

## 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

### Export Control Amendment (Streamlining Administrative Processes) Bill 2022<sup>1</sup>

<b>Purpose</b>	This bill seeks to amend administrative and authorisation processes relating to the Department of Agriculture, Fisheries and Forestry, including by making information-sharing provisions relating to export control more flexible
<b>Portfolio</b>	Agriculture, Fisheries and Forestry
<b>Introduced</b>	House of Representatives, 30 November 2022
<b>Right</b>	Privacy

#### Information-sharing between government agencies and other bodies

1.2 This bill seeks to amend the *Export Control Act 2020* (Export Control Act) to alter information-sharing provisions relating to government agencies and other bodies. The bill would provide that 'entrusted persons' (which would include any level of departmental officer and certain contractors)<sup>2</sup> would be permitted to use or disclose 'relevant information' in relation to a range of matters.<sup>3</sup> 'Relevant information' would be defined to mean 'information obtained or generated by a person in the course of or for the purposes of: performing functions or duties, or

1 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Export Control Amendment (Streamlining Administrative Processes) Bill 2022, *Report 1 of 2023* [2023] AUPJCHR 3.

2 Schedule 1, Item 4, section 12. 'Entrusted persons' would mean any of the following: the minister; the Secretary; an Australian Public Service employee in the department; any other person employed or engaged by the Commonwealth to provide services to the Commonwealth in connection with the department; any other person employed or engaged by the Commonwealth or a body corporate that is established by a law of the Commonwealth, and who falls within a class of persons specified by rules.

3 Schedule 1, Item 12, proposed section 388–397F.

exercising powers, under the Export Control Act; or assisting another person to perform functions or duties, or exercise powers, under the Act'.<sup>4</sup>

1.3 Entrusted persons would be permitted to use or disclose relevant information in the course of, or for the purposes of, performing functions or duties under the Export Control Act.<sup>5</sup> They would also be permitted to use or disclose relevant information for twelve other purposes,<sup>6</sup> including: to a foreign government for the purposes of managing Australian international relations in respect of trade;<sup>7</sup> to the Australian Federal Police if the person reasonably believed that this was necessary for the enforcement of a criminal law;<sup>8</sup> and for the purposes of other Acts administered by the relevant minister (this would include the *Biosecurity Act 2015*),<sup>9</sup> or a law of a state or territory.<sup>10</sup>

## **Preliminary international human rights legal advice**

### ***Right to privacy***

1.4 By facilitating the use and disclosure of personal information this measure engages and limits the right to privacy. The right to privacy includes respect for informational privacy, including the right to respect for private and confidential information, particularly the storing, use and sharing of such information.<sup>11</sup> 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. In this 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; and whether any less rights restrictive alternatives could achieve the same stated objective. In order to be proportionate, a limitation on the right to privacy should only be as extensive as is strictly necessary to achieve its legitimate objective and must be accompanied by appropriate safeguards. The United Nations Human Rights

---

4 Schedule 1, item 6.

5 Schedule 1, item 12, proposed section 388.

6 Schedule 1, item 12, proposed sections 389–397C.

7 Schedule 1, item 12, proposed section 389.

8 Schedule 1, Item 12, proposed section 393.

9 Schedule 1, Item 12, proposed section 390.

10 Schedule 1, Item 12, proposed section 397C.

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

Committee has stated that legislation must specify in detail the precise circumstances in which interferences with privacy may be permitted.<sup>12</sup>

1.5 The statement of compatibility states that this measure may engage and limit the right to privacy because 'relevant information' may include personal information.<sup>13</sup> It states that the proposed statutory authorisations for sharing information are generally aimed at the objective of supporting the management of the export control framework and the effective operation and enforcement of the Export Control Act.<sup>14</sup> It also states that some of the provisions are 'properly aimed at assisting with the administration and enforcement of other Australian laws', including for law enforcement purposes. Further, it states that some of the authorisations relate to 'matters of public interest with a high threshold', such as where it is necessary to manage a severe and immediate threat that arises in connection with exports or has the potential to cause harm on a nationally significant scale.<sup>15</sup> These objectives would appear capable of constituting legitimate objectives for the purposes of international human rights law, and it seems likely that the sharing of information obtained pursuant to the Export Control Act would be rationally connected to that objective (that is, capable of achieving such objectives).

1.6 As to whether the proposed authorisations would constitute a proportionate limit on the right to privacy, a key consideration is whether the measure is sufficiently circumscribed. In this regard, while the proposed authorisations would permit the disclosure of information only on specific grounds, it is not clear precisely what kinds of information may be subject to such disclosure provisions, to what extent (and in what contexts) this could include personal information, and in such instances what kinds of personal information would be shared. The term 'relevant information' is defined very broadly to include all information obtained or generated as a result of activities undertaken pursuant to the Export Control Act. No examples are provided of likely scenarios in which each proposed authorisation could be relied on, and the likely personal information that would be used and disclosed in those circumstances.

1.7 Additionally, while the measure mostly provides for who may use the relevant information (namely, an entrusted person), and the persons to whom information may be disclosed (such as a foreign government agency or a court or tribunal), there are some circumstances where this is not the case.<sup>16</sup> In these circumstances, relevant information may be disclosed for specified purposes, such as for the purposes of certain Acts or to manage severe and immediate threats, without

---

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

13 Statement of compatibility, p. 61.

14 Statement of compatibility, p. 61.

15 Statement of compatibility, p. 61.

16 Schedule 1, item 12, proposed sections 388, 390 and 397D.

limiting to whom any such disclosures may be made. Further, some of the bases on which information may be disclosed appear quite broad. For example, proposed section 393 allows all information obtained using powers under the Act to be shared for law enforcement purposes, unrelated to managing risks arising in connection with export operations or the administration of the Act. It is therefore unclear whether the proposed authorisations are sufficiently circumscribed.

1.8 A further aspect relevant to an assessment of proportionality is the presence of safeguards. In this regard, the statement of compatibility states that if personal information also met the definition of 'protected information', it would be afforded additional protections by proposed section 397G, which would establish an offence and civil penalty for the unauthorised use or disclosure of such information.<sup>17</sup> Protected information would include information the disclosure of which could reasonably be expected to found an action by a person for breach of a duty of confidence, and could include further kinds of information specified by the Secretary by legislative instrument where disclosure could prejudice the effective working of the department or otherwise harm the public interest.<sup>18</sup> This may have safeguard value, however it would appear that the definition of 'protected information' is directed primarily towards information that may cause harm to the public interest or to the department, not harm to an individual in respect of their personal privacy. Further, the proposed offence and civil penalty provision would not apply where an entrusted person has acted in good faith, or where the disclosure was required or authorised by law,<sup>19</sup> which would restrict the potential applicability of the penalty. Consequently, this specific offence provision would have restricted safeguard value.

1.9 The statement of compatibility also states that some of the proposed authorisations may include future safeguards. For example, authorisations to disclose information made under proposed sections 393 (for the purposes of law enforcement) and 397C (to a State or Territory body) would require an agreement between the Commonwealth and a State or Territory body. The statement of compatibility states that such agreements could include a requirement that the receiving body confirms that safeguards will protect personal information that has been disclosed. Were such a requirement in place, this would likely have important safeguard value with respect to such authorisations. However, this has limited utility in an assessment of the proportionality of the proposed measures in the bill as it is not a legislative requirement and would only apply in limited circumstances. It is not clear why the bill does not include a requirement that the sharing of personal information under any such agreements should include such a restriction. The statement of compatibility also states that the proposed note after section 387—

---

17 Statement of compatibility, p. 61.

18 Proposed section 397F.

19 Proposed subsections 397G(3)–(4).

clarifying that nothing in Part 3 of Chapter 11 would prevent the Commonwealth from making agreements or other arrangements to impose conditions on the use or disclosure of relevant information—is intended to include additional conditions such as a requirement that personal information be de-identified prior to use. Again, however, it is not clear why such safeguards are not specifically set out in the bill itself.

1.10 Further, proposed section 387E would allow the creation of rules to prescribe the use or disclosure of relevant information in additional circumstances. The statement of compatibility states that such rules would be able to impose 'appropriate limitations' on the use or disclosure of the information (such as requiring the person who is using or disclosing the information to ensure appropriate protections are in place for any personal information). Such a requirement could have important safeguard value with respect to any additional use or disclosure provisions contained in such rules.

### **Committee view**

1.11 The committee notes that the proposed statutory authorisations for sharing information are generally aimed at the legitimate objective of supporting the management of the export control framework and the effective operation and enforcement of the Export Control Act. The committee considers that further information is required to assess the proportionality of the measure with the right to privacy, in particular:

- (a) what kinds of personal information may be disclosed and used pursuant to the proposed authorisations, including examples of such information and the contexts in which the information may be disclosed;
- (b) the person or body to whom relevant information may be disclosed for the purposes of the Act (proposed section 388) or other Acts (proposed section 390) and managing severe and immediate threats (proposed section 397D)—noting that in these circumstances, it is not clear to whom the information may be disclosed;
- (c) why it is necessary to allow all information obtained using powers under the Act to be shared for law enforcement purposes, unrelated to managing risks that arise in connection with export operations or the administration of the Act;
- (d) why the potential safeguards identified in the statement of compatibility in respect of these proposed authorisations are not set out in the bill itself; and
- (e) what other safeguards, if any, would operate to protect personal information disclosed or used pursuant to these proposed authorisations.

## National Reconstruction Fund Bill 2022<sup>1</sup>

<b>Purpose</b>	A bill for the establishment of a National Reconstruction Fund Corporation
<b>Portfolio</b>	Industry, Science and Resources
<b>Introduced</b>	House of Representatives, 30 November 2022
<b>Right</b>	Privacy

### Disclosure of official information

1.12 The bill seeks to establish a National Reconstruction Fund Corporation (Corporation), which would provide finance to constitutional corporations, other entities, and state and territories in priority areas (as declared by ministers).<sup>2</sup>

1.13 Subclause 85(1) would provide that a Corporation official may disclose 'official information' (not including national security information or sensitive financial intelligence information) to an agency, body or person, including if the disclosure will enable or assist the agency, body or person to perform or exercise any of their functions or powers. This would include disclosure to an Australian Public Service departmental employee, and the government of a state or territory. The term 'official information' means information that was obtained by a person in their capacity as a Corporation official; and which relates to the affairs of a person other than a Corporation official.<sup>3</sup> The term 'person' would include an individual.<sup>4</sup>

1.14 Subclause 85(3) would provide that a Corporation official may disclose 'official information' that is national security information or sensitive financial intelligence information to entities, including a national security agency, including if the disclosure will facilitate the performance of the Corporation's investment functions, or will enable or assist the agency, body or person to perform or exercise any of their functions or powers. Clause 5 defines 'national security information' to mean information the publication of which is likely to prejudice national security.

1 This entry can be cited as: Parliamentary Joint Committee on Human Rights, National Reconstruction Fund Bill 2022, *Report 1 of 2023*; [2023] AUPJCHR 4.

2 See, clauses 6 and 63.

3 Clause 5.

4 Clause 5, by reference to section 2C of the *Acts Interpretation Act 1901*.

## Preliminary international human rights legal advice

### **Right to privacy**

1.15 Permitting the disclosure of 'official information' (being information that relates to the affairs of a person) may engage the right to privacy if 'official information' includes personal information.

1.16 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.<sup>5</sup> 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. 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.

1.17 The statement of compatibility is very brief, and states only that three clauses in the bill (including clause 85) may restrict the right to freedom of expression (of Corporation officials).<sup>6</sup> The statement of compatibility does not identify whether clause 85 engages the right to privacy. It states that clause 85 'authorises the kind of information that can be disclosed, to whom it can be disclosed and for what purpose to protect the rights of those who disclose information to the Corporation, protect national security and other sensitive information, while enabling agencies with national security functions to effectively perform their functions'.<sup>7</sup> However, it is unclear what kinds of information may be disclosed under clause 85 and whether this could include personal information. No examples of potential disclosure are provided.

1.18 If clause 85 may permit the disclosure of personal information (and so engage and limit the right to privacy), further information would be required to establish whether this would constitute a permissible limitation on the right. In this regard, further information would be required as to the objective sought to be achieved by permitting the disclosure of information to a broad range of entities

---

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

6 Statement of compatibility pp. 7–8. In this regard, it is noted that clause 26 of the bill provides for the termination of board members including where a member is 'unable to perform the duties of the member's office because of physical or mental incapacity'. However, no analysis is provided as to the compatibility of this measure with the right to just and favourable conditions of work, and with the rights of persons with disability.

7 Statement of compatibility p. 8.

(including separately permitting disclosure under subclauses 85(1) and 85(3)), and how this proposed measure would be rationally connected (that is, capable of achieving) that objective. As to proportionality, it is unclear whether the disclosure power is sufficiently circumscribed (having regard to the breadth of entities to which disclosure may be permitted under subclause 85(2)); what safeguards would operate to protect any personal information disclosed pursuant to clause 85 (for example, would the *Privacy Act 1988* or other legislation be applicable?); and whether any less rights restrictive alternatives (for example, the prescription of specific entities under subclause 85(2) rather than broad classes of entity) could achieve the same stated objective.

### Committee view

1.19 The committee considers that permitting the proposed National Reconstruction Fund Corporation to disclose official information, including national security information in limited respects, may engage the right to privacy if 'official information' may include personal information. The committee notes that the statement of compatibility accompanying this bill is brief and does not fully meet its expectations regarding the content of statements of compatibility.<sup>8</sup>

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

- (a) what type of information may be disclosed under clause 85 and whether this could include personal information; and
- (b) if personal information may be disclosed:
  - (i) what is the objective sought to be achieved by permitting the disclosure of information to a broad range of entities (including separately permitting disclosure under subclauses 85(1) and 85(3));
  - (ii) how this proposed measure would be rationally connected to (that is, capable of achieving) that objective;
  - (iii) whether the disclosure power is sufficiently circumscribed (having regard to the breadth of entities to which disclosure may be permitted under subclause 85(2));
  - (iv) what safeguards would operate to protect any personal information disclosed pursuant to clause 85; and

---

8 For further information see, Parliamentary Joint Committee on Human Rights, [Guidance Note 1: Expectations for statements of compatibility](#).



- (v) whether any less rights restrictive alternatives (for example, the prescription of specific entities under subclause 85(2) rather than broad classes of entity) could achieve the same stated objective.

## Referendum (Machinery Provisions) Amendment Bill 2022<sup>1</sup>

<b>Purpose</b>	<p>This bill seeks to amend the <i>Referendum (Machinery Provisions) Act 1984</i> to ensure that referendums reflect contemporary federal election voting processes and extends transparency and integrity measures in the <i>Commonwealth Electoral Act 1918</i> (the Electoral Act). In particular it seeks:</p> <ul style="list-style-type: none"> <li>• to modernise postal voting in referendums;</li> <li>• promote operational efficiencies in the sorting and counting of votes in referendums;</li> <li>• update authorisation requirements to align with recent changes to the Electoral Act;</li> <li>• amend the financial disclosure and foreign donation restrictions framework for referendum campaigning;</li> <li>• require 'designated electors' to cast a declaration vote in referendums; and</li> <li>• enable the Electoral Commissioner to make modifications to certain aspects of a referendum during a declared emergency.</li> </ul>
<b>Portfolio</b>	Finance
<b>Introduced</b>	House of Representatives, 1 December 2022
<b>Rights</b>	Freedom of expression; freedom of association; privacy; equality and non-discrimination

### Prohibition on foreign campaigners engaging in certain referendum conduct

1.21 This bill seeks to prohibit foreign campaigners from authorising referendum matters, being matters communicated, or intended to be communicated, for the dominant purpose of influencing the way electors vote at a referendum.<sup>2</sup> A 'foreign campaigner' means a person or entity who is not an elector, an Australian citizen, an Australian resident,<sup>3</sup> or a New Zealand citizen who holds a Subclass 444 (Special

1 This entry can be cited as: Parliamentary Joint Committee on Human Rights, *Referendum (Machinery Provisions) Amendment Bill 2022, Report 1 of 2023*; [2023] AUPJCHR 5.

2 Schedule 3, item 2, proposed section 3AA and item 12, proposed section 110CA. The meaning of 'referendum matter' is consistent with the current definition of 'electoral matter'.

3 Section 287 of the *Commonwealth Electoral Act 1918* defines an 'Australian resident' as a person who holds a permanent visa under the *Migration Act 1958*. Subsection 30(1) of the *Migration Act 1958* defines a 'permanent visa' as a visa to remain in Australia indefinitely.

Category) visa.<sup>4</sup> The prohibition would cover the production or distribution, and approving the content, of referendum advertisements; or approving the content of referendum matters in the form of a sticker, fridge magnet, leaflet, flyer, pamphlet, notice or poster.<sup>5</sup> However, exceptions would apply where the referendum matter forms part of opinion polls or research relating to voting intentions at a referendum; personal or internal communications; and certain communications at meetings.<sup>6</sup> Contravention of this prohibition would attract a civil penalty of 120 penalty units (\$33,000).<sup>7</sup>

1.22 The bill also seeks to prohibit the provision and receipt of foreign donations of at least \$100 for the purposes of referendum expenditure as well as prohibit foreign campaigners from directly incurring referendum expenditure in a financial year equal to, or more than, \$1,000.<sup>8</sup> Referendum expenditure means expenditure incurred for the dominant purpose of creating or communicating a referendum matter.<sup>9</sup> The prohibition extends to conduct that occurs in and outside Australia.<sup>10</sup> Contravention of these provisions attracts the higher of a civil penalty of 200 penalty units (\$55,000) or three times the value of the donation or expenditure if calculable, or, in the case of foreign donations, a criminal penalty of 100 penalty units (\$27,500).<sup>11</sup> Additionally, where the Electoral Commissioner has reasonable grounds to conclude that a person is conducting a scheme for the purpose of avoiding these provisions, they may issue a written notice requiring the person not to enter into,

---

4 *Commonwealth Electoral Act 1918*, sections 287 and 287AA. 'Foreign campaigner' has the same meaning as 'foreign donor', as defined in section 287AA of the *Commonwealth Electoral Act 1918*.

5 Schedule 3, item 12, proposed section 110CA.

6 Schedule 3, item 12, proposed subsection 110CA(2).

7 Schedule 3, item 12, proposed section 110CA.

8 Schedule 4, item 3, proposed sections 109J and 109L.

9 Schedule 4, item 2, proposed section 3AAA. 'Referendum matter' is defined in proposed subsection 3AA(1).

10 Schedule 4, item 3, proposed subsections 109J(8) and 109L(2).

11 Schedule 4, item 3, proposed subsections 109J(6)–(8) and 109L(1). Depending on the size of the donation or expenditure, the potential civil penalty of three times the value of the donation or expenditure could, in practice, amount to a substantial pecuniary penalty. Were this to be the case, it may be necessary to consider whether the civil penalty could be considered criminal in nature for the purposes of international human rights law. See Parliamentary Joint Committee on Human Rights, [Guidance Note 2: offence provisions, civil penalties and human rights](#) (2014).

not to begin to carry out, or not to continue to carry out the anti-avoidance scheme.<sup>12</sup>

1.23 Further, the bill would empower the Electoral Commissioner to obtain information and documents from persons to assess compliance with new Part VIIIA, which relates to disclosure of referendum expenditure and gifts, including by foreign campaigners.<sup>13</sup> Failure to comply with a notice to provide information or documents is an offence punishable by six months imprisonment or 10 penalty units or both.<sup>14</sup> The Commissioner may inspect, make copies of and retain for as long as is necessary, any documents provided.<sup>15</sup>

### **Preliminary international human rights legal advice**

#### ***Rights to freedom of expression, freedom of association, privacy, and equality and non-discrimination***

1.24 Noting this bill applies to foreign persons only, it is important to note at the outset that Australia's human rights obligations apply to all people subject to its jurisdiction, regardless of whether they are Australian citizens. This means that Australia owes human rights obligations to everyone in Australia, including foreign persons who are not citizens or permanent residents.<sup>16</sup> While many foreign campaigners would not fall within Australia's jurisdiction for the purposes of international human rights law, there are likely to be some foreign persons residing in Australia who are owed human rights obligations and whose rights may be impacted by this bill.<sup>17</sup>

1.25 By prohibiting foreign persons authorising the production or distribution, and approving the content, of a referendum matter, as well prohibiting donating or

---

12 Schedule 4, item 3, proposed section 109M. Paragraph 109(1)(b) includes proposed sections 109J and 109L. Failure to comply with the written notice attracts the higher of a civil penalty of 200 penalty units (\$55,000) or three times the amount that was not prohibited as a result of the anti-avoidance scheme (e.g. the amount donated or expenditure incurred).

13 Schedule 4, item 3, proposed section 109N.

14 Schedule 4, item 3, proposed subsection 109N(5).

15 Schedule 4, item 3, proposed sections 109P and 109Q.

16 Australia's obligations under the International Covenant on Civil and Political Rights are applicable in respect of its acts undertaken in the exercise of its jurisdiction to anyone within its power or effective control (and even if the acts occur outside its own territory). See United Nations Human Rights Committee, *General Comment No.31: The nature of the general legal obligation imposed on States Parties to the Covenant*, CCPR/C/21/Rev.1/Add.13 (26 May 2004) [10]; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Reports 136 [107]–[111].

17 It is noted that the committee considered similar issues in the context of the Electoral Legislation Amendment (Foreign Influences and Offences) Bill 2022. See Parliamentary Joint Committee on Human Rights, [Report 2 of 2022](#) (9 February 2022) pp. 13–21.

directly incurring referendum expenditure, the measure interferes with these persons' right to freedom of expression, particularly their right to disseminate ideas and information.<sup>18</sup> The right to freedom of expression includes the freedom to seek, receive and impart information and ideas of all kinds, either orally, in writing or print, in the form of art, or through any other media of an individual's choice, including online platforms.<sup>19</sup> It protects all forms of expression, including political discourse and commentary on public affairs, and the means of its dissemination, including spoken, written and sign language and non-verbal expression (such as images).<sup>20</sup> International human rights law has placed particularly high value on uninhibited expression in the context of public debate in a democratic society.<sup>21</sup>

1.26 To the extent that the restriction on foreign persons donating or incurring referendum expenditure interferes with the ability of a political association to carry out its activities, it may also engage and limit the right to freedom of association. The right to freedom of association protects the right of all persons to group together voluntarily for a common goal and to form and join an association.<sup>22</sup> This right prevents States parties from imposing unreasonable and disproportionate restrictions on the right to form associations, including imposing procedures that may effectively prevent or discourage people from forming an association. For instance, the European Court of Human Rights has found that legislation prohibiting a French political party receiving funding or donations from foreign entities

---

18 The European Court of Human Rights has found that legislation restricting persons from incurring electoral expenditure in the weeks prior to an election amounted to a restriction on the right to freedom of expression. See *Bowman v The United Kingdom*, European Court of Human Rights (Grand Chamber), Application No. 141/1996/760/961 (1998), particularly [33]. Further, it is noted that the right to take part in public affairs and elections is not directly engaged by this measure as this right only applies to citizens. See International Covenant on Civil and Political Rights, article 25.

19 International Covenant on Civil and Political Rights, article 19(2). See also UN Human Rights Council, *The promotion, protection and enjoyment of human rights on the Internet*, UNHRC Res. 20/8 (2012).

20 UN Human Rights Committee, *General Comment No. 34, Article 19: Freedoms of opinion and expression* (2011) [11]–[12].

21 UN Human Rights Committee, *General Comment No. 34, Article 19: Freedoms of opinion and expression* (2011) [34], [37] and [38]. The UN Committee has previously raised concerns about certain restrictions on political discourse, including 'the prohibition of door-to-door canvassing' and 'restrictions on the number and type of written materials that may be distributed during election campaigns'.

22 International Covenant on Civil and Political Rights, article 22.

interfered with its right to freedom of association by impacting its financial capacity to carry on its political activities.<sup>23</sup>

1.27 In addition, by prohibiting individuals from engaging in certain conduct in the private sphere, such as incurring referendum expenditure, and by expanding the Electoral Commissioner's information-gathering powers, the measure also engages and limits the right to privacy. The statement of compatibility partly acknowledges this, noting that information gathered by the Electoral Commissioner may contain personal information.<sup>24</sup> The right to privacy prohibits arbitrary and unlawful interferences with an individual's privacy, family, correspondence or home.<sup>25</sup> It includes the idea that individuals should have an area of autonomous development; a 'private sphere' free from government intervention and excessive unsolicited intervention by others. The right to privacy also includes respect for informational privacy, including the right to respect for private and confidential information, particularly the storing, use and sharing of such information.

1.28 Further, noting the measure applies to foreign persons, treating such persons differently from others on the basis of their nationality engages and may limit the right to equality and non-discrimination.<sup>26</sup> 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.<sup>27</sup> While Australia maintains a discretion under international law with respect to its treatment of non-citizens in the context of the electoral process, Australia also has obligations under article 26 of the International Covenant on Civil and Political Rights not to discriminate on grounds of nationality or national origin.<sup>28</sup> Differential treatment will not constitute unlawful

---

23 *Parti Nationaliste Basque – Organisation Régionale D'Iparralde v France*, European Court of Human Rights, Application No. 71251/01 (2007) [43]–[44]. Ultimately the Court concluded at [51] that 'the impact of the measure in question on the applicant party's ability to conduct its political activities is not disproportionate. Although the prohibition on receiving contributions from the Spanish Basque Nationalist Party has an effect on its finances, the situation in which it finds itself as a result is no different from that of any small political party faced with a shortage of funds'.

24 Statement of compatibility, p. 8.

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

26 International Covenant on Civil and Political Rights, articles 2 and 26.

27 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.

28 UN Committee on the Elimination of Racial Discrimination, *General Recommendation 30: Discrimination against non-citizens* (2004).

discrimination if the differential treatment is based on reasonable and objective criteria.<sup>29</sup>

1.29 The statement of compatibility acknowledges that the above rights may be engaged and limited by the measure.<sup>30</sup> 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.<sup>31</sup> In relation to the rights to freedom of expression and freedom of association, a legitimate objective is one that is necessary to protect specified interests, including the rights or reputations of others, national security, public order, or public health or morals.<sup>32</sup>

1.30 The stated objectives of the bill are first, to ensure that only those with a genuine, legitimate stake in the outcomes of the Australian referendum process are able to influence Australian referendums, and second, to secure and promote the actual and perceived integrity of the Australian referendum process by reducing the risk of foreign persons and entities exerting undue or improper influence on the outcomes of referendums.<sup>33</sup> Regarding the expanded information-gathering powers, the stated objective is to facilitate the gathering of information to enable the Electoral Commissioner to regulate the potential influence of foreign campaigners over Australian referendums.<sup>34</sup> The statement of compatibility states that these objectives are integral to maintaining public order and public confidence in the legitimacy of referendum results and to safeguarding the integrity of the referendum system.<sup>35</sup> It notes the threat of foreign influence in referendums can risk undermining democratic integrity and has the potential to erode democracy by compromising trust in voting results and trust in political participants.<sup>36</sup>

---

29 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].

30 Statement of compatibility, pp. 7–9.

31 Regarding limitations on the right to privacy see, UN Human Rights Council, *Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin*, A/HRC/13/37 (2009) [15]–[18]. Regarding limitations on the right to freedom of expression see, UN Human Rights Committee, *General Comment No.34: Article 19: Freedoms of Opinion and Expression* (2011) [21]–[36].

32 International Covenant on Civil and Political Rights, article 19(3) and article 22(2). See UN Human Rights Committee, *General Comment No. 34: Article 19: Freedoms of Opinion and Expression* (2011) [32]–[35].

33 Schedule 4, item 3, proposed sections 109H and 109K; Statement of compatibility, pp. 7–9.

34 Statement of compatibility, p. 8.

35 Statement of compatibility, pp. 8–9.

36 Statement of compatibility, p. 7.

1.31 Seeking to maintain the integrity of electoral processes has been recognised as a legitimate objective for the purposes of international human rights law.<sup>37</sup> Indeed, the United Nations (UN) Human Rights Committee has accepted that legislation 'restricting the publication of opinion polls for a limited period in advance of an election' for the purposes of guaranteeing fair elections and protecting the rights of candidates addressed the legitimate objectives of protecting public order and respecting the rights of others.<sup>38</sup> The European Court of Human Rights has also accepted that prohibiting foreign States and foreign legal entities from funding national political parties pursued the legitimate objective of protecting institutional order and prevention of disorder.<sup>39</sup> In light of this jurisprudence, the measure appears to pursue a legitimate objective. To the extent that prohibiting foreign campaigners from engaging in certain conduct relating to referendums would reduce the threat of foreign influence in Australia's democracy and maintain the public's confidence in the integrity of the referendum process, the measure appears rationally connected to (that is, effective to achieve) the stated objectives.

1.32 A key aspect of whether a limitation on a right can be justified is whether the limitation is proportionate to the objective being sought. In this respect, it is necessary to consider a number of 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.

1.33 The breadth of the measure, including the persons and types of expression captured, is relevant in considering whether it is sufficiently circumscribed. The measure applies to foreign campaigners, which, as noted above, encompasses foreign persons who are not citizens or permanent residents but may still reside in Australia on another type of visa. This definition may capture a broad range of people, some of whom may have a legitimate connection with Australia and a genuine interest in the outcome of Australian referendums.

1.34 As to the type of expression captured, the measure prohibits the expression of referendum matter, meaning 'matter communicated or intended to be communicated for the dominant purpose of influencing the way electors vote at a

---

37 UN Human Rights Committee, *General Comment No.34: Article 19: Freedoms of Opinion and Expression* (2011) [37].

38 *Kim Jong-Cheol v Republic of Korea*, UN Human Rights Committee Communication No. 968/2001 (2005) [8.3].

39 *Parti Nationaliste Basque – Organisation Régionale D'Iparralde v France*, European Court of Human Rights, Application No. 71251/01 (2007) [43]–[44]. See also *Bowman v The United Kingdom*, European Court of Human Rights (Grand Chamber), Application No. 141/1996/760/961 (1998), where the Court found that legislation restricting electoral expenditure prior to an election pursued the legitimate aim of protecting the rights of others, namely the candidates for election.



referendum'.<sup>40</sup> This would include referendum advertisements paid for, and approved by, a foreign campaigner; and referendum matters approved by a foreign campaigner that form part of a sticker, fridge magnet, leaflet, flyer, pamphlet, notice or poster.<sup>41</sup> The measure sets out matters to be taken into account in determining the dominant purpose of the expression, such as whether the matter expressly or implicitly comments on a proposed law for the alteration of the constitution.<sup>42</sup> It also contains a rebuttable presumption that matter that expressly promotes or opposes a proposed law for the alteration of the Constitution, to the extent that it relates to a referendum, is a 'referendum matter' and thus a prohibited form of expression.<sup>43</sup> Finally, the measure includes some exceptions to the prohibition, such as matters communicated for academic, educative and artistic purposes, news content and private communication.<sup>44</sup> However, notwithstanding these exceptions, in its current form, the definition of 'referendum matter' could potentially capture a wide range of materials and forms of expression. Considering the broad range of people to whom the measure may apply, and the types of expression prohibited, questions arise as to whether the measure is sufficiently circumscribed.<sup>45</sup>

1.35 In addition, the UN Human Rights Committee has noted that restrictions on the right to freedom of expression must not be overly broad and, even where restrictions are based on legitimate grounds, States parties 'must demonstrate in [a] specific and individualized fashion the precise nature of the threat' and establish 'a direct and immediate connection between the expression [in question] and the threat'.<sup>46</sup> This bill does not allow for an individualised assessment of the threat posed by either the foreign person or the particular expression in question. It is therefore not clear that all forms of expression prohibited by this bill would necessarily pose a

---

40 Scheduled 3, item 3, proposed subsection 3AA(1).

41 Schedule 3, item 12, proposed section 110CA.

42 Scheduled 3, item 3, proposed subsection 3AA(5).

43 Scheduled 3, item 3, proposed subsection 3AA(4).

44 Scheduled 3, item 3, proposed subsection 3AA(6).

45 The Parliamentary Joint Committee on Human Rights has previously raised concerns about the breadth of related measures that restrict foreign campaigners engaging in electoral conduct and foreign political donations; and impose registration requirements on certain campaigners and entities, as well as persons undertaking activities on behalf of a foreign principal. See Parliamentary Joint Committee on Human Rights, Electoral Legislation Amendment (Foreign Influences and Offences) Bill 2022, [Report 2 of 2022](#) (9 February 2022) pp. 13–21; Electoral Legislation Amendment (Electoral Funding and Disclosure Reform) Bill 2017, [Report 1 of 2018](#) (6 February 2018), pp.11–29; [Report 3 of 2018](#) (27 March 2018) pp. 154–180; Foreign Influence Transparency Scheme Bill 2017 and Foreign Influence Transparency Scheme (Charges Imposition) Bill 2017, [Report 1 of 2018](#) (6 February 2018), pp.34–44; [Report 3 of 2018](#) (27 March 2018) pp. 189–206.

46 UN Human Rights Committee, *General Comment No.34: Article 19: Freedoms of Opinion and Expression* (2011) [34]–[35].

threat to Australia's democracy and referendum processes in practice. A measure that imposes a blanket prohibition without regard to the merits of an individual case is less likely to be proportionate than those which provide flexibility to treat different cases differently.

1.36 It is noted that proposed section 109ZA states that this proposed new part will not apply to the extent that any constitutional doctrine of implied freedom of political communication would be infringed if this Part were to apply to the person or entity. This could potentially operate as a safeguard to respect the right to freedom of expression. However, as the constitutional doctrine of implied freedom of political communication is grounded on the functioning of democratic and responsible government,<sup>47</sup> and as only citizens can vote, it is not clear that it would have any safeguard value in this context. It is also not clear, even if it were to operate as a safeguard in theory, that it would do so in practice, being a broadly defined exception without any clear guidance as to its parameters.

1.37 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. The measure not only prohibits individuals from engaging in certain conduct in the private sphere, such as incurring referendum expenditure or donating to referendum campaigns, but it also empowers the Electoral Commissioner to require individuals to give information or produce documents that are relevant to assessing compliance with these prohibitions. The Commissioner could require individuals to provide personal information, including in relation to their own compliance with the Act. As a failure to comply with these prohibitions is subject to civil penalties, and not criminal penalties, it appears that individuals would not be able to rely on the privilege against self-incrimination to refuse to comply with the Commissioner's request to produce information or documents that go to their own compliance with the legislation. Indeed, a person would commit an offence, punishable by six months imprisonment or 10 penalty units or both, if they fail to comply with the Commissioner's notice. The cumulative effect of these provisions, requiring the production of information or documents that could lead to the imposition of a civil penalty, would likely constitute a substantial interference with the right to privacy. Further, depending on the extent to which the prohibition on foreign donations and expenditure impacted the financial capacity of a political association to carry on its activities, it could also substantially interfere with the right to freedom of association.

1.38 Further, it is not clear from the information provided in the statement of compatibility whether the measure is accompanied by sufficient safeguards to ensure any limitation on rights is proportionate. It is also not clear whether there are

---

47 *Lange v Australian Broadcasting Corporation* [1997] HCA 25; (1997) 189 CLR 520.

less rights restrictive ways of achieving the stated objectives. As such, further information is required to assess the proportionality of the measure.

### **Committee view**

1.39 The committee acknowledges the important objective of this measure in seeking to prevent foreign state players maliciously interfering with our referendum processes. However, the committee notes that prohibiting foreign campaigners (including foreign persons who are neither citizens nor permanent residents) who are in Australia from engaging in certain referendum conduct, including restricting forms of expression and fundraising or donating to referendum entities, engages and limits the rights to freedom of expression, freedom of association, privacy and equality and non-discrimination. 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) why the bill does not allow for an individualised assessment of the threat posed by the foreign person or the form of expression sought to be prohibited;
- (b) why it is necessary for proposed subsection 3AA(4) to be framed as a rebuttable presumption rather than the obligation being placed on the Electoral Commissioner to establish that the communication is a prohibited form of expression;
- (c) why it is necessary for it to be an offence, punishable by six months imprisonment, to not comply with the Electoral Commissioner's expanded information-gathering powers (under proposed section 109N);
- (d) would a person be able to refuse to provide information to the Electoral Commissioner on the grounds that it might make them liable to a civil penalty under the new provisions, and if not, is the limitation on the right to privacy by requiring the production of the information or documents proportionate to the objective sought to be achieved;
- (e) would the implied freedom of political communication, protected by proposed section 109ZA, operate to safeguard the rights of foreign persons to freedom of expression in this context, and if so, how;
- (f) what other safeguards accompany the measure; and
- (g) whether consideration was given to less rights restrictive ways of achieving the stated objectives, and if so, why these alternatives were considered inappropriate.

1.40 The committee has sought advice on whether the temporary removal of the requirement relating to the distribution of an official pamphlet to households has any human rights implications and reserves the right to report further on this bill.

## Treasury Laws Amendment (Modernising Business Communications and Other Measures) Bill 2022<sup>1</sup>

<b>Purpose</b>	<p>This bill seeks to make amendments to multiple Acts relating to the Treasury portfolio, including to:</p> <ul style="list-style-type: none"> <li>allow for technology to be used in communication methods under the <i>Corporations Act 2001</i> and other Commonwealth Acts;</li> <li>implement recommendations made by the Australian Law Reform Commission in relation to simplifying and improving the navigability of Australia's financial services laws;</li> <li>transfer matters contained in Australian Security and Investments Commission legislative instruments into the primary law; and</li> <li>make miscellaneous and technical amendments to Treasury portfolio legislation, including extending the application of civil penalty provisions to foreign persons.</li> </ul>
<b>Portfolio</b>	Treasury
<b>Introduced</b>	House of Representatives, 23 November 2022
<b>Rights</b>	Criminal process rights

### Extending the application of civil penalty provisions

1.41 Schedule 4, division 11 of the bill seeks to extend the application of certain civil penalty provisions<sup>2</sup> in the *Foreign Acquisitions and Takeovers Act 1975* (the Act) to capture exempt core Part 3 actions taken by foreign persons (those not ordinarily resident in Australia, which may include Australian citizens).<sup>3</sup> The civil penalty provisions amended would include section 98B, which provides for a civil penalty of

1 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Treasury Laws Amendment (Modernising Business Communications and Other Measures) Bill 2022, *Report 1 of 2023*; [2023] AUPJCHR 6.

2 Including the civil penalties at sections 98B, 98D, 98E and 101AA of the *Foreign Acquisitions and Takeovers Act 1975*.

3 Schedule 4, division 11, items 49–58. A core Part 3 action is defined under Divisions 2, 4A and 4B of Part 2 of the *Foreign Acquisitions and Takeovers Act 1975*. See Explanatory Memorandum, p. 77. A foreign person is defined in section 4 of the *Foreign Acquisitions and Takeovers Act 1975*.

up to 2,500,000 penalty units (\$687.5 million) for persons who provide false or misleading information to the Treasurer in relation to a no objection notification.<sup>4</sup> Information could be false or misleading because of the omission of a matter or thing. The other relevant civil penalty provisions carry a penalty of 250 penalty units (\$68,750).<sup>5</sup>

## International human rights legal advice

### *Criminal process rights*

1.42 The committee previously commented on the civil penalty provisions under the Act that are to be amended by this bill.<sup>6</sup> In particular, the committee concluded that given the deterrent nature of the civil penalty and the substantial pecuniary sanction (up to 2,500,000 penalty units for individuals), there remained a risk that the penalties may be so severe as to amount to a criminal sanction under international human rights law. Noting that this bill seeks to extend the application of these same civil penalty provisions to foreign persons,<sup>7</sup> including penalties of up to 2,500,000 penalty units (\$687.5 million) for individuals, a similar risk arises that these penalties may be considered criminal in nature under international human rights law.<sup>8</sup>

1.43 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 civil penalty provisions are regarded as 'criminal' for the purposes of international human rights law, they will engage the criminal process rights under article 14 of the International Covenant on Civil and Political Rights, including the right to be presumed innocent until proven

---

4 *Foreign Acquisitions and Takeovers Act 1975*, section 98B. Subsection 3 provides that the maximum penalty for contravention of section 98B is the lesser of a) 2,500,000 penalty units or b) the greater of the following: 5,000 penalty units or the sum of the amounts worked out under section 98F.

5 *Foreign Acquisitions and Takeovers Act 1975*, sections 98D and 98E.

6 Parliamentary Joint Committee on Human Rights, *Foreign Investment Reform (Protecting Australia's National Security) Bill 2020*, Report 14 of 2020 (26 November 2020) pp. 2–17 and Report 1 of 2021 (3 February 2021) pp. 49–74.

7 The statement of compatibility states that the amendments seek to implement the original policy intention underlying the Foreign Investment Reform (Protecting Australia's National Security) Bill 2020, namely that foreign persons should be liable under relevant civil penalty provisions, even if they have been issued with an exemption certificate: p. 99.

8 At the time the committee initially commented on these civil penalty provisions the penalty unit was \$222, meaning that the penalty of 2,500,000 penalty units equated to \$555 million. Following the passing of the Crimes Amendment (Penalty Unit) Act 2022, the penalty unit was increased to \$275, meaning that the penalty of 2,500,000 penalty units now equates to \$687,500,000. See Parliamentary Joint Committee on Human Rights, Report 6 of 2022 (25 November 2022), pp. 34–38.

guilty according to law,<sup>9</sup> which requires that the case against the person be demonstrated on the criminal standard of proof of beyond reasonable doubt. The statement of compatibility acknowledges that by widening the scope of the civil penalty provisions under the Act to capture certain actions of foreign persons, the bill engages article 14.<sup>10</sup>

1.44 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.<sup>11</sup>

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

1.46 In relation to (b), a civil penalty is more likely to be considered 'criminal' in nature if it applies to the public in general rather than a specific regulatory or disciplinary context, and where there is an intention to punish or deter, irrespective of the severity of the penalty. The penalties would apply to foreign persons, namely those not ordinarily resident in Australia, who take certain actions under the Act. The penalties therefore appear to apply to persons in a specific regulatory context rather than the general public. As to the underlying intention of the penalties, the statement of compatibility notes the need to create a sufficient deterrent to protect the national interest, particularly given the potential benefits and profits that may be derived from non-compliance with the Act, and to impose penalties that reflect the seriousness of potential non-compliance and align with community standards and expectations.<sup>12</sup> As deterrence is the stated purpose of the penalties, it would seem to meet the test that the penalty is intended to deter and punish.

1.47 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

---

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

10 Statement of compatibility, p. 99.

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

12 Statement of compatibility, pp. 99–100. These factors reflect those set out in the statement of compatibility accompanying the Foreign Investment Reform (Protecting Australia's National Security) Bill 2020, pp. 226–227.

relevant.<sup>13</sup> The penalty is more likely to be considered criminal for the purposes of 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, they would impose a potentially substantial pecuniary sanction on individuals (including up to 2,500,000 penalty units, equivalent to over \$687 million). The statement of compatibility indicates that the penalties are intentionally substantial so as to deter non-compliance with the Act, having regard to the potential profits to be derived from non-compliance.

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

1.49 While the civil penalty provisions may be considered to be 'criminal' for the purposes of international human rights law, this neither means that the relevant conduct must be turned into a criminal offence in domestic law nor that the civil penalty is illegitimate. Instead, it means that the civil penalty provisions in Schedule 2 must be shown to be consistent with the criminal process guarantees set out in article 14 of the International Covenant on Civil and Political Rights, including the right to be presumed innocent until proven guilty according to law.<sup>14</sup> This right requires that the case against the person be demonstrated on the criminal standard of proof, that is, it must be proven beyond reasonable doubt. The standard of proof applicable in civil penalty proceedings is the civil standard of proof, requiring proof on the balance of probabilities. Were the civil penalties in this bill to be characterised as 'criminal' for the purposes of international human rights law, the lower standard of civil proof would not appear to comply with article 14.

### **Committee view**

1.50 The committee considers that extending the civil penalty provisions in the Act to certain actions taken by foreign persons is an important measure to realise the original policy intention of the penalty provisions and ultimately deter non-compliance with the Act. However, noting the substantial pecuniary sanctions of over \$687 million that could apply to individuals, there is a risk that the penalties may be so severe as to constitute a 'criminal' sanction under international human rights law.

---

13 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.

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

The committee notes that it raised similar human rights concerns in relation to these civil penalties when they were first introduced in 2020.<sup>15</sup> Were the penalties to be considered 'criminal', the committee notes that this does not mean the relevant conduct must be classified as a criminal offence or that the civil penalty is illegitimate. Rather, it must be shown that the provisions are consistent with the criminal process guarantees set out in article 14 of the International Covenant on Civil and Political Rights.

1.51 Noting the related legislative scheme applies a civil standard of proof (and not proof beyond a reasonable doubt), the committee considers that, depending on the severity of the pecuniary penalty applied, there may be a risk that the civil penalty provisions are not consistent with the criminal process guarantees.

#### **Suggested action**

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

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

---

15 Parliamentary Joint Committee on Human Rights, Foreign Investment Reform (Protecting Australia's National Security) Bill 2020, *Report 14 of 2020* (26 November 2020) pp. 2–17 and *Report 1 of 2021* (3 February 2021) pp. 49–74.



## Legislative instruments

### Aged Care Quality and Safety Commission Amendment (Code of Conduct and Banning Orders) Rules 2022 [\[F2022L01457\]](#)<sup>1</sup>

<b>Purpose</b>	This legislative instrument makes provision for the Code of Conduct for Aged Care and its enforcement, establishes that certain information must be included in the register of banning orders, and makes provision for matters relating to accessing, correcting information in, and publication of, the register of banning orders.
<b>Portfolio</b>	Health and Aged Care
<b>Authorising legislation</b>	<i>Aged Care Quality and Safety Commission Act 2018</i>
<b>Last day to disallow</b>	15 sitting days after tabling (tabled in the House of Representatives and the Senate on 21 November 2022). Notice of motion to disallow must be given by 15 February 2023 in the House and 8 March 2023 in the Senate <sup>2</sup>
<b>Rights</b>	Health; privacy; rights of persons with disability

#### Information gathering powers and other compliance action powers

1.54 This legislative instrument amends the Aged Care Quality and Safety Commission Rules 2018 to establish the Code of Conduct for Aged Care (Code of Conduct).<sup>3</sup> The Code of Conduct establishes minimum standards of conduct for approved providers and their aged care workers and governing persons (such as treating people with dignity and respecting their rights, providing appropriate care and supports and acting with integrity).

1.55 It also provides (section 23BD) that the Aged Care Quality and Safety Commissioner (the Commissioner) may take certain actions in relation to compliance

1 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Aged Care Quality and Safety Commission Amendment (Code of Conduct and Banning Orders) Rules 2022 [F2022L01457], *Report 1 of 2023*; [2022] AUPJCHR 7.

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

3 Item 2 and Schedule 1.

with the Code of Conduct, including in relation to compliance by an individual who is, or was, an aged care worker or a governing person of an approved provider. The Commissioner may take various action, including: discussing compliance issues with any person; requesting information or documents from any person; carrying out an investigation; referring information about the compliance to another person or body; and taking any other action considered reasonable in the circumstances.<sup>4</sup> It appears the Commissioner's powers under section 23BD of this instrument may not be enforceable under this instrument – but the *Aged Care Quality and Safety Commission Act 2018* makes it an offence for a person to fail to comply with a notice given by the Commissioner to answer questions or provide information or documents.<sup>5</sup>

## **Preliminary international human rights legal advice**

### ***Rights to health, privacy and rights of persons with disability***

1.56 Insofar as taking action in relation to compliance with the Code of Conduct helps to ensure that aged care workers provide care, support and services in accordance with the Code, this measure appears to promote the rights to health and, as many people in aged care live with disability, the rights of persons with disability. The right to health is the right to enjoy the highest attainable standard of physical and mental health.<sup>6</sup> The right to health requires available, accessible, acceptable and quality health care. The right to be free from all forms of violence, abuse and exploitation in article 16 of the Convention on the Rights of Persons with Disabilities requires that States Parties shall take all appropriate legislative, administrative, social, educational and other measures to protect persons with disabilities, both within and outside the home, from all forms of exploitation, violence and abuse.<sup>7</sup> Further, '[i]n order to prevent the occurrence of all forms of exploitation, violence and abuse, States Parties shall ensure that all facilities and programmes designed to serve persons with disabilities are effectively monitored by independent authorities'.<sup>8</sup>

1.57 However, by providing that the Commissioner may take compliance action that includes carrying out an investigation and requesting information or documents, this measure also engages and limits the right to privacy. The right to privacy includes respect for informational privacy, including the right to respect for private and confidential information, particularly the storing, use and sharing of such

---

4 Section 23BD.

5 See Part 8A, Division 3 of the *Aged Care Quality and Safety Commission Act 2018*.

6 International Covenant on Economic, Social and Cultural Rights, article 12(1).

7 Convention on the Rights of Persons with Disabilities, article 16(1).

8 Convention on the Rights of Persons with Disabilities, article 16(3).

information.<sup>9</sup> It also includes the right to control the dissemination of information about one's private life.

1.58 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.

1.59 The statement of compatibility does not identify that this measure engages and limits the right to privacy, and so no assessment of its compatibility is available.

1.60 The statement of compatibility states that the general objective of the legislative instrument is to strengthen safeguards for older Australians receiving aged care and the instrument aims to increase public confidence in the aged care sector and workforce.<sup>10</sup> Protecting the safety of vulnerable aged care recipients is a legitimate objective for the purposes of international human rights law, and taking action to enforce the Code of Conduct appears to be rationally connected to (that is, likely to be effective to achieve) that objective.

1.61 The key question is whether the information gathering measures are proportionate. With respect to proportionality, it is necessary to consider several factors, including whether the 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. It is noted that the Commissioner would be permitted to take action in relation to persons who were formerly aged care workers or governing persons of an approved aged care provider (including, it would seem, those who have since left that area of work).<sup>11</sup> It is not clear that any time limit applies restricting how long ago a person may have been employed in the sector and remain liable to such action. Further, the Commissioner would be empowered to discuss the compliance with any other person (and request that they provide documents or information or be required to attend before an authorised officer and answer questions). It is not clear whether and how these information-gathering powers would be circumscribed.

1.62 It is also unclear what safeguards would apply to protect information that has been collected and shared. The statement of compatibility identifies that personal information collected is 'protected information', and that the use or disclosure of such information other than as authorised is an offence.<sup>12</sup> However, this would not appear to operate as a safeguard except in circumstances of

---

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

10 Statement of compatibility, p. 17.

11 Section 23BD.

12 Statement of compatibility, p. 19.

unauthorised use or disclosure, and so does not appear to be directly relevant to the question of the range of use and disclosure authorised by this legislative instrument. Further, no information is provided as to what happens once personal information has been collected and shared, how it is required to be stored, and whether it is required to be destroyed after a certain period. Consequently, it is unclear whether this measure constitutes a proportionate limit on the right to privacy.

### **Committee view**

1.63 The committee considers that taking action to ensure compliance by aged care workers and providers with the Code of Conduct promotes the rights to health and, as many people in aged care live with disability, the rights of persons with disability. The committee considers that establishing broad information gathering and sharing powers for the Commissioner to enforce the Code also engages and limits the right to privacy. However, as the statement of compatibility does not recognise this right has been engaged, the committee considers further information is required to assess the compatibility of this measure with the right to privacy, and as such seeks the minister's advice in relation to:

- (a) whether and how these information gathering powers would be circumscribed;
- (b) what threshold would be required to be met before the Commissioner may exercise these powers;
- (c) what safeguards would apply to protect information that has been collected and shared (including what happens once personal information has been collected and shared, how it is required to be stored, and whether it is required to be destroyed after a certain period); and
- (d) whether other, less rights-restrictive alternatives would be effective to achieve the same objective.

---

### **Publication of a register of banning orders**

1.64 The legislative instrument establishes additional provisions relating to the register of banning orders. Banning orders prohibit or restrict specified activities, including those of current and former aged care workers.<sup>13</sup> The *Aged Care Quality and Safeguard Commission Act 2018* requires that a register of banning orders must include: the relevant individual's name; Australian Business Number (if any); and details of the banning order (including any conditions to which the order is

---

13 Aged Care Quality and Safety Commission Act, section 74GB.

subject).<sup>14</sup> This instrument provides for additional matters that must be included on the register, stating that the register must include the state or territory, suburb and postcode of an individual's last known place of residence; and if the Commissioner considers that further information is necessary to identify the individual the register can include further information that the Commissioner considers is sufficient to identify the individual.<sup>15</sup>

1.65 The instrument also provides that an individual may request access to information about themselves that is included in the register and may seek the correction of such information. The instrument provides that the Commissioner may (and in some cases must) correct information that is included in the register of banning orders.<sup>16</sup> Further, the instrument provides that the register of banning orders may be published on the Commission's website. However, a part of the register must not be published if the Commissioner considers that its publication would be contrary to the public interest or the interests of one or more care recipients.<sup>17</sup>

### **Preliminary international human rights legal advice**

#### ***Rights to health, rights of persons with disability and right to privacy and reputation***

1.66 Insofar as the register of banning orders helps to ensure that unsuitable people who may present a risk to aged care recipients are not engaged in the provision of their care, this measure appears to promote the rights to health and, as many people in aged care live with disability, the rights of people with disability, as set out at paragraph [1.56].

1.67 However, by providing that the register of banning orders may be made public, including the names and other identifying information in relation to the individuals subject to those orders, the measure also engages and limits the right to privacy. The right to privacy protects against arbitrary and unlawful interferences with an individual's privacy and attacks on reputation. It includes respect for informational privacy, including the right to respect for private and confidential information, particularly the storing, use and sharing of such information. It also includes the right to control the dissemination of information about one's private life.

1.68 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

---

14 Aged Care Quality and Safety Commission Act, section 74GI.

15 Section 23CB.

16 Sections 23CE-CF.

17 Section 23CG.

measure must pursue a legitimate objective, be rationally connected to that objective and proportionate to achieving that objective.

1.69 The statement of compatibility states that the objective of this measure is to promote the rights of aged care recipients, and to protect them from exploitation and abuse. Protecting the safety of vulnerable aged care recipients is a legitimate objective for the purposes of international human rights law. Making information about banned individuals accessible to the public, including future employers, is likely to be effective to achieve that objective.

1.70 The key question is whether the measure is proportionate. In assessing the proportionality of the measure, relevant considerations include whether the limitation is only as extensive as is strictly necessary; whether there are other less rights restrictive means to achieve the objective; and whether there are appropriate safeguards accompanying the measure.

1.71 The scope of personal information published on the register is relevant in considering whether the limitation on the right to privacy is only as extensive as is strictly necessary. In this regard, the instrument establishes that the Commissioner may include additional personal information if they consider it is necessary to identify the person subject to a banning order. The explanatory statement notes:

It is intended that [subsection 23CB(b)] only be relied up on where it would not otherwise be possible to correctly identify an individual. For example, where two individuals who work in aged care have the same name, live in the same suburb, and a banning order is made in relation to one of those individuals. In these circumstances, the Commissioner can include additional personal information in the register to correctly identify the individual in relation to whom the banning order relates. It is not intended that any information beyond that which is reasonably necessary to enable correct identification of an individual would be included.<sup>18</sup>

1.72 Based on the current version of the register available online (as at 20 January 2023) it would appear that this discretion has been used to include the date of birth of a person subject to a banning order. Further, the current version of the register appears to indicate that the date of birth of each person subject to a banning order will be published (as it is included as a standard column on the register: 'full name and date of birth').<sup>19</sup>

1.73 Inclusion on the register indicates that a banning order has been made against the individual (even if the order is no longer in force). A banning order may be made against an individual on a number of grounds, including that the Commissioner considers they are not complying, or are likely not to comply, with the

---

18 Explanatory statement, p. 11.

19 See [Register of banning orders](#).

Code of Conduct, or that they are not suitable to be involved in the provision of aged care.<sup>20</sup> This may be based on a number of factors, including their experience in aged care or other relevant forms of care; that they have been subject to relevant adverse findings; or that they have been convicted of an indictable offence.<sup>21</sup> As such, given that the register must include: an individual's name; state or territory, suburb and postcode of their last known residence; publication of the fact of the banning order; and details of the order, this is likely to have a considerable effect on the individual's right to privacy and reputation, as it indicates they are not suitable to be involved in providing aged care services. The register includes any banning order made, including if it is no longer in force, except where a banning order has been revoked or set aside.<sup>22</sup> Where an application has been made for reconsideration of a decision to make an order, a statement to this effect must also be included.<sup>23</sup>

1.74 In considering whether the limitation on the right to privacy is no more than is strictly necessary, it is not clear if the register needs to be published on the Commissioner's website and accessible to the general public in order to achieve the stated objective of protecting aged care recipients. For example, would it be as effective to provide access only to employers in the aged care sector, noting this would appear to be sufficient to ensure persons banned from the sector are not employed professionally in that sector in future?

1.75 In terms of safeguards, the statement of compatibility states that the ability for persons to request the correction of the register, and the Commissioner's power to make corrections, ensures that the register does not unintentionally and incorrectly implicate another person, and that the Commissioner has the power not to publish information if in the public interest.<sup>24</sup> The ability to seek a correction of the register is a safeguard in terms of ensuring that the content of the register is accurate, as is the Commissioner's general discretion to correct inaccurate, out-of-date, incomplete, irrelevant or misleading information. However it is not clear why there is no obligation (rather than a discretion) on the Commissioner to correct personal information that is wrong or misleading. The instrument refers in a note to the Commissioner's obligations to correct information under Australian Privacy Principle (APP) 13 in Schedule 1 to the *Privacy Act 1988*.<sup>25</sup> However, it is noted that APP 13 does not apply to 'Commonwealth records'. The Office of the Australian Information Commissioner states that it is likely that the definition of

---

20 Aged Care Quality and Safety Commission Act, section 74GB.

21 Aged Care Quality and Safety Commission Act, section 8C.

22 Aged Care Quality and Safety Commission Act, section 74GI.

23 Aged Care Quality and Safety Commission Act, section 74GI.

24 Statement of compatibility, p. 19.

25 Section 23CF, note.

Commonwealth records 'is likely to include, in almost all cases, all personal information held by agencies',<sup>26</sup> meaning this APP obligation would not appear to apply to compel the Commissioner to correct incorrect or misleading information on the register.

1.76 Further, it is noted that the Commissioner's power not to publish information where to do so would be contrary to the public interest appears unlikely to serve as a personal safeguard for individuals named in banning orders, as it would seem unlikely that the privacy of the subject of a banning order would be regarded as being in the public interest.

### Committee view

1.77 The committee considers that publishing a register of persons who have been banned from providing aged care services is directed towards the extremely important objective of protecting vulnerable older Australians and ensuring that persons found to be unsuitable to provide aged care services are not employed in the sector in future. This committee considers that this measure promotes the rights to health and, as many people in aged care live with disability, the rights of persons with disability. The committee considers publishing this data also limits the right to privacy, but the measure is clearly directed towards a legitimate objective, and publishing this information is likely to be effective to achieve this objective.

1.78 However, the committee requires further information to determine whether the measure constitutes a proportionate limit on the right to privacy. The committee notes that it has previously considered legislation relating to the register of banning orders on numerous occasions and raised questions as to proportionality.<sup>27</sup> As such the committee seeks the minister's advice in relation to:

- (a) whether any less rights restrictive alternatives to publicly publishing the register (including the register being available only to employers, or on request) would not be effective to achieve the objective of this measure;
- (b) whether it is intended that the date of birth of each person subject to a banning order will be published as a matter of routine, and if so why; and

---

26 Office of the Australian Information Commissioner, *Australian Privacy Principles guidelines*, [Chapter 13: APP 13 — Correction of personal information](#), [13.48].

27 See consideration of Aged Care and Other Legislation Amendment (Royal Commission Response No. 2) Bill 2021 in: *Report 11 of 2021*, (16 September 2021), pp. 2–6; *Report 14 of 2021*, (24 November 2021), pp. 2–9; and *Report 1 of 2022* (9 February 2022) pp. 23–39.



- (c) why the instrument does not *require* the Commissioner to correct inaccurate or misleading information on the register (when brought to their attention) in all instances.

## Fair Entitlements Guarantee Regulations 2022 [F2022L01529]<sup>1</sup>

<b>Purpose</b>	This instrument repeals and replaces the Fair Entitlements Guarantee Regulation 2012 and makes modifications to the <i>Fair Entitlements Guarantee Act 2012</i> for the purpose of continuing the established scheme of financial assistance for textile, clothing and footwear industry contract outworkers
<b>Portfolio</b>	Employment and Workplace Relations
<b>Authorising legislation</b>	<i>Fair Entitlements Guarantee Act 2012</i>
<b>Last day to disallow</b>	15 sitting days after tabling (tabled in the House of Representatives on 29 November 2022 and in the Senate on 30 November 2022). Notice of motion to disallow must be given by 9 March 2023 in the House and by 24 March 2023 in the Senate <sup>2</sup>
<b>Rights</b>	Just and favourable conditions of work; equality and non-discrimination

### Financial assistance scheme for textile, clothing and footwear industry contract outworkers

1.79 These regulations continue the scheme of financial assistance for textile, clothing and footwear (TCF) industry contract outworkers in situations where their employer has become insolvent.<sup>3</sup> A 'TCF contract outworker' is an individual who does, or has done, work in the TCF industry otherwise than as an employee and at a premises not normally regarded as a business premises, such as a residential premises.<sup>4</sup> The scheme allows TCF contract outworkers to recover unpaid employment entitlements, including annual leave, long service leave, payment in lieu

1 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Fair Entitlements Guarantee Regulations 2022 [F2022L01529], *Report 1 of 2023*; [2023] AUPJCHR 8.

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

3 The financial assistance scheme for TCF contract outworkers was first established by the Fair Entitlements Guarantee Regulation 2012, which is repealed and replaced by this instrument. The scheme operates under the Fair Entitlements Guarantee (FEG), which is established under the *Fair Entitlements Guarantee Act 2012*.

4 Section 4; *Fair Work Act 2009*, section 12. See generally Department of Employment and Workplace Relations, [TCF contract outworkers scheme](#) (September 2022).

of notice, redundancy pay and wages entitlements.<sup>5</sup> A TCF contract outworker is eligible to recover such entitlements if, among other things, they are an Australian citizen or a holder of a permanent visa or a special category visa (namely persons who hold New Zealand citizenship).<sup>6</sup>

### **Preliminary international human rights legal advice**

#### ***Rights to just and favourable conditions of work and equality and non-discrimination***

1.80 For those eligible for the scheme, the payment of financial assistance to workers who are owed unpaid employment entitlements would promote the right to just and favourable conditions of work.<sup>7</sup> This includes the right of all workers to adequate and fair remuneration, which, at a minimum, encompasses:

fair wages, equal remuneration for work of equal value without distinction of any kind, in particular women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work...and a decent living for workers and their families.<sup>8</sup>

1.81 The United Nations (UN) Committee on Economic, Social and Cultural Rights has stated that workers 'should receive all wages and benefits legally due upon termination of a contract or in the event of the bankruptcy or judicial liquidation of the employer'.<sup>9</sup> The enjoyment of the right to just and favourable conditions of work is important for realising other economic, social and cultural rights, including the right to an adequate standard of living through decent remuneration.<sup>10</sup>

1.82 However, by excluding TCF contract outworkers who are not Australian citizens, permanent residents or holders of a special category visa from accessing the financial assistance scheme, the measure engages and limits the right to equality and non-discrimination by treating individuals differently on the basis of nationality. The

---

5 Schedule 1, item 1.

6 Schedule 1, item 2, paragraph 10(1)(f).

7 International Covenant on Economic, Social and Cultural Rights, article 7. The statement of compatibility states that this measure also promotes the right to social security, p. 16.

8 UN Committee on Economic, Social and Cultural Rights, *General Comment No. 23 (2016) on the right to just and favourable conditions of work (article 7 of the International Covenant on Economic, Social and Cultural Rights)* (2016) [9].

9 UN Committee on Economic, Social and Cultural Rights, *General Comment No. 23 (2016) on the right to just and favourable conditions of work (article 7 of the International Covenant on Economic, Social and Cultural Rights)* (2016) [10].

10 UN Committee on Economic, Social and Cultural Rights, *General Comment No. 23 (2016) on the right to just and favourable conditions of work (article 7 of the International Covenant on Economic, Social and Cultural Rights)* (2016) [1]. The right to an adequate standard of living is protected by the International Covenant on Economic, Social and Cultural Rights, article 11.

statement of compatibility acknowledges that the measure limits this right by making citizenship or visa status a condition of eligibility for financial assistance.<sup>11</sup> The right to equality and non-discrimination provides that everyone is entitled to enjoy their rights without discrimination of any kind and that all people are equal before the law and entitled without discrimination to equal and non-discriminatory protection of the law.<sup>12</sup> 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).<sup>13</sup> This measure not only treats people differently on the basis of nationality or migration status, but it appears to also have a disproportionate impact on people with other protected attributes, such as sex and race, noting that the majority of TCF contract outworkers are women, many of whom are from migrant backgrounds and experience cultural and linguistic barriers.<sup>14</sup>

1.83 Under international human rights law, where a person possesses characteristics which make them particularly vulnerable to intersectional discrimination, such as on the grounds of both sex and race or nationality, the UN Committee on Economic, Social and Cultural Rights has highlighted that 'particularly special or strict scrutiny is required in considering the question of possible

---

11 Statement of compatibility, p. 12.

12 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. Articles 1–4 and 15 of the Convention on the Elimination of All Forms of Discrimination against Women further describe the content of these obligations, including the specific elements that State parties are required to take into account to ensure the rights to equality for women.

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

14 See Fair Work Ombudsman, *Textile, Clothing and Footwear Compliance Phase Campaign Report* (January 2019) p. 10, which reports women comprise 59.1% of TCF workers and 44 % are people born overseas. The Fair Work Ombudsman states that TCF workers are 'especially vulnerable to exploitation' due to a number of factors, including 'a high proportion are mature-aged migrant women, who face cultural and linguistic barriers to understanding and inquiring about their workplace entitlements' and 'an unverified number are outworkers, who work away from business premises (often at home) at the end of long and complex production supply chains - and are therefore difficult to identify, or "hidden": p 5. See also The Senate Education, Employment and Workplace Relations Legislation Committee, [Fair Work Amendment \(Textile, Clothing and Footwear Industry\) Bill 2011](#) (February 2012) pp. 3, 12; Textile Clothing and Footwear Union of Australia, *Submission No 214 to the Productivity Commission Review into the Workplace Relations Framework* (27 March 2015) [3.2].

discrimination'.<sup>15</sup> In general, differential treatment will not constitute unlawful discrimination if the differential treatment is based on reasonable and objective criteria.<sup>16</sup>

1.84 Additionally, insofar as the measure results in certain workers enjoying more favourable working conditions than others, the measure may engage and limit the right to just and favourable conditions of work and potentially associated rights, such as the right to an adequate standard of living, for those workers unable to access the scheme. States parties have an immediate obligation to guarantee that the right to just and favourable working conditions is exercised without discrimination of any kind, including distinction based on race, ethnicity, nationality, migration status or gender.<sup>17</sup> The right to just and favourable conditions of work is to be enjoyed by 'all workers in all settings', including workers in the informal sector, migrant workers and workers from ethnic and other minorities.<sup>18</sup> Regarding migrant workers in particular, the UN Committee on Economic, Social and Cultural Rights has stated that 'laws and policies should ensure that migrant workers enjoy treatment that is no less favourable than that of national workers in relation to remuneration and conditions of work'.<sup>19</sup> More generally, States parties have an obligation to fulfil the right to just and favourable conditions of work, which could include 'establishing non-

---

15 See *Marcia Cecilia Trujillo Calero v. Ecuador*, UN Committee on Economic, Social and Cultural Rights, Communication No. 10/2015, E/C.12/63/D/10/2015 (26 March 2018) [19.2]. See also *Rodriguez v Spain*, UN Committee on Economic, Social and Cultural Rights, Communication No. 1/2013 E/C.12/57/D/1/2013 (20 April 2016) [14.1]; UN Committee on Economic, Social and Cultural Rights, *General Comment 20: non-discrimination in economic, social and cultural rights* (2009) [17] and *General Comment 16: the equal right of men and women to the enjoyment of all economic, social and cultural rights* (2005) [5]; and Committee on the Elimination of Discrimination against Women, *General Recommendation No. 28: The Core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women*, CEDAW/C/GS/28 (16 December 2010) [28].

16 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].

17 UN Committee on Economic, Social and Cultural Rights, *General Comment No. 23 (2016) on the right to just and favourable conditions of work (article 7 of the International Covenant on Economic, Social and Cultural Rights)* (2016) [5], [11], [53].

18 UN Committee on Economic, Social and Cultural Rights, *General Comment No. 23 (2016) on the right to just and favourable conditions of work (article 7 of the International Covenant on Economic, Social and Cultural Rights)* (2016) [5].

19 UN Committee on Economic, Social and Cultural Rights, *General Comment No. 23 (2016) on the right to just and favourable conditions of work (article 7 of the International Covenant on Economic, Social and Cultural Rights)* (2016) [47(e)].

contributory social security programmes for certain workers, such as workers in the informal economy'.<sup>20</sup>

1.85 The above rights may be subject to permissible limitations where the limitation pursues a legitimate objective and is rationally connected to, and a proportionate means of achieving, that objective.

1.86 The stated objective of the measure is to establish an assistance scheme that is intended to operate as a safety net for eligible TCF contract outworkers whose employment has ended due to insolvency of their direct engagers or employers.<sup>21</sup> The statement of compatibility states that the measure seeks to alleviate some of the disadvantages experienced by TCF contract outworkers, noting that these workers are particularly vulnerable as a result of their employment in non-business premises as well as the fact that many workers have poor English language skills and a lack of knowledge about the Australian legal system, and low levels of union membership in the industry.<sup>22</sup> As to the reason for restricting eligibility for the scheme on the basis of migration status, the statement of compatibility states that the scheme is analogous to social security legislation and as such the measure has been drafted in such a way as to maintain some consistency with conditions of eligibility in analogous social security legislation.<sup>23</sup>

1.87 Seeking to financially support vulnerable workers during an insolvency event would, in general, constitute a legitimate objective for the purposes of international human rights law. However, in relation to the specific objective sought to be achieved by excluding certain TCF contract outworkers from the scheme, it is not clear that ensuring legislative consistency would constitute a legitimate objective. To be capable of justifying a proposed limitation on human rights, a legitimate objective must address a pressing or substantial concern and not simply seek an outcome regarded as desirable or administratively convenient. It must also be demonstrated that any limitation on a right has a rational connection to the objective sought to be achieved.

1.88 In assessing whether the limitation is proportionate to the objective being sought, it is necessary to consider a number of factors, including whether a proposed limitation is accompanied by sufficient safeguards and whether any less rights restrictive alternatives could achieve the same stated objective.

---

20 UN Committee on Economic, Social and Cultural Rights, *General Comment No. 23 (2016) on the right to just and favourable conditions of work (article 7 of the International Covenant on Economic, Social and Cultural Rights)* (2016) [64].

21 Statement of compatibility, p. 12.

22 Statement of compatibility, p. 16.

23 Statement of compatibility, p. 12.

1.89 The statement of compatibility states that the limitation on the right to equality and non-discrimination is reasonable, in particular because it does not preclude those TCF contract outworkers who are ineligible for financial assistance from recovering unpaid entitlements from their former employer or engager.<sup>24</sup> However, given there is a recognised need to establish a financial assistance scheme for workers affected by an insolvency event, in part due to their unique vulnerabilities and the challenges in recovering unpaid entitlements, it seems unlikely that the alternative option of individuals recovering payments directly from their insolvent employer would be effective in practice. As such, the availability of this avenue of redress does not appear to assist with the proportionality of the measure. The statement of compatibility does not identify any other safeguards that may assist with proportionality.

1.90 Another relevant factor in assessing proportionality is whether the measure provides sufficient flexibility to treat different cases differently. The eligibility criteria set out in the measure are exhaustive, requiring the Secretary to be satisfied of all criteria in order for a TCF contract outworker to be eligible for financial assistance.<sup>25</sup> Under international human rights law, a measure that imposes a blanket policy without regard to the merits of an individual case is less likely to be proportionate. It is not clear why, for example, the Secretary is unable to consider the individual circumstances of each worker who were to apply for financial assistance, such as the impact of the insolvency event on the worker's personal and family life; the amount of unpaid entitlements owing; whether the worker has access to other social security benefits or financial assistance; or any other vulnerabilities experienced by the worker, such as disability, linguistic and cultural diversity or family and caring responsibilities, noting these other factors may influence a worker's ability to obtain other employment.<sup>26</sup> Were the Secretary to be conferred with such a discretion, this may be a less rights restrictive way of achieving the stated objective.

### **Committee view**

1.91 The committee notes that providing a financial assistance scheme for eligible TCF contract outworkers during an insolvency event would promote the right to just and favourable conditions of work. However, restricting access to this scheme on the basis of migration status also engages and limits the rights to equality and non-discrimination and may limit the right to just and favourable conditions of work. The

---

24 Statement of compatibility, p. 12.

25 Schedule 1, item 2, proposed subsection 10(1).

26 The FWO observed that the 'lack of higher-level educational attainment [among TCF workers] compounds the vulnerability of [this] labour force by imposing further barriers to alternative employment options'. See Fair Work Ombudsman, *Textile, Clothing and Footwear Compliance Phase Campaign Report* (January 2019) p.11.

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) what is the pressing or substantial concern sought to be addressed by excluding certain TCF contract outworkers from accessing the financial assistance scheme on the basis of migration status;
- (b) what proportion of TCF contract outworkers are not eligible for the financial assistance scheme (namely, how many TCF contract outworkers are not Australian citizens, permanent residents or holders of a special category visa);
- (c) why was it considered necessary to make the eligibility criteria exhaustive such that the Secretary is unable to consider the individual circumstances of each worker who were to apply for financial assistance;
- (d) whether, in the period since the establishment of the scheme in 2012, any TCF contract outworkers who were ineligible for the scheme have successfully recovered unpaid entitlements from former employers in the event of insolvency;
- (e) what safeguards accompany the measure; and
- (f) whether consideration was given to less rights restrictive ways of achieving the stated objective, and if so, why these alternatives were considered inappropriate.



## Quality of Care Amendment (Restrictive Practices) Principles 2022 [[F2022L01548](#)]<sup>1</sup>

<b>Purpose</b>	This legislative instrument amends the Quality of Care Principles 2014 to authorise certain individuals or bodies to provide informed consent to the use of a restrictive practice in relation to a care recipient
<b>Portfolio</b>	Health and Aged care
<b>Authorising legislation</b>	<i>Aged Care Act 1997</i>
<b>Last day to disallow</b>	15 sitting days after tabling (tabled in the House of Representatives on 1 December 2022 and in the Senate on 6 February 2023). Notice of motion to disallow must be given by 21 March 2023 in the House and 29 March 2023 in the Senate <sup>2</sup>
<b>Rights</b>	Rights of persons with disabilities; equal recognition before the law; equality and non-discrimination; access to justice; effective remedy

### Consent to the use of restrictive practices in aged care

1.92 This legislative instrument amends the Quality of Care Principles 2014 (Quality of Care Principles) to specify a hierarchy of persons who can give consent on behalf of persons in aged care to the use of restrictive practices, if the care recipient is assessed to lack capacity to give consent. Restrictive practices include physical, environmental, mechanical or chemical restraints or seclusion<sup>3</sup> (such as the use of restraining chairs, bed rails, locked doors or medications for the purpose of sedation). The instrument specifies who is classified as a 'restrictive practices substitute-decision maker'.

1.93 Under the instrument, the priority for who can give consent is an individual or body appointed under a relevant state or territory law (where the care recipient lives) who can give consent to a restrictive practice.<sup>4</sup> If no such person or body has

1 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Quality of Care Amendment (Restrictive Practices) Principles 2022 [F2022L01548], *Report 1 of 2023*; [2023] AUPJCHR 9.

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

3 See Quality of Care Principles 2014, section 15E.

4 See Quality of Care Amendment (Restrictive Practices) Principles 2022, Schedule 1, item 3, subsection 5B(1).

been appointed and there is no clear mechanism for appointing such a person or body, or an application has been made but there is a significant delay in deciding the appointment, then the following persons or bodies can give consent in hierarchical order:<sup>5</sup>

- (a) a restrictive practices nominee – being an individual or group of individuals nominated in writing by the care recipient while they still had capacity;
- (b) the care recipient's partner with whom they have a close continuing relationship;
- (c) a previous unpaid carer, who is a relative or friend of the care recipient with whom they have a close continuing relationship and who has a personal unpaid interest in the care recipient's welfare (and if more than one, the eldest relative or friend);
- (d) the care recipient's relative or friend with whom they have a close continuing relationship and who has a personal unpaid interest in the care recipient's welfare (and if more than one, the eldest relative or friend); or
- (e) a medical treatment authority, being a person or body appointed in writing under state or territory law as one that can give consent to the provision of medical treatment to the care recipient.

1.94 All of those who could consent on the care recipients' behalf have to themselves have the capacity to consent and have agreed in writing to act as a restrictive practices substitute decision-maker.

1.95 The *Aged Care Act 1997* provides that if a restrictive practice is used on a person in aged care who is assessed to lack capacity to give informed consent to its use, an approved provider or anyone who uses the restrictive practice is not subject to any criminal or civil liability for its use, if informed consent was given by a person or body specified in delegated legislation.<sup>6</sup> This instrument provides that the persons or bodies listed in the instrument are specified for the purposes of this immunity.

1.96 Prior to the introduction of this instrument, the Quality of Care Principles only specified as a restrictive practices substitute decision-maker a person or body authorised under state or territory law to give consent to the use of restrictive practices.<sup>7</sup> This instrument is intended to address 'unexpected outcomes' as in many

---

5 Quality of Care Amendment (Restrictive Practices) Principles 2022, Schedule 1, item 3, subsection 5B(2) and table.

6 *Aged Care Act 1997*, section 54-11.

7 See Quality of Care Principles 2014, section 4A definition of 'restrictive practices substitute decision-maker' (as in force before 1 December 2022).

jurisdictions it is unclear if the relevant state or territory laws can provide the necessary authorisation. To this end, this instrument is intended to introduce interim arrangements to allow time for state and territory governments to make amendments to their consent and guardianship laws.<sup>8</sup> As such, the amendments last for two years, and then will revert back to provide that consent can be given only as authorised as per state and territory laws.<sup>9</sup>

## **Preliminary international human rights legal advice**

### ***Rights of persons with disability***

1.97 Setting out who can consent to the use of restrictive practices on behalf of a care recipient engages and may promote and limit a number of human rights, as set out by the committee in previous report entries.<sup>10</sup> In particular, specifying who can consent on another person's behalf when that person is assessed to lack capacity to give consent, engages and limits the rights of persons with disabilities, including the right of persons with disabilities to consent to medical treatment.<sup>11</sup>

1.98 Article 12 of the Convention on the Rights of Persons with Disabilities provides that in all measures that relate to the exercise of legal capacity, there should be appropriate and effective safeguards to prevent abuse. Such safeguards must ensure that measures relating to the exercise of legal capacity respect the rights, will and preferences of the person, are free of conflict of interest and undue influence, are proportional and tailored to the person's circumstances, apply for the shortest time possible and are subject to regular review by an independent and impartial body.<sup>12</sup> The United Nations (UN) Committee on the Rights of Persons with Disabilities has confirmed that there can be no derogation from article 12, which describes the content of the general right to equality before the law under the International Covenant on Civil and Political Rights.<sup>13</sup> In other words, 'there are no permissible circumstances under international human rights law in which this right may be limited'.<sup>14</sup> While not all aged care recipients are people with disability, those

---

8 Explanatory statement to the Quality of Care Amendment (Restrictive Practices) Principles 2022, pp. 2–3.

9 Quality of Care Amendment (Restrictive Practices) Principles 2022, Schedule 3.

10 See most recently Parliamentary Joint Committee on Human Rights, [Report 10 of 2021](#) (25 August 2021) pp. 63–90.

11 The committee has previously commented on this, see most recently Parliamentary Joint Committee on Human Rights, [Report 1 of 2022](#) (9 February 2022) pp. 23–39.

12 Convention on the Rights of Persons with Disabilities, article 12(4). See also article 17.

13 Committee on the Rights of Persons with Disabilities, *General comment No. 1 – Article 12: Equal recognition before the law* (2014) [1], [5].

14 Committee on the Rights of Persons with Disabilities, *General comment No. 1 – Article 12: Equal recognition before the law* (2014) [5].

who are assessed to lack capacity are invariably those with cognitive impairment and thus, in effect, the measure exclusively applies to people with disability. Enabling a substitute decision-maker to consent to the use of a restrictive practice on behalf of a care recipient would therefore engage the rights of persons with disability.<sup>15</sup>

1.99 The UN Committee on the Rights of Persons with Disabilities has stated that substitute decision-making should be replaced by supported decision-making.<sup>16</sup> Supports may include peer support, advocacy, assistance with communication or advance planning, whereby a person can state their will and preferences in advance should they be unable to do so at a later point in time. The Committee on the Rights of Persons with Disabilities has noted that 'where, after significant efforts have been made, it is not practicable to determine the will and preferences of an individual, the "best interpretation of will and preferences" must replace the "best interests" determinations'.<sup>17</sup> States are also required to create appropriate and effective safeguards for the exercise of legal capacity to protect persons with disabilities from abuse.<sup>18</sup>

1.100 In addition, the Convention on the Rights of Persons with Disabilities requires health professionals to provide care of the same quality to persons with disabilities as to others including on the basis of free and informed consent.<sup>19</sup> It also provides persons with disabilities must be protected from all forms of exploitation, violence and abuse.<sup>20</sup>

---

15 The Committee on the Rights of Persons with Disabilities has made clear that practices that deny the right of people with disabilities to legal capacity in a discriminatory manner, such as substitute decision-making regimes, must be 'abolished in order to ensure that full legal capacity is restored to persons with disabilities on an equal basis with others': *General comment No. 1 – Article 12: Equal recognition before the law* (2014) [7]. For a discussion of the academic debate regarding the interpretation and application of article 12, particularly in relation to substitute decision-making, see e.g. Bernadette McSherry and Lisa Waddington, 'Treat with care: the right to informed consent for medical treatment of persons with mental impairments in Australia', *Australian Journal of Human Rights* (2017) vol. 23, issue no. 1, pp. 109–129.

16 Committee on the Rights of Persons with Disabilities, *General comment No. 1 – Article 12: Equal recognition before the law* (2014) [15]–[16], [21]. The features of a supported decision-making regime are detailed in paragraph [29].

17 Committee on the Rights of Persons with Disabilities, *General comment No. 1 – Article 12: Equal recognition before the law* (2014) [21].

18 Committee on the Rights of Persons with Disabilities, *General comment No. 1 – Article 12: Equal recognition before the law* (2014) [20]; Convention on the Rights of Persons with Disabilities, article 12(4).

19 Convention on the Rights of Persons with Disabilities, article 25(d).

20 Convention on the Rights of Persons with Disabilities, article 16.

1.101 The engagement of the rights of persons with disability by this instrument was not acknowledged in the statement of compatibility accompanying the instrument, and as such, no assessment of the compatibility of the instrument with these rights has been provided.<sup>21</sup>

1.102 The explanatory statement to the instrument states that the instrument is not intended to displace the common law presumption of capacity.<sup>22</sup> However, it is not clear that the common law presumption would necessarily require aged care providers and their staff to provide for supported decision-making before approaching a restrictive practices substitute decision-maker.

1.103 Further, it is unclear whether an individual or body appointed under state or territory law would be required to try to determine the will and preferences of the care recipient or the best interpretation of their will and preferences. For example, while some jurisdictions have legislation stating that medical treatment decision makers should respect the preferences of the person they are making decisions on behalf of,<sup>23</sup> other jurisdictions require substitute decision-makers to 'act in the best interests' of the person.<sup>24</sup> Yet, as stated above, the Committee on the Rights of Persons with Disabilities has noted that 'where, after significant efforts have been made, it is not practicable to determine the will and preferences of an individual, the "best interpretation of will and preferences" must replace the "best interests" determinations'.<sup>25</sup>

1.104 The instrument provides that a person appointed under state or territory law takes precedence over other persons listed in the instrument. It is not clear if guidance has been provided to aged care providers to make it clear in each state and territory when they should follow the laws of the state or territory or when they should use the list of persons in this instrument. It is also not clear exactly when the list of persons has effect, noting that the instrument states that it only has effect if there is no such individual or body appointed under state or territory law *and* either there is no clear mechanism for appointing such a person, or an application has been made for an appointment but there is a significant delay in making the application.<sup>26</sup> It is not clear who determines whether there is a 'clear mechanism for appointing' a

---

21 The statement of compatibility stated that the instrument only promoted rights, by setting out clear consent arrangements.

22 Explanatory statement to the Quality of Care Amendment (Restrictive Practices) Principles 2022, p. 3

23 See for example *Medical Treatment Planning and Decisions Act 2016* (Victoria).

24 See for example *Guardianship and Administration Act 1990* (Western Australia).

25 Committee on the Rights of Persons with Disabilities, *General comment No. 1 – Article 12: Equal recognition before the law* (2014) [21].

26 Quality of Care Amendment (Restrictive Practices) Principles 2022, Schedule 1, item 3, new subsection 5B(2).

person under the state and territory laws, or what is a 'significant delay' in deciding an application. It is also not clear what happens if an application has been made, but not yet determined, but there is no significant delay. In such cases it would appear that while no-one may yet be appointed under the state and territory law, the list of persons in the instrument would not yet take effect.

1.105 Further, it appears that there is no requirement on persons in the list, be they nominees, partners, carers, relatives or friends, to seek to determine the will and preferences of the aged care recipient in consenting to the use of the restrictive practice. It is also not clear that partners, friends or relatives would have the necessary skills or expertise needed to question the use of restrictive practices. There are also a number of terms in the instrument which likely leave a great deal of discretion to the aged care providers and their staff to determine, such as who has a 'close continuing relationship' with the aged care recipient, who was 'a carer' for them on an unpaid basis, and who has a 'personal interest in the care recipient's welfare'.<sup>27</sup>

1.106 In addition, under the instrument the last option for gaining consent is to seek consent from a 'medical treatment authority'. This is someone who has been appointed in writing as someone who can give consent to medical treatment on the aged care recipient's behalf under state or territory law. However, it is not clear if all states and territories have laws that would always authorise persons 'in writing' to give consent. If not all state and territory laws fit within the definition in the instrument it would appear that there would be no one legally able to provide consent to the use of the restrictive practices, and as such, if providers, out of perceived necessity, use the restrictive practice without consent, there would be no consent to that use, and therefore limited oversight.

***Rights of persons with disabilities to equality and non-discrimination, access to justice and effective remedy***

1.107 In addition, this instrument, in specifying persons who may consent for the purposes of granting immunity from all civil and criminal liability to those who rely on that consent, engages and may limit the rights of persons with disabilities to equal recognition before the law, equality and non-discrimination, and access to justice and has implications for the right to an effective remedy.<sup>28</sup> The committee considered the immunity provision in 2022 when it was introduced as an

---

27 It is noted that subsections 5B(3) and (4) set out some detail about who was a carer and who has a personal interest in the care recipient's welfare – but this is on the basis of what the person was not (i.e. was not a paid carer, was not hired by the care recipient), rather than on the basis of what they must have done or be doing to satisfy this requirement. See Quality of Care Amendment (Restrictive Practices) Principles 2022, Schedule 1, item 3, new subsections 5B(3) and (4).

28 International Covenant on Civil and Political Rights, articles 2 and 26; Convention on the Rights of Persons with Disabilities, articles 5, 12 and 13.

amendment to the *Aged Care Act 1997* and concluded that it did not appear to be compatible with the above listed rights.<sup>29</sup> This instrument, in specifying the persons who may give consent, to ensure the immunity applies, raises the same concerns. These concerns were not addressed in the statement of compatibility and so no assessment of compatibility with these rights was provided.

### **Committee view**

1.108 The committee notes that setting out who can consent to the use of restrictive practices on behalf of an aged care recipient engages and may promote and limit a number of human rights. In particular, the committee considers this may limit the rights of persons with disabilities. Further, specifying persons who may consent for the purposes of granting immunity from all civil and criminal liability to those who rely on that consent, engages and may limit the rights of persons with disabilities to equal recognition before the law, equality and non-discrimination, and access to justice and has implications for the right to an effective remedy.

1.109 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) what guidance has been provided to aged care providers to assist them in assessing if a care recipient lacks capacity to give consent (and so when it is, or is not, appropriate to rely on the consent arrangements in the instrument);
- (b) what guidance has been provided to aged care providers to enable them to determine if the law in their state or territory allows for the appointment of an individual or body to give consent to the use of restrictive practices;
- (c) who determines whether there is a 'clear mechanism for appointing' a person under the state and territory laws, or what is a 'significant delay' in deciding an application for appointment under the state or territory laws;
- (d) who is authorised to give consent under the instrument if an application for an appointment to consent to the use of restrictive practices has been made under state or territory law but not yet determined, but there is no significant delay in deciding the application (yet no one is yet appointed);
- (e) are all the state and territory laws that allow for the appointment of an individual or body to give consent to the use of restrictive practices

---

29 Parliamentary Joint Committee on Human Rights, [Report 1 of 2022](#) (9 February 2022) pp. 23–39.

consistent with the Convention on the Rights of Persons with Disabilities. If not, what is the Commonwealth, as the signatory to the Convention, doing to ensure the use of restrictive practices in aged care is compatible with human rights (now, and in two years when the instrument reverts back to provide that consent will only be as set out in state and territory law);

- (f) why does the instrument not require that restrictive practices substitute decision-makers must have a duty to seek to ascertain the wishes of the care recipient and, where possible, act in a manner consistent with their will and preferences;
- (g) will substitute decision-makers as specified in this instrument have the necessary skills and expertise to be able to properly give informed consent to the use of restrictive practices;
- (h) do all states and territories have laws that allow for a medical treatment authority to be appointed in writing, and if not, what can aged care providers do to seek consent;
- (i) since this instrument came into force how many notifications in aged care facilities across the Commonwealth have been made specifying that restrictive practices have been used without consent (organised per jurisdiction); and
- (j) how is specifying persons as those who may give consent for the purposes of granting immunity from all civil and criminal liability consistent with the rights of persons with disabilities to equal recognition before the law, equality and non-discrimination, access to justice and the right to an effective remedy.