Parliamentary Joint Committee on Human Rights

Human rights scrutiny report

Report 5 of 2022

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Committee information

Under the *Human Rights (Parliamentary Scrutiny) Act 2011* (the Act), the committee's functions are to examine bills, Acts and legislative instruments for compatibility with human rights, and report 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 for compatibility with the human rights set out in seven international treaties to which Australia is a party.[1] The committee's *Guide to Human Rights* provides a short and accessible overview of the key rights contained in these treaties which the committee commonly applies when assessing legislation.[2]

The establishment of the committee builds on Parliament's tradition of legislative scrutiny. The committee's scrutiny of legislation seeks 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, most rights may be limited as long as it meets certain standards. Accordingly, a focus of the committee's reports is to determine whether any limitation on rights is permissible. In general, any measure that limits a human right must comply with the following limitation criteria: be prescribed by law; be in pursuit of a legitimate objective; be rationally connected to (that is, effective to achieve) its stated objective; and be a proportionate way of achieving that objective.

Chapter 1 of the reports include new and continuing matters. Where the committee considers it requires further information to complete its human rights assessment it will seek a response from the relevant minister, or otherwise draw any human rights concerns to the attention of the relevant minister and the Parliament. Chapter 2 of the committee's reports examine responses received in relation to the committee's requests for information, on the basis of which the committee has concluded its examination of the legislation.

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1 International Covenant on Civil and Political Rights; International Covenant on Economic, Social and Cultural Rights; International Convention on the Elimination of All Forms of Racial Discrimination; Convention on the Elimination of Discrimination against Women; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; Convention on the Rights of the Child; and Convention on the Rights of Persons with Disabilities.

2 See the committee's *Guide to Human Rights*. See also the committee's guidance notes, in particular *Guidance Note 1 – Drafting Statements of Compatibility*.

Report snapshot[1]

1.1 In this report the committee has examined the following bills and legislative instruments for compatibility with human rights. The committee's full consideration of legislation commented on in the report is set out at the page numbers indicated.

Bills

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Animal Health Australia and Plant Health Australia Funding Legislation Amendment Bill 2022

No comment

Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Bill 2022

No comment

Biosecurity Amendment (Strengthening Biosecurity) Bill 2022

The committee has deferred consideration of this bill.

1 This section can be cited as Parliamentary Joint Committee on Human Rights, Report snapshot, *Report 5 of 2022*; [2022] AUPJCHR 36.

2 The committee makes no comment on the remaining bills on the basis that they do not engage, or only marginally engage, human rights; promote human rights; and/permissibly limit human rights. This 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.

Crimes Legislation Amendment (Ransomware Action Plan) Bill 2022

The committee notes that this private member's bill appears to engage and may limit human rights. Should this bill 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.

Environment and Other Legislation Amendment (Removing Nuclear Energy Prohibitions) Bill 2022

No comment

Family Assistance Legislation Amendment (Cheaper Child Care) Bill 2022

No comment

Maritime Legislation Amendment Bill 2022

No comment

National Anti-Corruption Commission Bill 2022

National Anti-Corruption Commission (Consequential and Transitional Provisions) Bill 2022

Advice to Parliament

pp. 7-31

Investigative and reporting powers; contempt of Commission; journalist search warrants; and covert investigative powers

Multiple rights

These two bills seek to establish the National Anti-Corruption Commission, as an independent agency to investigate and report on serious or systemic corruption in the Commonwealth public sector. The committee notes that an inquiry into these bills will conclude on 10 November 2022, and therefore does not seek a response from the Attorney-General in the interests of ensuring the timeliness of its advice to Parliament.

The Commissioner's proposed investigative and reporting powers engage and limit multiple human rights, however the statement of compatibility largely provides a comprehensive explanation of how those limits are permissible. The committee recommends minor amendments to the bill and statement of compatibility. The bills would establish provisions for finding persons in contempt of the Commission, and the committee recommends an amendment to those provisions.

The bills would also enable the Commission to access information confidentially provided to journalists, including through search warrants and by invoking existing covert investigative powers. The committee recommends an amendment to the bill to strengthen existing safeguards relating to the issue of search warrants, and recommends a foundational human rights assessment of

the compatibility of the existing covert surveillance powers sought to be conferred on the Commission.

National Energy Transition Authority Bill 2022

No comment

Offshore Electricity Infrastructure Legislation Amendment Bill 2022

No comment

Ozone Protection and Synthetic Greenhouse Gas Management Reform (Closing the Hole in the Ozone Layer) Bill 2022

No comment

Ozone Protection and Synthetic Greenhouse Gas (Import Levy) Amendment Bill 2022

No comment

Ozone Protection and Synthetic Greenhouse Gas (Manufacture Levy) Amendment Bill 2022

No comment

Social Security (Administration) Amendment (Repeal of Cashless Debit Card and Other Measures) Bill 2022

Advice to Parliament

pp. 39-55

Abolishing Cashless Debit Card program

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

The bill (now Act) abolishes the Cashless Debit Card (CDC) program and transitions certain individuals to the income management regime following the closure of the CDC program. In particular, the Act subjects participants in the Northern Territory who are within a specified class of persons to mandatory income management.

The committee notes that were the income management regime to be made voluntary, as advised by the minister, the human rights concerns relating to compulsory income management would be addressed. However, until a further bill is introduced to facilitate the transition to a voluntary regime, transitioning certain CDC participants to mandatory income management limits a number of human rights. As the bill has now passed both Houses of Parliament, the committee makes no further comment.

Social Services and Other Legislation Amendment (Workforce Incentive) Bill 2022

No comment

Treasury Laws Amendment (More Competition, Better Prices) Bill 2022

Advice to Parliament

Increasing civil penalties
Right to a fair hearing

pp. 32-37

This bill seeks to increase the maximum financial penalties for contravention of various civil penalty provisions under competition and consumer law to $2.5 million for individuals. The committee considers that increasing the maximum penalties is an important measure to deter serious misconduct and protect consumers against egregious conduct, but notes that there is a risk that the penalties may be so severe as to constitute a 'criminal' sanction under international human rights law, and depending on the severity of the pecuniary penalty applied and whether a person is also subject to criminal proceedings, there may be a risk that the increased civil penalties are not consistent with criminal process rights.

The committee recommends that when civil penalties are so severe such that there is a risk that they may be regarded as 'criminal' under international human rights law, consideration be given to applying a higher standard of proof in the related civil penalty proceedings, and draws its concerns to the attention of the Assistant Minister and the Parliament.

Treasury Laws Amendment (Australia-India Economic Cooperation and Trade Agreement Implementation) Bill 2022

No comment

Legislative instruments

Chapter 1: New and continuing matters

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Migration Amendment (Protecting Australia's Critical Technology) Regulations 2022 [F2022L00541]
Migration Amendment (Postgraduate Research in Critical Technology—Student Visa Conditions) Regulations 2022 [F2022L00866]

Advice to Parliament

pp. 65-76

Restriction on visa holders relating to critical technologies

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

These two legislative instruments regulate the ability for specified visa holders to undertake study or research, and may be liable to visa cancellation, where there is an 'unreasonable risk of unwanted transfer of critical technology by the visa holder'.

By allowing for visa cancellations for people in Australia and establishing requirements for certain visa holders to gain the minister's approval to change their course of study or to communicate certain matters, these measures engage and may limit the rights to education, work, freedom of expression, and equality and non-discrimination.

The committee considers the measure pursues the important objective of seeking to protect national security, public order, public health and safety, and Australia's international relations by preventing the unwanted transfer of critical technology to malicious actors. The committee considers that this measure may be

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.

4 The committee makes no comment on the remaining legislative instruments on the basis that they do not engage, or only marginally engage, human rights; promote human rights; and/permissibly limit human rights. This is based on an assessment of the instrument and relevant information provided in the statement of compatibility (where applicable). The committee may have determined not to comment on an instrument notwithstanding that the statement of compatibility accompanying the instrument may be inadequate.

compatible with human rights, if the detail of what constitutes a 'critical technology' is sufficiently clear and accessible. It is intended that this detail will be specified in a future legislative instrument and the committee notes it will examine any such future instrument for compatibility with human rights.

Migration (Daily Maintenance Amount for Persons in Detention) Determination (LIN 22/031) 2022 [F2022L00877]

Advice to Parliament

pp. 56-64

Liability for costs of detention

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

This legislative instrument increases the determined daily cost of maintaining a person in immigration detention. Persons convicted of people smuggling and illegal foreign fishing offences are liable to repay the Commonwealth for the cost of their immigration detention.

The committee considers there is a risk that, for some affected persons, the penalty being imposed may be so severe as to amount to a criminal penalty under human rights law, meaning that the right not to be punished twice would apply and would risk being violated. The committee also considers that, having regard to previous findings by the United Nations Human Rights Committee regarding immigration detention in Australia, there may also be a risk that increasing the daily fee for certain immigration detainees has the effect of exacerbating detention conditions which have previously been found to amount to cruel, inhuman or degrading treatment, and which could constitute an impermissible breach of the right to humane treatment in detention. The committee draws these human rights concerns to the attention of the Minister and the Parliament.

Instruments imposing sanctions on individuals[5]

A number of legislative instruments impose sanctions on individuals. The committee has considered the human rights compatibility of similar instruments on a number of occasions, and retains scrutiny concerns about the compatibility of the sanctions regime with human rights.[6] However, as these legislative instruments do not appear to designate or declare any individuals who are currently within Australia's jurisdiction, the committee makes no comment in relation to these instruments at this stage.

5 See, Charter of the United Nations (Listed Persons and Entities) Amendment (No. 2) Instrument 2022 [F2022L01210]; Autonomous Sanctions (Designated Persons and Entities and Declared Persons—Russia and Ukraine) Amendment (No. 20) Instrument 2022 [F2022L01231].

6 See, most recently, Parliamentary Joint Committee on Human Rights, *Report 15 of 2021* (8 December 2021), pp. 2-11.

Chapter 1

New and continuing matters

1.1 The committee comments on the following bills.

Bills

National Anti-Corruption Commission Bill

National Anti-Corruption Commission (Consequential and Transitional Provisions) Bill 2022[1]

Purpose	The National Anti-Corruption Commission Bill seeks to create a new Commonwealth anti-corruption agency: the National Anti-Corruption Commission (the Commission). The Commission is intended to serve as an independent agency to investigate and report on serious or systemic corruption in the Commonwealth public sector, refer evidence of criminal corrupt conduct for prosecution, and undertake education and prevention activities regarding corruption The National Anti-Corruption Commission (Consequential and Transitional Provisions) Bill 2022 seeks to make changes that would support the establishment of the NACC
Portfolio	Attorney-General
Introduced	House of Representatives, 28 September 2022
Rights	Privacy; fair hearing; liberty; freedom of movement; freedom of expression; effective remedy; rights of persons with disabilities

Commission's investigative and reporting powers

1.2 The National Anti-Corruption Commission Bill (the bill) seeks to establish a National Anti-Corruption Commission (the Commission). The Commission would be vested with a range of powers in order to investigate 'corruption issues' where the Commissioner is of the opinion that the issue could involve corrupt conduct that is

1 This entry can be cited as: Parliamentary Joint Committee on Human Rights, National Anti-Corruption Commission Bill 2022 and National Anti-Corruption Commission (Consequential and Transitional Provisions) Bill 2022, *Report 5 of 2022*; [2022] AUPJCHR 36.

'serious or systemic',[2] and to report on those issues.[3] This would include the power to investigate conduct that took place before the commencement of the bill.[4] Corrupt conduct would include conduct of a public official that constitutes a breach of trust or abuse of the person's office, or any conduct of any person that adversely affects (or could adversely affect) either directly or indirectly the honest and impartial exercise of any public official's powers.[5] The words 'serious' and 'systemic' are stated to take their ordinary meaning, and the explanatory memorandum provides a series of examples of factors that may contribute to either the substance or result of conduct reaching those thresholds.[6]

1.3 To enable the Commission to exercise these powers, the bill would empower the Commission to: require the production of information, or a document or thing;[7] summon witnesses to attend hearings and answer questions under oath or affirmation;[8] apply for orders for the surrender of travel documents;[9] apply for an order to arrest a person;[10] require that information about a notice to produce or a private hearing summons must be kept secret for up to five years;[11] use and disclose investigation material in order to obtain derivative material (and disclose this to prosecutors in some cases);[12] conduct searches;[13] and report on the investigation.[14] Failure to comply with some of these powers would constitute a criminal offence and be punishable by periods of imprisonment between two and five years.[15]

2 Clause 41.

3 Part 8.

4 Subclause 8(4).

5 Clause 8.

6 Explanatory memorandum, pp. 116–117.

7 Claude 58. See also clause 65.

8 Clause 63.

9 Clause 88.

10 Clause 90.

11 Clause 95.

12 Clauses 104-109.

13 Part 7, Division 7.

14 Part 8.

15 Clauses 60, 61, 68, 69, 70, 71, 72, and 81.

International human rights legal advice

Multiple rights

1.4 The Commissioner's proposed investigative and reporting powers engage and limit multiple human rights.[16] Most human rights may be subject to permissible limitations where the limitation pursues a legitimate objective, is rationally connected to that objective and is a proportionate means of achieving that objective.

Right to privacy and reputation

1.5 Investigating people in relation to potential corrupt conduct—including conducting searches, compelling people to give evidence, disclosing evidence, and reporting on the investigation—engages and limits the right to privacy and reputation. The right to privacy includes the right to respect for private and confidential information, particularly the storing, use and sharing of such information.[17] It also includes the right to control the dissemination of information about one's private life, and protects against arbitrary and unlawful interferences with an individual's privacy and attacks on reputation.[18]

1.6 The statement of compatibility recognises that the right to privacy is engaged and limited by these measures. It states that the objectives of these provisions are to permit the detection and investigation of serious or systemic corrupt conduct, the making of findings and recommendations in relation to this, and the ability to prosecute or take other action in response to such conduct (including by enabling the Commission to report publicly on its findings in some circumstances). These would appear to constitute legitimate objectives for the purposes of international human rights law, and the inclusion of coercive powers enabling the Commission to investigate such matters would appear to be rationally connected to those objectives.

1.7 With respect to proportionality, the statement of compatibility sets out numerous safeguards in relation to the Commission's investigative and reporting powers (as provided in the main bill)[19] that appear to make the limitations on the right to privacy likely to be proportionate. These include: less obtrusive powers being

16 The bill would also establish an Inspector of the National Anti-Corruption Commission who would have similar powers to investigate corruption issues within the Commission itself. See, Part 10.

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

18 There is international case law to indicate that this protection only extends to attacks which are unlawful. See *RLM v Trinidad and Tobago*, UN Human Rights Committee Communication No. 380/89 (1993); and *IP v Finland,* UN Human Rights Committee Communication No. 450/91 (1993).

19 In relation to the powers conferred on the Commission to use existing covert investigative powers, these are sought to be applied by the Consequential bill. For further detail, see paragraphs [1.53] to [1.69] below.

available for preliminary investigations and public inquiries;[20] hearings being held in private by default and only permitted to be public in limited circumstances;[21] a requirement that certain sensitive information must be heard in private (including information that would unreasonably disclose a person's personal affairs);[22] the power for the Commissioner to include a non-disclose notation on a notice to produce or a summons; restrictions on the use and disclosure of investigation material (including secrecy requirements) and public reporting on investigations.[23] These would appear to operate as important safeguards with respect to the right to privacy and reputation of persons required to engage with the Commission's processes (including those subject to investigation), and would appear to assist in making these limits on privacy in the bill proportionate.

Right to a fair trial

1.8 In addition, the Commissioner would be empowered to: require that a person who has separately been charged with a relevant offence or been subject to relevant confiscation proceedings give information to the Commission;[24] and disclose certain investigation material (and material derived as a result of that material) to prosecutors by partially abrogating the privilege against self-incrimination and legal professional privilege.[25] As such, while the Commission itself could not find that a person has committed an offence,[26] its processes may nevertheless engage and limit the right to a fair trial, because it would permit the use of self-incriminatory investigation material and derivative material in certain criminal proceedings. The right to a fair trial and fair hearing applies to both criminal and civil proceedings, to cases before both courts and tribunals.[27] The right is concerned with procedural fairness, and 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.[28] Specific guarantees

20 Clause 42 and Part 9.

21 Clause 73.

22 Clauses 74 and 227.

23 The statement of compatibility steps comprehensively through the engagement of the right to privacy, including articulating why (in some instances) other, less rights restrictive alternatives would not be as effective to achieve the objective of the measure. See, pp. 30–43.

24 Clauses 58, 63 and 105.

25 Clauses 113–114.

26 Clause 150.

27 International Covenant on Civil and Political Rights, article 14.

28 UN Human Rights Committee, *General Comment No. 13: Article 14, administration of justice* (1984).

of the right to a fair trial in relation to a criminal charge include the presumption of innocence and the right not to incriminate oneself.

1.9 The statement of compatibility recognises that this right is engaged and limited.[29] It states that the authorised derivative use of self-incriminatory investigation material is necessary to achieve the objective of facilitating the investigation and prosecution of criminal offences, and notes the limitation on the ability to disclose derivative material to a prosecutor of a witness, and the powers of courts to make any orders necessary to ensure a witness's fair trial.[30] The explanatory memorandum also sets out why no derivative use immunity is included.[31] The involvement of the courts is an important safeguard, however compelling a person to give evidence where anything derived from it can be used against the person is a significant limit on the right to silence. It is noted that the Senate Standing Committee for the Scrutiny of Bills is likely to raise questions in relation this matter.[32] In the interests of providing human rights law advice in a timely manner,[33] noting this other scrutiny committee is likely to examine this matter in greater detail, no further comment is made here in relation to this human rights concern.

Rights to liberty and freedom of movement

1.10 The bill would also empower the Commission to: temporarily detain a person (for the purpose of bringing them before a court for contempt);[34] summon a person to give evidence;[35] and seek a court order to arrest a person,[36] or require the surrender of their travel documents.[37] These powers engage and limit the right to liberty and freedom of movement. The right to liberty prohibits the arbitrary and unlawful deprivation of liberty.[38] Any detention must not only be lawful, it must also be reasonable, necessary and proportionate in all of the circumstances. The right to

29 Statement of compatibility, pp. 19–29.

30 Statement of compatibility, p. 27.

31 Explanatory memorandum, p. 173.

32 Standing Order 24(1)(a)(i) provides that the Senate Standing Committee for the Scrutiny of Bills to the Senate shall report on whether bills trespass unduly on personal rights and liberties.

33 It is noted that these two bills have been referred to the Joint Select Committee on National Anti-Corruption Commission Legislation for inquiry and report by 10 November 2022, and public hearings relating to this inquiry will be held from 18-21 October 2022.

34 Clause 85.

35 Clause 63.

36 Clause 90.

37 Clause 88

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

liberty applies to all forms of deprivation of liberty. The right to freedom of movement includes the right to move freely within a country for those who are lawfully within the country, the right to leave any country and the right to enter one's own country.[39]

1.11 The statement of compatibility recognises that these provisions engage and limit these rights.[40] With respect to the powers to detain or arrest, it states that these powers are to enable the Commission's overarching objective of detecting and investigating corruption and are critical aspects of the Commissioner's ability to effectively hold hearings and public inquiries.[41] This is likely to constitute a legitimate objective, and the powers appear to be rationally connected to it. With respect to proportionality, the statement of compatibility details in particular the judicial oversight of these powers,[42] which would operate as an important safeguard. With respect to the power to require the surrender of a travel document, the statement of compatibility notes that this power would ensure a person's attendance at a hearing and ensure they do not leave Australia (which is likely a legitimate objective). This requires an order of a superior court, which would serve as an important safeguard.[43]

Right to freedom of expression and rights of persons with disability

1.12 The bill would restrict the ability of people to disclose certain information, including where they have received a notice to produce information or a summons to a private hearing, which is subject to a non-disclosure notation.[44] This would have the effect that the person would be unable to disclose information about the notice or summons, or any matter about the relevant corruption investigation or Commission processes,[45] other than in specified circumstances.[46] This engages and limits the right to freedom of expression, which includes the freedom to seek, receive and impart

39 International Covenant on Civil and Political Rights, article 12.

40 Statement of compatibility, pp. 9–15.

41 Statement of compatibility, pp. 9–10.

42 Statement of compatibility, pp. 10–11.

43 Statement of compatibility, pp. 13—14.

44 Clause 96 would provide that the Commissioner must include such a notation if they are satisfied that not including one on a notice to produce or a private hearing summons would reasonably be expected to prejudice a person's safety or reputation, a fair trial, or a Commission process or action taken as a result of a process. It would also provide the Commissioner with the discretion to include such a notation where they are satisfied that not doing so *might* prejudice those matters, or might otherwise be contrary to the public interest.

45 Clause 95.

46 Subclause 95(2) provides that a non-disclosure notation may permit disclosure of information in specified circumstances. Subclause 98(3) permits a person to disclose information about such a matter to a lawyer for the purposes of obtaining legal advice or representation.

information and ideas of all kinds.[47] This right may be permissibly limited for purposes including for national security and respect for the rights or reputations of others,[48] however any limitation must seek to achieve a legitimate objective, be rationally connected to that objective, and be proportionate.

1.13 The statement of compatibility recognises the limitation on this right. It states that permitting disclosure of information contained in a notice of summons could prejudice investigations and inquiries, or cause harm to a person's reputation or privacy.[49] It also states that further restrictions on the ability to refer and disclose certain information (and confidentiality requirements for Commission staff and associated persons) reflect that the Commission may obtain sensitive information that could prejudice Australia's national security and relationship with foreign governments, making it necessary for the Commission to be empowered to prohibit the disclosure of certain secret or sensitive information in its remit.[50] Protecting privacy and reputation as well as national security constitute legitimate objectives, and restricting disclosure of sensitive related information would appear capable of achieving these objectives. With respect to proportionality, the statement of compatibility notes that only sufficiently sensitive information may be restricted from being recorded, referred or disclosed.[51] In this regard, Division 4 of Part 7 of the bill restricts the circumstances in which a non-disclosure notation either may or must be included in a notice to produce or private hearing summons, and requires consideration of cancelling such a notation five years after service of the relevant document if it has not already been cancelled.[52] These measures would appear to constrain the powers limiting the right to freedom of expression. No information is provided, however, to explain why the Commissioner would be required to consider cancelling a non-disclosure notation only after a period of five years (and not some shorter period of time, such as two years).

1.14 It is noted that there may be circumstances in which a person who has received a summons or notice may have particular vulnerabilities, such as a mental or physical impairment that may mean they require additional assistance in order for them to understand the notice and to fairly engage in the Commission's process. Subjecting such witnesses to a non-disclosure notation would mean they would not be permitted to disclose the existence of such a notice or summons for the purposes of obtaining that assistance, for example, to a social worker, an intermediary, or other

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

48 International Covenant on Civil and Political Rights, article 19(3).

49 Statement of compatibility, p. 42.

50 Statement of compatibility, pp. 41–42.

51 Statement of compatibility, p. 43.

52 See, clause 97.

professional.[53] This would appear to leave open a risk that in such a scenario, a person with disability may be at risk of discrimination. While this may be addressed by the Commissioner in using their discretion not to impose a notation in such instances, there is nothing on the face of the bill or in the explanatory materials that addresses this issue.

Right to an effective remedy

1.15 Lastly, the bill provides for immunity from civil liability for acts done by Commission staff (including the Commissioner) and the Inspector of the Commission in the performance of their functions or duties.[54] This engages the right to an effective remedy, which requires the availability of a remedy which is effective with respect to any violation of rights and freedoms recognised by the International Covenant on Civil and Political Rights.[55] The statement of compatibility does not identify the engagement of this right in this respect, and so no analysis of the compatibility of these provisions is provided. However, noting that these provisions do not appear to preclude a civil suit against the Commonwealth itself, it would appear that an effective remedy may be available for a violation of a person's rights and freedoms.

Committee view

1.16 The committee notes that the proposed National Anti-Corruption Commissioner's investigative and reporting powers engage and limit multiple rights, including the rights to privacy, fair trial, freedom of expression, liberty and freedom of movement. These rights may be subject to permissible limitations if they are shown to be reasonable, necessary and proportionate

53 Persons with disabilities have a right to be free from all forms of exploitation (Convention on the Rights of Persons with Disabilities, article 16). This refers to taking advantage of another person, and in the context of criminal investigations necessitates consideration of the power imbalance between the relevant agency and people with disability who are brought into contact with them. Persons with disabilities must be provided with necessary modifications and adjustments in order to obtain effective access to justice during their participation in the criminal justice system. The absence of such supports may give rise to a risk of discrimination against a person based on their disability. See, for example, Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, *The Criminal Justice System: Issues Paper* (January 2020), p. 5.

54 Clauses 196 and 269. 'Staff member of the NACC' is defined in clause 266.

55 International Covenant on Civil and Political Rights, article 2(3). See, *Kazantzis v Cyprus,* UN Human Rights Committee Communication No. 972/01 (2003) and *Faure v Australia,* UN Human Rights Committee Communication No. 1036/01 (2005). States parties must not only provide remedies for violations of the ICCPR but must also provide forums in which a person can pursue arguable if unsuccessful claims of violations of the ICCPR. Per *C v Australia* UN Human Rights Committee Communication No. 900/99 (2002), remedies sufficient for the purposes of article 5(2)(b) of the ICCPR must have a binding obligatory effect.

1.17 The committee notes that it will ordinarily write to proponents of legislation seeking a response to any questions it has about the compatibility of proposed legislation with human rights. However, in this instance, the committee notes that these two bills have been referred to the Joint Select Committee on National Anti-Corruption Commission Legislation for inquiry and report by 10 November 2022, and that public hearings relating to this inquiry will be held from 18-21 October 2022. For this reason, it is not possible for the committee in the timeframe available to seek a response from the Attorney-General in relation to the matters it has raised, and instead offers recommendations to improve the human rights compatibility of specified provisions, in order that these recommendations will be available to the Attorney-General and the Parliament for timely consideration. Absent this tight timeframe the committee would otherwise have written to the Attorney-General to seek further information.

1.18 The committee notes that the bill is accompanied by a lengthy and detailed statement of compatibility with human rights that identifies that the bill engages and limits human rights. The committee notes that (aside from the issue raised in relation to the right to an effective remedy) the statement sets out in helpful detail how each of the above rights are engaged, and where the bill limits a right, the statement explains the objective being sought, how the measure will be effective to achieve that objective, and how such a limitation may be seen to be proportionate to that objective. The committee thanks the Attorney-General for this comprehensive and well-reasoned statement of compatibility, which has greatly assisted the committee in undertaking its scrutiny role. The committee considers that, in general (excepting those issues specifically discussed), the limitations on human rights in the bill have been adequately explained in the statement of compatibility. However, the committee below makes some further comments and recommends some amendments to the bill and statement of compatibility to strengthen human rights.

1.19 The committee notes that investigating people in relation to potential corrupt conduct—including conducting searches, compelling people to give evidence, disclosing evidence, and reporting on the investigation—engages and limits the right to privacy and reputation. The committee notes that this right may be permissibly limited, and that such a limitation must be a proportionate means by which to achieve a legitimate objective. In this regard, the committee considers that facilitating the detection and investigation of serious or systemic corrupt conduct, the making of findings and recommendations in relation to this, and the ability to prosecute or take other action in response to such conduct are important and legitimate objectives, which may be achieved through the inclusion of coercive powers enabling the Commission to investigate such matters. The committee considers that with respect to proportionality, the statement of compatibility helpfully sets out numerous safeguards in relation to the Commission's investigative and reporting powers (as

provided in the main bill),[56] which appear to make the limitations on the right to privacy likely to be proportionate. The committee considers that of particular safeguard value are: the requirement that hearings be held in private (by default) and would only be permitted to be public in exceptional circumstances; that certain sensitive information must be heard in private (including information that would unreasonably disclose a person's personal affairs); and that the Commissioner is empowered to include a non-disclosure notation on a notice to produce or a summons. The committee considers that these would appear to operate as important safeguards with respect to the right to privacy and reputation of persons required to engage with the Commission's processes (including those subject to investigation), and would appear to assist in making these limits on privacy in the bill proportionate.

1.20 With respect to the right to a fair trial, the committee notes the lack of derivative use immunity in the bill. However, the committee notes the explanation for this in the explanatory materials, and that this is a matter which may be further raised by the Senate Standing Committee for the Scrutiny of Bills. The committee also notes that the bill does not appear to contemplate circumstances in which a person who has received a summons or notice that is subject to a non-disclosure notation, and who is a person with disability that may necessitate additional assistance in order for them to understand the notice and to fairly engage in the Commission's process, would be permitted to disclose such a notice or summons for the purposes of obtaining that assistance (for example, to a social worker, an intermediary, or other professional). The committee considers that amending the bill to establish appropriate safeguards in this respect would be prudent, in order to ensure that the proposed framework enables persons with disability to fairly engage with the Commission's processes.

56 In relation to the powers conferred on the Commission to use existing covert surveillance powers, these are sought to be applied by the Consequential bill. For further detail, see paragraphs [1.53] to [1.69] below.

Suggested action

1.21 The committee considers that the compatibility of the measure may be assisted were the bill amended to require that if the Commissioner is considering making a non-disclosure notation on a notice to produce or summons and the Commissioner is aware that a person has a disability or other vulnerability that may impact their ability to comply with a non-disclosure notation, they must consider making exceptions to allow the person to obtain any necessary assistance in order that they may engage fairly with the Commission's processes.

1.22 The committee recommends that the statement of compatibility with human rights be updated to:

(a) set out the compatibility of provisions providing for immunity from civil proceedings (clauses 196 and 269) with the right to an effective remedy; and

(b) explain why clause 97 would only require the Commissioner to consider cancelling a non-disclosure notation after a period of five years has passed (and not some shorter period of time).

1.23 The committee draws these comments to the attention of the Attorney-General and the Parliament.

Contempt of Commission for using insulting language or creating a disturbance

1.24 The bill would provide that a person is in contempt of the Commission where they engage in certain conduct, including if they:

- insult, disturb or use insulting language towards a Commissioner holding a hearing (paragraph 82(d));
- create a disturbance, or take part in creating or continuing a disturbance, in or near a place that the person knows is being used to hold a hearing (paragraph 82(e));
- obstruct or hinder a staff member of the Commission in the performance of their powers or duties in connection with a hearing (paragraph 82(f)); or
- disrupt a hearing (paragraph 82(g)).[57]

57 Clause 82.

1.25 If the Commissioner considers a person to be in contempt of the Commission they may apply to a superior court for the person to be dealt with for contempt.[58] The explanatory memorandum states that the court could find that the person was in contempt of the Commission, and deal with them as if their conduct had constituted contempt of that court.[59] The Commissioner may direct that the person be detained so as to be brought before a court to hear that application.[60] Disruption of a hearing would also be an offence punishable by imprisonment for two years.[61]

International human rights legal advice

Rights to freedom of expression, freedom of assembly and liberty

1.26 Prohibiting anyone from using insulting language or creating a disturbance or disruption of a hearing of the Commission engages and may limit the right to freedom of assembly and the right to freedom of expression. The right to freedom of assembly provides that all people have the right to peaceful assembly.[62] This is the right of people to gather as a group for a specific purpose. It is strongly linked to the right to freedom of expression, as it is a means for people together to express their views. Further, as set out above, providing that a person who is found to be in contempt may be detained engages and limits the right to liberty. 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. Limitations must be prescribed by law, pursue a legitimate objective, and be rationally connected and proportionate to that objective.

1.27 The statement of compatibility identifies that the power to detain a person for contempt of the Commission engages the right to liberty,[63] and states that the nature of contempt, in this context, 'is focused on conduct that would prevent, hinder or disrupt the effective conduct of a hearing'.[64] However, it does not identify that these provisions engage and limit the rights to freedom of expression and assembly, and so no assessment of these limitations is provided. The explanatory memorandum states that the ability to bring contempt proceedings is important, including because contempt provisions 'motivate an uncooperative witness to reconsider their position and comply with the requirements of a hearing, as the witness is immediately subject

58 Clause 82.

59 Explanatory memorandum, p. 150.

60 Clause 85.

61 Clause 72.

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

63 Statement of compatibility, pp. 11–12.

64 Statement of compatibility, p. 12.

to the possibility of being taken into custody before a superior court'.[65] It states that the conduct which would constitute contempt 'would significantly impede' the Commissioner's ability to conduct investigations and frustrate the objects of the bill.[66]

1.28 While ensuring that the Commissioner can effectively perform their functions may constitute a legitimate objective, it is not clear whether the terms 'insults, disturbs or uses insulting language' towards the Commissioner are drawn so broadly that they may limit legitimate criticism of, or objection to, the Commission and its activities. Further, it is unclear whether and how a person who 'insults, disturbs or uses insulting language' would prevent the Commissioner from undertaking their functions.

1.29 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. This provision 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.

1.30 It is also not clear that paragraphs 82(d) and (e), in prohibiting the use of insulting language or behaviour that could disturb a proceeding, are necessary in light of proposed paragraphs 82(f) and (g) of the bill. These paragraphs provide that it is a contempt to obstruct or hinder a Commission staff member (including the Commissioner) in the performance or exercise of their functions, powers or duties in connection with a hearing or to disrupt a hearing. It is therefore not clear why these provisions alone are not sufficient to address conduct that may disrupt the Commission and the conduct of hearings. As drafted, clause 82 does not appear to be the least rights restrictive way to achieve the stated objectives, and therefore risks disproportionately limiting the rights to freedom of expression and assembly.

Committee view

1.31 The committee notes that prohibiting anyone from using insulting language or creating a 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.

1.32 The committee notes that the statement of compatibility does not identify the engagement of these rights by these provisions. In this regard, though the committee recognises the importance of ensuring that the Commission can undertake its functions, the committee notes that it has historically raised repeated concerns regarding the compatibility of similar contempt provisions relating to Royal

65 Explanatory memorandum, p. 148.

66 Explanatory memorandum, p. 149.

Commissions (and other bodies invested with the powers of Royal Commissions),[67] and has recommended their amendment.[68]

1.33 The committee considers that paragraphs 82(d) and (e), in classifying the use of insulting language or creating a disturbance near a Commission hearing, is overly broad. The committee considers the objective of ensuring the Commission's important work is not disrupted could be achieved by other provisions already in the bill that provide that it is a contempt to obstruct or hinder a Commission staff member (including the Commissioner) in the performance or exercise of their functions, powers or duties in connection with a hearing or to disrupt a hearing. The committee considers that, as drafted, clause 82 is not the least rights restrictive way to achieve the stated objectives, and therefore risks disproportionately limiting the rights to freedom of expression and assembly.

Suggested action

1.34 The committee considers that the compatibility of the measure with the rights to freedom of expression and peaceful assembly may be assisted were clause 82 of the bill amended to remove paragraphs (d) and (e) (which make it a contempt to use insulting language or creating a disturbance near a Commission hearing).

1.35 The committee recommends that the statement of compatibility with human rights be updated to set out the compatibility of clause 82 with the rights to freedom of expression and assembly.

1.36 The committee draws these comments to the attention of the Attorney-General and the Parliament.

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67 See Parliamentary Joint Committee on Human Rights, Royal Commissions Amendment Regulation 2016 (No. 1) [F2016L00113], *Thirty-Eighth Report of the 44th Parliament* (3 May 2016) pp. 21-26; Prime Minister and Cabinet Legislation Amendment (2017 Measures No. 1) Bill 2017, *Report 6 of 2017* (20 June 2017) pp. 35-49; Banking and Financial Services Commission of Inquiry Bill 2017, *Report 4 of 2017* (9 May 2017) pp. 42-45; Commission of Inquiry (Coal Seam Gas) Bill 2017, *Report 11 of 2017* (17 October 2017) pp. 51-52; Murray-Darling Basin Commission of Inquiry Bill 2019, *Report 2 of 2019* (12 February 2019) pp. 131–135; National Integrity Commission Bill 2018, National Integrity Commission Bill 2018 (No. 2) and National Integrity (Parliamentary Standards) Bill 2018, *Report 2 of 2019* (12 February 2019), pp. 136–145; National Integrity Commission Bill 2018 (No. 2) and National Integrity Commission Bill 2019, *Report 6 of 2019* (5 December 2019), pp. 99–116.

68 Parliamentary Joint Committee on Human Rights, National Integrity Commission Bill 2018 (No. 2), *Report 6 of 2019* (5 December 2019), pp. 99–116.

Accessing information provided to journalists

1.37 The bill establishes that if a person has given information (directly or indirectly) to a journalist, and the journalist reasonably believes that the person providing the information did not want their identity to be disclosed, neither the journalist nor their employer is required to do anything under the bill that would disclose the person's identity or enable it to be ascertained.[69] However, this would not prevent an authorised officer from searching premises, persons, or conveyances (such as cars), using modified search powers under Part IAA of the *Crimes Act 1914*.[70] If the evidentiary material being sought related to an alleged offence against a secrecy provision by a person other than the journalist, when issuing a search warrant the issuing officer would be required to weigh the public interest in issuing the warrant against the public interest in protecting the confidentiality of the identity of the journalist's source, and in facilitating the exchange of information between journalists and the public so as to facilitate reporting of matters in the public interest.[71]

1.38 A document, copy or thing seized or made (including seized electronic equipment) could then be made available to another constable or Commonwealth officer (including one conducting a Commission process), and for other purposes including preventing, investigating or prosecuting an offence.[72]

International human rights legal advice

Freedom of expression

1.39 These provisions would provide that, although a journalist or their employer may not be required to provide information that would identify their source themselves, a search warrant may be issued, and neither the journalist nor their employer could lawfully refuse the seizure of material under the warrant on the basis that it could disclose an informant's identity.[73]

1.40 These provisions may therefore limit the right to freedom of expression insofar as they may discourage persons from disclosing information about suspected corruption to journalists in the public interest. The right to freedom of expression

69 Clause 31.

70 Subclause 31(4). See also clauses 119 and 124. Noting, however, that subclause 117(2) would not permit the exercise of a search warrant in relation to premises occurred by the Australian Broadcasting Corporation (ABC) or Special Broadcasting Service Corporation (SBS).

71 Clause 124(2A)–(2B).

72 *Crimes Act 1914*, section 3ZQU. Note, item 40 of the National Anti-Corruption Commission (Consequential and Transitional Provisions) Bill 2022 would amend section 3ZQU (purposes for which things and documents may be used and shared) to authorise use of such materials by the Commission.

73 See, explanatory memorandum, pp. 102–103.

extends to the communication of information or ideas through any medium, including written and oral communications, the media, public protest, broadcasting, artistic works and commercial advertising.[74] The United Nations (UN) Human Rights Committee has commented that a free, uncensored and unhindered press is essential to ensure freedom of opinion and expression, and the enjoyment of other civil and political rights.[75] The right may be subject to limitations that are necessary to protect the rights or reputations of others, national security, public order, or public health or morals. Additionally, such limitations must be prescribed by law, be rationally connected to the objective of the measures and be proportionate.[76]

1.41 The statement of compatibility does not identify that these provisions engage and limit this right, and so no assessment of their compatibility is provided.

1.42 The explanatory memorandum states that these provisions are appropriate because the power to issue a search warrant involving a journalist is modified by clause 124, which requires consideration of the public interest in protecting journalists' sources and the free exchange of information between journalists and members of the public, thereby balancing 'the importance of ensuring the [Commission] can conduct corruption investigations and public inquiries with the importance of preserving freedom of expression by maintaining the confidentiality of journalists' sources'.[77] However, the explanatory memorandum then later qualifies this, stating:

> The purpose for this additional threshold, being the protection of public interests associated with source confidentiality and the freedom of the press, is reflected in the stipulation that this additional threshold only applies where the evidential material relates to an alleged offence against a secrecy provision by a person other than a journalist. This stipulation would ensure that the additional threshold:
>
> • would apply where an authorised officer is seeking a search warrant in relation to a journalist as part of a corruption investigation relating to the alleged unauthorised disclosure of information by a public official—which would be the kind of investigation that could directly engage with source confidentiality and the freedom of the press; but
>
> • would not apply where the authorised officer is seeking a search warrant in relation to a journalist as part of a corruption investigation relating to other corruption issues—for example, an attempt by a person who happens to work as a journalist who is alleged to have used their contacts with public

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

75 UN Human Rights Committee*, General Comment No. 34, Article 19: Freedoms of opinion and expression* (2011) [13].

76 UN Human Rights Committee, *General Comment No.34: Article 19: Freedoms of Opinion and Expression* (2011) [21]-[36].

77 Explanatory memorandum, p. 102.

officials and business figures to engage in a conspiracy to defraud the Commonwealth.[78]

1.43 However, the example provided would not appear to encapsulate all the circumstances in which information may have been provided confidentially (or anonymously) to a journalist—an act which may not itself be alleged to have contravened a secrecy provision—but in relation to which the informant may nevertheless wish to remain anonymous. A 'secrecy provision' refers, among other things, to a provision of a law of the Commonwealth that prohibits the use or disclosure of information or a document or thing.[79] As such, it would not encapsulate the covert provision of information (not subject to such a legal secrecy requirement) to a journalist by a public servant, although that conduct may breach the Australian Public Service Code of Conduct and so expose the person to certain sanctions.[80] It would appear, therefore, that information or things seized in the course of a search warrant, which could then be provided to the Commission for the purposes of conducting a corruption investigation, could result in the person who provided information confidentially to the journalist being (for example) summoned to give evidence, or required to provide further information to the Commission. In such instances, no weighing of the public interest in protecting the journalist's sources and facilitating the exchange of information in this manner would be required. By contrast, under the *Telecommunications (Interception and Access) Act 1979*, the Attorney-General must not issue a journalist information warrant unless they are satisfied that the public interest in issuing the warrant outweighs the public interest in protecting the confidentiality of the identity of the source in connection with whom authorisations would be made under the authority of the warrant.[81]

1.44 This raises questions as to whether the provisions relating to protections for journalists' informants, as currently drafted, may potentially act as a disincentive to persons from disclosing matters to journalists in the public interest, resulting in a possible 'chilling effect' on freedom of expression. In this regard, international human rights law has recognised the importance of anonymous expression, particularly in the context of public debate concerning political and public institutions.[82] The UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression has, in a number of reports, highlighted the value of anonymous expression

78 Explanatory memorandum, p. 186.

79 Clause 7.

80 See, *Public Service Act 1999*.

81 *Telecommunications (Interception and Access) Act 1979*, section 180L.

82 See, eg, UN Human Rights Committee, *General comment No. 34: Article 19: Freedoms of opinion and expression* [38]; *Standard Verlagsgesellschaft MBH v Austria (No. 3)*, European Court of Human Rights, Application No. 39378/15 (2021); *Delfi AS v Estonia*, European Court of Human Rights (Grand Chamber), Application No. 64569/09 (2015).

in protecting the rights to freedom of expression and privacy.[83] In a 2015 report, the Special Rapporteur stated:

> Anonymity has been recognized for the important role it plays in safeguarding and advancing privacy, free expression, political accountability, public participation and debate…Encryption and anonymity, and the security concepts behind them, provide the privacy and security necessary for the exercise of the right to freedom of opinion and expression in the digital age. Such security may be essential for the exercise of other rights, including economic rights, privacy, due process, freedom of peaceful assembly and association, and the right to life and bodily integrity.[84]

1.45 Noting the significant ways anonymity facilitates opinion and expression online, the Special Rapporteur has stated that 'States should protect it and generally not restrict the technologies that provide it'.[85] In another report, the Special Rapporteur noted that:

> restrictions on anonymity have a chilling effect, dissuading the free expression of information and ideas. They can also result in individuals' de facto exclusion from vital social spheres, undermining their rights to expression and information, and exacerbating social inequalities.[86]

1.46 Consequently, there is a risk that providing that a search warrant may be issued in respect of a journalist, in circumstances that do not require an issuing officer to consider the public interest in protecting the journalist's sources and facilitating the exchange of information, may impermissibly limit the right to freedom of expression. The invocation of other covert investigation powers pursuant to the National Anti-Corruption Commission (Consequential and Transitional Provisions) Bill 2022 are considered separately below.

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83 See, eg, UN Human Rights Council, *Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, David Kaye*, A/HRC/29/32 (2015) [12]–[17], [47]–[60]; A/HRC/32/38 (2016) [62], [85]; A/HRC/35/22 (2017) [21], [78]; UN Human Rights Council, *Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue*, A/HRC/23/40 (2013) [47]–[49].

84 UN Human Rights Council, *Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, David Kaye*, A/HRC/29/32 (2015) [47], [56].

85 UN Human Rights Council, *Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, David Kaye*, A/HRC/29/32 (2015) [47].

86 UN Human Rights Council, *Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue*, A/HRC/23/40 (2013) [49].

Committee view

1.47 The committee notes that, although a journalist or their employer may not be required to provide information that would identify their source themselves, a search warrant may be issued, and neither the journalist nor their employer could lawfully refuse the seizure of material under the warrant on the basis that it could disclose an informant's identity. The committee notes that this may limit the right to freedom of expression.

1.48 The committee notes that the statement of compatibility does not identify that these provisions engage and may limit the right to freedom of expression, and so no assessment of their compatibility with the right is available. The committee notes that the explanatory memorandum explains the rationale behind the limited public interest threshold set out in subclause 124(2A). However, the committee considers that the brief example provided does not adequately address the full range of circumstances in which a source may wish to remain confidential (even though they may not have breached a secrecy provision by providing information to the journalist).

1.49 The committee considers that protecting the confidentiality of journalists' sources is a generally important objective, and one which must be weighed against the bill's overarching objective of addressing serious and systemic corruption. In this regard, the committee considers that, when a search warrant is being sought in relation to a journalist, a requirement to always consider the public interest in protecting the confidentiality of the identity of a journalist's source, and in facilitating the exchange of information between journalists and members of the public so as to facilitate reporting of matters in the public interest, would better protect the right to freedom of expression.

Suggested action

1.50 The committee considers that the compatibility of the measure with the right to freedom of expression may be assisted were the bill amended to remove paragraph 124(2A)(b), with the effect that where an issuing officer is considering whether to issue a search warrant to search a journalist or their employer or premises, they must always be required to have regard to the public interest, as set out in subclause 124(2B).

1.51 The committee recommends that the statement of compatibility with human rights be updated to set out the compatibility of these provisions with the right to freedom of expression.

1.52 The committee draws these concerns to the attention of the Attorney-General and the Parliament.

Conferral of covert investigative powers on the Commission

1.53 The National Anti-Corruption Commission (Consequential and Transitional Provisions) Bill 2022 (the Consequential bill) seeks to repeal legislation[87] establishing the Australian Commission for Law Enforcement Integrity, and to transition its functions to the Commission and thereby grant existing covert investigative powers to the Commission (with some amendments and exceptions).

1.54 As such, the Consequential bill seeks to confer on the Commission (among other powers):

- surveillance devices and computer access powers under the *Surveillance Devices Act 2004*;[88]
- access to telecommunications interceptions, stored communications (for example emails, SMS or voice messages stored on equipment), telecommunications data (metadata) and international production orders under the *Telecommunications (Interception and Access) Act 1979* (TIA Act);[89]
- access to the industry assistance framework under Part 15 of the *Telecommunications Act 1997* to obtain reasonable assistance from communications providers to access encrypted information stored on devices to support the Commission's powers;[90]
- the power to authorise and conduct controlled operations under Division 4 Part IAB of the *Crimes Act 1914*;[91]
- the power under Part IABA of the *Crimes Act 1914* to conduct operations designed to test the integrity of staff members of the Australian Criminal Intelligence Commission, the Australian Federal Police and the Department of Home Affairs, using controlled or simulated situations;[92]
- the power to seek information about accounts held by a person of interest to a corruption investigation and to search for and seize tainted property (such as proceeds of an offence) and evidential material (such as benefits derived from commission of an offence), and apply for freezing orders under the *Proceeds of Crime Act 2002*;[93] and

87 *Law Enforcement Integrity Commissioner Act 2006*.

88 See Schedule 1, Part 1, items 188-204.

89 See Schedule 1, Part 1, items 206-260.

90 See Schedule 1, Part 1, item 263-270.

91 See Schedule 1, Part 1, items 35-39, 42-46, 48-54 and 56-62.

92 See Schedule 1, Part 1, items 63-88.

93 See Schedule 1, Part 1, items 158-162.

- reciprocal information sharing powers between the Commissioner and relevant agencies.[94]

International human rights legal advice

Multiple rights

1.55 In seeking to grant the Commission a number of existing covert investigative powers, the Consequential bill engages and limits a number of human rights, most particularly the right to privacy, the right to freedom of expression and the right to an effective remedy.

1.56 Many of these existing powers were enacted prior to the enactment of the *Human Rights (Parliamentary Scrutiny) Act 2011* and the establishment of this committee, and the requirement for legislation to be accompanied by a statement of compatibility. As such, many of these covert investigatory powers, such as intercepting communications and the use of surveillance devices, have not been subject to a foundational human rights assessment. For example, the committee has, on a number of previous occasions, recommended that the TIA Act would benefit from a foundational review of its human rights compatibility.[95]

1.57 While the statement of compatibility acknowledges how the application of these powers to the Commission engages human rights, without a foundational assessment of legislation such as the TIA Act and the *Surveillance Devices Act 2004*, and the sufficiency of the safeguards provided therein, it is difficult to assess the full human rights implications of the Consequential bill in conferring these powers.

1.58 Some of the powers to be conferred have previously been considered by the committee and the committee has previously raised concerns that such powers may not constitute a proportionate limit on human rights.

1.59 For example, the committee has considered the computer access scheme under the *Surveillance Devices Act 2004*, which allows officers (under a warrant) to search a computer remotely or physically and access content on that computer. The committee previously held that there is a risk that the computer access warrant scheme may be incompatible with the right to privacy, due to the extent of the impact on privacy, though much would depend on how the computer access warrant scheme operates in practice. It recommended that the scheme be monitored to ensure that

94 See for example, information sharing powers in Schedule 1, Part 1 between the Commissioner (and other staff members of the Commission) and other bodies under the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (items 4-10), *Australian Federal Police Act 1979* (items 20 to 33), *Inspector-General of Intelligence and Security Act 1986* (items 117 to 121), *Data Availability and Transparency Act 2021* (items 108 to 111), and *Taxation Administration Act 1953* (items 201-204).

95 See for example, Parliamentary Joint Committee on Human Rights, Telecommunications (Interception and Access) Regulations 2017, *Report 3 of 2018* (27 March 2018) pp. 129–137.

any limitation on the right to privacy is only as extensive as is strictly necessary. Further, it stated that emergency authorisations to obtain access to data held on a computer are likely to be incompatible with the right to privacy. The committee also previously held that powers relating to the concealment of the use of these computer access powers were likely to be incompatible with the right to privacy.[96]

1.60 The committee has also previously considered the provisions requiring the retention of, and giving access to, telecommunications data (metadata).[97] It previously held that the types of data to be retained for the purposes of the scheme may be so broad as to risk leading to an arbitrary (and therefore impermissible) interference with the right to privacy.[98] It also raised concerns regarding the breadth of circumstances in which information intercepted under the scheme could be disclosed, the potential uses of such data, and the blanket two-year data retention period. The committee also considered that the mandatory retention of some data may limit the right to freedom of expression, insofar as the scheme may have an inhibiting or 'chilling' effect on people's freedom and willingness to communicate via telecommunication services.[99] It made a series of recommendations to amend the TIA Act in order to avoid any arbitrary interference with the right to privacy occasioned by this scheme.[100]

1.61 The committee has also previously considered the industry assistance framework under Part 15 of the *Telecommunications Act 1997*. This framework would allow the Commission to obtain reasonable assistance from communications providers to access encrypted information stored on devices to support the Commission's powers. When this power was introduced in 2018, the committee considered this framework was unlikely to constitute a proportionate limitation on the rights to

96 Parliamentary Joint Committee on Human Rights, Telecommunications and Other Legislation Amendment (Assistance and Access) Bill 2018, *Report 13 of 2018* (4 December 2018) pp. 71-81 and 89-92.

97 Parliamentary Joint Committee on Human Rights, Telecommunications (Interception and Access) Amendment (Data Retention) Bill 2014, *15th Report of the 44th Parliament* (14 November 2014) pp. 10–22 and *20th Report of the 44th Parliament* (18 March 2015) p. 47–48.

98 Parliamentary Joint Committee on Human Rights, Telecommunications (Interception and Access) Amendment (Data Retention) Bill 2014, *20th Report of the 44th Parliament* (18 March 2015) p. 47–48.

99 Parliamentary Joint Committee on Human Rights, Telecommunications (Interception and Access) Amendment (Data Retention) Bill 2014, *20th Report of the 44th Parliament* (18 March 2015) pp. 53-60 and p. 72.

100 Parliamentary Joint Committee on Human Rights, Telecommunications (Interception and Access) Amendment (Data Retention) Bill 2014, *15th Report of the 44th Parliament* (14 November 2014) pp. 10–22 and *20th Report of the 44th Parliament* (18 March 2015) pp. 39-74.

privacy and freedom of expression, and was unable to conclude that the measure was compatible with the right to an effective remedy.[101]

1.62 The committee has also previously considered the international production order framework, which permits Australian agencies to access overseas communications data (and to allow foreign governments to access private communications data) under the TIA Act. When these powers were introduced in 2020, the committee considered that this framework may not be sufficiently circumscribed or contain sufficient safeguards to ensure that the measures do not arbitrarily limit the right to privacy, and recommended several amendments.[102]

1.63 In addition, the committee has previously considered the power to seek information relating to suspected proceeds of crime under the *Proceeds of Crime Act 2002*.[103] The committee has concluded that it is not clear that the safeguards contained in the Act, many of which are discretionary, would be sufficient in all circumstances to ensure that any limitation on the rights to a fair trial and privacy is proportionate.[104]

1.64 Finally, the committee has previously examined legislation that sought to invest the NSW Law Enforcement Conduct Commission with the powers of an interception agency under the TIA Act, thereby permitting it to apply for warrants to access stored communications content and self-authorising access to metadata.[105] In this instance, the committee was unable to conclude that extending access to those coercive powers to a further body constituted a justifiable limit on the right to privacy, including having regard to the absence of a foundational human rights assessment for this Act.[106]

1.65 Noting that significant privacy concerns have been raised by this committee regarding certain aspects of the covert surveillance powers sought to be conferred on

101 Parliamentary Joint Committee on Human Rights, Telecommunications and Other Legislation Amendment (Assistance and Access) Bill 2018, *Report 13 of 2018* (4 December 2018) pp. 51-71.

102 Parliamentary Joint Committee on Human Rights, Telecommunications Legislation Amendment (International Production Orders) Bill 2020, *Report 7 of 2020* (17 June 2020) pp. 87–129.

103 See Schedule 1, Part 1, items 158-162.

104 See most recently, Parliamentary Joint Committee on Human Rights, Crimes Legislation Amendment (Economic Disruption) Regulations 2021 [F2021L00541], *Report 10 of 2021* (25 August 2021) pp. 91–102.

105 Parliamentary Joint Committee on Human Rights, Law Enforcement Legislation Amendment (State Bodies and Other Measures) Bill 2016, *Report 1 of 2017* (16 February 2017) pp. 35–44.

106 Parliamentary Joint Committee on Human Rights, *Report 1 of 2017* (16 February 2017) p. 36.

the Commission, there is a risk that the Consequential bill, in conferring such powers, would not be compatible with a number of human rights, particularly the right to privacy. Further, as no foundational human rights assessment has been made of other significant powers sought to be conferred, particularly the interception and surveillance powers, it is not possible to conclude that the conferral of these powers on the Commission would be compatible with human rights.

Committee view

1.66 The committee notes that granting existing covert investigative powers to the Commission (with some amendments and exceptions), engages and limits multiple human rights, most particularly the right to privacy. The committee notes that the statement of compatibility accompanying this bill acknowledges how the application of these powers to the Commission engages human rights. However, the committee notes that many of the powers stemming from this suite of legislation were enacted prior to the establishment of the committee, and so have not been reviewed by the committee for compliance with Australia's human rights obligations. Of those powers that have been reviewed by the committee, the committee notes it has previously raised concerns as to the compatibility of a number of these powers with human rights, particularly the right to privacy. As such, the committee considers conferring such powers on the Commission raises similar privacy concerns to those previously raised.

1.67 Further, the committee considers that without a foundational assessment of legislation such as the TIA Act, the *Surveillance Devices Act 2004* and the *Proceeds of Crime Act 2002*, and the sufficiency of the safeguards provided therein, it is difficult to assess the full human rights implications of the Consequential bill in conferring those powers. In this regard, the committee notes that a recent review of Australia's surveillance powers noted that a foundational principle for the legislative framework for Australia's six intelligence agencies is that these agencies must operate in a manner that respects human rights and fundamental freedoms.[107] The committee considers that the completion of a foundational assessment of the human rights compatibility of these complex pieces of legislation would appropriately reflect the importance of this principle.

107 Mr Dennis Richardson AC, *Comprehensive Review of the Legal Framework of the National Intelligence Community* (2020), volume 1, p. 36.

Suggested action

1.68 The committee recommends that a foundational human rights assessment of existing covert surveillance powers be undertaken, in particular of the powers in the *Telecommunications (Interception and Access) Act 1979*, the *Surveillance Devices Act 2004,* the *Proceeds of Crime Act 2002* and the *Crimes Act 1914* to assess their compatibility with human rights, in particular the right to privacy.

1.69 The committee draws these concerns to the attention of the Attorney-General and the Parliament.

Treasury Laws Amendment (More Competition, Better Prices) Bill 2022[1]

Purpose	This bill seeks to increase penalties for breaches of competition and consumer laws and to provide greater protections for small business from unfair contract terms Schedule 1 of the bill seeks to increase the maximum penalty applicable to certain breaches of competition and consumer law Schedule 2 of the bill seeks to clarify existing unfair contract terms provisions, reduce the prevalence of unfair contract terms in consumer and small business standard form contracts, and introduce a civil penalty regime prohibiting the use of and reliance on unfair contract terms in standard form contracts
Portfolio	Treasury
Introduced	House of Representatives, 28 September 2022
Right	Right to a fair hearing

Increasing civil penalties

1.70 This bill seeks to increase the maximum financial penalties for contravention of various civil penalty provisions under the *Competition and Consumer Act 2010* (the Act) to $2.5 million for individuals.[2] In most cases, this is a 400 per cent increase in the penalty amount (from $500,000 to $2,500,000).

International human rights legal advice

Right to a fair hearing

1.71 The significant increase in civil penalties to $2.5 million for individuals who are found to have contravened the Act raises the risk that these penalties may be considered criminal in nature under international human rights law. Under Australian law, civil penalty provisions are dealt with in accordance with the rules and procedures that apply in relation to civil matters (the burden of proof is on the balance of

1 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Treasury Laws Amendment (More Competition, Better Prices) Bill 2022, *Report 5 of 2022*; [2022] AUPJCHR 37.

2 Schedule 1, items 25, 36, 39, 42, 45, 48, 51, 54, 57, 60, 63, 66, 69, 72, 75, 78, 81, 84, 87, 90, 93, 96, 99, 102 and 103; Schedule 2, item 12. The civil penalty provisions to which these increased penalties relate are held in Parts IV, IVBA, X, XIB and XICA and Schedule 2, section 224 of the Australian Consumer Law in the *Competition and Consumer Act 2010*. See Statement of Compatibility, p. 52.

probabilities). However, if the new civil penalties are regarded as 'criminal' for the purposes of international human rights law, they will engage the criminal process rights under articles 14 and 15 of the International Covenant on Civil and Political Rights, including the right not to be tried or punished twice[3] and the right to be presumed innocent until proven guilty according to law,[4] which requires that the case against the person be demonstrated on the criminal standard of proof of beyond reasonable doubt. The statement of compatibility acknowledges that the measure engages the criminal process rights under articles 14 and 15 and states that the increased civil penalties may be viewed as 'criminal' for the purposes of human rights law.[5]

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

(a) the domestic classification of the offence as civil or criminal;

(b) the nature of the penalty; and

(c) the severity of the penalty.[6]

1.73 In relation to (a), the penalties would be classified as 'civil' not criminal penalties. However, the term 'criminal' has an autonomous meaning in international 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. Consequently, the domestic classification of the penalties as 'civil', while relevant, is not determinative.

1.74 In relation to (b), a civil penalty is more likely to be considered 'criminal' in nature if it applies to the public in general rather than a specific regulatory or disciplinary context, and where there is an intention to punish or deter, irrespective of the severity of the penalty. The statement of compatibility states that the penalties do not apply to the general public, but to a sector or class of people, such as individuals who hold positions of high responsibility in corporations, who should reasonably be aware of their obligations under the Act.[7] However, having regard to the nature of offences to which these civil penalties apply, it appears that the provisions may apply to a broad range of people, some of whom may not necessarily be aware of their legal obligations or hold positions of high responsibility in large corporations. For example,

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

4 International Covenant on Civil and Political Rights, article 14(2).

5 Statement of compatibility, p. 53.

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

7 Statement of compatibility, p. 54.

the bill proposes new civil penalty provisions relating to unfair contract terms. A person contravenes these provisions if they:

- make a consumer or small business contract that is a standard form contract, and they propose and include an unfair term in the contract;
- apply or rely on, or purport to apply or rely on, an unfair term of a consumer or small business contract that is a standard form contract.[8]

1.75 Under existing Australian Consumer Law, a court may find that a person has contravened a civil penalty provision in a broader range of circumstances, including where a person has been in any way, directly or indirectly, knowingly concerned in, or party to, the contravention by a person of such a provision.[9] Thus, an individual may have indirectly been a party to a contravention of the prohibition of unfair terms in consumer contracts and, as a result of the amendments in this bill, be liable for a maximum penalty of $2.5 million.[10] In such circumstances, while the provision could be said to operate in a regulatory context, it appears it still may apply to a broad range of people.

1.76 As to the purpose of the penalties, the statement of compatibility states that the penalties are intended to be deterrent in nature and proceedings would be instituted by a public authority with statutory powers of enforcement.[11] It states that imposing civil penalties will enable an effective disciplinary response to non-compliance.[12] The statement of compatibility explains that increasing the severity of the penalties will ensure the price of misconduct is high enough to deter unfair activity and improve competition in Australia for the benefit of consumers and small businesses.[13] As deterrence is the stated primary objective of this measure, it would seem to meet the test that the penalty is intended to deter and punish.

1.77 In relation to (c), in determining whether a civil penalty is sufficiently severe as to amount to a 'criminal' penalty, the nature of the industry or sector being regulated and the relative size of the penalties in that regulatory context is relevant.[14] The penalty is more likely to be considered criminal for the purposes of international

8 Schedule 2, item 1. A consumer contract and a small business contract are defined in section 23 of the *Competition and Consumer Act 2010*.

9 Schedule 2, section 224 of the Australian Consumer Law in the *Competition and Consumer Act 2010*.

10 Schedule 2, items 11 and 12.

11 Statement of compatibility, p. 53.

12 Statement of compatibility, p. 54.

13 Statement of compatibility, p. 52.

14 See Simon NM Young, 'Enforcing Criminal Law Through Civil Processes: How Does Human Rights Law Treat "Civil For Criminal Processes"?', *Journal of International and Comparative Law*, vol. 2, no. 2, 2017, pp. 133-170.

human rights law if the penalty carries a term of imprisonment or a substantial pecuniary sanction. While the civil penalty provisions would not carry a term of imprisonment, the maximum penalty amount of $2.5 million for individuals is a substantial pecuniary sanction. Indeed, the statement of compatibility acknowledges that the new penalties are intentionally significant, stating that the penalties must be high enough to achieve deterrence and protect consumers.[15] The statement of compatibility states that the large penalties are, however, appropriate for regulatory and disciplinary purposes, as individuals involved in contraventions of the Act may receive large financial benefits from their misconduct, and paying a penalty should not become a cost of doing business.[16] It also notes that the increased penalties are more comparable with international jurisdictions.[17] The statement of compatibility further notes that there is flexibility in the penalty amount, as the court has the discretion to consider the seriousness of the contravention and impose an appropriate penalty in the circumstances.[18] Where a civil penalty is imposed by the court, the individual may have that decision reviewed.

1.78 While some factors may support classifying the penalties as 'civil', namely the domestic classification, the regulatory context and the lack of a term of imprisonment, other factors indicate that the penalties could be regarded as 'criminal', including the fact that the penalties are intended to deter misconduct and may amount to a substantial pecuniary sanction. In cases where the maximum pecuniary order is made, there is a greater risk that the civil penalty may be considered so severe as to constitute a criminal sanction for the purposes of international human rights law.

1.79 While the civil penalty provisions may be characterised as 'criminal' for the purposes of international human rights law, this neither means that the relevant conduct must be turned into a criminal offence in domestic law nor that the civil penalty is illegitimate. Instead, it means that the civil penalty provisions must be shown to be consistent with the criminal process guarantees set out in articles 14 and 15 of the International Covenant on Civil and Political Rights, including the right to be presumed innocent until proven guilty according to law.[19] This right requires that the case against the person be demonstrated on the criminal standard of proof, that is, it must be proven beyond reasonable doubt. The standard of proof applicable in civil penalty proceedings is the civil standard of proof, requiring proof on the balance of probabilities. As the civil penalties in this bill appear to be characterised as 'criminal'

15 Statement of compatibility, pp. 52, 54.

16 Statement of compatibility, p. 54.

17 Statement of compatibility, p. 52.

18 Statement of compatibility, p. 54.

19 International Covenant on Civil and Political Rights, article 14(2).

for the purposes of international human rights law, the lower standard of civil proof would not appear to comply with article 14.

1.80 Another criminal process guarantee is 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).[20] The statement of compatibility states that the related legislative scheme does not permit proceedings to be brought against the person for substantially the same conduct.[21] In particular, where a person contravenes one or more civil penalty provisions, they will not be liable to more than one pecuniary penalty in respect of the same conduct.[22] Additionally, a court must not order a pecuniary penalty in relation to a contravention of a civil penalty provision if the person has already been convicted of an offence for substantially the same conduct.[23]

1.81 However, in certain circumstances, the legislative scheme does allow a person to be subject to both criminal and civil law proceedings for conduct that is substantially the same. For example, after a pecuniary order has been made against a person for contravention of a civil penalty provision and regardless of the fact that this pecuniary order has been made, criminal proceedings can be started against that person for conduct that is substantially the same as the conduct giving rise to the civil penalty.[24] In other words, a person could be liable to pay a pecuniary penalty and then be subject to criminal proceedings for the same conduct. Alternatively, if a person was subject to criminal proceedings but not convicted, a civil penalty order could then be made against them in relation to conduct that is substantially the same as the conduct constituting the offence.[25] This therefore may limit the right to not be tried and punished twice for an offence for which the person has been finally convicted or acquitted.

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

21 Statement of compatibility, p. 54. See, eg, subsection 76(3) of the *Competition and Consumer Act 2010* and Schedule 2, section 224 of the Australian Consumer Law in the *Competition and Consumer Act 2010*.

22 Statement of compatibility, p. 54. See, eg, subsection 76(3) and Schedule 2, subsection 224(4) of the Australian Consumer Law in the *Competition and Consumer Act 2010*.

23 See eg Schedule 2, subsection 225(1) of the Australian Consumer Law in the *Competition and Consumer Act 2010*.

24 See eg Schedule 2, subsection 225(3) of the Australian Consumer Law in the *Competition and Consumer Act 2010*.

25 See eg Schedule 2, subsection 225(2) of the Australian Consumer Law in the *Competition and Consumer Act 2010*.

Committee view

1.82 The committee considers that increasing the maximum penalty for contravention of civil penalty provisions in competition and consumer law is an important measure to deter serious misconduct and protect consumers against egregious conduct. However, noting the substantial pecuniary sanctions of up to $2.5 million that would apply to individuals, there is a risk that the penalties may be so severe as to constitute a 'criminal' sanction under international human rights law. If the penalties were considered to be 'criminal', the committee notes that this does not mean the relevant conduct must be classified as a criminal offence or that the civil penalty is illegitimate. Rather, it must be shown that the provisions are consistent with the criminal process guarantees set out in article 14 of the International Covenant on Civil and Political Rights.

1.83 The committee notes the related legislative scheme applies a civil standard of proof and in certain circumstances allows a person to be subject to civil and criminal proceedings for substantially the same conduct. In light of this, the committee considers that, depending on the severity of the pecuniary penalty applied and whether a person is also subject to criminal proceedings, there may be a risk that the increased civil penalty provisions are not consistent with the criminal process guarantees.

Suggested action

1.84 The committee recommends that when civil penalties are so severe such that there is a risk that they may be regarded as 'criminal' under international human rights law, consideration should be given to applying a higher standard of proof in the related civil penalty proceedings.

1.85 The committee draws these human rights concerns to the attention of the Assistant Minister and the Parliament.

Chapter 2

Concluded matters

2.1 This chapter considers responses to matters raised previously by the committee. The committee has concluded its examination of these matters on the basis of the responses received.

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

Bills

Social Security (Administration) Amendment (Repeal of Cashless Debit Card and Other Measures) Bill 2022[2]

Purpose	This bill sought to abolish the cashless welfare arrangements in Part 3D of the *Social Security (Administration) Act 1999*, and facilitate arrangements for individuals to enter or re-enter the income management regime under Part 3B of the Act The bill also sought to make consequential amendments to the *A New Tax System (Family Assistance) (Administration) Act 1999*, the *National Emergency Declaration Act 2020* and the *Social Security Act 1991* to reflect the repeal of Part 3D and associated measures
Portfolio	Social Services
Introduced	House of Representatives, 27 July 2022 *Received Royal Assent on 30 September 2022*
Rights	Social security; private life; equality and non-discrimination; rights of the child

2.3 The committee requested a response from the minister in relation to the bill in *Report 3 of 2022*.[3]

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, Social Security (Administration) Amendment (Repeal of Cashless Debit Card and Other Measures) Bill 2022 *Report 5 of 2022*; [2022] AUPJCHR 38.

Abolishing the Cashless Debit Card program

2.4 This bill (now Act) sought to abolish the Cashless Debit Card (CDC) program[4] 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 sought to subject certain persons to the income management regime if, among other things, on the day before the 'closure day'[5] of the CDC program, they were a CDC participant due to Northern Territory residency[6] and were within a class of persons determined by the minister by legislative instrument.[7] Such persons included participants who are identified in a child protection notice;[8] vulnerable welfare payment recipients;[9] disengaged youth;[10] long term welfare payment recipients;[11] participants who have an eligible care child who is required to be, but is not, enrolled at a primary or secondary school;[12] participants who meet the school attendance criteria (namely where an unsatisfactory school attendance situation exists in relation to an eligible care child);[13] and participants who are the subject of a State or Territory referral notice.[14] 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

3 Parliamentary Joint Committee on Human Rights, *Report 3 of 2022* (7 September 2022), pp. 15-26.

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

5 Item 1 established 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.

6 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.

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

8 Items 2 and 3.

9 Items 4 and 7.

10 Items 8 and 11.

11 Items 12 and 15.

12 Items 16 and 17.

13 Items 18 and 19.

14 Items 27 and 28.

body which operates under Queensland state law) gives the Secretary a written notice requiring a person to be subject to the income management regime.[15]

2.5 The bill provided for some exemptions. A person who would otherwise meet the eligibility criteria to transition to income management under the 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.[16] The person seeking the exemption would bear the onus of producing evidence to satisfy the Secretary that they are suitable to be exempt.[17]

2.6 Finally, the bill sought to enable CDC participants in certain areas[18] 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).[19] The effect of this amendment would have been to enable certain participants to voluntarily 'opt-out' of the CDC program as soon as Part 1 of this bill commenced and prior to the repeal of the CDC program, which will occur at a later date.[20]

2.7 It is noted that prior to passage, 37 amendments to this bill were agreed to by both Houses of Parliament.[21] Most relevant to this analysis, an enhanced income

15 Items 20 and 23.

16 See items 7, 11, 15, 17, 19 and 26. 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).

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

18 The areas included 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). However, subsequent amendments to this bill omitted items 38 and 40, having the effect that participants in the Cape York and Northern Territory areas may not request to cease to be a program participant.

19 Items 33–36.

20 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.

21 See Schedule of the amendments made by the Senate.

management regime was introduced, meaning that CDC participants in the Northern Territory and Cape York region are now required to transition to this new income management regime under Part 3AA of the Act (instead of the regime under Part 3B).[22] Additionally, CDC participants in the Northern Territory and Cape York region are no longer able to request to cease to be a program participant.[23] Further, the class of persons in the Northern Territory who will transition from the CDC program to the income management regime has been limited.[24]

Summary of initial assessment

Preliminary international human rights legal advice

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

2.8 As the committee has previously reported, measures relating to the CDC program engage numerous human rights.[25] 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.[26] 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,[27] social security[28] and equality and non-discrimination.[29] In particular, it 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

22 Item 1R of bill finally passed by both Houses.

23 Items 38 and 40 of the original bill were omitted.

24 See items 7, 11, 15, 17, 19, 28 of bill finally passed by both Houses; Supplementary Explanatory Memorandum, pp. 2–3.

25 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.

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

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

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

29 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 by the International Convention on the Elimination of All Forms of Racial Discrimination, articles 2 and 5.

payments. Further, as the CDC program disproportionately affects Aboriginal and Torres Strait Islander persons,[30] it also engages and limits the right to equality and non-discrimination.[31] 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.[32]

2.9 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.

2.10 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.[33] 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

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

31 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.

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

33 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.

spend their restricted funds on 'priority needs' (which excludes alcohol and gambling).[34] 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,[35] and enjoyment of the right requires that social support schemes must be accessible, providing universal coverage without discrimination.[36]

2.11 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 accessibility of food, clothing, water and housing for all people in its jurisdiction.[37] 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.[38] In light of these concerns, it is not clear whether transitioning from the CDC program to the income management regime may result in

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

35 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.

36 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.

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

38 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.

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.[39]

2.12 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.[40] 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 CDC program participants are First Nations persons.[41] 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,[42] noting that it is participants in these geographical areas that are to be transitioned to mandatory income management.[43]

39 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.

40 *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'.

41 Statement of compatibility, p. 33.

42 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*.

43 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.

2.13 Further, noting that 'disengaged youth' (which includes children aged between 15 and 17 years)[44] 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.[45] 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.[46] 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.[47] 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,[48] 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.[49] This obligation requires legislative, administrative and judicial bodies and institutions to systematically consider how children's rights and interests are or will be affected directly or indirectly by their decisions and actions.[50]

2.14 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.

Committee's initial view

2.15 The committee considered the bill addressed 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.

2.16 However, the committee noted that the bill, in transitioning certain CDC participants to mandatory income management, limited a number of human rights.

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

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

46 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.

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

48 Statement of compatibility, p. 33.

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

50 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].

The committee considered further information was required to assess the human rights compatibility of this measure and sought 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 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.

2.17 The full initial analysis is set out in *Report 3 of 2022*.

Minister's response[51]

2.18 The minister advised:

(a) What objective is being sought to be achieved by compulsorily transitioning certain participants from the CDC program to the income management regime and why is it necessary to achieving the stated objective of abolishing the CDC program?

51 The minister's response to the committee's inquiries was received on 4 October 2022. This is an extract of the response. The response is available in full on the committee's website.

The Government's objective is to implement voluntary income management (IM) regime in the near future. One step in achieving this overall objective is abolishing the Cashless Debit Card (CDC) program, which has now been achieved, and reforming the existing IM regime.

To this end, in the near future I intend to introduce a further Bill to facilitate the transition of IM to a voluntary regime. This further Bill will be introduced once I have had a sufficient opportunity to adequately consult with affected communities and individuals about what support is required, and to ensure appropriate support systems are in place before the transition occurs.

As addressed in detail further below, I have undertaken consultation on these reforms with affected individuals and communities. Following these consultations, the Government has considered how best to operationalise its commitment to abolish the CDC and reform the existing IM regime.

The option of abolishing CDC on a single date this year was considered but ultimately regarded as unsuitable for a number of reasons. The Government considered that a phased transition to a voluntary IM regime is the best option to ensure that individuals receive the support they require, noting that many individuals have received welfare payments through IM (and/or CDC once it became operational) arrangements for over 10 years. These individuals would likely be significantly disadvantaged by a sudden cessation of all cashless welfare arrangements, and will require time and appropriate support to move towards managing their welfare payments if they choose not to participate in the voluntary IM regime.

(b) Why are CDC participants in the Northern Territory being treated differently from participants in other geographical areas?

In the Northern Territory, a different approach is required to other existing CDC program areas because the Northern Territory is the only area in which an individual has been able to elect to move from IM to CDC. If individuals who voluntarily transitioned to CDC from IM were transitioned off CDC without restrictions on how they receive their welfare payments, they would face different arrangements to people who chose to stay on IM (who would continue to have their welfare payments restricted). This would have the effect of treating those individuals who chose to transfer to CDC differently to those that did not. To ensure fair and equivalent application of cashless welfare arrangements across the Northern Territory, it was decided that CDC program participants residing in the Northern Territory should transition to a form of IM upon closure of the CDC program. The amendments the Government introduced to this Bill addressed many of the Committee's overarching concerns relating to the Northern Territory.

(c) For those participants in the Northern Territory who would be required to transition to the income management regime, will a request to the Secretary to cease participation in the CDC program prevent a participant being subjected to mandatory income management?

The amendments to the Bill which passed both houses of parliament on 28 September 2022 address these concerns. Under the amended Bill, to ensure fairness to those in the Northern Territory who elected to remain on IM rather than transitioning to CDC, Northern Territory CDC participants will not be able to opt-out.

(d) Why are certain participants 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

In most circumstances, current CDC program participants will cease to be subject to any cashless welfare arrangements before the CDC program is legislatively closed. These individuals will be able to volunteer for IM if they choose to do so. There are two exceptions to this general circumstance, namely individuals residing in the Northern Territory and the Cape York area.

The compulsory CDC to IM in the Northern Territory is addressed above.

The mandatory transition of individuals from CDC to IM in the Cape York Area recognises the important role of the Family Responsibilities Commission (FRC) in supporting individuals within its jurisdiction. This will ensure the FRC can continue to exercise all powers available to it under its originating legislation and continue its work unchanged.

While voluntary CDC participants will automatically transition to IM, they will have the ability to opt-out.

(e) What is 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 what were the outcomes of such consultation?

I have personally visited and spoke with communities in Ceduna, the East Kimberley, Cairns and the Northern Territory. Assistant Minister Elliot visited and spoke with communities in Bundaberg and Hervey Bay, Cape York and the Goldfields region. I have consulted not only with these broader communities, but also with individual CDC program participants and key stakeholders in the communities including First Nations leaders, service providers, healthcare workers, and police.

The discussions undertaken as part of these consultations have been focused on understanding:

- what services are needed to address social issues within communities and to drive economic independence.
- what supports people may need while transitioning off the program.
- what the future of IM may look like and what other supports that may be needed to operationalise this.

Outcomes of the consultations undertaken are detailed throughout this correspondence.

(f) Was consideration given to less rights restrictive ways to achieve the stated objective, and what other safeguards will operate to assist the proportionality of transitioning individuals to compulsory income management?

The staged reform of welfare management, through the abolition of CDC and reforms to the IM regime, has been and will continue to be developed in consultation with affected communities and other stakeholders, including First Nations leaders. Several options have been mooted over time including full abolition. The Government considers that our chosen pathway is the most appropriate way to implement changes and remove or lessen restrictions with minimal disruption to accepted arrangements that have helped people to meet their priority needs.

The government is introducing a range of safeguards to support the transition away from CDC and, ultimately, to a voluntary scheme. These include tailored community support and engagement with services delivered to individual participants.

This process remains ongoing and, as with all successful policies, will adapt and may be revised as the pathway to voluntary arrangements gets underway.

(g) Will participants who will be subjected to the income management regime have an opportunity in the future to opt-out of this regime or cease their participation in mandatory income management

The Government is committed to abolishing the mandatory CDC program and to instead support communities to make their own decisions about the way forward. As noted above, the Government's intention is to transition away from existing cashless welfare arrangements to a voluntary regime over coming years.

In order to best achieve this while ensuring affected individuals receive the support they require, a stepped approached is preferred by the Government and affected communities. This will involve initially abolishing the CDC program and reforming the IM regime, followed by further amendments to complete the transition to a voluntary regime.

Concluding comments

International human rights legal advice

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

2.19 The initial analysis noted that by requiring certain individuals to transition from the CDC program to the income management regime, the bill engaged and limited multiple human rights. As noted above (at paragraph [2.7]), several amendments were made to the bill prior to it passing both Houses of Parliament, including the introduction of a new enhanced income management regime. The initial analysis noted that the right to an adequate standard of living may be engaged

and limited if those participants who transitioned to the income management regime experienced difficulties in accessing and meeting their basic needs, such as food, clothing and housing. The supplementary explanatory memorandum states that the new enhanced income management regime addresses concerns regarding the inflexibility and restrictiveness of the BasicsCard, with individuals having access to a Contemporary Card with more modern functionality, including accessing more merchants, allowing for BPAY and online shopping and better supports for money management. Individuals will also receive support from Services Australia. Additionally, amendments to the bill allow the Secretary to vary the percentage of qualified and unqualified portions of a person's welfare payment if a person is unable to access their BasicsCard bank account as a direct result of a technological fault or malfunction with the card or account; a natural disaster; or a national emergency.[52] To the extent that these amendments mitigate the risk that individuals subject to income management will experience difficulties accessing and meeting their basic needs, the right to an adequate standard of living appears unlikely to be limited.

2.20 However, those subject to compulsory income management will continue to have a portion of their social security payment managed or quarantined and can only spend their restricted funds on 'priority needs'. As such, the amended measure would still engage and limit the rights to social security and private life and, insofar as it disproportionately impacts Aboriginal and Torres Strait Islander persons and applies to 'disengaged youth', the right to equality and non-discrimination and the rights of the child.

2.21 Further information was sought regarding the objective sought to be achieved by compulsorily transitioning certain CDC participants to the income management regime. The minister stated that the government's objective is to implement voluntary income management in the near future. The minister noted that abolishing the CDC program and reforming the existing income management regime are steps to achieve this objective. The minister noted that a further bill is intended to be introduced following further consultations with affected communities and individuals to facilitate the transition of income management to a voluntary regime. In the meantime, the minister stated that a phased transition to a voluntary income management regime is the best option to ensure that individuals receive the support they require, noting that many individuals, particularly those who have been on income management for a significant period of time, will require time and appropriate support to move towards managing their welfare payments.

2.22 As to the necessity of the measure, the minister noted that the Northern Territory is the only area where individuals were able to elect to transition from income management to the CDC program. If individuals who elected to transition from the income management regime to the CDC program were to cease to be

52 See item 1R, subsection 123SJ(4)–(5); item 48E, subsection 123SM(3)–(4); item 48M, subsection 123SP(3)–(4) of bill as finally passed by both Houses.

participants following the closure of the CDC program, those participants would be treated differently to people who elected to remain on the income management regime. The minister stated that it is therefore necessary to transition Northern Territory CDC participants to compulsory income management to ensure fair and equivalent application of cashless welfare arrangements across the Northern Territory. Regarding the transition of participants in the Cape York area, the minister stated that this measure recognises the important role of the Family Responsibilities Commission in supporting individuals within its jurisdiction. The minister noted that the Commission will continue to be able to exercise all powers available under its originating legislation and continue its work unchanged.

2.23 Considering the myriad ways in which the CDC program has limited human rights, abolishing the CDC program would be a rights-enhancing measure and making income management voluntary and removing any compulsory element would address the human rights concerns with the income management regime. In this way, the broader objective underpinning the bill – namely, abolishing the CDC program – would likely constitute a legitimate objective for the purposes of international human rights law.

2.24 However, questions remain as to whether the specific measure in this bill, of compulsorily transitioning certain CDC participants to income management, is, for the purposes of international human rights law, necessary and addresses a public or social concern that is pressing and substantial enough to warrant limiting human rights. While applying cashless welfare arrangements fairly across the Northern Territory may be important from a policy perspective, it is not clear that this objective would constitute a pressing and substantial concern such that it would warrant limiting human rights. Additionally, while it is important to ensure that individuals are adequately supported to transition away from the CDC program and are not disadvantaged by the program's closure, it remains unclear why this supported transition must occur on a mandatory basis.

2.25 Regarding proportionality, as noted in the initial analysis, for Northern Territory CDC participants there appears to be currently 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. While specifying classes of persons who are to be subject to the income management regime, including disengaged youth and long-term welfare recipients, would assist with proportionality, concerns remain that this approach is not currently sufficiently individualised.

2.26 As to the existence of safeguards, the minister confirmed that participants in the Northern Territory are not able to opt-out of the CDC program.[53] As such, the

53 It is noted that items 38 and 40 were omitted from the bill as finally passed by both Houses, having the effect that participants in the Cape York and Northern Territory areas may not request to cease to be a program participant.

opt-out mechanism contained in the bill does not offer any safeguard value for those required to transition to mandatory income management. While the exemptions outlined above (in paragraph [2.5]) may operate as a safeguard, their value will depend on how they operate in practice, noting the committee has previously raised concerns about the adequacy and effectiveness of these exemptions in the context of the CDC program.[54]

2.27 To assess the effectiveness of community consultations as a safeguard, further information was sought from the minister regarding the nature and outcome of consultations undertaken to date. The minister stated that she had personally visited and spoken with communities in Ceduna, the East Kimberly, Cairns and the Northern Territory, while the assistant minister had visited and spoken with communities in Bundaberg and Hervey Bay, Cape York and the Goldfield region. The minister noted that consultation occurred with communities and individuals as well as key stakeholders, such as First Nations leaders, service providers, healthcare workers and police. As to the outcomes of consultations, the minister stated that the government and affected communities preferred a stepped approach involving initially abolishing the CDC program and reforming the income management regime, followed by further amendments to complete the transition away from existing cashless welfare arrangements to a voluntary regime. If this consultation process contained the constituent elements of free, prior and informed consent, with participants having a genuine opportunity to influence the decision-making process and outcome, it may satisfy the requirements under international human rights law regarding consultation.[55]

2.28 Finally, as to whether less rights restrictive ways to achieve the stated objective were considered, the minister stated that several options were considered,

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

55 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. This is particularly the case where Aboriginal and Torres Strait Islander people are affected by the decision. Article 19 of the United Nations 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. The right of indigenous peoples to be consulted about measures which impact on them is a critical component of free, prior and informed consent. Genuine consultation in this context should be 'in the form of a dialogue and negotiation towards consent'. See 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) [14], [15], [20]. For previous committee commentary on this issue see Parliamentary Joint Committee on Human Rights, *Report 1 of 2021* (3 February 2021) pp. 95–98.

including full abolition of the CDC on a single date, but these options were ultimately regarded as unsuitable for a number of reasons. The minister stated that the chosen approach is the most appropriate way to implement changes and remove or lessen restrictions with minimal disruption to accepted arrangements. The minister noted that a phased transition will ensure individuals receive the support they require, noting that the sudden cessation of all cashless welfare arrangements would likely significantly disadvantage individuals, especially those who have been subject to such welfare arrangement arrangements for a long period of time (over 10 years). The minister further stated that the government is introducing a range of safeguards to support the transition away from the CDC program, and ultimately, to a voluntary scheme.

2.29 As noted above, ensuring that individuals are adequately supported to transition away from the CDC program and are not disadvantaged by the closure of the CDC program is an important aim. However, questions remain as to whether there may be a less rights restrictive way of achieving the stated objective, by providing extra support while allowing individuals to voluntarily opt-in to the regime or only be subject to the regime on the basis of individual circumstances.

2.30 In conclusion, in abolishing the CDC 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. The intention to make income management voluntary in the future is also positive for addressing the adverse impact on human rights. However, this bill, in requiring certain individuals to transition from the CDC program to the income management regime, still engages and limits multiple human rights. As it is not clear, as a matter of international human rights law, whether compulsorily transitioning certain participants to the income management regime addresses a pressing or substantial concern, and as the current income management regime is not accompanied by sufficient safeguards, this aspect of the bill risks impermissibly limiting the rights to social security, privacy and equality and non-discrimination. It is noted that the government intends to further amend the income management regime, ultimately transitioning to a voluntary scheme. Were the income management regime to be made voluntary and those transitioned to the regime under this bill to be removed from any form of welfare restrictions, the human rights concerns outlined above would be addressed.

Committee view

2.31 The committee thanks the minister for this response. The committee notes the minister's advice that the government intends to transition away from existing cashless welfare arrangements to a voluntary regime and will continue to develop this staged reform in consultation with affected communities and other stakeholders, including First Nations leaders. In particular, the committee notes the minister's advice that a further bill is intended to be introduced to facilitate the

transition of income management to a voluntary regime and this is to occur once further consultations are undertaken and appropriate support systems are in place.

2.32 The committee notes that were the income management regime to be made voluntary, the human rights concerns outlined above would be addressed. However, until a further bill is introduced, the committee notes that transitioning certain CDC participants to mandatory income management limits a number of human rights. As the bill has passed both Houses of Parliament, the committee makes no further comment.

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	*Migration Act 1958*
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

2.33 The committee requested a response from the minister in relation to this instrument in *Report 3 of 2022*.[2]

Liability for costs of detention

2.34 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.[3] Persons convicted of people smuggling and illegal foreign fishing offences are liable to repay the Commonwealth for this cost of their immigration detention.[4]

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 5 of 2022*; [2022] AUPJCHR 39.

2 Parliamentary Joint Committee on Human Rights, *Report 3 of 2020* (7 September 2021), pp. 27-30.

3 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).

4 *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.

Summary of initial assessment

Preliminary international human rights legal advice

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

2.35 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.

2.36 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 penalty; and

(c) the severity of the penalty.[5]

2.37 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.[6] 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.[7]

2.38 As this legislative instrument is exempt from disallowance, no statement of compatibility with human rights is required to be prepared.[8] As such, no assessment of the instrument's compatibility with human rights is available.

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

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

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

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

Committee's initial view

2.39 The committee considered that further information was 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 sought 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.

2.40 The full initial analysis is set out in *Report 3 of 2022*.

Minister's response[9]

2.41 The minister advised:

(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

Immigration detention in Australia is administrative in nature and is not a punishment. Detention of unlawful non-citizens is required under s189 of the *Migration Act 1958* (the Act).

The primary intention of making certain cohorts liable for the cost of their immigration detention is to recoup the significant financial impost detaining such persons represents to the Commonwealth. As the Committee notes, the *Migration Amendment (Abolishing Detention Debt) Act 2009* (the 2009 Act) amended the Act to

9 The minister's response to the committee's inquiries was received on 27 September 2022. This is an extract of the response. The response is available in full on the committee's website.

remove the liability for the cost of their detention for all detainees apart from convicted people smugglers and illegal foreign fishers. The then Minister for Immigration summarised the rationale and noted that the Bill aimed to strike:

> an appropriate balance by abolishing an ineffective system that penalises former detainees with enormous debt burdens, while ensuring that liability for detention costs remains a deterrent in relation to convicted illegal foreign fishers and people smugglers.

The explanatory memorandum accompanying the 2009 Act similarly stated "These provisions are being retained in response to the serious nature of the offences covered by section 262 of the Migration Act and in recognition of the need for a significant deterrent to apply to these offences."

These documents make it clear that the retention of the liability for detention costs for these particular cohorts was also intended to act as a deterrent due to the seriousness of these activities often perpetrated by recidivist offenders.

The individual and the master, owner, agent and charter of the vessel on which the person travel to Australia are jointly and severally liable for the costs of the individual's immigration detention.

The period subject to immigration detention debt does not include time spent in criminal custody. A person is not detained in immigration detention in relation to conduct for which they have been convicted of a criminal offence, rather it relates to their status as an unlawful non-citizen (generally after, and in some cases before, their criminal custody).

(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

An immigration detainee who has exhausted visa options to remain in Australia must be removed from Australia as soon as reasonably practicable, subject to some exceptions relating to removal to a person's country of origin that give effect to Australia's *non-refoulement* obligations. The Department seeks to effect the removal of unlawful non-citizens who were convicted of people smuggling offences and illegal foreign fishers promptly after the conclusion of their criminal custody. The time an individual spends in immigration detention depends on a range of factors, including the complexity of their case, the legal processes they pursue and whether they voluntarily choose to leave Australia.

The Department has issued detention debt liability notifications for fewer than five individuals in total for the financial years from 2018/19 until 2022/23. A notice in respect to detention, removal or deportation costs is to be handed to an unlawful non-citizen once estimated costs of detention, removal or deportation are known.

The notice advises the unlawful non-citizen that the costs are an estimate only and that final costs will be sent to them via an invoice once the removal is completed.

(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

The liability for detention costs is not a criminal penalty under the Act. Subsection 262(3) of the Act provides that the sum a person who is liable for in relation to their immigration detention cannot be more than the cost to the Commonwealth of detaining that person. It is clear from this wording that the amount imposed under the Act can only be for the actual cost of detention and cannot be a punitive measure. It is therefore not a punishment as the Act does not allow the Commonwealth to do so. Also, as noted above, the immigration detention debt does not relate to the conduct for which the person was convicted of a criminal offence. The person is therefore not charged for detention that relates to their conviction and the detention debt is not intended to amount a criminal penalty for the purposes of international human rights law or to the person being punished twice for their offence.

(b) whether imposing a daily charge (including increasing it) limits the right to humane treatment in detention.

All persons detained administratively under the Act have the same rights to humane treatment in immigration detention regardless of whether they are liable for the cost of their immigration detention.

The Government is committed to ensuring all detainees in immigration detention are provided with high quality services commensurate to Australian standards and that the conditions in immigration detention are humane and respect the inherent dignity of the person.

The Department invests a significant amount of resources to provide high quality facilities and amenities, a broad range of services and activities within the immigration detention network and to ensure safety and security within the centres. All people in immigration detention are accommodated in facilities most appropriate to their needs and circumstances, are able to access legal representation and are provided with the means to contact family, friends and other support.

Internal assurance and external oversight processes are in place to ensure that the health, safety and wellbeing of all immigration detainees is maintained.

Immigration detainees have access to appropriate food (accommodating dietary and cultural requirements), educational programs, cultural, recreational and sporting activities, internet and computer facilities, televisions, and clean, comfortable sleeping quarters.

Health care services for immigration detainees are generally commensurate with those available to the Australian community under the Australian public health system and as clinically indicated and with the person's consent.

The imposition of a detention debt in relation to some immigration detainees does not limit their access to the above services or limit their rights to humane conditions of detention.

Concluding comments

International human rights legal advice

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

2.42 As noted above, imposing liability for the costs of a person's 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 if the costs of detention are characterised as 'criminal' for the purposes of international human rights law. The relevant test for this relies on three criteria: the domestic classification of the offence; the nature of the penalty; and the severity of the penalty. The minister advised that the purpose behind the imposition of the costs is twofold, namely: to recoup the cost of detaining certain persons; and to serve as a deterrent in relation to people smuggling and illegal fishing offences. Given the stated intention of deterring others from engaging in people smuggling or relevant fishing, the penalty is more likely to be considered 'criminal' in nature under international human rights law.

2.43 As to the potential severity of the penalty, advice was sought as to 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. The minister noted that the department seeks to effect the removal of people convicted of people smuggling and illegal foreign fishing offences promptly after their custodial sentence has concluded, but stated that the length of time will depend on the complexity of their case, the legal processes they pursue and whether they voluntarily choose to leave Australia.

2.44 The minister did not provide information as to the average and longest length of time those persons have remained in detention (and therefore accrued debts). The potential severity of this penalty depends on the length of time that relevant persons remain in detention. Detention of merely weeks or months may not be so significant that the penalty can be regarded as criminal under international human rights law. However, a period of detention extending for years may risk this. In this regard, it is noted that statistics relating to all persons in immigration detention are regularly published. The most recent statistics indicate that, at 31 May 2022, the average length of immigration detention was 736 days, and that 138 people have been in detention for more than 1,825 days.[10] Applying those general

10 Department of Home Affairs, *Immigration Detention and Community Statistics Summary* (31 May 2022), p. 12.

statistics as a guide, were a person convicted of a foreign fishing or people smuggling offence to be held in immigration detention for the current average length of time and subject to this increased daily rate for that period, they would be liable for a debt of $361,147.84. A person held for 1,825 days would accrue a debt of $895,892.50. Given the magnitude of these potential costs, and the absence of information indicating that people in the relevant cohort are held for shorter periods of time (and so accrue smaller debts), there appears to be a risk that the penalties may be sufficiently severe in nature so as to be characterised as a criminal penalty for the purposes of international human rights law

2.45 The minister stated that the department has issued debt liability notices for less than five people for the financial years from July 2018 to present. However, it is noted that while these penalties may not be frequently imposed in practice, this does not alter the establishment of the liability for the penalty as a matter of law, and the ability to impose the penalty in every instance in which it arises.[11]

2.46 For those persons held for short periods of time after the conclusion of a custodial sentence, this measure would be unlikely to amount to a criminal charge or criminal penalty. However, for those for whom detention is lengthy, there is a risk that imposing (and increasing) this charge could be so severe as to amount to a criminal penalty for the purposes of international human rights law. This would require that the penalty must be shown to be consistent with the criminal process guarantees set out in articles 14 and 15 of the International Covenant on Civil and Political Rights, including the right not to be tried twice for the same offence (the prohibition against double punishment).[12]

2.47 In relation to the prohibition against double punishment, the minister advised that the liability for detention costs is not a criminal penalty under legislation, and stated that it cannot be more than the cost to the Commonwealth of detaining that person. The minister also stated that the debt does not 'relate to' the conduct for which the person was convicted of a criminal offence, and the person is therefore not charged for detention that relates to their conviction. However, it is noted that this penalty only applies to persons in immigration detention who have been convicted of a people smuggling or foreign fishing offence, and consequently would appear to be directly related to the commission of those offences.

2.48 Relevant international jurisprudence on this precise question is limited. The UN Committee on Human Rights has held that a decision to proceed with deportation is administrative in nature and independent of a person's conviction and

11 It may, equally, raise questions as to the necessity and efficacy of imposing this liability for such debts at all, given that they appear to be rarely enforced.

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

sentence under criminal law.[13] However, this would appear to be distinguishable from a decision to impose (and to increase) a daily fee for mandatory immigration detention only for those persons in immigration detention who have been convicted of a relevant offence. Further, the UN Committee on Human Rights has commented that proceedings for the expulsion of a person not holding the nationality of a State party are ordinarily outside the scope of article 14, however it would appear that this may change if a person were to demonstrate that a measure was intended to impose additional punishment upon them rather than to protect the public.[14] In this regard, it is noted that the minister has said that the imposition of this penalty only on people convicted of relevant offences is intended to deter potential offenders and re-offenders.

2.49 As such, it would appear that there is some risk that, in such instances where the accumulated debt for one's detention is so substantial that it may be regarded as a criminal penalty under international human rights law, the imposition of this penalty may constitute double punishment. Were this the case, this would violate the right to a fair trial.[15]

2.50 With respect to the right to humane treatment in detention, the minister stated that all persons in immigration detention have access to the same services and supports, including the availability of education, healthcare, and living quarters. The minister stated that the imposition of a detention debt in relation to some immigration detainees does not limit their access to those services or their rights to humane conditions of detention. However, 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 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.[16] It may be that increasing a detainee's liability for the cost of their detention could render the overall conditions of their immigration detention more difficult, including noting that it may potentially deter those persons from pursuing legal avenues of appeal, which can take long periods of time (and would have the effect of causing the debt to continue to accrue). Within this broader

13 UN Human Rights Committee, *JG v New Zealand* (Communication No. 2631/2015) para [4.4].

14 UN Human Rights Committee, *Nystrom v Australia* (Communication No. 1557/2007) para [6.4].

15 See, for example, the language used by the UN Human Rights in *Babkin v Russian Federation* (CCPR/C/92/D/1310/2004) at para [13.6].

16 *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].

context, and having regard to previous findings by the UN Committee on Human Rights, there may, therefore, be a risk that increasing the daily fee for certain immigration detainees has the effect of exacerbating detention conditions which have previously been found to amount to cruel, inhuman or degrading treatment, and therefore constitute an impermissible limit on the right to humane treatment in detention.

Committee view

2.51 The committee thanks the minister for this response. The committee notes that for those persons held in immigration detention for short periods of time after the conclusion of a custodial sentence, increasing the costs of detention payable by a detainee would be unlikely to amount to a criminal penalty for the purposes of international human rights law. However, for those for whom detention is lengthy, the committee considers there is some risk that imposing (and increasing) this cost could be so severe as to amount to a criminal penalty for the purposes of international human rights law. If so, the committee notes that this would require that the penalty be shown to be consistent with criminal process guarantees, including the right not to be tried twice for the same offence (the prohibition against double punishment). The committee considers there may be a risk that, in such instances, the imposition of a substantial debt only on those convicted of certain offences may breach the prohibition against double punishment.

2.52 The committee notes that the United Nations Human Rights Committee has stated, regarding immigration detention in Australia that subjecting individuals to arbitrary and protracted and/or indefinite detention, the 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. Therefore, the committee considers there may also be a risk that increasing the daily fee for certain immigration detainees has the effect of exacerbating detention conditions, which could constitute an impermissible breach of the right to humane treatment in detention.

2.53 The committee draws these human rights concerns to the attention of the minister and the Parliament.

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

Migration Amendment (Postgraduate Research in Critical Technology—Student Visa Conditions) Regulations 2022 [F2022L00866][72]

Purpose	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 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
Portfolio	Home Affairs
Authorising legislation	*Migration Act 1958*
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[73]
Rights	Education; work; freedom of expression; equality and non-discrimination

2.54 The committee requested a response from the minister in relation to the instruments in *Report 3 of 2022*.[74]

72 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 5 of 2022*; [2022] AUPJCHR 40.

73 In the event of any change to the Senate or House's sitting days, the last day for the notice would change accordingly.

74 Parliamentary Joint Committee on Human Rights, *Report 3 of 2022* (7 September 2022), pp. 31-37.

Restriction on visa holders relating to critical technologies

2.55 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 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,[75] 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.

2.56 '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.[76] 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.[77]

Summary of initial assessment

Preliminary international human rights legal advice

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

2.57 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

75 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].

76 Migration Amendment (Protecting Australia's Critical Technology) Regulations 2022 [F2022L00541], item 1, definition contained in section 1.03.

77 Migration Amendment (Protecting Australia's Critical Technology) Regulations 2022 [F2022L00541], item 2, subsection 1.15Q(1).

of unwanted critical technology knowledge transfer, these legislative instruments engage and may limit several human rights including the rights to education, work, freedom of expression and equality and non-discrimination.[78]

2.58 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.[79] 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.[80] 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.[81]

2.59 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.[82] It is recognised that nation states have a broad discretion to regulate the issue of visas, and to establish criteria accompanying those visas. However, those laws

78 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.

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

80 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].

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

82 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.

must be implemented in a non-discriminatory manner, consistent with the right to equality. The right to equality encompasses both 'direct' discrimination (where measures have a discriminatory intent) and 'indirect' discrimination (where measures have a discriminatory effect on the enjoyment of rights).[83] 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.[84]

2.60 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.[85]

Committee's initial view

2.61 To assess the human rights compatibility of this measure, the committee sought 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

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

84 *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'.

85 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].

been prior instances in which unwanted communication of technology intended to be captured by these measures has occurred; and

(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.

2.62 The full initial analysis is set out in *Report 3 of 2022*.

Minister's response[86]

2.63 The minister advised:

(a) what types of technology will be specified for the purposes of the definition of 'critical technology' and when?

The amendments made by the PACT Regulations provide that the Minister may, by legislative instrument, specify kinds of technology as critical technology in regulation. The Minister for Home Affairs is yet to make this instrument. The Department has undertaken extensive consultation with affected stakeholders in the higher education sector and industry groups on the list of technologies to be specified—informed by the Department of the Prime Minister and Cabinet's 2021 *List of critical technologies in the national interest*.[87]

As at September 2022, the following list of classes of technologies has been provided to affected stakeholders for consultation for the purpose of the visa screening framework:

- Advanced materials and manufacturing technology
- Artificial intelligence, computing and communications technology
- Biotechnology, vaccines and gene technology
- Energy and environment
- Sensing, timing and navigation technology
- Transportation, robotics and space
- Quantum technology

The amendments made by the PACT Regulations commenced in part on 1 July 2022—amending the Migration Regulations to introduce the PIC for the Student visa subclass and applying the new Student visa condition.

86 The minister's response to the committee's inquiries was received on 27 September 2022. This is an extract of the response. 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.

87 https://www.pmc.gov.au/sites/default/files/publications/ctpco-critical-tech-list-of-63.pdf

While they have been made, the amendments made by the PACT Regulations will not be operational (in effect, visa screening will not 'go live') until the Minister has specified the kinds of critical technology for the purpose of the regulations.

The application of the PIC to additional visa subclasses and the operation of new cancellation ground will commence no later than 6 October 2022. These mechanisms will similarly not be 'operational' until the kinds of critical technology have been specified.

The Department will draft a proposed legislative instrument and explanatory statement for the Minister's consideration in Q4 2022. The final content of the specification, and its timing, is at the discretion of the Minister.

(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?

These grounds are modelled after grounds outlined in section 121.1 of the *Criminal Code* in relation to information causing harm to Australia's interest (paragraphs (a), (b), (c) and subparagraph (d)(i)) and the grounds upon which the Defence Minister determines whether the supply of certain technologies would prejudice the security, defence or international relations under section 25A of the *Defence Trade Controls Act 2012* as prescribed in section 8 of the *Defence Trade Controls Regulation 2013* (subparagraphs (f)(ii) and (iii)).

An 'indirect' transfer of critical technology or communication of critical technology, for the purposes of the Migration Regulations, is a transfer or communication that would indirectly result in harm or prejudice to the security or defence of Australia, or to the health or safety of the Australian public, or interfere with or prejudice the prevention, detection, investigation, prosecution or punishment of Commonwealth offences, or harm Australia's international relations.

'Indirect' transfer of critical technology is intended to capture conduct that would facilitate or contribute to the unwanted transfer of critical technology, including transfer of underlying research and other enablers.

(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.

Enhanced visa screening protects Australia's world-class science and technology institutions from malicious activities. Technological advances

drive productivity, growth and improved living standards; however, they also have the potential to harm our national security and undermine our democratic values and principles. University, industry and research sectors are key to our economic success and national security; however, some countries may seek to undermine Australia's interests through foreign interference in these sectors.

These threats are sophisticated, enduring and pervasive, with our higher education institutions at particular risk of unwanted transfers of critical technology to malicious actors. Such activities can result in the transfer of knowledge or theft of intellectual property, undermining Australia's strategic and commercial advantages. Effectively managing these risks is vital to maintaining Australia's status as a secure destination of choice for students and skilled workers.

The new visa screening framework will strengthen Australia's ability to identify and manage risks associated with the unwanted transfer of critical technologies. The following case studies illustrate the observed extant risk to critical technologies through the visa program.

Case Study 1:

- A foreign national applied for a Temporary Work visa, at an Australian university to research a critical technology, as per the List of critical technologies in the national interest. The technology is of significance to 'game changing' military strategies within a global context.
- The Department of Home Affairs identified that a foreign military-linked laboratory was funding the individual. The research conducted at the foreign laboratory was indistinguishable from the research at the Australian university. The foreign national's research conducted at the foreign laboratory indicated links to top-secret research for the military, meaning their research likely has links to military technologies.
- The foreign national may have intended to come to Australia to inform foreign military-related research, with a high likelihood this technology would be used to advance the foreign defence technologies.

Case Study 2:

- A foreign national, holding a Global Talent visa returned to Australia to seek employment in a critical technology field. They had completed their PhD at a top Australian university with highly-developed defence priority technologies, specifically in this field. The foreign national's PhD was funded by a foreign government scholarship program. Their PhD and research

assistance experience in Australia has direct correlation to a technology category identified in the List of critical technologies in the national interest that is also a priority of the foreign national's Government.

- The foreign national stated that they had interviews lined up in Australia for work in a critical technology field. However, the foreign national also stated they would continue to work remotely in Australia for a foreign state-owned company developing critical technologies.
- Australian Border Force Officers observed that the foreign national only became nervous when asked about how their return to Australia may be in conflict with obligations under the foreign government scholarship funding.
- Less than 24 hours after arriving in Australia, the foreign national departed for their home country. The Department of Home Affairs assesses that the individual may have become aware of the heightened awareness of critical technology-related issues and sensitivities in the Australian border environment.

Case Study 3:

- A foreign national lodged a Temporary Activity visa application to travel to Australia as a visiting PhD student for one year in an Australian research institution. The foreign national intends to study a technology identified in the List of critical technologies in the national interest. The applicant intends to be under the supervision of a highly renowned professor in that field, who has collaborated with multiple foreign universities linked to defence research. Defence application of research in this field is of high strategic interest globally.
- The foreign national intends to apply their theory to the professor's projects, and subsequently take their learnings back to their home country. The foreign national's host university is considered a very high-risk institution for its involvement in economic espionage and very high level of defence research. The foreign national's specific line of research is under a designated defence research area of their host university.
- The foreign national is also funded by a foreign government scholarship program, where an obligation is to return to their home country for a period after completing their degree. Links to defence research areas for the foreign national and professor, combined with foreign government funding, indicate this foreign national may be intending to advance interests of their state in a manner that may be against Australia's national interest.

(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.

The amendments made by the PACT Regulations do not differentiate on the basis of nationality and the provisions can be applied to non-citizens of any nationality, depending on their individual circumstances and on the assessed threat environment – which may change over time. This allows the Department to respond to the rapid pace of critical technology development, and to shifts in the geopolitical environment and foreign interference risks. Those countries which are high threat vectors for the unwanted transfer of Weapons of Mass Destruction intellectual property are also relevant in the critical technology transfer environment.

In practice, visa applicants and visa holders with affiliations with countries that present greater threat of critical technology transfer will be more likely to be affected by these provisions. However, the decision as to whether a visa applicant or visa holder may present an unreasonable risk of an unwanted transfer of critical technologies will depend on their individual circumstances such as their field of study, the foreign institutions with which they are affiliated and how their research is being funded—informed by available intelligence about risks to Australia's national security that these factors may indicate. Therefore, any differential impact on citizens of some countries would be on the basis of reasonable and objective factors in their individual circumstances, with decisions by the Minister (or her delegate) being informed by intelligence from a range of Australian government sources.

Concluding comments

International human rights legal advice

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

2.64 To assess whether the regulations meet the 'quality of law' test, further information was sought from the minister regarding what types of technology may be specified by legislative instrument for the purposes of defining 'critical technology'. The minister provided advice regarding the classes of technologies that may be specified, such as technology relating to manufacturing, artificial intelligence, biotechnology etc.

2.65 As to the meaning of 'indirect' transfer of critical technology or communication of critical technology, the minister advised that it is a transfer or communication that would indirectly result in harm or prejudice to the security or defence of Australia, or to the health or safety of the Australian public, or interfere with or prejudice the prevention, detection, investigation, prosecution or

punishment of Commonwealth offences, or harm Australia's international relations. The minister stated that 'indirect' transfer is intended to capture conduct that would facilitate or contribute to the unwanted transfer of critical technology, including transfer of underlying research and other enablers.

2.66 As to the timing of the legislative instrument, the minister advised that a draft legislative instrument specifying the list of technologies will be drafted later this year for consideration and noted that until such an instrument is made, the visa screening provisions and new cancellation ground contained in these regulations will not become 'operational'.

2.67 The list of technologies set out in the minister's response provides a clearer indication of what technologies may be specified by the minister and provides more certainty as to what is meant by 'critical technology'. The minister's response also provides greater clarity as to what is meant by indirect transfer of critical technology and communication of information about critical technology. This additional information assists in understanding how the measure is likely to operate in practice. If the legislative instrument were to be drafted in a way that is 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, the measure would likely satisfy the 'quality of law' test (although noting that much will depend on the detail to be contained in the legislative instrument).

2.68 As to the objective being pursued by this measure, the initial analysis noted that while the stated objective of protecting national security, public order, public health and safety, and Australia's international relations, would be capable of constituting a legitimate objective, it was unclear whether the measure sought to address a pressing and substantial concern. In this regard, further information was sought as to whether there had been prior instances in which unwanted communication of technology had occurred. The minister advised that higher education institutions are at particular risk of unwanted transfers of critical technology to malicious actors and such activities can result in the transfer of knowledge or theft of intellectual property, which undermines Australia's strategic and commercial activities. To illustrate the extant risk, the minister provided three case studies. These case studies indicate instances where visa holders could communicate information about critical technologies, including military and defence technologies, to foreign institutions and actors, which, given the sensitivity of the information being communicated, could result in harm to Australia's national security. Based on this additional information, the regulations appear to address a pressing and substantial concern for the purposes of international human rights law. To the extent that the future legislative instrument is drafted in such a way as to capture the instances of unwanted transfer or communication of technology which the measure is intended to address, it may be effective to achieve the stated objective.

2.69 In assessing proportionality, it is necessary to consider a number of factors, including whether the proposed limitation is sufficiently circumscribed and accompanied by adequate safeguards. As noted in the initial analysis, the measure is accompanied by some safeguards, including the availability of merits review. However, as the technologies that are to be captured by this measure will be specified in a future legislative instrument, it is difficult to assess the potential breadth of the measure and whether it will be sufficiently circumscribed in practice. As noted above, were the legislative instrument to be drafted in way that is sufficiently clear and accessible, it would assist with proportionality.

2.70 With respect to equality and non-discrimination, the minister advised that in practice visa applicants and visa holders with affiliations with countries that present greater threat of critical technology transfer will be more likely to be affected by these provisions. The minister stated that whether an individual poses an unreasonable risk of an unwanted transfer of critical technologies will depend on their individual circumstances, such as their field of study, the foreign institutions with which they are affiliated and how their research is being funded. This assessment will also be informed by available intelligence about risks to Australia's national security. While it seems that the measure may have a disproportionate impact on individuals of some nationalities more than others in practice, this differential treatment would appear to be based on reasonable and objective criteria.

Committee view

2.71 The committee thanks the minister for this response. The committee considers that the measure pursues an important objective, that of seeking to protect national security, public order, public health and safety, and Australia's international relations by preventing the unwanted transfer of critical technology to malicious actors. Having regard to the case studies provided by the minister, the committee considers that there is an extant risk of unwanted transfers of critical technology, particularly in the higher education sector, and this measure seeks to address this pressing and substantial concern.

2.72 The committee considers that this measure may be compatible with human rights, if the detail of what constitutes a 'critical technology' is sufficiently clear and accessible. The committee notes it is intended that this detail will be specified in a future legislative instrument and notes that it will examine any such future instrument for compatibility with human rights.

Mr Josh Burns MP

Chair

Coalition Members' Additional Comments[1]

1.1 In line with our dissenting report to the Committee's initial report on the Social Security (Administration) Amendment (Repeal of Cashless Debit Card and Other Measures) Bill 2022, we again express the view that the abolition of the Cashless Debit Card was not a rights-enhancing measure. The benefits of the Cashless Debit Card were substantial and constituted a permissible limitation on human rights.

1.2 We do not support the Committee's comments at paragraph [2.32] of this report which suggest that a move to voluntary income management would be preferable from a human rights perspective.

The Hon David Coleman MP
Deputy Chair
Member for Banks

Senator Jacinta Nampijinpa-Price
Senator for the Northern Territory

Senator Matthew O'Sullivan
Senator for Western Australia

1 This section can be cited as Parliamentary Joint Committee on Human Rights, Additional Comments, *Report 5 of 2022;* [2022] AUPJCHR 41.