Parliamentary Joint Committee on Human Rights

Human rights scrutiny report

Report 2 of 2023

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Committee information

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

The committee assesses legislation for compatibility with the human rights set out in seven international treaties to which Australia is a party.[1] The committee's *Guide to Human Rights* provides a short and accessible overview of the key rights contained in these treaties which the committee commonly applies when assessing legislation.[2]

The establishment of the committee builds on Parliament's tradition of legislative scrutiny. The committee's scrutiny of legislation seeks to enhance understanding of, and respect for, human rights in Australia and ensure attention is given to human rights issues in legislative and policy development.

Some human rights obligations are absolute under international law. However, most rights may be limited as long as it meets certain standards. Accordingly, a focus of the committee's reports is to determine whether any limitation on rights is permissible. In general, any measure that limits a human right must comply with the following limitation criteria: be prescribed by law; be in pursuit of a legitimate objective; be rationally connected to (that is, effective to achieve) its stated objective; and be a proportionate way of achieving that objective.

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

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

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

Report snapshot[1]

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

Bills

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Australia Council Amendment (Creative Australia) Bill 202

No comment

Commonwealth Electoral Amendment (Cleaning up Political Donations) Bill 2023

The committee notes that this private member's bill appears to engage and may limit human rights. Should this bill proceed to further stages of debate, the committee may request further information from the member as to the human rights compatibility of the bill.

Criminal Code Amendment (Inciting Illegal Disruptive Activities) Bill 2023

The committee notes that this private senator's bill appears to engage and may limit human

1 This section can be cited as Parliamentary Joint Committee on Human Rights, Report snapshot, *Report 2 of 2023*; [2023] AUPJCHR 16.

2 The committee makes no comment on the remaining bills on the basis that they do not engage, or only marginally engage, human rights; promote human rights; and/permissibly limit human rights. This is based on an assessment of the bill and relevant information provided in the statement of compatibility accompanying the bill. The committee may have determined not to comment on a bill notwithstanding that the statement of compatibility accompanying the bill may be inadequate.

rights. Should this bill proceed to further stages of debate, the committee may request further information from the senator as to the human rights compatibility of the bill.

Electoral Legislation Amendment (Lowering the Voting Age) Bill 2023

No comment

Export Control Amendment (Streamlining Administrative Processes) Bill 2022

Advice to Parliament

pp. 49-62

Information-sharing between government agencies and other bodies

Right to privacy

This bill seeks to amend the *Export Control Act 2020* to alter information-sharing provisions relating to government agencies and other bodies, by authorising 'entrusted persons' (which would include any level of departmental officer and certain contractors) to use and disclose 'relevant information' (which may include personal information) in a range of circumstances and for a variety of purposes. By facilitating the use and disclosure of personal information this measure engages and limits the right to privacy.

Based on the additional information provided by the Minister for Agriculture, Fisheries and Forestry, the committee considers that the measure is accompanied by a number of important safeguards, but given its breadth there is a risk that these safeguards may not be adequate in all circumstances so as to ensure that any limitation on the right to privacy will be proportionate in practice. The committee has recommended that the measure be amended to provide that when an entrusted person is considering disclosing relevant information they must consider certain matters, and that the statement of compatibility be updated.

Fair Work Amendment (Prohibiting COVID-19 Vaccine Discrimination) Bill 2023

The committee notes that this private senators' bill appears to engage and may limit human rights. Should this bill proceed to further stages of debate, the committee may request further information from the senators as to the human rights compatibility of the bill.

Housing Australia Future Fund Bill 2023

No comment

Migration (Visa Pre-application Process) Charge Bill 2023

No comment

Migration Amendment (Aggregate Sentences) Bill 2023

Advice to Parliament

pp. 11-33

Consideration of aggregate sentences for the purposes of the Migration Act

Prohibition on the expulsion of aliens without due process; right to liberty; rights of the child; prohibition on torture and ill-treatment; right to freedom of movement; right to protection of the family; prohibition on non-refoulement; and right to an effective remedy

This bill, now Act, is in response to a Federal Court decision. It provides that

aggregate sentences may be taken into account for all relevant purposes of the Migration Act and regulations, including for the purposes of assessing whether to automatically cancel a visa on character grounds, and retrospectively validates past decisions and actions.

By expanding the bases on which a visa can be cancelled on character grounds, noting that the consequence of a visa cancellation decision is mandatory immigration detention and subsequent removal from Australia, the committee considers that the measure engages and limits multiple rights.

The committee considers that the measure pursues an important objective, that is, protecting the safety of the Australian community and the integrity of the migration system. However, prior to these amendments the *Migration Act 1958* already enabled the cancellation of visas on the basis of a person's criminal record, and as such, the committee considers this measure does not appear to address a pressing and substantial need, as required by international human rights law.

As regards proportionality, there appear to be a lack of adequate safeguards or avenues for effective review and as the measure significantly interferes with a person's human rights, it is not clear that the measure would in all circumstances constitute a proportionate limitation on rights.

The committee therefore considers there is a significant risk that the measure is incompatible with the prohibition on the expulsion of aliens without due process, the rights to freedom of movement, protection of the family and liberty, and were children to be affected, with the rights of the child. There is also a risk that the measure may not be compatible with Australia's non-refoulement obligations (were it to apply to persons to whom protection obligations are owed) and the prohibition against torture and ill-treatment (were persons to be detained for an indefinite or prolonged period of time).

The committee notes that this bill passed both Houses of Parliament within three sitting days, which did not provide the committee with adequate time to scrutinise the legislation. This is of particular concern given the significant human rights implications of this bill. The committee draws this matter to the attention of the Minister for Home Affairs and the Parliament.

Migration Amendment (Australia's Engagement in the Pacific and Other Measures) Bill 2023

No comment

Migration Amendment (Evacuation to Safety) Bill 2023

No comment

Migration Amendment (Strengthening the Character Test) Bill 2023

The committee notes that this private member's bill appears to engage and may limit human rights (see the committee's entry on a substantially similar bill in *Report 15 of 2021* pp. 17-34). Should this bill proceed to further stages of debate, the committee may request further information from the member as to the human rights compatibility of the bill.

National Housing Supply and Affordability Council Bill 2023

No comment

National Reconstruction Fund Corporation Bill 2022

Advice to Parliament

pp. 63-68

Disclosure of official information

Right to privacy

This bill seeks to establish a National Reconstruction Fund Corporation to provide finance to projects across priority areas. It provides that a Corporation official may disclose 'official information' (namely, information relating to the affairs of a person other than a Corporation official) to an agency, body or person, including if the disclosure will assist these persons to perform or exercise any of their functions or powers.

The committee sought additional information from the Minister for Industry, Science and Resources to establish whether official information could include personal information. Based on the minister's response, the committee considers that while the disclosure of official information limits the right to privacy, this is a marginal, and non-arbitrary, limitation on the right to privacy and considers its concerns have been addressed. The committee has recommended that the statement of compatibility be updated.

Northern Territory Safe Measures Bill 2023

The committee notes that this private senator's bill appears to engage and may limit human rights. Should this bill proceed to further stages of debate, the committee may request further information from the senator as to the human rights compatibility of the bill.

Offshore Petroleum and Greenhouse Gas Storage Amendment (Stop PEP11 and Protect Our Coast) Bill 2023

No comment

Referendum (Machinery Provisions) Amendment Bill 2022

Advice to Parliament

pp. 69-82

Prohibition on foreign campaigners engaging in certain referendum conduct

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

This bill seeks to prohibit foreign campaigners (including people in Australia who are neither citizens nor permanent residents) from engaging in certain referendum conduct, including restricting forms of expression and fundraising or donating to referendum entities. The bill would also empower the Electoral Commissioner to obtain information and documents from persons to assess compliance.

The committee acknowledges the important objective of this measure in seeking to prevent foreign state players maliciously interfering with our referendum processes. The committee considers the measure pursues the legitimate objective of protecting the integrity of Australia's electoral system and reducing the threat of foreign influence on Australia's elections. However, the committee considers it

has not been established that the measure is a proportionate limit on the rights to freedom of expression, privacy and equality and non-discrimination, as it does not allow for an individualised assessment of the threat posed by particular campaigning by foreign nationals, and provides broad information-gathering powers. Further, to the extent that restricting foreign persons fundraising or incurring electoral expenditure interferes with the ability of a domestic political association to carry out its activities, the committee considers it may also engage and limit the right to freedom of association, and it has not been established that this is a proportionate limit on rights.

The committee has recommended amending the bill to require the Electoral Commissioner to consider whether the foreign campaigner has a genuine connection to Australia, and the extent of the campaigning, gift, expenditure or fundraising undertaken by the individual.

Royal Commissions Amendment (Enhancing Engagement) Bill 2023

No comment

Treasury Laws Amendment (2023 Measures No.1) Bill 2023

No comment

Treasury Laws Amendment (Housing Measures No. 1) Bill 2023

No comment

Workplace Gender Equality Amendment (Closing the Gender Pay Gap) Bill 2023

No comment

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Aged Care Quality and Safety Commission Amendment (Code of Conduct and Banning Orders) Rules 2022 [F2022L01457]

Advice to Parliament

pp. 83-101

Information gathering powers and other compliance action powers

Rights to health; privacy; and rights of persons with disability

This legislative instrument establishes the Code of Conduct for Aged Care, which sets out minimum standards of conduct for approved providers and their aged care workers and governing persons. It provides that the Aged Care Quality and Safety Commissioner may take certain actions in relation to compliance with the Code, including requesting information or documents from any person.

Taking action to ensure compliance with the Code promotes the right to health and the rights of persons with disability. However, establishing broad information gathering and sharing powers also engages and limits the right to privacy. Noting the breadth of the measure and that many of the accompanying safeguards are

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

4 Australian Immunisation Register Amendment (Japanese Encephalitis Virus) Rules 2022 [F2022L01712], previously deferred in Parliamentary Joint Committee on Human Rights, *Report 1 of 2023* (8 February 2023) p. 9.

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

discretionary, depending on how the Commissioner's powers are exercised in practice, there is some risk that the measure may not be a proportionate limit on the right to privacy in all circumstances.

The committee has recommended that the legislative instrument be amended to include in more detail the circumstances in which the Commissioner's information gathering powers may be exercised and the threshold that should be met before the Commissioner takes compliance action, and that the statement of compatibility with human rights be updated.

Publication of a register of banning orders

Right to health; rights of persons with disability; and right to privacy and reputation

This legislative instrument provides for additional matters that must be included on the register of banning orders for current and former aged care workers, including an individual's last known place of residence and other information that the Commissioner considers is necessary to identify an individual. The instrument also provides that the register of banning orders may be published on the Commission's website, unless publication would be contrary to the public interest or the interests of one or more care recipients.

Publishing the register of banning orders to protect vulnerable older Australians promotes the right to health and the rights of persons with disability. However, publishing this data also engages and limits the right to privacy. The committee considers that it has not been demonstrated that publishing the register on a publicly available website (that means that the names of those on the register will appear in a general google search) constitutes a proportionate limit on the right to privacy. In particular, the committee considers that it is not clear that making the register available as an online resource accessible via a secure portal by aged care providers would not be as effective to achieve the stated objective.

The committee has recommended that the instrument be amended to ensure the register be made readily available to all aged care providers but not published on a public website; require the Commissioner to correct information on the register they know to be misleading or inaccurate; and that the department's internal processes relating to the permissible inclusion of information on the register be reviewed.

Australian Immunisation Register Amendment (Japanese Encephalitis Virus) Rules 2022 [F2022L01712]

Seeking information

pp. 34-37

Expansion of requirement to report vaccination information

Rights to health and privacy

This legislative instrument requires all registered vaccination providers to report the administration of a relevant vaccine for the Japanese encephalitis virus to the Australian Immunisation Register. The primary legislation provides that the minister (or their delegate) may authorise 'a person' to use or disclose protected information contained in the Register for a specified purpose where satisfied 'it is in the public interest' to do so.

Adding a new vaccination to the Register, and so increasing the ability for the government to enhance the monitoring of the disease, may promote the right to health. However, requiring vaccination providers to report a recipient's personal

information to the Register limits the right to privacy. There is a risk that the existing broad ministerial discretion to disclose personal information to 'any person' and for any purpose if it is considered to be 'in the public interest' to do so, does not sufficiently safeguard the right to privacy. The committee seeks a response from the Minister for Health and Aged Care to its previous recommendation that the ministerial discretion in the *Australian Immunisation Register Act 2015* be amended.

Biosecurity (Entry Requirements—Human Coronavirus with Pandemic Potential) Determination 2023 [F2023L00009]

Seeking information

pp. 38-44

Restriction of passengers entering Australia

Rights to life; health; freedom of movement; privacy; equality and non-discrimination

This legislative instrument imposes entry requirements on passengers to provide proof of a negative test for COVID-19 taken within a 48-hour period prior to boarding a flight that has commenced from the People's Republic of China or the Special Administrative Region of Hong Kong or Macau and ends in Australian territory. The measure does not appear to be time limited, and the explanatory statement does not explain why the determination was made.

While the measure may promote the rights to life and health for persons in Australia, the measure may mean that persons who cannot produce a negative Covid-19 test may be temporarily banned from entering Australia, including Australian citizens and permanent residents. As such, this engages and may limit a number of other human rights. The committee seeks further information from the Minister for Health and Aged Care to assess the compatibility of this measure with the rights to freedom of movement, privacy and equality and non-discrimination.

Federal Court Legislation Amendment Rules 2022 [F2023L00033]

Seeking information

pp. 45-48

Access to court documents

Right to freedom of expression

These rules provide that a person who is not a party to a Federal Court proceeding cannot inspect certain court documents in a proceeding until after the first directions hearing or the hearing (whichever is earlier).

Restricting access to court documents, which journalists may use to help them accurately report on cases before the Federal Court, engages and limits the right to freedom of expression. The statement of compatibility accompanying the instrument does not identify that this right is engaged, and the explanatory statement provides no information as to why this amendment was considered necessary. The committee is seeking further information from the Attorney-General in order to assess the compatibility of the measure with the right to freedom of expression.

Instruments imposing sanctions on individuals[6]

A number of legislative instruments impose sanctions on individuals. The committee has considered the human rights compatibility of similar instruments on a number of occasions, and retains scrutiny concerns about the compatibility of the sanctions regime with human rights.[7] However, as these legislative instruments do not appear to designate or declare any individuals who are currently within Australia's jurisdiction, the committee makes no comment in relation to these instruments at this stage.

6 See Autonomous Sanctions (Designated Persons and Entities and Declared Persons—Russia and Ukraine) Amendment (No. 1) Instrument 2023 [F2023L00074]; Autonomous Sanctions (Designated Persons and Entities and Declared Persons—Thematic Sanctions) Amendment (No. 1) Instrument 2023 [F2023L00075]; and Autonomous Sanctions (Designated and Declared Persons – Myanmar) Amendment Instrument 2023 [F2023L00076].

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

Chapter 1

New and continuing matters

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

Bills

Migration Amendment (Aggregate Sentences) Bill 2023[1]

Purpose	This bill (now Act) amends the *Migration Act 1958* to clarify that provisions in the *Migration Act 1958* and the regulations apply to a single sentence imposed by a court in the same way, regardless of whether the sentence is in respect of a single offence or for two or more offences.
Portfolio	Home Affairs
Introduced	Senate, 7 February 2023. *Finally passed both Houses on 13 February 2023.*
Rights	Prohibition on the expulsion of aliens without due process; liberty; rights of the child; prohibition on torture and ill-treatment; freedom of movement; protection of the family; prohibition on non-refoulement; effective remedy

Consideration of aggregate sentences for the purposes of the Migration Act

1.2 This bill, now Act, amends the *Migration Act 1958* (Migration Act) to clarify that aggregate sentences (that is, where a court imposes a single sentence in respect of multiple offences) may be taken into account for all relevant purposes under the Migration Act and regulations. This includes for the purposes of assessing whether a person is of 'character concern' and whether to refuse or cancel a visa on character grounds. The amendments are stated to be in direct response to the Federal Court

1 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Migration Amendment (Aggregate Sentences) Bill 2023, *Report 2 of 2023*; [2023] AUPJCHR 17.

decision of *Pearson v Minister for Home Affairs* (*Pearson*),[2] which held that aggregate sentences are not subject to the minister's mandatory visa cancellation powers under subsection 501(3A) of the Migration Act. Subsection 501(3A) requires the minister to cancel a visa if they are satisfied that the person does not pass the character test because they have a substantial criminal record, namely, where a person has been sentenced to death, imprisonment for life or a term of imprisonment of 12 months or more.[3]

1.3 This bill reverses the effect of the *Pearson* decision by inserting new section 5AB, which provides that a single sentence imposed by a court in respect of two or more offences is to be applied in the same way as a sentence imposed by a court in respect of a single offence,[4] and retrospectively validates past decisions and actions (including mandatory visa cancellation decisions) that were rendered invalid on the basis of *Pearson*.[5] As a result of new section 5AB, for example, a person sentenced to a term of imprisonment of 12 months or more, irrespective of whether the sentence relates to one offence or multiple offences (that is, an aggregate sentence), would be considered to have a 'substantial criminal record'[6] for the purposes of triggering the minister's mandatory visa cancellation powers under subsection 501(3A). The minister may also take into account a person's aggregate sentence when exercising their discretionary powers to refuse or cancel a visa.[7]

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2 Explanatory Memorandum, p. 2. See *Pearson v Minister for Home Affairs* [2022] FCAFC 203. This case involved the mandatory cancellation of the applicant's visa under section 501(3A) of the Migration Act (which requires the minister to cancel a person's visa if they fail the character test because of a substantial criminal record). The applicant had been sentenced to an aggregate maximum term of imprisonment of 4 years and 3 months in respect of 10 offences under section 53A of the *Crimes (Sentencing Procedure) Act 1999* (NSW). At [47], the Court held that '[h]ad Parliament intended that an aggregate sentence of 12 months or more should be subject to mandatory cancellation of a person's visa it would have been a straightforward matter to say so. That it did not do so is consistent with the apparent purpose of s 501(3A), namely that only the most serious offending subjects a person to mandatory cancellation of a visa. Self-evidently, an aggregate sentence may be arrived at after conviction of a series of lesser offences, none of which on their own could render a person liable to have his or her visa mandatorily cancelled'. At [48], the Court reasoned that the applicant had not been sentenced to *a* term of imprisonment of 12 months or more with respect to *an* offence, and consequently her visa was not amenable to mandatory cancellation.

3 *Migration Act 1958*, subsection 501(3A) and paragraphs 501(7)(a)–(c).

4 Item 5, new section 5AB.

5 Item 4. Item 5 deals with the effect of validation under item 4 on review and appeal rights.

6 Within the meaning given by paragraph 501(7)(c) of the *Migration Act 1958*, which applies in relation to a person sentenced to a term of imprisonment of 12 months or more. See Item 1.

7 Under subsections 501(1)–(3) of the *Migration Act 1958*, the minister may refuse to grant or cancel a visa on a number of grounds, including where a person does not pass the character test because they are 'not of good character' having regard to the person's 'past and present criminal conduct' (paragraph 501(6)(c)).

1.4 Additionally, the bill provides that new section 5AB applies retrospectively, meaning that it applies in relation to things that came into existence or were obtained before commencement of the bill, offences that occurred before commencement, and applications made before commencement.[8] For example, section 5AB applies, when making a visa cancellation decision, to any conduct of the non-citizen before commencement of the bill.[9]

International human rights legal advice

Prohibition on the expulsion of aliens without due process

1.5 Including aggregate sentences within the meaning of 'substantial criminal record' for the purposes of section 501 of the Migration Act[10] has the effect of expanding the circumstances to which the minister's mandatory visa cancellation powers must apply. Where a visa is cancelled on character grounds by the minister personally, including under subsection 501(3A) of the Migration Act, the rules of natural justice are stated not to apply.[11]

1.6 The cancellation of a visa for those in Australia would generally result in the expulsion of those persons from Australia as soon as reasonably practicable (noting that most individuals affected by this measure will be in Australia having served a term of imprisonment in Australia).[12] Therefore, by expanding the bases on which visas must be cancelled on character grounds, noting that the rules of natural justice do not apply to such decisions, this measure engages and may limit the prohibition on the expulsion of aliens without due process under article 13 of the International Covenant on Civil and Political Rights.[13] The statement of compatibility acknowledges

8 Item 3.

9 Explanatory memorandum, p. 8.

10 Noting that under subsection 501(3A) of the *Migration Act 1958*, the minister must cancel a person's visa if satisfied that they do not pass the character test because they have a substantial criminal record within the meaning of paragraph 501(7)(a)–(c).

11 *Migration Act 1958*, subsection 501(5), which provides the rules of natural justice do not apply to decisions made under subsections 501(3) and (3A).

12 *Migration Act 1958*, section 198.

13 While the measure would have implications for the minister's discretionary powers under section 501 of the *Migration Act 1958*, insofar as it clarifies that the minister may consider a person's aggregate sentence in exercising their discretion to refuse to grant or cancel a visa, this entry focuses on the impact of the measure on the minister's mandatory visa cancellation powers as the human rights implications in this context are more significant (noting also that the minister already has broad discretionary cancellation powers to cancel a visa on the basis of a person's past or present criminal conduct, regardless of any sentence, see *Migration Act 1958*, paragraph 501(6)(c)).

that as visa cancellation decisions can lead to the removal of a person from Australia, the cancellation process can amount to expulsion as contemplated in article 13.[14]

1.7 Article 13 provides that non-citizens lawfully in a territory may be expelled, but unless compelling reasons of national security otherwise require, they should be allowed to submit reasons against expulsion and to have their case reviewed by a competent authority, and be represented for the purpose of that review.[15] The United Nations (UN) Human Rights Committee has stated that article 13 requires that 'an alien…be given full facilities for pursuing [their] remedy against expulsion so that this right will in all circumstances of [their] case be an effective one'.[16] If the effect of this measure were to limit the procedural guarantees of article 13 such that the individual is unable to *effectively* submit reasons against their expulsion, article 13 may be engaged and limited. This right may be subject to permissible limitations where the limitation pursues a legitimate objective, is rationally connected to that objective and is a proportionate means of achieving that objective.[17]

1.8 The stated objective of the bill is to protect the safety of the Australian community and the integrity of the migration system.[18] The statement of compatibility states that the measure will protect the Australian community by

14 Statement of compatibility, p. 18.

15 International Covenant on Civil and Political Rights, article 13. This incorporates notions of due process also reflected in article 14 of the International Covenant on Civil and Political Rights and should be interpreted in light of that right, see UN Human Rights Committee, *General Comment No. 32: The right to equality before courts and tribunals and to a fair trial* (2007) [17], [63].

16 UN Human Rights Committee, *General Comment No. 15: The position of aliens under the Covenant* (1986) [10]. The UN Committee has also stated that 'Article 13 directly regulates only the procedure and not the substantive grounds for expulsion. However, by allowing only those carried out "in pursuance of a decision reached in accordance with law", its purpose is clearly to prevent arbitrary expulsions'.

17 Note that the due process guarantees in article 13 may be departed from, but only when 'compelling reasons of national security' so require. Thus, if there are compelling reasons of national security not to allow an alien to submit reasons against their expulsion, the right will not be limited. Where there are no such grounds (as appears to be the case in relation to this measure), the right will be limited, and then it will be necessary to engage in an assessment of the limitation using the usual criteria (of necessity and proportionality). See International Covenant on Civil and Political Rights, article 13; UN Human Rights Committee, *General Comment No. 15: The position of aliens under the Covenant* (1986) [10]. The UN Human Rights Committee has applied a reasonably high threshold which States parties must meet before departing from their due process obligations. See e.g. *Mansour Leghaei and others v Australia,* United Nations Human Rights Committee Communication No. 1937/2010 (2015) [10.4] and dissenting opinion of Committee members Sarah Cleveland and Víctor Manuel Rodríguez-Rescia; *Mansour Ahani v Canada,* United Nations Human Rights Committee Communication No. 1051/2002 (2004) [10.8]; *Alzery v Sweden,* United Nations Human Rights Committee Communication No. 1416/2005 (2006).

18 Statement of compatibility, pp. 14, 16.

ensuring that persons who do not pass the character test because of a substantial criminal record, including having been sentenced to an aggregate term of imprisonment of 12 months or more, will be liable for continued immigration detention pending their removal from Australia.[19] The statement of compatibility acknowledges that in practice, this will result in persons who were released from detention as a result of the *Pearson* decision being re-detained in immigration detention, but states that is appropriate because these persons present a considerable risk to the community and need to be returned to immigration detention in order to progress their removal from Australia.[20] It notes that this approach aligns with community expectations that such persons should not be allowed to travel or remain in Australia.[21]

1.9 Protecting the safety of the Australian community and the integrity of the migration system may be capable of being legitimate objectives for the purposes of international human rights law. However, to be a legitimate objective, the objective must be one that is pressing and substantial, and not one that simply seeks an outcome that is desirable or convenient.

1.10 It is noted that the provisions of the Migration Act as it stood before these amendments were made already provided for a visa to be refused or cancelled on a broad range of character grounds, including when a person is sentenced to two or more terms of imprisonment, where the total of those terms is 12 months or more.[22] The Migration Act also includes a discretionary power for cancellation or refusal of a visa 'having regard to' the person's 'past and present criminal conduct' or 'past and present general conduct'.[23] The statement of compatibility states that were it not for this measure, there would be a 'perverse situation' whereby a person would automatically fail the character test for receiving a five year sentence for a single offence but another person would not automatically fail the character test if they received a five year aggregate sentence for multiple offences, regardless of the perceived seriousness of any single offence.[24] However, in the latter situation, under the law as it stood previously , the minister could still cancel that person's visa on the basis of not passing the character test using the grounds described above. It has therefore not been demonstrated that the laws as they stood were insufficient to achieve the stated objective.

19 Statement of compatibility, p. 14.

20 Statement of compatibility, p. 16.

21 Statement of compatibility, p. 15.

22 *Migration Act 1958*, paragraph 501(7)(d).

23 *Migration Act 1958*, paragraph 501(6)(c).

24 Statement of compatibility, p. 13.

1.11 Further, in relation to the need to accommodate the risk posed by an individual to the Australian community, it would appear that this is a risk more appropriately managed by the courts in the sentencing process.[25] It is not clear why a court's assessment of an appropriate sentence for an individual having committed one or multiple offences would not be sufficient to manage such risk, such that visa cancellation or refusal is also required. If the risk posed by Australian citizens who have been sentenced to an aggregate term of imprisonment can be adequately managed in the community, such that they do not require further detention and removal from Australia following the completion of their sentence, it is unclear why similar measures could not adequately mitigate the potential risk posed by non-citizens, noting that it has not been demonstrated that non-citizens pose a greater risk to the community than citizens.[26]

1.12 Additionally, in the context of automatic or mandatory visa cancellations, there is no individualised assessment of the risk posed by an individual to the community. Without taking into account the seriousness of the offences to which an aggregate sentence relates, as well as consideration of the particular circumstances and risk factors associated with an individual, such as participation in rehabilitation, community ties, employment and family support, it does not appear possible to conclusively state that all those 'non-citizens who have been released from immigration detention as a result of the *Pearson* decision present a considerable risk to the community'.[27] Further, even if there were evidence to establish that a particular non-citizen posed a 'considerable risk', as noted above, it is not clear why the pre-existing visa cancellation powers were not sufficient to manage any such risk.

1.13 As such, in circumstances where the minister may already cancel or refuse a person's visa where a person receives an aggregate sentence to address any

25 For example, the *Penalties and Sentences Act 1992* (Qld) provides that one of the purposes for sentencing an offender includes protecting the community from the offender (section 9(1)), and that for violent offences or offences that resulted in physical harm, a court must have regard to the risk of physical harm to any members of the community if a custodial sentence were not imposed and the need to protect any members of the community from that risk (paragraphs 9(3)(a)-(b)).

26 It is noted that this differential treatment of individuals based on citizenship status and nationality may also engage and limit the right to equality and non-discrimination. See *A and others v Secretary of State for the Home Department; X and another v Secretary of State for the Home Department* [2004] UKHL 56, particularly [54]–[68]. At [68], in assessing whether differential treatment of non-UK nationals and UK nationals in the context of national security measures was permissible, Lord Bingham concluded '[w]hat cannot be justified here is the decision to detain one group of suspected international terrorists, defined by nationality or immigration status, and not another. To do so was a violation of' the right to equality and non-discrimination under article 14 of the European Convention on Human Rights and article 26 of the ICCPR and 'so inconsistent with the United Kingdom's other obligations under international law within the meaning of article 15 of the European Convention'.

27 Statement of compatibility, p. 16.

perceived risks to community safety, and noting that questions remain as to whether non-citizens who have completed their sentence pose any additional risk (over and above that posed by citizens in the same circumstances), it has not been established that the measure is necessary, and addresses a pressing and substantial concern for the purposes of international human rights law. It is thus not clear that the measure pursues a legitimate objective, and is rationally connected to that objective, for the purposes of international human rights law.

1.14 Further, 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 accompanied by sufficient safeguards, including the possibility of oversight and the availability of review; whether any less rights restrictive alternatives could achieve the same stated objective; and the extent of any interference with human rights.

1.15 As to the existence of safeguards, the statement of compatibility states that the current review mechanisms available under the Migration Act are not restricted by this measure, including merits review for decisions made by a delegate, and judicial review of decisions made by the minister personally.[28] It states that the majority of *discretionary* decisions to cancel or refuse visas on character grounds are made under subsections 501(1) and (2) of the Migration Act, to which the rules of natural justice apply.[29] This means that in relation to these decisions, a person is allowed to comment and provide supporting documents as to why their visa should not be cancelled or refused. However, in relation to *mandatory* visa cancellation decisions under subsection 501(3A), as noted above, the rules of natural justice do not apply and merits review is not available.[30] In these cases, a person is not afforded an opportunity to provide reasons as to why their visa should not be cancelled – the consequence of which is removal from Australia. The statement of compatibility notes that in these situations, the non-citizen is able to seek revocation of the cancellation decision and the minister may exercise discretion to revoke the automatic visa cancellation under section 501CA if the person satisfies them that

28 Statement of compatibility, p. 18.

29 Statement of compatibility, p. 19.

30 Only decisions of a delegate of the minister to cancel a person's visa under section 501 may be subject to merits review by the administrative appeals tribunal: see paragraph 500(1)(b) of the *Migration Act 1958*. Decisions for which merits review is not available include decisions of the minister personally exercising the visa refusal or cancellation power under section 501, and also decisions of the minister personally to set aside a decision by a delegate or the Administrative Appeals Tribunal not to exercise the power to refuse or cancel a person's visa and to substitute it with their own decision to refuse or to cancel the visa: section 501A of the *Migration Act 1958*. Merits review is also unavailable where the minister exercises the power to set aside a decision of a delegate to refuse to cancel a person's visa and substitute it with their own refusal or cancellation under section 501B.

they pass the character test or there is another reason why the decision should be revoked.[31] However, as the effect of the measure is to ensure that a person who is sentenced to an aggregate term of imprisonment of 12 months or more does not pass the character test, such that their visa will be automatically cancelled, it is not clear on what basis a person could satisfy the minister that they do, in fact, pass the character test, except in the narrow circumstance where the minister made an error in relation to the person's conviction.

1.16 The committee has considered on a number of previous occasions that in the Australian domestic legal context the availability of merits review would likely be required to comply with Australia's obligations under international law, not simply judicial review.[32] While judicial review of the minister's decision to cancel a person's visa on character grounds remains available, the committee has previously concluded that judicial review in the Australian context is not likely to be sufficient to fulfil the international standard required of 'effective review'.[33] This is because judicial review is only available on a number of restricted grounds and represents a limited form of review, in that it allows a court to consider only whether the decision was lawful (that is, within the power of the relevant decision-maker). The court cannot undertake a full review of the facts (that is, the merits), as well as the law and policy aspects of the original decision, to determine whether the decision is the correct or preferable decision.[34] Limiting the form of review in this way raises serious concerns as to whether judicial review alone in the Australian context would be sufficient to constitute 'effective review'.

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31 Statement of compatibility, p. 19.

32 See, most recently, in relation to the Migration (Validation of Port Appointment) Bill 2018 in Parliamentary Joint Committee on Human Rights, *Report 11 of 2018* (16 October 2018) pp. 84-90. See also Parliamentary Joint Committee on Human Rights, *Thirty-sixth report of the 44th Parliament* (16 March 2016) pp. 196-202; *Report 12 of 2017* (28 November 2017) p. 92 and *Report 8 of 2018* (21 August 2018) pp. 25-28.

33 See, e.g. Parliamentary Joint Committee on Human Rights, *Report 11 of 2018* (16 October 2018) pp. 84-90; *Report 15 of 2021* (8 December 2021) pp. 17–34. See also *Singh v Canada,* UN Committee against Torture Communication No.319/2007 (30 May 2011) [8.8]–[8.9].

34 The jurisprudence of the UN Human Rights Committee and the UN Committee against Torture establish the proposition that there is a strict requirement for 'effective review' of non-refoulement decisions, with the purpose of an 'effective' review to 'avoid irreparable harm to the individual', see *Agiza v Sweden,* Committee against Torture Communication No.233/2003 (24 May 2005) [11.8] and[13.7]; *Josu Arkauz Arana v France,* Committee against Torture Communication No.63/1997 (5 June 2000); *Alzery v Sweden*, Human Rights Committee Communication No.1416/2005 (20 November 2006) [11.8]. For an analysis of this jurisprudence, see Parliamentary Joint Committee on Human Rights, *Thirty-sixth report of the 44th Parliament* (16 March 2016) pp. 182-183. See also *Singh v Canada,* UN Committee against Torture Communication No.319/2007 (30 May 2011) [8.8]–[8.9].

1.17 The statement of compatibility states that the bill preserves the availability of the review and revocation powers in relation to decisions by the minister that were invalidated by the *Pearson* decision.[35] However, noting the concerns outlined above, these review mechanisms do not appear to offer an effective form of review and, as such, offer minimal safeguard value.

1.18 As such, there appears to be a significant risk that a person may not have sufficient opportunity to present reasons against their expulsion in cases where the minister exercises their mandatory visa cancellation powers.[36] Noting the consequence of a visa cancellation decision is detention and subsequent removal from Australia, the resulting interference with a person's human rights is significant. This is especially the case in the context of this specific measure, noting that the result of this bill is the re-detention of persons previously released due to the *Pearson* decision. The greater the interference with rights, the less likely the measure is to be considered proportionate. Additionally, it is not clear that the measure pursues the least rights-restrictive option to achieve the stated objective. For example, the potential interference with rights would be lessened if the rules of natural justice applied to all visa cancellation decisions and, more broadly, if the visa cancellation powers under the Migration Act were only discretionary. For these reasons, the measure does not appear to be a proportionate limitation on the right of aliens not to be expelled without due process.

Right to liberty, rights of the child and prohibition on torture and ill-treatment

1.19 Under the Migration Act, the cancellation of a person's visa on character grounds results in that person being classified as an unlawful non-citizen and subject to mandatory immigration detention prior to removal from Australia.[37] By expanding the bases on which a visa can be cancelled, this measure engages and limits the right to liberty. The right to liberty prohibits the arbitrary and unlawful deprivation of liberty.[38] The notion of 'arbitrariness' includes elements of inappropriateness, injustice and lack of predictability. Accordingly, any detention, including immigration detention, must not only be lawful, but must also be reasonable, necessary, and proportionate in all circumstances. Detention that may initially be necessary and reasonable may become arbitrary over time if the circumstances no longer require detention. In this respect, regular review must be available to scrutinise whether the continued detention is lawful and non-arbitrary.

35 Item 5; statement of compatibility, p. 19.

36 Similar human rights concerns have been raised in relation to the minister's discretionary powers under section 501 to refuse or cancel a person's visa. See Parliamentary Joint Committee on Human Rights, Migration Amendment (Strengthening the Character Test) Bill 2021, *Report 15 of 2021* (8 December 2021) pp. 17–34.

37 *Migration Act 1958*, section 189.

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

1.20 The detention of a non-citizen on cancellation of their visa pending deportation will not necessarily constitute arbitrary detention, as it is permissible to detain a person for a reasonable time pending their deportation. However, in the context of mandatory immigration detention, in which individual circumstances are not taken into account, and where there is no right to periodic judicial review of the detention, there may be circumstances where the detention could become arbitrary under international human rights law.[39] This is most likely to apply in cases where the person may be subject to indefinite or prolonged detention as the person cannot be returned to their home country because they may be subject to persecution there.[40] It may also apply where the person applies for review of a decision and the review process takes a prolonged period of time to finalise.

1.21 In addition, as the measure does not differentiate between adults and children, and the provisions of section 501 can operate to cancel or refuse a child's visa, which could also lead to their detention, it also engages and may limit the rights of the child.[41] Children have special rights under international human rights law taking into account their particular vulnerabilities.[42] In the context of immigration detention, the UN Human Rights Committee has stated that:

> children should not be deprived of liberty, except as a measure of last resort and for the shortest appropriate period of time, taking into account their best interests as a primary consideration with regard to the duration and conditions of detention, and also taking into account the extreme vulnerability and need for care of unaccompanied minors.[43]

1.22 Further, to the extent that the measure results in prolonged or indefinite detention, it may also have implications for Australia's obligation not to subject any

39 See, for example, *MGC v Australia,* UN Human Rights Committee Communication No. 1875/2009 (7 May 2015).

40 See an analysis of this in Parliamentary Joint Committee on Human Rights, *Report 7 of 2021* (16 June 2021), pp. 100–124. See also *Report 15 of 2021* (8 December 2021) pp. 17–34.

41 Including the requirement that the best interests of the child be a primary consideration in all actions concerning children; the obligation to provide protection and humanitarian assistance to child refugees and asylum seekers; the requirement that detention is used only as a measure of last resort and for the shortest appropriate period of time; and the obligation to take measures to promote the health, self-respect and dignity of children recovering from torture and trauma: Convention on the Rights of the Child, articles 3(1), 22, 37(b) and 39.

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

43 UN Human Rights Committee, *General Comment No. 35: Liberty and security of person* (2014) [18].

person to torture or to cruel, inhuman or degrading treatment or punishment.[44] This obligation is absolute and may never be limited.

1.23 The statement of compatibility acknowledges that the right to liberty and the rights of the child are engaged by the measure insofar as a person is liable to be detained where their visa is cancelled.[45] It also notes that persons who were released from immigration detention following the *Pearson* decision will be once again subject to immigration detention as a result of the measure retrospectively validating the original visa cancellation decisions (which were invalidated by *Pearson*).[46] It considers re-detention of such persons to be appropriate because they 'present a considerable risk to the community'.[47]

1.24 While the prohibition on torture and ill-treatment is absolute, there may be permissible limitations on the right to liberty and the rights of the child, provided the limitation supports a legitimate objective, is rationally connected to that objective, and is a proportionate way to achieve that objective.

1.25 As set out above at paragraphs [1.8]–[1.13], it is not clear that the measure addresses an objective that is pressing and substantial enough to warrant limiting these rights.

1.26 In assessing proportionality, a relevant factor to consider is the flexibility of the measure, including whether decision-makers have the discretion to consider the individual circumstances of a case. The statement of compatibility states that in exercising their discretion to refuse or cancel a visa or to revoke a mandatory visa cancellation (under 501CA of the Migration Act), decision-makers are guided by comprehensive policy guidelines and ministerial directions, and take into account the individual's circumstances.[48] In the context of visas automatically cancelled pursuant to section 501(3A), as noted above in paragraph [1.15], the minister may revoke this mandatory visa cancellation decision if the person satisfies the minister that they pass the character test (which is unlikely unless there was an error in relation to the person's conviction) or where there is another reason why the original decision should be revoked. In assessing the latter, the decision-maker must take into account specified primary considerations as well as other considerations where relevant.[49]

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44 International Covenant on Civil and Political Rights, article 7; and Convention against Torture and other Cruel, Inhuman, Degrading Treatment or Punishment, articles 3–5.

45 Statement of compatibility, pp. 15–16.

46 Statement of compatibility, p. 16.

47 Statement of compatibility, p. 16.

48 Statement of compatibility, p. 16.

49 Minister for Immigration, Citizenship and Multicultural Affairs, 'Direction no. 99 – Visa refusal and cancellation under section 501 and revocation of a mandatory cancellation of a visa under section 501CA' (23 January 2023), sections 6–9.

The relevant ministerial direction states that primary considerations (such as protection of the community from criminal conduct and the community expectation that non-citizens who disobey the law should not be allowed to remain in Australia) should generally be given greater weight than other considerations (such as Australia's non-refoulement obligations or impediments that may be faced by the person if removed from Australia).[50] Given that decision-makers are directed to give greater consideration to the protection, and perceived expectations, of the Australian community than to most individual circumstances, the relevant ministerial direction appears to be an inadequate safeguard against the risk of arbitrary detention.[51]

1.27 The statement of compatibility also notes that there is regular review of individuals held in immigration detention by detention review committees. However, the committee has previously considered that administrative and discretionary processes alone may not meet the requirement for periodic and substantive judicial review of detention so as to be compatible with the right to liberty, especially where there is no possibility of release.[52] Further, in *MGC v Australia,* the UN Human Rights Committee considered a case in which visa cancellation under section 501 of the Migration Act was found to be incompatible with the right to liberty. The UN Human Rights Committee noted that the detainee 'was deprived of the opportunity to challenge his indefinite detention in substantive terms [noting that] judicial review of the lawfulness of detention is not limited to mere compliance of the detention with domestic law but must include the possibility to order release if the detention is incompatible with the requirements of the Covenant'.[53] It stated that detaining persons while their claims were being resolved would be arbitrary 'in the absence of particular reasons specific to the individual, such as individualised likelihood of absconding, a danger of crimes against others, or a risk of acts against national security'.[54] As noted above at paragraphs [1.16]–[1.17], in the absence of merits

50 Minister for Immigration, Citizenship and Multicultural Affairs, 'Direction no. 99 – Visa refusal and cancellation under section 501 and revocation of a mandatory cancellation of a visa under section 501CA' (23 January 2023), section 7.

51 Similar concerns were raised regarding the inadequacy of ministerial directions in the context of discretionary decisions to refuse or cancel a visa. See Parliamentary Joint Committee on Human Rights, Migration Amendment (Strengthening the Character Test) Bill 2021, *Report 15 of 2021* (8 December 2021) pp. 17–34.

52 Parliamentary Joint Committee on Human Rights, *Nineteenth Report of the 44th Parliament* (3 March 2015) p. 19; *Thirty-Sixth Report of the 44th Parliament* (16 March 2016) pp. 202–205; *Report 15 of 2021* (8 December 2021) pp. 17–34.

53 *MGC v Australia,* UN Human Rights Committee Communication No.1875/2009 (7 May 2015) [11.6].

54 *MGC v Australia,* UN Human Rights Committee Communication No.1875/2009 (7 May 2015) [11.5]. See also *FKAG et al v Australia,* UN Human Rights Committee Communication No.2094/2011 (28 October 2013).

review, judicial review in the context of this measure, which is unlikely to include the possibility of release from detention, is not effective for the purposes of international human rights law.

1.28 The statement of compatibility also refers to arrangements other than detention that can be made, such as granting a bridging visa with conditions or a community placement under a residence determination. It states that these alternative options enable the least rights restrictive option to be implemented.[55] However, it is noted that such arrangements are limited and remain at the discretion of the minister. For example, while section 195A of the Migration Act gives the minister the power to grant a visa to a person who is in detention, this is subject to the requirement that the minister must think it is 'in the public interest to do so', and the power is personal and non-compellable.[56] Similarly, section 197AB also gives the minister a personal and non-compellable power to make a 'residence determination' to the effect that a person in detention may instead reside at a specified place. However, the Migration Act and regulations continue to apply to such a person as if they were being kept in immigration detention.[57] It is also noted that these powers appear to be infrequently exercised in practice.[58] Further, while the statement of compatibility states that the amendments made to the Migration Regulations 1994 in 2021 enhance the options available to the minister in considering whether to grant a bridging visa,[59] this remains a personal and discretionary power with the conditions that may be imposed on the grant of such a visa, themselves raising human rights concerns.[60] Therefore, notwithstanding the administrative processes to review detention, the minister is not obliged to release a person even if a person's individual circumstances do not justify continued or protracted detention. As observed by the UN High Commissioner for Refugees, alternatives to detention must be accessible in

55 Statement of compatibility, pp. 16–17.

56 *Migration Act 1958*, subsections 195A(2), (4), (5).

57 *Migration Act 1958*, section 197AB and subsection 197AC(1).

58 Parliamentary Joint Committee on Human Rights, Migration Amendment (Clarifying International Obligations for Removal) Bill 2021, *Report 5 of 2021* (29 April 2021) pp. 13–28 and *Report 7 of 2021* (16 June 2021) pp. 100–124. At the time of this report, the minister advised that in the 2015-16 financial year, no persons were granted a discretionary visa under section 195A and less than five people were granted these visas in each financial year between 2016 and 2021. The minister did not specify the exact number of visas granted under section 195A between 2015 and 2021 and stated that the number of persons granted a residence determination under section 197AB is not available in a reportable format.

59 Statement of compatibility, p. 15.

60 See Parliamentary Joint Committee on Human Rights, *Report 9 of 2021* (4 August 2021), pp. 66-108.

practice (not merely available on paper) and should not be used as alternative forms of detention.[61]

1.29 As such, the mandatory nature of detention of persons who have had their visa cancelled, in the absence of any opportunity to challenge detention in substantive terms, means that expanding the bases on which visas may be cancelled increases the risk of a person being arbitrarily deprived of liberty. If this were to apply to children, this would also risk being incompatible with the rights of the child.

1.30 In relation to the prohibition against torture and ill-treatment that may apply when a person is indefinitely detained, the statement of compatibility notes that there are processes in place to mitigate any risk of a person's detention becoming indefinite or arbitrary, including internal administrative review processes, oversight by the Commonwealth Ombudsman, and the minister's personal intervention powers to grant a visa or residence determination where it is considered in the public interest.[62] While these processes could help to ensure that detention conditions are humane, it is not clear they are sufficient to ameliorate concerns about the implications of the measure for the prohibition against torture and ill-treatment arising from protracted or indefinite detention, particularly as these processes are unlikely to result in the release of a person from immigration detention. It is noted that the UN Human Rights Committee has previously characterised the conditions in Australia's detention facilities as 'difficult'.[63] The UN Committee found that these difficult detention conditions in combination with the arbitrary character of detention, its protracted and/or indefinite duration, and the absence of procedural safeguards to challenge detention, cumulatively inflicted serious psychological harm on detainees that amounted to cruel, inhuman or degrading treatment.[64] Noting the possibility of indefinite or protracted detention under the Migration Act (as there is no legislative maximum period of detention), the absence of effective review and other procedural safeguards, there is a risk that the measure, having regard to the legislative context in which it operates, may not be

61 UNHCR, *Detention Guidelines: Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention* (2012) [37]–[38].

62 Statement of compatibility, p. 16.

63 *F.K.A.G v. Australia*, UN Human Rights Committee Communication No. 2094/2011 (2013) [9.8].

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

compatible with Australia's obligation not to subject any person to torture or to cruel, inhuman or degrading treatment or punishment.[65]

Rights to freedom of movement, protection of the family and rights of the child

1.31 For those for whom the consequence of a decision to cancel their visa is expulsion from Australia, the measure engages and may limit the right to freedom of movement. The right to freedom of movement includes a right to leave Australia as well as the right to enter, remain, or return to one's 'own country'.[66] The reference to a person's 'own country' is not restricted to countries with which the person has the formal status of citizenship. It includes a country to which a person has very strong ties, such as the country in which they have resided for a substantial period of time and established their home.[67] As such, for those with very strong ties to Australia, the cancellation of their visa on character grounds, leading to their expulsion, and any subsequent refusal to grant them a visa to return to Australia would limit their right to return to their 'own country'. The statement of compatibility acknowledges this, stating that were a person's visa cancelled on the basis of an aggregate sentence, the measure may engage this right depending on the strength, nature and duration of their ties to Australia.[68]

1.32 The measure also engages and limits the right to protection of the family as a visa cancellation decision could operate to separate family members. The right to protection of the family includes ensuring that family members are not involuntarily and unreasonably separated from one another.[69] There is significant scope under international human rights law for states to enforce their immigration policies and to require the departure of unlawfully present persons. However, where a family has been in the country for a significant duration of time, additional factors justifying the separation of families, going beyond a simple enforcement of immigration law, must

65 In addition, if a person were to be detained for a significant period of time, questions arise as to whether the period of detention would be characterised as a criminal sanction under international human rights law. If it were to be considered a criminal sanction, the measure will engage the criminal process rights under articles 14 and 15 of the International Covenant on Civil and Political Rights, including the right not to be tried twice for the same offence. Given the retrospective application of the measure, it is also not clear whether there would be implications for the prohibition against retrospective application of criminal laws under article 15.

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

67 *Nystrom v Australia,* UN Human Rights Committee Communication No.1557/2007 (1 September 2011).

68 Statement of compatibility, p. 18.

69 See International Covenant on Civil and Political Rights, articles 17 and 23; International Covenant on Economic, Social and Cultural Rights, article 10(1); and the Convention on the Rights of the Child, article 16(1).

be demonstrated in order to avoid a characterisation of arbitrariness or unreasonableness.[70]

1.33 Further, as the measure does not differentiate between adults and children, and the provisions of section 501 can operate to cancel a child's visa, were the measure to apply to a child, it would engage and limit the rights of the child. The obligation to consider the best interests of the child is engaged when determining whether to cancel a child's visa. It is also engaged when considering the cancellation of a parent's or close family member's visa, insofar as that cancellation of the family member's visa may not be in the best interests of their children. Further, under the Convention on the Rights of the Child, Australia has an obligation to ensure that, in all actions concerning children, the best interests of the child are a primary consideration. This requires legislative, administrative and judicial bodies and institutions to systematically consider how children's rights and interests are or will be affected directly or indirectly by their decisions and actions. The statement of compatibility acknowledges that the right to protection of the family and the rights of the child are engaged by the measure.[71]

1.34 Limitations on the above rights are permissible, provided the limitation supports a legitimate objective, is rationally connected to that objective, and is a proportionate way to achieve that objective.

1.35 As set out above at paragraphs [1.8]–[1.13], noting the existing powers under the Migration Act to cancel a visa on the basis of a person's criminal record, including where a person was sentenced to an aggregate term of imprisonment for multiple offences, it is not clear that the measure addresses an objective that is pressing and substantial enough to warrant limiting these rights.

1.36 The statement of compatibility states that the limitation on the above rights is proportionate because any decision to cancel a visa would occur after careful consideration of the person's individual circumstances, including their ties to Australia, any potential separation of family units, and the best interests of the child.[72] However, while such considerations are relevant in the context of *discretionary* decisions to cancel a visa (insofar as decision-makers are guided by ministerial directions and policy guidelines), in the case of *mandatory* visa cancellation decisions made under section 501(3A) (relating to persons serving a sentence of imprisonment), there can be no consideration of individual circumstances. If a person is sentenced to an aggregate term of imprisonment of 12 months or more, their visa is automatically cancelled without consideration of the seriousness of each offence to which the aggregate sentence relates or any other

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

71 Statement of compatibility, p. 20.

72 Statement of compatibility, pp. 18, 20.

personal circumstances that may be relevant, such as ties to Australia and possible separation of family members. Only where a person seeks revocation of a mandatory visa cancellation under section 501CA can the minister consider some individual circumstances.[73] In particular, decision-makers may consider the strength, nature, and duration of a person's ties to Australia, the possible impact of a visa cancellation decision on the person's family members as well as the 'best interests of minor children in Australia'. Following recent amendments to the relevant ministerial direction, these considerations are to be taken into account by decision-makers as 'primary considerations', which assists with proportionality. However, they are to be considered alongside other 'primary considerations', including protection of the Australian community and community expectations, and the decision-maker retains the discretion to attribute greater weight to these other primary considerations above a person's ties to Australia and the best interests of the child.[74] Placing the best interests of the child on the same or a lower level as other considerations risks being incompatible with Australia's obligations to consider the best interests of the child.[75] Further, the ministerial direction states that in some circumstances the nature of the non-citizen's conduct, or the harm caused were it to be repeated, may be so serious that even strong countervailing considerations may be insufficient to justify not revoking the visa.[76] Against this background, the ministerial direction appears to be of limited safeguard value in the context of an automatic cancellation of a visa, particularly noting that ministerial directions may be amended or revoked by the executive. For the purposes of international human rights law, discretionary

73 *Migration Act 1958*, section 501CA, which provides that the minister may revoke the original visa cancellation decision if the person makes representations in accordance with the invitation and the minister is satisfied that the person passes the character test (as defined by section 501) or there is another reason why the original decision should be revoked. For the consideration that applies, see Minister for Immigration, Citizenship and Multicultural Affairs, 'Direction no. 99 – Visa refusal and cancellation under section 501 and revocation of a mandatory cancellation of a visa under section 501CA' (23 January 2023).

74 Minister for Immigration, Citizenship and Multicultural Affairs, 'Direction no. 99 – Visa refusal and cancellation under section 501 and revocation of a mandatory cancellation of a visa under section 501CA' (23 January 2023), subsection 7(3).

75 The UN Committee on the Rights of the Child has explained that 'the expression 'primary consideration' means that the child's best interests may not be considered on the same level as all other considerations. This strong position is justified by the special situation of the child': *General comment No. 14 on the right of the child to have his or her best interests taken as a primary consideration*, CRC/C/GC/14 (29 May 2013); see also *IAM v Denmark,* Committee on the Rights of the Child Communication No.3/2016 (8 March 2018) [11.8]. See also Parliamentary Joint Committee on Human Rights, *Report 7 of 2021* (12 June 2021) pp. 89-99; *Report 15 of 2021* (8 December 2021) pp. 17–34.

76 Minister for Immigration, Citizenship and Multicultural Affairs, 'Direction no. 99 – Visa refusal and cancellation under section 501 and revocation of a mandatory cancellation of a visa under section 501CA' (23 January 2023), subsection 5.2(6).

safeguards alone are unlikely to be sufficient because they are less stringent than the protection of statutory processes.

1.37 Further, the potential separation of family members, including parents from their children or vice versa, when those persons may have resided in Australia for a very long time, indicates that the impact of these measures may be significant. The greater the interference, the less likely the measure is to be considered proportionate. It seems unlikely that there would be circumstances where it would be proportionate to separate a child from their parents, for example, through cancelling a child's visa and deporting them.

1.38 Given there are no other safeguards identified in the statement of compatibility, and as noted above, access to review is unlikely to be effective in practice, it appears the measure would not be compatible with the rights to freedom of movement (were a person to have very strong ties to Australia) and protection of the family (were the measure to result in the separation of the family unit), and where applicable, the rights of the child.

Prohibition against non-refoulement and right to effective remedy

1.39 While a decision to which this measure relates, including a decision to cancel a protection visa on character grounds, would not, in itself, necessarily result in a person being sent to a country where they could be at risk of persecution or ill-treatment, the cancellation could be the first step in a process by which a person may be subject to removal to such a country (refoulement). In this way, if a visa cancellation decision related to a person to whom Australia owes protection obligations, the measure may engage the prohibition on non-refoulement and the right to an effective remedy. In particular, noting that the rules of natural justice are stated not to apply to mandatory visa cancellations, to the extent that this would limit a person's ability to effectively challenge a decision which may lead to their removal, possibly to a country where they would face persecution, torture or other serious forms of harm, there is a risk that it may not be consistent with Australia's non-refoulement obligations, which include the requirement for independent, effective and impartial review of non-refoulement decisions, and the right to an effective remedy.[77] Non-refoulement obligations are absolute and may not be subject to any limitations.

77 Obligations arise under the International Covenant on Civil and Political Rights and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. See also United Nations Committee against Torture, *General Comment No.4 (2017) on the implementation of article 3 in the context of article 22* (9 February 2018). The Parliamentary Joint Committee on Human Rights has previously concluded that powers to cancel or refuse a person's visa under the *Migration Act 1958*, in the context of the current legislative regime, were likely to be incompatible with Australia's non-refoulement obligations and the right to an effective remedy. See, e.g. *Report 15 of 2021* (8 December 2021) pp. 17–34; *Report 11 of 2021* (16 September 2021) pp. 54–59; *Report 3 of 2021* (17 March 2021) pp. 37–62.

1.40 The statement of compatibility states that the measure does not affect Australia's commitment to complying with its non-refoulement obligations.[78] It explains that where a visa that is not a protection visa is cancelled, the person may apply for a protection visa under section 501E. It notes that a person would not be subject to involuntary removal from Australia to the country to which their protection claims relate unless and until their protection claims have been assessed.[79] However, while subsection 501E(2) provides that a person is not prevented from making an application for a protection visa, that section also notes that the person may be prevented from applying for a protection visa because of section 48A of the *Migration Act 1958*. Section 48A provides that a non-citizen who, while in the migration zone, has made an application for a protection visa and that visa has been refused or cancelled, may not make a further application for a protection visa while still in the migration zone. This constitutes a very significant limitation on the effectiveness of section 501E as a safeguard to ensure Australia's compliance with its non-refoulement obligations. For example, circumstances may have changed in the country to which a person's protection claim relates since their last application, such that their claim for protection may be even stronger. However, if that person's visa was cancelled, they would be prevented from making a further application for a protection visa due to section 48A. In these circumstances, there may be risk that they could be removed to a country where they would face persecution, torture or other serious forms of harm.

1.41 The statement of compatibility further states that where the visa that is cancelled is a protection visa, the effect of subsection 197C(3) of the Migration Act is that a person will be protected from removal in breach of Australia's *non-refoulement* obligations.[80] Subsection 197C(3) of the Migration Act provides that where a protection finding has been made in the course of considering a protection visa application, such a person cannot be removed to the relevant country unless they request this or the minister makes a decision that a protection finding would no longer be made in the person's case, for example due to improving country conditions.[81] As was stated in the committee's report when subsection 197C(3) was introduced, this measure appears to support Australia's ability to adhere to its non-refoulement obligations, to the extent that it would provide a statutory protection to ensure that an unlawful non-citizen to whom Australia owes protection obligations will not be removed from Australia, even where they are ineligible for the grant of a

78 Statement of compatibility, p. 18.

79 Statement of compatibility, p. 17.

80 Statement of compatibility, p. 17.

81 Statement of compatibility, pp. 17–18.

protection visa.[82] However, the committee also noted that the inclusion of the power in section 197D, which allows the minister to make a decision that an unlawful non-citizen to whom a protection finding is made is no longer a person in respect of whom any protection finding would be made,[83] may have significant human rights implications insofar as it has the effect of allowing the minister to overturn a protection finding, thereby exposing the person to the risk of being returned to the country in relation to which a protection finding was previously made. It is not clear on what basis the minister would make this decision, noting that section 197D provides limited guidance as to the circumstances in which the minister would be 'satisfied' that a person is no longer owed protection obligations.

1.42 Further, the obligation of non-refoulement and the right to an effective remedy require an opportunity for independent, effective and impartial review of decisions to deport or remove a person.[84] Such review mechanisms are important in guarding against the potentially irreparable harm which may be caused by breaches of Australia's non-refoulement obligations.[85] As outlined above at paragraphs [1.16]–[1.17], there is limited availability of merits review in respect of the relevant decisions and, while judicial review is available, it is unlikely to be effective in practice because it is only available on a number of restricted grounds and represents a limited form of review. As such, there is some risk that by expanding the bases on which a visa, including a protection visa, can be cancelled, this could expand the risk of Australia not meeting its non-refoulement obligations.

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82 Parliamentary Joint Committee on Human Rights, Migration Amendment (Clarifying International Obligations for Removal) Bill 2021, *Report 5 of 2021* (29 April 2021) pp. 13–28 and *Report 7 of 2021* (16 June 2021) pp. 100–124. The committee noted that while subsection 197(3) would support Australia's ability to uphold its non-refoulement obligations, to the extent that it resulted in prolonged or indefinite detention of persons who are deemed to be unlawful non-citizens and cannot be removed because a protection finding has been made in relation to them, it also limits the rights to liberty and the rights of the child. See also Migration Amendment (Strengthening the Character Test) Bill 2021, *Report 15 of 2021* (8 December 2021) pp. 17–34.

83 *Migration Act 1958*, subsection 197D(2).

84 International Covenant on Civil and Political Rights, article 2 (the right to an effective remedy). See, for example, *Singh v Canada,* UN Committee against Torture Communication No.319/2007 (30 May 2011) [8.8]-[8.9]; *Alzery v Sweden*, UN Human Rights Committee Communication No. 1416/2005 (20 November 2006) [11.8]. See, also, Parliamentary Joint Committee on Human Rights, *Report 11 of 2018* (16 October 2018) pp. 82-98; *Report 2 of 2017* (21 March 2017) pp. 10-17; *Report 4 of 2017* (9 May 2017) pp. 99-111.

85 *Alzery v Sweden*, UN Human Rights Committee Communication No.1416/2005(20 November 2006) [11.8]; *Singh v Canada*, UN Committee against Torture Communication No.319/2007 (2011) [8.8]–[8.9].

Conclusion

1.43 By clarifying that aggregate sentences may be taken into account for all relevant purposes of the Migration Act and regulations, the measure expands the bases on which a visa can be cancelled on character grounds. As the consequence of a visa cancellation decision is mandatory immigration detention and subsequent removal from Australia, the measure engages and limits multiple rights.

1.44 In general terms, protecting the safety of the Australian community and the integrity of the migration system are capable of being legitimate objectives for the purposes of international human rights law. However, in the context of this specific measure, noting that it has not been demonstrated that the visa cancellation powers as they stood before these amendments were insufficient to achieve the stated objective and that questions remain as to whether non-citizens who have completed their sentence pose any additional risk (over and above that posed by citizens in the same circumstances), it has not been established that the measure addresses a pressing and substantial need.

1.45 Regarding proportionality, noting the lack of avenues for effective review, the lack of adequate safeguards, the inability to consider the individual circumstances of a case in a meaningful way, and the significant interference with human rights, it does not appear that the measure would in all circumstances constitute a proportionate limitation on rights. For these reasons, there is a significant risk that the measure is incompatible with the prohibition on the expulsion of aliens without due process, and the rights to freedom of movement, protection of the family and liberty, and were children to be affected by the measure, with the rights of the child. There is also a risk that the measure may not be compatible with Australia's non-refoulement obligations (were it to apply to persons to whom protection obligations are owed) and the prohibition against torture and ill-treatment (were persons to be detained for an indefinite or prolonged period).

Committee view

1.46 The committee notes that the bill, now Act, clarifies that aggregate sentences may be taken into account for all relevant purposes of the Migration Act and regulations, including for the purposes of assessing whether a person is of 'character concern' and whether to refuse or cancel a visa on character grounds. Insofar as these amendments expand the bases on which a visa can be cancelled on character grounds, noting that the consequence of a visa cancellation decision is mandatory immigration detention and subsequent removal from Australia, the committee considers that the measure engages and limits multiple rights.

1.47 In particular, as the cancellation of a person's visa generally results in their expulsion from Australia (including potentially those with strong ties with Australia, including family ties), the committee considers the measure may limit the prohibition on expulsion of aliens without due process; the right to freedom of movement (which includes the right to return to one's 'own country'); the right to protection of

the family; and the rights of the child. As a visa cancellation decision would also subject a person to mandatory immigration detention prior to removal, this measure limits the right to liberty (and the rights of the child if a child's visa is cancelled). If a person is subjected to prolonged or indefinite detention, the measure may have implications for the prohibition against torture or ill-treatment. Finally, as protection visas could also be cancelled, the measure engages the obligation of non-refoulement (namely, the prohibition on sending a person to a country where they are at risk of persecution). Most of these rights can be permissibly limited if the measure limiting the rights is shown to be reasonable, necessary and proportionate.

1.48 The committee considers that the measure pursues an important objective, that is, protecting the safety of the Australian community and the integrity of the migration system. However, it notes that for an objective to be legitimate for the purposes of international human rights law, it must be necessary and address a pressing and substantial concern. In this regard, the committee notes that prior to these amendments, the Migration Act already enabled the cancellation of visas on the basis of a person's criminal record, which appeared capable of achieving the stated objective of protecting the Australian community and the integrity of the migration system, and as such, the committee considers this measure does not appear to addresses a pressing and substantial need, as required by international human rights law.

1.49 As regards proportionality, the committee notes that in the context of mandatory visa cancellation decisions, there appear to be a lack of adequate safeguards or avenues for effective review. The committee also notes that having regard to the consequences of a visa cancellation decision, that is detention and subsequent removal from Australia, the measure significantly interferes with a person's human rights. It is therefore not clear that the measure would in all circumstances constitute a proportionate limitation on rights.

1.50 The committee therefore considers, consistent with its previous findings in relation to substantially similar measures, there is a significant risk that the measure is incompatible with the prohibition on the expulsion of aliens without due process, the rights to freedom of movement, protection of the family and liberty, and were children to be affected by the measure, with the rights of the child. There is also a risk that the measure may not be compatible with Australia's non-refoulement obligations (were it to apply to persons to whom protection obligations are owed) and the prohibition against torture and ill-treatment (were persons to be detained for an indefinite or prolonged period of time).

1.51 Further, the committee notes that this bill passed both Houses of Parliament within three sitting days of introduction.[86] It notes that this short timeframe did not

86 The bill was first introduced in the Senate on 7 February 2023 and finally passed both Houses on 13 February 2023.

provide the committee with adequate time to scrutinise the legislation and seek further information in order to provide appropriate advice to the Parliament as to the human rights compatibility of the bill. This is of particular concern given the significant human rights implications of this bill. The committee draws this matter to the attention of the minister and the Parliament.

Legislative instruments

Australian Immunisation Register Amendment (Japanese Encephalitis Virus) Rules 2022 [F2022L01712][1]

Purpose	This legislative instrument amends the Australian Immunisation Rule 2015 to make it mandatory for all vaccination providers to report vaccinations of a person with Japanese encephalitis vaccines to the Australian Immunisation Register
Portfolio	Health and Aged Care
Authorising legislation	*Australian Immunisation Register Act 2015*
Last day to disallow	15 sitting days after tabling (tabled in the Senate and the House of Representatives on 6 February 2023). Notice of motion to disallow must be given by 23 March 2023 in the House and by 29 March 2023 in the Senate[2]
Rights	Health; privacy

Expansion of requirement to report vaccine information

1.52 This legislative instrument makes amendments to require that all registered vaccination providers must report the administration of a relevant vaccine for the Japanese encephalitis virus (JEV) to the Australian Immunisation Register (AIR). Failure to comply with these reporting requirements is subject to a civil penalty of up to 30 penalty units for each failure to report.[3]

1.53 Vaccination providers must report: the person's Medicare number (if applicable), name, contact details, date of birth, and gender; the provider number, name and contact details of the person who administered the vaccines; and the brand name, dose number and batch number, and date of administration.[4]

1 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Australian Immunisation Register Amendment (Japanese Encephalitis Virus) Rules 2022 [F2022L01712], *Report 2 of 2023*; [2021] AUPJCHR 18.

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 *Australian Immunisation Register Act 2015*, subsections 10A(5) and 10B(3).

4 Australian Immunisation Register Rule 2015, section 9.

International human rights legal advice

Rights to health and privacy

1.54 By adding a new vaccination that must be registered on the AIR, and thereby increasing the ability for the government to enhance the monitoring of vaccine-preventable diseases, and contributing to enriched monitoring and statistics on health related issues, this measure appears to promote the right to health. The right to health is the right to enjoy the highest attainable standard of physical and mental health.[5] It is a right to have access to adequate health care as well as to live in conditions which promote a healthy life (such as access to safe drinking water, housing, food, and a healthy environment).[6]

1.55 However, in requiring vaccination providers to provide personal information about individuals who receive JEV vaccinations, the measure also appears to limit the right to privacy. The right to privacy includes respect for informational privacy, including the right to respect for private and confidential information, particularly the storing, use and sharing of such information.[7] The right to privacy also includes the right to control the dissemination of information about one's private life.

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

1.57 In assessing whether the measure seeks to achieve a legitimate objective, the statement of compatibility states that mandatory reporting of the administration of relevant vaccines for the JEV in Australia will assist in the policy objective of protecting the health of individuals and the community more generally by enhanced monitoring of vaccine preventable disease and vaccine coverage.[8] This would appear to constitute a legitimate objective for the purposes of international human rights law and the measure appears rationally connected to (that is, effective to achieve) that objective.

1.58 When considering whether a limitation on a right is proportionate to achieve the stated objective, it is necessary to consider, among other things, whether there are sufficient safeguards in place to protect the right to privacy and whether there

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

6 UN Economic, Social and Cultural Rights Committee, *General Comment No. 14: the right to the Highest Attainable Standard of Health* (2000) [4]. See also, *General Comment No. 12: the right to food (article 11)* (1999); *General Comment No. 15: the right to water (articles 11 and 12)* (2002); and *General Comment No. 22: the right to sexual and reproductive health* (2016).

7 International Covenant on Civil and Political Rights, article 17. International human rights law also recognises the right of children to be free from arbitrary or unlawful interferences with their privacy. See, Convention on the Rights of the Child, article 16.

8 Statement of compatibility, p. 5.

are other less rights restrictive ways to achieve the stated objective. The statement of compatibility states that the information required to be provided is subject to the secrecy provisions in the *Australian Immunisation Register Act 2015* (AIR Act), which controls the use and disclosure of information stored on the AIR and who can use and disclose this information.[9] It also states that existing privacy provisions in the AIR Act regulate the uploading of personal information or of 'relevant identifying information' for the purposes of including such information in the AIR. Section 23 of the AIR Act provides that it is an offence for a person to record, disclose or use protected information (including personal information) obtained, or derived, under the Act, unless they are authorised to do so. A person is authorised to record, disclose or use protected information if they do so in order to include the information on the Register or to otherwise perform functions under the AIR Act, to disclose the information to a court or coroner, or where authorised to do so under another law.[10] These safeguards assist with the proportionality of the measure.

1.59 However, the AIR Act also includes a broad power for the minister (or their delegate) to authorise a person to use or disclose protected information for a specified purpose where satisfied 'it is in the public interest' to do so.[11] It is not clear why it is necessary for the AIR Act to include this broad discretionary power enabling the disclosure of the personal vaccination information of Australians to 'any person', for any specified purpose, so long as it is considered to be in the (undefined) 'public interest'.

1.60 As set out in earlier analyses of related legislation,[12] empowering the minister to disclose protected information to 'a person' rather than 'a specified class of person', appears to enable disclosure without specifying or limiting the recipients of the information. While a former minister has previously advised the committee that it was not his intention (at that time) to use this power to authorise the disclosure of information regarding vaccinations, as a matter of law the minister is empowered to, at any time, disclose personal information regarding a person's vaccination status to any person for any purpose, if the minister considers it to be in the public interest to do so. Expanding the type of vaccinations required to be reported to the AIR means that this power may now be exercised with respect to a larger volume of information.

1.61 It is difficult to assess the privacy implications of requiring vaccination providers to report information relating to National Immunisation Register

9 Statement of compatibility, p. 5.

10 *Australian Immunisation Register Act 2015*, section 22.

11 *Australian Immunisation Register Act 2015*, subsection 22(3).

12 Parliamentary Joint Committee on Human Rights, *Thirty-Second Report of the 44th Parliament* (1 December 2015) p. 53; and *Report 4 of 2021* (31 May 2021), and *Report 10 of 2021* (25 August 2021) p. 31–35.

vaccinations to the AIR without knowing the extent to which such information may be disclosed or the purposes for which it may be used. However, noting the existing broad ministerial discretion to authorise the disclosure of this information to any person for any purpose if it is considered to be in the public interest to do so, there is a risk that expanding the range of personal information that may be so disclosed may impermissibly limit the right to privacy.

Committee view

1.62 The committee considers that enabling the government to enhance its monitoring of vaccination coverage of the Japanese encephalitis virus promotes the right to health. However, requiring vaccination providers to provide personal information about individuals who receive such vaccinations also limits the right to privacy.

1.63 The committee considers that monitoring information about vaccination coverage in order to identify health-related issues constitutes a legitimate objective for the purposes of international human rights law and the measure is rationally connected to that objective. In relation to proportionality, the committee notes that while the legislation provides safeguards regarding collection, use and disclosure of personal information, there is a risk that the existing broad ministerial discretion to disclose personal information to 'any person' and for any purpose if it is considered to be 'in the public interest' to do so, does not sufficiently safeguard the right to privacy.

1.64 In order to better respect the right to privacy, the committee has previously recommended,[13] that subsection 22(3) of the *Australian Immunisation Register Act 2015* be amended to provide that:

(a) the minister's power to disclose protected information is to 'a specified class of persons' rather than 'a person';

(b) specific, and limited, purposes for disclosure are set out in the legislation; and

(c) in authorising disclosure the minister must have regard to the extent to which the privacy of any person is likely to be affected by the disclosure.

1.65 The committee seeks the minister's response to this recommendation to amend the *Australian Immunisation Register Act 2015*.

13 Parliamentary Joint Committee on Human Rights, and *Report 4 of 2021* (31 May 2021), and *Report 10 of 2021* (25 August 2021) p. 31–35.

Biosecurity (Entry Requirements—Human Coronavirus with Pandemic Potential) Determination 2023 [F2023L00009][1]

Purpose	This legislative instrument imposes entry requirements on passengers to provide proof of a negative test for Covid-19 taken within a 48-hour period prior to boarding a flight that has commenced from the People's Republic of China or the Special Administrative Region of Hong Kong or Macau and ends in Australian territory.
Portfolio	Health and Aged Care
Authorising legislation	*Biosecurity Act 2015*
Disallowance	This legislative instrument is exempt from disallowance (see subsection 44(3) of the *Biosecurity Act 2015*)
Rights	Life; health; freedom of movement; privacy; equality and non-discrimination

Restriction of passengers entering Australia

1.66 This determination sets out entry requirements on passengers on flights that commenced from the People's Republic of China or the Special Administrative Region of Hong Kong or Macau and end in Australian territory. The requirements are to provide proof of a negative test for Covid-19 taken within 48 hours prior to the flight. This requirement does not apply to:

- children less than 12 years old;
- individuals with evidence from a medical practitioner that:
  - (a) they have a medical condition that prevents them from taking a Covid-19 test;
  - (b) it has been at least 7 days since the person has had Covid-19 and they have now recovered, are not considered to be infectious, and have not had a fever or respiratory symptoms in the last 72 hours; or
  - (c) they have a serious medical condition that requires emergency management or treatment in Australia within 48 hours, that is not reasonably available in China, Hong Kong or Macau;

1 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Biosecurity (Entry Requirements—Human Coronavirus with Pandemic Potential) Determination 2023 [F2023L00009], *Report 2 of 2023*; [2023] AUPJCHR 19.

- individuals accompanying and supporting a person who is on an emergency medical evacuation flight;
- individuals granted an exemption by an official in exceptional circumstances (being that the individual provided a compelling reason for not being tested), or flights being granted an exemption in exceptional circumstances;
- class of individuals for whom no test for Covid-19 is reasonably available.

1.67 If a person fails to comply with an entry requirement they may contravene a civil penalty provision of 30 penalty units ($8,250).[2]

Preliminary international human rights legal advice

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

1.68 The explanatory statement does not explain why this determination has been made. However, the provision in the *Biosecurity Act 2015* that empowers the making of this determination states that the section applies for the purpose of preventing a listed human disease (in this case Covid-19) from entering, or establishing itself or spreading in, Australia.[3] As such, if the determination assists in preventing and managing the spread of Covid-19 it may promote and protect the rights to life and health for persons in Australia. The right to life requires the State to take positive measures to protect life.[4] The United Nations (UN) Human Rights Committee has stated that the duty to protect life implies that States parties should take appropriate measures to address the conditions in society that may give rise to direct threats to life, including life threatening diseases.[5]

1.69 The right to health is the right to enjoy the highest attainable standard of physical and mental health.[6] Article 12(2) of the International Covenant on Economic, Social and Cultural Rights requires that States parties shall take steps to prevent, treat and control epidemic diseases.[7] The UN Committee on Economic, Social and Cultural Rights has stated that the control of diseases refers to efforts to:

> make available relevant technologies, using and improving epidemiological surveillance and data collection on a disaggregated basis, the

2 *Biosecurity Act 2015*, section 46.

3 *Biosecurity Act 2015*, section 44.

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

5 See United Nations Human Rights Committee, *General Comment No. 36, Article 6 (Right to Life)* (2019), [26].

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

7 International Covenant on Economic, Social and Cultural Rights, article 12(2)(c).

> implementation or enhancement of immunization programmes and other strategies of infectious disease control.[8]

1.70 While the measure may promote the rights to life and health for persons in Australia, the effect of the measure may mean that persons who cannot produce a negative Covid-19 test may be temporarily banned from entering Australia, including Australian citizens and permanent residents. As such, this engages and may limit a number of other human rights, particularly the rights to freedom of movement and equality and non-discrimination. The right to freedom of movement includes the right to enter, remain in, or return to one's own country.[9] The UN Human Rights Committee has stated that the right of a person to enter his or her own country 'recognizes the special relationship of a person to that country'.[10] The reference to a person's 'own country' is not restricted to countries with which the person has the formal status of citizenship. It includes a country to which a person has very strong ties, such as long-standing residence and close personal and family ties.[11] The right to freedom of movement is not absolute: limitations can be placed on the right provided certain standards are met. However, the UN Human Rights Committee has stated in relation to the right to enter one's own country:

> In no case may a person be arbitrarily deprived of the right to enter his or her own country. The reference to the concept of arbitrariness in this context is intended to emphasize that it applies to all State action, legislative, administrative and judicial; it guarantees that even interference provided for by law should be in accordance with the provisions, aims and objectives of the Covenant and should be, in any event, reasonable in the particular circumstances. The Committee considers that there are few, if any, circumstances in which deprivation of the right to enter one's own country could be reasonable.[12]

1.71 Further, requiring the production of a negative Covid-19 test 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 information.[13] It also includes the right to control the dissemination of information about one's private life. A private

8 UN Committee on Economic, Social and Cultural Rights, *General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12)* (2000) [16].

9 International Covenant on Civil and Political Rights, article 12(4).

10 UN Human Rights Committee, *CCPR General Comment No. 27: Article 12 (Freedom of movement)* (1999) [19].

11 *Nystrom v Australia*, UN Human Rights Committee Communication No.1557/2007 (2011).

12 UN Human Rights Committee, *CCPR General Comment No. 27: Article 12 (Freedom of movement)* (1999) [21].

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

life is linked to notions of personal autonomy and human dignity. It includes the idea that individuals should have an area of autonomous development; a 'private sphere' free from government intervention and excessive unsolicited intervention by others. 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.

1.72 In addition, the measure also appears to engage the right to equality and non-discrimination.[14] 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.[15] 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).[16] Indirect discrimination occurs where 'a rule or measure that is neutral at face value or without intent to discriminate', exclusively or disproportionately affects people with a particular protected attribute, such as race or nationality.[17] In this case it appears that requiring passengers from China, Macau and Hong Kong to show evidence of a negative Covid-19 test is likely to disproportionately affect persons of Chinese descent. Where a measure impacts on a particular group disproportionately it establishes *prima facie* that there may be indirect discrimination.[18] Differential treatment (including the differential effect of a measure that is neutral on its face) will not constitute unlawful discrimination if the differential treatment is based on reasonable and objective

14 Articles 2 and 26 of the International Covenant on Civil and Political Rights.

15 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.

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

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

18 *D.H. and Others v the Czech Republic,* European Court of Human Rights (Grand Chamber), Application no. 57325/00 (2007) [49]; *Hoogendijk v the Netherlands*, European Court of Human Rights, Application no. 58641/00 (2005).

criteria such that it serves a legitimate objective, is rationally connected to that objective and is a proportionate means of achieving that objective.[19]

1.73 As this determination is exempt from disallowance by the Parliament, it is not required to be accompanied by a statement of compatibility with human rights.[20] As such, no assessment of the compatibility of this measure with the rights to freedom of movement or equality and non-discrimination has been provided. Further, the explanatory statement provides no explanation as to why this measure has been imposed.

1.74 The Department of Health website states that this measure is part of the government's response to the wave of Covid-19 infections in China and is being implemented to protect Australia from the risk of potential new variants.[21] If the objective of the measure is to protect Australia from the risk of new variants, this would appear to constitute a legitimate objective for the purposes of international human rights law. However, it is not clear that requiring only travellers from China, Macau and Hong Kong to show evidence of a negative Covid-19 test would be effective to achieve that objective. In particular, it is not clear that travellers from these countries have a greater likelihood of having new Covid-19 variants.[22]

1.75 It is also necessary to consider whether the measure is proportionate to the objective sought to be achieved. In this respect, it is necessary to consider whether the measure: is sufficiently circumscribed; whether the measure is accompanied by sufficient safeguards; whether there is sufficient flexibility to treat different cases differently; and whether any less rights restrictive alternatives could achieve the same stated objective.

1.76 There are a number of matters that assist with proportionality. In particular, this is not a complete ban on travel to Australia from these countries, rather if an individual has Covid-19 they would need to wait until they were no longer infectious. Further, the instrument sets out a number of exceptions from the requirement, including exceptions based on individual circumstances.

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19 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].

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

21 Department of Health and Aged Care, Travellers from China, Hong Kong and Macau (accessed 22 February 2023).

22 Noting, on the reported cases available, it appears that there are many other countries, Australia included, that have significantly more reported cases per 100,000 people. See data from John Hopkins University and Medicine, Coronavirus Resource Centre, Covid-19 Dashboard (accessed 22 February 2023).

1.77 However, it is noted that unlike previous measures to control the spread of Covid-19,[23] this instrument does not appear to be time-limited. It commenced on 5 January 2023, and it appears that it is not due to sunset until 1 April 2033 – 10 years after it was made. While it is possible for the minister to repeal the instrument, it is not clear why a shorter time period was not provided for in the instrument, with the minister being required to turn his mind to whether to remake the instrument based on the evidence available at the expiry of this period.

1.78 Noting the lack of any information in the explanatory statement as to why this instrument was made, and the lack of a statement of compatibility, further information is required to assess the compatibility of this measure with the rights to freedom of movement, privacy and equality and non-discrimination.

Committee view

1.79 The committee considers that measures designed to prevent the spread of Covid-19, are likely to promote and protect the rights to life and health, noting that the right to life requires that Australia takes positive measures to protect life, and the right to health requires Australia takes steps to prevent, treat and control epidemic diseases.

1.80 However, the committee notes that requiring only travellers from China, Macau and Hong Kong to show evidence of a negative Covid-19 test before entering Australia limits the rights to freedom of movement, a private life and equality and non-discrimination. These rights may be subject to permissible limitations if they are shown to be reasonable, necessary and proportionate.

1.81 The committee notes that the explanatory statement accompanying this instrument provided no information as to why this measure was considered necessary. The committee also notes that there was no statement of compatibility provided with this instrument. The committee's role is to scrutinise all legislative instruments for compatibility with human rights.[24] There is no legislative requirement that these determinations, which are exempt from the disallowance process, be accompanied by a statement of compatibility.[25] However, the committee

23 For example, the declaration of the human biosecurity emergency period can only last for three months, see *Biosecurity Act 2015*, section 475. Further, the ban on travel from passengers from India was time limited to 12 days, see Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Emergency Requirements—High Risk Country Travel Pause) Determination 2021 [F2021L00533].

24 The *Human Rights (Parliamentary Scrutiny) Act 2011*, section 7, provides that the function of the committee is to examine all legislative instruments that come before either House of the Parliament for compatibility with human rights.

25 The *Human Rights (Parliamentary Scrutiny) Act 2011*, section 9, provides that only legislative instruments subject to disallowance under the *Legislation Act 2003* require a statement of compatibility.

has consistently said since the start of the legislative response to the Covid-19 pandemic,[26] that given the human rights implications of legislation regulating the movement of persons, it would be appropriate for all such legislative instruments to be accompanied by a detailed statement of compatibility. The committee reiterates that the Department of Health and Aged Care should be providing statements for instruments made under the *Biosecurity Act 2015*, many of which can have a profound effect on human rights.

1.82 The committee considers further information is required to assess the compatibility of this measure with the rights to freedom of movement, privacy and equality and non-discrimination, and as such seeks the minister's advice in relation to:

(a) what is the objective behind requiring travellers from China, Macau and Hong Kong to show evidence of a negative Covid-19 test before entering Australia;

(b) how is requiring only travellers from China, Macau and Hong Kong to show such evidence rationally connected to – that is, effective to achieve – that objective;

(c) whether persons of Chinese descent will be disproportionately affected by this requirement, and if so, is this differential treatment based on reasonable and objective criteria;

(d) whether there is any less rights restrictive way to achieve the stated aims of preventing and controlling the entry, emergence, establishment or spread of Covid-19 into Australia; and

(e) why this instrument is not time-limited, but is due to sunset ten years from the date it was made.

26 The committee first stated this in Parliamentary Joint Committee on Human Rights, *Report 5 of 2020: Human rights scrutiny of COVID-19 legislation*, 29 April 2020. The committee also wrote to all ministers advising them of the importance of having a detailed statement of compatibility with human rights for all COVID-19 related legislation in April 2020 (see media statement of 15 April 2020, available on the committee's website).

Federal Court Legislation Amendment Rules 2022 [F2023L00033][1]

Purpose	This legislative instrument amends the Federal Court Rules 2011, Federal Court (Criminal Proceedings) Rules 2016, Federal Court (Bankruptcy) Rules 2016, and Federal Court (Corporations) Rules 2000 to provide updates to references to rules, regulations and the Federal Circuit and Family Court of Australia. It clarifies the transfer of proceedings to and from the Federal Circuit and Family Court of Australia (Division 2).
Portfolio	Attorney-General
Authorising legislation	*Federal Court of Australia Act 1976*
Last day to disallow	15 sitting days after tabling (tabled in the Senate and the House of Representatives on 6 February 2023). Notice of motion to disallow must be given by 23 March 2023 in the House and by 29 March 2023 in the Senate[2]
Right	Freedom of expression

Access to court documents

1.83 These rules provide that a person who is not a party to a Federal Court proceeding cannot inspect certain court documents in a proceeding until after the first directions hearing or the hearing (whichever is earlier).[3]

1.84 This applies to documents such as originating applications; pleadings; statements of agreed facts; judgments or orders of court; notices of appeal; and reasons for judgment.[4]

1 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Federal Court Legislation Amendment Rules 2022 [F2023L00033], *Report 2 of 2023*; [2023] AUPJCHR 20.

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 Schedule 1, item 4.

4 See Federal Court Rules 2011, subrule 2.32(2).

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Right to freedom of expression

1.85 Restricting access to court documents, which journalists may use to help them accurately report on cases before the Federal Court, engages and limits the right to freedom of expression. This right 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.[5] The United Nations (UN) Human Rights Committee has noted the important status of this right under international human rights law.[6]

1.86 The right to freedom of expression extends to the communication of information or ideas through any medium, including written and oral communications, the media, public protest, broadcasting, artistic works and commercial advertising.[7] A free, uncensored and unhindered press is essential to ensure freedom of opinion and expression, and the enjoyment of other civil and political rights.[8]

1.87 The right to freedom of expression also includes 'a right of access to information held by public bodies'[9] and according to the UN Human Rights Committee:

> To give effect to the right of access to information, States parties should proactively put in the public domain Government information of public interest. States parties should make every effort to ensure easy, prompt, effective and practical access to such information. States parties should also enact the necessary procedures, whereby one may gain access to information, such as by means of freedom of information legislation.[10]

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

6 UN Human Rights Committee, *General comment No. 34: Article 19: Freedoms of opinion and expression*, CCPR/C/GC/34 (2011) [2]–[3]. The UN Human Rights Committee stated that: 'Freedom of opinion and freedom of expression are indispensable conditions for the full development of the person. They are essential for any society. They constitute the foundation stone for every free and democratic society. The two freedoms are closely related, with freedom of expression providing the vehicle for the exchange and development of opinions. Freedom of expression is a necessary condition for the realization of the principles of transparency and accountability that are, in turn, essential for the promotion and protection of human rights'.

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

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

9 UN Human Rights Committee, *General Comment 34, Article 19: Freedom of opinions and expression* (12 September 2011) [18].

10 UN Human Rights Committee, *General Comment 34, Article 19: Freedom of opinions and expression* (12 September 2011) [19].

1.88 The right to freedom of expression may be subject to limitations that are necessary to protect the rights or reputations of others,[11] national security,[12] public order, or public health or morals.[13] Additionally, such limitations must be prescribed by law, be rationally connected to the objective of the measures and be proportionate.[14]

1.89 In determining whether limitations on the right to freedom of expression are proportionate, the UN Human Rights Committee has noted that restrictions on freedom of expression must not be overly broad.[15]

1.90 The statement of compatibility accompanying the instrument does not identify that this right is engaged, and the explanatory statement provides no information as to why this amendment was considered necessary. As such, it is not possible to assess whether the measure seeks to achieve a legitimate objective, and if there are any safeguards in place that would assist with the proportionality of the measure.

Committee view

1.91 The committee notes that restricting access to certain court documents prior to a hearing, including access by journalists, engages and limits the right to freedom of expression. The committee considers further information is required to assess the compatibility of this measure with this right, and as such seeks the Chief Justice's advice in relation to:

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11 Restrictions on this ground must be constructed with care. For example, while it may be permissible to protect voters from forms of expression that constitute intimidation or coercion, such restrictions must not impede political debate. See UN Human Rights Committee, *General Comment No. 34: Article 19: Freedoms of Opinion and Expression* (2011) [28].

12 Extreme care must be taken by State parties to ensure that treason laws and similar provisions relating to national security are crafted and applied in a manner that conforms to the strict requirements of paragraph 12(3) of the International Covenant on Civil and Political Rights. It is not compatible with paragraph 3, for instance, to invoke such laws to suppress or withhold from the public information of legitimate public interest that does not harm national security or to prosecute journalists, researchers, environmental activists, human rights defenders, or others, for having disseminated such information. See UN Human Rights Committee, *General Comment No. 34: Article 19: Freedoms of Opinion and Expression* (2011) [30].

13 The concept of 'morals' here derives from myriad social, philosophical and religious traditions. This means that limitations for the purpose of protecting morals must be based on principles not deriving exclusively from a single tradition. See UN Human Rights Committee, *General Comment No. 34: Article 19: Freedoms of Opinion and Expression* (2011) [32].

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

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

(a) what is the objective behind preventing people who are not parties to a proceeding from inspecting certain documents in the proceeding until after the first directions hearing or the hearing;

(b) is restricting such access likely to be effective to achieve that objective; and

(c) is this a proportionate way to achieve that objective. In particular, are there any safeguards in place or any less rights restrictive ways to achieve the objective (for example, allowing non-parties to apply for access; allowing decisions to be made on a case-by-case basis).

Chapter 2

Concluded matters

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

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

Bills

Export Control Amendment (Streamlining Administrative Processes) Bill 2022[2]

Purpose	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
Portfolio	Agriculture, Fisheries and Forestry
Introduced	House of Representatives, 30 November 2022
Right	Privacy

2.3 The committee requested a response from the minister in relation to the bill in *Report 1 of 2023*.[3]

Information-sharing between government agencies and other bodies

2.4 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

1 See https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Scrutiny_reports.

2 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Export Control Amendment (Streamlining Administrative Processes) Bill 2022, *Report 2 of 2023* [2023] AUPJCHR 21.

3 Parliamentary Joint Committee on Human Rights, *Report 1 of 2023* (8 February 2023), pp. 13–17.

of departmental officer and certain contractors)[4] would be permitted to use or disclose 'relevant information' in relation to a range of matters.[5] '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 exercising powers, under the Export Control Act; or assisting another person to perform functions or duties, or exercise powers, under the Act'.[6]

2.5 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.[7] They would also be permitted to use or disclose relevant information for twelve other purposes,[8] including: to a foreign government for the purposes of managing Australian international relations in respect of trade;[9] to the Australian Federal Police if the person reasonably believed that this was necessary for the enforcement of a criminal law;[10] and for the purposes of other Acts administered by the relevant minister (this would include the *Biosecurity Act 2015*),[11] or a law of a state or territory.[12]

Summary of initial assessment

Preliminary international human rights legal advice

Right to privacy

2.6 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.[13] It also includes the right to control the dissemination of information about one's private life.

4 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.

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

6 Schedule 1, item 6.

7 Schedule 1, item 12, proposed section 388.

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

9 Schedule 1, item 12, proposed section 389.

10 Schedule 1, Item 12, proposed section 393.

11 Schedule 1, Item 12, proposed section 390.

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

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

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 (UN) Human Rights Committee has stated that legislation must specify in detail the precise circumstances in which interferences with privacy may be permitted.[14]

2.7 The stated objective of the measure appears capable of constituting a legitimate objectives for the purposes of international human rights law, and the measure is rationally connected to that objective, but questions remain regarding proportionality.

Committee's initial view

2.8 The committee noted 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, and sought further information 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

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

(e) what other safeguards, if any, would operate to protect personal information disclosed or used pursuant to these proposed authorisations.

2.9 The full initial analysis is set out in *Report 1 of 2023*.

Minister's response[15]

2.10 The minister advised:

> *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;*
>
> The proper, effective and efficient performance of functions or duties, or the exercise of powers under the Export Control Act will often involve the use or disclosure of relevant information which may include personal information. For that reason, the authorisations set out in proposed new Division 2 of Part 3 of Chapter 11 of the Act are clearly defined and aimed at the legitimate objective of supporting the effective operation and enforcement of the Act.
>
> These authorisations allow for the use or disclosure of relevant information in certain circumstances, including in the course of, or for the purposes of, the performance of functions or duties, or the exercise of powers under the Act (new section 388), or for research, policy development or data analysis to assist the Department of Agriculture, Fisheries and Forestry (new section 394). They also include the disclosure of statistics (new section 395) and disclosure to a foreign government, an authority or agency of a foreign government or an international body of an intergovernmental character, for the purposes of the export of goods from Australia, managing Australia's international relations in respect of trade or giving effect to Australia's international obligations (new section 389).
>
> The kinds of personal information that may be used and disclosed pursuant to the proposed authorisations is constrained by the operation of the Act, whereby relevant information is limited to information collected for the purposes of performing functions or duties, or exercising powers, under this Act. This may include information used to meet obligations or requirements under the Act, such as personal information contained in applications or other submissions under the Act. The types of personal information collected may include, but is not limited to, an applicant's name; address; business associates and interests; details of intended export operations; previous convictions; or orders to pay a pecuniary penalty under relevant legislation.

15 The minister's response to the committee's inquiries was received on 21 February 2023. This is an extract of the response. The response is available in full on the committee's website.

Relevant information that is also personal information may be used or disclosed to other Commonwealth entities under proposed sections 391 (disclosures to Commonwealth entities) or 393 (disclosure for the purposes of law enforcement), for example in circumstances where export information is requested in support of investigating suspected criminal activity or undertaking surveillance operations. For example, the Australian Federal Police or Australian Border Force may request personal information from the department relating to an exporter or export operations, in specific cases concerning a port of export, or an export vessel that may be under suspicion. These entities may request information relating to any prior convictions, as well as known business associates or interests.

Several of the authorisations impose specific measures to limit or prevent the sharing of relevant information that may contain personal information. For example, the authorisation to use or disclose relevant information for the purposes of research policy development or data analysis requires reasonable steps to be taken to de-identify personal information, wherever possible, and to otherwise minimise the amount of personal information disclosed. The authorisation to use or disclose statistics can only be used for statistics that are not likely to enable the identification of a person. Authorisations to disclose information to a State or Territory body require an agreement to be in place between the Commonwealth and that State or Territory body before the relevant information may be disclosed, which may include requiring the State or Territory body to confirm that any personal information that is disclosed will be subject to appropriate safeguards.

> *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;*

While the proposed authorisations for the disclosure of information under proposed section 388, section 390, and section 397D, do not list the persons to whom disclosures may be made, the persons to whom relevant information can be disclosed are necessarily limited by the requirement that the disclosure be for the purpose of a function, duty or power under the Act or export control rules, or the administration of portfolio Acts, or for the specific purpose of managing severe and immediate threats.

Section 388 would authorise the use or disclosure of relevant information for the purposes of performing functions or duties, or exercising powers, under the Act or export control rules, or assisting another person to perform or exercise such functions, duties or powers. The disclosure of information is governed and limited by the functions, duties, and powers under the Act. For example, an approved auditor who has collected information in conducting an audit (which is a function or duty under the Act) may share that information with administrative staff who are assisting the approved auditor to carry out their function of providing an audit report.

Proposed section 390 provides for information to be disclosed for the purposes of the administration of the Act, or other portfolio Acts. This allows for best practice and streamlined information sharing, and by definition limits the persons to whom disclosure of relevant information is allowed, as there must be a clear connection between the disclosure and the specific legislative purpose of the relevant Act. This authorisation would, for example, enable information that is collected in the course of performing a function under the Act that may be relevant to the administration of the *Biosecurity Act 2015* (the Biosecurity Act), such as information relating to a pest incursion, to be efficiently shared for the purposes of managing the incursion under that Act.

Proposed section 397D would authorise the disclosure of relevant information where there is a reasonable belief that it is necessary to manage severe and immediate threats that arise in connection with exports or that could cause harm on a nationally significant scale. Proposed section 397D does not limit to whom any such disclosures may be made, as flexibility under the authorisation is necessary and reasonable in responding to circumstances in which a severe and immediate threat exists. It is anticipated that this authorisation will be used rarely, as there is a high threshold that must be met in order to rely on this authorisation – that is, that there is a severe and immediate threat which either relates to exports or has the potential to cause harm on a nationally significant scale. The fact that the power is given to the Secretary and cannot be subdelegated below SES level is a further safeguard on the exercise of this power.

In relation to protected information, there are sanctions for unauthorised use or disclosure. The offence in subsection 397G is triggered if certain persons who obtained or generated protected information in the course of, or for the purposes of, performing functions or duties, or exercising powers, under the Act (or assisting another person to perform such functions or duties, or exercise such powers), use or disclose protected information, and the use or disclosure is not required or authorised by a Commonwealth law or a prescribed State or Territory law (and where the good faith exception in subsection 397G(4) does not apply). The *Privacy Act 1988* regulates disclosures of personal information about an individual.

> *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;*

Section 393 would authorise the disclosure of information for the purposes of law enforcement to certain Commonwealth, State or Territory bodies which have a law enforcement or protection of public revenue function. Relevant law enforcement purposes may include the investigation of offences under the *Crimes Act 1914*.

A robust and effective framework for information sharing for the purposes of law enforcement is a matter of public interest. The amendments address

the need to simplify and clarify the current information sharing regime, and allow a key element of best practice, that is, the ability to share information for law enforcement purposes when it is in the public interest to do so.

This would better enable enforcement decisions to be informed by proper investigation of differing, intersecting issues and information, before an effective enforcement decision can be made.

Under these proposed amendments, where information is proposed to be disclosed to a State or Territory body or a police force or police service of a State or Territory, an agreement is required to be in place between the Commonwealth and that body in which the relevant body has undertaken not to use or further disclose the information except in accordance with that agreement. This provides some certainty as to the use and onward disclosure of the information provided.

The amendments outlined in the Bill align with similar changes to the Biosecurity Act agreed to by the Parliament in passing the *Biosecurity Amendment (Strengthening Biosecurity) Act 2022* in November 2022. As noted above, the Biosecurity Act is another key Act regulating the supply chain and administered by the department, and alignment across this authorisation provides consistency and predictability for stakeholders. This amendment is also consistent with the way information sharing regimes are framed in other legislation, for example the *Hazardous Waste (Regulation of Exports and Imports) Act 1989* and the *Industrial Chemicals Act 2019*.

The enforcement of Australian laws is an appropriate framing for the authorised disclosure of relevant information, as it is a matter of public interest. I consider that there are sufficient checks and balances on the use of such information and the authorisation allows the Commonwealth to make a judgement about the necessity of sharing for any proposed purpose.

> *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;*

The proposed authorisations for sharing information are aimed at the legitimate objective of supporting the management of the export control framework and for the effective operation and enforcement of the Act. In support of this, the Bill contains safeguards that are reasonable, necessary, and proportionate to meeting this objective.

As identified in the statement of compatibility, it would be consistent with the legislation to also apply additional safeguards when disclosing relevant information, however, it would not be possible and practical to impose all these requirements in the Bill itself because flexibility is required in their application. For example, an agreement between the Commonwealth and a State or Territory body may sometimes prohibit the onward disclosure of information or require that information may only be used for a specific purpose, while in other situations the agreement may impose limitations on onward use or disclosure rather than prohibitions. In some circumstances,

it may be clear that the relevant state or territory legislative framework already sufficiently governs the onward use and disclosure of the information, making it unnecessary to impose restrictions as part of the agreement.

Similarly, whether conditions should be placed on the use and onward disclosure of relevant information, and if so, the specific conditions that are required, need to be adapted to the particular circumstances of the initial disclosure, which should not be limited to specific conditions set out in the Bill. For example, where information is being disclosed to another Commonwealth officer for the purposes of the Biosecurity Act, the use or disclosure of that information would be governed by the equivalent information management provisions in that Act and further conditions would be unnecessary. Similarly, disclosures to other Commonwealth entities would be governed by the *Privacy Act 1988* and unauthorised disclosure that could cause harm may breach existing offence provisions in the Criminal Code. Where a disclosure to a person outside the Commonwealth is made, there may already be arrangements in place, for example, by way of conditions imposed through an instrument of authorisation made under section 291 of the Act.

As discretion is required, it is not necessary to reference these safeguards in the Bill itself as there is no need for legislation to specify that something may be done if it would not otherwise be prohibited.

Similarly, the need to create tailored authorisations to govern the use or disclosure of relevant information in the rules, which impose appropriate limitations on the use or disclosure of the information, has been recognised in the formulation of proposed section 397E. It would not be possible to set out these limitations in the Bill because the limitations will need to be tailored to the particular authorisations prescribed in the rules. Rules made under section 397E are disallowable and will be subject to parliamentary oversight.

The following safeguards mentioned in the statement of compatibility have been included in the Bill:

- The ability for disallowable rules made under proposed section 397E to be tailored to particular circumstances by allowing the rules to prescribe the kinds of relevant information that may be used or disclosed, the classes of person who may use or disclose the information, the purposes for use or disclosure and limitations on the use or disclosure of the relevant information
- Section 394 would require reasonable steps to be taken to de-identify personal information, wherever possible, and for personal information to otherwise be minimised
- Section 395 would allow the use or disclosure of statistics only if they are not likely to enable the identification of a person

- Authorisations such as proposed new sections 393 and 397C require an agreement to be in place between the Commonwealth and a State or Territory body before the relevant information may be disclosed
- The legislation makes clear by way of a note that the Commonwealth can make agreements or other arrangements to impose conditions on the use or disclosure of relevant information.

Further, as mentioned in response to point (b) above, where additional safeguards have not been included in an authorisation, this is because the authorisation by definition, limits the persons to whom information can be disclosed, for example, because the use or disclosure must be for the purpose of performing or exercising a function, duty or power under the Act or for the administration of a portfolio Act. Appropriate safeguards have been included in each authorisation that are proportionate and adapted to the purpose of the use or disclosure permitted by that authorisation.

In addition to the offence and penalties set out in proposed new section 397G of the Act for the unauthorised use or disclosure of protected information, the *Privacy Act 1988* applies in relation to personal information about individuals.

Other safeguards such as departmental policies and procedures regarding the proposed authorisations, are appropriately not set out or referenced in the Bill itself. These authorisations can and will provide additional safeguards around what information can be shared and by whom. Further information is provided in the response to e) below.

e) What other safeguards, if any, would operate to protect personal information disclosed or used pursuant to these proposed authorisations.

The department maintains robust policies and procedures to protect any personal information which it holds, as documented in the department's Privacy Policy at agriculture.gov.au/about/commitment/privacy. As part of these processes, personal information is held in accordance with the collection and security requirements of the Australian Privacy Principles, the department's policies and procedures and the Australian Government Protective Security Policy Framework. Should personal information held by the department be subject to unauthorised access or disclosure, the department has procedures in place to assess the incident and mitigate any harm that may have been caused and considers the incident in accordance with its responsibilities under the privacy Act and requirements under the Notifiable Data Breach Scheme to notify the Office of the Australian Information Commissioner of any potential eligible data breaches.

Many of the authorisations impose specific measures to prevent the sharing of relevant information that may also be personal information. For example, new section 394 requires reasonable steps to be taken to de-identify (as defined in section 12 of the Act) personal information, wherever possible, before relevant information is disclosed for the purposes of research, policy

development or data analysis. New section 395 also limits the use or disclosure of statistics to where those statistics are not likely to enable the identification of a person.

Authorisations such as new sections 393 (disclosure for law enforcement purposes) and 397C (disclosure to State or Territory body) will require an agreement to be in place between the Commonwealth and a State or Territory body before the relevant information may be disclosed to that body. This may include for example, requiring the State or Territory body to confirm that any personal information that is disclosed will be subject to appropriate safeguards.

In addition, relevant departmental policies and procedures, which can be implemented on a case-by-case basis, include the following:

- application of additional restrictions, including via protective marking, to limit the clearance level for access of personal information
- notifying particular affected parties of a particular disclosure or use, if appropriate
- entering into agreements with other parties, which as noted above is required for certain authorisations, will set out use, handling and storage requirements of personal information; and
- ensuring the storage of personal information meets best practice protocols and is in line with Commonwealth record-keeping obligations.

Concluding comments

International human rights legal advice

2.11 To assess whether the proposed limitation on the right to privacy is proportionate, further information was sought regarding the breadth of the measure, particularly in relation to the persons to whom, and the bases on which, information may be disclosed under the information management framework. 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, there are some circumstances where this is not the case.[16] In particular, sections 388, 390 and 397D authorise the disclosure of relevant information for specified purposes without limiting to whom any such disclosures may be made. The minister advised that disclosure of information under these sections is governed and limited by the functions, duties and powers under the Act and other relevant legislation such as the *Privacy Act 1988*, as well as the fact that disclosure must be for the specified legislative purpose under which it operates. The effect of this would be to confine disclosure to persons who would legitimately require the information to achieve and manage one of the listed purposes in the relevant legislation. In relation to proposed section 397D

16 See Schedule 1, item 12, proposed sections 388, 390, 395 and 397D.

(disclosure of relevant information where there is a reasonable belief that it is necessary to manage severe and immediate threats), the minister advised the provision does not limit to whom any such disclosures may be made, as flexibility under the authorisation is necessary and reasonable in responding to circumstances in which a severe and immediate threat exists. The minister further noted that recipients of relevant information under these sections will be governed by other legislation, such as state and territory laws if the recipient was a state or territory body.

2.12 It is noted that sections 388, 390 and 397D place limitations regarding the persons who are authorised to disclose relevant information (namely, entrusted persons) and the purposes for which information may be disclosed, which could, as the minister suggests, have the effect of limiting the persons to whom information may be disclosed. However, without limiting to whom information may be disclosed in the text of the legislation itself, it remains unclear how broadly this power would be exercised. For example, in the case of disclosing information for the purpose of managing exports, it appears possible that information could be disclosed to a broad range of front-line workers, private companies and contractors, such as airport staff and transport workers. In order to be proportionate, a limitation on the right to privacy should only be as extensive as is strictly necessary and legislation must specify in detail the precise circumstances in which interferences with privacy may be permitted.[17]

2.13 As to the bases on which information may be disclosed, further information was sought as to why it is necessary to allow all information obtained using powers under the Act to be shared for law enforcement purposes, unrelated to managing biosecurity risks or the administration of the Act (as permitted under section 393). The minister advised that the amendments are intended to reflect best practice by sharing information for law enforcement purposes when it is in the public interest to do so. The minister stated that a robust and effective framework for information sharing for law enforcement is a matter of public interest. The minister noted this would better enable enforcement decisions to be informed by proper investigation of differing, intersecting issues and information, before an effective enforcement decision can be made.

2.14 However, questions remain as to whether sharing all information obtained by officials using powers under the *Export Control Act 2020* to enforce any other law, unrelated to any exports or for the administration of the *Export Control Act 2020*, will be proportionate in practice, noting that the adequacy of the public interest justification will depend on the circumstances of each case. It is noted that the personal information that may be shared may include sensitive information such as information relating to prior convictions or pecuniary penalties and known business associates or interests. Given the breadth of this information-sharing power and the corresponding considerable extent of the potential interference with the right to

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

privacy, it is critical that the measure is accompanied by stringent safeguards to ensure any limitation on the right to privacy is proportionate.

2.15 In this regard, the minister notes there are a number of safeguards in the bill that would assist with proportionality, including:

- requiring reasonable steps to be taken to de-identify personal information in the context of information used or disclosed for research, policy development or data analysis (but not other purposes);[18]
- permitting the use or disclosure of relevant information that is statistical information that is not likely to enable the identification of a person;[19]
- requiring an agreement to be in place between the Commonwealth and a state or territory body before the relevant information may be disclosed to the body. The agreement may include a requirement that the state or territory body confirm any personal information disclosed is subject to appropriate safeguards;[20]
- the discretion of the Commonwealth to make an information sharing agreement or impose conditions on the use or disclosure of relevant information shared under this division;[21] and
- the prohibition on unauthorised use or disclosure of protected information.[22]

2.16 As to why the safeguards identified in the statement of compatibility that could apply are not set out in the bill itself, the minister advised that it would not be possible or practical to impose additional safeguards in the bill, because flexibility is required in their application. The minister gave the example that sometimes agreements between Commonwealth and state and territory bodies may prohibit the onward disclosure of information, whereas on other occasions it may limit the disclosure rather than prohibit it, and that any conditions imposed need to be adapted to the particular circumstances of the disclosure. However, it is not clear why the legislation could not set out a list of safeguards that the entrusted person must consider when determining whether to disclose information: for example, requiring the de-identification of personal information where appropriate; requiring

18 Schedule 1, item 12, proposed section 394.

19 Schedule 1, item 12, proposed section 395.

20 Schedule 1, item 12, proposed sections 393 and 397C.

21 Schedule 1, item 12, Note 2 to proposed section 387 provides that nothing in this Part would prevent the Commonwealth from making agreements or other arrangements to impose conditions on the use or disclosure of relevant information by a body or person who obtains the information as a result of an authorised disclosure.

22 Schedule 1, item 12, proposed section 397G, which would apply a fault-based offence, civil penalty provision and strict liability offence to the unauthorised use or disclosure of protected information which is obtained or generated under the *Export Control Act 2020*.

decision-makers to consider the effect on privacy of disclosing the information; or requiring the decision-maker to consider, before personal information is shared, if the individual or entity it is sharing it with has appropriate processes in place to protect the information. This would still allow the decision-maker the flexibility to determine what safeguards are applicable, but would provide legislative guidance as to the type of matters the decision-maker must turn their mind to when authorising disclosure.

2.17 As to the existence of other safeguards, the minister referred to the department's Privacy Policy and the Australian Government Protective Security Policy Framework. The minister further noted that certain departmental policies and procedures can be applied on a case-by-case basis, such as requiring the mandatory destruction of personal information after an agreed timeframe and in an agreed manner or applying additional restrictions to limit the clearance level for access to personal information.

2.18 The above safeguards would assist with proportionality, although it is noted that discretionary safeguards are less stringent than the protection of statutory processes as there is no requirement to follow them. However, given the breadth of the measure, including the absence of a limit on the persons to whom information may be disclosed in certain circumstances and the type of information that may be shared for law enforcement purposes, there is a risk that the existing safeguards may not be adequate in all circumstances so as to ensure that any limitation on the right to privacy will be proportionate in practice.

Committee view

2.19 The committee thanks the minister for this response. The committee considers that authorising the use and disclosure of personal information engages and limits the right to privacy.

2.20 The committee considers that the measure pursues the legitimate objective of supporting the management of the export control framework and the effective operation and enforcement of the *Export Control Act 2020*. The committee considers that the measure is accompanied by a number of important safeguards that will help to ensure any interference with the right to privacy is only as extensive as is strictly necessary. However, given the breadth of the measure, there is a risk that the existing safeguards may not be adequate in all circumstances so as to ensure that any limitation on the right to privacy will be proportionate in practice.

Suggested action

2.21 The committee considers the proportionality of this measure may be assisted were Schedule 1, item 12 of the bill amended to provide that when an entrusted person is considering disclosing information under this Division they must consider:

- the effect of any such disclosure on the privacy of individuals;

- if the objective of the disclosure can be served without identifying individuals, and if so, consider de-identifying all personal information unless unreasonable or impracticable to do so;
- whether, before personal information is shared, the individual or entity it is sharing it with has appropriate processes in place to protect the information.

2.22 The committee recommends that the statement of compatibility be updated to reflect the information provided by the minister.

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

National Reconstruction Fund Bill 2022[1]

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

2.24 The committee requested a response from the minister in relation to the bill in *Report 1 of 2023*.[2]

Disclosure of official information

2.25 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).[3]

2.26 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.[4] The term 'person' would include an individual.[5]

2.27 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

1 This entry can be cited as: Parliamentary Joint Committee on Human Rights, National Reconstruction Fund Bill 2022, *Report 2 of 2023*; [2023] AUPJCHR 22.

2 Parliamentary Joint Committee on Human Rights, *Report 1 of 2023* (8 February 2023), pp. 18–21.

3 See, clauses 6 and 63.

4 Clause 5.

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

functions or powers. Clause 5 defines 'national security information' to mean information the publication of which is likely to prejudice national security.

Summary of initial assessment

Preliminary international human rights legal advice

Right to privacy

2.28 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.

2.29 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.[6] 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.

2.30 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.

Committee's initial view

2.31 The committee considered further information is required to assess the compatibility of this measure with the right to privacy, and sought 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;

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

(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

(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.

2.32 The full initial analysis is set out in *Report 1 of 2023*.

Minister's response[7]

2.33 The minister advised:

Disclosure of personal information

I confirm that the official information that may be disclosed by the Corporation under clause 85 of the Bill, including national security information, may include personal information, and may therefore engage the right to privacy. The information that would be provided to the Corporation would typically be provided by businesses seeking investment, and could contain some limited personal information, such as the names and contact details of senior officers in the business for the purpose of the Corporation making investments.

The intention of clause 85 is not to be generally permissive but to provide for the Corporation's ability to share information, particularly national security information or sensitive financial intelligence information in a narrow set of circumstances, to facilitate the effective and efficient performance of the Corporation's investment functions.

Compatibility with the right to privacy

The Australian Privacy Principles (APPs) as provided for by the *Privacy Act 1988* authorise the disclosure of personal information where the disclosure is authorised by or under an Australian law (APP 6.2(b)). Clause 85 provides such an authorisation for the provision of information about the affairs of a person (including personal information) to limited classes of recipients to enable appropriate sharing of information in limited circumstances where it will facilitate the exercise of the Corporation's investment functions or enable the receiving entity to perform or exercise any of its functions.

It is the Government's intention that subclause 85(1) could be used, for example, to:

7 The minister's response to the committee's inquiries was received on 22 February 2023. This is an extract of the response. The response is available in full on the committee's website.

(a) enable sharing of information between the Corporation and its subsidiaries; and

(b) enable the provision of information by the Corporation to its administering Commonwealth departments;

without requiring the express consent of every individual whose information is contained in the material or the redaction of large amounts of material. The alternative would directly impinge on the effective and efficient performance of the Corporation's investment functions where this performance relies on the Corporation's ability to disclose official information as appropriate.

The Bill also authorises the sharing of information for national security or financial intelligence purposes under subparagraph 85(3)(a)(iii), such as where information is referred to the Australian Transaction Reports and Analysis Centre to investigate potential money-laundering, provided that this information is shared to facilitate the performance of the Corporation's investment functions or to enable the recipient to exercise their functions or powers (clause 85(3)(a) refers). Sharing information for those purposes is broadly consistent with the *Privacy Act 1988*, in particular APP 6.2(e), which permits the disclosure of information where it is reasonably necessary for one or more enforcement related activities conducted by or on behalf of an enforcement body.

Furthermore, the scope of the Corporation's financing remit includes investment in defence capabilities as well as critical technologies in the national interest. It is important that any concerns that may arise in the course of the Corporation exercising its investment functions (including matters that arise during due diligence and negotiation) are able to be shared with relevant national security or intelligence bodies. To the extent that personal information is shared with an intelligence or national security body under subclause 85(3)(a)(iii), that sharing would be proportionate to the essential public interest of enabling this intelligence or national security body to perform its functions.

The proposed measure is therefore directly connected to its objective of facilitating the effective and efficient performance of Government functions. Moreover, it is the Government's view that any risks related to limiting the right to privacy in the manner this provision does are commensurate and proportionate to the necessity of the provision to achieving this objective.

Entities to whom official information may be disclosed

The disclosure powers under clause 85 are also sufficiently circumscribed when considered in the context of the limited classes of recipients that may receive official information under subclauses 85(2) and 85(4) of the Bill. I note that the classes of entities listed under subclauses 85(2)(a), 85(2)(b) and 85(2)(c), including any subsidiaries the Corporation establishes, would themselves subject to the APPs and, as such, would be required to keep any

personal information received confidential. Most state and territory governments (subclause 85(d) refers), where they are not subject to the APPs, have equivalent legislation which cover their public sector agencies. Furthermore, any rules made by the Ministers prescribing a further agency, body or person under subclause 85(2)(e) would be subject to disallowance.

It is the Government's view that it would be inappropriate to prescribe specific entities under subclause 85(2), rather than broad classes of entity, since the specific entities the Corporation may be required to interact with in order to exercise its investment functions may reasonably be expected to change over time.

Concluding comments

International human rights legal advice

2.34 As the minister has advised that the official information that may be disclosed by the Corporation in this bill, including national security information, may include personal information, this therefore engages and limits the right to privacy.

2.35 The minister states that the objective of the measure is to facilitate the effective and efficient performance of the Corporation's investment functions. In relation to the sharing of national security information the minister has advised that it is important that any concerns that may arise in the course of the Corporation exercising its investment functions are able to be shared with relevant national security or intelligence bodies. Facilitating the effective performance of the Corporation's functions is likely to be a legitimate objective for the purposes of international human rights law, and the measure would appear to be rationally connected to (that is, effective to achieve) this objective.

2.36 In relation to proportionality it is important to consider the extent of the interference with human rights. In this regard the minister advised that the type of information that may be shared would typically be provided by businesses seeking investment, and could contain limited personal information, such as the names and contact details of senior officers in the business for the purpose of the Corporation making investments. As such, it appears that any limitation on the right to privacy would be minimal. Further, the minister has set out the safeguards that would apply, including that the bill sets out who the information may be disclosed to and the listed class of entities would themselves be subject to the Australian Privacy Principles (as is the Corporation). On the basis of the information provided it appears that the bill does not arbitrarily limit the right to privacy.

Committee view

2.37 The committee thanks the minister for this response. The committee considers that while the disclosure of official information by the Corporation limits the right to privacy, on the basis of the information provided the committee considers this to be a marginal, and non-arbitrary, limitation on the right to privacy.

2.38 The committee notes that had this information been provided initially in the statement of compatibility it would not have been necessary for the committee to raise this matter further.

Suggested action

2.39 The committee recommends that the statement of compatibility be updated to reflect the information provided by the minister.

2.40 The committee considers that its concerns have been addressed, and makes no further comment in relation to this bill.

Referendum (Machinery Provisions) Amendment Bill 2022[1]

Purpose	This bill seeks to amend the *Referendum (Machinery Provisions) Act 1984* to ensure that referendums reflect contemporary federal election voting processes and extends transparency and integrity measures in the *Commonwealth Electoral Act 1918* (the Electoral Act). In particular it seeks to: • modernise postal voting in referendums; • promote operational efficiencies in the sorting and counting of votes in referendums; • update authorisation requirements to align with recent changes to the Electoral Act; • amend the financial disclosure and foreign donation restrictions framework for referendum campaigning; • require 'designated electors' to cast a declaration vote in referendums; and • enable the Electoral Commissioner to make modifications to certain aspects of a referendum during a declared emergency.
Portfolio	Finance
Introduced	House of Representatives, 1 December 2022
Rights	Freedom of expression; freedom of association; privacy; equality and non-discrimination

2.41 The committee requested a response from the minister in relation to this bill in *Report 1 of 2023*.[2]

Prohibition on foreign campaigners engaging in certain referendum conduct

2.42 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.[3] A 'foreign campaigner' means a person or entity who is not an elector, an Australian citizen, an

1 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Referendum (Machinery Provisions) Amendment Bill 2022, *Report 2 of 2023*; [2023] AUPJCHR 23.

2 Parliamentary Joint Committee on Human Rights, *Report 1 of 2023* (8 February 2023), pp. 22–31.

3 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'.

Australian resident,[4] or a New Zealand citizen who holds a Subclass 444 (Special Category) visa.[5] 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.[6] 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.[7] Contravention of this prohibition would attract a civil penalty of 120 penalty units ($33,000).[8]

2.43 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.[9] Referendum expenditure means expenditure incurred for the dominant purpose of creating or communicating a referendum matter.[10] The prohibition extends to conduct that occurs in and outside Australia.[11] 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).[12] 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

4 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.

5 *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*.

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

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

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

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

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

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

12 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).

written notice requiring the person not to enter into, not to begin to carry out, or not to continue to carry out the anti-avoidance scheme.[13]

2.44 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.[14] 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.[15] The Commissioner may inspect, make copies of and retain for as long as is necessary, any documents provided.[16]

Summary of initial assessment

Preliminary international human rights legal advice

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

2.45 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.[17] 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.[18]

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13 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).

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

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

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

17 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].

18 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.

2.46 By prohibiting foreign persons authorising the production or distribution, and approving the content, of a referendum matter, as well prohibiting donating or directly incurring referendum expenditure, the measure interferes with these persons' right to freedom of expression, particularly their right to disseminate ideas and information.[19] 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.[20] 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).[21] International human rights law has placed particularly high value on uninhibited expression in the context of public debate in a democratic society.[22]

2.47 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.[23] 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

19 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.

20 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).

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

22 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'.

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

funding or donations from foreign entities interfered with its right to freedom of association by impacting its financial capacity to carry on its political activities.[24]

2.48 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.[25] The right to privacy prohibits arbitrary and unlawful interferences with an individual's privacy, family, correspondence or home.[26] 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.

2.49 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.[27] 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.[28] 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.[29]

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24 *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'.

25 Statement of compatibility, p. 8.

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

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

28 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.

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

Differential treatment will not constitute unlawful discrimination if the differential treatment is based on reasonable and objective criteria.[30]

2.50 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.[31] 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.[32]

2.51 Seeking to maintain the integrity of electoral processes has been recognised as a legitimate objective for the purposes of international human rights law.[33] 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. A key aspect of whether a limitation on a right can be justified is whether the limitation is proportionate to the objective being sought.

Committee's initial view

2.52 The committee acknowledged the important objective of this measure in seeking to prevent foreign state players maliciously interfering with our referendum processes. However, the committee considered further information was required to assess the compatibility of this measure with the rights to freedom of expression, freedom of association, privacy and equality and non-discrimination, and sought 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

30 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].

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

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.

2.53 The full initial analysis is set out in *Report 1 of 2023*.

Minister's response[34]

2.54 The minister advised:

Application of the foreign campaigner provisions

The Bill would amend the Referendum Act to prevent foreign campaigners authorising referendum matter, and fundraising or directly incurring referendum expenditure in a financial year equal to or more than $1,000. This is consistent with the Electoral Act and recognises that the threat of foreign influence in democratic referendums, perceived or actual, has the potential to erode democracy by compromising trust in voting results and trust in political participants.

The Committee has asked 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. In the lead up to a referendum, including where a referendum is held on the same day as an election, campaigns on the proposed alteration may result in a high volume of communication of referendum matter and referendum expenditure. Requiring the AEC to conduct an individualised assessment of the threat posed by each foreign person or kind of referendum communication would

34 The minister's response to the committee's inquiries was received on 7 March 2023. This is an extract of the response. The response is available in full on the committee's website.

be impracticable due to the complexity, volume of material and cost. The individualised assessments would not be completed prior to the polling day, diminishing the value of that approach and the integrity of the poll.

Instead, by aligning the foreign campaigner provisions across the Electoral Act and Referendum Act, the Bill will ensure a common approach to foreign campaigners across Commonwealth electoral events and provide the AEC with the mechanism to respond to foreign interference, further supporting Australians' trust in democratic processes. For donors and recipients the alignment of requirements to the extent practicable will also minimise compliance burden and risk.

I consider that the foreign campaigner framework proposed in the Bill provides an appropriate framework to safeguard integrity and trust in referendum events. I further note the circumscribed nature of the foreign campaigner provisions, which expressly exclude Australian permanent residents and New Zealand Citizens who hold subclass 444 (Special Category) visas, and also excludes communications for academic, educative and artistic purposes, news content and private communications to ensure the requirements are appropriately confined.

Reversal of the burden of proof

You have requested further advice in relation to the necessity for 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'.

The Bill inserts new section 3AA into the Referendum Act, with new subsections 3AA(1) and (2) defining "referendum matter" based on the definition of "electoral matter" in the Electoral Act, adapted to a referendum context. Proposed subsection 3AA(6) provides exceptions for matter that is not "referendum matter''.

Where contravention of the authorisation of referendum matter is raised, the Bill would require a person or entity to raise specific defences. This because these exemptions are matters that would be peculiarly within the knowledge of the defendant and would be significantly more difficult and costly for the prosecution to disprove than for the defendant to establish the matter. This approach is consistent with the guidance provided by the Guide to Framing Commonwealth Offences.

The matters in proposed subsection 3AA(6) go the intended communication of the matter, for example if the dominant purpose of the communication was intended to be private communication, or satirical (see proposed subsections 3AA(6)(b) and (c)). As detailed in paragraph 73 of the Explanatory Memorandum to the Bill.

This approach is consistent with the Guide to Framing Commonwealth Offence as these are matters that would be peculiarly within the knowledge of the defendant and would be significantly more difficult and costly for the prosecution to prove than for the defendant to establish the matter.

As such the offence-specific defences in the Bill are appropriate, and I do not consider that it necessary to amend the Bill to provide that these matters are specified as elements of the offence.

Information-gathering powers

The Bill would establish an offence for non-compliance with a notice issued by the Electoral Commissioner, seeking information relevant to assessing compliance with the financial disclosure obligations proposed in the Bill, under proposed section 109N. This will support the ability of the AEC to investigate and address non-compliance.

This offence and related penalty provisions replicate the equivalent provisions of the Electoral Act. This replication provides consistency across the Electoral Act and Referendum Acts and supports understanding of those offences by those engaging in both electoral and referendum expenditure.

Exercise of the information-gathering powers is appropriately circumscribed. This includes a requirement that the Electoral Commissioner may only issue a notice where they reasonably believe the person or entity has information or documents relevant to an assessment of their compliance with Part XIIIA of the Bill. Further, before issuing a notice, the Electoral Commissioner is required to have regard to the costs a person would bear in complying with that notice. A person may also request, and must be granted, a review of the Electoral Commissioner's decision to issue a notice.

Proposed section 109Z further protects the privacy of information provide in compliance with a section 109N notice where this does not relate to a contravention of the civil penalty provisions of the Act. I also note the privilege against self-incrimination applies unless explicitly abrogated, which the Bill does not propose.

I am satisfied that the offence provisions are a necessary part of the establishment and enforcement of the financial disclosure obligations provided for in the Bill.

Safeguards

The Bill includes a range of safeguards to ensure the foreign campaigner provisions do not apply broadly, and that the Electoral Commissioner's information-gathering powers proposed in the Bill are exercised subject to reasonable limitations. These are outlined above.

The High Court of Australia has held that an implied freedom of political communication exists as part of the system of representative and responsible government created by the Australian Constitution. Proposed section 109ZA of the Bill provides that proposed Part XIIIA of the Bill (Referendum financial disclosure) does not apply to the extent that any constitutional doctrine of implied freedom of political communication would be infringed. The operation of the implied freedom is a matter for the High Court in each case.

Consideration of alternatives

The restrictions imposed by the Bill on foreign campaigners engaging in Australian referendums are proportionate to achieving the legitimate objective of safeguarding the integrity of referendums by ensuring that only those with a legitimate connection to Australia are able to influence Australian referendums. A less-restrictive approach may result in increased foreign campaigning activity which may undermine trust in the referendum process, and the ability to regulate compliance with the foreign campaigner provisions.

Referendums were the subject of the Standing Committee on Social Policy and Legal Affairs' 2021 Inquiry in the constitutional reform and referendums. That inquiry recommended the Referendum Act be updated to prohibit referendum campaign organisations from receiving gifts or donations of $100 or more from foreign donors, consistent with the Electoral Act (recommendation 8). The Committee recommended that the referendum process more generally is modernised (recommendation 10). That Committee accepted public submissions, conducted hearings, and considered previous reports related matters. The Bill responds to those recommendations.

The Bill was also referred to the Joint Standing Committee on Electoral Matters (JSCEM) for inquiry. That Inquiry received submissions on the Bill, and on 13 February 2022 JSCEM released its advisory report on the Bill. That report recommended that, subject to recommendations about strengthening enfranchisement opportunities and the provision of clear, factual, and impartial information, the Bill be passed.

In summary, I consider the Bill provides an appropriate framework for the regulation of foreign campaigners in referendums and the exercise of information gathering powers in relation to compliance with financial disclosure obligations proposed in the Bill. This framework replicates the existing provisions in the Electoral Act and will operate to prevent foreign donations and restrict foreign individuals and entities from exerting political influence in Australian referendums.

Concluding comments

International human rights legal advice

2.55 In relation to why the bill does not provide for an individualised assessment of the threat posed by foreign campaigners, the minister advised that there may be a high volume of communication of referendum matters and expenditure and requiring the Australian Electoral Commission (AEC) to conduct an individualised assessment would be impracticable due to the complexity, volume of material and cost. The minister advised that the individualised assessment would not be completed prior to the polling day which would diminish the value of that approach and the integrity of the poll, and that this is consistent with the approach taken in the *Commonwealth Electoral Act 1918* (Electoral Act). The minister also stated that the provisions are

circumscribed as they do not apply to Australian permanent residents or certain New Zealand citizens and excludes communications for academic, educative and artistic purposes, news content and private communications.

2.56 Ensuring consistency with the Electoral Act would not appear to provide a sufficient justification for limiting human rights, noting that the committee has also raised human rights concerns with the same provisions in the Electoral Act.[35] Further, the main justification for not providing for an individualised assessment appears to be that this would be impracticable and time-consuming for the AEC. However, administrative inconvenience or a lack of resources, in itself, is unlikely to be a sufficient basis for not including effective safeguards in laws that seek to limit human rights. It is noted that to impose the proposed civil penalty on an individual the AEC would need to conduct an assessment of the referendum communication or expenditure to determine whether it was made by a foreign campaigner and if it meets certain other specific requirements.[36] It is therefore not clear why it would be impracticable for the AEC to also conduct an individualised assessment of whether the foreign campaigner has a genuine, legitimate stake in the outcome of the referendum process and whether the conduct engaged in by the foreign campaigner is likely to threaten the integrity of the referendum process, before seeking such a penalty. Further, if it is accepted that it is not possible to complete such an assessment prior to polling day, a somewhat less rights restrictive approach may be to enable the Electoral Commissioner to apply for an injunction pending consideration of the imposition of a final penalty.[37]

2.57 As such it has not been established that restricting all persons who are not citizens or permanent residents,[38] including those living in Australia and who may have a genuine connection with Australia, from campaigning on referendums or incurring referendum expenditure is a proportionate limit on the right to freedom of expression. As set out above, the UN Human Rights Committee has stated that restrictions on expression must not be overly broad, and if States parties wish to take measures restricting the right to freedom of expression they must demonstrate the precise nature of the threat that needs to be addressed and establish a direct and immediate connection between the expression and the threat.[39] This has not been established in this case as the measure does not allow for an individualised assessment of the threat

35 Parliamentary Joint Committee on Human Rights, , *Report 2 of 2022* (9 February 2022) pp. 13–21.

36 As set out in Schedule 3, item 12, proposed section 110CA and Schedule 4, item 3, proposed sections 109J and 109L.

37 See Part 7 of the *Regulatory Powers (Standard Provisions) Act 2014*.

38 Or New Zealand citizens who hold subclass 444 (Special Category) visas.

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

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 threat to Australia's democracy and referendum processes in practice. For example, it may be that it would be a proportionate limit on the right to freedom of expression to prohibit a well-funded campaign from an individual with no real connection to Australia that is designed to skew the results of the referendum in a way that benefits a foreign country. However, it appears unlikely to be proportionate to prohibit an individual living for many years in Australia, for example on a student or spouse visa, who has a genuine connection to Australia, from organising the distribution of pamphlets setting out their views on an upcoming referendum.

2.58 As such, the measure appears to be overly broad as the blanket prohibition provides no flexibility to treat different cases differently. There would also appear to be a less rights restrictive option available – that is, to narrow the scope of the prohibition by enabling an exception for those who can establish a genuine connection to Australia and a consideration of the specific nature of the threat posed.

2.59 In relation to the meaning of a 'referendum matter', proposed subsection 3AA(4) provides that the dominant purpose of the communication or matter that expressly promotes or opposes a proposed referendum is presumed to be for the purpose of influencing the way electors vote at a referendum, unless the contrary is proved. The minister was asked why this was framed as a rebuttable presumption rather than the obligation being on the Electoral Commissioner to establish that the communication is a prohibited form of expression. The minister advised that this is because this is a matter 'peculiarly within the knowledge of the defendant' and significantly more difficult and costly for the 'prosecution' to disprove, and this is consistent with the Guide to Framing Commonwealth Offences. However, it is noted that this rebuttable presumption does not relate to the elements of a criminal offence. Rather it relates to what constitutes a 'referendum matter'. It remains unclear why the Electoral Commissioner would be unable to establish that the relevant material was for the dominant purpose of influencing the way electors vote at a referendum.

2.60 Further, the measure not only prohibits individuals from engaging in certain conduct, 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. The minister advised that these provisions are consistent with the Electoral Act and the powers are appropriately circumscribed because the Electoral Commissioner may only issue a notice where they reasonably believe a person or entity has relevant information or documents and must have regard to the costs a person would bear in complying with the notice, and review mechanisms are available. While access to review mechanisms would assist with the proportionality of the measure, consideration of whether a person has the relevant information or documents, and the costs that may be

applicable, offers a limited form of a safeguard for the right to privacy. The minister also lists as a safeguard that only the names of persons subject to a contravention or 'potential contravention' of a civil penalty provision are to be published in a report provided to the minister, and tabled in Parliament. However, it is not clear that publishing the names of such persons in a public report would be a proportionate limit on the right to privacy.

2.61 The minister also advised that the privilege against self-incrimination applies unless expressly abrogated and the bill does not propose to do this, and that he is satisfied that the offence provisions are necessary. However, it is noted that the prohibitions on foreign campaigning and expenditure are subject to civil penalties, and not criminal penalties. From research, it appears that there is a common law privilege to refuse to answer questions or provide information on the ground that to do so might tend to expose the party to the imposition of a pecuniary penalty (even if not a criminal offence),[40] which may operate as a safeguard. However, it is not clear if the Commissioner's request to produce information or documents makes it clear that people are not required to produce information or documents if to do so might expose them to a penalty.

2.62 Noting the concerns about the breadth of the measure, as currently drafted it does not appear to be a proportionate limit on the rights to freedom of expression, association, privacy or equality and non-discrimination.

Committee view

2.63 The committee thanks the minister for this response. The committee reiterates it acknowledges the important objective of this measure in seeking to prevent foreign state players maliciously interfering with our referendum processes. The committee considers the measure pursues the legitimate objective of protecting the integrity of Australia's electoral system and reducing the threat of foreign influence on Australia's elections.

2.64 However, the committee considers it has not been established that the measure is a proportionate limit on the rights to freedom of expression, privacy and equality and non-discrimination, as it does not allow for an individualised assessment of the threat posed by particular campaigning or expenditure by foreign nationals, and provides broad information-gathering powers. While the committee appreciates that requiring an individualised assessment of risk may be more time-consuming for the AEC to establish, administrative inconvenience is not a sufficient basis on which to limit human rights.

40 See *Pyneboard Pty Ltd v Trade Practices Commission* (1983) 152 CLR 328 at 336 and *Australian Competition and Consumer Commission v FFE Building Services Ltd* [2003] FCAFC 132 at [12]–[13].

Suggested action

2.65 The committee considers the proportionality of this measure would be assisted were the bill[41] to be amended to require the Electoral Commissioner to consider:

(a) whether the foreign campaigner has a genuine connection to Australia; and

(b) the extent of the campaigning, gift, expenditure or fundraising undertaken by the individual.

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

41 Schedule 3, item 12, proposed section 110CA and Schedule 4, item 3, proposed sections 109J and 109L. The committee notes that Schedule 4, item 4 could also be amended, if considered necessary, to apply Part 7 of the *Regulatory Powers (Standard Provisions) Act 2014*, relating to injunctions, to these provisions.

Legislative instruments

Aged Care Quality and Safety Commission Amendment (Code of Conduct and Banning Orders) Rules 2022 [F2022L01457][1]

Purpose	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.
Portfolio	Health and Aged Care
Authorising legislation	Aged Care Quality and Safety Commission Act 2018
Last day to disallow	15 sitting days after tabling (tabled in the House of Representatives and the Senate on 21 November 2022).
Rights	Health; privacy and reputation; and rights of persons with disability

2.67 The committee requested a response from the minister in relation to the legislative instrument in *Report 1 of 2023*.[2]

Information gathering powers and other compliance action powers

2.68 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).[3] 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).

2.69 It also provides (section 23BD) that the Aged Care Quality and Safety Commissioner (the Commissioner) may take certain actions in relation to compliance with the Code of Conduct, including in relation to compliance by an individual who is,

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 2 of 2023*; [2023] AUPJCHR 24.

2 Parliamentary Joint Committee on Human Rights, *Report 1 of 2023* (8 February 2023), pp. 37–45.

3 Item 2 and Schedule 1.

or was, an aged care worker or a governing person of an approved provider. The Commissioner may take various actions, 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.[4] 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.[5]

Summary of initial assessment

Preliminary international human rights legal advice

Right to health; rights of persons with disability; and right to privacy

2.70 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. 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. 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'.

2.71 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 information. It also includes the right to control the dissemination of information about one's private life.

2.72 The right to privacy may be subject to permissible limitations which are provided by law and are not arbitrary. In order for limitations not to be arbitrary, the

4 Section 23BD.

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

measure must pursue a legitimate objective and be rationally connected to (that is, effective to achieve) and proportionate to achieving that objective.

2.73 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. The key question is whether the information gathering measures are proportionate.

Committee's initial view

2.74 The committee considered 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 considered that establishing broad information gathering and sharing powers for the Commissioner to enforce the Code also engages and limits the right to privacy, and sought 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.

2.75 The full initial analysis is set out in *Report 1 of 2023*.

Minister's response[6]

2.76 The minister advised:

> *Whether and how these information gathering powers would be circumscribed*
>
> The Code of Conduct for Aged Care (Code) began on 1 December 2022. The Code, contained within the Code and Banning Orders Instrument, sets out the minimum standards of behaviour for approved providers, their aged care workers and governing persons in order to help build confidence in the

6 The minister's response to the committee's inquiries was received on 24 February 2023. This is an extract of the response. The response is available in full on the committee's website.

safety and quality of care for older Australians. The Commission is responsible for monitoring and compliance of the Code.

As the committee notes, 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 is rationally connected to that objective.

The Aged Care Quality and Safety Commissioner (Commissioner) may become aware of issues relating to compliance with the Code through a range of different mechanisms, including complaints processes, SIRS reportable incident notifications and referrals from other regulators (for example the National Disability Insurance Scheme Quality and Safeguards Commission (NDIS Commission) and the Australian Health Practitioner Regulation Agency).

Once a decision has been made that a particular action, such as the use of information gathering powers, is appropriate in the circumstances to deal with compliance with the Code, the Commission will, as always, ensure that all relevant legislative requirements are adhered to in exercising powers or functions. This includes having due regard to procedural fairness, in accordance with section 23BG of the Code and Banning Orders Instrument and administrative law principles, to ensure that any action can be effectively taken and is legally defensible. For example, decision makers will make their decisions based on relevant considerations, will act in a manner that affords procedural fairness to those affected by a decision, and will explain those decisions in a clear way that people can understand.

The Department has advised that Section 23BG was inserted following consultation on the exposure draft of the Code and Banning Orders Instrument and explicitly states that the Commissioner must have due regard to the rules of procedural fairness in taking action under Division 3 of the Code and Banning Orders Instrument.

These provisions provide acceptable legislative safeguards for approved providers, their aged care workers and governing persons throughout a Code compliance investigation and any other regulatory action that may be taken as a result of the outcome of such an investigation. This is supported by the Commission's internal operational policies and processes, which outline what decision-makers should consider in deciding whether to exercise a power or function, as well as any mandatory requirements or preferred/expected policy positions relating to the exercising of a specific power or function.

Section 76(1B) of the *Aged Care Quality and Safety Commission Act 2018* (Commission Act) provides that the Commissioner must not delegate a function or power to a person under section 76(1) or (1A) unless the Commissioner is satisfied that the person has suitable training or experience to properly perform the function or exercise the power. Having regard to the requirement in section 76(1B) of the Commission Act, the Commissioner

has delegated their power under section 23BE of the Aged Care Quality and Safety Commission Rules 2018 (Commission Rules) to Senior Executive Service Band 1, Executive Level 2 and Executive Level 1 Commission staff only. Through appropriate recruitment and performance management processes, there is ongoing oversight to ensure officers at these levels have suitable training and experience to perform their function.

The Commissioner's information gathering powers are also circumscribed by the Commission's statutory obligations under the *Privacy Act 1988* (Privacy Act) and the Australian Privacy Principles (APPs). The Commission's Privacy Policy (Privacy Policy) states that the Commission will only collect the information it needs for the function or activity being carried out, in accordance with APP 3. Further, in compliance with APP 6, the Privacy

Policy provides that the Commission will generally only use and disclose personal information for the particular purpose for which it was collected and will not otherwise use or disclose personal information for another purpose unless the person's consent has been obtained, or the use or disclosure is permitted under the Privacy Act.

What threshold would be required to be met before the Commissioner may exercise these powers

The Commission manages non-compliance and potential non-compliance with the Code in accordance with the Commission's Compliance and Enforcement Policy. Consistent with this policy, the Commission takes a risk-based approach and responds in a way that is proportionate to the risks that the non-compliance or potential non-compliance poses to the safety, health, wellbeing and quality of life of aged care recipients.

The Commission's Compliance and Enforcement Policy notes that when potential noncompliance is identified, there may not initially be enough evidence to determine whether there is compliance or non-compliance, the extent of the non-compliance and/or the appropriate compliance response. In such circumstances, it may be necessary and appropriate for the Commission to use its information gathering powers, including those under section 23BD of the Code and Banning Orders Instrument, to obtain further information to be able to make a determination about non-compliance with the Code. This process supports procedural fairness as the worker will be offered an opportunity to respond to the matter. Decision-makers are responsible for determining all material questions of fact and basing each finding of fact on relevant supporting material.

Disclosure by the Commission of personal information relating to compliance with the Code may be necessary and appropriate, for example, because the personal information:

- promotes the safety and rights of other persons
- relates to the regulatory functions of another entity (for example another regulator

- such as the NDIS Commission) and is required by the other entity to exercise their powers or perform their functions
- is required by an approved provider to take appropriate action in relation to compliance with the Code by their aged care worker or governing person (as authorised by section 23BD(3)(a) of the Code and Banning Orders Instrument).

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)

The Commission has statutory obligations that it must comply with in relation to the collection, use, storage and disclosure of personal information under the Privacy Act, the APPs and the Archives Act 1983. The Privacy Policy outlines the personal information handling practices and expectations.

As noted above, the Privacy Policy states that the Commission will generally only use and disclose personal information for the particular purpose for which it was collected. The Commission also states in its Privacy Policy that it will not otherwise use or disclose personal information for another purpose unless it obtains the person's consent, or the use or disclosure is permitted under the Privacy Act. This is all in accordance with APP 6.

In relation to the storage and security of personal information, the Privacy Policy outlines the safeguards implemented by the Commission to protect personal information in its holdings against misuse, interference and loss, and from unauthorised access, modification or disclosure. The Privacy Policy also notes that when no longer required, the Commission destroys or archives personal information in a secure manner and as permitted by relevant legislation, including the Privacy Act and the *Archives Act 1983*. These personal information handling practices of the Commission are in compliance with its obligations under APP 11.

Further, as noted in the explanatory statement, the Commission and its staff are bound by legislative provisions in the Commission Act that regulate handling of 'protected information' collected by the Commission in carrying out its functions. All personal information, including sensitive information, acquired under or for the purposes of the Commission Act or the *Aged Care Act 1997* (Aged Care Act) is protected information for the purposes of those Acts. A breach of the protected information provisions under either Act is an offence, punishable by 2 years imprisonment. The existing penalties for misuse and unauthorised disclosure of protected information under the Commission Act and the Aged Care Act will protect and ensure safe handling of the information collected by the Commission.

Whether other, less rights-restrictive alternatives would be effective to achieve the same objective

The collection, use and disclosure of personal information relating to compliance with the Code is necessary and appropriate because the personal information:

- is directly related to the performance of the Commissioner's Code functions under section 16(da) of the Commission Act (and more broadly, the Commissioner's function under section 16(a) to protect and enhance the safety, health, wellbeing and quality of life of aged care recipients). The Code functions of the Commissioner are outlined in section ISA of the Commission Act and provide a function for the Commissioner to take action in relation to compliance with the Code by approved providers, and their aged care workers and governing persons, and to do anything else relating to that matter as specified in the Commission Rules
- the use of the personal information will relate to an actual, alleged or suspected instance of non-compliance with the Code by an approved provider or their aged care worker or governing person.

It is important for the Commissioner to be able to collect, use and disclose information, including personal information, as part of investigating alleged breaches of the Code in order to be able to effectively investigate and ascertain whether a breach has occurred and where a breach has occurred, to ensure that appropriate action is taken to protect aged care recipients.

The Commissioner's discretion in taking certain actions (including information gathering and sharing) in relation to compliance with the Code is necessary to ensure that the Commissioner can take the most reasonable action allowable to protect the health, safety and wellbeing of aged care recipients, noting that any actions are in accordance with the Commission Rules, the Commission Act, other relevant legislation and the principles of administrative law. If the Commissioner's discretion was limited, the Commissioner's ability to protect the health, safety and wellbeing of aged care recipients could be limited and could potentially cause harm.

The Commission's information gathering and sharing powers under the Code and Banning Orders Instrument are therefore proportionate having regard to the above. There are no effective less rights-restrictive alternatives available for the Commission to achieve the same objective.

Concluding comments

International human rights legal advice

2.77 A key factor in assessing proportionality is whether the information gathering measures are sufficiently circumscribed.[7] In this regard, the minister advised that the Commissioner will exercise their powers in accordance with all relevant legislative requirements and have due regard to procedural fairness and administrative law principles. The minister stated that the Commission's internal operational policies and processes outline what decision-makers should consider in deciding whether to exercise a power or function as well as any mandatory requirements or preferred/expected policy positions relating to the exercise of a specific power or function. The minister also stated that the Commissioner's information gathering powers are circumscribed by the Commission's statutory obligations under the *Privacy Act 1988* (Privacy Act) and the Australian Privacy Principles (APPs) as well as the Commission's privacy policy.

2.78 The minister advised that the information-gathering powers may be exercised when a potential non-compliance with the Code is identified and the Commissioner requires further information to determine compliance, the extent of any non-compliance and/or the appropriate compliance response. The circumstances when disclosure of personal information relating to compliance may be necessary and appropriate include: to promote the safety and rights of other persons; where another entity, such as the NDIS Commission, requires the information to exercise their powers or perform their functions; or where an approved provider requires the information to take appropriate action in relation to the non-compliance.

2.79 The Commission's internal operational policies and processes may assist to circumscribe the Commissioner's information-gathering powers in practice. For example, the Commission's Compliance and Enforcement Policy appears to provide the Commissioner with some guidance as to the scope and manner in which the information-gathering powers should be exercised. It states that the 'question to be decided is whether, based on logically supporting material, the decision-maker is reasonably satisfied that the provider has not complied with the Code or is not complying with one or more of its responsibilities'.[8] However, the circumstances in which the information gathering powers should be exercised, and the threshold that is required to be met, before the Commissioner takes action in relation to compliance, are not specified in the legislative instrument itself. There is no requirement in the

7 International human rights law jurisprudence states that laws conferring discretion on decision-makers must indicate with sufficient clarity the scope of any such discretion and the manner of its exercise. See, e.g. *Hasan and Chaush v Bulgaria,* European Court of Human Rights App No.30985/96 (2000) [84].

8 Commission, *Compliance and Enforcement Policy*, p. 8.

instrument, for example, for the Commissioner to reasonably suspect non-compliance before exercising their information gathering powers. As it is currently drafted, the measure confers on the Commissioner a broad discretion to take any action they consider reasonable in the circumstances in relation to compliance by an approved provider or an individual who is or was an aged care worker or governing person of an approved provider (noting there is no time limit restricting how long ago a person may have been employed in the aged care sector and remain liable to such action).[9] The measure empowers the Commissioner to, among other things, discuss the compliance with any other person, request documents or information from any person and refer that information to another person or body. Given the broad terms in which the information-gathering powers are drafted and noting that discretionary safeguards are less stringent than the protection of statutory processes (as they may be amended or revoked at any time and there is no requirement to follow them) there is some risk that, depending on how the Commissioner's powers are exercised in practice, the measure may not be sufficiently circumscribed.

2.80 As to the existence of safeguards, the minister advised that the collection, use, storage and disclosure of personal information is in compliance with the Privacy Act, the APPs and the Commission's privacy policy. The latter provides that the Commission will only collect information that is necessary for the function or activity being carried out, and will only use and disclose personal information for the particular purpose for which it was collected, unless the person to whom the information relates provides their consent or the use or disclosure is permitted under the Privacy Act. The privacy policy also outlines how personal information is to be stored, providing that when the information is no longer required, the Commission should destroy or archive the information in a secure manner. Further, the minister advised that the Commission and its staff are bound by the Commission Act, which makes it an offence, punishable by two years imprisonment, to use or disclose protected information unless authorised to do so under the Act.[10] The minister stated that these protected information provisions will protect and ensure safe handling of personal information collected by the Commission.

2.81 Prohibiting the unauthorised use or disclosure of personal information collected by the Commissioner may assist with proportionality to the extent that it restricts interference with privacy beyond what is strictly necessary. However, having regard to the breadth of the measure, it is not clear that the Commission's privacy policy would adequately limit the scope of personal information which may be collected and the purposes for which it may be used and disclosed. Further, the committee has previously noted that while compliance with the Privacy Act and APPs may offer some safeguard value, it is not a complete answer to concerns about

9 Section 23BC and subsection 23BD(1), noting paragraph (f).

10 *Aged Care Quality and Safety Commission Act 2018*, section 60.

interference with the right to privacy for the purposes of international human rights law. This is because the APPs contain a number of exceptions to the prohibition on use or disclosure of personal information for a secondary purpose, including where its use or disclosure is authorised under an Australian law,[11] which may be a broader exception than permitted in international human rights law. There is also a general exemption in the APPs regarding the disclosure of personal information for a secondary purpose where it is reasonably necessary for one or more enforcement related activities conducted by, or on behalf of, an enforcement body.[12]

2.82 A further safeguard identified by the minister is section 23BG of the Code, which provides that the Commissioner must have due regard to procedural fairness. The minister stated that decision-makers will make their decisions based on relevant considerations, will act in a manner that affords procedural fairness to those affected by a decision, and will explain those decisions in a clear way that people can understand. Affording procedural fairness assists with the proportionality of the measure.

2.83 Finally, the minister advised that there are no effective less rights-restrictive alternatives available for the Commission to achieve the same objective. The minister stated that the Commissioner's discretion to take certain actions in relation to compliance, including gathering and sharing information, is necessary to ensure the Commissioner can take the the most reasonable action allowable to protect the health, safety and wellbeing of aged care recipients. The minister noted that if this discretion was limited, the Commissioner's ability to protect the health, safety and wellbeing of aged care recipients could be limited and could potentially cause harm. While acknowledging the importance of taking compliance action to protect the safety of aged care recipients, questions remain as to whether there are less rights restrictive ways of achieving this legitimate objective. For example, the potential interference with the right to privacy may be lessened if the measure was more narrowly circumscribed (for instance, by including in the legislative instrument itself the threshold that is required to be met before the Commissioner takes action in relation to compliance).

2.84 In conclusion, protecting the safety of vulnerable aged care recipients is a legitimate objective for the purposes of international human rights law, and taking action in relation to compliance with the Code of Conduct appears to be rationally connected to (that is, likely to be effective to achieve) that objective. However, noting the breadth of the measure and that many of the accompanying safeguards are discretionary, there is some risk that, depending on how the Commissioner's powers are exercised in practice, the measure may not be proportionate in all circumstances.

11 APP 9; APP 6.2(b).

12 APP; 6.2(e).

Committee view

2.85 The committee thanks the minister for this response. The committee notes 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 also notes that establishing broad information gathering and sharing powers in relation to compliance also engages and limits the right to privacy.

2.86 The committee considers that protecting the safety of vulnerable aged care recipients is an important and legitimate objective for the purposes of international human rights law and taking action in relation to compliance is likely to be effective to achieve this objective. The committee notes the minister's advice that conferring discretion on the Commissioner to take compliance action is necessary to ensure the most reasonable action is taken to protect the health, safety and wellbeing of aged care recipients. The committee considers that the measure is accompanied by some safeguards that may assist with proportionality. However, noting the breadth of the measure and that many of the accompanying safeguards are discretionary, the committee considers that, depending on how the Commissioner's powers are exercised in practice, there is some risk that the measure may not be a proportionate limit on the right to privacy in all circumstances.

Suggested action

2.87 The committee considers that the proportionality of the measure may be assisted were the legislative instrument amended to include in more detail the circumstances in which the Commissioner's information gathering powers may be exercised and the threshold that should be met before the Commissioner takes action in relation to compliance.

2.88 The committee recommends that the statement of compatibility with human rights be updated to reflect the information provided by the minister.

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

Publication of a register of banning orders

2.90 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.[13] The *Aged Care Quality and Safeguard Commission Act 2018* requires that a register of banning orders must

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

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 subject).[14] 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.[15]

2.91 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.[16] 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.[17]

Summary of initial assessment

Preliminary international human rights legal advice

Right to health; rights of persons with disability; and right to privacy and reputation

2.92 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 [2.4].

2.93 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.

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

15 Section 23CB.

16 Sections 23CE-CF.

17 Section 23CG.

2.94 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, be rationally connected to that objective and proportionate to achieving that objective.

2.95 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. The key question is whether the measure is proportionate.

Committee's initial view

2.96 The committee considered 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 considered 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 considered 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.

2.97 However, the committee required further information to determine whether the measure constitutes a proportionate limit on the right to privacy and sought 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

(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.

Minister's response[18]

2.98 The minister advised:

> *Whether a 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*

18 The minister's response to the committee's inquiries was received on 24 February 2023. This is an extract of the response. The response is available in full on the committee's website.

While the majority of aged care workers exceed expectations in their care of older Australians/ like in all industries, there will be occasions when individuals are not suited to this highly trusted work. The Code and Banning Orders Instrument ensures that the Aged Care Quality and Safety Commission is able to consider matters as they arise, investigate if required and respond to ensure ongoing compliance. This approach upholds principles of safety and dignity for both the workforce and care recipients. The introduction of the Code and Banning Orders Instrument is a positive step forward for the sector and will support aged care providers, their governing persons and aged care workers to deliver safe and quality care to older Australians.

Banning orders are considered one of the Commission's most serious enforcement actions and will only be appropriate for the most serious cases of poor conduct. This can be evidenced in only four banning orders having been made since 1 December 2022. Those named are currently subject to criminal justice processes in relation to alleged fraud and acts of physical violence directly involving care recipients. With approximately 380,000 people working in aged care this is a very small proportion of the workforce who may find themselves subject to a banning order. Never-the-less, the Government takes seriously the need for quality and safety in aged care and this regulatory option is an important tool in the suite of safeguards being delivered in line with the Royal Commission's recommendations.

In order to ensure that the register of banning orders (Register) functions properly, it is considered necessary for the personal information of banned individuals to be made public.

This is due to the importance of preventing banned individuals from working in the aged care sector and the potential significant consequences for public health and safety if this does not happen.

This aims to ensure the safety of aged care recipients by providing future employers notice of individuals who were found unsuitable to provide aged care or specified types of aged care services.

The Department has advised this provision aligns with the approach taken under the National Disability Insurance Scheme (see section 73ZS of the *National Disability Insurance Scheme Act 2013*].

The Australian Government is seeking to align worker regulation arrangements across the aged care and disability support sector where it is reasonable and practical to do so. Worker screening is an area where the Australian Government is seeking alignment. While worker screening has not yet been expanded to aged care, individuals with an NDIS worker screening clearance can rely on this clearance to work in the aged care sector. This has the effect of preventing banned individuals from working in either the aged care sector or in the National Disability Insurance Scheme.

The publication of the Register is also intended to act as a deterrent to individuals from engaging in conduct that could result in the issuing of a banning order.

Publication of this information is considered reasonable, necessary and proportionate in order to protect the safety of vulnerable older Australians.

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

It is not intended that the date of birth of each person subject to a banning order will be published as a matter of routine. The Commission will consider whether there is a concern about misidentification for each person subject to a banning order, noting that the inclusion of additional identifying information is to safeguard the identities, reputations, and rights of third parties with similar names. The date of birth will only be added where misidentification is of sufficient concern. The date of birth information previously published has been removed and this will not be standard practice.

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

Under subsection 74GI(4) of the Commission Act, the Commissioner must ensure that the Register is kept up to date. Sections 23CE and 23CF of the Code of Conduct and Banning Order Instrument are consistent with APP 13 in Schedule 1 to the *Privacy Act 1988*. APP 13 sets out minimum procedural requirements for correcting personal information an entity holds about an individual.

The Commission undertake their functions in accordance with APP 13. It further operates on the basis that there is nothing in APP 13 which excludes information contained in a Commonwealth record (such as APP 11. 2(c) which relates to the destruction or deidentification of personal information). The Commission understands information contained in records in its possession or control would also be a Commonwealth record and subject to the requirements of the *Archives Act 1983*.

As noted by the committee, the Commissioner's general discretion under section 23CF of the Instrument to correct information in the Register is a safeguard in terms of ensuring that the content of the register is accurate. The Commissioner's discretion, rather than obligation, to correct personal information in the Register is consistent with APP 13, which does not impose an obligation on APP entities (such as the Commission) to correct personal information in all instances. Rather, APP 13 requires that APP entities must take reasonable steps to correct an individual's personal information, and must only do so if it can be satisfied that the information is incorrect. The level of discretion afforded to the Commissioner under section 23CF of the Instrument is therefore appropriate having regard to the requirements of

APP 13. The discretion also takes into account that there may be other legal obligations in certain circumstances (for example, where a family and domestic violence protection order is in place) which may prevent the Commissioner from publishing certain information to the register.

APP 13 operates alongside and does not replace other informal or legal procedures by which an individual can seek correction of their personal information, including under the *Freedom of Information Act 1982*.

Concluding comments

International human rights legal advice

2.99 As to 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, the minister stated that banning orders are considered one of the Commission's most serious enforcement actions and will only be appropriate for the most serious cases of poor conduct. The minister stated that a small number of banning orders (four) have been made since December 2022, relative to the number of employees in the aged care sector (380,000 people). The minister also stated that it is considered necessary for the personal information of banned individuals to be made public to ensure consistency with the approach taken in relation to the NDIS banning order register. Lastly, the minister stated that the publication of the register is to enable a banning order to serve as a deterrent from engaging in conduct that could result in such an order.

2.100 It remains unclear, on the basis of this advice, as to whether publishing the banning order on a publicly accessible website is the least rights restrictive approach, such as to ensure any limitation on privacy is proportionate to the objective sought to be achieved. It is not clear that the approach taken in relation to NDIS banning orders is directly comparable. It appears that aged care sector workers would be employed by aged care providers, and not by aged care recipients directly. By contrast, it appears that NDIS workers may be engaged directly by NDIS participants as part of their NDIS plan. As such, the fact that a particular person is subject to an aged care sector banning order would appear to be of most immediate regulatory significance to an aged care service provider screening prospective staff, rather than to aged care recipients themselves. Aged care service providers would be required to screen employees prior to their employment, including by reference to the banning order register. It is not clear why the register cannot be made available to all aged care providers, and any other organisation employing workers in the aged care sector, without the need to make the register publicly available. Further, it is not clear that publication of a banning order would be necessary to serve as a deterrent, noting that conduct giving rise to such an order may give rise to criminal charges, and being on the banning register (whether it be publicly available or not) results in a person not being eligible for employment as an aged care worker. Consequently, it has not been established that a less rights restrictive alternative (such as limiting access to employers via a

secure database or access by request) would not be as effective in achieving the objective of protecting the safety of vulnerable aged care recipients.

2.101 In addition, is noted that the banning order register was previously included on the departmental website as a PDF attachment,[19] and did not seem to appear when a person named on the register was searched via a web search, such as google. However, it appears that the register has since been embedded as text on a departmental web sub-page, and if someone conducts a general google search of a person's name, for purposes unrelated to checking the banning order register, the listing on the banning order will appear. Inclusion of the public register would, therefore, appear to constitute a greater interference with the right to privacy than previously. No information has been provided to explain why this has changed.

2.102 With respect to the inclusion of a person's date of birth on the register, the minister stated that it is not intended that the date of birth of each person subject to a banning order will be published as a matter of routine. The minister stated that the Commission will consider whether there is a concern about misidentification for each person subject to a banning order, and that a person's date of birth will only be added where misidentification is of sufficient concern. With respect to the version of the register of banning orders published online at the time of the initial consideration of the rules (which included the date of birth of the only listed individual, and included a column that suggested a date of birth would be included as a matter of course), the minister stated that the date of birth information previously published has been removed and this will not be standard practice. It assists with the proportionality of the measure that a person's date of birth will not be included on the register as a matter of course. In instances where it may be included, seeking to ensure that persons with the same name as someone subject to a banning order are not misidentified as being subject to the order is clearly an important consideration. However, the countervailing consideration is that inclusion of a person's date of birth in such circumstances will likely exacerbate the interference with the named person's privacy. In this regard, it is unclear why this information was initially included on the register itself, and whether there were sufficient internal guidelines in place to ensure that such information was only included in accordance with the considerations the minister has outlined.

2.103 As to 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, the minister stated that this requirement is consistent with Australian Privacy Principle (APP) 13 – the 'minimum procedural requirements' for correcting personal information held about an individual. APP 13 requires that relevant entities must take reasonable steps to correct an individual's personal information, and must

19 At February 2023, when these rules were initially considered. See, Parliamentary Joint Committee on Human Rights, *Report 1 of 2023* (8 February 2023), pp. 37-45.

only do so if it can be satisfied that the information is incorrect. The minister further stated that there may be other legal obligations in certain circumstances (for example, where a family and domestic violence protection order is in place) which may prevent the Commissioner from publishing certain information to the register. However, it remains unclear why establishing an obligation to correct personal information (subject to certain exceptions, such as where there is a risk to personal safety) would not be appropriate, particularly noting the minister's advice that APP 13 constitutes only the minimum relevant procedural requirement.

Committee view

2.104 The committee thanks the minister for this response. 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. In doing so, the 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.

2.105 However, the committee considers that publishing a register of persons subject to a banning order also limits the right to privacy. The right to privacy may be limited if it is demonstrated it is reasonable and necessary to do so. The committee considers the measure is directed towards this important and legitimate objective of protecting vulnerable older Australians. However, the committee considers it has not been demonstrated that publishing the banning order register on a publicly available website (that means that the names of those on the register will appear in a general google search) constitutes a proportionate limit on the right to privacy. In particular, the committee considers that it is not clear that making the register available as an online resource accessible via a secure portal by aged care providers would not be as effective to achieve the objective of protecting vulnerable older Australians.

Suggested action

2.106 The committee considers that the proportionality of this measure may be assisted were the instrument amended to:

(a) ensure the register of banning orders is made readily available to all aged care providers but not published on a public website; and

(b) require the Commissioner to correct inaccurate or misleading information on the register (when this has been brought to their attention), subject to a discretion to not make such a correction where there are extenuating circumstances such as a risk to a person's safety.

2.107 The committee notes the minister's advice that the register has been amended since the committee's initial consideration of these rules, specifically the removal of the date of birth of one person listed where it would appear there was

no basis for its inclusion. The committee recommends the department's internal guidelines relating to the permissible inclusion of information on the register to be reviewed in light of this.

2.108 The committee recommends that the statement of compatibility with human rights be updated to reflect the information provided by the minister.

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

Mr Josh Burns MP

Chair