Chapter 1

New and continuing matters

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

Bills

Appropriation Bills 2022-2023[1]

Purpose	These bills propose appropriations from the Consolidated Revenue Fund for services[2]
Portfolio	Finance
Introduced	House of Representatives, 25 October 2022
Rights	Multiple rights

Appropriation of money

1.2 These bills seek to appropriate money from the Consolidated Revenue Fund for a range of services. The portfolios, budget outcomes and entities for which these appropriations would be made are set out in the schedules to each bill.[3]

International human rights legal advice

Multiple rights

1.3 Proposed government expenditure to give effect to particular policies may engage and limit, or promote, a range of human rights, including civil and political rights and economic, social and cultural rights (such as the rights to housing, health, education and social security).[4] The rights of people with disability, children and

1 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Appropriation Bills 2022-2023, *Report 6 of 2022*; [2022] AUPJCHR 46.

2 Appropriation Bill (No. 1) 2022-2023; Appropriation Bill (No. 2) 2022-2023; and Appropriation (Parliamentary Departments) Bill (No. 1) 2022-2023.

3 Appropriation Bill (No. 1) 2022-2023, Schedule 1; Appropriation Bill (No. 2) 2022-2023, Schedule 2; and Appropriation (Parliamentary Departments) Bill (No. 1) 2022-2023, Schedule 1.

4 Under the International Covenant on Civil and Political Rights and the International covenant on Economic, Social and Cultural Rights.

women may also be engaged where policies have a particular impact on vulnerable groups.[5]

1.4 Australia has obligations to respect, protect and fulfil human rights, including the specific obligations to progressively realise economic, social and cultural rights using the maximum of resources available; and a corresponding duty to refrain from taking retrogressive measures (or backwards steps) in relation to the realisation of these rights.[6] Economic, social and cultural rights may be particularly affected by appropriation bills, because any increase in funding would likely promote such rights, and any reduction in funding for measures which realise such rights, such as specific health and education services, may be considered to be retrogressive with respect to the attainment of such rights and, accordingly, must be justified for the purposes of international human rights law.

1.5 The statements of compatibility accompanying these bills do not identify that any rights are engaged by the bills, and state that the High Court has emphasised that because appropriation Acts do not ordinarily confer authority to engage in executive action, they do not ordinarily confer legal authority to spend, and as such, do not engage human rights.[7] However, because appropriations are the means by which the appropriation of money from the Consolidated Revenue Fund is authorised, they are a significant step in the process of funding public services. The fact that the High Court has stated that appropriations Acts do not create rights or duties as a matter of Australian law, does not address the fact that appropriations may nevertheless engage human rights for the purposes of international law. As the committee has consistently stated since 2013,[8] the appropriation of funds facilitates the taking of actions which may affect both the progressive realisation of, and failure to fulfil, Australia's obligations under international human rights law. Appropriations may, therefore, engage human rights for the purposes of international law, because reduced appropriations for particular areas may be regarded as retrogressive – a type of limitation on rights.

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5 Under the Convention on the Rights of Persons with Disabilities; Convention on the Rights of the Child; and Convention on the Elimination of All Forms of Discrimination against Women.

6 See, International Covenant on Economic, Social and Cultural Rights.

7 Statements of compatibility, p. 4.

8 Parliamentary Joint Committee on Human Rights, *Report 3 of 2013* (13 March 2013) pp. 65-67; *Report 7 of 2013* (5 June 2013) pp. 21-27; *Report 3/44* (4 March 2014) pp. 3-6; *Report 8/44* (24 June 2014) pp. 5-8; *Report 20/44* (18 March 2015) pp. 5-10; *Report 23/44* (18 June 2015) pp. 13-17; *Report 34/44* (23 February 2016) p. 2; *Report 9 of 2016* (22 November 2016) pp. 30-33; *Report 2 of 2017* (21 March 2017) pp. 44-46; *Report 5 of 2017* (14 June 2017) pp. 42-44; *Report 3 of 2018* (27 March 2018) pp. 97-100; *Report 5 of 2018* (19 June 2018) pp. 49-52; *Report 2 of 2019* (2 April 2019) pp. 106-111; *Report 4 of 2019* (10 September 2019) pp. 11-17; *Report 3 of 2020* (2 April 2020) pp. 15-18; *Report 12 of 2020* (15 October 2020) pp. 20-23; *Report 7 of 2021* (16 June 2021) pp. 11-15; *Report 2 of 2022* (25 March 2022) pp. 3-7.

1.6 There is international guidance about reporting on the human rights compatibility of public budgeting measures.[9] For example, the Committee on the Rights of the Child has advised that countries must show how the public budget-related measures they have chosen to take result in improvements in children's rights,[10] and has provided detailed guidance as to implementation of the rights of the child, which 'requires close attention to all four stages of the public budget process: planning, enacting, executing and follow-up'.[11] It has also advised that countries should 'prepare their budget-related statements and proposals in such a way as to enable effective comparisons and monitoring of budgets relating to children'.[12]

1.7 Without an assessment of human rights compatibility of appropriations bills, it is difficult to assess whether Australia is promoting human rights and realising its human rights obligations. For example, a retrogressive measure in an individual bill may not, in fact, be retrogressive when understood within the budgetary context as a whole. Further, where appropriation measures may engage and limit human rights, an assessment of the human rights compatibility of the measure would provide an explanation as to whether that limitation would be permissible under international human rights law.

1.8 Considering that appropriations may engage human rights for the purposes of international law, in order to assess such bills for compatibility with human rights the statements of compatibility accompanying such bills should include an assessment of the budget measures contained in the bill, including an assessment of:

9 See, for example, UN Office of the High Commissioner for Human Rights, *Realising Human Rights through Government Budgets* (2017); South African Human Rights Commission, *Budget Analysis for Advancing Socio-Economic Rights* (2016); Ann Blyberg and Helena Hofbauer, *Article 2 and Governments' Budgets* (2014); Diane Elson, *Budgeting for Women's Rights: Monitoring Government Budgets for Compliance with CEDAW*, (UNIFEM, 2006); and Rory O'Connell, Aoife Nolan, Colin Harvey, Mira Dutschke, Eoin Rooney*, Applying an International Human Rights Framework to State Budget Allocations: Rights and Resources* (Routledge, 2014).

10 Committee on the Rights of the Child, *General Comment No. 19 on public budgeting for the realization of children's rights (art. 4)* (2016) [24].

11 Committee on the Rights of the Child, *General Comment No. 19 on public budgeting for the realization of children's rights (art. 4)* (2016) [26].

12 Committee on the Rights of the Child, *General Comment No. 19 on public budgeting for the realization of children's rights (art. 4)* (2016) [81].

- overall trends in the progressive realisation of economic, social and cultural rights (including any retrogressive trends or measures);[13]
- the impact of budget measures (such as spending or reduction in spending) on vulnerable groups (including women, First Nations Peoples, people with disability and children);[14] and
- key individual measures which engage human rights, including a brief assessment of their human rights compatibility.

1.9 In relation to the impact of spending or reduction in spending on vulnerable groups, relevant considerations may include:

- whether there are any specific budget measures that may disproportionately impact on particular groups (either directly or indirectly); and
- whether there are any budget measures or trends in spending over time that seek to fulfil the right to equality and non-discrimination for particular groups.[15]

Committee view

1.10 The committee notes that these bills seek to appropriate money from the Consolidated Revenue Fund for services. The committee considers that proposed government expenditure to give effect to particular policies may engage and promote, or limit, a range of human rights.

1.11 The committee acknowledges that appropriations bills may present particular difficulties given their technical and high-level nature, and as they generally include appropriations for a wide range of programs and activities across many portfolios. As such, it may not be appropriate to assess human rights compatibility for each individual measure. However, the committee considers that

13 This could include an assessment of any trends indicating the progressive realisation of rights using the maximum of resources available; any increase in funding over time in real terms; any trends that increase expenditure in a way which would benefit vulnerable groups; and any trends that result in a reduction in the allocation of funding which may impact on the realisation of human rights and, if so, an analysis of whether this would be permissible under international human rights law.

14 Spending, or reduction of spending, may have disproportionate impacts on such groups and accordingly may engage the right to equality and non-discrimination.

15 There are a range of resources to assist in the preparation of human rights assessments of budgets. See, for example, UN Office of the High Commissioner for Human Rights, *Realising Human Rights through Government Budgets* (2017); South African Human Rights Commission, *Budget Analysis for Advancing Socio-Economic Rights* (2016); Ann Blyberg and Helena Hofbauer, *Article 2 and Governments' Budgets* (2014); Diane Elson, *Budgeting for Women's Rights: Monitoring Government Budgets for Compliance with CEDAW* (2006); Rory O'Connell, Aoife Nolan, Colin Harvey, Mira Dutschke, Eoin Rooney, *Applying an International Human Rights Framework to State Budget Allocations: Rights and Resources* (Routledge, 2014).

the allocation of funds via appropriations bills is susceptible to a human rights assessment that is directed at broader questions of compatibility, namely, their impact on progressive realisation obligations and on vulnerable minorities or specific groups.

1.12 The committee considers that statements of compatibility for future appropriations bills should contain an assessment of human rights compatibility which meets the standards outlined in the committee's *Guidance Note 1* and addresses the matters set out at paragraphs [1.8] and [1.9]. The committee would benefit from a statement of compatibility if budget measures directly impact human rights and if the measures are not addressed elsewhere in legislation.

1.13 The committee draws this matter to the attention of the minister and the Parliament.

Biosecurity Amendment (Strengthening Biosecurity) Bill 2022[1]

Purpose	This bill seeks to amend the *Biosecurity Act 2015* (the Biosecurity Act) to enable the minister to determine certain biosecurity measures and requirements for individuals entering Australian territory; establish and increase civil and criminal penalties for breaches to the Biosecurity Act; expand pre-arrival reporting requirements for aircraft and vessels; and provide for the use and disclosure of certain information, including protected information
The Portfolio	Agriculture, Fisheries and Forestry
Introduced	House of Representatives, 28 September 2022
Rights	Health; privacy; freedom of movement; liberty; equality and non-discrimination; culture

Entry requirements

1.14 The bill seeks to confer new powers on the Agriculture Minister to determine, by exempt legislative instrument,[2] one or more entry requirements for individuals or classes of individuals who are entering Australian territory at a landing place or port.[3] The kinds of requirements that may be specified include requiring an individual to provide certain information by way of a declaration, be screened by equipment or in any other way, or move to a certain place for the purposes of a

1 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Biosecurity Amendment (Strengthening Biosecurity) Bill 2022, *Report 6 of 2022*; [2022] AUPJCHR 47.

2 Schedule 1, item 5, proposed subsection 196A(4) provides that a determination made under this section is a legislative instrument but the disallowance provision (section 42 of the *Legislation Act 2003*) does not apply to the instrument. The Senate Standing Scrutiny of Bills and Scrutiny of Delegated Legislation Committees have previously raised concerns regarding the use of exempt legislative instruments under the *Biosecurity Act 2015*. See Senate Standing Committee for the Scrutiny of Bills, Review of exemption from disallowance provisions in the Biosecurity Act 2015, *Scrutiny Digest 7 of 2021* (12 May 2021), chapter 4, pp. 33–44; *Scrutiny Digest 1 of 2022* (4 February 2022), chapter 4, pp. 76–86; Senate Standing Committee for the Scrutiny of Delegated Legislation, Exemption of delegated legislation from parliamentary oversight: Final report (16 March 2021).

3 Schedule 1, item 5.

biosecurity risk assessment, whereby a biosecurity officer would assess the level of biosecurity risk associated with the individual and/or their goods and baggage.[4]

1.15 Before making an entry requirement, the minister must be satisfied that a disease or pest poses an unacceptable level of biosecurity risk; and the requirement is appropriate and adapted to prevent, or reduce the risk of, the disease or pest entering, establishing itself or spreading in, Australian territory or part of Australian territory.[5] The minister would also be required to consult with certain persons, including the Directors of Biosecurity and Human Biosecurity, before making a determination, although failure to do so would not affect the validity of the determination.[6] Failure to comply with an entry requirement would attract a civil penalty of 120 penalty units (currently $26,640).[7] A person may also commit an offence or contravene a civil penalty provision if they provide false or misleading information or documents.[8]

Preliminary international human rights legal advice

Right to health

1.16 To the extent that the measure prevents a disease or pest that may pose a risk to human health entering, establishing itself or spreading in Australian territory, it would promote the right to health. The right to health is the right to enjoy the highest attainable standard of physical and mental health, and requires States parties to take steps to prevent, treat and control epidemic diseases.[9] The statement of compatibility states that the bill promotes the right to health by ensuring there are suitable mechanisms to identify and control the spread of serious communicable diseases and protect against the risks posed by people entering Australia on international aircraft or vessels.[10]

4 Schedule 1, item 5, proposed subsections 196A(7)–(8) set out the kinds of requirements that may be specified.

5 Schedule 1, item 5, proposed subsection 196A(5).

6 Schedule 1, item 5, proposed subsection 196A(5).

7 Schedule 1, item 5, proposed subsections 196A(9)–(10). At the time of writing, it was proposed that the value of the penalty unit be increased from $222 to $275. See Crimes Amendment (Penalty Unit) Bill 2022. Were this bill to pass, the applicable penalty would be $33,000.

8 Schedule 1, item 5, proposed subsection 196A(8), Note 1.

9 International Covenant on Economic, Social and Cultural Rights, article 12.

10 Statement of compatibility, p. 26.

Rights to privacy, freedom of movement, liberty and equality and non-discrimination

1.17 However, the measure would also engage and limit other human rights. Insofar as the measure may require individuals to provide a declaration containing certain information, including personal information, it would engage and limit the right to informational privacy. This is acknowledged in the statement of compatibility, which notes that the requirements may incidentally require individuals to provide personal information.[11] The right to privacy includes respect for informational privacy, including the right to respect for private and confidential information, particularly the storing, use and sharing of such information, and the right to control the dissemination of information about one's private life.[12] Additionally, were a determination to require an individual to be screened by equipment or in any other physical way, and subjected to a biosecurity assessment involving a body or other physical search, the measure may engage and limit the right to personal autonomy and physical and psychological integrity – an aspect of the right to privacy.[13] The United Nations (UN) Human Rights Committee has emphasised that personal and body searches must be accompanied by effective measures to ensure that such searches are carried out in a manner consistent with the dignity of the person who is being searched, and further that persons subject to body searches should only be examined by persons of the same sex.[14]

1.18 The measure may also engage and limit the rights to freedom of movement and liberty if an individual was required to move to a place at the landing place or port for a biosecurity risk assessment and was detained while undergoing that assessment. The statement of compatibility states that this requirement may have the effect of preventing a person from leaving the landing place or port, or confining their movement within that landing place or port, until the level of biosecurity risk associated with the individual has been assessed, and acknowledges that this may be considered administrative detention.[15] The right to freedom of movement includes the right to move freely within a country for those who are lawfully in the country.[16] The right to freedom of movement is linked to the right to liberty—a person's

11 Statement of compatibility, p. 41.

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

13 See, *MG v Germany*, UN Human Rights Committee Communication No. 1428/06 (2008) [10.1].

14 UN Human Rights Committee, *General Comment No.16: The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation* (1988), [8].

15 Statement of compatibility, p. 27.

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

movement across borders should not be unreasonably limited by the state.[17] The right to liberty prohibits the arbitrary and unlawful deprivation of liberty.[18] The notion of 'arbitrariness' includes elements of inappropriateness, injustice and lack of predictability. Accordingly, any detention must be lawful as well as reasonable, necessary and proportionate in all of the circumstances.[19]

1.19 The rights to privacy, freedom of movement and liberty 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.

1.20 Additionally, depending on the persons or class of persons to whom the determination is applied, the measure may engage and limit the right to equality and non-discrimination. This is acknowledged by the statement of compatibility.[20] 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.[21] 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).[22] While the measure itself is

17 UN Human Rights Committee, *General Comment 27: Freedom of movement* (1999) [8]. The freedom to leave the territory of a State may not be made dependent on any specific purpose or on the period of time the individual chooses to stay outside the country. The right of the individual to determine the State of destination is part of the legal guarantee.

18 International Covenant on Civil and Political Rights, article 9. It is noted that, depending on the degree and intensity, a restriction on liberty, such as restricting a person's liberty of movement, may not necessarily constitute 'deprivation' of liberty for the purposes of engaging this right. See United Nations Human Rights Committee, *General Comment No.27: Article 12 (Freedom of Movement)* (1999) [7]. See also, *Celepli v Sweden*, UN Human Rights Committee, Communication No. 456/1991 (2 August 1994); *Amuur v. France,* European Court of Human Rights, Application Nos. 17/1995/523/609, (1996), [42]; and *Guzzardi v. Italy*, European Court of Human Rights, Application no. 7367/76, (1980) [92].

19 In relation to administrative detention, the UN Human Rights Committee has stated that administrative or security detention – that is, detention not in contemplation of prosecution on a criminal charge – 'presents severe risks of arbitrary deprivation of liberty', especially where there is no limit on the overall length of possible detention and there is a risk that detention may last longer than absolutely necessary. See UN Human Rights Committee, *General Comment 35: Liberty and security of person* (2014) [15].

20 Statement of compatibility, p. 47.

21 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.

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

drafted in neutral terms, were it to be applied to a particular class of persons on the basis of a protected attribute such as nationality or place of residence, it may constitute indirect 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.[23]

1.21 The measure itself specifies the objective that it is seeking to achieve. Namely, the entry requirements are for the 'purposes of preventing, or reducing the risk of, a disease or pest that is considered to pose an unacceptable level of biosecurity risk entering, or establishing itself or spreading in, Australian territory or part of Australian territory'.[24] The explanatory memorandum notes that the early identification and assessment of biosecurity is important in effectively responding to and managing biosecurity risks.[25] It states that these risks are becoming increasingly complex to manage due to the increased volume and complexity of trade, the effects of climate change, and the increasing spread of pests and diseases.[26] For example, the entry and spread of pests and diseases such as Foot and Mouth Disease, African Swine Fever, Lumpy Skin Disease and *Xylella fastidiosa*, could have devastating effects on plant and animal health.[27] The statement of compatibility states that implementation of prompt infection control measures may mitigate contagion related to incoming conveyances.[28]

1.22 Preventing the entry and spread of pests and diseases, especially those that pose a risk to public health, constitutes a legitimate objective for the purposes of international human rights law.[29] Imposing entry requirements that assist to identify and manage such risks would likely be effective to achieve this objective.

1.23 A key aspect of whether the proposed limitation on rights would be justified is whether the limitation is proportionate to the objective being sought. In this

23 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].

24 Schedule 1, item 5, proposed subsection 196A(1).

25 Explanatory memorandum, p. 3.

26 Explanatory memorandum, p. 3.

27 Explanatory memorandum, p. 2.

28 Statement of compatibility, p. 26.

29 Measures that seek to protect public health and the rights and freedoms of others are recognised as legitimate objectives for the purposes of international law. See, eg, International Covenant on Civil and Political Rights, article 12(3), which provides that a limitation on the right to freedom of movement may be permissible where it is necessary and proportionate to achieve the objectives of protecting the rights and freedoms of others, national security, public health or morals, or public order.

respect, it is necessary to consider a number of factors, including whether a proposed limitation is sufficiently circumscribed; whether it is accompanied by sufficient safeguards, including the possibility of oversight and the availability of review; and whether any less rights restrictive alternatives could achieve the same stated objective.

1.24 As to whether the measure is sufficiently circumscribed, it is noted that the determination is required to specify the disease or pest which the entry requirements are seeking to address, and where the requirements apply.[30] The measure also requires the Agriculture Minister to be satisfied of specific things and consult with certain people.[31] Further, the measure sets out the kinds of requirements that may be specified in the determination, although this is a non-exhaustive list. As such, the measure appears to be drafted in such a way that provides reasonable clarity as to the scope of the minister's powers and guidance as to how the powers may be exercised.

1.25 As to the existence of safeguards, the requirement that the minister be satisfied that the disease or pest poses an unacceptable level of biosecurity risk and that the entry requirement is appropriate and adapted to prevent or reduce that risk, may assist in ensuring that any limitation on rights is proportionate.[32] In particular, were the minister to no longer be satisfied of these things, they must vary or revoke the determination, thus ensuring that any interference with rights is only as extensive as is strictly necessary.[33] The requirement that the minister consult before making a determination may also operate as a safeguard. The statement of compatibility states that the entry requirements will be determined on the basis of scientific and technical expertise and advice, and will solely be aimed at managing biosecurity risks in the most appropriate manner.[34] However, a failure by the minister to comply with the requirement to consult does not affect the validity of the determination,[35] which lessens the strength of this as a safeguard.

1.26 Regarding the limitation on the right to privacy, the statement of compatibility states that any personal information collected must be managed in accordance with the information management framework, and this operates as a safeguard to respect the right to privacy. However, while this framework contains some important protections, such as the prohibition on unauthorised use and disclosure of protected information, it also authorises information sharing in a broad

30 Schedule 1, item 5, proposed subsections 196A(3) and (6).

31 Schedule 1, item 5, proposed subsections 196A(5) and (9).

32 Schedule 1, item 5, proposed subsection 196A(5).

33 Schedule 1, item 5, proposed section 196B.

34 Statement of compatibility, p. 47.

35 Schedule 1, item 5, proposed subsections 196A(9) and (10).

range of circumstances, which may weaken the overall strength of this safeguard. The human rights compatibility of the information management framework is assessed below (starting at paragraph [1.47]).

1.27 Additionally, the length of any detention when a person is required to move to a certain place for the purposes of a biosecurity risk assessment, as well as the conditions of detention and whether there is access to review, are relevant considerations in assessing whether administrative detention under this bill constitutes arbitrary 'deprivation' of liberty such that it constitutes an impermissible limit on the right to liberty. International human rights law jurisprudence has indicated that detention that may initially be necessary and reasonable may become arbitrary over time if the circumstances no longer require detention. In this respect, regular review must be available to scrutinise whether the continued detention is lawful and non-arbitrary. This is particularly important in the context of administrative detention.[36]

1.28 The statement of compatibility states that the period of detention is intended to be no longer than is appropriate to manage the risk.[37] It elaborates that by requiring all individuals and goods to be assessed in one location, if a biosecurity risk is detected, the risk will be contained in one location and the risk can be combatted and appropriately managed.[38] The explanatory memorandum notes that appropriate management of persons may include treatment under existing powers in the Biosecurity Act.[39] However, no information is provided as to what the applicable treatment would be or which existing powers may be invoked.

1.29 It is also not clear, based on the explanatory materials, how long a person or class of persons may be subject to administrative detention in practice, including whether there is a maximum length of detention, or the likely conditions of detention. It is also not clear whether decisions made under a determination,

36 The UN Human Rights Committee has stated that administrative 'detention would normally amount to arbitrary detention as other effective measures addressing the threat, including the criminal justice system, would be available. If, under the most exceptional circumstances, a present, direct and imperative threat is invoked to justify the detention of persons considered to present such a threat, the burden of proof lies on States parties to show that the individual poses such a threat and that it cannot be addressed by alternative measures, and that burden increases with the length of the detention. States parties also need to show that detention does not last longer than absolutely necessary, that the overall length of possible detention is limited and that they fully respect the guarantees provided for by article 9 in all cases'. See UN Human Rights Committee, *General Comment 35: Liberty and security of person* (2014) [15].

37 Statement of compatibility, p. 28.

38 Statement of compatibility, p. 27; explanatory memorandum, p. 6–7.

39 Explanatory memorandum, p. 7.

including in relation to administrative detention, will be reviewable.[40] Further information regarding the length and conditions of detention, as well as the availability of review, is therefore required in order to establish that any detention under these powers would not be arbitrary.

1.30 As to whether there are less rights restrictive options, much will depend on the nature of the specific determination and the breadth of its operation, noting that consideration of less rights restrictive alternatives is particularly important in the context of administrative detention.

Committee view

1.31 The committee considers that empowering the Agriculture Minister to make entry requirements for people entering Australia in order to prevent the entry or spread of diseases or pests that pose a risk to human health, promotes the right to health. However, the committee notes that requiring people to provide personal information, be screened, or moved to locations to carry out biosecurity risk assessments, also engages and may limit the rights to privacy, freedom of movement and liberty and the right to equality and non-discrimination.

1.32 The committee considers further information is required to assess the compatibility of this measure with these rights, and as such seeks the minister's advice in relation to:

(a) whether certain persons with protected attributes (such as nationality or place of residence) will be disproportionately affected by the measure;

(b) in relation to proposed paragraph 196A(8)(f), what other methods (apart from equipment) may be used to screen an individual;

(c) in relation to proposed paragraph 196A(8)(g), what would a biosecurity risk assessment of an individual involve. For example, could an individual be subjected to a body search or required to provide a bodily sample;

(d) how long a person or class of persons may be subject to administrative detention and whether there is a maximum length of detention;

(e) the conditions of administration detention;

(f) which existing powers in the Biosecurity Act may be invoked in relation to a requirement for an individual to move to a place for the purpose of a biosecurity risk assessment;

40 Section 574 sets out reviewable decisions under the *Biosecurity Act 2015*. The bill does not propose amendments to this section and the measure itself does not provide for access to review.

(g) whether decisions made pursuant to a determination made under section 196A will be reviewable;

(h) whether any less rights restrictive alternatives were considered, and if so, why these were considered inappropriate; and

(i) whether the measure is accompanied by any other safeguards.

Preventative biosecurity measures

1.33 The bill also seeks to confer new powers on the Agriculture Minister to determine, by exempt legislative instrument,[41] certain other biosecurity measures for the purposes of preventing a specified behaviour or practice that causes or contributes to the entry into, or the emergence, establishment or spread in, Australian territory of a specified disease (other than a listed human disease) or pest that is considered to pose an unacceptable level of biosecurity risk.[42] The determination would apply to specified classes of persons and may ban or restrict, or require, a behaviour or practice; require the provision of a specified report; or provide for tests to be conducted on goods or conveyances.[43]

1.34 Before making a preventative biosecurity measure, the minister must be satisfied that the disease or pest poses an unacceptable level of biosecurity risk; and the measure is appropriate and adapted to prevent, or reduce the risk of, the disease or pest entering, or establishing itself or spreading in, Australian territory or part of Australian territory.[44] The minister would also be required to consult with certain persons, including the Directors of Biosecurity and Human Biosecurity, before making a determination, although failure to do so would not affect the validity of the determination.[45] Additionally, failure to comply with a preventative biosecurity measure would attract a civil penalty of 120 penalty units (currently $26,640).[46]

Preliminary international human rights legal advice

Right to health

1.35 To the extent that the determination could prevent a behaviour or practice that causes the entry, establishment or spread of a disease or pest in Australian

41 Schedule 1, item 11, proposed subsection 393B(4) provides that a determination made under this section is a legislative instrument but the disallowance provision (section 42 of the *Legislation Act 2003*) does not apply to the instrument.

42 Schedule 1, item 11.

43 Schedule 1, item 11, proposed subsection 393B(2).

44 Schedule 1, item 11, proposed subsection 393B(5).

45 Schedule 1, item 11, proposed subsection 393B(5).

46 Schedule 1, item 11, proposed subsections 393B(7)–(8).

territory that may pose a risk to human health, it may promote the right to health. This is acknowledged in the statement of compatibility (as outlined above in paragraph [1.16]).[47]

Rights to privacy, equality and non-discrimination, culture, and freedom of movement

1.36 However, the measure would also engage and limit other human rights. By banning, restricting or requiring a behaviour or practice, and requiring a person to provide a specified report or keep specified records, the measure would engage and limit the right to privacy.[48] Further, depending on the class of persons to whom the determination is applied, the measure may engage and limit the right to equality and non-discrimination, as acknowledged by the statement of compatibility.[49] Additionally, depending on the content of the determination, including the behaviour or practice that is restricted or banned, the measure may engage other human rights. For example, were the determination to ban or restrict traditional trading practices in the Torres Strait Islands, it may engage and limit the right to culture[50]—which, in the context of Indigenous peoples, includes the right to use land resources including through traditional activities such as hunting and fishing, and to live on their traditional lands—as well as related rights under the United Nations Declaration on the Rights of Indigenous Peoples.[51] It could also engage and limit the right to freedom of movement if the behaviours to be restricted include prohibiting movement to particular locations. Without further information as to the types of behaviours and practices that may be restricted by a determination, it is difficult to fully assess what human rights are engaged by this measure.

1.37 The above 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.

47 Statement of compatibility, p. 26.

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

49 Statement of compatibility, p. 47.

50 International Covenant on Economic, Social and Cultural Rights, article 15; and International Covenant on Civil and Political Rights, article 27. See also, UN Committee on Economic, Social and Cultural Rights, *General Comment No. 21: article 15 (right of everyone to take part in cultural life)* (2009). The committee explains, at [6], that the right requires from a State party both abstention (including non-interference with the exercise of cultural practices) and positive action (including ensuring preconditions for participation, facilitation and promotion of cultural life).

51 See, eg, United Nations Declaration on the Rights of Indigenous Peoples, article 8 (right not to be subjected to forced assimilation or destruction of their culture) and 11 (right to practise and revitalize cultural traditions and customs).

1.38 The measure itself specifies the objective it is seeking to achieve: namely, to prevent a behaviour or practice that may cause or contribute to a disease or pest, that poses an unacceptable level of biosecurity risk, entering, emerging, establishing or spreading in Australian territory.[52] As outlined above (at paragraphs [1.21] – [1.22]), this constitutes a legitimate objective for the purposes of international human rights law, and preventing behaviours or practices that may cause or contribute to the entry and spread of diseases and pests would likely be effective to achieve this objective.

1.39 A key aspect of whether the proposed limitation on rights would be justified is whether the limitation is proportionate to the objective being sought.

1.40 As to whether the measure is sufficiently circumscribed, it is necessary to consider the scope of power conferred on the decision-maker and the manner of its exercise. The measure requires the minister to specify the behaviour or practice and the disease or pest to which the determination would apply; be satisfied of specific things and consult with specific people before making a determination.[53] The explanatory memorandum states that this requirement ensures transparency and ensures that the assessment of whether the determination is appropriate and adapted is carried out within the context of a specific and named pest or disease.[54] The measure also sets out the types of biosecurity measures that may be taken, such as banning or restricting a behaviour or practice. The explanatory memorandum states that it is necessary for the determination to specify the exact biosecurity measures to be taken as the measures will vary from case to case to respond to the nature of each individual disease or pest.[55]

1.41 While some of these requirements assist to clarify the scope of the minister's powers and provide some guidance as to how the powers may be exercised, there remains uncertainty as to the types of behaviours or practices that may be specified in a determination. The explanatory materials provide little guidance in this regard. International human rights law jurisprudence states that laws conferring discretion or rule-making powers on the executive must indicate with sufficient clarity the scope of any such power or discretion conferred on competent authorities and the manner of its exercise.[56] This is because, without sufficient safeguards, broad powers may be exercised in such a way as to be incompatible with human rights. Without further information it is difficult to fully assess the human rights implications of the measure, including whether any interference with rights is proportionate.

52 Schedule 1, item 11, proposed section 393A and subsection 393B(1).

53 Schedule 1, item 11, proposed subsections 393B(3) and (5).

54 Explanatory memorandum, pp. 19–20.

55 Explanatory memorandum, p. 19.

56 *Hasan and Chaush v Bulgaria,* European Court of Human Rights App No.30985/96 (2000) [84].

1.42 As to the existence of safeguards, the requirement that the minister be satisfied that the disease or pest poses an unacceptable level of biosecurity risk, and that the measure is appropriate and adapted to prevent or reduce that risk, may assist to ensure that any limitation on rights is proportionate.[57] However, unlike the above measure relating to entry requirements, there is no requirement that the minister must vary or revoke a preventative biosecurity measure if they are no longer satisfied of these things. Another safeguard accompanying the measure is the requirement that the determination must specify the period during which it is force, which must not be more than one year.[58] The time-limited nature of the measure may assist with proportionality, although depending on the extent of interference with rights, one year may still be a substantial period of time.

1.43 The requirement that the minister consult before making a determination may also operate as a safeguard. The statement of compatibility states that the biosecurity measures will be determined on the basis of scientific and technical expertise and advice, and will solely be aimed at managing biosecurity risks in the most appropriate manner.[59] The strength of this safeguard, however, is reduced by the fact that a failure by the minister to comply with this requirement does not affect the validity of the determination.[60]

1.44 While the measure is accompanied by some safeguards, questions remain as to whether these are sufficient, including whether there is any possibility of oversight or access to review in relation to decisions made under a determination.

Committee view

1.45 The committee considers that empowering the Agriculture Minister to determine certain biosecurity measures, for the purposes of preventing a specified behaviour or practice that causes or contributes to the entry or spread into Australia of certain diseases or pests that may pose a risk to human health, promotes the right to health. However, the committee notes that banning, restricting, or requiring certain behaviours or practices or requiring the provision of specified information also engages and may limit other human rights, including the rights to privacy and equality and non-discrimination, culture and freedom of movement.

1.46 The committee considers further information is required to assess the compatibility of this measure with human rights, and as such seeks the minister's advice in relation to:

57 Schedule 1, item 11, proposed subsection 393B(5).

58 Schedule 1, item 11, proposed subsection 393B(6).

59 Statement of compatibility, p. 47. See also explanatory memorandum, pp. 20–21.

60 Schedule 1, item 5, proposed subsections 196A(9) and (10).

(a) whether certain persons with protected attributes (such as nationality or place of residence) will be disproportionately affected by the measure;

(b) what types of behaviours and practices would likely be specified in a determination, and in particular, is it likely that a determination would ban or restrict:

(i) traditional trading or other cultural practices among Aboriginal and Torres Strait Islander persons, particularly in the Torres Strait Islands;

(ii) movement between particular locations;

(c) whether decisions made pursuant to a determination made under section 393B will be reviewable;

(d) whether any less rights restrictive alternatives were considered, and if so, why these were considered inappropriate; and

(e) whether the measure is accompanied by any other safeguards.

Information management framework

1.47 Schedule 3 to the bill seeks to amend the Biosecurity Act in relation to the management of information obtained or generated under the Act, in particular to enable greater sharing of information with government agencies and other bodies.

1.48 In particular, Schedule 3 seeks to introduce the concept of 'entrusted persons' who would have specific authorisations to deal with 'relevant information'.[61] The information that it applies to would include personal information, some of which may be obtained using the coercive powers under the Biosecurity Act (such as the powers referenced above).

1.49 An 'entrusted person' is defined in the bill[62] as meaning relevant Commonwealth ministers or departmental secretaries or the Director of Biosecurity or the Director of Human Biosecurity, as well as:

- any Australian Public Service (APS) employee in the Agriculture Department or the Health Department;
- anyone employed or engaged to provide services to the Commonwealth in connection with the Agriculture Department or the Health Department; or

61 Schedule 3, item 8 defines 'relevant information' to mean information obtained or generated by a person in the course of, or for the purposes of, performing functions or duties or exercising powers under the Biosecurity Act, or assisting another person to do this.

62 See Schedule 3, item 5, definition of 'entrusted person'.

- anyone employed or engaged by the Commonwealth or a statutory body corporate that is in a prescribed class of persons (with the class to be prescribed in future regulations).

1.50 The bill provides that entrusted persons would then be authorised to deal with the information in a variety of ways, including:

- disclosing the information to a state or territory body, or foreign government, in order to manage risks posed by diseases and pests;[63]
- disclosing the information to a court or tribunal for the purposes of law enforcement or to assist in the review an administrative decision;[64]
- disclosing information for the purpose of enforcing the criminal law or a law imposing a pecuniary penalty, or for the protection of the public revenue, to a body that enforces such laws (including the police);[65] and
- using or disclosing the information for research, policy development or data analysis or statistics.[66]

1.51 In addition, relevant information would be authorised to be disclosed in the course of, or for the purposes of, performing functions or duties, or exercising powers, under the Biosecurity Act, or assisting another person to do so.[67] The persons that could disclose information for this purpose would include:

- entrusted persons;
- persons employed or engaged by the Commonwealth or a statutory body corporate;
- various biosecurity officials;
- biosecurity industry participants or their employees (which carry out specified activities to manage the biosecurity risks associated with imported goods);[68] and
- survey authorities or their officers or employees (which appear to be international shipping authorities).[69]

63 Schedule 3, item 27, proposed sections 584 and 585.

64 Schedule 3, item 27, proposed section 588.

65 Schedule 3, item 27, proposed section 589.

66 Schedule 3, item 27, proposed sections 590 and 590A.

67 Schedule 3, item 27, proposed section 582.

68 *Biosecurity Act 2015*, sections 9 and 14 defines a 'biosecurity industry participant' as being the holder of the approval of an approved arrangement.

1.52 The bill does not set out who the information could be disclosed to. There would also be a separate authorisation for certain persons to use or disclose relevant information for the purposes of managing risks to human health.[70] Such persons would include entrusted persons, persons employed or engaged by the Commonwealth or a body corporate established by Commonwealth law, biosecurity officials, chief human biosecurity officers, human biosecurity officers and biosecurity industry participants (including their officers or employees).

Preliminary international human rights legal advice

Right to privacy

1.53 By authorising the use and disclosure of personal information, the measure would engage and limit the right to privacy.[71] This is acknowledged in the statement of compatibility.[72] The right to privacy may be subject to permissible limitations which are provided by law and are not arbitrary. In order for limitations not to be arbitrary, the measure must pursue a legitimate objective and be rationally connected to (that is, effective to achieve) and proportionate to achieving that objective.

1.54 The stated objective of the measure is to support the management of biosecurity risks and facilitate the effective operation and enforcement of the Biosecurity Act.[73] This would likely constitute a legitimate objective for the purposes of international human rights law. The statement of compatibility states that the proper, effective and efficient performance of functions or duties, or the exercise of powers, under the Biosecurity Act will often involve the use and disclosure of relevant information.[74] Thus, to the extent that effective information sharing is necessary for the operation of the Biosecurity Act, the measure would appear to be capable of achieving the stated objective.

1.55 In order to be proportionate, a limitation on the right to privacy should only be as extensive as is strictly necessary to achieve its legitimate objective and must be

69 *Biosecurity Act 2015*, section 9 defines 'survey authority' as meaning a person authorised by the Director of Biosecurity under section 290A to be a survey authority. Section 290A allows persons to be prescribed to meet ballast water functions, and the Biosecurity (Ballast Water Survey Authority) Authorisation (No. 2) 2017 authorises the following: American Bureau of Shipping (ABS); Bureau Veritas (BV); Det Norske Veritas Germanischer Lloyd (DNV GL); Lloyd's Register (LR); Nippon Kaiji Kyokai (Class NK); China Classification Society (CCS); Korean Register of Shipping (KR); Registro Italiano Navale (RINA).

70 Schedule 3, item 27, proposed section 583.

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

72 Statement of compatibility, p. 44.

73 Statement of compatibility, p. 44.

74 Statement of compatibility, p. 7.

accompanied by appropriate safeguards. The UN Human Rights Committee has stated that legislation must specify in detail the precise circumstances in which interferences with privacy may be permitted.[75] The measure sets out the various circumstances in which personal information may be used and disclosed, which assists with proportionality.[76] However, some of the bases on which information may be disclosed appear quite broad. For example, entrusted persons can disclose information to bodies for law enforcement purposes. It is not clear why all information obtained by officials using powers under the Biosecurity Act should be able to be shared in order to enforce any other law, unrelated to any biosecurity risk or for the administration of the Biosecurity Act.

1.56 In relation to most of these circumstances, the measure clearly provides who may use the relevant information (namely, an entrusted person), and the persons to whom information may be disclosed.[77] However, in other circumstances, it is not clear to whom the information may be disclosed. For example, proposed section 583 authorises an entrusted person to use or disclose relevant information for the purposes of managing human health risks, but the provision does not specify the person or body to whom the information may be disclosed.[78]

1.57 The statement of compatibility identifies some safeguards accompanying the measure, including:

- requiring reasonable steps to be taken to de-identify personal information in the context of information used or disclosed for research, policy development or data analysis (but not other purposes);[79]
- permitting the use or disclosure of relevant information that is statistical information that is not likely to enable the identification of a person;[80]
- requiring an agreement to be in place between the Commonwealth and a state or territory body before the relevant information may be disclosed to the body. The agreement may include a requirement that the state or

75 *NK v Netherlands*, UN Human Rights Committee Communication No.2326/2013 (2018) [9.5].

76 Schedule 3, item 27, proposed division 3.

77 See, e.g. Schedule 3, item 27, proposed section 584, which would authorise an entrusted person (as defined in item 5) to disclose relevant information to a state or territory body for the purpose of assisting the body to perform its functions or duties, or exercise its powers, in relation to managing a specific risk, such as the likelihood of a pest or disease entering the state or territory.

78 Schedule 3, item 27, proposed section 583.

79 Schedule 3, item 27, proposed section 590; statement of compatibility, pp. 44–45.

80 Schedule 3, item 27, proposed section 590A; statement of compatibility, p. 45.

territory body confirm any personal information disclosed is subject to appropriate safeguards;[81]

- the discretion of the Commonwealth to make an information sharing agreement or impose conditions on the use or disclosure of relevant information shared under this division;[82] and
- the prohibition on unauthorised use or disclosure of protected information.[83]

1.58 The above safeguards would assist with proportionality. In particular, having an information sharing agreement that requires confirmation that any personal information will be subject to appropriate safeguards and not used or further disclosed unless in accordance with the agreement, may ensure that any limit on privacy is only as extensive as necessary.

1.59 The statement of compatibility notes that the Commonwealth has the discretion to make agreements and impose conditions on the use or disclosure of relevant information, for example, a condition requiring the de-identification of any personal information before it can be used in certain circumstances.[84] While this discretionary safeguard would assist with proportionality, it is less stringent than the protection of statutory processes as there is no requirement to follow it. Noting the potential safeguard value of information sharing agreements, it is not clear why it is only required in certain circumstances.[85]

Committee view

1.60 The committee considers that authorising the use and disclosure of personal information engages and limits the right to privacy. The committee considers further information is required to assess the compatibility of this measure with this right, and as such seeks the minister's advice in relation to:

(a) the person or body to whom relevant information may be disclosed for the purposes of the Biosecurity Act (proposed section 582) or other Acts (proposed section 586) and managing human health risks

81 Schedule 3, item 27, proposed sections 589 and 590F; statement of compatibility, p. 45.

82 Schedule 3, item 16, proposed section 579, Note 2 provides that nothing in Part 2 of Chapter 11 of the Biosecurity Act would prevent the Commonwealth from making agreements or other arrangements to impose conditions on the use or disclosure of relevant information by a body or person who obtains the information as a result of an authorised disclosure.

83 Schedule 3, item 18, proposed section 580, which would apply a fault-based offence, civil penalty provision and strict liability offence to the unauthorised use or disclosure of protected information which is obtained or generated under the Biosecurity Act.

84 Statement of compatibility, p. 45.

85 For example, an agreement is required for the disclosure of relevant information for the purposes of law enforcement: Schedule 3, item 27, proposed section 589.

(proposed section 583)—noting that in these circumstances, it is not clear to whom the information may be disclosed;

(b) why it is necessary to allow all information obtained using powers under the Biosecurity Act to be shared for law enforcement purposes, unrelated to managing biosecurity risks or the administration of the Biosecurity Act;

(c) why an information sharing agreement is not required in relation to all circumstances where personal information is shared between the Commonwealth and another entity or body; and

(d) what other safeguards accompany the measure to protect personal information. For example, is there a requirement that personal information be stored on a secure database or destroyed after a set amount of time.

Crimes Amendment (Penalty Unit) Bill 2022[1]

Purpose	This bill seeks to amend the *Crimes Act 1914* to increase the amount of the Commonwealth penalty unit from $222 to $275, with effect from 1 January 2023.
Portfolio	Attorney-General
Introduced	House of Representatives, 9 November 2022
Rights	Criminal process rights

Increasing penalty units

1.61 This bill seeks to amend the *Crimes Act 1914* to increase, by 24 per cent, the amount of one Commonwealth penalty unit to $275 from 1 January 2023, to be further indexed every three years to the Consumer Price Index (CPI). Currently, a penalty unit is $222, and is due to be indexed on 1 July 2023 in line with the CPI.[2]

1.62 Commonwealth pecuniary criminal and civil penalty provisions are typically expressed in penalty units rather than individual dollar amounts.[3] A penalty unit determines the sum of money that a person may be penalised for both Commonwealth civil penalties and Commonwealth criminal offences carrying a pecuniary penalty. This means that the effect of this bill would be to uniformly adjust the maximum civil and criminal penalties expressed in penalty units contained in all Commonwealth legislation. For example, a criminal offence punishable by a penalty of up to 2000 penalty units currently may be punishable by a fine of up to $444,000.[4] The effect of this bill would be that such a penalty would increase to a fine of up to $550,000 from 1 January 2023.

International human rights legal advice

Criminal process rights

1.63 Increasing the value of a penalty unit, and correspondingly increasing the maximum available penalty for Commonwealth civil penalty provisions expressed in terms of penalty units, may engage criminal process rights in some instances. This is

1 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Crimes Amendment (Penalty Unit) Bill 2022, *Report 6 of 2022*; [2022] AUPJCHR 48.

2 *Crimes Act 1914*, subsection 4AA(3).

3 In this regard, the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (September 2011 edition) notes that this is a principle of framing penalties. See, p. 42.

4 2000 x $222.

because civil penalties may be considered criminal in nature under international human rights law in certain circumstances.

1.64 The statement of compatibility does not identify the engagement of any human rights, and so no assessment of the compatibility of this measure is provided.[5] The explanatory memorandum states that maintaining the value of the penalty unit over time is necessary to ensure that financial penalties for Commonwealth offences reflect community expectations and continue to remain effective in deterring unlawful behaviour.[6] It further states that the financial impact of the measure would be to increase the revenue returned to the Consolidated Revenue Fund.[7] In this regard, the Attorney-General stated that the measure was estimated to result in increased revenue to the Commonwealth of $31.6 million over the next four years, thereby supporting the government's budget repair efforts.[8]

1.65 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 probabilities). However, if a civil penalty as applicable to individuals is regarded as 'criminal' for the purposes of international human rights law, it would 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[9] and the right to be presumed innocent until proven guilty according to law,[10] which requires that the case against the person be demonstrated on the criminal standard of proof of beyond reasonable doubt.

1.66 The test for whether a civil penalty should be characterised as 'criminal' for the purposes of international human rights law relies on three criteria: the domestic classification of the offence as civil or criminal; the nature of the offence; and the severity of the penalty.[11] This bill would increase the value of a penalty unit, and therefore the maximum potential severity of all Commonwealth civil penalty provisions expressed as penalty units. As such, in circumstances where a particular civil penalty provision may be almost, or already, so severe as to be considered criminal in nature under international human rights law, increasing the penalty units would further exacerbate that risk.

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5 Statement of compatibility, p. 3.

6 Explanatory memorandum, p. 5.

7 Explanatory memorandum, p. 2.

8 The Hon Mark Dreyfus KC MP, second reading speech, 9 November 2022.

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

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

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

1.67 For example, the Biosecurity Amendment (Strengthening Penalties) Bill 2021 (now an Act), increased 28 penalties applying specified criminal offences and civil penalty provisions across the *Biosecurity Act 2015* relating to the management of risk of pests and diseases entering Australian territory. This included increasing the maximum civil penalty for bringing or importing prohibited or suspended goods into Australian territory from 120 penalty units (currently $26,640) to 1000 penalty units (currently $222,000).[12] Given that those penalties would apply to the public at large, and noting their potential severity and the stated legislative intention for them to serve as a deterrent, the committee previously noted there was a risk that these penalties could be regarded as 'criminal' under international human rights law.[13] Because this bill would increase that potential maximum penalty from the current maximum of $222,000 to $275,000, this would have the effect of further increasing the risk that this penalty may be regarded as criminal.

1.68 Where a civil penalty provision enables a judicial officer to exercise their discretion in determining an appropriate sum in the particular circumstances, there may be circumstances in which the maximum possible penalty is not handed down. In this regard, the statement of compatibility notes that this increase does not alter the obligation on a sentencing judge to apply the most appropriate fine or financial penalty in all the circumstances.[14] However, because this bill would have the effect that judicial officers would have the discretion to impose the maximum penalty, the risk that the application of some penalties may nevertheless be considered criminal in nature under international human rights law remains.

1.69 If civil penalty provisions are considered to be 'criminal' for the purposes of international human rights law, this does not mean that the relevant conduct must be turned into a criminal offence in domestic law nor does it mean that the civil penalty is illegitimate. Instead, it means that the civil penalty provisions in question must be shown to be consistent with international human rights law criminal process guarantees, including the right not to be tried twice for the same offence,[15] and the right to be presumed innocent until proven guilty according to law.[16] Civil penalty provisions, which require proof of the conduct on the balance of probabilities, do not meet the guarantee that a person be proved guilty beyond all reasonable doubt.

12 Biosecurity Amendment (Strengthening Penalties) Bill 2021, Schedule 1, item 1, table item 14, subsection 185(3). This amendment is reflected in the *Biosecurity Act 2015,* subsection 185(3).

13 See, *Report 2 of 2021* (24 February 2021) (initial consideration of the bill), and *Report 4 of 2021* (31 March 2021) (concluding advice on the bill).

14 Statement of compatibility, p. 3.

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

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

Committee view

1.70 The committee notes that civil penalties (as applicable to individuals) may be regarded as 'criminal' for the purposes of international human rights law, if they meet certain criteria, including because of their potential severity. The committee notes that, where this is the case, these penalties must be shown to be consistent with criminal process guarantees including the right to be presumed innocent until proven guilty according to law, which requires that the case against the person be demonstrated on the criminal standard of proof of beyond reasonable doubt (not the lower civil standard of on the balance of probabilities).

1.71 The committee considers that, because this bill would have the effect of increasing the maximum possible civil penalty in respect of every Commonwealth civil penalty expressed in terms of penalty units, there is a risk that this may in some cases create, and in other cases further exacerbate, the risk that certain civil penalty provisions may be regarded as criminal under international human rights law, and so not comply with the criminal process rights under international human rights law. In this regard, the committee notes that it has raised concerns regarding the compatibility of existing civil penalty provisions with criminal process rights on numerous occasions, including due to their potential severity,[17] and cautions that it cannot comprehensively quantify the total level of risk given the number of civil penalty provisions this bill would amend.

1.72 The committee recommends that the statement of compatibility with human rights be updated to reflect the potential engagement and limitation of criminal process rights by this bill.

1.73 The committee draws these human rights concerns to the attention of the Attorney-General and the Parliament.

17 See, for example, Biosecurity Amendment (Strengthening Penalties) Bill 2021 in *Report 2 of 2021* (24 February 2021) (initial consideration of the bill), and *Report 4 of 2021* (31 March 2021) (concluding advice on the bill). See also, Online Safety Bill 2021 and Online Safety (Transitional Provisions and Consequential Amendments) Bill 2021, *Report 3 of 2021* (17 March 2021), pp. 27–29.

Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022[1]

Purpose	This bill seeks to make a number of amendments to the *Fair Work Act 2009*, including: • abolishing the Registered Organisations Commission (ROC) and the Australian Building Construction Commission (ABCC); • establishing gender equality as a key consideration for the minimum wage objective; • establishing a Pay Equity Expert Panel and Care and Community Sector Expert Panel within the Fair Work Commission; • prohibiting pay secrecy clauses and sexual harassment in connection with work; • creating a new dispute resolution function for the FWC to deal with sexual harassment disputes; • adding three protected attributes (breastfeeding, gender identity and intersex status) to existing provisions that provide protection against discrimination; • limiting the use of fixed term contracts; • expanding the circumstances in which an employee may request flexible work arrangements to include experiences of family and domestic violence; • amending the process for agreement terminations and sunsetting 'zombie agreements'; • amending the process for initiating bargaining, the approval requirements for enterprise agreements, and the Better Off Overall Test (BOOT); • increasing the monetary cap on the amounts that can be awarded in small claims proceedings; • prohibiting employers advertising employment at a rate of pay that contravenes the Act; and • updating the workers' compensation presumptive liability provisions for firefighters in the *Safety, Rehabilitation and Compensation Act 1988.*
Portfolio	Employment and Workplace Relations
Introduced	House of Representatives, 27 October 2022

1 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022, *Report 6 of 2022*; [2022] AUPJCHR 49.

Rights	Rights to just and favourable conditions of work; freedom of association

1.74 This bill seeks to make a number of amendments to the *Fair Work Act 2009* (Fair Work Act) and related legislation—many of which would promote human rights, including the rights to work, just and favourable conditions of work, and equality and non-discrimination. For example, the bill seeks to prohibit employers from including pay secrecy terms in employment contracts;[2] limit the use of fixed term contracts;[3] prohibit sexual harassment in connection with work;[4] add the protected attributes of breastfeeding, gender identity and intersex status to existing anti-discrimination provisions;[5] and expand the circumstances in which employees may request flexible work arrangements, including where the employee or their immediate family or household member experiences family and domestic violence.[6]

1.75 Additionally, the bill would repeal chapter 5 of the *Building and Construction Industry (Improving Productivity) Act 2016*, which, among other things, prohibits picketing and certain kinds of industrial action relating to building work.[7] The Parliamentary Joint Committee on Human Rights has previously commented on the likely incompatibility of these provisions with the rights to freedom of association, assembly and expression.[8] Repealing these provisions would therefore remove restrictions on industrial action under Australian law and protect the right to strike.[9]

1.76 However, there are also a number of measures which engage and limit the rights to freedom of association and just and favourable conditions of work, as set out below.

2 Part 7.

3 Part 10.

4 Part 8.

5 Part 9.

6 Part 11.

7 Part 3, items 223.

8 See Parliamentary Joint Committee on Human Rights, *Fourteenth Report of the 44th Parliament* (28 October 2014), *Building and Construction Industry (Improving Productivity) Bill 2013*, pp. 106–111; Statement of compatibility, [194]–[198], [206]–[208].

9 The UN Committee on Economic Social and Cultural Rights has previously raised concerns regarding this legislation. See *Concluding Observations on Australia*, E/C.12/AUS/CO/5 (2017) [29]: 'The committee is concerned about the existence of legal restrictions to the exercise of trade union rights, including in the Fair Work Amendment Act of 2015, the Code for the Tendering and Performance of Building Work 2016, and The Building and Construction Industry (Improving Productivity) Act 2016'.

1.77 It is noted that the bill passed the House of Representatives on 10 November 2022 with 157 amendments agreed to.[10] The below analysis assesses the bill as amended.

Restrictions on industrial action relating to cooperative workplace agreements

1.78 Subsection 413(2) of the Fair Work Act currently provides that industrial action must not relate to a proposed greenfields agreement or multi-enterprise agreement. The bill proposes to omit 'multi-enterprise agreement' and substitute 'cooperative workplace agreement'.[11] A cooperative workplace agreement is defined in the bill as a multi-enterprise agreement where there is no supported bargaining authorisation[12] in operation immediately before the agreement is made.[13] Such agreements would cover multiple businesses and their employees, including potentially small businesses.[14]

1.79 The effect of this proposed amendment would be to restrict industrial action in relation to cooperative workplace agreements and remove the restriction in relation to multi-enterprise agreements (thereby allowing protected industrial action to take place in relation to multi-enterprise agreements that are supported

10 Including 153 Government amendments and 4 Crossbench amendments.

11 Part 20, item 625. It is noted that the item 577 of the bill as first introduced in the House proposed to repeal and substitute subsection 413(2) – the effect being to continue to restrict the availability of protected industrial action in relation to greenfields agreements, extend the restriction to cooperative workplace agreements, and remove the restriction in relation to multi-enterprise agreements. Amendment 61 omitted item 577 on the basis that the same outcome could be achieved at item 625. See Supplementary explanatory memorandum, [41].

12 A supported bargaining authorisation would be made by the Fair Work Commission (FWC) if it is satisfied that it is appropriate for the employers and employees that will be covered by the agreement to bargain together, having regard to a number of factors, including the prevailing pay and industry conditions and whether employers have clearly identifiable common interests. See Part 20, items 607–611.

13 Part 23, item 642. The explanatory memorandum explains that cooperative workplace agreements would replace the process of bargaining for and making multi-enterprise agreements where a supported bargaining authorisation is not in operation: [45].

14 Explanatory memorandum, p. 189. In their submission to the Senate Education and Employment Committee Inquiry into this bill, the Department of Employment and Workplace Relations stated that cooperative workplace agreements are 'expected to be particularly attractive to small business employers' and confirmed that 'industrial action is not available in relation to proposed or existing agreements made through the cooperative workplaces bargaining stream': Department of Employment and Workplace Relations, *Submission* 49, pp. 16–17 to the Senate Standing Committees on Education and Employment, *Inquiry into Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2020*.

bargaining agreements).[15] The consequences for taking unprotected action include a penalty of up to $13,320 for individuals.[16]

International human rights legal advice

Rights to freedom of association and just and favourable conditions of work

1.80 By excluding cooperative workplace agreements from protected industrial action, employees covered by these agreements would be prohibited from organising or engaging in any industrial action, which limits the right to strike. The right to strike is protected as an aspect of the right to freedom of association and the right to form and join trade unions under article 8 of the International Covenant on Economic, Social and Cultural Rights.[17] The existing restrictions on taking industrial action under Australian domestic law have been consistently found by international supervisory mechanisms to go beyond what is permissible under international law.[18] In particular, the United Nations (UN) Committee on Economic Social and Cultural Rights has previously recommended that Australia remove penalties for unprotected industrial action, noting that taking industrial action or participating in strikes is protected and permitted under international law.[19] The International Labour Organization (ILO) Committee on Freedom of Association (ILO Committee) has also

15 Explanatory memorandum, pp. 156, 169.

16 *Fair Work Act 2009*, sections 418–421. The civil penalty applicable is 60 penalty units: section 538.

17 The right to freedom of association and the right to form and join trade unions is also protected by article 22 of the International Covenant on Civil and Political Rights.

18 See UN Committee on Economic Social and Cultural Rights, *Concluding Observations on Australia*, E/C.12/AUS/CO/4 (2009) 5; *Observation Concerning Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87) - Australia*, ILO Committee of Experts on the Adoption of Conventions and Recommendations (CEACR), adopted 2013,published 103rd ILC session (2014); *Observation Concerning Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87) – Australia,* ILO CEACR, adopted 2011, published 101st ILC session (2012); *Observation Concerning Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87) – Australia*, ILO CEACR, adopted 2009, published 99th ILC session (2010*); Observation Concerning the Right to Organise and Collective Bargain Convention, 1949, (No.98) – Australia*, ILO CEACR, adopted 2009, published 99th ILC session (2010).

19 UN Committee on Economic Social and Cultural Rights, *Concluding Observations on Australia*, E/C.12/AUS/CO/5 (2017) [29]-[30]: 'The Committee is also concerned that the right to strike remains constrained in the State party (art. 8). The Committee recommends that the State party bring its legislation on trade union rights into line with article 8 of the Covenant and with the provisions of the relevant International Labour Organization (ILO) Conventions (nos. 87 and 98), particularly by removing penalties, including six months of incarceration, for industrial action, or the secret ballot requirements for workers who wish to take industrial action'.

held that imposing sanctions and penalties for carrying out or attempting to carry out a legitimate strike is a 'grave violation of the principles of freedom of association'.[20]

1.81 The right to strike is important for realising the right to just and favourable working conditions. The UN Committee on Economic, Social and Cultural Rights has noted that the right to 'freedom of association and the right to strike are crucial means of introducing, maintaining and defending just and favourable conditions of work'.[21] Thus by placing restrictions on industrial action, the ability of employees to bargain for more favourable working conditions would be limited, which engages and limits the right to just and favourable conditions of work.[22] This right encompasses the right of all workers to adequate and fair remuneration, and decent work providing an income that allows the worker to support themselves and their family, as well as the right to safe working conditions.[23] While the statement of compatibility notes that the bill as a whole engages these rights, it does not provide an assessment as to the human rights compatibility of this specific measure.

1.82 The rights to strike and just and favourable conditions of work may be limited in certain circumstances. Generally, to be capable of justifying a limitation on human rights, the measure must address a legitimate objective, be rationally connected to that objective and be a proportionate way to achieve that objective. Further, article 8 of the International Covenant on Economic, Social and Cultural Rights expressly provides that no limitations are permissible on the right to strike if they are inconsistent with the guarantees of freedom of association and the right to collectively organise contained in the ILO Convention of 1948 concerning Freedom of Association and Protection of the Right to Organize (ILO Convention No. 87).[24]

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20 International Labour Office, *Freedom of Association: Compilation of decisions of the Committee of Freedom of Association* (6th ed, 2018) [951], [953], [971].

21 UN Committee on Economic, Social and Cultural Rights, *General Comment No. 23: on the right to just and favourable conditions of work* (2016) [1].

22 It is noted that employees covered by a greenfields agreement are not employed at the time the enterprise agreement is entered into and so cannot be involved in bargaining for the agreement. Additionally, a greenfields agreement may be made without the consent of an employee organisation or representative trade union: *Fair Work Act 2009*, subsection 182(4).

23 International Covenant on Economic, Social and Cultural Rights, article 7. See, UN Committee on Economic, Social and Cultural Rights, *General Comment No. 18: the right to work (article 6)* (2005) [2].

24 The *Human Rights (Parliamentary Scrutiny) Act 2011* does not include the International Labour Organization (ILO) Constitution or ILO conventions on freedom of association and the right to bargain collectively in the list of treaties against which the human rights compatibility of legislation is to be assessed. Nonetheless, these ILO standards and jurisprudence are relevant to the mandate of the committee as they are the practice of the international organisation with recognised and long-established expertise in the interpretation and implementation of these rights.

1.83 The overall objective of the bill appears to be to 'get wages moving, boost job security, tackle gender inequality and restore fairness and integrity to Fair Work institutions'.[25] While this general objective may be capable of constituting a legitimate objective for the purposes of international human rights law, the statement of compatibility provides no information about the importance of these objectives in the specific context of the measure. In order to demonstrate that the measure pursues a legitimate objective for the purposes of international human rights law, a reasoned and evidence-based explanation of the necessity of the measure and how it addresses a substantial and pressing concern is required.

1.84 A key aspect of whether a limitation on rights can be justified is whether the limitation is proportionate to the objective being sought. In this respect, it is necessary to consider a number of factors, including whether a proposed limitation is accompanied by sufficient safeguards; whether any less rights restrictive alternatives could achieve the same stated objective; and whether there is the possibility of oversight and the availability of review. A further consideration is the extent of any interference with human rights. The greater the interference, the less likely the measure is to be considered proportionate.

1.85 In assessing proportionality, it is also relevant to consider ILO jurisprudence regarding prohibitions and restrictions on the right to strike. The ILO Committee has held that a general prohibition of strikes 'can only be justified in the event of an acute national emergency and for a limited period of time'.[26] Additionally, the ILO Principles on the right to strike accept that the right to strike may be restricted or prohibited only in relation to certain employees, including:

> members of the armed and police forces, public servants who exercise authority in the name of the State and workers employed in essential services in the strict sense of the term (the interruption of which could endanger the life, safety or health of the whole or part of the population), or in situations of acute national crisis.[27]

1.86 Where the right to strike is restricted or prohibited in these specific circumstances, the ILO Committee has stated that 'adequate protection should be given to the workers to compensate for the limitation thereby placed on their freedom of action with regard to disputes affecting such undertakings and

25 Statement of compatibility, [2].

26 International Labour Office, *Freedom of Association: Compilation of decisions of the Committee of Freedom of Association* (6th ed, 2018) [824].

27 International Labour Office, *ILO Principles Concerning the Right to Strike* (2000), Principle B, p. 55. See also International Labour Office, *Freedom of Association: Compilation of decisions of the Committee of Freedom of Association* (6th ed, 2018) [826]–[852].

services'.[28] Regarding the types of protections that should accompany a restriction, the ILO Committee has held that, at a minimum:

> If strikes are prohibited while a collective agreement is in force, this restriction must be compensated for by the right to have recourse to impartial and rapid mechanism, within which individual or collective complaints about the interpretation or application of collective agreements can be examined.[29]

1.87 Imposing a complete prohibition on all employees covered by a cooperative workplace agreement from organising and participating in industrial action would constitute a significant interference with their right to strike and their right to negotiate and defend just and favourable conditions of work. In the absence of exceptions to the prohibition or any flexibility to treat different cases differently, it is highly unlikely that the proposed limitation would be considered proportionate under international human rights law.[30] Additionally, it does not appear that the measure would fall into any of the exceptions recognised in ILO jurisprudence so as to justify the general prohibition on industrial action. It also does not appear to be accompanied by adequate protections to compensate for the restriction on the right to strike. On this basis, the measure does not appear to be a permissible limitation on the rights to freedom of association and just and favourable conditions of work.

Committee view

1.88 The committee considers that many of the measures in this bill would promote human rights, including the rights to work, just and favourable conditions of work, and equality and non-discrimination (as set out above at paragraphs [1.74] to [1.75]). If removing the restriction on industrial action in relation to 'multi-enterprise agreements' would protect employees under such agreements to take industrial action, in circumstances which are currently prohibited by the Fair Work Act, the committee considers this would help to better protect the right to strike.

1.89 However, the committee notes that by prohibiting industrial action in relation to 'cooperative workplace agreements', the measure engages and limits the right to freedom of association, including the right to strike, and the associated right to just and favourable conditions of work. The committee notes that this prohibition

28 International Labour Office, *Freedom of Association: Compilation of decisions of the Committee of Freedom of Association* (6th ed, 2018) [853].

29 International Labour Office, *Freedom of Association: Compilation of decisions of the Committee of Freedom of Association* (6th ed, 2018) [768]. Such mechanisms could include 'adequate, impartial and speedy conciliation and arbitration proceedings': [856].

30 The Parliamentary Joint Committee on Human Rights has previously raised concerns regarding the human rights compatibility of the prohibition on industrial action in relation to greenfields agreements: *Report 2 of 2021* (24 February 2021) pp. 19–50 and *Report 4 of 2021* (31 March 2021) pp. 47–88.

on industrial action could cover multiple businesses and their employees, with such agreements expected to be particularly attractive to small business employers.[31]

1.90 The committee notes that the general objectives of the bill, including to increase wages and address gender inequality, are important and are likely legitimate objectives for the purposes of international human rights law. However, based on the information contained in the explanatory materials, it remains unclear what is the specific objective behind prohibiting industrial action for cooperative workplace agreements, and therefore whether this is a legitimate objective for the purposes of international human rights law.

1.91 In considering proportionality, the committee notes that the measure applies a general prohibition on industrial action, without any exceptions or flexibility to treat different cases differently. Noting that the measure does not appear to fall into any of the exceptions to the right to strike recognised in ILO jurisprudence, the committee considers that this specific measure does not appear to be a proportionate limitation on the rights to freedom of association and just and favourable conditions of work.

1.92 The committee recommends that the statement of compatibility with human rights be updated to include an assessment of the compatibility of this measure with human rights, particularly the rights to freedom of association and just and favourable conditions of work.

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

Compulsory mediation or conciliation before industrial action is protected

1.94 Part 19 of the bill seeks to amend provisions relating to requirements for industrial action to be protected industrial action under the Fair Work Act.[32] In particular, the bill seeks to introduce compulsory mediation or conciliation between bargaining representatives before industrial action is authorised and insert an

31 Department of Employment and Workplace Relations, *Submission* 49, pp. 16–17 to the Senate Standing Committees on Education and Employment, *Inquiry into Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2020*.

32 Among other things, for industrial action to be protected it must relate to certain types of agreements; the person organising or engaging in the industrial action must be genuinely trying to reach an agreement and must not have contravened any orders relating to the industrial action; the notice requirements must be complied with; and the industrial action must not take place before the nominal expiry date of an enterprise agreement passes. See *Fair Work Act 2009*, section 413. The consequences for taking unprotected industrial action are set out in sections 418–421 of the *Fair Work Act 2009*.

additional requirement in relation to when employee claim actions are protected industrial action.[33] Specifically, new section 448A would require the FWC to direct the bargaining representatives for a proposed enterprise agreement to attend a mediation or conciliation conference prior to industrial action taking place.[34] The conference must be conducted in private and occur prior to the day by which voting in the protected action ballot closes. If a bargaining representative contravened any order made by the FWC under section 448A, then any subsequent industrial action taken would not be protected.[35] If industrial action is not protected, the FWC must order it to stop, not occur or not be organised (as the case may be) and contravention of such an order is covered by a civil remedy provision, attracting a penalty of up to $13,320 for individuals.[36]

International human rights legal advice

Rights to freedom of association and just and favourable conditions of work

1.95 By proposing additional requirements that must be met in order for industrial action to be protected – noting that failure to meet these requirements could result in industrial action being unprotected, which attracts a penalty of up to $13,320 for individuals – the measure engages and limits the right to freedom of association, particularly the right to strike. The measure may also engage and limit the right to just and favourable conditions of work, noting that the protection of the right to freedom of association is crucial to protect just and favourable working conditions. The substance of these rights are set out above in paragraphs [1.80]–[1.81].

33 The Fair Work Commission notes that the majority of protected industrial action taken is employee claim action. See Fair Work Commission, *Industrial action benchbook*, 'Employee claim action' (accessed 8 November 2022). Section 409 of the *Fair Work Act 2009* provides that an employee claim action is industrial action for a proposed enterprise agreement that is organised or engaged in for the purpose of supporting or advancing claims in relation to the agreement that are only about, or are reasonably believed to only be about, permitted matters; and is organised or engaged in, against an employer that will be covered by the agreement, by a bargaining representative covered by the agreement or an employee specified in a protected action ballot order. Employee claim actions must also meet the requirements set out in this section.

34 Part 19, item 585.

35 Part 19, item 581 (in relation to employee bargaining representatives). See also explanatory memorandum, [879]; Amendment 64 to item 581. Protected industrial action would also not be available to an employer or employer bargaining representative who contravened an order to attend a conciliation conference during the Protected Action Ballot period: Part 19, item 583.

36 *Fair Work Act 2009*, sections 418–421. The civil penalty applicable is 60 penalty units: section 538.

1.96 Regarding prerequisites to taking strike action, while the UN Committee on Economic Social and Cultural Rights has urged states to remove administrative obstacles to the right to strike, the ILO Committee has accepted that certain procedural or formal prerequisites for lawful strikes may be permitted.[37] The ILO Committee has observed that:

> The conditions that have to be fulfilled under the law in order to render a strike lawful should be reasonable and in any event not such as to place a substantial limitation on the means of action open to trade union organizations.[38]

1.97 The ILO principles have accepted a number of conditions for exercising the right to strike, including:

> the obligation to have recourse to conciliation, mediation and (voluntary) arbitration procedures in industrial disputes as a prior condition to declaring a strike, provided that the proceedings are adequate, impartial and speedy and that the parties concerned can take part at every stage.[39]

1.98 In particular, the ILO Committee has held that legislation stipulating that conciliation and mediation procedures must be exhausted before strike action is called is compatible with Article 4 of the ILO Convention of 1949 concerning the Right to Organise and Collective Bargaining (ILO Convention No. 98), which encourages the full development and utilisation of machinery for voluntary negotiation of collective agreements. However, these procedures must have the 'sole purpose of facilitating bargaining', be impartial and 'should not be so complex or slow that a lawful strike becomes impossible in practice or loses its effectiveness'.[40]

1.99 The right to strike and associated right to just and favourable working conditions 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. However, no limitations are permissible on the right to freedom of association if the measure taken would prejudice the guarantees

37 Ben Saul, David Kinley and Jacqueline Mowbray, *The International Covenant on Economic, Social and Cultural Rights: Commentary, Cases and Materials*, Oxford University, New York, 2013, p. 582.

38 International Labour Office, *Freedom of Association: Compilation of decisions of the Committee of Freedom of Association* (6th ed, 2018) [789].

39 International Labour Office, *ILO Principles Concerning the Right to Strike* (2000), pp. 25, 55–56 (Principle G).

40 International Labour Office, *ILO Principles Concerning the Right to Strike* (2000), p. 25. See also International Labour Office, *Freedom of Association: Compilation of decisions of the Committee of Freedom of Association* (6th ed, 2018) [790].

of freedom of association and the right to collectively organise contained in the ILO Convention No. 87.[41]

1.100 The statement of compatibility states that the measure seeks to de-escalate disputes by requiring bargaining representatives to attend a compulsory conference held during the protected action ballot period before industrial action is authorised.[42] The conference is intended to provide parties with an opportunity to further negotiate and potentially resolve the dispute before industrial action commences. Facilitating the negotiated settlement of disputes would be a legitimate objective for the purposes of international human rights law. Requiring parties to attend a mediation or conciliation conference would likely be effective to achieve this objective.

1.101 In assessing proportionality, it is necessary to consider a number of factors, including whether a proposed limitation is accompanied by sufficient safeguards; whether any less rights restrictive alternatives could achieve the same stated objective; and the extent of the interference with human rights. Additionally, mediation or conciliation procedures must not be so complex or protracted as to make declaring a legal strike practically impossible.[43]

1.102 As to the existence of safeguards, that the conciliation or mediation conference would be conducted by the FWC would assist with proportionality. In this regard, the ILO Committee has stated that in cases of mandatory conciliation, the conciliation procedure should be conducted by an independent body.[44] The statement of compatibility has not identified any other safeguards that accompany the measure so it is not clear whether this safeguard alone would be sufficient.

1.103 There is an argument that providing parties with recourse to conciliation or mediation on a voluntary basis would be a less rights restrictive alternative and would provide greater flexibility to treat different cases differently. The compulsory nature of the requirements means that the consequences for non-compliance are substantial. If a bargaining representative does not attend a conference or contravenes any order made by the FWC under new section 448A (in relation to mediation or conciliation), then any industrial action taken would not be protected. As a result, persons or trade unions who organised and participated in unprotected industrial action would be penalised for conduct permitted under international law, thus constituting a significant interference with their right to strike.

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41 International Covenant on Economic, Social and Cultural Rights, article 8(3).

42 Statement of compatibility, [218].

43 International Labour Office, *ILO Principles Concerning the Right to Strike* (2000), p. 25. See also International Labour Office, *Freedom of Association: Compilation of decisions of the Committee of Freedom of Association* (6th ed, 2018) pp. 149–150.

44 International Labour Office, *Freedom of Association: Compilation of decisions of the Committee of Freedom of Association* (6th ed, 2018) [797].

1.104 As to length of the procedures, the conference must be conducted during the protected action ballot period, which is a maximum period of 14 days.[45] The UN Committee on Economic Social and Cultural Rights has found excessively lengthy procedures for declaring a strike legal constitute a restriction the right to strike.[46] Whether the period of 14 days is excessive will depend on the nature of the dispute and the particular circumstances of each case. Thus, much will depend on how the measure operates in practice as to whether it is unnecessarily complex or protracted so as to prevent legal industrial action in practice.

Committee view

1.105 The committee notes that by imposing compulsory mediation or conciliation before industrial action will be protected, the measure engages and limits the right to freedom of association, particularly the right to strike, and the associated right to just and favourable conditions of work. The committee considers that the measure pursues the legitimate objective of de-escalating disputes and encouraging negotiation and resolution of disputes before industrial action commences. While the measure is accompanied by some safeguards, including that the conference would be conducted by the FWC, the committee notes that the consequences of failing to attend the conference (namely, that any industrial action would not be protected) would constitute a significant interference with the right to strike.

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

45 Statement of compatibility, [218].

46 UN Committee on Economic Social and Cultural Rights, *Concluding observations, Bolivia*, E/C.12/1/Add.60 (2001) [18].

Privacy Legislation Amendment (Enforcement and Other Measures) Bill 2022[1]

Purpose	This bill seeks to enhance the protection of personal information by increasing penalties, strengthening the Australian Information Commissioner's (the Commissioner) enforcement powers, and provide the Commissioner and Australian Communications and Media Authority (ACMA) with greater information sharing arrangements
Portfolio	Attorney-General
Introduced	House of Representatives, 26 October 2022
Rights	Privacy; criminal process rights

Increasing civil penalties

1.107 The bill seeks to amend the *Privacy Act 1988* (Privacy Act) to increase penalties under section 13G for serious or repeated interferences with the privacy of an individual.[2] Section 13G currently makes it a civil penalty punishable by up to 2,000 penalty units ($444,000) if an entity does an act, or engages in a practice, that seriously interferes with the privacy of an individual or repeatedly interferes with the privacy of one or more individuals. The bill seeks to increase the maximum civil penalty for breach of this provision for 'a person other than a body corporate' to $2.5 million. It also seeks to significantly increase the penalty applicable to body corporates to up to $50 million.

Preliminary international human rights legal advice

Criminal process rights

1.108 The significant proposed increase in this civil penalty to a maximum of $2.5 million for persons other than a body corporate, to the extent that it applies to individuals,[3] raises the risk that this penalty 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 probabilities). However, if the

1 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Privacy Legislation Amendment (Enforcement and Other Measures) Bill 2022, *Report 6 of 2022*; [2022] AUPJCHR 50.

2 Item 14.

3 Noting that human rights apply only to humans, this advice does not consider the proposed increase in relation to bodies corporate.

new civil penalties as applicable to individuals are regarded as 'criminal' for the purposes of international human rights law, they would 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[4] and the right to be presumed innocent until proven guilty according to law,[5] which requires that the case against the person be demonstrated on the criminal standard of proof of beyond reasonable doubt. The statement of compatibility recognises this, stating that the 'substance of the civil penalties' is relevant to the guarantees in article 14.[6]

1.109 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.[7]

1.110 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.

1.111 In relation to (b), a civil penalty is more likely to be considered 'criminal' in nature where there is an intention to punish or deter, irrespective of the severity of the penalty, and if the penalty applies to the public in general rather than a specific regulatory or disciplinary context. The statement of compatibility states that the proposed penalties in section 13G are intended to punish and deter the behaviour that the provision targets, having regard to the potential financial and emotional harm of serious or repeated breaches of privacy.[8] As punishment and 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.

1.112 As to when the penalties may apply (whether to the public or in a regulatory or disciplinary context), section 13G operates with respect to 'entities', which means an agency, organisation or small business operator.[9] The Privacy Act defines an

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

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

6 Statement of compatibility, pp. 5–6.

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

8 Statement of compatibility, p. 6.

9 *Privacy Act 1988*, section 6.

organisation or small business operator as including an individual.[10] The statement of compatibility states that the existing civil penalties in section 13G 'fall short of community expectations, particularly if it is large multinational organisations being penalised'.[11] However, it is not clear whether and how section 13G may operate with respect to individual persons who are not operating within a specific regulatory or disciplinary context. For example, would it apply to a naturopath, gym-owner or childcare operator who regularly emails their clients a newsletter and accidentally shares their client email addresses in doing so? In this regard, it is unclear whether the nature of conduct which could give rise to a serious or repeated interference with privacy would be such that penalties for breaches of section 13G would necessarily be restricted to specific regulatory contexts. An 'interference with the privacy of an individual' encompasses a range of conduct, including an act or practice by an agency or organisation that breaches an Australian Privacy Principle.[12] This would appear to include, for example, the disclosure of personal information about a person that was collected for a different purpose, by an individual who constitutes an organisation for the purposes of the Privacy Act.[13] The term 'serious interference' or 'repeated' is not defined in the Privacy Act,[14] and the explanatory materials accompanying this bill do not elucidate the circumstances which could give rise to a serious or repeated interference with privacy by a person other than a body corporate. There also appears to be limited jurisprudence interpreting section 13G to date. Consequently, some questions remain with respect to the nature of section 13G, and the circumstances in which it may apply. It seems possible that the section could apply beyond specific regulatory or disciplinary contexts and affect the public more generally.

1.113 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.[15] The penalty is more likely to be considered criminal for the purposes of

10 *Privacy Act 1988*, subsection 6C(1)(a) and section 6D. An 'agency' may likewise include a person, but only where they are holding or performing the duties of an appointment or office. See, *Privacy Act 1988*, section 6.

11 Statement of compatibility, p. 6.

12 *Privacy Act 1988*, subsection 13(1). See also definition of 'APP entity' in section 6.

13 See, Australian Privacy Principles (*Privacy Act 1988*, Schedule 1), section 6 (Australian Privacy Principle 6 – use or disclosure of personal information).

14 The explanatory material accompanying the bill which originally established section 13G of the Privacy Act (the Privacy Amendment (Enhancing Privacy Protection) Bill 2012) provides no further explanation of its intended scope of operation.

15 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.

international 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 and are intended to meet community expectations.[16] It also notes the role of the court in determining pecuniary penalties, stating that it must take all relevant matters into account, including the circumstances of the contravention, the nature and extent of any loss or damage suffered because of the contravention and whether the entity has previously been found to have engaged in similar conduct.[17] While the court may choose not to apply the full $2.5 million penalty for individuals, the proposed legislative changes would allow for this, thereby risking the application of a penalty that may be considered criminal in nature under international human rights law. It is noted that if the civil penalty provisions were considered to be 'criminal' for the purposes of international human rights law, this does not mean that the relevant conduct must be turned into a criminal offence in domestic law nor does it mean that the civil penalty is illegitimate. Instead, it means that the civil penalty provisions in question must be shown to be consistent with international human rights law criminal process guarantees, including the right not to be tried twice for the same offence,[18] and the right to be presumed innocent until proven guilty according to law.[19]

Committee view

1.114 The committee notes that the bill overall seeks to provide the Australian Information Commissioner (the Commissioner) with greater enforcement and information sharing powers, and the Australian Communications and Media Authority with greater information sharing powers. The committee notes that the objective of the bill is to strengthen protections against unlawful interferences with privacy,[20] and considers that this is an important objective. The committee therefore considers that, in general, these proposed information-sharing and enforcement powers will likely promote the right to privacy by strengthening the capacity of these oversight bodies to share information relevant to their functions, and expanding the mechanisms available to the Commissioner to enforce the protections provided

16 Statement of compatibility, p. 6.

17 Statement of compatibility, p. 6.

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

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

20 See, statement of compatibility, p. 4.

under the *Privacy Act 1988* for situations in which an unlawful interference with privacy may occur.[21]

1.115 The committee notes that these proposed information-sharing and enforcement powers will also limit the right to privacy and the right to a fair hearing,[22] including by compelling the provision of information or documents.[23] The committee notes that these 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. The committee notes that the statement of compatibility sets out an analysis of this, including identifying that these proposed measures are directed towards the overarching objective of strengthening the capacity of these oversight bodies to share information and enforce existing privacy protections.[24] As such, the committee makes no further comment in relation to these aspects of the bill.

1.116 In relation to those aspects of the bill seeking to increase to $2.5 million civil penalties applicable to individuals, the committee notes this may engage criminal process rights. The committee considers further information is required to assess the compatibility of this measure with these rights, and as such seeks the Attorney General's advice in relation to:

(a) examples of the type of individuals section 13G would apply to, and whether any individuals would be covered by the provision who may not fully understand the regulatory context (noting the examples in the advice above);

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21 See, statement of compatibility, p. 4. The right to privacy includes the right to respect for private and confidential information, particularly the storing, use and sharing of such information. It also includes the right to control the dissemination of information about one's private life, and protects against arbitrary and unlawful interferences with an individual's privacy and attacks on reputation. See, International Covenant on Civil and Political Rights, article 17.

22 The right to a fair trial and fair hearing applies to both criminal and civil proceedings, to cases before both courts and tribunals. It 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. Specific guarantees 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. See, International Covenant on Civil and Political Rights, article 14.

23 See, for example, items 38–41, which would establish civil penalties contraventions of the obligation to give information, answer a question or produce a record or document under the Privacy Act.

24 The statement of compatibility sets out the specific respects in which the bill promotes the right to privacy (pp. 4–5), limits the right to privacy in other respects (pp. 8–9), and limits the right to a fair trial (pp. 6–7).

(b) examples of the types of conduct that may constitute a serious interference, and a repeated interference, with privacy under section 13G of the *Privacy Act 1988*, particularly with respect to conduct by individuals; and

(c) in those instances where an individual may be subject to a significant penalty under the proposed changes to section 13G, why requiring the courts to apply a higher civil standard of proof would not be appropriate.

Telecommunications Legislation Amendment (Information Disclosure, National Interest and Other Measures) Bill 2022[1]

Purpose	This bill seeks to amend the *Telecommunications Act 1997* to alter the operation of information disclosure provisions and record of disclosure requirements. It would also make technical amendments to the *Telstra Corporation and Other Legislation Amendment Act 2021*
Portfolio	Infrastructure, Transport, Regional Development, Communications and the Arts
Introduced	House of Representatives, 10 November 2022
Rights	Privacy; effective remedy

Increased access to the Integrated Public Number Database

1.117 The bill seeks to amend the *Telecommunications Act 1997* (Telecommunications Act) to expand the information that may be disclosed from the Integrated Public Number Database (Number Database), allowing disclosure of information related to unlisted (and listed) phone numbers in the case of calls to emergency services numbers.[2] It would also insert a requirement that it must be unreasonable or impracticable to obtain the other person's consent to the disclosure or use of their information.

1.118 The Number Database, maintained by Telstra, is a record of most Australian phone numbers and owner details, including both listed and unlisted phone numbers. Currently, Telstra can only disclose information or a document contained in the Number Database where it relates to a listed phone number in dealing with the matters raised by a call to an emergency service number.[3] The explanatory

1 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Telecommunications Legislation Amendment (Information Disclosure, National Interest and Other Measures) Bill 2022, *Report 6 of 2022*; [2022] AUPJCHR 51.

2 Items 1–6. See, *Telecommunications Act 1997,* section 285.

3 Subsection 285(1A). Part 13 of the *Telecommunications Act 1997* (Telecommunications Act) requires that carriers and carriage service providers (such as mobile phone service providers) must protect the confidentiality of information relating to carriage services, the contents of communications being carried, and the affairs or personal particulars of persons. The disclosure or use of protected information is authorised in limited circumstances only and is subject to use and disclosure offences (see, section 276–278). The Act establishes a series of exceptions to these offences, permitting the disclosure or use of such information in limited circumstances (see, sections 279–294).

memorandum states that there are 72 million active phone numbers in Australia, and only five per cent are listed on the Number Database, including because mobile phone numbers are unlisted by default.[4]

Preliminary international human rights legal advice

Right to privacy

1.119 Permitting the use and disclosure of personal information related to unlisted phone numbers on the Number Database in emergency call situations engages and limits the right to privacy.

1.120 The right to privacy includes respect for informational privacy, including the right to respect for private and confidential information, particularly the storing, use and sharing of such information.[5] It also includes the right to control the dissemination of information about one's private life. The right to privacy may be subject to permissible limitations which are provided by law and are not arbitrary. In order for limitations not to be arbitrary, the measure must pursue a legitimate objective and be rationally connected to (that is, effective to achieve) and proportionate to achieving that objective.

1.121 The statement of compatibility recognises that this amendment would limit the right to privacy. It states that this would allow access to unlisted numbers to emergency call persons in an emergency situation and has the potential to save lives.[6] Permitting the disclosure of unlisted phone numbers in such circumstances in order to protect life is a legitimate objective for the purposes of international human rights law, and this measure appears to be rationally connected to (that is, capable of achieving) that objective.

1.122 In assessing whether a measure constitutes a proportionate limit on the right to privacy, it is necessary to consider several factors, including whether a proposed limitation is sufficiently circumscribed; whether it is accompanied by sufficient safeguards; and whether any less rights restrictive alternatives could achieve the same stated objective.

1.123 In this regard, the statement of compatibility does not identify to whom information or documents obtained under this measure may be disclosed. For example, it is unclear whether the wording 'matters raised by a call to an emergency service number' would restrict disclosure to police, fire and ambulance services, or allow disclosure to any person so long as it related to a matter originally raised by the emergency services call. Further, the parameters of 'dealing with matters raised by' a

4 Explanatory memorandum, p. 9.

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

6 Statement of compatibility, p. 6.

call to an emergency service number are unclear, including because it does not appear to connect such follow-up with a risk of harm to any person.

1.124 It is also unclear why such a provision is necessary, noting existing provisions in the Telecommunications Act. Section 286 of the Act currently provides that where information or documents came to a person's knowledge or into their possession because of an emergency services call, they are not prohibited from disclosing that information to the police, fire or ambulance services for purposes connected with dealing with matters raised by the call. The statement of compatibility does not explain whether and how the alternative basis for disclosing information relating to a call to an emergency services phone number in section 286 interacts with this proposed amendment to section 285, and why the proposed amendment is necessary despite this existing exception.

1.125 Finally, the statement of compatibility has not identified any safeguards which would apply to information disclosed under section 285 as amended (for example, restrictions on how the data must be handled, used, stored, and destroyed). Consequently, it is not clear whether this proposed amendment would constitute a proportionate limit on the right to privacy.

Committee view

1.126 While noting the important objective of this bill, the committee notes that permitting the disclosure of information relating to unlisted phone numbers (such as mobile phone numbers) on the Integrated Public Number Database in dealing with matters raised by a call to an emergency service number engages and limits the right to privacy. The committee considers further information is required to assess the compatibility of this measure with this right, and as such seeks the minister's advice as to:

(a) whom information or documents obtained under this measure may be disclosed, and examples of such disclosure;

(b) what are the parameters of the term 'dealing with matters raised by' a call to an emergency service number;

(c) whether and how the alternative basis for disclosing information relating to a call to an emergency services phone number in section 286 interacts with this proposed amendment to section 285, and why the proposed amendment is necessary despite this existing exception; and

(d) what safeguards would apply to information disclosed under section 285 as amended (including restrictions in terms of how the data must be handled, used, stored, and destroyed).

1.127 The committee also notes that the statement of compatibility accompanying this bill is very brief. The committee reiterates that where a measure contained in legislation limits human rights, the statement of compatibility must provide a

detailed assessment of whether each limitation is permissible and must be capable of being read as a stand-alone document. This includes setting out whether and how each measure that limits a right seeks to achieve a legitimate objective, is effective to achieve that objective and whether it is a proportionate means of achieving the objective.[7]

Sharing of information in the case of a threat to a person's life or health

1.128 The bill seeks to expand a further exception from the use and disclosure offences set out in Part 13 of the Telecommunications Act where the disclosure relates to threats to a person's life or health.[8] Section 287 currently provides that a person may disclose or use information or a document relating to the affairs or personal particulars (including any unlisted telephone number or any address) of another person if the first person 'believes on reasonable grounds that the disclosure or use is reasonably necessary to prevent or lessen a serious and imminent threat to the life or health of a person'. The bill seeks to remove the qualifier that a threat to the life or health of a person be 'imminent' and insert a requirement that it is unreasonable or impracticable to obtain the other person's consent to the disclosure or use of information.

1.129 The bill also seeks to repeal and replace section 300, which provides for the secondary use and disclosure of information that has been obtained under section 287.[9] This would allow for the secondary disclosure or use of information by the person who obtained it from the carriage service provider or carrier where it is unreasonable or impracticable to obtain consent and either: the disclosure or use is for the purpose of, or in connection with, preventing or lessening a serious threat to the life or health of a person; or the first person believes on reasonable grounds that the disclosure or use is reasonably necessary to prevent or lessen a serious threat to the life or health of a person. The explanatory memorandum notes that this change aligns with the amendment proposed to section 287.[10]

Preliminary international human rights legal advice

Right to privacy

1.130 The proposed expansion of the exception from the use and disclosure offences set out in Part 13 of the Telecommunications Act where the disclosure

7 For further information see, Parliamentary Joint Committee on Human Rights, *Guidance Note 1: Expectations for statements of compatibility*.

8 Items 7–8 amending section 287.

9 Item 9.

10 Explanatory memorandum, p. 11.

relates to threats to a person's life or health likewise engages and limits the right to privacy. The right to privacy may be subject to permissible limitations which are provided by law and are not arbitrary. In order for limitations not to be arbitrary, the measure must pursue a legitimate objective and be rationally connected to (that is, effective to achieve) and proportionate to achieving that objective.

1.131 The statement of compatibility states that this amendment would strike an appropriate balance between protecting the privacy of personal communication and the prevention of threats to a person's safety and wellbeing.[11] It states that two recent coronial inquests both concluded that the 'imminent' qualifier was a barrier in saving lives, and that a 2008 Australian Law Reform Commission (ALRC) recommendation, as well as subsequent reforms to the *Privacy Act 1988*, have deemed it inappropriate for a threat to be considered 'serious' as well as 'imminent' given that any analysis of 'seriousness' must involve consideration of the gravity of the potential outcome as well as the relative likelihood.[12]

1.132 Permitting the disclosure of information (and its onward disclosure) in order to protect life and health of a person is a legitimate objective, and this measure appears to be rationally connected to (that is, capable of achieving) that objective. However, with respect to the proportionality of the measure, the statement of compatibility does not outline whether the measure is appropriately circumscribed and fails to identify any safeguards relating to access to, and the use of, such data. In particular, it is unclear:

- what is the process by which section 287 is invoked (for example, is it only ever police contacting carriage service providers in practice?), and is a warrant or other formal application a part of the process;
- what specific kinds of information may be requested (for example, would it include the content of a person's text messages or voicemail; their call log; or only Global Positioning System (GPS) phone triangulation);
- how such data is required to be managed on receipt;
- whether, how, and for how long such data is then stored; and
- to whom that data may then be secondarily disclosed or used under section 300.

1.133 Further, the statement of compatibility does not comprehensively explain the reasoning behind the proposed removal of the current requirement that a threat to life or health in relation to a person is reasonably believed to be both serious *and* imminent. The explanatory materials note a recommendation by the ALRC in 2008

11 Statement of compatibility, p. 6.

12 Statement of compatibility, p. 6.

that section 287 be amended so an exception applies where a threat is serious but not necessarily imminent.[13] In this report, the ALRC noted that it had, in a similar context,[14] found that it was not appropriate to require that a threat be both serious and imminent because any analysis of whether a threat is 'serious' must involve consideration of the gravity of the potential outcome as well as the relative likelihood.[15] The ALRC stated: '[i]f a threat carries a potentially grave outcome but is highly unlikely to occur, it cannot be considered 'serious' in any meaningful sense'.[16] The ALRC posited that the removal of the imminence requirement was appropriate because, while its removal would not impact on the need to assess whether a threat is likely to eventuate, it would render unnecessary an assessment of *when* a threat is likely to take place.[17] While the ALRC made the same recommendation in relation to section 287,[18] its detailed consideration of the words 'serious and imminent' took place in the context of a proposed amendment to the Privacy Act,[19] and there was not unanimous agreement from submitters in relation to that proposal.[20]

1.134 The statement of compatibility further states this proposal is also in response to two coronial inquests, which both concluded that the current provision 'was a barrier in saving lives'.[21] The more recent of those inquests, dated September 2022, is not public, and therefore the deputy coroner's reasoning cannot be examined in

13 Explanatory memorandum, p. 2. In reference to: Australian Law Reform Commission (ALRC), *Report 108, For Your Information: Australian Privacy Law and Practice* (May 2008), vol. 3, recommendation 72-7, p. 2433.

14 ALRC, *Report 108, For Your Information: Australian Privacy Law and Practice* (May 2008), vol. 2, chapter 25: use and disclosure relating to the *Privacy Act 1988* (at May 2008). Referring specifically to s 14, Information Privacy Principles 10(1)(e) and 11(1)(c); and schedule 3, National Privacy Principle 2.1(e)(i).

15 ALRC, *Report 108, For Your Information: Australian Privacy Law and Practice* (May 2008), vol. 3, p. 2432, in reference to the substantive discussion in vol. 2, pl. 860.

16 ALRC, *Report 108, For Your Information: Australian Privacy Law and Practice* (May 2008), vol. 2, p. 860.

17 ALRC, *Report 108, For Your Information: Australian Privacy Law and Practice* (May 2008), vol. 2, p. 860.

18 ALRC, *Report 108, For Your Information: Australian Privacy Law and Practice* (May 2008), vol. 3, p. 2432

19 ALRC, *Report 108, For Your Information: Australian Privacy Law and Practice* (May 2008), vol. 2, p. 860.

20 ALRC, *Report 108, For Your Information: Australian Privacy Law and Practice* (May 2008), vol. 2, pp. 854-859.

21 Statement of compatibility, p. 6.

detail.[22] However, in the inquest in 2020, into the death of Thomas James Hunt, Deputy Coroner Magistrate Teresa O'Sullivan provided nuanced recommendations with respect to section 287.[23] Magistrate O'Sullivan noted that different police officers were interpreting section 287 in varying ways (including because of differing views by individual police officers as to whether a person's 'health' included their mental health), and that this contributed to a breakdown in the response of police to the events leading to Mr Hunt's death.[24] She considered that there was utility in providing further guidance and training to police on how section 287 is to be interpreted.[25]

1.135 Magistrate O'Sullivan did not, in September 2020, single out the 'imminent' qualifier in section 287 as a barrier necessitating legislative amendment. She found that it was already open to police to apply a lower threshold in using section 287 than had been applied,[26] but if the section were to be amended it should be to permit police to access telecommunications information of a person if they reasonably 'suspect' (as opposed to 'believe') that the disclosure or use is necessary.[27]

1.136 The explanatory materials do not explain why the alternative amendment proposed by Magistrate O'Sullivan (allowing police to use section 287 where they suspect, as opposed to reasonably believe, relevant matters) is not proposed in this bill, nor does it identify whether Deputy Coroner Magistrate Erin Kennedy (who oversaw the more recent coronial inquest) expressed an alternative view as to appropriate amendments. Further, the explanatory materials do not address why Magistrate O'Sullivan's other proposal—that police be provided with guidance and training—would not be (or perhaps has not been) as effective to achieve the same objective. Consequently, it is not clear on the information available whether this proposed amendment would constitute a proportionate limit on the right to privacy.

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22 See, James Glenday, *'Mobile phone triangulation laws to be changed to help find 'high risk' missing people'*, ABC News (8 November 2022).

23 Coroners Court of New South Wales (NSW), *Inquest into the death of Thomas James Hunt* (4 September 2020).

24 Coroners Court of NSW, *Inquest into the death of Thomas James Hunt* (4 September 2020), para [157(e)].

25 Coroners Court of NSW, *Inquest into the death of Thomas James Hunt* (4 September 2020), paras [65], [163].

26 Coroners Court of NSW, *Inquest into the death of Thomas James Hunt* (4 September 2020), para [68].

27 Coroners Court of NSW, *Inquest into the death of Thomas James Hunt* (4 September 2020), para [163].

Committee view

1.137 While noting the important objective of this bill, the committee notes that allowing a carrier or carriage service provider to disclose personal information or documents if necessary to prevent or lessen a serious threat to life or health (and not a serious and imminent threat, as is currently required), engages and limits the right to privacy. The committee considers further information is required to assess the compatibility of the measure, and seeks the minister's advice as to:

(a) what is the process by which section 287 is invoked (for example, is it only ever police contacting carriage service providers in practice?), and is a warrant or other formal application a part of the process;

(b) what specific kinds of information may be used or disclosed as a result of the offence provisions not applying. In particular, would it allow for the content of a person's text messages or voicemail or their call log to be made available, or only the GPS phone triangulation;

(c) how such data is managed on receipt, and whether, how, and for how long such data is then stored;

(d) to whom that data may then be secondarily disclosed or used under section 300; and

(e) why is the provision of guidance and training to police regarding the applicability and scope of section 287 not sufficient to achieve the aim of this measure.

Immunity from civil liability

1.138 The bill seeks to amend subsection 313(5)(a) of the Telecommunications Act relating to civil immunities for carriers, carriage service providers and carriage service intermediaries.[28] This amendment would provide that a carrier or carriage service provider or intermediary is not liable to an action or other proceeding for damages for or in relation to an act done (or omitted to be done) in good faith when providing help as is reasonably necessary for specific purposes in connection with preparing for, responding to, or recovering from an emergency.[29] The explanatory materials state that this is intended to correct a drafting error, and to ensure the section operates as it was originally intended.[30]

28 Item 10.

29 That is, duties established under subsections 313(4A) or (4B)).

30 Explanatory memorandum, p. 11.

Preliminary international human rights legal advice

Right to an effective remedy

1.139 By extending immunity of these bodies from civil liability to include an act done or omitted in good faith when providing help in connection with an emergency, this measure engages the right to an effective remedy. This is because, if such an act done or omitted by a carrier or carriage service provider/intermediary resulted in a violation of a person's human rights (such as the right to privacy), they would be unable to seek a civil remedy for that violation from the various carriers.

1.140 The right to an effective remedy requires the availability of a remedy which is effective with respect to any violation of rights and freedoms recognised by the covenant.[31] It includes the right to have such a remedy determined by competent judicial, administrative or legislative authorities or by any other competent authority provided for by the legal system of the state. While limitations may be placed in particular circumstances on the nature of the remedy provided (judicial or otherwise), states parties must comply with the fundamental obligation to provide a remedy that is effective.[32]

1.141 The statement of compatibility fails to acknowledge the engagement of this right. As such, no information is provided as to whether and how this proposed amendment is consistent with the right, and in particular, whether:

- there are other alternative remedies that may be available to persons in such circumstances (for example, standing to bring a civil claim against the Commonwealth, or access to a remedy via a regulatory oversight framework);
- safeguards regulating the operation of the immunity exist; and
- independent oversight and review of the operation of this immunity in practice exists.

Committee view

1.142 The committee notes that extending the immunity of carriers and carriage service providers (such as mobile service providers) from civil liability engages the

31 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.

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

right to an effective remedy. The committee notes that the statement of compatibility does not identify the engagement of this right, and therefore seeks the minister's advice as to:

(a) whether the measure is consistent with the right to an effective remedy; and

(b) what alternative remedies are available to persons where performance of a duty under subsections 313(4A) and (4B) results in a violation of their human rights.

1.143 The committee recommends that the statement of compatibility be updated to reflect the engagement of the right to an effective remedy.

Records relating to authorised disclosures of information or documents

1.144 Items 12–14 of Schedule 1 of the bill seek to amend section 306 of the Telecommunications Act, which establishes the record-keeping requirements where an eligible person or eligible number-database person[33] has disclosed information or a document as authorised by a provision of Division 3 of the Telecommunications Act, or as authorised under specified sections of the *Telecommunication (Interception and Access) Act 1979* (TIA Act).[34]

1.145 The measure would expand the circumstances in which section 306 would require the creation of a record to include where a disclosure has been made pursuant to section 187AA(1) of the TIA Act.[35] Subsection 187AA(1) sets out the kinds of information that a service provider must keep, or cause to be kept. This includes: the name and address of a telecommunications subscriber; the source and destination of their communications (i.e. the device a communication was sent from and where it was sent); the type of communication (e.g. email, voicemail); and the location of the equipment used for the communication (e.g. cell towers or wi-fi hot spots). The bill would provide that, if the information or document that was lawfully

33 An 'eligible person' is a carrier; carriage service provider; telecommunications contractor; or employee of such. An 'eligible number-database person' is a number-database operator or contractor, or employee of such. See, Telecommunications Act, ss. 271–272.

34 Namely, sections 177, 178 or 179, subsection 180(3) or section 180A of the *Telecommunication (Interception and Access) Act 1979*.

35 Specifically, item 15 of the bill would insert a new paragraph 306(5)(g) which would require the creation of a record where the information or document includes information specified in a table that is (a) specified in a determination made by the Minister, by legislative instrument under new subsection 305(5A) (inserted by Item 16); or (b) if there is no determination, the table in subsection 187AA(1) of the *Telecommunications (Interception and Access) Act 1979*.

disclosed included information of a kind specified in subsection 187AA(1), a record of the disclosure must set out the number of the item[36] and a description of the content of those items to the extent that the content relates to the information or document.

Preliminary international human rights legal advice

Right to privacy

1.146 Requiring the creation of a record of disclosure under section 306 of the Telecommunications Act engages and limits the right to privacy. This is because the information required to be retained by a service provider under subsection 187AA(1) would include personal information (including the name and address of a service subscriber, and information relating to all of their communications on a device).

1.147 The statement of compatibility states that increasing the reporting and oversight obligations on carriers promotes the right to privacy by 'strengthening the protection of the law against unlawful information disclosure request (sic)'.[37] However, it does not identify that aspects of this measure would also limit the right to privacy, meaning that no assessment of its compatibility is provided.

1.148 The right to privacy may be subject to permissible limitations which are provided by law and are not arbitrary. In order for limitations not to be arbitrary, the measure must pursue a legitimate objective and be rationally connected to (that is, effective to achieve) and proportionate to achieving that objective. In this regard, it would appear likely that increasing reporting and oversight obligations of carriers so as to prevent unlawful requests for the disclosure of information constitutes a legitimate objective, and that the proposed measure would be effective in achieving that objective. As to whether this constitutes a proportionate means by which to achieve that objective, it is necessary to consider: whether and how the measure is sufficiently circumscribed; the presence of safeguards;[38] and why any less rights restrictive alternatives could not achieve the same objective. In this regard, the Telecommunications Act requires that records of disclosure be retained for three years,[39] and provides that the Australian Communications and Media Authority (ACMA) and the Information Commissioner report on, and maintain oversight of,

36 The table in subsection 187AA(1) groups the types of information into six numbered groups. For example, recording the number of the item as 'Item No. 6' would indicate that the information relates to the location of the equipment used in connection with a communication.

37 Statement of compatibility, p. 6.

38 For example, restrictions on the onwards disclosure of such records; requirements for the secure storage of such records; and timeframes for the destruction of records.

39 Telecommunications Act, subsection 306(2)(b).

these disclosures.[40] However, section 306 does not itself require the destruction of records after the three-year retention period, and it is unclear whether any requirements as to how that data must be stored (for example, on a secure server) exist. Consequently, further information is required as to whether this measure would constitute a proportionate limit on the right to privacy.

Committee view

1.149 The committee notes that expanding the requirement to record where an authorised disclosure of information, including personal information, has occurred engages and may limit the right to privacy. The committee considers further information is required to assess the human rights implications of this measure, and as such seeks the minister's advice as to:

(a) whether the measure is consistent with the right to privacy; and

(b) in particular, what safeguards would operate in respect of information required to be recorded under section 306 (including with respect to requirements for the data's storage, and its destruction after it is no longer required to be retained).

1.150 The committee recommends that the statement of compatibility with human rights be updated to set out the limitation of the right to privacy in respect of this measure.

40 Telecommunications Act, sections 308–309.

Legislative instruments

Data Availability and Transparency (Consequential Amendments) Transitional Rules 2022 [F2022L01260][1]

Purpose	This legislative instrument makes transitional arrangements for the data sharing scheme established by the *Data Availability and Transparency Act 2022* by prescribing six Australian entities as transitional entities, which are taken to be accredited data service providers for the purposes of the Act for a limited transition period
Portfolio	Finance
Authorising legislation	*Data Availability and Transparency (Consequential Amendments) Act 2022*
Last day to disallow	15 sitting days after tabling
Right	Privacy

Facilitating access to Australian Government data

1.151 This legislative instrument prescribes six entities[2] as transitional entities for the purposes of the data sharing scheme established by the *Data Availability and Transparency Act 2022* (the Act). Transitional entities are taken to be accredited data service providers (ADSPs) for the purposes of the Act for a transition period (up to 30 July 2025).[3]

1.152 Under the Act, departments and agencies that control Australian Government data are treated as 'data custodians' and may share the data they control with 'accredited users' under a data sharing agreement. This data may be shared through an ADSP, which acts as an intermediary. An ADSP is a provider that is meant to have 'particular expertise in data sharing and the provision of data services',[4] and may provide: de-identification data services; secure access data

1 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Data Availability and Transparency (Consequential Amendments) Transitional Rules 2022 [F2022L01260], *Report 6 of 2022*; [2022] AUPJCHR 52.

2 Australian Bureau of Statistics, Australian Institute of Family Studies, Australian Institute of Health and Welfare, Commonwealth Social Services Department (DSS), Queensland Treasury, and Victorian Department of Health, see section 7.

3 Section 7.

4 Explanatory statement, p. 1.

services; and complex data integration services.[5] Consequently, this measure has the effect that these six entities may facilitate the sharing of Australian Government data during the transitional period.

Preliminary international human rights legal advice

Right to privacy

1.153 By authorising the provision of controlled access to Australian Government data to the six prescribed entities until 30 July 2025, this measure engages and limits the right to privacy.

1.154 The right to privacy is multi-faceted. It comprises respect for informational privacy, including the right to respect for private and confidential information, particularly the storing, use and sharing of such information.[6] It prohibits arbitrary and unlawful interferences with an individual's privacy, family, correspondence or home.[7] This includes a requirement that the state does not arbitrarily interfere with a person's private and home life,[8] meaning that any interference with a person's privacy—including one provided for by law—should be in accordance with the provisions, aims and objectives of the International Covenant on Civil and Political Rights, and be reasonable in the particular circumstances.[9] It also includes the right to control the dissemination of information about one's private life, and requires that States Parties take effective measures to ensure that information concerning a person's private life does not reach the hands of persons who are not authorised by law to receive, process and use it.[10] It also requires that legislation must specify in detail the precise circumstances in which an interference with privacy will be

5 *Data Availability and Transparency Act 2022* (Data Availability and Transparency Act), sections 16C–16D. This instrument limits the types of services that some of these transitional entities may provide: DSS must not provide secure access services; Queensland Treasury must not provide secure access services and is limited in providing de-identification services; and the Victorian Department of Health is restricted in terms of any of the three services an ADSP can provide (in that any services must be provided by the Centre for Victorian Data Linkage). See, section 5.

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

7 UN Human Rights Committee, *General Comment No. 16: Article 17 (Right to Privacy)* (1988) [3]-[4].

8 The UN Human Rights Committee further explains that this right is required to be guaranteed against all such interferences and attacks whether they emanate from State authorities or from natural or legal persons: *General Comment No. 16: Article 17 (Right to Privacy)* (1988).

9 UN Human Rights Committee, *General Comment No. 16: Article 17 (Right to Privacy)* (1988) [4].

10 UN Human Rights Committee, *General Comment No. 16: Article 17 (Right to Privacy)* (1988) [10].

permitted.[11] The right to privacy 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 it.

Legitimate objective and rational connection

1.155 The statement of compatibility identifies that this measure engages the right to privacy.[12] With respect to the objective of the measure, it states that if this instrument was not made, there would be no ADSPs in the data sharing scheme established by the Act until Australian entities were accredited as ADSPs by the Commissioner, meaning that departments and agencies with high levels of expertise would not be able to act as intermediaries in data sharing projects in the short term.[13] In this regard, the explanatory statement also states that ADSPs have particular expertise in data sharing and the provision of data services.[14]

1.156 To the extent that the scheme overall seeks to facilitate controlled access to public sector data for specific purposes, this would appear capable of constituting a legitimate objective. Further, to the extent that the prescription of these six entities as 'intermediaries' for a transitional period will facilitate such controlled data sharing, the measure would appear to be rationally connected to that objective.

Proportionality

1.157 The primary issue is whether this measure constitutes a proportionate means by which to achieve the stated objective, having regard to the extent of the interference with the right to privacy and the question of whether the measure is appropriately circumscribed. It is also necessary to consider the presence of safeguards, the possibility of oversight, the availability of review, and any less rights restrictive alternatives.

1.158 The statement of compatibility highlights several safeguards regulating the sharing of information under the scheme. It states that a transitional entity taken to be an ADSP may only collect and use shared data as authorised by section 13B of the Act.[15] This includes the requirement that a transitional entity may only collect and use personal information as an ADSP if it is subject to privacy obligations in relation to the information.[16] It further notes that personal information may only be shared under the Act if the sharing is consistent with the privacy protections in sections 16A

11 UN Human Rights Committee, *General Comment No. 16: Article 17 (Right to Privacy)* (1988) [8].

12 Statement of compatibility, pp. 8–9.

13 Statement of compatibility, p. 9.

14 Explanatory statement, p. 1.

15 Statement of compatibility, p. 9.

16 Data Availability and Transparency Act, subsection 13B(3) and section 16E.

and 16B of that Act. These protections: set out the requirements for: consent regarding the sharing of personal information; prohibit any personal information from being shared, stored, or accessed outside Australia; and require that any de-identified data remains de-identified. However, the Act also establishes that there are circumstances where the sharing of data may be permitted despite these restrictions, such as where it has been deemed 'unreasonable or impracticable' to seek the relevant person's consent.[17]

1.159 The statement of compatibility further notes that the prescription of these transitional entities cannot extend beyond 30 July 2025.[18] It states that each transitional entity has been assessed under non-statutory arrangements as being suitable to perform data services in relation to Australian Government data. It also notes that the Commissioner has regulatory oversight over these entities and, if necessary, the Commissioner may vary, suspend or cancel their ADSP accreditation.[19] This oversight has the capacity to serve as an important safeguard. However, were such disciplinary responses to take place once a breach of privacy has occurred, this would not assist with the interference with a person's privacy.

1.160 In addition, the statement of compatibility states that all data sharing under the Act must be consistent with the *Privacy Act 1988*.[20] To the extent that this requirement is enforced in practice (before the sharing of personal information has occurred, and the corresponding interference with privacy has taken place), this has the capacity to serve as a safeguard.

1.161 The above safeguards assist the proportionality of the measure with respect to the right to privacy to varying degrees. However, the extent to which this measure is likely to constitute a proportionate limit on the right to privacy also depends on whether the data-sharing scheme itself constitutes a proportionate limit on the right to privacy.[21] In this regard, what kinds of data, the sharing of which these entities may facilitate as transitional ADSPs, is unclear. It is also unclear whether such data could include personal information that may be identifiable. The statement of compatibility does not provide examples of potential or anticipated data-sharing agreement projects to which these six entities may be party. Further, the statement

17 Data Availability and Transparency Act, section 16B.

18 The explanatory statement states that it is expected that the six entities will apply to the Commissioner for accreditation as ADSPs within this period. See, p. 2.

19 Statement of compatibility, p. 9.

20 Data Availability and Transparency Act, subsection 17(5).

21 The committee published its consideration of the bill that gave effect to this scheme—the Data Availability and Transparency Bill 2022—in its scrutiny *Report 2 of 2021* and *Report 4 of 2021*. At that time, the committee retained concerns that this scheme, as drafted, may not be a proportionate means by which to achieve its objectives. However, when that bill was passed by the Parliament, it included 251 amendments which were not considered by this committee.

of compatibility specifically identifies the relevance of the right to privacy as it applies to children under the Convention on the Rights of the Child.[22] However, it does not particularise whether (for example) the prescription of these six entities may have the effect of facilitating the sharing of particular information that relates to children, or whether it may facilitate data-sharing agreements that may have a particular impact on children.

Committee view

The committee notes that authorising the provision of controlled access to Australian Government data to six entities as prescribed by these rules, engages and limits the right to privacy.

1.162 The committee considers further information is required to assess the compatibility of this measure with this right, and as such seeks the minister's advice as to:

(a) the type of data, the sharing of which these prescribed entities may facilitate as ADSPs, and whether this could include personal information that may be identifiable; and

(b) whether the prescription of these six entities may have particular implications with respect to the right to privacy as it applies to children (including, whether this measure may have the effect of facilitating the sharing of particular information that relates to children, or whether it may facilitate data-sharing agreements that may have a particular impact on children).

1.163 The committee further notes, more broadly, that it raised numerous concerns about the bill (now Act) which established this scheme (the Data Availability and Transparency Bill 2022), particularly with respect to the right to privacy.[23] The committee notes that 251 amendments were made to the bill after it had been considered by the committee, meaning that it is challenging to determine whether, and to what extent, the data-sharing scheme, as implemented, reflects the committee's previous concerns. The committee considers that a comprehensive understanding of the entire data-sharing scheme is necessary in order for it to assess the compatibility of this legislative instrument with the right to privacy.

22 Statement of compatibility, p. 8.

23 The committee published its consideration of the bill that gave effect to this scheme—the Data Availability and Transparency Bill 2022—in its scrutiny *Report 2 of 2021* and *Report 4 of 2021*. At that time, the committee retained concerns that this scheme, as drafted, may not be a proportionate means by which to achieve its objectives.

1.164 Noting the complexity of the scheme, the committee intends to write to the minister asking departmental officials to provide a briefing to the committee secretariat about how the scheme as a whole operates, whether the amendments to the bill establishing the scheme have addressed the committee's previous concerns, and the interaction of this legislative instrument with the scheme as a whole.