

1.176 In relation to whether the measure is likely to be effective to achieve its stated objectives, the committee requested the advice of the minister in 2017 when this trial was first proposed, as to whether overseas experience indicates that this trial will be effective to achieve its objectives. The then minister advised that the available international evidence was limited as many overseas experiences had not been comprehensively evaluated, the evaluations had not been published or the results were not comparable to the proposed trial, noting that the model proposed did not appear to have been implemented previously in any other country.[24] It is not clear from the explanatory materials to this bill whether there is now any available evidence to demonstrate that the trial would be likely to achieve the stated objectives.

1.177 In addition, it is not clear that the single use of an illicit drug would constitute a barrier to employment or would necessarily lead to dependence.[25] Further, no evidence has been adduced as to whether income management and, in certain circumstances, reducing payments of persons who fail to undertake treatment activities, would be an effective or proportionate means of ensuring job seekers get the support they need to address drug dependency issues.

Proportionality

1.178 There are also questions as to whether the measure is a proportionate limitation on the rights identified above.

23 Statement of compatibility, p. 27.

24 See response by the Hon Christian Porter MP, Minister for Social Services to the Parliamentary Joint Committee on Human Rights, 29 August 2017, reproduced in Parliamentary Joint Committee on Human Rights, *Report 11 of 2017* (17 October 2017) Appendix 3.

25 One study indicated that the percentage of users who developed a dependency was 9% for marijuana, 15% for alcohol, 17% for cocaine, and 23% for heroin: U.S. National Academy of Sciences, Institute of Medicine, *Marijuana and Medicine: Assessing the Science Base* (Washington D.C., 1999).

1.179 In particular, there are questions as to whether the measure is sufficiently circumscribed. The randomised drug test is not reliant on any reasonable suspicion that a person has a drug abuse problem. Any randomly selected trial participant would be required to provide a urine, hair or saliva sample and would need to disclose relevant medical information to the private firm contracted to conduct the testing. It would appear that the trial would limit the privacy rights of a large group of people, in order to identify a very small number of people who had used illicit drugs or have a drug abuse problem. For example, in relation to drug testing in the United States jurisdiction of Florida, there is some evidence that suggests only 2.6 per cent of welfare recipients tested were found to have used drugs, most commonly marijuana.[26] The explanatory memorandum states that the trial sites – Canterbury-Bankstown in New South Wales, Logan in Queensland and Mandurah in Western Australia – were selected using a range of factors 'including crime statistics, drug use statistics, social security data and health service availability'.[27] However, based on this information, it is not entirely clear if these sites were chosen based on the best available evidence and data about the prevalence of drug and alcohol use in the locations.

1.180 Given the breadth of the application of the drug testing, it may be that there are other, less rights restrictive, methods to achieve the objective of providing new pathways for referral to treatment of those who have, or are likely to develop, substance abuse issues, including increasing the availability and promotion of treatment options for those with drug and alcohol dependency. This was not addressed in the statement of compatibility.

1.181 In relation to privacy safeguards around the medical and drug-related information disclosed to a private provider of drug tests, the statement of compatibility provides:

> This trial will be subject to the existing safeguards in the *Privacy Act 1988* and the confidentiality provisions in the *Social Security (Administration) Act 1999* which protect the collection, use and disclosure of protected information. A joint Privacy Impact Assessment by the Department of Human Services and the Department of Social Services is being conducted for this measure and will be submitted to the Office of the Australian Information Commissioner to ensure implementation of the measure minimises privacy law risks.[28]

1.182 The bill provides that the minister may make rules that set out how samples are to be given and taken, how such samples are to be dealt with, the carrying out of

26 See Australian National Council on Drugs Position Paper, *Drug Testing*, August 2013, p. 13, available at: https://www.drugsandalcohol.ie/20368/1/ANCD_paper_DrugTesting.pdf.

27 See explanatory memorandum, p. 3.

28 Statement of compatibility, p. 33.

drug tests, giving results of the tests, the confidentiality and disclosure of results of drug tests and the keeping and destroying of records relating to samples and drug tests.[29] As such, none of the detail relating to the privacy safeguards is set out in the bill currently before Parliament. Rather, the explanatory memorandum states that the intention is that the 'rules will set out high level protocols that will apply for conducting the drug tests, including in relation to the use and disclosure of test results'.[30] An exposure draft of the rules has not been provided with the bill, but the explanatory memorandum states that exposure draft rules were tabled in 2017, but that these rules remain subject to change.[31]

1.183 Questions also remain as to whether automatically placing a trial participant who tests positive once to drugs (even if it was the first time they had used an illicit drug) on income management is consistent with the rights listed above. The committee notes that it is the contracted provider (rather than a public official) who would be responsible for determining if a person is to be subject to income management. It is unclear whether a decision of such a contractor to subject a person to income management would be subject to independent merits review. The Senate Standing Committee for the Scrutiny of Bills raised concerns when it reviewed the substantially similar proposal for a drug testing trial in 2017, noting that:

> it appears that the only way a person subject to income management under this proposed provision could seek review of the results of the drug test itself is by asking the contractor to review its own processes. The committee notes that an exposure draft of the Drug Test Rules has been tabled by the Minister in another inquiry.[32] This draft suggests that there will be a process by which an affected person can provide evidence to the contractor about the drug test and the contractor will need to satisfy itself, having regard to that evidence, as to the validity of the drug test. The details of this process, as to how a person will apply to the contractor and how the contractor will assess any submissions or evidence, do not appear to be set out in legislation.[33]

1.184 It is unclear why a positive test should automatically result in the application of income management without an individual assessment of whether the person has drug 'dependency' problem and whether income management is necessary or appropriate in the person's circumstances. The bill provides that the secretary of the

29 See item 3, proposed section 38FA of the *Social Security Act 1991*.

30 Explanatory memorandum, p. 8.

31 Explanatory memorandum, p. 9.

32 See Senate Standing Committee on Community Affairs, inquiry on the Social Services Legislation Amendment (Welfare Reform) Bill 2017, Additional Documents, tabled on 30 August 2017 by the Department of Social Services.

33 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 10 of 2017* (6 September 2017) pp. 90-91.

department must determine a person is not subject to income management if satisfied that being subject to the regime poses a serious risk to the person's mental, physical or emotional wellbeing.[34] However, the bill also provides that the secretary is not required to inquire into this question[35] and the explanatory memorandum states that this means that the secretary 'is not required to actively take steps to assess every trial participant who is referred to income managements'.[36]

1.185 In relation to the imposition of income management arrangements in the event of a positive drug test result, the statement of compatibility states:

> Income management does not reduce the total amount of income support available to a person, just the way in which they receive it… Job seekers placed on Income Management under this trial will still be able to purchase items at approved merchants and pay rent and bills with their quarantined funds… Evidence collected on Income Management in Western Australia indicates that the program is improving the lives of many Australians. It has given many participants a greater sense of control of money, improved housing stability and purchase restraint for socially harmful products while reducing a range of negative behaviours in their communities including drinking and violence.[37]

1.186 While income management does not reduce the amount of income support available, income management measures do raise human rights concerns, particularly where income management is not voluntary or is inflexibly applied. The committee has previously found that while compulsory income management did reduce spending of income managed funds on proscribed items, it could increase welfare dependence, and interfere with a person's private and family life.[38] In particular, the committee has highlighted that '[t]he compulsory income management provisions operate inflexibly raising the risk that people who do not need assistance managing their budget will be caught up in the regime.'[39] Similarly, in this instance, the imposition of income management for two years or more,[40]

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34 *Social Security (Administration) Act 1999*, item 28, Schedule 1, proposed subsection 123UFAA(1C).

35 *Social Security (Administration) Act 1999*, item 28, Schedule 1, proposed subsection 123UFAA(1D).

36 Explanatory memorandum, p. 20.

37 Statement of compatibility, pp. 28-29.

38 Parliamentary Joint Committee on Human Rights, *2016 Review of Stronger Futures Measures* (16 March 2016) pp. 60-61.

39 Parliamentary Joint Committee on Human Rights, *2016 Review of Stronger Futures Measures* (16 March 2016) p. 61, [4.101].

40 Noting that the bill provides that the secretary has the discretion to, by legislative instrument, determine a period longer than 24 months, see item 28, Schedule 1, proposed subsection 123UFAA(1B) of the *Social Security (Administration) Act 1999.*

raises questions as to proportionality, particularly where inflexibly imposed on a person who may have used an illicit drug but does not have ongoing drug abuse issues. The statement of compatibility does not demonstrate whether there are any less rights-restrictive alternatives available.

1.187 The reduction in payments to penalise a person for failing to undertake treatment activities as part of their employment pathway plan may also compromise a person's ability to afford basic necessities. The statement of compatibility reasons that Australia's welfare system is founded on principles of mutual obligation, and that 'it is reasonable to expect the job seeker to pursue treatment as part of their Job Plan and be subject to proportionate consequences if they fail to do so.'[41] However, there are questions regarding whether withholding subsistence payments for failure to attend treatment takes into account evidence that addiction often involves cycles of relapse before recovery.[42] In this respect, the statement of compatibility argues that there are provisions in place to address individual vulnerabilities:

> the vulnerability of people and the impact of their circumstances on their ability to comply with their mutual obligation requirements is considered under social security law through reasonable excuse and exemption provisions. Delegates of the Secretary have significant discretionary powers regarding the application of compliance actions to consider the circumstances of each individual case.[43]

1.188 However, it is unclear how a delegate's discretion will prevent those addicted to drugs from being unable to afford basic needs if their welfare payments are suspended.

1.189 Finally, the statement of compatibility does not address the availability of less rights restrictive measures to achieve the objectives of the measure. For example, it does not explain whether there are other methods which could improve a job-seeker's capacity to find employment or participate in education or training and receive treatment that is not as restrictive of their human rights. While this bill is intended to trial new ways of identifying people with drug use issues and 'assist'[44] them to enter treatment, the explanatory materials do not state whether other, less rights restrictive, measures have first been trialled and have been found not to work.

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41 Statement of compatibility, p. 29.

42 See Australian National Council on Drugs, *Position Paper: Drug Testing*, August 2013, p. 14; National Institute on Drug Abuse, *Principles of Drug Addiction Treatment: A Research Based Guide*, December 2012, p. 12 [Figure illustrating relapse rates between drug addiction and other chronic illnesses: drug addiction was 40 to 60% of all patients. 'For the addicted individual, lapses to drug abuse do not indicate failure — rather, they signify that treatment needs to be reinstated or adjusted, or that alternative treatment is needed'].

43 Statement of compatibility, p. 30.

44 Statement of compatibility, p. 31.

1.190 The mandatory drug testing of welfare recipients, subjecting persons to income management and suspending welfare payments, engages and limits a number of human rights, including the rights to privacy, social security, adequate standard of living and equality and non-discrimination.

1.191 In order to fully assess the proportionality and likely effectiveness of the proposed measures, further information is required as to:

- what evidence was relied on to indicate that the trial is likely to achieve its stated objectives;
- what evidence was relied on to choose the three trial sites, in particular whether there is evidence and data about a high prevalence of drug use in these locations;
- how subjecting a person to income management for two or more years, or reducing the payments of persons who fail to undertake treatment activities, will be likely to be effective in removing a person's barriers to employment and ensuring they get the necessary support to address any drug dependency issues;
- what safeguards are in place to ensure a person is able to meet their basic needs if their payments are suspended for failure to comply with their employment pathway plan;
- whether there is a process to remove income quarantining where it is not necessary or appropriate to an individual's circumstances (but where it doesn't reach the threshold of posing a 'serious risk' to a person's mental, physical or emotional wellbeing);
- whether independent merits review of the contractor's decision to issue a notice referring a person to income management will be available, and whether there will be an independent process to review the accuracy of any drug test results;[45] and
- whether other, less rights restrictive, methods have first been trialled to improve a job-seeker's capacity to find employment or participate in education or training and receive treatment.

Committee view

1.192 The committee notes the legal advice on the bill. In order to fully assess the proportionality and likely effectiveness of the proposed measures, the committee seeks the minister's advice as to the matters set out at paragraph [1.191].

45 Having regard to the comments made by the Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 10 of 2017* (6 September 2017) pp. 85-91.

Treasury Laws Amendment (International Tax Agreements) Bill 2019[1]

Purpose	The bill seeks to amend the *International Tax Agreements Act 1953* to give force to the Australia-Israel Convention and to amend the *Income Tax Assessment Act 1997* to introduce a new deemed source of income rule (intended to eliminate double taxation and prevent tax avoidance)
Portfolio	Treasury
Introduced	House of Representatives, 19 September 2019
Rights	Privacy
Status	Seeking additional information

Exchange of taxpayer information between Israel and Australia

1.193 The Treasury Laws Amendment (International Tax Agreements) Bill 2019 (the bill) seeks to amend the *International Tax Agreements Act 1953* to give force to the Israel-Australia Convention (the Convention) signed on 28 March 2019. The Convention seeks to remove double taxation of income and improve administrative cooperation in tax matters to help reduce tax evasion and avoidance.[2] Article 26 of the Convention provides that Israeli and Australian taxation authorities shall exchange taxpayer information to the extent that it is 'foreseeably relevant for carrying out the provisions of the Convention or to the administration or enforcement of domestic laws concerning the taxes covered by the Convention'.[3]

Preliminary international human rights legal advice

Right to privacy

1.194 The exchange of taxpayer information, which would include personal information, engages and limits the right to privacy. The right to privacy includes respect for informational privacy, including the right to respect for private and confidential information, particularly the storing, use and sharing of such information. It also includes the right to control the dissemination of information about one's private life.[4] Limitations on this right will be permissible where they

1 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Treasury Laws Amendment (International Tax Agreements) Bill 2019, *Report 6 of 2019*; [2019] AUPJCHR 96.

2 Explanatory memorandum, p. 5.

3 Explanatory memorandum, p. 43.

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

pursue a legitimate objective, are rationally connected to that objective and are a proportionate means of achieving that objective.

1.195 The statement of compatibility explains that the exchange of information is necessary to enable the correct application, administration and enforcement of the provisions of the Convention, which pursues the legitimate aim of eliminating double taxation and tax evasion.[5] This is likely to be a legitimate objective for the purposes of international human rights law.

1.196 In relation to the proportionality of the measure, the statement of compatibility explains that article 26 balances the information needs of taxation authorities with the need to protect taxpayers from arbitrary or unlawful interference with their privacy. It states that the standard of 'foreseeable relevance' provides for the exchange of information in tax matters to the widest possible extent while not allowing the competent authorities to request information unlikely to be relevant to the tax affairs of a given taxpayer.[6]

1.197 The statement of compatibility also identifies some safeguards for the protection of a taxpayer's privacy, including that any information shared will be treated as secret and in the same manner as taxation information that is currently obtained by the Australian and Israeli authorities under domestic taxation laws. It also states that the authorities must take all reasonable measures to protect confidential information from any unauthorised disclosure.[7] However, it does not provide further information about how information is currently obtained under domestic taxation laws and does not specify what reasonable measures the authorities must take to protect confidential information from unauthorised disclosure.

1.198 The bill would authorise the disclosure of personal taxpayer information between Israel and Australia, which engages and limits the right to privacy. In order to assess the proportionality of this measure, further information is required as to:

- what legislative provisions in both Australia and Israel protect the confidentiality of taxpayer information, including what safeguards are in place to protect confidential information from unauthorised disclosure; and
- what processes exist, if any, to inform a taxpayer if there has been an unauthorised disclosure of their information.

5 Statement of compatibility, p. 58.

6 Statement of compatibility, pp. 58-59.

7 Statement of compatibility, p. 59.

Committee view

1.199 The committee notes the legal advice on the bill. In order to assess the proportionality of this measure, the committee seeks the minister's more detailed advice as set out at paragraph [1.198].

Advice only[1]

1.200 The committee notes that the following private members' bills appear to engage and may limit human rights. Should any of these bills proceed to further stages of debate, the committee may request further information from the legislation proponent as to the human rights compatibility of the bill:

- Australian Bill of Rights Bill 2019;
- Commonwealth Electoral Amendment (Real Time Disclosure of Political Donations) Bill 2019; and
- National Consumer Credit Protection Amendment (Small Amount Credit Contract and Consumer Lease Reforms) Bill 2019 [No. 2].

1.201 Further, the committee draws the following bill and legislative instrument to the attention of the relevant minister on an advice only basis. The committee does not require a response to these comments.

1 This section can be cited as: Parliamentary Joint Committee on Human Rights, Advice only, *Report 6 of 2019*; [2019] AUPJCHR 98.

Currency (Restrictions on the Use of Cash) Bill 2019[1]

Purpose	The bill seeks to restrict the use of cash by introducing offences for entities (including individuals) that make or accept cash payments of $10,000 or more
Portfolio	Treasury
Introduced	House of Representatives, 19 September 2019
Rights	Privacy
Status	Advice only

Restrictions on the use of cash of $10,000 or more

1.202 The Currency (Restrictions on the Use of Cash) Bill 2019 (the bill) seeks to introduce offences for entities, including individuals, which make or accept cash payments of $10,000 or more. The maximum penalty for these offences is 120 penalty units (currently $25,200) or two years imprisonment. The bill seeks to ensure that entities cannot avoid the creation of records of significant transactions and facilitate their participation in the black economy by making large cash payments.[2]

International human rights legal advice

Right to privacy

1.203 Restricting the use of cash payments of $10,000 or more, and thereby requiring bank transactions and records of such payments, engages the right to privacy, because this creates records of an individual's private activities and expenditure. The right to privacy includes respect for informational privacy, including the right to respect for private and confidential information, particularly the storing, use and sharing of such information. It also includes the right to control the dissemination of information about one's private life.[3] 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.

1.204 The statement of compatibility identifies that the objective of the measure is to 'protect the integrity of the taxation law and other Commonwealth laws by

1 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Currency (Restrictions on the Use of Cash) Bill 2019, *Report 6 of 2019*; [2019] AUPJCHR 98.

2 Statement of compatibility, pp. 19 and 21.

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

ensuring that entities cannot avoid scrutiny and facilitate their participation in the black economy by making large payments in cash'.[4] This is likely to be a legitimate objective for the purposes of international human rights law, and the measures in the bill are rationally connected to achieving this objective.

1.205 In relation to the proportionality of the measure, the statement of compatibility states that the measure is 'a reasonable and proportionate means of addressing this broader public interest that is necessary in light of the substantial costs to Australia of the black economy activity facilitated by large cash payments, noting that the restriction is limited to payments in excess of $10,000'.[5] However, the statement of compatibility does not offer further exploration of how the impact of the bill on individuals' privacy is proportionate to the objective of reducing the costs of black economy activity, such as whether the measures in the bill represent the least rights-restrictive means of achieving this objective.

1.206 The fact that the measure only applies to transactions of $10,000 or more assists with the proportionality of the measure, as it reduces the impact on individuals' privacy. Further, under current legislation, Australian banks are already required to report cash transactions of $10,000 or more (or foreign equivalent) to the Australian Transaction Reports and Analysis Centre, and information collected is handled in accordance with the *Privacy Act 1988*.[6]

1.207 However, the penalties for the offences in the bill are substantial, and apply to entities including individuals. The statement of compatibility could have more helpfully included further information to explain the justification for the substantial penalties on individuals, and further information about the impact of the measure on the right to privacy and any relevant safeguards in place, including information as to who will be able to access records of individual's transactions and for what purposes. While the measures in the bill may be proportionate, if the monetary threshold were much lower, this would amount to a much more substantial interference with individuals' privacy. This would require very careful justification in order to be found to be proportionate to the objective of reducing the costs of black economy activity.

1.208 **T**he bill, in restricting the use of cash payments of $10,000 or more, engages and may limit the right to privacy as it requires bank transactions and records of an individual's private expenditure. The statement of compatibility does not fully explore the impact of the bill on individuals' privacy.

4 Statement of compatibility, p. 19.

5 Statement of compatibility, p. 22.

6 *Anti-Money Laundering and Counter-Terrorism Financing Act 2006*, sections 43 and 44; Anti-Money Laundering and Counter-Terrorism Financing Rules Instrument 2007 (No. 1) [F2019C00383], Chapter 19.

1.209 As the measure applies only to transactions of $10,000 or more this assists with it being a proportionate limit on the right to privacy, however, if the monetary threshold were lower a more detailed justification for this limitation would be required.

Committee view

1.210 The committee notes the legal advice on the bill. The committee considers that as the measure applies only to transactions of $10,000 or more this assists with it being a proportionate limit on the right to privacy, however, it notes that if the monetary threshold were lower it would expect a more detailed justification for this limitation. The committee draws this matter to the attention of the minister and the Parliament.

Proceeds of Crime Regulations 2019 [F2019L01045][1]

Purpose	To prescribe a number of matters related to the operation of the *Proceeds of Crime Act 2002*
Portfolio	Home Affairs
Authorising legislation	*Proceeds of Crime Act 2002*
Last day to disallow	15 sitting days after tabling (tabled in the Senate and in the House of Representatives on 9 September 2019).
Rights	Fair trial and fair hearing; privacy
Status	Advice only

1.211 The Proceeds of Crime Regulations 2002 (2002 Regulations) were to sunset on 1 October 2019. The Proceeds of Crime Regulations 2019 (2019 Regulations) remake the 2002 Regulations in their entirety, with some amendments.

List of 'serious offences' under the *Proceeds of Crime Act 2002*

1.212 Under the *Proceeds of Crime Act 2002* (the Act), various actions can be taken in relation to the restraint, freezing or forfeiture of property which may have been obtained as a result, or used in the commission, of specified offences, including 'serious offences'. The term 'serious offence' is defined in the Act as including 'an indictable offence specified in the regulations'.[2]

1.213 Section 13 of the 2019 Regulations provides that, for the purposes of the definition of 'serious offence' in the Act, the indictable offences set out in the tables in Schedule 4 to the instrument are specified. Schedule 4 prescribes various offences under the *Australian Crime Commission Act 2002*, the *Copyright Act 1968* (Copyright Act) and the *Criminal Code Act 2002* as 'serious offences' for the purposes of the Act. Some of these offences appear to be newly listed in the 2019 Regulations.[3]

1 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Proceeds of Crime Regulations 2019 [F2019L01045], *Report 6 of 2019*; [2019] AUPJCHR 99.

2 Section 338 of the *Proceeds of Crime Act 2002* (the Act); paragraph (h) of the definition of 'serious offence'.

3 These include offences relating to dangerous weapons, identity crime, and failing to produce certain documents or things in Australian Criminal Intelligence Commission investigations.

International human rights legal advice

Right to privacy

1.214 The measures in the 2019 Regulations extend the operation of the Act to a number of 'serious offences', and enliven restraint and forfeiture powers which may be exercised in relation to real property. In this respect, the measure engages and limits the right to privacy, which includes the right not to be subject to arbitrary or unlawful interference with a person's family, home or correspondence.[4] 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.

1.215 Under the Act real property may be liable to seizure or forfeiture, even where a person has been acquitted of an offence, or where their conviction has been quashed.[5] This appears to leave open the possibility that a person may be acquitted of an offence, but nonetheless have their property forfeited, because they have made mortgage payments, or made improvements on that property, using funds that the court considers on the balance of probabilities are 'proceeds' of crime.[6] Further, it does not appear that a court would be able to revoke a forfeiture order following an acquittal. This raises concerns that the powers of restraint and forfeiture in the Act could be exercised in such a manner as to constitute an arbitrary interference with a person's home.

1.216 Noting that the Act was enacted prior to the establishment of the committee, and no statement of compatibility was provided for that legislation, it would be beneficial if the minister were to undertake a detailed assessment of the Act to determine its compatibility with the right to privacy.

1.217 The statement of compatibility to the 2019 Regulations recognises that prescribing offences as 'serious offences' for the purposes of the Act engages and limits the right to privacy, but asserts that the measures are 'necessary, reasonable and proportionate to achieve the legitimate objective of preserving public order and the rights and freedoms of those subject to serious criminal behaviour'.[7] It further explains that designating the offences in Schedule 4 as 'serious offences' is necessary to remove the link between those offences and an actual or intended benefit, noting that the requirement to prove such a link 'unnecessarily frustrates' law enforcement's ability to address the financial support and incentives for organised crime.[8] The statement of compatibility further provides detailed information about

4 International Covenant on Civil and Political Rights (ICCPR), article 17.

5 Section 80 of the Act.

6 Section 48(1)(c) of the Act.

7 Statement of compatibility, p. 39.

8 Statement of compatibility, pp. 39-40.

this matter in relation to each category of offences listed in Schedule 4 to the 2019 Regulations.

1.218 In general, preserving public order and the rights and freedoms of those subject to serious criminal behaviour is a legitimate objective for the purposes of international human rights law. Relatedly, providing additional tools for proceeds of crime authorities to target the incentives behind certain offences (for example, those relating to slavery-like practices, human trafficking and child sexual abuse material) is likely to be a legitimate objective.

1.219 However, it is not clear that prescribing all of the offences as a 'serious offence' under the 2019 Regulations necessarily achieves the stated objective of preserving the rights of those subjected to 'serious criminal behaviour'. In particular, it is not clear why it is necessary to designate offences under the Copyright Act as 'serious offences' for the purposes of the Act.

1.220 As to proportionality, the statement of compatibility outlines a number of safeguards in the Act to protect individuals whose property is subject to restraint or forfeiture on the basis of a link to a 'serious offence'.[9] It notes, for example, that a court may make allowances for expenses to be met out of property covered by a restraining order,[10] or refuse to make an order where it is not in the public interest to do so.[11] Property will also cease to be 'proceeds' of an offence or an 'instrument' of an offence in certain circumstances, including if it is acquired by a third party for sufficient consideration without the third party knowing, and in circumstances that would not arouse reasonable suspicion, that the property was proceeds of an offence or an instrument of an offence.[12] Further, a person may seek compensation orders for the proportion of the value of the property they did not derive or realise from the commission of an offence.[13]

1.221 These safeguards are important and relevant to the proportionality of the measures. However, as noted at paragraph [1.215] above, it appears that a person's real property may be subject to a restraint or forfeiture order under the Act, even where they have been acquitted of a criminal offence, or where a conviction has been quashed. Notwithstanding the safeguards outlined in the statement of compatibility, concerns remain that the powers of restraint and forfeiture in the Act may be exercised, in relation to a 'serious offence', in a manner that may constitute a disproportionate limit on a person's right to privacy.

9 Statement of compatibility, p. 43.

10 Section 24 of the Act.

11 Sections 17(4), 19(3), 47(4), 48(2) and 49(4) of the Act.

12 Section 330(4) of the Act.

13 Sections 77 and 94A of the Act.

1.222 The measures extend the operation of the *Proceeds of Crime Act 2002* (the Act) to a number of 'serious offences', and enliven restraint and forfeiture powers which may be exercised in relation to real property. In this respect, the measures engage and limit the right to privacy, including the right not to be subject to arbitrary interference with a person's home.

1.223 The *Proceeds of Crime Act 2002* would benefit from a full review of the human rights compatibility of the legislation.

Right to a fair trial

1.224 The right to a fair trial encompasses notions of equality in proceedings, the right to a public hearing and the requirement that hearings are conducted by an independent and impartial body. Specific guarantees of the right to a fair trial in criminal proceedings include the presumption of innocence,[14] the right not to incriminate oneself,[15] and the guarantee against retrospective criminal laws.[16]

1.225 The regime established by the Act for the freezing, restraint or forfeiture of property may be considered 'criminal' under international human rights law, and therefore may engage the right to a fair trial. Forfeiture orders may be made against property where a court is satisfied that property is 'proceeds' of an indictable offence or an 'instrument' of one or more serious offences,[17] and the fact a person has been acquitted of an offence does not affect the court's power to make a forfeiture order.[18] Additionally, an order need not be based on a finding that a particular person committed any offence.[19] Rather, a court need only be satisfied that property is 'proceeds' of an indictable offence or an 'instrument' of a serious offence. This appears to entail 'blameworthiness' or 'culpability'. The term 'criminal' has an autonomous meaning in international human rights law, such that even if a penalty or other sanction is classified as civil under domestic law, it may nevertheless be considered criminal for the purposes of international human rights law.[20] Therefore, as set out above, empowering the freezing, restraint or forfeiture of property may be considered to be imposing a penalty or sanction that is 'criminal' in nature under international human rights law, and therefore the Act, and by expanding the

14 ICCPR, article 14(2).

15 ICCPR, article 14(3)(g).

16 ICCPR, article 15(1).

17 Section 49 of the Act.

18 Sections 51 and 80 of the Act.

19 Section 49(2)(a) of the Act.

20 See Parliamentary Joint Committee on Human Rights, *Guidance note 2: Offence provisions, civil penalties and human rights* (December 2014) p. 3.

operation of the Act, the 2019 Regulations, may engage and limit the right to a fair trial.

1.226 Noting that the Act was enacted prior to the establishment of the committee, and no statement of compatibility was provided for that legislation, it would be beneficial if the minister were to undertake a detailed assessment of the Act to determine its compatibility with the right to a fair trial and a fair hearing.

1.227 The statement of compatibility does not recognise that the measures may engage and limit the right to a fair trial. It only provides a broad statement that the regulations do not affect civil court procedures applicable to proceedings under the Act, and asserts that the regulations do not engage criminal process rights—on the basis that the Act is civil in nature.[21]

1.228 Without specific information as to how the safeguards in the Act would ensure that the right to a fair trial would be adequately protected, it is not possible to determine whether the measures in the 2019 Regulations are compatible with that right. In order to fully assess the compatibility of the measures, a full assessment of the Act would be necessary.

1.229 The regime established by the *Proceeds of Crime Act 2002* (the Act) for the freezing, restraint or forfeiture of property may engage and limit the right to a fair trial, and extending the provisions in the Act to additional 'serious offences' listed by the 2019 Regulations may also engage this right. This was not addressed in the statement of compatibility.

1.230 The *Proceeds of Crime Act 2002* would benefit from a full review of the human rights compatibility of the legislation.

Committee view

1.231 The committee notes the legal advice on the bill and considers that the *Proceeds of Crime Act 2002* would benefit from a full review of the human rights compatibility of the legislation.

21 Statement of compatibility, p. 35.

Bills and instruments with no committee comment [1]

1.232 The committee has no comment in relation to the following bills which were introduced into the Parliament between 16 September and 19 September 2019. This is on the basis that the bills do not engage, or only marginally engage, human rights; promote human rights; and/or permissibly limit human rights:[2]

- Agricultural and Veterinary Chemicals Legislation Amendment (Australian Pesticides and Veterinary Medicines Authority Board and Other Improvements) Bill 2019;
- Australian Research Council Amendment Bill 2019;
- Defence Service Homes Amendment Bill 2019;
- Education Legislation Amendment (Tuition Protection and Other Measures) Bill 2019;
- Fair Work Amendment (Stop Work to Stop Warming) Bill 2019;
- Family Assistance Legislation Amendment (Building on the Child Care Package) Bill 2019;
- Higher Education Support (HELP Tuition Protection Levy) Bill 2019;
- Medical and Midwife Indemnity Legislation Amendment Bill 2019;
- Protection of the Sea (Prevention of Pollution from Ships) Amendment (Air Pollution) Bill 2019;
- Treasury Laws Amendment (2019 Measures No. 2) Bill 2019;
- Treasury Laws Amendment (Prohibiting Energy Market Misconduct) Bill 2019;
- Treasury Laws Amendment (Recovering Unpaid Superannuation) Bill 2019; and
- VET Student Loans (VSL Tuition Protection Levy) Bill 2019.

1 This section can be cited as: Parliamentary Joint Committee on Human Rights, Bills and instruments with no committee comment, *Report 6 of 2019*; [2019] AUPJCHR 100.

2 Inclusion in the list is based on an assessment of the bill and relevant information provided in the statement of compatibility accompanying the bill. The committee may have determined not to comment on a bill notwithstanding that the statement of compatibility accompanying the bill may be inadequate. Where the committee considers that a statement of compatibility is inadequate it may write to the relevant minister setting out its concerns, see Parliamentary Joint Committee on Human Rights, *Annual Report 2018*, pp. 36-37.

1.233 The committee has examined the legislative instruments registered on the Federal Register of Legislation between 9 August and 19 September 2019.[3] The committee has reported on three legislative instruments from this period earlier in this chapter. The committee has determined not to comment on the remaining instruments from this period on the basis that the instruments do not engage, or only marginally engage, human rights; promote human rights; and/or permissibly limit human rights.

3 The committee examines all legislative instruments registered in the relevant period, as listed on the Federal Register of Legislation. To identify all of the legislative instruments scrutinised by the committee during this period, select 'legislative instruments' as the relevant type of legislation, select the event as 'assent/making', and input the relevant registration date range in the Federal Register of Legislation's advanced search function, available at: https://www.legislation.gov.au/AdvancedSearch.

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

Dissenting Report by Labor and Greens members in relation to the Migration Amendment (Repairing Medical Transfers) Bill 2019

1.1 Australian Labor Party and Australian Greens members (dissenting members) of the Parliamentary Joint Committee on Human Rights (committee) consider it regrettable that it has become necessary to prepare another dissenting report for this previously well-functioning committee.

1.2 However, the important mandate of this committee to examine bills for compatibility with the rights and freedoms recognised or declared by the seven core international human rights treaties that Australia is a signatory to must be discharged by its members.

1.3 At the time of the formation of the committee, the then Attorney-General McClelland, said in his second reading speech:

> The Parliamentary Joint Committee on Human Rights will contribute to debate on human rights issues by examining and reporting to parliament on human rights compatibility with new and existing laws and in that sense that parliamentary committee process… will promote greater participatory democracy by enabling Australian citizens to have a direct say on how their rights might be affected by particular legislation.[1]

1.4 As members of this committee, we must never lose sight of the committee's important mandate. This committee does not exist to be partisan; and it does not exist to rubber-stamp government policy, irrespective of the political party occupying the Treasury benches.

1.5 The legislation scrutinised in this report deserves to be properly considered by this committee through a human rights framework. The limitation of human rights that may flow from the repeal of the subject legislation, include a limitation of: Australia's 'non-refoulement' obligations under the International Covenant on Civil and Political Rights (ICCPR) (including the right to an effective remedy) and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT); and the right to health.

1.6 Reputable bodies have raised concerns about outcomes flowing from decisions of the Coalition Government. The Office of the United Nations High Commissioner for Refugees has cautioned about a 'deteriorating health situation' in

1 The Hon. Robert McClelland MP, Attorney General, *House of Representatives Hansard*, 23 November 2010, p. 3525.

Papua New Guinea and Nauru which has 'led to significant risks of irreparable harm and loss of life'.

1.7 The Queensland State Coroner has raised concerns in relation to the death of Hamid Khazaei that 'insufficient and transparent and accountable procedures for acting upon serious health concerns can have life-threatening and tragic consequences'.[2] Hamid Khazaei was a 24 year old Iranian citizen who became ill while being detained on Manus Island. Throughout his time in detention, the Australian government had significant responsibilities for Mr Khazaei's health and wellbeing.

1.8 We mention these matters in introduction to this dissenting report by way of reminder that legislation can save lives, it can be transformative, but in some cases when human rights are limited to such an extent to cause harm, it can be deadly. It is why the Human Rights Committee is so important and its work should not be hindered or tainted by partisanship. As the work of the Human Rights Committee is closely followed by similar committees internationally, and by the judiciary, it would be a horrible reflection of the members of this committee if in the 46th Parliament the Human Rights Committee became politicised.

1.9 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 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]

1.10 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

2 Coroners Court of Queensland, Inquest into the death of Hamid Khazaei, Findings of Inquest, 30 July 2018.

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.

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.

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

1.11 In *Report 4 of 2019*,[11] the Parliamentary Joint Committee on Human Rights raised a number of human rights concerns with regards to this bill, and requested further information from the minister as to the compatibility of these measures 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;
- 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
- whether there is independent, impartial and effective review of any decision to remove the person from Australia.

1.12 As noted in the Parliamentary Joint Committee on Human Rights' initial analysis of this bill,[12] sending a person 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).

1.13 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.[13] Non-refoulement obligations are absolute and may not be subject to any limitations.

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

12 Parliamentary Joint Committee on Human Rights, *Report 4 of 2019* (10 September 2019) p. 3.

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

1.14 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.

1.15 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.[14] On a number of previous occasions, the Parliamentary Joint Committee on Human Rights has raised serious concerns about the adequacy of protections against the risk of refoulement in the context of the existing legislative regime.[15] It is unclear from the statement of compatibility whether there is sufficient scope for independent and effective review of such a removal.[16] 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.

1.16 We note the minister's advice, received on 1 October 2019, that Nauru and Papua New Guinea have committed to treat transferees with respect and dignity and in accordance with relevant human rights standards, and that both countries are

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

15 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.

16 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.

parties to a number of relevant human rights treaties. We also note the advice that the Australian Government works with the governments of Nauru and PNG to provide health, welfare and support services to transferees.

1.17 However, reported conditions for individuals in regional processing countries raise concerns as to the adequacy of these undertakings and arrangements. In 2013 the Parliamentary Joint Committee on Human Rights 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.[17] The United Nations Committee Against Torture has also expressed concerns about the transfer of individuals to regional processing centres in Papua New Guinea and Nauru in view of reports of 'harsh conditions' and 'serious physical and mental pain and suffering'.[18] 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.[19] 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 according to international human rights law standards.'[20] 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.[21] It has described offshore processing itself as the

17 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).

18 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].

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) [77]–[79],[82] and [118].

20 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].

21 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.

cause behind severe and negative health impacts, 'which are as acute as they are predictable'.[22]

1.18 We also note that 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'.[23] 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.[24] 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.'[25] UNHCR similarly report that conditions for refugees and asylum-seekers on Nauru and PNG have 'led to the deterioration of the health of the vast majority…[and] to significant risks of irreparable harm and loss of life.'[26]

1.19 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, we note advice as to the department's practice of considering non-refoulement obligations prior to a person being transferred from Australia to a regional processing country. We also note the advice

22 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.

23 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].

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.

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

26 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.

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. However, administrative arrangements and ministerial discretion would appear to be insufficient to protect against refoulement, particularly noting 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, we note 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] Therefore, 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.

1.20 In relation to the availability of independent, impartial and effective review of any decision to remove a person from Australia, we note the 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'. However, 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.

1.21 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. Accordingly, the Parliamentary Joint Committee on Human Rights has previously concluded that judicial review in the Australian context is not likely to be sufficient to fulfil the international standard required of 'effective review' because it is only available on a number of restricted grounds of review.[28]

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

28 See 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.

1.22 The dissenting members note that the Migration Amendment (Repairing Medical Transfers) Bill 2019, 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.

1.23 The dissenting members note that reported conditions for individuals in regional processing countries raise concerns as to the adequacy of these undertakings and arrangements in ensuring that persons returned to such countries would not be at risk of suffering serious harm.

1.24 The dissenting members note 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, we note there is no statutory requirement[29] to consider these obligations, and discretionary or administrative safeguards alone are less stringent than the protection of statutory processes and can be amended or removed at any time.

1.25 The dissenting members note 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.

1.26 As such, the dissenting members consider that 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

1.27 In *Report 4 of 2019*,[30] the Parliamentary Joint Committee on Human Rights noted that by repealing the medical transfer provisions, these measures engage and

29 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.

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

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).[31] 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.

1.28 The Parliamentary Joint Committee on Human Rights 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.[32] 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 proposed to be repealed.[33] 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.[34] 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.

1.29 As such, the Parliamentary Joint Committee on Human Rights, 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

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31 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.

32 Parliamentary Joint Committee on Human Rights, *Report 4 of 2019* (10 September 2019) pp. 6-9.

33 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'.

34 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.

- the adequacy and effectiveness of the remaining discretionary transfer provisions under section 198B of the *Migration Act 1958* in protecting the right to health.

1.30 We note the minister's advice, received on 1 October 2019, that Australia has contracted health services to support the delivery of health care to transferees in regional processing countries. However, in light of reported conditions, 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 by the Parliamentary Joint Committee on Human Rights itself in 2013, concerns have been raised as to the adequacy of access to health care and the right to health for those held under regional processing arrangements.[35]

1.31 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.'[36] It has called on Australia to halt its policy of offshore processing of asylum claims.[37] 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'.[38]

1.32 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'.[39] *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,

35 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.

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

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

38 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].

39 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.[40]

1.33 We note 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). We also note 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.

1.34 However, the dissenting members of the committee note that section 198B transfers are discretionary. 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.[41] If the minister refuses to approve a person's transfer to Australia, the Independent Health Advice Panel[42] 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).[43]

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40 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.

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

42 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*.

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

1.35 A number of organisations have recently raised concerns about the frequency of delays in the administration of urgent medical transfers under the discretionary transfer system available under section 198B of the Migration Act and the negative health implications of these delays.[44] The UNHCR highlighted the report of the Queensland State Coroner in relation to the death of Hamid Khazaei as demonstrating 'that insufficiently transparent and accountable procedures for acting upon serious health concerns can have life-threatening and tragic consequences.'[45] Repealing the current mandatory legislative provisions and relying solely on administrative discretion to ensure persons receive adequate medical or psychiatric assessment raises concerns around whether this represents a retrogressive step in relation to the realisation of the right to health for refugees and asylum seekers in regional processing countries.

1.36 The dissenting members note 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).

1.37 However, the dissenting members note that 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.

1.38 The dissenting members consider that the medical transfer provisions sought to be repealed by this bill would appear to provide a higher degree of access to healthcare. As such, repealing this legislative safeguard may represent an unjustified retrogressive step in relation to the realisation of the right to health for refugees and asylum seekers in regional processing countries.

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44 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.

45 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.

1.39 We draw these human rights concerns to the attention of the minister and the Parliament.

Graham Perrett MP
Deputy Chair
Member for Moreton

Steve Georganas MP
Member for Adelaide

Senator Nita Green
Senator for Queensland

Senator Pat Dodson
Senator for Western Australia

Senator Nick McKim
Senator for Tasmania

Appendix 1

Deferred legislation[1]

3.1 The committee continues to defer its consideration of the **Discrimination Free Schools Bill 2018**.[2]

1 This appendix can be cited as: Parliamentary Joint Committee on Human Rights, Deferred legislation, *Report 6 of 2019*; [2019] AUPJCHR 104.

2 Previously deferred in Parliamentary Joint Committee on Human Rights, *Report 3 of 2019* (30 July 2019) p. 23, *Report 4 of 2019* (10 September 2019) p. 29, and *Report 5 of 2019* (17 September 2019) p. 85.