

Chapter 1

New and continuing matters

1.1 The committee comments on the following bills and legislative instruments, and in some instances, seeks a response or further information from the relevant minister.

Bills

Restoring Territory Rights Bill 2022¹

Purpose	This bill seeks to remove legislative constraints on the legislative powers of the Australian Capital Territory and Northern Territory
Sponsor	Mr Luke Gosling MP and Ms Alicia Payne MP
Introduced	House of Representatives, 1 August 2022
Rights	Public affairs; private life; life

Powers of territory governments to legislate for voluntary euthanasia

1.2 The governments of the Northern Territory (NT) and the Australian Capital Territory (ACT) were created by legislation of the federal Parliament. Their powers are set out in the *Northern Territory (Self-Government) Act 1978* (NT Act) and the *Australian Capital Territory (Self-Government) Act 1988* (ACT Act).

1.3 Currently, both Acts provide that the powers of the NT and ACT Legislative Assemblies do not extend to the making of laws which permit the intentional killing of a person (euthanasia) or the assisting of a person to terminate their life.²

1.4 This bill seeks to repeal the relevant provisions of the NT Act and ACT Act – the effect of which would be to enable the NT and ACT parliaments to legislate in this area.

1 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Restoring Territory Rights Bill 2022, *Report 3 of 2022*; [2022] AUPJCHR 24.

2 See *Northern Territory (Self-Government) Act 1978*, section 50A and *Australian Capital Territory (Self-Government) Act 1988*, subsections 23(1A) and (1B).

International human rights legal advice

Rights to take part in public affairs, private life, and life

1.5 By removing restrictions on the ability of the NT and ACT parliaments to legislate, the bill promotes the right of citizens to take part in public affairs. The right to take part in public affairs includes guarantees of the right of Australian citizens to stand for public office, to vote in elections and to have access to positions in public service.³ The right to take part in public affairs is an essential part of democratic government that is accountable to the people. It applies to all levels of government, including local government. It includes the right of every citizen to take part in the conduct of public affairs by exerting influence through public debate and dialogues with representatives either individually or through bodies established to represent citizens.⁴

1.6 The United Nations (UN) Human Rights Committee has stated in relation to this right:

Citizens participate directly in the conduct of public affairs when they exercise power as members of legislative bodies or by holding executive office...Citizens also participate directly in the conduct of public affairs when they choose or change their constitution or decide public issues through a referendum or other electoral process...

Where citizens participate in the conduct of public affairs through freely chosen representatives, it is implicit in article 25 that those representatives do in fact exercise governmental power and that they are accountable through the electoral process for their exercise of that power.⁵

1.7 As the law currently stands, citizens in the NT or ACT do not have the same opportunity, via their freely chosen representatives, to choose whether to legislate for voluntary euthanasia as those citizens residing in the States. As such, this bill would appear to promote the right to participate in public affairs.

1.8 In removing the prohibition on the territories legislating with regard to voluntary euthanasia, the bill does not directly engage any other human rights as it does not itself legislate in relation to this matter. Rather, it allows the territory parliaments to decide whether to make voluntary euthanasia lawful. Nonetheless, in

3 UN Human Rights Council, *General Comment No.25: Article 25, Right to participate in public affairs, voting rights and the right of equal access to public service* (1996).

4 International Covenant on Civil and Political Rights, article 25. See also UN Human Rights Council, *General Comment No.25: Article 25, Right to participate in public affairs, voting rights and the right of equal access to public service* (1996) [1],[5]–[6].

5 UN Human Rights Council, *General Comment No.25: Article 25, Right to participate in public affairs, voting rights and the right of equal access to public service* (1996) [6]–[7].

enabling the NT or ACT to legislate in relation to voluntary euthanasia, the bill indirectly engages the right to a private life and the right to life.

1.9 The right to a private life prohibits arbitrary and unlawful interferences with an individual's privacy, family, correspondence or home.⁶ A private life 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.

1.10 The European Court of Human Rights has held that laws preventing a person from exercising their choice to avoid, what they consider will be an undignified and distressing end to their life, may limit the right to a private life.⁷ In particular, it has held:

the Court considers that an individual's right to decide by what means and at what point his or her life will end, provided he or she is capable of freely reaching a decision on this question and acting in consequence, is one of the aspects of the right to respect for private life.⁸

1.11 As such, if NT or ACT laws are enacted enabling an individual to decide when they may choose to end their own life is likely to promote the right to a private life.

1.12 Such laws may also limit the right to life. The right to life prohibits the state from arbitrarily killing a person and imposes an obligation on the state to protect people from being killed by others or identified risks.⁹ It is not an absolute right, and by requiring that deprivations of life must not be arbitrary, the right 'implicitly recognizes that some deprivations of life may be non-arbitrary', but such 'exceptional measures should be established by law and accompanied by effective institutional safeguards designed to prevent arbitrary deprivations of life'.¹⁰ In relation to voluntary euthanasia, the UN Human Rights Committee has commented:

States parties that allow medical professionals to provide medical treatment or the medical means in order to facilitate the termination of life of afflicted adults, such as the terminally ill, who experience severe physical or mental pain and suffering and wish to die with dignity, must ensure the existence of robust legal and institutional safeguards to verify that medical professionals are complying with the free, informed, explicit

6 International Covenant on Civil and Political Rights, article 17. See also UN Human Rights Committee, *General Comment No. 16: Article 17* (1988) [3]–[4].

7 European Court of Human Rights, *Pretty v United Kingdom* (Application no. 2346/02) (2002) [67].

8 European Court of Human Rights, *Haas v Switzerland* (Application no. 31322/07) (2011) [51].

9 International Covenant on Civil and Political Rights, article 6(1) and Second Optional Protocol to the International Covenant on Civil and Political Rights, article 1.

10 United Nations Human Rights Committee, *General comment No. 36: on article 6 of the International Covenant on Civil and Political Rights on the right to life* (2018) [10].

and, unambiguous decision of their patients, with a view to protecting patients from pressure and abuse.¹¹

Committee view

1.13 The committee notes that this bill does not itself make voluntary euthanasia legal. Rather it empowers the NT and ACT parliaments to make that choice. The committee considers that this bill, by removing restrictions on the ability of the NT and ACT parliaments to legislate in relation to voluntary euthanasia, promotes the right of citizens to take part in public affairs, by ensuring their elected representatives can choose whether to legislate in this area.

1.14 As the bill does not itself make voluntary euthanasia legal, the committee considers the bill does not directly engage any other human rights. The committee notes that should the NT and ACT Parliaments choose to legalise voluntary euthanasia, this may promote the right to a private life and may limit the right to life.

1.15 The committee draws its human rights advice to the attention of the legislation proponents and the Parliament.

11 United Nations Human Rights Committee, *General comment No. 36: on article 6 of the International Covenant on Civil and Political Rights on the right to life* (2018) [9].

Social Security (Administration) Amendment (Repeal of Cashless Debit Card and Other Measures) Bill 2022¹

Purpose	<p>This bill seeks to abolish the cashless welfare arrangements in Part 3D of the <i>Social Security (Administration) Act 1999</i>, and facilitate arrangements for individuals to enter or re-enter the income management regime under Part 3B of the Act</p> <p>The bill also seeks to make consequential amendments to the <i>A New Tax System (Family Assistance) (Administration) Act 1999</i>, the <i>National Emergency Declaration Act 2020</i> and the <i>Social Security Act 1991</i> to reflect the repeal of Part 3D and associated measures</p>
Portfolio	Social Services
Introduced	House of Representatives, 27 July 2022
Rights	Social security; private life; equality and non-discrimination; adequate standard of living; rights of the child

Abolishing the Cashless Debit Card program

1.16 The bill seeks to abolish the Cashless Debit Card (CDC) program² and transition certain individuals to the income management regime under Part 3B of the *Social Security (Administration) Act 1999* (the Act) following the closure of the CDC program. Regarding the latter, the bill would subject certain persons to the income management regime if, among other things, on the day before the 'closure day'³ of the CDC program, they were a CDC participant due to Northern Territory residency⁴ and are within a class of persons determined by the minister by legislative

1 This entry can be cited as: Parliamentary Joint Committee on Human Rights, *Social Security (Administration) Amendment (Repeal of Cashless Debit Card and Other Measures) Bill 2022*, Report 3 of 2022; [2022] AUPJCHR 25.

2 Item 64 would repeal Part 3D of the *Social Security (Administration) Act 1999*, which contains the substantive provisions establishing the Cashless Debit Card program.

3 Item 1 would establish a 'closure day', being the day that Part 1 of the bill would commence the process of abolishing the CDC program, and a 'repeal day', being the day that Part 3D of the *Social Security (Administration) Act 1999* is repealed by Part 2 of the bill and the CDC program would cease in its entirety.

4 Northern Territory participants who leave the Northern Territory may remain subject to the income management regime despite no longer meeting the Northern Territory residency requirement. See items 9, 10, 13 and 14.

instrument.⁵ Such persons would include participants who are identified in a child protection notice;⁶ vulnerable welfare payment recipients;⁷ disengaged youth;⁸ long term welfare payment recipients;⁹ participants who have an eligible care child who is required to be, but is not, enrolled at a primary or secondary school;¹⁰ participants who meet the school attendance criteria (namely where an unsatisfactory school attendance situation exists in relation to an eligible care child);¹¹ and participants who are the subject of a State or Territory referral notice.¹² Additionally, participants in the Cape York region of Far North Queensland may be required to transition from the CDC program to income management if the Queensland Commission (also known as the 'Family Responsibilities Commission', a body which operates under Queensland state law) gives the Secretary a written notice requiring a person to be subject to the income management regime.¹³

1.17 The bill provides for some exemptions. A person who would otherwise meet the eligibility criteria to transition to income management under this bill may not become subject to the income management regime if the Secretary makes a determination that the person should not be subject to the regime because it would pose a serious risk to their mental, physical or emotional wellbeing, or because the person has demonstrated reasonable and responsible management of their affairs.¹⁴ The person seeking the exemption would bear the onus of producing evidence to satisfy the Secretary that they are suitable to be exempt.¹⁵

5 Items 2–4, 7–8, 11–12, 15–16, 18–19 and 27–28.

6 Items 2 and 3.

7 Items 4 and 7.

8 Items 8 and 11.

9 Items 12 and 15.

10 Items 16 and 17.

11 Items 18 and 19.

12 Items 27 and 28.

13 Items 20 and 23.

14 See items 7, 11, 15, 17, 19, 26 and 38. The minister's powers to make these determinations exempting people from income management are set out in subsections 124PHA(1) or 124PHB(3) of the *Social Security (Administration) Act 1999*. It is noted that a determination made under subsection 124PHA(1) does not apply to persons in the Cape York area (subsection 124PHA(5)) but may apply to persons subject to the regime due to the Queensland Commission (see item 26).

15 *Social Security (Administration) Act 1999*, sections 124PHA and 124PHB.

1.18 Finally, the bill would enable CDC participants in certain areas¹⁶ to request to cease being a participant on or after the 'closure day' of the CDC program but before the 'repeal day' (that being the date when the CDC program ceases in its entirety for all participants).¹⁷ The effect of this amendment would be to enable certain participants to voluntarily 'opt-out' of the CDC program as soon as Part 1 of this bill commences and prior to the repeal of the CDC program, which would occur at a later date.¹⁸ However, as discussed below (at paragraph [1.30]), this opt-out mechanism does not appear to prevent certain participants being compulsorily transitioned to the income management regime.

Preliminary international human rights legal advice

Rights to social security, private life, adequate standard of living, equality and non-discrimination and rights of the child

1.19 As the committee has previously reported, measures relating to the CDC program engage numerous human rights.¹⁹ The committee has found that, to the extent that the CDC program ensures a portion of an individual's welfare payment is available to cover essential goods and services, the CDC program could have the potential to promote rights, including the right to an adequate standard of living and the rights of the child.²⁰ However, the committee has found that the CDC program also engages and limits a number of other human rights, including the rights to a private life,²¹ social security²² and equality and non-discrimination.²³ In particular, it

16 The areas would include Ceduna (item 33), East Kimberly (item 34), Goldfields (item 35), Bundaberg and Hervey Bay (item 36), Cape York (item 38) and the Northern Territory (item 40).

17 Items 33–36, 38 and 40.

18 Item 1 establishes the 'closure day' as the day on which Part 1 of Schedule 1 of this bill commences and the 'repeal day' as the day on which Part 2 of Schedule 1 of this bill commences. Part 1 would commence on the later of the day after the bill receives the Royal Assent and 19 September 2022. Part 2 would commence on a day to be fixed by Proclamation, however if the provisions do not commence within 6 months beginning on the day the bill receives the Royal Assent, then they would commence on the day after the end of that 6-month period.

19 See Parliamentary Joint Committee on Human Rights, *Thirty-first report of the 44th Parliament* (24 November 2015) pp. 21-36; *Report 7 of 2016* (11 October 2016) pp. 58-61; *Report 9 of 2017* (5 September 2017) pp. 34-40; *Report 11 of 2017* (17 October 2017) pp. 126-137; *Report 8 of 2018* (21 August 2018) pp. 37-52; *Report 2 of 2019* (2 April 2019) pp. 146–152; *Report 1 of 2020* (5 February 2020) pp. 132–142; *Report 1 of 2021* (3 February 2021) pp. 83–102; *Report 14 of 2021* (24 November 2021) pp. 14–18.

20 International Covenant on Economic, Social and Cultural Rights, article 11, and Convention on the Rights of the Child.

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

22 International Covenant on Economic, Social and Cultural Rights, article 9.

limits the rights to a private life and 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. Further, as the CDC program disproportionately affects Aboriginal and Torres Strait Islander persons,²⁴ it also engages and limits the right to equality and non-discrimination.²⁵ In relation to whether this limitation on rights is reasonable, necessary and proportionate, the committee has previously found that, while the stated objective of the CDC program – to combat social harms caused by the use of harmful products – would constitute a legitimate objective, it is not clear that the CDC program is effective to achieve this objective, noting in particular, that the evaluations are inconclusive regarding its effectiveness, and whether it has caused or contributed to other harms. Additionally, the committee has held that it has not been clearly demonstrated that the CDC program constitutes a proportionate limit on human rights, having regard to the absence of adequate and effective safeguards to ensure that limitations on human rights are the least rights restrictive way of achieving the legitimate objective, and the absence of sufficient flexibility within the program to treat different cases differently. For these reasons, the committee has previously considered that the CDC program appears to impermissibly limit the rights to social security, a private life and equality and non-discrimination.²⁶

1.20 The explanatory memorandum acknowledges that the CDC program is discriminatory and unfair, referencing the Australian National Audit Office's recent findings that the program did not meet its objectives.²⁷ The statement of compatibility states that abolishing the CDC program will advance the protection of

23 International Covenant on Civil and Political Rights, articles 2, 16 and 26 and International Covenant on Economic, Social and Cultural Rights, article 2. It is further protected with respect to people with disability by the Convention on the Rights of Persons with Disabilities, article 2.

24 The statement of compatibility, p. 33, states that approximately 49 per cent of CDC program participants are First Nations people.

25 International Covenant on Civil and Political Rights, article 26. 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, see *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.

26 See most recently Parliamentary Joint Committee on Human Rights, *Report 14 of 2021* (24 November 2021) pp. 14–18.

27 Explanatory memorandum, p. 6.

human rights by giving individuals appropriate choice over how they receive their welfare payments.²⁸

1.21 In light of the myriad ways in which the CDC program has limited human rights, in abolishing this specific program the bill would address the human rights concerns previously raised by this committee in relation to the program and, for those participants removed from any form of welfare restrictions, would alleviate the adverse impact of the program on their rights.

1.22 However, by requiring certain individuals to transition from the CDC program to the income management regime, the bill also engages and limits multiple human rights.²⁹ A person subject to the income management regime would continue to have a portion of their social security payment managed or quarantined and could only spend their restricted funds on 'priority needs' (which excludes alcohol and gambling).³⁰ By subjecting an individual to mandatory income management and restricting how they may spend a portion of their social security payment, the measure limits the rights to social security and a private life insofar as it interferes with an individual's freedom and autonomy to organise and make decisions about their private and family life. 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,³¹ and enjoyment of the right requires that social support schemes must be accessible, providing universal coverage without discrimination.³²

1.23 The measure may also engage and limit the right to an adequate standard of living. This right is often engaged simultaneously with the right to social security and requires that Australia take steps to ensure the availability, adequacy and

28 Statement of compatibility, p. 35.

29 The committee has previously commented on mandatory income management in Parliamentary Joint Committee on Human Rights, *2016 Review of Strong Futures measures* (16 March 2016) pp. 37–62; *Eleventh Report of 2013: Stronger Futures in the Northern Territory Act 2012 and related legislation* (June 2013) pp. 45–62.

30 Department of Social Services, [Income Management](#) (5 April 2022); Statement of compatibility, pp. 33–34.

31 The Parliamentary Joint Committee on Human Rights has previously stated that the income management regime fails to promote social inclusion, but rather stigmatises individuals, and as such, limits the enjoyment of the right to social security, an adequate standard of living and privacy: *2016 Review of Strong Futures measures* (16 March 2016) p. 47.

32 UN Committee on Economic, Social and Cultural Rights, *General Comment No. 19: The Right to Social Security* (2008) [3]. The core components of the right to social security are that social security, whether provided in cash or in kind, must be available, adequate, and accessible.

accessibility of food, clothing, water and housing for all people in its jurisdiction.³³ Concerns have previously been raised regarding the inflexibility and restrictiveness of the BasicsCard (which those subject to income management are required to use), noting that fewer merchants accept the BasicsCard compared to the CDC and participants are unable to use the BasicsCard to purchase groceries and other essential services online.³⁴ In light of these concerns, it is not clear whether transitioning from the CDC program to the income management regime may result in difficulties for participants in accessing and meeting their basic needs, such as food, clothing and housing. If this were the case, the measure may limit the right to an adequate standard of living.³⁵

1.24 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.³⁶ The measure would indirectly limit the right to equality and non-discrimination due to its disproportionate impact on Aboriginal and Torres Strait Islander persons and its differential treatment of participants based on geographical location. The statement of compatibility states that approximately 49 per cent of

33 International Covenant on Economic, Social and Cultural Rights, article 11.

34 Parliamentary Library, [Bills Digest No. 001, 2022-23](#) (1 August 2022) pp. 7–8. Telecommunications outages also appear to have an acute impact on individuals subject to the income management regime. In the Northern Territory, for example, evidence has been provided that telecommunications outages in remote Aboriginal communities result in disruptions to EFTPOS facilities and consequently have left individuals subject to the income management regime unable to purchase basic goods: see NAAJA, *Submission 17*, pp. 4–5 and 8 to the Senate Standing Committee on Community Affairs, *Inquiry into Social Security (Administration) Amendment (Repeal of Cashless Debit Card and Other Measures) Bill 2022*. See also Northern Territory Women's Legal Services, *Submission 6*, pp. 4–5; Tangentyere Council, *Submission 29*, p. 5.

35 The Parliamentary Joint Committee on Human Rights has raised concerns that welfare conditionality more generally may limit multiple rights, including the rights to social security and an adequate standard of living. See *ParentsNext: examination of Social Security (Parenting payment participation requirements – class of persons) Instrument 2021* (4 August 2021) pp 73–112.

36 *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'.

CDC program participants are First Nations persons.³⁷ There is evidence to suggest that an even higher proportion of CDC participants in the Northern Territory and Cape York region are Aboriginal and Torres Strait Islander persons,³⁸ noting that it is participants in these geographical areas that are to be transitioned to mandatory income management.³⁹

1.25 Further, noting that 'disengaged youth' (which includes children aged between 15 and 17 years)⁴⁰ are a class of participants who are to be transitioned to the income management regime, the measure would engage the rights of the child. Children have special rights under human rights law taking into account their particular vulnerabilities.⁴¹ Children's rights are protected under a number of treaties, particularly the Convention on the Rights of the Child. All children under the age of 18 years are guaranteed these rights, without discrimination on any grounds.⁴² For the reasons outlined above, the rights of a child to social security, privacy and equality and non-discrimination would be engaged and limited by subjecting disengaged youth to mandatory income management.⁴³ Additionally, noting that the bill does not provide an individual assessment of those participants who are to be transitioned from the CDC program to the income management regime,⁴⁴ the measure would appear to raise issues regarding Australia's obligation to ensure that, in all actions concerning children, the best interests of the child are a primary consideration.⁴⁵ This obligation requires legislative, administrative and

37 Statement of compatibility, p. 33.

38 As at 3 June 2022 there were 3,931 cashless debit card participants in the Northern Territory, 78% of whom are Indigenous: see Parliamentary Library, [Bills Digest No. 001, 2022-23](#) (1 August 2022) p. 9. See also Australian Council of Social Service (ACOSS), *Submission 6*, p. 2; NAAJA, *Submission 17*, p. 4 and NTCOSS, *Submission 18*, p. 2 to the Senate Standing Committee on Community Affairs, *Inquiry into Social Security (Administration) Amendment (Repeal of Cashless Debit Card and Other Measures) Bill 2022*.

39 The explanatory memorandum states that the intention of the bill is to end compulsory income management in most CDC program areas other than the Northern Territory and Cape York area: pp. 9, 10, 12–16.

40 Note that Category E payments apply to those aged between 15–25 years, see *Social Security (Administration) Act 1999*, s 123UCB.

41 Convention on the Rights of the Child. See also, UN Human Rights Committee, *General Comment No. 17: Article 24* (1989) [1].

42 UN Human Rights Committee, *General Comment No. 17: Article 24* (1989) [5]. See also International Covenant on Civil and Political Rights, articles 2 and 26.

43 Convention on the Rights of the Child, articles 2, 16 and 26.

44 Statement of compatibility, p. 33.

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

judicial bodies and institutions to systematically consider how children's rights and interests are or will be affected directly or indirectly by their decisions and actions.⁴⁶

1.26 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.

1.27 The stated objective of the measure is to abolish the CDC program through a staged transition – which, as outlined above, would involve transitioning certain participants to mandatory income management.⁴⁷ While abolishing the CDC program would be a rights-enhancing measure (as set out above), the stated objective appears to be more of a description of what the measure does rather than articulating the specific objective being pursued by transitioning certain CDC participants to mandatory income management. Based on the information provided in the explanatory materials, it is not clear why it is necessary to transition certain CDC participants to mandatory income management.

1.28 A key aspect of whether any limitation on rights can be justified is whether the limitation is proportionate to the objective being sought. In this respect, it is necessary to consider a number of factors, including whether the measure provides sufficient flexibility to treat different cases differently. For CDC participants in the Northern Territory, there appears to be little flexibility to consider the merits of an individual case, as participation in the income management regime is broadly based on geographical location and the type of social security payment received. As outlined above, the measure would require classes of persons (as determined by legislative instrument) who exit the CDC program to enter or re-enter the income management regime where they reside in the Northern Territory and meet other specified criteria.⁴⁸ The explanatory memorandum states that it is appropriate to base entry or re-entry into income management on a class specified in a legislative instrument as this will allow transition from the CDC program in a way that is consistent with the needs of different program participants in the Northern Territory.⁴⁹ There appears to be greater flexibility to treat different cases differently in relation to participants in the Cape York area, as entry or re-entry to the income management regime would be based, among other things, on an individual assessment by the Queensland Commission.

46 UN Committee on the Rights of Children, *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].

47 Statement of compatibility, p. 32

48 The criteria, as set out in Part 3B of the *Social Security (Administration) Act 1999*, relate to child protection; vulnerable welfare payment recipients; disengaged youth; long term welfare payment recipients; school enrolment; school attendance; or other state or territory referrals.

49 Explanatory memorandum, p. 8.

1.29 A related factor in assessing proportionality is whether the measure is sufficiently circumscribed. By specifying classes of persons who are to be subjected to the income management regime, such as disengaged youth, vulnerable welfare payment recipients and long-term welfare recipients, the bill adopts a more targeted approach than that of the CDC program. While this would assist with proportionality, there remain questions as to whether this approach is sufficiently individualised.

1.30 Another consideration is whether the measure is accompanied by sufficient safeguards. The statement of compatibility notes that certain participants can opt-out of the program during stage one of the bill by requesting the Secretary to cease their program participation.⁵⁰ However this opt-out mechanism does not appear to offer any safeguard value for those required to transition to mandatory income management. The statement of compatibility notes that while participants in the Cape York region are able to request the Secretary to cease their program participation, the Queensland Commission will still be able to subject such participants to mandatory income management despite any such request.⁵¹ Further, while participants in the Northern Territory appear to be able to request the Secretary to cease their CDC program participation,⁵² it is not clear that such a request would prevent compulsory transition to the income management regime if such a participant otherwise met the eligibility criteria.

1.31 To the extent that participants can access the exemptions outlined above (in paragraph [1.17]), these provisions may operate as a safeguard. However, the value of this safeguard will depend on how it operates in practice, noting the committee has previously raised concerns about the adequacy and effectiveness of these exemptions in the context of the CDC program.⁵³

1.32 A further safeguard identified in the statement of compatibility is the occurrence of community consultations in affected areas.⁵⁴ The statement of compatibility notes that consultations occurred in June 2022 to determine the form of the transition from the CDC program and the supports that communities and individuals would need during the transition. It states that community consultations will continue throughout 2022 and following these consultations, a further bill will be introduced to address the transition for individuals who access income management arrangements after they exit the CDC program. It notes that transitional arrangements will include an extensive communication strategy and face-to-face engagement in CDC program areas working in collaboration with local support

50 Statement of compatibility, p. 32.

51 Statement of compatibility, pp. 33 and 35.

52 Item 40.

53 See Parliamentary Joint Committee on Human Rights, *Report 1 of 2021* (3 February 2021) pp. 98–102.

54 Statement of compatibility, p. 32.

services, and will enable former CDC participants to receive accurate information about their circumstances and options.⁵⁵ It is clear that consultation with affected communities was taken into account in deciding to discontinue the CDC program. However, it is not clear the extent to which communities were consulted about those aspects of the bill which transition CDC participants to mandatory income management. Although the statement of compatibility suggests that future consultations may genuinely seek the consent of communities and individuals affected by the transition to income management, it is not clear that such targeted consultation has occurred to date.

1.33 As the committee has previously reported, for consultation to be an effective safeguard, it must be a two-way deliberative process of dialogue in advance of a decision to progress the measure.⁵⁶ This is particularly the case where Aboriginal and Torres Strait Islander people are affected by the decision. Article 19 of the United Nations (UN) Declaration on the Rights of Indigenous Peoples provides that States should consult and cooperate in good faith with indigenous peoples in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.⁵⁷ The right of indigenous peoples to be consulted about measures which impact on them is a critical component of free, prior and informed consent.⁵⁸ Genuine consultation in this context should be 'in the form of a dialogue and negotiation towards consent'.⁵⁹

1.34 It is not clear based on the information in the explanatory materials whether the consultation process associated with the current bill contained the constituent elements of free, prior and informed consent for the purposes of international human rights law. For instance, it is not clear whether communities and individuals affected had the opportunity to genuinely influence the outcome of the decision-making processes affecting them or whether consent was achieved prior to

55 Statement of compatibility, p. 31.

56 See Parliamentary Joint Committee on Human Rights, *Report 1 of 2021* (3 February 2021) pp. 95–98.

57 While the UN Declaration on the Rights of Indigenous Peoples is not included in the definition of 'human rights' that this committee considers under the *Human Rights (Parliamentary Scrutiny) Act 2011*, it provides clarification as to how human rights standards under international law, including under the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights apply to the particular situation of indigenous peoples, and as such is relevant to this analysis.

58 UN Human Rights Council, *Free, prior and informed consent: a human rights-based approach - Study of the Expert Mechanism on the Rights of Indigenous Peoples*, A/HRC/39/62 (2018) [14].

59 UN Human Rights Council, *Free, prior and informed consent: a human rights-based approach - Study of the Expert Mechanism on the Rights of Indigenous Peoples*, A/HRC/39/62 (2018) [20].

introducing the measure.⁶⁰ The ability to genuinely influence the decision-making process is a fundamental component of good faith consultation and important for realising article 19 of the UN Declaration on the Rights of Indigenous Peoples.⁶¹

1.35 Finally, it is necessary to consider whether any less rights restrictive alternatives could achieve the same stated objective. It is not clear why the bill requires certain participants to be compulsorily transitioned to the income management regime rather than being able to voluntarily opt-in to the regime, or at a minimum, being subjected to the regime on the basis of individual circumstances. These options would appear to be a less rights restrictive way of achieving the stated objective.

Committee view

1.36 For many years the committee has raised concerns regarding the human rights compatibility of the CDC program with multiple human rights. As such, in abolishing this specific program the committee considers this bill is a rights-enhancing measure. In particular, it considers the bill would address the human rights concerns previously raised by the committee in relation to the CDC program and, for those participants removed from any form of welfare restrictions, would alleviate the adverse impact of the program on their rights.

1.37 However, the committee notes that the bill, in transitioning certain CDC participants to mandatory income management, will limit a number of human rights. The committee considers further information is required to assess the compatibility of this measure with multiple human rights, and as such seeks the minister's advice in relation to:

- (a) the objective that is sought to be achieved by compulsorily transitioning certain participants from the CDC program to the income management regime and why it is necessary to achieving the stated objective of abolishing the CDC program;
- (b) why CDC participants in the Northern Territory are being treated differently from participants in other geographical areas;
- (c) for those participants in the Northern Territory who would be required to transition to the income management regime, whether a request to

60 UN Human Rights Council, *Free, prior and informed consent: a human rights-based approach - Study of the Expert Mechanism on the Rights of Indigenous Peoples*, A/HRC/39/62 (2018) [15]–[16].

61 UN Human Rights Council, *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people*, A/HRC/12/34 (2009) [46]–[47]; UN Human Rights Council, *Free, prior and informed consent: a human rights-based approach - Study of the Expert Mechanism on the Rights of Indigenous Peoples*, A/HRC/39/62 (2018) [15]. See also

- the Secretary to cease participation in the CDC program could prevent a participant being subjected to mandatory income management;
- (d) why certain participants are being compulsorily transitioned to the income management regime, rather than being able to voluntarily opt-in to the regime or, at a minimum, subjecting participants to the regime based on individual circumstances;
 - (e) the nature of the consultation that was undertaken with affected communities and individuals regarding the measure to compulsorily transition certain participants to income management, and the outcomes of such consultation;
 - (f) whether consideration was given to less rights restrictive ways to achieve the stated objective, and what other safeguards would operate to assist the proportionality of transitioning individuals to compulsory income management; and
 - (g) whether participants who will be subjected to the income management regime will have an opportunity in the future to opt-out of this regime or cease their participation in mandatory income management.

Legislative Instruments

Migration (Daily maintenance amount for persons in detention) Determination (LIN 22/031) 2022 [F2022L00877]¹

Purpose	This legislative instrument increases the daily amount from 1 July 2022 that certain detainees will owe the Commonwealth for the cost of their detention
Portfolio	Home Affairs
Authorising legislation	<i>Migration Act 1958</i>
Last day to disallow	This legislative instrument is exempt from disallowance (see section 10 of the Legislation (Exemptions and Other Matters) Regulation 2015).
Rights	Right not to be punished twice; humane treatment in detention

Liability for costs of detention

1.38 This legislative instrument increases, from \$456.23 to \$490.69, the determined daily cost of maintaining a person in immigration detention between 1 July 2022 to 30 June 2024.² Persons convicted of people smuggling and illegal foreign fishing offences are liable to repay the Commonwealth for this cost of their immigration detention.³

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- 1 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Migration (Daily maintenance amount for persons in detention) Determination (LIN 22/031) 2022 [F2022L00877], *Report 3 of 2022*; [2022] AUPJCHR 26.
 - 2 Subsection 262(3) of the *Migration Act 1958* provides that this sum is to be no more than the cost to the Commonwealth of detaining a person at that place in that period. The explanatory statement states that the amount specified does not include indirect, variable or associated departmental costs, and is therefore no more than the actual cost (p. 2).
 - 3 *Migration Act 1958*, section 262. Persons will be liable where: they are, or have been, detained under section 189 (as an unlawful non-citizen); were on board a vessel (not being an aircraft) when it was used in connection with the commission of an offence against the Migration Act or against a prescribed law in force in the Commonwealth or in a State or Territory, being a law relating to the control of fishing; and have been convicted of that offence.

Preliminary international human rights legal advice

Right not to be punished twice and right to humane treatment in detention

1.39 Making a person liable for the cost of their immigration detention, where that person is being detained in relation to conduct for which they have also been convicted of a criminal offence, may engage the right not to be punished twice, which is a dimension of the right to a fair trial and fair hearing. If the imposition of a cost for mandatory immigration detention may properly be regarded as a penalty, it may be that, as a matter of international human rights law, the imposition of this charge (and consequently an increase in that charge) would constitute a criminal penalty, such that the criminal process rights under articles 14 and 15 of the International Covenant on Civil and Political Rights (relating to the right to a fair trial and fair hearing) would apply.

1.40 The test for whether a matter should be characterised as 'criminal' for the purposes of international human rights law relies on three criteria:

- (a) the domestic classification of the offence;
- (b) the nature of the offence; and
- (c) the severity of the penalty.⁴

1.41 In relation to (a), liability for the cost of immigration detention as a debt to the Commonwealth is civil in nature, capable of being recovered in a legal action for debt. However, the term 'criminal' has an autonomous meaning in human rights law, such that a penalty or other sanction may be 'criminal' for the purposes of the International Covenant on Civil and Political Rights even though it is considered 'civil' under Australian domestic law.

1.42 In relation to (b), a penalty will likely be considered criminal under international human rights law if it is intended to punish and deter, and the penalty applies to the public in general as opposed to being in a particular regulatory or disciplinary context. Section 262 of the *Migration Act 1958* (which establishes the authority for the imposition of this charge) may apply generally to any non-citizen. Further, the explanatory statement to this instrument states that the liability for immigration detention costs is 'a deterrent against people smuggling and illegal fishing and in recognition of the seriousness of the offences'.⁵ As deterrence and

4 For further detail, see the Parliamentary Joint Committee on Human Rights, *Guidance Note 2: Offence provisions, civil penalties and human rights* (December 2014).

5 Explanatory statement, [5].

punishment are the stated primary objectives of this measure, it may meet the test that the penalty is intended to punish and deter.⁶

1.43 In relation to (c), the potential severity of the penalty (that is, the liability for the cost of immigration detention) would depend on the potential length of detention. In this regard, it is not clear how long on average a person convicted of people smuggling or illegal fishing offences is held in immigration detention, or what the longest period of detention is.⁷ In addition, the potential severity of the penalty may also depend on the extent to which such debts are enforced in practice.

1.44 If the imposition of a debt owed to the Commonwealth were capable of being considered a penalty for the purposes of international human rights law, its imposition on those convicted of certain offences may be capable of being considered to be double punishment. A specific guarantee of the right to a fair trial in the determination of a criminal charge includes the right not to be tried and punished twice for an offence for which a person has already been finally convicted or acquitted (sometimes referred to as the principle of double jeopardy).⁸

1.45 Further, the imposition of liability for the cost of a person's immigration detention may raise questions of compatibility with the right to humane treatment in detention. The right to humane treatment in detention provides that all people deprived of their liberty must be treated with humanity and dignity.⁹ This applies to everyone in any form of state detention, including immigration detention, and provides that a person deprived of their liberty may not be subjected to any hardship or constraint other than that resulting from the deprivation of their liberty.¹⁰ In cases considering individuals detained under Australia's mandatory immigration detention scheme, the UN Human Rights Committee has found that the combination of subjecting individuals to arbitrary and protracted and/or indefinite detention, the

6 The *Migration Act 1958* was amended by the Migration Amendment (Abolishing Detention Debt) Bill in 2009. This bill removed liability for detention costs for several classes of person but retained it for people convicted of people smuggling and illegal fishing offences. The explanatory memorandum to this bill states that these provisions were being retained in response to the serious nature of the offences, and in recognition of the need for a significant deterrent (having regard to the rates of recidivism) (p. 4).

7 At 30 April 2022, there were 222 people who had arrived unlawfully by air or boat, held in immigration detention facilities. Of all persons held in immigration detention at this time, the average period of time held in detention was 726 days (with 9.6 per cent of all detainees having been held for more than 1,825 days). See, Department of Home Affairs, 'Immigration Detention and Community Statistics Summary' (30 April 2022).

8 International Covenant on Civil and Political Rights, article 14(7)

9 International Covenant on Civil and Political Rights, article 10.

10 UN Human Rights Committee, *General Comment No. 21: article 10 (Human Treatment of Persons Deprived of Their Liberty)* [3].

absence of procedural safeguards to challenge that detention, and the difficult detention conditions, cumulatively inflicts serious psychological harm on such individuals that amounts to cruel, inhuman or degrading treatment.¹¹ Increasing a detainee's liability for the cost of their detention may render the overall conditions of their immigration detention more difficult.

1.46 As this legislative instrument is exempt from disallowance, no statement of compatibility with human rights is required to be prepared.¹² As such, no assessment of the instrument's compatibility with human rights is available.

Committee view

1.47 The committee considers further information is required to assess the compatibility of this measure with the right not to be punished twice and the right to humane treatment in detention, and as such seeks the minister's advice in relation to:

- (a) whether the imposition of liability for the costs of immigration detention (and an increase in that cost) amounts to a criminal penalty for the purposes of international human rights law, in particular:
 - (i) what is the intention of imposing the charge on the detained person;
 - (ii) the average, and longest, length of time people who have been convicted of people smuggling or illegal foreign fishing offences (and are therefore liable for the cost of their immigration detention) have been held in immigration detention;
 - (iii) if the imposition of this charge were to be classified as a criminal penalty, whether this would impermissibly limit the right against double punishment; and
- (b) whether imposing a daily charge (including increasing it) limits the right to humane treatment in detention.

11 *F.K.A.G v. Australia*, UN Human Rights Committee Communication No. 2094/2011 (2013) [9.8]. See also *F.J. et al. v. Australia*, UN Human Rights Committee Communication No. 2233/2013 (2016) [10.6].

12 *Human Rights (Parliamentary Scrutiny) Act 2011*, section 9.

Migration Amendment (Protecting Australia's Critical Technology) Regulations 2022 [F2022L00541]

Migration Amendment (Postgraduate Research in Critical Technology—Student Visa Conditions) Regulations 2022 [F2022L00866]¹

Purpose	<p>The Migration Amendment (Protecting Australia's Critical Technology) Regulations 2022 [F2022L00541] create new public interest criteria, visa conditions and visa cancellation grounds in relation to visa applicants and visa holders who pose an unreasonable risk of unwanted critical technology knowledge transfer</p> <p>The Migration Amendment (Postgraduate Research in Critical Technology—Student Visa Conditions) Regulations 2022 [F2022L00866] create a new visa condition to screen for and manage risks to specified critical technologies in the postgraduate research sector</p>
Portfolio	Home Affairs
Authorising legislation	<i>Migration Act 1958</i>
Last day to disallow	15 sitting days after tabling (tabled in both the Senate and the House of Representatives on 26 July 2022). Notice of motion to disallow must be given by 25 October 2022 ²
Rights	Education; work; freedom of expression; equality and non-discrimination

Restriction on visa holders relating to critical technologies

1.48 These two legislative instruments regulate the ability of specified visa holders to undertake study or research where there is an 'unreasonable risk of unwanted transfer of critical technology by the visa holder'. They provide that the

- 1 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Migration Amendment (Protecting Australia's Critical Technology) Regulations 2022 [F2022L00541] and Migration Amendment (Postgraduate Research in Critical Technology—Student Visa Conditions) Regulations 2022 [F2022L00866], *Report 3 of 2022*; [2022] AUPJCHR 27.
- 2 In the event of any change to the Senate or House's sitting days, the last day for the notice would change accordingly.

minister can refuse to grant a visa on this basis (initially relating to student visas but applying to a further 12 subclasses of visas at a date to be specified by the minister), provide that a student visa holder may not change their course of study without ministerial approval,³ and empower the minister to cancel a visa where satisfied that there is an unreasonable risk of unwanted transfer of critical technology by the visa holder.

1.49 'Critical technology' refers to: technology of a kind specified by the minister in a further legislative instrument; or property (whether tangible or intangible) that is part of, a result of, or used for the purposes of researching, testing, developing or manufacturing any such specified technology.⁴ The 'unwanted transfer of critical technology' means any direct or indirect transfer of critical technology; or communication of information about such technology by the person that would: harm or prejudice the security or defence of Australia, or the health and safety of the Australian public or a section of the Australian public, or Australia's international relations; or interfere with or prejudice the prevention, detection, investigation, prosecution or punishment of a criminal offence against a law of the Commonwealth.⁵

Preliminary international human rights legal advice

Rights to education, work, freedom of expression and equality and non-discrimination

1.50 It is noted that the state has a right to control immigration. However, by amending the Migration Regulations 1994 to allow for visa cancellations for those in Australia, or requirements for certain visa holders to gain the minister's approval to change their course of study, if the minister considers they pose an unreasonable risk of unwanted critical technology knowledge transfer, these legislative instruments

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- 3 This condition was first established in Migration Amendment (Protecting Australia's Critical Technology) Regulations 2022 [F2022L00541], item 8 (visa conditions 8204A and B). These conditions were then repealed and replaced by visa condition 8208 in Migration Amendment (Postgraduate Research in Critical Technology—Student Visa Conditions) Regulations 2022 [F2022L00866].
 - 4 Migration Amendment (Protecting Australia's Critical Technology) Regulations 2022 [F2022L00541], item 1, definition contained in section 1.03.
 - 5 Migration Amendment (Protecting Australia's Critical Technology) Regulations 2022 [F2022L00541], item 2, subsection 1.15Q(1).

engage and may limit several human rights including the rights to education, work, freedom of expression and equality and non-discrimination.⁶

1.51 Establishing a requirement for certain visa holders to seek ministerial approval to undertake certain studies engages and may limit the right to education. The right to education provides that education should be accessible to all.⁷ This requires that States parties 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 the respect for human rights and fundamental freedoms. The requirement for certain visa holders to seek ministerial approval to undertake certain studies, and the provisions allowing for visa cancellations for persons in Australia, may also engage and limit the right to work. This right provides that everyone must be able to freely accept or choose their work, and includes a right not to be unfairly deprived of work.⁸ Enabling visas to be cancelled if certain information is communicated also appears to limit the right to freedom of expression. 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 print, in the form of art, or through any other media of an individual's choice.⁹

1.52 Further, because these measures would apply to non-citizens, and could potentially operate disproportionately in relation to people from particular countries, they also engage and may limit the right to equality and non-discrimination. This right 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.¹⁰ It is recognised that nation states have a broad discretion to regulate the issue of visas, and to establish criteria accompanying those visas, provided those laws are implemented in a non-discriminatory manner. The right to equality encompasses

6 Establishing further conditions on the granting, and possession of, certain visas may also engage the right to privacy (as acknowledged in the statements of compatibility). In addition, the cancellation of a visa may also have flow on effects, which may engage and limit the right to liberty, right to protection of the family, and Australia's non-refoulement obligations. These are recognised in the statements of compatibility.

7 International Covenant on Economic, Social and Cultural Rights, article 13.

8 International Covenant on Economic, Social and Cultural Rights, articles 6–7. See also, UN Committee on Economic, Social and Cultural Rights, *General Comment No. 18: the right to work (article 6)* (2005) [4].

9 International Covenant on Civil and Political Rights, article 19(2).

10 International Covenant on Civil and Political Rights, articles 2 and 26. Article 2(2) of the International Covenant on Economic, Social and Cultural Rights also prohibits discrimination specifically in relation to the human rights contained in the International Covenant on Economic, Social and Cultural Rights.

both 'direct' discrimination (where measures have a discriminatory intent) and 'indirect' discrimination (where measures have a discriminatory effect on the enjoyment of rights).¹¹ 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.¹²

1.53 These rights may be subject to permissible limitations where the limitation is prescribed by law, pursues a legitimate objective, is rationally connected to that objective, and is a proportionate means of achieving that objective. With respect to the right to equality and non-discrimination, differential treatment (including the differential effect of a measure that is neutral on its face) will not constitute unlawful discrimination if the differential treatment is based on reasonable and objective criteria such that it serves a legitimate objective, is rationally connected to that objective and is a proportionate means of achieving that objective.¹³

1.54 Human rights standards require that interferences with rights must have a clear basis in law (that is, they must be prescribed by law). This principle includes the requirement that laws must satisfy the 'quality of law' test, which means that any measures that interfere with human rights must be sufficiently certain and accessible, such that people understand the legal consequences of their actions or the circumstances under which authorities may restrict the exercise of their rights.¹⁴ The definition of 'critical technology' in section 1.03 refers to technology 'of a kind specified by the minister for the purposes of this definition in a further legislative instrument'; or property (whether tangible or intangible) that is part of, a result of, or used for the purposes of researching, testing, developing or manufacturing any such specified technology. The statement of compatibility with human rights gives little detail of what will be specified, stating that critical technologies can be digital (such as artificial intelligence) or non-digital (such as synthetic biology).¹⁵ It is therefore unclear what technology the minister may specify. Further, the 'unwanted transfer

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

12 *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'.

13 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].

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

15 Migration Amendment (Protecting Australia's Critical Technology) Regulations 2022 [F2022L00541], statement of compatibility, p. 12.

of' such technology includes both the direct and indirect transfer of such technology, or communication of information about such technology by the person where that would have specified deleterious results.¹⁶ It is unclear what the 'indirect' transfer of such technology or information would encompass.

1.55 With respect to the legitimate objective of this measure, the statement of compatibility states that the objective is to protect national security, public order, public health and safety, and Australia's international relations by preventing the unwanted direct and indirect transfer of critical technology to foreign actors and entities where such actions would prejudice or harm Australia's national security, defence or international relations, or the health and safety of the Australian community; or interfere with the prevention and prosecution of criminal offences.¹⁷ This would appear to be capable of constituting a legitimate objective for the purposes of international human rights law. However, the statement of compatibility does not provide any information as to whether there have been instances in the past where visa holders have communicated information about critical technologies, and this has resulted in harm to Australia's national security. As such, it is unclear whether this objective satisfies the requirement that the measure seeks to address an issue of public or social concern that is pressing and substantial enough to warrant limiting these rights. Further, because it is unclear what technologies the minister may specify to be 'critical technologies', the extent to which the measure may be capable of achieving the stated objective is not clear.

1.56 A key aspect of whether a limitation on a right can be justified is whether the limitation is proportionate to the objective being sought. In this respect, it is necessary to consider: whether a proposed limitation is sufficiently circumscribed; whether it is accompanied by sufficient safeguards; whether any less rights restrictive alternatives could achieve the same stated objective; and whether there is the possibility of oversight and the availability of review. In this regard, the statement of compatibility notes that a decision not to approve a student visa holder undertaking particular studies will be subject to merits review, and notes that such a decision will not limit that person's ability to undertake other studies in Australia.¹⁸

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- 16 Namely, where the transfer of that information would: harm or prejudice the security or defence of Australia, or the health and safety of the Australian public or a section of the Australian public, or Australia's international relations; or interfere with or prejudice the prevention, detection, investigation, prosecution or punishment of a criminal offence against a law of the Commonwealth. See Migration Amendment (Protecting Australia's Critical Technology) Regulations 2022 [F2022L00541], item 2, subsection 1.15Q(1).
- 17 Migration Amendment (Protecting Australia's Critical Technology) Regulations 2022 [F2022L00541], statement of compatibility, pp. 9–10.
- 18 Migration Amendment (Protecting Australia's Critical Technology) Regulations 2022 [F2022L00541], statement of compatibility, p. 10.

The availability of merits review assists with the proportionality of the measure. Further, the statement of compatibility states that subsection 1.15Q(1) sets out the scope and specific circumstances in which the communication of information about critical technology will amount to an unwanted transfer.¹⁹ However, because it is unclear precisely what 'critical technology' means, the potential breadth of the provisions is not clear, and so it is difficult to assess the adequacy of the safeguards that exist.

1.57 With respect to equality and non-discrimination, the statement of compatibility states that these measures will apply to all student visas, will be 'country-agnostic',²⁰ and will prevent the entry and stay of 'high risk individuals working in identified critical technology fields'.²¹ However, it is not clear whether this measure may have a disproportionate impact on visa applicants and visa holders of some nationalities more than others in practice.

Committee view

1.58 The committee requires further information in order to assess the compatibility of this measure with the rights to education, work, freedom of expression and equality and non-discrimination, and as such seeks the minister's advice in relation to:

- (a) what types of technology will be specified for the purposes of the definition of 'critical technology' and when;
- (b) what is meant by 'indirect' transfer of critical technology or communication of information about critical technology in subsection 1.15Q(1), and examples of the circumstances this is intended to address;
- (c) whether the objective these legislative instruments seek to achieve is an issue of public or social concern that is pressing and substantial enough to warrant limiting these rights, including whether there have been prior instances in which unwanted communication of technology intended to be captured by these measures has occurred; and

19 Migration Amendment (Protecting Australia's Critical Technology) Regulations 2022 [F2022L00541], statement of compatibility, p. 21.

20 Migration Amendment (Postgraduate Research in Critical Technology—Student Visa Conditions) Regulation 2022 [F2022L00866], statement of compatibility, p. 10.

21 Migration Amendment (Protecting Australia's Critical Technology) Regulations 2022 [F2022L00541], statement of compatibility, p. 22.

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- (d) whether there are certain nationalities in relation to whom these provisions may operate more frequently in practice, and if so, whether this differential treatment is based on reasonable and objective criteria.

