



# Parliamentary Joint Committee on Human Rights

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Human rights scrutiny report

Report 5 of 2023

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# Membership of the committee

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Senator Karen Grogan	South Australia, ALP
Ms Peta Murphy MP	Dunkley, Victoria, ALP
Senator Jacinta Nampijinpa-Price	Northern Territory, CLP
Senator Matthew O'Sullivan	Western Australia, LP
Mr Graham Perrett MP	Moreton, Queensland, ALP
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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.<sup>1</sup> 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.<sup>2</sup>

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<sup>1</sup>

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

#### Chapter 1: New and continuing matters

Bills introduced 20 March to 30 March 2023	29
Bills commented on in report <sup>2</sup>	6
Private members or senators' bills that may engage and limit human rights	1

#### Chapter 2: Concluded

Bills committee has concluded its examination of following receipt of ministerial response	1
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#### Australian Security Intelligence Organisation Amendment Bill 2023

No comment

#### Australia Day Bill 2023

No comment

#### Constitution Alteration (Aboriginal and Torres Strait Islander Voice) 2023

<i>Advice to Parliament</i>	<b>Establishment of an Aboriginal and Torres Strait Islander Voice</b> <i>Rights to take part in public affairs, self-determination, and equality and non-discrimination</i>
	The bill, by facilitating the holding of a referendum and – if the referendum were

- 1 This section can be cited as Parliamentary Joint Committee on Human Rights, Report snapshot, *Report 5 of 2023*; [2023] AUPJCHR 38.
- 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.

[pp. 11-19](#)

to be successful, by amending the Constitution – engages the rights to take part in public affairs, self-determination and equality and non-discrimination.

The committee considers that as each person enrolled to vote in Commonwealth elections may participate in the relevant referendum, the bill promotes the right of all citizens to take part in public affairs. The committee also considers that if the Constitution were to be amended to establish the Voice, this would also promote the rights of Aboriginal and Torres Strait Islander peoples to participate in public affairs; the right to self-determination, particularly the obligation to consult with Indigenous peoples in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them; and the right to equality and non-discrimination, and is therefore compatible with these rights.

The committee does not consider that this bill would facilitate a special measure under international human rights law; rather, it is designed to promote the permanent rights of Aboriginal and Torres Strait Islander peoples as recognised in the international treaties. In relation to the right to equality and non-discrimination of non-Indigenous Australians, the committee notes differential treatment will not constitute unlawful discrimination under international human rights law if the differential treatment is based on reasonable and objective criteria. The committee considers any differential treatment is aimed at achieving the legitimate objective of realising Aboriginal and Torres Strait Islander peoples' right to self-determination and would not negatively affect the ability of members of the broader community to enjoy or exercise their rights and freedoms. The committee considers the bill is compatible with the right to equality and non-discrimination.

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### Crimes And Other Legislation Amendment (Omnibus) Bill 2023

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*Seeking  
information*

#### **Suspension of witness protection and assistance**

*Rights to life and security of person*

[pp. 20-25](#)

This bill, among other things, seeks to enable the temporary suspension of a participant's protection and assistance provided under the National Witness Protection Program, either at the request of the participant or at the discretion of the Australian Federal Police (AFP) Commissioner or a delegate.

Suspending witness protection or assistance for a participant at the discretion of the AFP may expose the participant to possible harm. As a result, the measure engages and may limit the rights to life and security of person. The committee is seeking further information from the Attorney-General to assess the compatibility of this measure with these rights.

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### Criminal Code Amendment (Prohibition of Nazi Symbols) Bill 2023

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No comment

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### Customs Tariff Amendment (Incorporation of Proposals) Bill 2023

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No comment

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### Digital Assets (Market Regulation) Bill 2023

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No comment

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### Ending Poverty in Australia (Antipoverty Commission) Bill 2023

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No comment

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### Fair Work Legislation Amendment (Protecting Worker Entitlements) Bill 2023

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No comment

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### Fair Work Amendment (Right to Disconnect) Bill 2023

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No comment

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### Family Law Amendment Bill 2023

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Advice to  
Parliament

[pp. 26-36](#)

#### Changes to the family law system

*Rights of the child; equality and non-discrimination; culture; protection of the family; fair hearing; privacy; freedom of expression*

This bill seeks to amend the *Family Law Act 1975* to make significant changes to the family law system. The proposed changes include: altering the factors to be considered when making parenting arrangements in the best interests of the child; repealing the existing presumption of equal shared parenting when parenting orders are made; limiting the circumstances in which a final parenting order may be reconsidered; amending the definitions in the Family Law Act related to the concept of 'family' so they are more inclusive of Aboriginal and Torres Strait Islander culture and traditions and recognise that persons may be related to a child in accordance with their Indigenous culture; and introducing new 'harmful proceedings orders' to restrain a party to proceedings from making further family court applications without first obtaining leave from the court.

The committee notes that these measures promote a number of rights, in particular the rights of the child, the right to culture, and the right to equality and non-discrimination. They would also limit certain human rights, including the right to a fair hearing and the right to protection of the family.

The committee considers that having regard to the comprehensive information set out in the statement of compatibility, and the extensive consideration of these matters in previous inquiries, these would constitute permissible limitations on human rights. However, the committee notes that the statement of compatibility does not recognise the engagement of the right to protection of the family, and [recommends](#) that it be updated to reflect this.

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### Family Law Amendment (Information Sharing) Bill 2023

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Advice to  
Parliament

[pp. 37-41](#)

#### Information sharing between agencies and family law courts

*Right of the child; equality and non-discrimination; privacy*

This bill would amend the *Family Law Act 1975* to provide for a broader court-led information sharing network for information relating to family violence, child

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abuse and neglect risks in parenting proceedings. This would enable the court to order an 'information sharing agency' (to be defined in regulations) to inform the court whether it possesses information relating to abuse, neglect or family violence or any risk or potential risk of such matters, and give the court particulars of the information, having regard to information sharing safeguards as prescribed by regulations.

By facilitating the sharing of such information these measures may promote the rights of the child (including to protection from violence, abuse or neglect) and the rights of women to non-discrimination (as these measures may assist in the elimination of gender-based violence against women). They would also limit the right to privacy.

The committee considers that if the measures operate in the manner set out in the explanatory memorandum, which suggests the regulations will limit the type of agencies who can share information and will set out information sharing safeguards, the limit on the right to privacy may be proportionate in practice. However, as these safeguards are not specified in the bill itself it is difficult to fully assess the compatibility of the bill with the right to privacy. The committee has [recommended](#) that the proportionality of the bill may be assisted if it were amended to specify the types of agencies that may be prescribed, and to include the broad principles to be included as information sharing safeguards.

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#### **Health Insurance Amendment (Prescribed Dental Patients and Other Measures) Bill 2023**

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No comment

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#### **Infrastructure Australia Amendment (Independent Review) Bill 2023**

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No comment

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#### **Inspector-General of Aged Care Bill 2023**

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No comment

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#### **Inspector-General of Aged Care (Consequential and Transitional Provisions) Bill 2023**

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No comment

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#### **Interactive Gambling Amendment (Credit Card Ban and Acknowledgement of Losses) Bill 2023**

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No comment

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#### **Jobs And Skills Australia Amendment Bill 2023**

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No comment

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#### **Nature Repair Market Bill 2023**

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No comment

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**Nature Repair Market (Consequential Amendments) Bill 2023**

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No comment

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**National Security Legislation Amendment (Comprehensive Review and Other Measures No. 2) Bill 2023**

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*Advice to  
Parliament*

**Expanded permissible disclosures of spent convictions**

*Right to privacy*

[pp. 42-45](#)

This bill seeks to make a number of amendments, including to the *Crimes Act 1914* to expand the exclusions in the spent convictions scheme, which would permit the Australian Security Intelligence Organisation (ASIO) to use, file or record and disclose spent convictions information in the exercise of its functions or the performance of its functions.

This limits the right to privacy. The statement of compatibility identifies that the measure limits this right, but does not set out to whom ASIO may disclose personal information about spent convictions, or any applicable safeguards.

The committee considers the measure seeks to achieve the legitimate objective of allowing ASIO access to the information necessary to perform its functions and to protect Australia from security threats. In considering the proportionality of the measure, the committee considers it would have been useful had the statement of compatibility identified any applicable safeguards. The committee appreciates that this information may not be available on national security grounds, however, without information as to whom the spent conviction information may be disclosed, it is not possible to fully assess the compatibility of this measure with the right to privacy.

The committee draws this matter to the attention of the Attorney-General and the Parliament.

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**Northern Australia Infrastructure Facility Amendment (Miscellaneous Measures) Bill 2023**

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No comment

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**Online Safety Amendment (Breaking Online Notoriety) Bill 2023**

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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.

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**Productivity Commission Amendment (Electricity Reporting) Bill 2023**

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No comment

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**Renewable Energy (Electricity) Amendment (Cheaper Home Batteries) Bill 2023**

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No comment

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## Social Security (Administration) Amendment (Income Management Reform) Bill 2023 and related instruments<sup>3</sup>

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Advice to  
Parliament

[pp. 58-80](#)

### **The enhanced income management regime**

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

This bill seeks to expand access to the enhanced income management regime under Part 3AA of the *Social Security (Administration) Act 1999* (the Act), including by introducing eligibility criteria for both compulsory and voluntary participation in the new regime. The bill would also specify portions of welfare payments that are to be 'qualified' and 'unqualified' as well as authorise the disclosure of personal information between relevant authorities for the purposes of the operation of the enhanced income management regime.

The related legislative instruments firstly set out the terms and conditions relating to the establishment, ongoing maintenance and closure of BasicsCard bank accounts, including the limitations on the use of the qualified portion of a person's welfare payment, and secondly specify the Ngaanyatjarra Lands as an area for the purposes of the eligibility criteria relating to vulnerable welfare payment recipients.

The committee notes that the bill and related instruments seek to facilitate the transition to the enhanced income management regime, which provides participants with access to a BasicsCard bank account and accompanying debit card (known as a SmartCard) that offers superior technology and improved banking functions. The committee considers this aspect of the legislation to be a positive measure, noting that the new SmartCard will improve participants' access to businesses, including access to over one million outlets across Australia, and may reduce the stigma associated with the existing BasicsCard.

However, in facilitating this transition, the bill and related instruments extend all measures relating to income management to the enhanced income management regime, and so the committee needs to scrutinise the remaking of the law relating to income management.

By compulsorily subjecting an individual to the enhanced income management regime and restricting how they may spend a portion of their social security payment, the measure limits the rights to social security, privacy and possibly an adequate standard of living as well as the rights of the child (to the extent that the measures apply to children). The measures also engage and limit the right to equality and non-discrimination insofar as they have a disproportionate adverse impact on certain groups of people, including Aboriginal and Torres Strait Islander persons.

The committee notes that while the general objective of the enhanced income management regime is important, it is not clear that expanding access to this regime, which effectively extends mandatory income management into the

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3 Social Security (Administration) (Declinable Transactions and BasicsCard Bank Accounts) Determination 2023 [F2023L00189] and Social Security (Administration) (Declared income management area — Ngaanyatjarra Lands) Determination 2023 [F2023L00190].

foreseeable future, is, for the purposes of international human rights law, a necessary measure that addresses a pressing and substantial concern. In the absence of adequate safeguards and sufficient flexibility to consider individual circumstances, as well as the potentially significant interference with human rights that may result from compulsory participation in the regime, the committee considers that the legislation risks impermissibly limiting the rights to social security, privacy, equality and non-discrimination and the rights of the child. With respect to the right to an adequate standard of living, the committee considers that the availability of mixed merchant agreements would appear to mitigate the risk that this right would be disproportionately limited.

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

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### **Social Services Legislation Amendment (Child Support Measures) Bill 2023**

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*Seeking  
information*

#### **Departure authorisation certificates**

##### *Right to freedom of movement*

[pp. 46-50](#)

This bill would expand the circumstances in which a child support debtor who is subject to a departure prohibition order (restricting them from leaving Australia) may be refused a departure authorisation certificate (which would allow them to leave Australia for a foreign country). It would provide that a certificate cannot be issued solely where a person has given a security for their return (as the law currently provides). The bill would require that a person must have given a security for their return and have satisfied the Child Support Registrar that they will wholly or substantially discharge the outstanding child support or carer liability (or the debt is irrecoverable or they will likely no longer have such a debt).

This limits the right to freedom of movement. The committee considers further information is required to assess the compatibility of the measure with this right. The committee is seeking further information from the Minister for Social Services.

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### **Special Recreational Vessels Amendment Bill 2023**

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No comment

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### **Treasury Laws Amendment (Refining and Improving Our Tax System) Bill 2023**

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No comment

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### **Veterans' Affairs Legislation Amendment (Miscellaneous Measures) Bill 2023**

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No comment

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## Legislative instruments

### Chapter 1: New and continuing matters

Legislative instruments registered on the [Federal Register of Legislation](#) between 3 March and 28 March 2023<sup>4</sup> 172

Legislative instruments commented on in report<sup>5</sup> 1

### Chapter 2: Concluded

Legislative instruments committee has concluded its examination of following receipt of ministerial response 4<sup>6</sup>

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

*Advice to Parliament*

[pp. 81-86](#)

#### **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.

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- 4 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](#).
- 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.
- 6 Note that two of these instruments are considered in the above bill entry relating to the Social Security (Administration) Amendment (Income Management Reform) Bill 2023.

The committee considers that monitoring information about vaccination coverage in order to identify health-related issues constitutes a legitimate objective and the measure is rationally connected to that objective. In relation to proportionality, 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. The committee considers other privacy protections in legislation are insufficient noting that the broad discretionary ministerial power would override any such protections. The committee has [recommended](#) that the existing broad ministerial discretion in the *Australian Immunisation Register Act 2015* be amended to better protect the right to privacy.

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### Family Law (Bilateral Arrangements—Intercountry Adoption) Regulations 2023 [\[F2023L00309\]](#)

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Seeking  
information

#### **Intercountry adoption with prescribed overseas jurisdictions**

*Rights of the child and right to protection of the family*

[pp. 51-57](#)

The regulations declare the Republic of Korea and Taiwan as 'prescribed overseas jurisdictions' for the purposes of bilateral arrangements between Australia and these overseas jurisdictions with respect to intercountry adoptions. The regulations also specify when an intercountry adoption will be recognised and effective under Australian law.

By facilitating intercountry adoption, the committee considers the regulations engage the rights of the child, particularly those rights relating to intercountry adoption, and the right to protection of the family. The committee notes that the statement of compatibility states that the regulations have a positive impact on these rights as they facilitate legal recognition of intercountry adoptions.

However, noting that intercountry adoption may involve the separation of families and involves the placement of a child in alternative care outside their country of origin, the committee considers there may be risk that the rights of the child and the right to protection of the family are also limited if the intercountry adoption is not undertaken in compliance with international human rights law. The committee is seeking further information from the minister to assess the compatibility of the regulations with these rights.

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### Social Security (Tables for the Assessment of Work-related Impairment for Disability Support Pension) Determination 2023 [\[F2023L00188\]](#)

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Advice to  
Parliament

#### **Eligibility for the Disability Support Pension**

*Rights to social security, adequate standard of living, equality and non-discrimination and rights of persons with disability*

[pp. 87-98](#)

This legislative instrument sets out the rules that must be used when assessing whether a person meets the work-related impairment level for the purposes of assessing eligibility for the Disability Support Pension (DSP).

By supporting the provision of a social security payment specifically to support persons with disability, this measure promotes the rights to social security, an adequate standard of living, equality and non-discrimination and the rights of persons with disability for those who are eligible for the DSP. However, in restricting which persons may be eligible for the DSP according to the work-

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related impairment tables set out in the instrument, the measure also limits these human rights.

The committee notes the advice from the Minister for Social Services that DSP provides targeted assistance to those who are unable to work to fully support themselves because of their disability or medical condition. However, the committee notes there are questions as to whether this assessment instrument is effective to achieve the stated objective of targeting assistance towards those who cannot fully support themselves – noting that those with complex co-morbidities may also need to complete a program of support for 18 months before being eligible for DSP. Therefore, in setting the impairment tables this instrument may not constitute a permissible limitation on the right to equality and non-discrimination based on disability. The committee further notes that the JobSeeker payment is the available social security benefit for those ineligible for DSP, and noting concerns that have been raised as to whether that payment is sufficient to meet a person's basic needs, it is not clear if restricting access to the DSP in the manner set out in the instrument may result in Australia not fulfilling its minimum core obligations regarding the rights to social security and an adequate standard of living.

The committee draws these human rights concerns to the attention of the Minister for Social Services and the Parliament.

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### **Instruments imposing sanctions on individuals<sup>7</sup>**

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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.<sup>8</sup> 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.

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7 See Autonomous Sanctions (Designated Persons and Entities and Declared Persons—Thematic Sanctions) Amendment (No. 2) Instrument 2023 [F2023L00271; and Autonomous Sanctions (Designated Persons and Entities and Declared Persons—Russia and Ukraine) Amendment (No. 3) Instrument 2023 [F2023L00272].

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



## Chapter 1

### New and ongoing matters

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

#### Bills

### Constitutional Alteration (Aboriginal and Torres Strait Islander Voice) 2023<sup>1</sup>

<b>Purpose</b>	This bill seeks to introduce a new Chapter into the Constitution to recognise Aboriginal and Torres Strait Islander peoples as the First Peoples of Australia and to provide for the establishment of a new constitutional entity called the Aboriginal and Torres Strait Islander Voice
<b>Portfolio</b>	Attorney-General
<b>Introduced</b>	House of Representatives, 30 March 2023
<b>Rights</b>	Participation in public affairs; self-determination; equality and non-discrimination

#### Establishment of an Aboriginal and Torres Strait Islander Voice

1.2 The bill seeks to introduce a new Chapter into the Commonwealth Constitution providing for the establishment of a constitutional entity called the 'Aboriginal and Torres Strait Islander Voice' (the Voice). The proposed new Chapter IX, entitled 'Recognition of Aboriginal and Torres Strait Islander Peoples' would:

- recognise Aboriginal and Torres Strait Islander peoples as the First Peoples of Australia;
- provide for the establishment of the Voice;

1 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Constitutional Alteration (Aboriginal and Torres Strait Islander Voice) 2023, *Report 5 of 2023*; [2023] AUPJCHR 39.

- provide that the Voice may make representations to the Parliament and the Executive Government of the Commonwealth on matters relating to Aboriginal and Torres Strait Islander peoples; and
- confer on the Parliament the power to make laws with respect to matters relating to the Voice, including its composition, functions, powers and procedures.<sup>2</sup>

1.3 The process of constitutional alteration commences with a bill in Parliament. If the bill passes the Parliament (with an absolute majority in both Houses), a referendum is held. For the Constitution to be amended, a majority of electors of the Commonwealth, and a majority of the electors in a majority of the states, must vote in favour of the amendment at that referendum.<sup>3</sup>

### **International human rights legal advice**

#### ***Rights to take part in public affairs, self-determination, and equality and non-discrimination***

1.4 The bill, by facilitating the holding of a referendum and – if the referendum were to be successful, by amending the Constitution – engages the rights to take part in public affairs, self-determination and equality and non-discrimination.

#### *Right to take part in public affairs*

1.5 The right to take part in public affairs includes guarantees of the right of citizens to stand for public office, to vote and to have access to positions in public service.<sup>4</sup> It is an essential part of democratic government that is accountable to the people. It applies to all levels of government, including local government. It includes the right of every citizen to take part in the conduct of public affairs by exerting influence through public debate and dialogues with representatives either individually or through bodies established to represent citizens.<sup>5</sup>

1.6 The statement of compatibility with human rights recognises that the bill promotes the right to take part in public affairs in that the Voice would enable the improved participation of Aboriginal and Torres Strait Islander peoples in the

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2 Item 2, proposed section 129.

3 See section 128 of the Commonwealth Constitution. See further, *House of Representatives Practice* (7th edition), pp. 26–34.

4 UN Human Rights Council, *General Comment No.25: Article 25, Right to participate in public affairs, voting rights and the right of equal access to public service* (1996). Given the importance of free speech and protest to the conduct of public affairs in a free and open democracy, the realisation of the right to take part in public affairs depends on the protection of other key rights, such as freedom of expression, association and assembly.

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

Australian democratic process through a body that can make representations to the Parliament and the Executive Government about issues that affect them.<sup>6</sup>

1.7 By facilitating the holding of a referendum proposing an amendment to the Constitution, in which each person enrolled to vote in Commonwealth elections may participate, this bill promotes the right to take part in public affairs. In addition, should the referendum be successful, the establishment of the Voice may also improve the capacity of Aboriginal and Torres Strait Islander peoples to engage in the democratic process via the Voice, and so this would also likely promote the right to participate in public affairs.

#### *Right to self-determination*

1.8 Should the passage of this bill lead to a successful referendum, and to the subsequent establishment of the Voice, this would engage the right to self-determination. This right, which is a right of 'peoples' rather than individuals, includes the right of peoples to freely determine their political status and to freely pursue their economic, social and cultural development.<sup>7</sup> In the Australian context, the right to internal self-determination<sup>8</sup> has particular significance in relation to Aboriginal and Torres Strait Islander peoples.

1.9 As part of its obligation to respect the right to self-determination, Australia has obligations to consult with Indigenous peoples in relation to actions which may affect them. The UN Declaration on the Rights of Indigenous Peoples (UNDRIP) states:

States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.<sup>9</sup>

1.10 UNDRIP is not one of the listed international texts which this committee is required to consider when examining legislation for compatibility with human rights.<sup>10</sup> However, it provides context as to how human rights standards under international law apply to the particular situation of Indigenous peoples. As such, it

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6 Statement of compatibility, p. 9.

7 International Covenant on Civil and Political Rights, article 1; and the International Covenant on Economic, Social and Cultural Rights, article 1.

8 That is, the right to autonomy within the confines of the existing sovereign state of Australia, as opposed to the right to external self-determination in the form of, for example, secession from the Australian state.

9 United Nations Declaration on the Rights of Indigenous Peoples, article 19.

10 *Human Rights (Parliamentary Scrutiny) Act 2011*, see section 3 definition of 'human rights' and section 7 for the functions of the committee.

provides clarification as to how human rights standards under international law, including under the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, apply to the particular situation of Indigenous peoples.

1.11 Commenting on the scope of free, prior and informed consent, the UN Human Rights Council has stated:

States' obligations to consult with indigenous peoples should consist of a qualitative process of dialogue and negotiation, with consent as the objective ... Use in the Declaration [on the Rights of Indigenous Peoples] of the combined terms 'consult and cooperate' denotes a right of indigenous peoples to influence the outcome of decision-making processes affecting them, not a mere right to be involved in such processes or merely to have their views heard ... It also suggests the possibility for indigenous peoples to make a different proposal or suggest a different model, as an alternative to the one proposed by the Government or other actor.<sup>11</sup>

1.12 The UN Special Rapporteur on the rights of Indigenous peoples said, following a visit to Australia in 2017, that Australia's failure to respect the rights of Aboriginal and Torres Strait Islander peoples 'to self-determination and to full and effective participation is alarming'<sup>12</sup> and recommended that the Australian government act on the proposals put forward by the Referendum Council, including the establishment of a First Nations' Voice.<sup>13</sup>

1.13 The statement of compatibility with human rights states that the bill is consistent with the realisation of Aboriginal and Torres Strait Islander peoples' right to self-determination:

The intention is that the members of the Voice would be selected by Aboriginal and Torres Strait Islander peoples based on the wishes of local communities by such means as the Parliament specifies. The Voice will improve Aboriginal and Torres Strait Islander peoples' participation in and input into the decisions, policies and laws that affect their rights and interests. The Voice will therefore improve the way in which decisions, policies and programs take into account Aboriginal and Torres Strait Islander peoples' views and interests. It will be for the Aboriginal and Torres Strait Islander Voice to determine the matters relating to Aboriginal or Torres Strait Islander peoples on which it will make representations, by

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11 United Nations Human Rights Council, *Free, prior and informed consent: a human rights-based approach - Study of the Expert Mechanism on the Rights of Indigenous Peoples*, A/HRC/39/62 (2018) [15]. See United Nations Declaration on the Rights of Indigenous Peoples, article 19.

12 [Report of the Special Rapporteur on the rights of indigenous peoples on her visit to Australia](#), Human Rights Council, A/HRC/36/46/Add.2 (2017) [36].

13 [Report of the Special Rapporteur on the rights of indigenous peoples on her visit to Australia](#), Human Rights Council, A/HRC/36/46/Add.2 (2017) [107(a)]

reference to the priorities of Aboriginal and Torres Strait Islander communities.<sup>14</sup>

1.14 By establishing the Voice and enabling it to make representations to Parliament and the Executive on matters relating to Aboriginal and Torres Strait Islander peoples, this bill (were the referendum to be successful) would promote the right to self-determination, particularly the obligation to consult with Indigenous peoples in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.

#### *Right to equality and non-discrimination*

1.15 By providing for the establishment of an advisory body empowered to make representations on matters relating to Aboriginal and Torres Strait Islander peoples, the bill also engages the right to equality and non-discrimination. This right provides that everyone is entitled to enjoy their rights without discrimination of any kind and that all people are equal before the law and entitled without discrimination to equal and non-discriminatory protection of the law.<sup>15</sup> The UN Committee on the Elimination of Racial Discrimination has stated that discrimination against Indigenous peoples falls within the scope of the International Convention on the Elimination of All Forms of Racial Discrimination and that all appropriate means must be taken to combat and eliminate such discrimination.<sup>16</sup>

1.16 The International Convention on the Elimination of All Forms of Racial Discrimination places an obligation on member states, when the circumstances warrant, to take temporary special measures to ensure the adequate development and protection of certain racial groups or individuals in order to guarantee full and equal enjoyment of rights.<sup>17</sup> However, the UN Committee on the Elimination of Racial Discrimination has made clear that this obligation is 'distinct from the general positive obligation of States parties to the Convention to secure human rights and fundamental freedoms on a non-discriminatory basis'. In particular, it has stated that special measures 'should not be confused with specific rights pertaining to certain

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14 Statement of compatibility, p. 8.

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 Committee on the Elimination of Racial Discrimination, *General recommendation No. 23 on the rights of indigenous peoples* (1997) [1].

17 International Convention on the Elimination of All Forms of Racial Discrimination, article 2(2).

categories of person or community', for instance the rights of Indigenous peoples, as 'such rights are permanent rights, recognized as such in human rights instruments'.<sup>18</sup>

1.17 Noting that the creation of the Voice would protect the permanent human rights of Aboriginal and Torres Strait Islander peoples to self-determination, equality and non-discrimination and participation in public affairs, it does not appear that the Voice would constitute a special measure under international human rights law. As a result, this bill would not (if the referendum were to be successful) facilitate a special measure. Rather, as the statement of compatibility makes clear, the bill is aimed at 'promoting the rights and freedoms of Aboriginal and Torres Strait Islander peoples by acknowledging their continuing disadvantage, and historical exclusion from participation in the making of decisions, policies and laws that affect them'.<sup>19</sup>

1.18 In this context, it is relevant to note the findings of international legal bodies regarding the disadvantage faced by Aboriginal and Torres Strait Islander peoples and the need, as a matter of international human rights law, to take steps to address that disadvantage. The UN Committee on the Elimination of All Forms of Racial Discrimination has expressed its concerns about the persisting challenges and discrimination faced by Aboriginal and Torres Strait Islander peoples in all aspects of their life<sup>20</sup> and has recommended that Australia:

...accelerate its efforts to implement the self-determination demands of indigenous peoples, as set out in the "Uluru Statement from the heart" of May 2017 including by taking steps towards extraconstitutional recognition of indigenous peoples, establishing a meaningful mechanism that enables their effective political participation and entering into good faith treaty negotiation with them.<sup>21</sup>

1.19 The UN Committee on Economic, Social and Cultural Rights has made similar recommendations, noting its concerns as to the inadequacy of meaningful consultation with Indigenous peoples regarding programs and policies that affect them, and urging Australia to take into consideration the Uluru Statement made by the Referendum Council in 2017.<sup>22</sup>

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18 UN Committee on the Elimination of Racial Discrimination, *General recommendation No. 32: The meaning and scope of special measures in the International Convention on the Elimination of All Forms of Racial Discrimination* (2009) [14] and [15].

19 Statement of compatibility, p. 8.

20 UN Committee on Elimination of Racial Discrimination, *Concluding observations on the eighteenth to twentieth periodic reports of Australia* (2017) [17].

21 UN Committee on Elimination of Racial Discrimination, *Concluding observations on the eighteenth to twentieth periodic reports of Australia* (2017) [20].

22 UN Committee on Economic, Social and Cultural Rights, *Concluding observations on the fifth periodic report of Australia* (2017) [15(a)] and [16(a)].

1.20 Consistent with these findings, the statement of compatibility states that the bill is consistent with the right to equality and non-discrimination on the following basis:

It would promote the rights and freedoms of Aboriginal and Torres Strait Islander peoples by acknowledging their continuing disadvantage, and historical exclusion from participation in the making of decisions, policies and laws that affect them. The Bill does this in a way that would not abrogate or otherwise negatively affect the ability of members of the broader community to enjoy or exercise their political, economic, social, cultural or other rights and freedoms. The Voice, as a representative institution, would enable Aboriginal and Torres Strait Islander peoples to express their views to the Parliament and the Executive Government of the Commonwealth on issues that relate to them, including their communities. This will ensure that the laws, policies and programs of the Commonwealth are better attuned to empowering Aboriginal and Torres Strait Islander peoples, addressing disadvantage, and improving outcomes.<sup>23</sup>

1.21 Since the Voice is designed to enable the effective participation of Aboriginal and Torres Strait Islander peoples in the making of decisions, policies and laws that affect them, it would promote the right to equality and non-discrimination for those peoples. It therefore appears that were the referendum to succeed, the bill, in establishing the Voice, would promote the right to equality and non-discrimination of Aboriginal and Torres Strait Islander peoples.

1.22 In relation to the right to equality and non-discrimination of non-Indigenous Australians, it is important to note that differential treatment will not always constitute unlawful discrimination under international human rights law. If the differential treatment is based on reasonable and objective criteria such that it serves a legitimate objective, is rationally connected to that objective and is a proportionate means of achieving that objective, then it is permissible as a matter of international human rights law.<sup>24</sup> In this regard, the UN Committee on the Elimination of Racial Discrimination has noted:

The term 'non-discrimination' does not signify the necessity of uniform treatment when there are significant differences in situation between one person or group and another, or, in other words, if there is an objective and reasonable justification for differential treatment. To treat in an equal manner persons or groups whose situations are objectively different will constitute discrimination in effect, as will the unequal treatment of persons whose situations are objectively the same. The Committee has

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23 Statement of compatibility, p. 8.

24 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].

also observed that the application of the principle of non-discrimination requires that the characteristics of groups be taken into consideration.<sup>25</sup>

1.23 In this respect, any differential treatment associated with establishing a Voice enabling representations to the Parliament and Executive on matters relating to Aboriginal and Torres Strait Islander peoples, is aimed at achieving the legitimate objective of realising Aboriginal and Torres Strait Islander peoples' right to self-determination and 'acknowledging their continuing disadvantage and historical exclusion'.<sup>26</sup> The ability for the Voice to make representations to the Parliament and Executive on matters relating to Aboriginal and Torres Strait Islander peoples appears likely to be rationally connected to, that is, effective to achieve, that objective. Further, the measure appears to be proportionate to the stated objective, noting that the bill would not 'negatively affect the ability of members of the broader community to enjoy or exercise their political, economic, social, cultural or other rights and freedoms'.<sup>27</sup> The bill therefore appears to be compatible with the right to equality and non-discrimination, in that it promotes this right with respect to Aboriginal and Torres Strait Islander peoples by seeking to address existing disadvantage, and any differential treatment is based on reasonable and objective criteria.

### **Committee view**

1.24 The committee notes that the bill, by facilitating the holding of a referendum proposing an amendment to the Constitution, engages the right to take part in public affairs. If the referendum were to be successful and the Constitution were amended in the manner provided for in the bill, the bill also engages this right and the rights to self-determination and equality and non-discrimination.

1.25 The committee considers that as each person enrolled to vote in Commonwealth elections may participate in the relevant referendum, the bill promotes the right of all citizens to take part in public affairs.

1.26 The committee also considers that if the Constitution were to be amended to establish the Voice, this would also promote the rights of Aboriginal and Torres Strait Islander peoples to participate in public affairs; the right to self-determination, particularly the obligation to consult with Indigenous peoples in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them; and the right to equality and non-discrimination, and is therefore compatible with these rights.

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25 UN Committee on the Elimination of Racial Discrimination, *General recommendation No. 32: The meaning and scope of special measures in the International Convention on the Elimination of All Forms of Racial Discrimination* (2009) [8].

26 Statement of compatibility, p. 8.

27 Statement of compatibility, p. 8.



1.27 The committee does not consider that this bill would facilitate a special measure under international human rights law; rather, it is designed to promote the permanent rights of Aboriginal and Torres Strait Islander peoples as recognised in the international treaties. In relation to the right to equality and non-discrimination of non-Indigenous Australians, the committee notes differential treatment will not constitute unlawful discrimination under international human rights law if the differential treatment is based on reasonable and objective criteria. As the UN Committee on the Elimination of Racial Discrimination has noted, the term 'non-discrimination' does not signify the necessity of uniform treatment when there are significant differences in situation between one person or group and another. The committee considers any differential treatment is aimed at achieving the legitimate objective of realising Aboriginal and Torres Strait Islander peoples' right to self-determination and would not negatively affect the ability of members of the broader community to enjoy or exercise their rights and freedoms. The committee considers the bill is compatible with the right to equality and non-discrimination.

## Crimes and Other Legislation Amendment (Omnibus) Bill 2023<sup>1</sup>

<b>Purpose</b>	An omnibus bill to make numerous amendments to crime-related legislation, including amendments that seek to update, improve and clarify the intended operation of key provisions administered by the Attorney-General's portfolio.
<b>Portfolio</b>	Attorney-General
<b>Introduced</b>	House of Representatives, 29 March 2023
<b>Rights</b>	Life and security of person

1.28 This bill seeks to make numerous amendments to crime-related legislation.<sup>2</sup> A number of measures in the bill appear to promote human rights. For example, schedule 7 of the bill would expand the scope of the mandatory ground of refusal with respect to mutual assistance requests under the *Mutual Assistance in Criminal Matters Act 1987*. In particular, it would require the Attorney-General to refuse requests for mutual assistance if there are substantial grounds for believing that, if the request was granted, 'a person' (which would include persons other than the subject of the investigation or prosecution, such as witnesses) would be in danger of being subjected to torture.<sup>3</sup> The statement of compatibility notes that this provides a stronger safeguard against providing assistance where there are substantial grounds for believing there is a risk of torture of anyone, beyond the existing discretionary ground of refusal.<sup>4</sup>

1.29 Another measure that would promote rights is the expansion of matters to which Public Interest Monitors in Queensland and Victoria may make submissions. Currently, before an eligible judge or nominated Administrative Appeals Tribunal (AAT) member can issue a warrant or an International Production Order they must

1 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Crimes and Other Legislation Amendment (Omnibus) Bill 2023, *Report 5 of 2023*; [2023] AUPJCHR 40.

2 The bill seeks to amend the *Australian Crime Commission Act 2002*, *Anti-Money Laundering and Counter-Terrorism Financing Act 2006*, *Crimes Act 1914*, *Criminal Code Act 1995*, *Criminology Research Act 1971*, *Foreign Evidence Act 1994*, *International Transfer of Prisoners Act 1997*, *Mutual Assistance in Criminal Matters Act 1987*, *Privacy Act 1988*, *Surveillance Devices Act 2004*, *Telecommunications (Interception and Access) Act 1979*, and *Witness Protection Act 1994*.

3 Schedule 7, item 1, which would amend paragraph 8(1)(ca) of the *Mutual Assistance in Criminal Matters Act 1987* by omitting 'the person' and substituting 'a person'.

4 Statement of compatibility, [4].

have regard to certain matters, including any submissions made by a Queensland or Victorian Public Interest Monitor. This measure would amend the legislation to allow submissions to also be made in relation to control orders, extended supervision orders and interim supervision orders.<sup>5</sup> This would strengthen the safeguard value of Public Interest Monitors to help guard against arbitrary or unlawful interference with privacy.<sup>6</sup>

1.30 There are also a number of other measures in the bill that appear to engage and may limit human rights. The statement of compatibility sets these out and, except in relation to the below measure relating to the suspension of witness protection and assistance, appears to have adequately justified the proposed limitations.

### **Suspension of witness protection and assistance**

1.31 Schedule 9 of this bill seeks to amend the *Witness Protection Act 1994* (Witness Protection Act) to enable the temporary suspension of a participant's protection and assistance provided under the National Witness Protection Program (Protection Program).<sup>7</sup> The bill provides that the Commissioner of the Australian Federal Police (AFP) or a delegate may suspend a participant's protection and assistance either on the request of the participant or at the discretion of the AFP.<sup>8</sup> Regarding the latter, protection and assistance may be suspended if, in the opinion of the Commissioner, the participant has done or intends to do something that limits, or would limit, the Commissioner's ability to provide adequate protection and assistance, and in the circumstances of the case, protection and assistance should be suspended.<sup>9</sup> The length of suspension in this context is determined by the Commissioner and may be extended or revoked by the Commissioner.<sup>10</sup>

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5 Schedule 8; Statement of compatibility, [50]–[53].

6 The Parliamentary Joint Committee on Human Rights has previously commented on the important safeguard value of Public Interest Monitors, particularly in the context of covert measures that interfere with privacy. See e.g. Surveillance Legislation Amendment (Identify and Disrupt) Bill 2020, [Report 1 of 2021](#) (3 February 2021) pp. 20–43; [Report 3 of 2021](#) (17 March 2021) pp. 63–112.

7 Schedule 9, part 2.

8 Schedule 9, part 2, item 4, new sections 17A and 17B. Item 5 provides that the Commissioner's powers in sections 17A and 17B may be delegated to an Assistant Commissioner. The Assistant Commissioner may, by writing, sub-delegate the power to a Commander or Superintendent in the AFP, who may exercise the power if the circumstances are serious and urgent.

9 Schedule 9, part 2, item 4, new section 17B.

10 Schedule 9, part 2, item 4, new subsection 17B(3).

1.32 The bill provides that if the Commissioner decides to suspend a participant's protection or assistance, they must take reasonable steps to notify the participant of that decision.<sup>11</sup> Within seven days of receiving the notification, a participant may apply to the Deputy Commissioner for a review of that decision, unless the decision was made personally by the Commissioner, in which case review is not available.<sup>12</sup>

1.33 The effect of a suspension means that the AFP must not provide protection or assistance to the participant while the suspension is in effect unless the Commissioner is satisfied that, in the circumstances, it is necessary and reasonable for the protection or assistance to be provided despite the suspension. The bill clarifies that a suspension does not result in the person ceasing to be a participant in the Protection Program while the suspension is in effect.<sup>13</sup>

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

### ***Rights to life and security of person***

1.34 Suspending protection or assistance for a participant in the witness protection program at the discretion of the AFP may expose the participant to possible harm. As a result, the measure engages and may limit the rights to life and security of person. The right to life imposes an obligation on the state to protect people from being killed by others or identified risks, including by enacting a protective legal framework and adopting special measures of protection for vulnerable persons, including victims of domestic and gender-based violence, and children.<sup>14</sup> The right to security of person concerns freedom from injury to the body and the mind or bodily and mental integrity, and requires the state to take steps to protect people against interference with personal integrity by others (including any governmental or private actors).<sup>15</sup> This includes protecting people who are subject to death threats, assassination attempts, harassment and intimidation, including providing protection for witnesses against retaliation.<sup>16</sup>

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11 Schedule 9, part 2, item 4, new subsection 17B(4).

12 Schedule 9, part 2, item 4, new section 17C.

13 Schedule 9, part 2, item 4, new subsections 17A(5)–(7) and 17B(5)–(7).

14 International Covenant on Civil and Political Rights, article 6(1) and Second Optional Protocol to the International Covenant on Civil and Political Rights, article 1. UN Human Rights Committee, *General Comment No. 36: article 6 (right to life)* (2019) [3], [20] and [23]. At [3], the UN Human Rights Committee stated that the right should not be interpreted narrowly and it 'concerns the entitlement of individuals to be free from acts and omissions that are intended or may be expected to cause their unnatural or premature death, as well as to enjoy a life with dignity'.

15 International Covenant on Civil and Political Rights, article 9(1). UN Human Rights Committee, *General Comment No. 35: Article 9 (Liberty and security of person)* (2014) [3].

16 UN Human Rights Committee, *General Comment No. 35: Article 9 (Liberty and security of person)* (2014) [9].

1.35 The statement of compatibility acknowledges that the right to security of the person is engaged and limited insofar as the measure temporarily removes the protection and assistance afforded to the participant.<sup>17</sup> It does not provide a compatibility assessment with respect to the right to life. The rights to life and security of the person 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.

1.36 The statement of compatibility states that the objective of the measure is to allow the Commissioner or their delegate to suspend the provision of protection or assistance where the participant requests this, or where the decision-maker determines that the participant does, or intends to do, something that would limit the AFP's ability to provide adequate protection and assistance, such as where the person places themselves outside the AFP's jurisdiction.<sup>18</sup> The statement of compatibility states that the measure preserves the integrity of the Protection Program and provides greater flexibility, noting that the Witness Protection Act currently does not allow a participant to be temporarily suspended from the Protection Program, only terminated in certain circumstances.<sup>19</sup> The statement of compatibility notes that the measure will minimise the risk of a participant being terminated from the Protection Program and having to re-apply, which may expose a participant to harm while awaiting re-entry into the Protection Program.<sup>20</sup>

1.37 If increasing the flexibility of the Commissioner to enable the temporary suspension, rather than termination, of protection or assistance would minimise the risk of harm that a participant may otherwise be exposed to while awaiting re-entry into the Protection Program, this is likely to pursue a legitimate objective for the purposes of international human rights law and be rationally connected to that objective.

1.38 A key aspect of whether a limitation on a right can be justified is whether the limitation is proportionate to the objective being sought. In this respect, it is necessary to consider a number of factors, including whether a proposed limitation is sufficiently circumscribed. In this regard, it is relevant to consider the scope of the discretionary power conferred on the Commissioner and the manner of its exercise. The bill provides that the Commissioner's power to suspend protection or assistance

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17 Statement of compatibility, [68].

18 Statement of compatibility, [56], [71].

19 Section 18 of the *Witness Protection Act 1994* sets out the circumstances in which a participant's inclusion in the National Witness Protection Program must and may be terminated, including for example where the participant deliberately breaches a term of the memorandum of understanding or the participant's conduct or threatened conduct is likely to compromise the integrity of the Protection Program.

20 Statement of compatibility, [69] – [70].

may be exercised in relation to both past actions of a participant (namely, where they have done 'something' that limits the Commissioner's ability to provide protection) and possible future actions (namely, where the participant *intends* to do 'something' that would limit the Commissioner's ability to provide protection).

1.39 The types of actions or circumstances that may trigger the exercise of the Commissioner's powers are unclear. The only example provided by the statement of compatibility is when a participant does or intends to do something that would place them outside the AFP's jurisdiction.<sup>21</sup> Apart from this example, neither the text of the bill nor the explanatory materials elaborate on what type of actions would limit the Commissioner's ability to provide adequate protection and assistance or what circumstances of the case would justify suspending protection and assistance. It is also not clear what the threshold would be for 'limiting' the Commissioner's ability to provide adequate protection and assistance – if something limits their ability but nonetheless protection could be provided, would protection be suspended? It is not clear why this should not be limited to actions that 'significantly limit' the Commissioner's ability to provide protection and assistance. Further, the bill does not impose any time limit on the length of any suspension. It enables the Commissioner to determine the time period in which the suspension has effect and extend the effect of the suspension by making a new decision. The scope of the Commissioner's power therefore appears to be reasonably broad and the basis for suspending protection or assistance appears to be quite low. Questions therefore arise as to whether the measure is sufficiently circumscribed.

1.40 Another relevant factor in assessing proportionality is whether the measure is accompanied by sufficient safeguards, including the availability of review. The statement of compatibility identifies some safeguards that it says ensure the measure is proportionate, reasonable and necessary. These include the ability to provide protection or assistance despite the suspension if considered reasonable and necessary for the assistance to be provided, and the availability of review in certain circumstances.<sup>22</sup> These could operate as important safeguards. However, given that review is only available for decisions made by a delegate (namely, decisions not made personally by the Commissioner), the effectiveness of this safeguard appears limited. The statement of compatibility states that limiting access to review in this way aligns with the approach to other powers exercised personally by the Commissioner in the Witness Protection Act, such as the termination of a participant's inclusion in the Protection Program. However, it is not clear that seeking to achieve legislative consistency in this context is a sufficient justification to limit the availability of review, particularly given the potential severity of the consequences of suspending protection and assistance on participants' rights.

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21 Statement of compatibility, [56].

22 Statement of compatibility, [74].

## Committee view

1.41 The committee welcomes those measures in the bill that would promote human rights, particularly expanding the scope of the mandatory ground of refusal with respect to mutual assistance requests to apply in situations where granting the request would result in a substantial risk of torture of any person, and expanding the matters to which Public Interest Monitors may make submissions.

1.42 However, the committee notes that the bill, by providing the Commissioner with the discretion to suspend a participant's protection or assistance in the National Witness Protection Program, engages and may limit the rights to life and security of person. The committee considers further information is required to assess the compatibility of this measure with these rights, and as such seeks the Attorney-General's advice as to:

- (a) what types of actions or circumstances would limit the AFP's ability to provide adequate protection or assistance to a participant;
- (b) why it is appropriate that a participant's protection and assistance be suspended where they do something that 'limits' the AFP's ability to provide protection and whether this threshold should be higher, such as 'significantly limits';
- (c) why it is necessary for the Commissioner's power to suspend protection and assistance to extend to possible future actions of a participant;
- (d) how the Commissioner would assess an appropriate time period for the suspension to have effect and whether the Commissioner would be required to regularly review the case to assess whether circumstances have changed such that protection and assistance should be reinstated;
- (e) why decisions to suspend protection or assistance made by the Commissioner personally are not reviewable, noting the importance of the availability of review as a safeguard and the potentially significant consequences for a participants' rights of such a decision; and
- (f) whether any less rights restrictive alternatives could achieve the same stated objective.

## Family Law Amendment Bill 2023<sup>1</sup>

<b>Purpose</b>	This bill would amend the <i>Family Law Act 1975</i> (Family Law Act), and make some consequential amendments to the <i>Federal Circuit and Family Court of Australia Act 2021</i> as set out below.
<b>Portfolio</b>	Attorney-General
<b>Introduced</b>	House of Representatives, 29 March 2023
<b>Rights</b>	Rights of the child; equality and non-discrimination; culture; protection of the family; fair hearing; privacy; freedom of expression

### Changes to the family law system

1.43 The bill seeks to amend the *Family Law Act 1975* (Family Law Act) and make some consequential amendments to the *Federal Circuit and Family Court of Australia Act 2021*, to make significant changes to the family law system.

1.44 Schedule 1 would amend the legislative framework for making parenting orders, including altering the factors to be considered when making parenting arrangements in the best interests of the child. Item 6 would replace section 60CC, which sets out how a court determines what is in a child's best interests. This would remove the two-tier hierarchical structure of two 'primary' and 14 'additional' considerations, and focus on a core list of six considerations, with an additional factor for Aboriginal or Torres Strait Islander children, that are likely to be relevant to a large majority of matters.<sup>2</sup> Further proposed amendments would alter provisions relating to parental responsibility, including to: encourage parents to consult about major long term issues where safe to do so;<sup>3</sup> repeal the existing presumption of equal shared parenting when parenting orders are made;<sup>4</sup> and (with retrospective effect) limit the circumstances in which a final parenting order may be reconsidered to where there has been a significant change of circumstances and the court is

1 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Family Law Amendment Bill 2023, *Report 5 of 2023*; [2023] AUPJCHR 41.

2 Explanatory memorandum, p.19. In addition, Item 4 would replace the existing 'objects' section of Part VII of the Family Law Act (relating to children) with 'ensure that the best interests of the child are met, including by ensuring their safety; and to give effect to the Convention on the Rights of the Child'. Schedule 1, item 4, proposed section 60B.

3 Schedule 1, item 14, proposed section 61CA. See also, item 16, proposed sections 61DAA and 61DAB.

4 Schedule 1, item 16.



satisfied that it is in the child's best interests (but if all parties consent the court may reconsider).<sup>5</sup>

1.45 Schedule 2 would redraft Division 13A of Part VII of the Family Law Act, which provides for the enforcement of parenting orders and other orders affecting children. In particular, it would: provide that evidence of anything said by a person attending a post-separation parenting program is not admissible in court (unless it indicates child abuse or a risk of such);<sup>6</sup> and replace Division 13A of Part VII to make the consequences of non-compliance with child-related orders clearer and more straightforward.<sup>7</sup>

1.46 Schedule 3 would amend the definitions in the Family Law Act related to the concept of 'family' so they are more inclusive of Aboriginal and Torres Strait Islander culture and traditions and recognise that persons may be related to a child in accordance with their Indigenous culture.<sup>8</sup>

1.47 Schedule 4 would amend provisions relating to 'independent children's lawyers', who are appointed by the court to represent the child's best interests in proceedings.<sup>9</sup> It would establish a requirement that independent children's lawyers must meet with a child and give them an opportunity to express any views about matters related to the proceedings.<sup>10</sup> It would also add an express statement to section 68L to clarify that matters arising under the 1980 Hague Convention on the Civil Aspects of International Child Abduction are to be treated as matters involving a child's welfare as the paramount or a relevant consideration for the purposes of section 68L, and therefore fall within the remit of independent children's lawyers.<sup>11</sup>

1.48 Part 1 of Schedule 5 would re-draft existing procedures related to the court's power to issue summary decrees where an application is found to be vexatious.<sup>12</sup> It

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5 Schedule 1, item 26, proposed section 65DAAA. Item 27 would provide that the amendment made by this Part would apply in relation to orders which came into force before, or come into force on or after, the day the item were to commence.

6 Schedule 2, item 10, proposed section 10PA.

7 Schedule 2, item 31, proposed Division 13A. The explanatory memorandum states, at p. 33, that these amendments would mean that Division 13A no longer separately provides for circumstances where the court considers the contravention to be 'more serious' or 'less serious'. Instead, it will have the discretion to tailor its response to match the gravity of the contravention, while still being required to consider a number of factors in weighing up the seriousness.

8 Schedule 3, items 2–4.

9 *Family Law Act 1975*, sections 4 and 68L.

10 Schedule 4, item 2.

11 Schedule 4, Part 2, item 4.

12 Schedule 5, item 6, proposed Division 1A – Summary decrees.

would also introduce new ‘harmful proceedings orders’, which courts could make to protect a respondent and/or children. A harmful proceedings order would restrain a party to the proceedings from making any further applications and serving them on the respondent without first obtaining leave of the court under proposed section 102QAG.<sup>13</sup> Part 2 would broaden the ‘overarching purpose of family law practice and procedure’ and the accompanying duty to act consistently with this purpose, to include all proceedings instituted under the Family Law Act.<sup>14</sup> The explanatory memorandum states that this is intended to broaden the obligation on the court, the parties and legal practitioners to facilitate a culture of litigation where family law disputes are resolved in a safe, just and efficient way that ensures the safety of families and children and promotes the best interests of the child.<sup>15</sup>

1.49 Schedule 6 would amend provisions in Part XIA of the Family Law Act which relate to court-based suppression and non-publication orders, largely to clarify the scope and operation of the restrictions on the public communicating identifiable information that relates to family law proceedings. Proposed new Part XIVB would provide that it is an offence to communicate certain information about proceedings under the Family Law Act where it would identify certain people, but to permit a communication to a person with a significant and legitimate interest in the subject matter that is greater than that of members of the public generally.<sup>16</sup> The explanatory memorandum states that these amendments are intended to clarify existing restrictions (including current confusion about the sharing of information between regulators, government agencies and other organisations who are supporting families), and are not intended to apply to private communications.<sup>17</sup>

1.50 Schedule 7 would establish a new power for government to make regulations that would provide standards and requirements to be met by professionals who prepare family reports. Schedules 8 and 9 would make administrative amendments to the *Federal Circuit and Family Court of Australia Act 2021*.

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13 Schedule 5, items 1–11. The explanatory memorandum states that harmful proceedings order powers differ from the court’s current vexatious proceedings order powers as harmful proceedings orders require the court to consider the impact that the repetitive and litigious nature of the applicant’s filings would have on the respondent. By contrast, vexatious proceedings order powers focus on the applicant’s intent to institute or conduct proceedings in a way so as to harass or annoy, cause delay or detriment, or achieve another wrongful purpose (see, p. 64).

14 Schedule 5, Part 2, items 15–33.

15 Explanatory memorandum, pp. 69–70.

16 Schedule 6, item 6.

17 Explanatory memorandum, p. 76.

## International human rights legal advice

### *Multiple rights*

1.51 A number of the amendments proposed by this bill would promote human rights. Some of the proposed amendments engage and limit human rights. Most human rights may be subject to permissible limitations where the limitation pursues a legitimate objective, is rationally connected to that objective and is a proportionate means of achieving that objective.

### *Rights of the child*

1.52 Numerous amendments in the bill promotes the right of the child to have their best interests considered as a paramount consideration. See in particular, proposed amendments in Schedule 1 (to prioritise the best interests of the child in making parenting decisions and provide a list of considerations that are likely to be relevant in assessing this); Schedule 2 (to make the consequences of non-compliance with a parenting order clearer); Schedule 4 (expanding the role of independent children's lawyers); and Schedule 5 (providing that the overarching purpose of family law practice and procedures is to facilitate the just resolution of disputes in a way that promotes the best interests of the child).

1.53 Children have special rights under human rights law taking into account their particular vulnerabilities.<sup>18</sup> Children's rights are protected under a number of treaties, particularly the Convention on the Rights of the Child. All children under the age of 18 years are guaranteed these rights, without discrimination on any grounds.<sup>19</sup> Australia is required to ensure that, in all actions concerning children, the best interests of the child are a primary consideration.<sup>20</sup> 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.<sup>21</sup> The United Nations (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.<sup>22</sup> The child's best interests includes the enjoyment of the rights set out in the Convention on the Rights of the Child, and, in the case of individual

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

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

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

21 UN Committee on the Rights of Children, *General Comment 14 on the right of the child to have his or her best interest taken as primary consideration* (2013).

22 UN Committee on the Rights of the Child, *General comment 14 on the right of the child to have his or her best interests taken as a primary consideration* (2013); see also *IAM v Denmark*, UN Committee on the Rights of the Child Communication No.3/2016 (2018) [11.8].

decisions, 'must be assessed and determined in light of the specific circumstances of the particular child'.<sup>23</sup>

1.54 The statement of compatibility states that this right is promoted by these measures.<sup>24</sup> It notes, in particular, that the UN Committee on the Rights of the Child has stated that it considers it useful to draw up a non-exhaustive and non-hierarchical list of elements that could be included in a best-interests assessment by any decision maker, which should provide concrete guidance, yet flexibility.<sup>25</sup> It states that proposed section 60CC reflects this, and provides the court with the ability to consider the unique circumstances in each parenting matter in a way that places the best interests of a child at the forefront of decision-making.<sup>26</sup>

1.55 These measures also promote the rights of children to life, and to protection from exploitation, violence and abuse.<sup>27</sup> These rights impose obligations on the state to protect people from being killed by others or identified risks,<sup>28</sup> and to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, including while in the care of parents.<sup>29</sup> The statement of compatibility recognises this, stating that the bill prioritises the safety of children over having a dangerous or harmful relationship with a parent, including by providing that, in determining what is in a child's best interests, the court must consider what arrangements promote the safety of the child and people who care for the child, including safety from family violence, abuse, neglect or other harm.<sup>30</sup>

1.56 In addition, the statement of compatibility notes that several measures in the bill promote other rights of children, including the right to express views freely in matters affecting them, and the right to be heard in proceedings. Children who are capable of forming their own views have the right to express those views freely in all matters affecting them, and the views are to be given due weight in accordance with

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23 UN Committee on the Rights of the Child, *General comment 14 on the right of the child to have his or her best interests taken as a primary consideration* (2013) p. 3.

24 Statement of compatibility pp. 6–8.

25 UN Committee on the Rights of Children, *General Comment 14 on the right of the child to have his or her best interest taken as primary consideration* (2013) [50].

26 Statement of compatibility, p. 7.

27 Convention on the Rights of the Child, articles 3(2), 6, 19(1) and 34. See also, International Covenant on Civil and Political Rights, articles 6 and 24(1).

28 UN Human Rights Committee, *General Comment No. 36: article 6 (right to life)* (2019) [3]: the right should not be interpreted narrowly and it 'concerns the entitlement of individuals to be free from acts and omissions that are intended or may be expected to cause their unnatural or premature death, as well as to enjoy a life with dignity'.

29 Convention on the Rights of the Child, article 19.

30 Statement of compatibility, pp. 10–11.

the age and maturity of the child.<sup>31</sup> They must be provided the opportunity to be heard in any judicial and administrative proceedings affecting them, either directly, or through a representative or an appropriate body. Further, the statement of compatibility states that the bill recognises and supports the right of the child to not be separated from their parents against their will except where it has been determined to be in their best interests,<sup>32</sup> and supports the principle that parents have common responsibilities for the development of their child and that the best interests of the child will be their basic concern.<sup>33</sup>

#### *Right to protection of the family*

1.57 By providing for processes by which parenting orders may be made, which may have the effect of limiting or preventing parents from having access to their children, the bill engages and limits the right to protection of the family.

1.58 The right to respect for the family requires the state not to arbitrarily or unlawfully interfere in family life and to adopt measures to protect the family.<sup>34</sup> The family is recognised as the natural and fundamental group unit of society and, as such, entitled to protection. An important element of protection of the family is to ensure family members are not involuntarily separated from one another. Laws and measures which prevent family members from being together will engage this right. Consideration of this right intersects with Australia's obligation to ensure that, in all actions concerning children, the best interests of the child are a primary consideration.<sup>35</sup> A limitation on the right to protection of the family will be permissible if it is reasonable and not arbitrary.

1.59 The statement of compatibility does not identify that this right is engaged. Section 61DA (which this bill would repeal) currently provides that when making a parenting order in relation to a child, the court must apply a presumption that it is in the best interests of the child for their parents to have equal shared 'parental responsibility' for the child. Section 65DAA (which this bill would also repeal) currently provides that in cases where the order would give parents equal shared parental responsibility, the court must consider whether the child spending equal (or substantial and significant) time with each parent would be in their best interests and whether this is reasonably practicable. The statement of compatibility with

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31 Convention on the Rights of the Child, article 12.

32 Convention on the Rights of the Child, article 9.

33 Convention on the Rights of the Child, article 18. Statement of compatibility, pp. 9–10.

34 International Covenant on Civil and Political Rights, articles 17 and 23; and the International Covenant on Economic, Social and Cultural Rights, article 10. See also, Convention on the Rights of the Child, article 5.

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

human rights states that these amendments would address misconceptions about how these provisions operate:

The repeal of the presumption is a response to substantial evidence of community misconception about the law – that is, that parenting arrangements after separation are based on a parent’s entitlement to equal time, rather than an assessment of what arrangements serve the child’s best interests. This misunderstanding may lead parents to agree to unsafe and unfair arrangements, or encourage parties to prolong litigation based on the incorrect expectation of equal time.

The repeal of the presumption will ensure that the law focuses on the child’s needs, especially in matters involving allegations of family violence or other complex issues. It will also ensure that the purpose of the parenting framework is clearer, assisting parents settling their matters outside of court to more accurately and easily navigate the law. The changes will help to ensure out-of-court settlements place the best interests of the child at the forefront, and that decisions about parenting arrangements are not influenced by misunderstandings about parental rights and responsibilities.<sup>36</sup>

1.60 The statement of compatibility highlights a 2019 Australian Law Reform Commission inquiry into Australia’s family law system, which recommended the amendments of these provisions on this basis.<sup>37</sup> Several parliamentary inquiries have also noted extensive evidence as to confusion caused by these two presumptions and made recommendations in this regard.<sup>38</sup>

1.61 The explanatory memorandum states that pursuant to these proposed amendments, the court could continue to make orders for equal time or substantial and significant time in the event that it determines that the arrangement is in the best interests of the child, but it would not be required to consider these arrangements if they would not be suitable.<sup>39</sup> The statement of compatibility states that repealing these provisions would support parents to focus on what arrangements are in their child’s best interests, and strengthen the family law system’s focus on parents’ responsibilities.<sup>40</sup>

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36 Statement of compatibility, p. 7.

37 Australian Law Reform Commission, [Family Law for the Future – An Inquiry into the Family Law System](#), recommendations 7 and 8.

38 Joint Select Committee on Australia’s Family Law System, [Improvements in family law proceedings – Interim Report](#) (October 2020) pp. 170–176 and pp. 306–311. See also, Standing Committee on Social Policy and Legal Affairs, [Parliamentary Inquiry into a better family law system to support and protect those affected by family violence](#) (December 2017).

39 Explanatory memorandum, p. 28.

40 Statement of compatibility, p. 9.

1.62 Based on this information, the repeal of these two rebuttable presumptions would continue to provide the courts with the ability to make parenting orders prioritising the best interests of the child, and may reduce confusion in making out of court parenting agreements. In particular, the proposed amendments would enhance the ability of the courts to make decisions specific to each family, and would prioritise the rights of the child and the need for safety overall. These bases for limiting the right to protection of the family therefore appear reasonable and not arbitrary. As such, these appear to constitute a permissible limit on the right to protection of the family.

### *Right to culture*

1.63 The proposed requirement for the court to consider the right to culture when determining what is in an Aboriginal or Torres Strait Islander child's best interest,<sup>41</sup> and the proposed extension of the definition of a 'relative' to recognise kinship systems and extended family structures,<sup>42</sup> promote the right to culture.

1.64 The right to culture provides that all people have the right to benefit from and take part in cultural life.<sup>43</sup> Individuals belonging to minority groups, including Indigenous peoples, have additional protections to enjoy their own culture, religion and language.<sup>44</sup> Children of Indigenous origin should not be denied the right, in community with other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.<sup>45</sup>

1.65 The statement of compatibility states that these aspects of the bill will promote this right, recognising that connection to culture is a significant protective factor for the wellbeing of Aboriginal and Torres Strait Islander children and their families.<sup>46</sup>

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41 Schedule 1, Item 6, proposed section 60CC.

42 Schedule 3, Item 4, proposed subsection 4(1AC).

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

44 International Covenant on Civil and Political Rights, article 27. UN Human Rights Committee, *General Comment No. 23: The rights of minorities* (1994) [5.2]. The committee confirms that article 27 confers rights on persons belonging to minorities which 'exist' within State parties, which would extend to, for example, migrant workers, provided their existence as an ethnic, religious or linguistic minority was established by objective criteria.

45 Convention on the Rights of the Child, article 30.

46 Statement of compatibility, p. 13.

### *Right to equality and non-discrimination*

1.66 The proposed amendments in Schedule 5 (to establish harmful proceedings orders) would promote the right to equality and non-discrimination insofar as they may better protect victims of family violence, which predominantly impacts women.

1.67 The right to equality and non-discrimination provides that everyone is entitled to enjoy their rights without discrimination of any kind and that all people are equal before the law and entitled without discrimination to equal and non-discriminatory protection of the law.<sup>47</sup> It encompasses both 'direct' discrimination (where measures have a discriminatory intent) and 'indirect' discrimination (where measures have a discriminatory effect on the enjoyment of rights).<sup>48</sup> The UN Convention on the Elimination of All Forms of Discrimination against Women further describes the content of these obligations, including the specific elements that states parties are required to take into account to ensure the right to equality for women.<sup>49</sup> With respect to family violence, the UN Committee on the Elimination of Discrimination Against Women has stated that gender-based violence against women constitutes discrimination against women, and has recommended that states adopt protective measures to ensure that the rights or claims of alleged perpetrators during, and after, judicial proceedings (including those relating to child access) should be determined in the light of women and children's human rights to life and physical, sexual and psychological integrity and guided by the principle of the best interests of the child.<sup>50</sup>

1.68 The statement of compatibility recognises that this right is promoted. It states that the proposed 'harmful proceedings orders' to prevent vexatious litigants from filing and serving new applications without first obtaining leave from the court will allow the court to prevent harm to the intended respondent, and thereby would help to protect victim survivors of family violence from systems abuse.<sup>51</sup> It also notes

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47 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.

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

49 Article 1 of CEDAW defines 'discrimination against women' as 'any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field'.

50 Committee on the Elimination of Discrimination against Women, *General recommendation No. 35 on gender-based violence against women, updating general recommendation No. 19* (26 July 2017) [31].

51 Statement of compatibility, p. 11.



that these powers will preserve the agency of victim survivors as the court must have regard to their wishes.

### *Rights to a fair hearing*

1.69 The proposed new 'harmful proceedings orders' in Schedule 5, which would prevent certain persons from instituting further family law applications and serving them on the respondent without first obtaining the leave of the court, engages and limits the right to a fair hearing.

1.70 The right to a fair hearing applies to both criminal and civil proceedings, and to cases before both courts and tribunals.<sup>52</sup> The right is concerned with procedural fairness, and encompasses notions of equality in proceedings (including both parties having a procedurally equal position to make their case), the right to a public hearing and the requirement that hearings are conducted by an independent and impartial body.<sup>53</sup> In order to constitute a fair hearing, the hearing must be conducted by an independent and impartial court or tribunal, before which all parties are equal, and have a reasonable opportunity to present their case.<sup>54</sup> Ordinarily, the hearing must be public, but in certain circumstances, a fair hearing may be conducted in private. In general, the right to a fair hearing 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.

1.71 The statement of compatibility notes that this right is limited by the proposed harmful proceedings orders, which would impose an additional procedural hurdle for certain persons to institute further family law proceedings. It states that this limitation is reasonable and proportionate to the legitimate aim of preventing harm to the respondent through continuous litigation, and notes that to ensure procedural fairness to the applicant, the court must not make a harmful proceedings order without first hearing the person or giving them an opportunity of being heard on the merits of their application. It further notes that once a harmful proceedings order is in place, a meritorious application made for a proper purpose would be allowed to proceed, regardless of the impact that it might have on the respondent.<sup>55</sup> As this would provide the court with the discretion to consider making a harmful proceedings order in relation to individual applicants, and noting that meritorious

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

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

54 See UN Human Rights Committee, *General Comment 32: Article 14, Right to Equality before Courts and Tribunals and to Fair Trial* (2007) [18].

55 Statement of compatibility, p. 14.

applications could nevertheless proceed, this would appear to constitute a permissible limitation on the right to a fair trial.<sup>56</sup>

### **Committee view**

1.72 The committee notes that the bill seeks to make significant changes to the family law system. The committee notes that many of the most significant changes are directed towards the important objectives of promoting the best interests of the child, and protecting all parties in family law proceedings from violence and harm.

1.73 The committee considers that many of these proposed amendments would promote human rights, including the rights of the child, the right to equality and non-discrimination, and the right to culture. The committee considers that the statement of compatibility has comprehensively set out how these rights would be promoted in the bill.

1.74 The committee notes that some of the measures engage and limit other human rights. The committee considers that having regard to the comprehensive information set out in the statement of compatibility, and the extensive consideration of these matters in previous inquiries referenced by the explanatory memorandum, these would constitute permissible limitations. However, the committee notes that the statement of compatibility does not recognise the engagement of the right to protection of the family.

### **Suggested action**

1.75 The committee recommends that the statement of compatibility with human rights be updated to include an assessment of the compatibility of the bill with the right to protection of the family.

1.76 The committee draws its views to the attention of the Attorney-General and the Parliament and makes no further comment in relation to this bill.

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56 The statement of compatibility also notes that some measures also engage and limit the right to privacy, and the right to freedom of expression. See, pp. 12 and 15.

## Family Law Amendment (Information Sharing) Bill 2023<sup>1</sup>

<b>Purpose</b>	A bill to amend the <i>Family Law Act 1975</i> to establish an enhanced court-led information sharing framework for information relating to family violence, child abuse and neglect risks in parenting proceedings before the Federal Circuit and Family Court of Australia, and the Family Court of Western Australia
<b>Portfolio</b>	Attorney-General
<b>Introduced</b>	House of Representatives, 29 March 2023
<b>Rights</b>	Rights of the child; equality and non-discrimination; privacy

### Information sharing between agencies and family law courts

1.77 The bill would amend the *Family Law Act 1975* (Family Law Act) to provide for a broader court-led information sharing network for information relating to family violence, child abuse and neglect risks in parenting proceedings. Proposed new subdivision DA of Part VIII of the Family Law Act would provide that the court may order an 'information sharing agency' (to be defined in regulations) to inform the court whether it possesses or has control of information relating to a range of matters (relating to abuse, neglect or family violence or any risk or potential risk of such matters), and give the court particulars of the documents or information.<sup>2</sup> It provides that an agency would also be permitted to give the court any other related documents of its own initiative.<sup>3</sup> Such orders could not require (but would allow) an information sharing agency to give the court protected material (including information subject to legal professional privilege).<sup>4</sup> Particulars, documents or information provided under these provisions would be required to be admitted into evidence by the court (with some restrictions to prevent the disclosure of the identity of a person who has made a notification of suspected child abuse, for example).<sup>5</sup> Proposed section 67ZBI would require that, when providing such information or documents under these orders, an information sharing agency must have regard to information sharing safeguards as prescribed by regulations.

1 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Family Law Amendment (Information Sharing) Bill 2023, *Report 5 of 2023*; [2023] AUPJCHR 42

2 Schedule 1, item 7, proposed sections 67ZBC–67ZBE.

3 Schedule 1, item 7, proposed subsections 67ZBD(5) and 67ZBE(5).

4 Schedule 1, item 7, proposed section 67ZBF.

5 Schedule 1, item 7, proposed section 67ZBH.

## International human rights legal advice

### ***Rights of the child, rights of equality and non-discrimination and privacy***

1.78 By facilitating the sharing of information between family law courts and certain agencies where the information relates to family violence, child abuse, neglect and related matters, these measures engage and may promote several human rights. These include the rights of the child (including to protection of the child from violence, abuse or neglect) and the rights of women to non-discrimination (insofar as these measures may assist in the elimination of gender-based violence against women and girls).<sup>6</sup> These rights are comprehensively identified in the statement of compatibility with human rights.<sup>7</sup>

1.79 The measure also engages and limits the right to privacy. The right to privacy is multi-faceted. 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.<sup>8</sup> It also includes the right to control the dissemination of information about one's private life, and prohibits arbitrary and unlawful interferences with an individual's privacy, family, correspondence or home.<sup>9</sup> A private life is linked to notions of personal autonomy and human dignity. It includes the idea that individuals should have an area of autonomous development; a 'private sphere' free from government intervention and excessive unsolicited intervention by others.

1.80 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.

1.81 The statement of compatibility identifies that this measure engages the right to privacy.<sup>10</sup> It states that the objective of the measure is to promote the safety and wellbeing of children and families accessing the family law system.<sup>11</sup> Such an objective would constitute a legitimate objective under international human rights law. The sharing of information directly relevant to the assessment and mitigation of

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6 See, Convention on the Rights of the Child and the Convention on the Elimination of All Forms of Discrimination Against Women.

7 See, pp. 8–13. The statement of compatibility also identifies that the measure engages the right to a fair hearing, which is concerned with procedural fairness. It states that the proposed amendments would streamline the process by which relevant information may be provided to courts, and notes that information shared pursuant to this measure would be admitted into evidence with some limited exceptions.

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

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

10 Statement of compatibility with human rights, pp.9–11.

11 Statement of compatibility, p. 7.

family violence, neglect or abuse risk for a child concerned in proceedings, or a party to proceedings, would also likely be rationally connected to (that is, capable of achieving) that objective.

1.1 A key aspect of whether a limitation on a right can be justified is whether the limitation is proportionate to the objective being sought. In this respect, it is necessary to consider a number of factors, including whether a proposed limitation is sufficiently circumscribed and accompanied by sufficient safeguards.

1.82 Proposed section 67ZBC provides that regulations may prescribe an agency of a state or territory (or part thereof) or a part of a Commonwealth agency that provides services on behalf of a state or territory, to be an 'information sharing agency'. The explanatory memorandum states that the scope of agencies, or parts of agencies, contemplated to be captured as information sharing agencies would be substantively similar to those captured as prescribed agencies by current subsection 60CI(4), which would be repealed.<sup>12</sup> It states that the types of organisations to be prescribed would include those that: have investigative power, or responsibility for the prevention of, family violence, child abuse and neglect matters; or hold information which is directly relevant to the assessment and mitigation of family violence, neglect or abuse risk for a child concerned in proceedings, or a party to proceedings (including child protection, policing and firearms authorities). It also states that state and territory courts would not be prescribed as information sharing agencies by the regulations.

1.83 However, as a matter of law, nothing on the face of proposed section 67ZBC would restrict the type of agency that could be prescribed as an information-sharing agency. The explanatory memorandum states that, given the diverse nature of policing, child protection and firearms agencies, it is not appropriate to define the specific class of persons who may be involved in information sharing within an information sharing agency.<sup>13</sup> Were future regulations to be made specifying only agencies which fall within this proposed scope, the provision may be a proportionate limit on the right to privacy. Further, the proposed requirement for a review of the operation of the subdivision and regulations made under it within 12 months of commencement may serve as an important safeguard in terms of how the measure may operate in practice. However, it is not clear why proposed section 67ZBC should not, itself, specify that only agencies (or parts of agencies) with investigative power, or responsibility for the prevention of, family violence, child abuse and neglect matters; or which hold information which is directly relevant to the assessment and mitigation of such matters in proceedings, may be prescribed.

1.84 Further, proposed section 67ZBI provides that information sharing agencies must have regard to prescribed information sharing safeguards when providing

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12 Explanatory memorandum, p. 16.

13 Explanatory memorandum, p. 17.

particulars, documents or information to the courts, and that the courts must have regard to them when using that information (meaning when handling, storing and accessing the information). However, these safeguards will be set out in the regulations and are not contained in the bill.

1.85 The explanatory memorandum sets out a list of the types of safeguards that are expected to be included in these regulations, including that information is only shared to the extent necessary, sharing is conducted in good faith, and that information is sent and received in a secure manner.<sup>14</sup> It states that these safeguards are intended to provide 'a minimum standard of safeguards' for the protection of information, and are expected to complement existing practices within the courts and information sharing agencies.<sup>15</sup> However, it is not clear why these safeguards are not set out in the bill itself, particularly noting that they are intended to represent the minimum standard of safeguards, and the proposed safeguards contained in the explanatory memorandum are expressed generally and would appear to have broad applicability.

1.86 Were regulations made which reflected the proposed information sharing safeguards set out in the explanatory memorandum, these would likely serve as important safeguards to help ensure the measure is a proportionate limit on the right to privacy. In addition, the proposed requirement for a review of the operation of the subdivision and regulations made under it within 12 months of commencement may also serve as an important safeguard in monitoring how the measure operates in practice.

### **Committee view**

1.87 The committee notes that streamlining information-sharing with the Federal Circuit and Family Court of Australia relating to family violence, child abuse and neglect risks in parenting proceedings is directed towards the important objectives of promoting the safety and wellbeing of children and families accessing the family law system, and this bill may promote several human rights, including the rights of the child and the right to equality non-discrimination.

1.88 The committee notes that facilitating the sharing of information between agencies and family law courts also engages and limits the right to privacy. The committee considers that if the measures operate in the manner set out in the explanatory memorandum (in particular, in relation to the prescription of a restricted class of agencies as 'information sharing agencies' and the making of regulations which set out information sharing safeguards) the limit on the right to privacy may be proportionate in practice. However, as such safeguards are not specified in the bill itself, it is difficult to fully assess the compatibility of the bill with the right to privacy.

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14 Explanatory memorandum, pp. 25–26.

15 Explanatory memorandum, p. 26.

The committee notes it will scrutinise any future regulations for compatibility with human rights.

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**Suggested action**

1.89 The committee considers the proportionality of this measure may be assisted were the bill amended in line with the information provided in the explanatory memorandum, setting out:

- (a) the type of agencies that may be prescribed as 'information sharing agencies'; and
- (b) the broad principles to be included in the information sharing safeguards.

1.90 The committee draws the above to the attention of the minister and the Parliament.

## National Security Legislation Amendment (Comprehensive Review and Other Measures No. 2) Bill 2023<sup>1</sup>

<p><b>Purpose</b></p>	<p>Schedule 1 Part 1 would amend the <i>Law Officers Act 1964</i> to remove the ability of the Attorney-General to delegate some of his or her powers under the <i>Australian Security Intelligence Organisation Act 1979</i> (ASIO Act) to Commonwealth officials, and amend the <i>Acts Interpretation Act 1901</i>, the ASIO Act, and the <i>Telecommunications (Interception and Access) Act 1979</i> to limit the ability for the Executive to confer the powers vested in the Attorney-General with respect to ASIO onto another minister.</p> <p>Part 2 would insert a new defence in the <i>Criminal Code Act 1995</i>.</p> <p>Part 3 would amend the <i>Intelligence Services Act 2001</i> in relation to the Parliamentary Joint Committee on Intelligence and Security.</p> <p>Part 4 would expand the exclusions in the spent convictions scheme under the <i>Crimes Act 1914</i> to enable ASIO to use, record and disclose spent convictions information.</p> <p>Part 5 would amend the <i>Inspector-General of Intelligence and Security Act 1986</i> to require the Inspector-General of Intelligence and Security (IGIS) to report on public interest disclosures received by, and complaints made to, the IGIS.</p> <p>Part 6 would amend the <i>Ombudsman Act 1976</i> to exclude intelligence services from the Commonwealth Ombudsman's jurisdiction.</p> <p>Part 7 would amend the <i>Freedom of Information Act 1982</i> to remove the Australian Geospatial-Intelligence Organisation's exemptions regarding documents related to the Australian Hydrographic Office, and align protections afforded to the Australian Transaction Reports and Analysis Centre's Suspicious Matter Reports and Suspicious Transaction Reports under the FOI Act.</p> <p>Part 8 would amend the <i>Administrative Appeals Tribunal Act 1975</i> and the <i>Archives Act 1983</i> to require all proceedings in</p>
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1 This entry can be cited as: Parliamentary Joint Committee on Human Rights, National Security Legislation Amendment (Comprehensive Review and Other Measures No. 2) Bill 2023, *Report 5 of 2023*; [2023] AUPJCHR 43.



	relation to security records under the Archives Act be heard in the Security Division of the Administrative Appeals Tribunal, and to amend requirements for IGIS to provide evidence.
	Part 9 would amend the <i>Intelligence Services Act 2001</i> regarding the level of detail required to describe the directed activities in a Ministerial direction.
<b>Portfolio</b>	Attorney-General
<b>Introduced</b>	House of Representatives, 29 March 2023
<b>Rights</b>	Privacy

### Expanded permissible disclosures of spent convictions

1.91 This bill seeks to amend the *Crimes Act 1914* (Crimes Act) to expand the exclusions in the spent convictions scheme. Proposed section 85ZZJA would permit the Australian Security Intelligence Organisation (ASIO) to use, file or record and disclose spent convictions information in the exercise of its functions or the performance of its functions.<sup>2</sup> This would extend to the Director-General of Security, an ASIO employee, and an ASIO affiliate (including a contractor, consultant or secondee).<sup>3</sup>

1.92 A conviction for an offence is spent if it has been 10 years since the date of the conviction; the individual was not sentenced to imprisonment or was not sentenced to imprisonment for more than 30 months; the individual has not re-offended during the 10 years waiting period; and a statutory or prescribed exclusion does not apply.<sup>4</sup> Section 85ZA provides that where a conviction is spent a person is not required to disclose it to any person or Commonwealth authority, for any purpose (unless an exception applies).

### International human rights legal advice

#### *Right to privacy*

1.93 Expanding the circumstances in which spent convictions may be permissibly used, filed, recorded and disclosed to ASIO 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

<sup>2</sup> Item 14.

<sup>3</sup> Schedule 1, Part 4, item 14, proposed subsection 85ZZJA(2).

<sup>4</sup> *Crimes Act 1914*, section 85ZM.

sharing of such information.<sup>5</sup> It also includes the right to control the dissemination of information about one's private life.

1.94 The right to privacy may be permissibly limited where the limitation pursues a legitimate objective (one that is necessary and addresses an issue of public or social concern that is pressing and substantial enough to warrant limiting the right), is rationally connected to (that is, capable of achieving) that objective and is a proportionate means of achieving it.

1.95 The statement of compatibility acknowledges that the measure limits the right to privacy.<sup>6</sup> It states that the objective of the bill is to improve the legislative framework governing national intelligence agencies to 'protect the lives and security of Australians, mitigate imminent and significant risks to their safety and address national security risks to Australia', and that this measure would allow ASIO access to the information necessary to perform its functions, and to protect Australia from security threats.<sup>7</sup> The explanatory memorandum states that this item implements recommendation 136 of the Comprehensive Review of the Legal Framework of the National Intelligence Community.<sup>8</sup> The Comprehensive Review noted that spent convictions could be shared with other law enforcement agencies for the purposes of the investigation or prevention of crime but not to ASIO, and that the Australian Criminal Intelligence Commission had provided a number of examples demonstrating where it had encountered problematic limitations to sharing information with ASIO.<sup>9</sup> As such, it appears that the amendment would address a problem that has been encountered in practice. Consequently, protecting against security risks would be capable of constituting a legitimate objective under international human rights law, and allowing ASIO to access such information would appear rationally connected to, that is, capable of achieving, that objective.

1.96 With respect to proportionality, the statement of compatibility states that ASIO would only be able to access, disclose or use spent conviction information for the purposes of performing its functions or exercising its powers.<sup>10</sup> However, it does not identify any safeguards that would operate to protect spent conviction information. It merely states that the interests of ASIO in protecting Australia from national security threats should outweigh the individual's entitlement to privacy in

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

6 Statement of compatibility, p. 10.

7 Statement of compatibility, p. 10.

8 Explanatory memorandum, p. 21.

9 [Report of the Comprehensive Review of the Legal Framework of the National Intelligence Community](#), Volume 3; Information, Technology, Powers and Oversight, p. 50.

10 Statement of compatibility, p. 10.

respect of a spent conviction. The acts and practices of ASIO are exempt from the *Privacy Act 1988*.<sup>11</sup>

1.97 It is noted that ASIO is subject to guidelines issued by the Minister for Home Affairs, which include requirements as to how ASIO should treat personal information.<sup>12</sup> These guidelines require ASIO to maintain policies about its access to and retention of personal information, which must provide clear guidance on the purposes for which ASIO may disclose personal information, including the disclosure of information overseas.<sup>13</sup> Policies made pursuant to these guidelines have the capacity to serve as an important safeguard, however, as the policies are not publicly available it is not possible to ascertain their full safeguard value. In particular, it is not clear to whom ASIO may permissibly disclose personal information. As such, it is not possible to fully assess the compatibility of this measure with the right to privacy.

### **Committee view**

1.98 The committee notes that permitting ASIO to use, file or record and disclose spent convictions information in the exercise of its functions or the performance of its functions, limits the right to privacy, particularly as it is not clear to whom ASIO may disclose personal information about spent convictions. The committee considers the measure seeks to achieve the legitimate objective of allowing ASIO access to the information necessary to perform its functions, and to protect Australia from security threats. In considering the proportionality of the measure, the committee considers it would have been useful had the statement of compatibility identified any applicable safeguards. The committee appreciates this information may not be available on national security grounds, however, without information as to whom the spent conviction information may be disclosed, it is not possible for the committee to fully assess the compatibility of this measure with the right to privacy.

1.99 The committee draws this matter to the attention of the Attorney-General and the Parliament.

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11 *Privacy Act 1988*, s. 7.

12 [Minister's Guidelines to the Australian Security Intelligence Organisation](#), Part 4.

13 [Minister's Guidelines to the Australian Security Intelligence Organisation](#), clause 4.3.

## Social Services Legislation Amendment (Child Support Measures) Bill 2023<sup>1</sup>

<b>Purpose</b>	This bill seeks to amend <i>the Child Support (Registration and Collection) Act 1988</i> in relation to the issue of departure authorisation certificates, expanding the circumstances in which Services Australia can deduct child support debts directly from a person's wages, and determining adjusted taxable income.
<b>Portfolio</b>	Social Services
<b>Introduced</b>	House of Representatives, 29 March 2023
<b>Right</b>	Freedom of movement

### Departure authorisation certificates

1.100 Currently Part VA of the *Child Support (Registration and Collection) Act 1988* (the Act) provides that where a person (or carer) has a child support liability (or carer liability), and they owe a child support debt, the Child Support Registrar (the Registrar) can make an order prohibiting the person from departing Australia (a departure prohibition order). Currently, a person who is subject to a departure prohibition order may apply for a certificate authorising them to leave Australia for a foreign country, and the Registrar must issue a certificate if:

- (a) satisfied that it is likely the person will depart and return in an appropriate time period; and it is likely that the order will likely need to be revoked within a particular period of time (because either the person will no longer have a child support debt, satisfactory arrangements have been made for it to be discharged, or the liability is irrecoverable);<sup>2</sup> and it is not necessary for the person to give a security for their return; or
- (b) the person has given a security for their return; or
- (c) if the person is unable to give a security, the Registrar is satisfied the certificate should be issued on humanitarian grounds or because

1 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Social Services Legislation Amendment (Child Support Measures) Bill 2023, *Report 5 of 2023*; [2023] AUPJCHR 44.

2 These are the bases on which the Registrar must revoke a departure prohibition order pursuant to section 721 of the *Child Support (Registration and Collection) Act 1988*.

refusing to issue the certificate will be detrimental to Australia's interests.<sup>3</sup>

1.101 This bill seeks to amend the Act relating to when a departure authorisation certificate can be issued. In effect, the bill would provide that a certificate cannot be issued solely where a person has given a security for their return. They must have given a security for their return *and* have satisfied the Registrar that they will wholly or substantially discharge the outstanding child support or carer liability (or the debt is irrecoverable or they will likely no longer have such a debt).<sup>4</sup>

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

### ***Right to freedom of movement***

1.102 By expanding the circumstances in which the Registrar may refuse to issue a departure authorisation certificate, which prevents persons from leaving Australia, the measure engages and limits the right to freedom of movement.

1.103 The right to freedom of movement includes the right to move freely within a country for those who are lawfully within the country, the right to leave any country and the right to enter one's own country.<sup>5</sup> This encompasses both the legal right and practical ability to leave a country, and therefore it applies not just to departure for permanent emigration but also for the purpose of travelling abroad.

1.104 The right to freedom of movement 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, subject to some additional requirements. The right may only be restricted in particular circumstances, including where it is necessary to achieve the objectives of protecting the rights and freedoms of others, national security, public health or morals, and public order.<sup>6</sup> The United Nations (UN) Human Rights Committee has stated that these permitted grounds for restrictions on freedom of movement constitute 'exceptional circumstances', and that laws authorising the application of restrictions should use precise criteria and may not confer unfettered discretion on those charged with their execution.<sup>7</sup>

1.105 The statement of compatibility with human rights recognises that this measure limits the right to freedom of movement, and states that it is reasonable,

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3 Part VA, Division 4.

4 See Schedule 1, Part 1. Schedule 1 Part 2 of the bill relates to extending employer withholding, and Part 3 deals with determining adjustable taxable income.

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

6 International Covenant on Civil and Political Rights, Article 12(3).

7 United Nations Human Rights Committee, *General Comment No. 27: Article 12 (Freedom of movement)* (1999), [13].

necessary and proportionate.<sup>8</sup> It states that this measure does not introduce a new limitation on freedom of movement, but rather tightens an existing limitation.<sup>9</sup> It states that the proposed limitation is directed towards the permissible purpose of restricting a right under domestic law on the grounds that the rights and freedoms of others is impacted, noting that when a parent does not meet their child support obligation and has a debt to another person, they impact the rights of the child to receive maintenance and the rights of the child and the other party to an adequate standard of living.

1.106 The minister's second reading speech further states that the bill will improve debt recovery for child support, and that this measure will close a loophole which currently exists, where a parent who has the financial resources to provide a bond is able to travel overseas despite actively avoiding their legal obligations to provide financial support to their children.<sup>10</sup> In this regard, the second reading speech states that the measure will only impact approximately 110 parents with average child support debts of \$43,500 each.

1.107 Improving the ability to enforce payment of child support debts is likely to be a legitimate objective under international human rights law, and appears capable of meeting the requirement that a limit on the right to freedom of movement is necessary to achieve the objective of promoting the rights and freedoms of others. However, the small number of affected persons raises questions as to whether the measure addresses an issue of public or social concern that is pressing and substantial enough to warrant limiting the right. In addition, no information has been provided as to whether there has been an existing problem with this cohort leaving Australia under current provisions. Further, it is not clear whether the circumstances contemplated by this measure would meet the threshold requirement set out by the UN Human Rights Committee of being 'exceptional circumstances'.

1.108 As to whether the measure is rationally connected to (that is, capable of achieving) this objective, the statement of compatibility states that the measure ensures that child support debtors subject to a departure prohibition order, and with a history of defaulting on their child support debt payment obligations, are no longer

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8 Statement of compatibility, p. 16.

9 The committee previously considered the legislation which established this limitation: Social Services Legislation Amendment (Enhanced Welfare Payment Integrity) Bill 2016. See, Parliamentary Joint Committee on Human Rights, [36<sup>th</sup> Report of the 44<sup>th</sup> Parliament](#) (16 March 2016) pp. 8–11; and [Report 7 of 2016](#) (11 October 2016) pp. 103-107. The committee concluded that there is a risk that, in some cases departure prohibition orders may be applied in circumstances where they are not the least rights restrictive way to achieve the objective of encouraging the repayment of social security debts, and noted that the bill could be amended to add a wider range of specific safeguards.

10 The Hon Amanda Rishworth MP, [second reading speech](#), *House of Representatives Hansard*, Wednesday 29 March 2023, pp. 23-24.

able to bypass the restrictions imposed by the order simply by providing a security for their return to Australia.<sup>11</sup> However, it is not clear whether preventing such persons from travelling outside Australia will be effective to cause them to pay their debt (other than by ensuring that they do not spend money on the cost of travelling internationally). The statement of compatibility provides no information as to whether (or to what extent) preventing a parent from leaving the country would result in more timely payment of child support debt. This raises some questions as to whether the measure is rationally connected to the stated objective.

1.109 A key aspect of whether the proposed limitation on the right to freedom of movement can be justified is whether the limitation is proportionate to the objective being sought. In this respect, it is necessary to consider a number of factors, including whether the proposed limitation is sufficiently circumscribed; whether it is accompanied by sufficient safeguards; and whether any less rights restrictive alternatives could achieve the same stated objective. It is also necessary to assess whether there is the possibility of oversight and the availability of review.

1.110 The statement of compatibility notes that debtors will continue to be able to apply for a departure authorisation certificate on other grounds including: where they are likely to depart and return to Australia within a specified period of time, and it is likely the Registrar will be required to revoke the order (for example, where the Registrar is satisfied the child support debt will be paid in a reasonable timeframe);<sup>12</sup> on humanitarian grounds; or because it is in Australia's interests.<sup>13</sup> These would operate as safeguards by providing some limited flexibility. Further, both the decision to make a departure prohibition order and a decision in relation to the issuing of a departure authorisation certificate are reviewable by courts and tribunals,<sup>14</sup> which assists with the proportionality of the measure (although it is noted that there are fees and complexities inherent in applying to the courts and tribunals).

1.111 As to whether the measure is sufficiently circumscribed, the second reading speech states that a departure prohibition order is reserved for extreme cases where other avenues have failed.<sup>15</sup> This suggests that these orders are a measure of last resort in practice. However, this is not set out in the legislation itself, and so the power is not circumscribed in this way as a matter of law. This raises questions as to

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11 Statement of compatibility, p. 16.

12 Subsection 72L(2).

13 Subsection 72L(3)(b). Statement of compatibility, p. 16.

14 Sections 72Q and 72T.

15 The Hon Amanda Rishworth MP, [second reading speech](#), *House of Representatives Hansard*, Wednesday 29 March 2023, pp. 23-24.

whether the measure is consistent with the requirement that any limitation on the right to freedom of movement must use precise criteria.<sup>16</sup>

### **Committee view**

1.112 The committee notes that restricting when a person who owes a child support debt can leave Australia engages and limits the right to freedom of movement. The committee considers further information is required to assess the compatibility of this measure with this right, and as such seeks the minister's advice in relation to:

- (a) whether the measure addresses an issue of public or social concern that is pressing and substantial enough to warrant limiting the right, and whether the circumstances contemplated by this measure would meet the threshold requirement of being 'exceptional circumstances' such as to warrant limiting the right to freedom of movement;
- (b) whether (or to what extent) preventing a parent from leaving the country will result in more timely payment of child support debt; and
- (c) why the legislation does not provide that a departure prohibition order is only to be used as a last resort if it is intended that the measure operates this way in practice.

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16 UN Human Rights Committee, General Comment No. 27, [13].



## Legislative instruments

### Family Law (Bilateral Arrangements—Intercountry Adoption) Regulations 2023 [F2023L00309]<sup>1</sup>

<b>Purpose</b>	The Family Law (Bilateral Arrangements—Intercountry Adoption) Regulations 2023 facilitate Australia's bilateral arrangements for intercountry adoptions by prescribing the Republic of Korea and Taiwan as overseas jurisdictions for the purposes of section 111C of the <i>Family Law Act 1975</i> , and providing that adoptions made under the laws of a 'prescribed overseas jurisdiction' are recognised for the purposes of Australian law
<b>Portfolio</b>	Social Services
<b>Authorising legislation</b>	<i>Family Law Act 1975</i>
<b>Last day to disallow</b>	15 sitting days after tabling (tabled in the House of Representatives on 23 March 2023 and in the Senate on 24 March 2023). Notice of motion to disallow must be given by 13 June 2023 in the House and by 22 June 2023 in the Senate) <sup>2</sup>
<b>Rights</b>	Rights of the child and protection of the family

### Intercountry adoption with prescribed overseas jurisdictions

1.113 The Family Law (Bilateral Arrangements—Intercountry Adoption) Regulations 2023 declare the Republic of Korea and Taiwan as 'prescribed overseas jurisdictions' for the purposes of bilateral arrangements between Australia and these overseas jurisdictions with respect to intercountry adoptions.<sup>3</sup> The regulations also

- 1 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Family Law (Bilateral Arrangements—Intercountry Adoption) Regulations 2023, *Report 5 of 2023*; [2023] AUPJCHR 45.
- 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 Family Law (Bilateral Arrangements—Intercountry Adoption) Regulations 2023 [F2023L00309], section 5. It is noted that the related instrument – Family Law (Bilateral Arrangements—Intercountry Adoption) (Repeals and Consequential Amendments) Regulations 2023 [F2023L00308] – repeals the Family Law (Bilateral Arrangements—Intercountry Adoption) Regulations 1998 and makes consequential amendments to the Australian Citizenship Regulation 2016 and the Migration Regulations 1994, to update the references to the 1998 regulations with the 2023 regulations.

provide that an intercountry adoption will be recognised and effective for the purposes of Australian law if certain conditions are met, including that an adoption compliance certificate was issued by a competent authority of the prescribed overseas jurisdiction and the certificate states that the adoption was carried out in accordance with the laws of that overseas jurisdiction.<sup>4</sup> An adoption compliance certificate is evidence, for the purposes of Australian law, that the adoption to which the certificate relates was carried out in accordance with the laws of the prescribed overseas jurisdiction.<sup>5</sup> The effect of recognition for the purposes of Australian law is that the relationship between the child and their adoptive parents is the relationship of child and parent; each adoptive parent has parental responsibility for the child; and the child has the same rights as a child who is adopted under Australian state or territory laws.<sup>6</sup>

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

### ***Rights of the child and right to protection of the family***

1.114 To the extent that the regulations facilitate intercountry adoption between Australia and the Republic of Korea and Taiwan, they engage the rights of the child, particularly those rights relating to intercountry adoption, and the right to protection of the family.

1.115 Children have special rights under human rights law taking into account their particular vulnerabilities.<sup>7</sup> Children's rights are protected under a number of treaties, particularly the Convention on the Rights of the Child. All children under the age of 18 years are guaranteed these rights, without discrimination on any grounds.<sup>8</sup> Australia is required to ensure that, in all actions concerning children, the best interests of the child are a primary consideration.<sup>9</sup> 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.<sup>10</sup>

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4 Family Law (Bilateral Arrangements—Intercountry Adoption) Regulations 2023 [F2023L00309], section 7.

5 Family Law (Bilateral Arrangements—Intercountry Adoption) Regulations 2023 [F2023L00309], section 9.

6 Family Law (Bilateral Arrangements—Intercountry Adoption) Regulations 2023 [F2023L00309], section 8.

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

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

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

10 UN Committee on the Rights of Children, *General Comment 14 on the right of the child to have his or her best interest taken as primary consideration* (2013).

1.116 Article 21 of the Convention on the Rights of the Child provides special protection in relation to intercountry adoption, seeking to ensure that it is performed in the best interests of the child. Specific protections include that intercountry adoption:

- is authorised only by competent authorities;
- may be considered as an alternative means of the child's care, if the child cannot be placed in a foster or an adoptive family or cannot in any suitable manner be cared for in the child's country of origin;
- is subject to the same safeguards and standards equivalent to those that apply to national adoption; and
- does not result in improper financial gain for those involved.

1.117 Article 21 also provides that States parties should, where appropriate, promote the objectives of article 21 by concluding bilateral or multilateral arrangements. Article 20 of the Convention on the Rights of the Child provides that should alternative child care arrangements be necessary, when considering options, due regard should be paid to the desirability of continuity in a child's upbringing and to the child's ethnic, religious, cultural and linguistic background.

1.118 The Hague Convention on the Protection of Children and Co-operation in Respect of Intercountry Adoption<sup>11</sup> (Hague Convention) establishes a common regime, including minimum standards and appropriate safeguards, for ensuring that inter-country adoptions are performed in the best interests of the child and with respect for the fundamental rights guaranteed by the Convention on the Rights of the Child. The Hague Convention also assists in combatting the sale of children and human trafficking.

1.119 The right to respect for the family requires the state not to arbitrarily or unlawfully interfere in family life and to adopt measures to protect the family.<sup>12</sup> An important element of protection of the family is to ensure family members are not involuntarily separated from one another. Laws and measures which prevent family members from being together, or involuntarily remove children from their parents, will therefore engage this right.

1.120 The statement of compatibility states that the regulations have a positive impact on the above rights insofar as the regulations facilitate intercountry adoptions with prescribed overseas jurisdictions and the recognition of these adoptions under Australian law. It notes that intercountry adoption in Australia is facilitated on the basis of the principles and standards contained in the Hague

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11 [Hague Convention on the Protection of Children and Co-operation in Respect of Intercountry Adoption](#) (29 May 1993).

12 International Covenant on Civil and Political Rights, articles 17 and 23; and the International Covenant on Economic, Social and Cultural Rights, article 10.

Convention. While the Republic of Korea and Taiwan have not yet signed (in the case of Taiwan) and ratified (in the case of the Republic of Korea) the Hague Convention, the explanatory statement states that the bilateral arrangements with these jurisdictions nevertheless comply with the Hague Convention. To the extent that intercountry adoptions facilitated in accordance with these bilateral arrangements are compliant with the Hague Convention and the Convention on the Rights of the Child, these rights may be protected.

1.121 However, noting that intercountry adoption may involve the separation of families and involves the placement of a child in alternative care outside their country of origin, there may be a risk that the rights of the child and the right to protection of the family are also limited if the intercountry adoption is not undertaken in compliance with international human rights law. For intercountry adoption to be legally recognised in Australia, there must be an adoption compliance certificate which states that the adoption was carried out in accordance with the laws of the prescribed overseas jurisdiction. However, if the laws of the Republic of Korea and Taiwan do not fully comply with the Hague Convention and the Convention on the Rights of the Child, for example the laws fail to ensure the best interests of the child are a primary consideration, there may be a risk that these rights are limited. The statement of compatibility does not recognise that these rights may be limited and so provides no assessment as to the permissibility of such limitations.

1.122 Similar concerns have been previously raised by the Parliamentary Joint Committee on Human Rights in its consideration of earlier legislation relating to intercountry adoption.<sup>13</sup> The committee previously emphasised that compliance with the Hague Convention is a critical component of ensuring the protections required by article 21 of the Convention on the Rights of the Child are maintained in any intercountry adoption. The committee stated that legislation relating to intercountry adoption, particularly the *Australian Citizenship Amendment (Intercountry Adoption) Act 2015*, specifies no standards or safeguards that will apply to intercountry adoptions under a bilateral agreement, and it is therefore not clear whether lower standards, or fewer safeguards, may apply to intercountry adoptions under a bilateral agreement than those that apply under the Hague Convention and the framework it sets out to ensure the best interests of the child. The committee noted the Australian Government's previous advice that it only establishes international adoption arrangements with countries which can apply the standards required by the Hague Convention. However, the committee considered that it remained unclear

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13 See, e.g. Parliamentary Joint Committee on Human Rights, Migration Legislation Amendment (2014 Measures No. 2) Regulation 2014 [F2014L01461], [Twenty-second Report of the 4<sup>th</sup> Parliament](#) (13 May 2015); Australian Citizenship Amendment (Intercountry Adoption) Bill 2014, [Eighth Report of the 44<sup>th</sup> Parliament](#) (24 June 2014) and [Tenth Report of the 44<sup>th</sup> Parliament](#) (26 August 2014).

how Australia establishes that a country that is not a party to the Hague Convention can nevertheless apply the standards required by that convention and how Australia confirms the efficacy of child protection measures in countries to which Australia has, or proposes to have, bilateral relationships which are not party to the Hague Convention.<sup>14</sup>

1.123 The rights of the child and the right to protection of the family 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.

1.124 The stated purpose of the regulations is to facilitate Australia's bilateral arrangements for intercountry adoptions with 'prescribed overseas jurisdictions', specifically the Republic of Korea and Taiwan.<sup>15</sup> This appears to be a legitimate objective for the purposes of international human rights law, noting Australia's obligation to promote the objectives of article 21 of the Convention on the Rights of the Child by concluding bilateral or multilateral arrangements with respect to intercountry adoption. The regulations appear to be rationally connected to, that is effective to achieve, the stated objective insofar as they operationalise key aspects of the intercountry adoption process, for example, by specifying when an intercountry adoption is recognised and has legal effect in Australia.

1.125 In assessing whether a possible limitation on a right is proportionate, it is necessary to consider whether the measure is accompanied by sufficient safeguards. The concerns outlined above in paragraph [1.10] similarly apply to the regulations as neither the regulations nor the authorising legislation specify standards or safeguards to ensure that intercountry adoptions facilitated under a bilateral arrangement with an overseas jurisdiction that is not a party to the Hague Convention are nevertheless compliant with the Hague Convention and the Convention on the Rights of the Child.

1.126 While there do not appear to be legislative safeguards, there appear to be government policies which may assist with proportionality. In particular, the Commonwealth-State Agreement for the Continued Operation of Australia's Intercountry Adoption Program (Agreement) provides that the Commonwealth and states will 'work cooperatively to ensure that intercountry adoption practice is focused on the best interests of the child, is fair and transparent, and promotes best practice in intercountry adoption'. It states that:

the Commonwealth and the States shall use their best endeavours, either through direct services or through accredited bodies, to facilitate

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14 See, most recently, Parliamentary Joint Committee on Human Rights, Migration Legislation Amendment (2014 Measures No. 2) Regulation 2014 [F2014L01461], [Twenty-second Report of the 4<sup>th</sup> Parliament](#) (13 May 2015), pp. 116–124.

15 Statement of compatibility.

intercountry adoptions, in compliance with the Hague Convention and relevant international obligations, including the United Nations Convention on the Rights of the Child. It is noted that the legal and administrative processes in the child's country of origin are not within the control of the Commonwealth or the States.<sup>16</sup>

1.127 The Agreement further states that the 'Commonwealth will ensure that regulations made pursuant to section 111C of the *Family Law Act 1975* [to which the regulations relate] are reviewed and maintained to ensure that Australia is able to fulfil its obligations under the Hague Convention'.<sup>17</sup> It continues that 'the Commonwealth and the States agree not to introduce amendments to legislation or change administrative procedures in relation to intercountry adoption in such a way that may adversely affect Australia's ability to comply with the Hague Convention'.<sup>18</sup> Regarding the making of bilateral arrangements with countries that are not party to the Hague Convention, the Agreement states that any new or revised program shall be negotiated by the Commonwealth and this negotiation will be subject to Australia being satisfied that the non-Convention country demonstrates compliance with the Hague Convention.<sup>19</sup> The Agreement also provides that the Commonwealth will provide states, at least every two years, with a statement on each partner country to which the Commonwealth has an arrangement, outlining its ongoing compliance with the requirements of the Hague Convention.<sup>20</sup>

1.128 To the extent that it is implemented, the Agreement contains useful safeguards that may assist to ensure that intercountry adoptions between Australia and overseas jurisdictions that are not a party to the Hague Convention, including the Republic of Korea and Taiwan, are facilitated in compliance with international human rights law. However, noting that government policies are not as strong as legislative safeguards and that it is difficult to properly assess the adequacy of the adoption laws of overseas jurisdictions in terms of compliance with the Hague Convention and the Convention on the Rights of the Child, there may be a risk that intercountry adoptions with overseas jurisdictions that are not a party to the Hague Convention may limit the rights of the child and the right to protection of the family in a manner that may not, in all circumstances, be proportionate.

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16 [Commonwealth-State Agreement for the Continued Operation of Australia's Intercountry Adoption Program](#) (2018), [I].

17 [Commonwealth-State Agreement for the Continued Operation of Australia's Intercountry Adoption Program](#) (2018), [11].

18 [Commonwealth-State Agreement for the Continued Operation of Australia's Intercountry Adoption Program](#) (2018), [13].

19 [Commonwealth-State Agreement for the Continued Operation of Australia's Intercountry Adoption Program](#) (2018), [15].

20 [Commonwealth-State Agreement for the Continued Operation of Australia's Intercountry Adoption Program](#) (2018), [16].

## Committee view

1.129 By facilitating intercountry adoption between Australia and the Republic of Korea and Taiwan, the committee considers the regulations engage the rights of the child, particularly those rights relating to intercountry adoption, and the right to protection of the family. The committee notes that the statement of compatibility states that the regulations have a positive impact on these rights as they facilitate legal recognition of intercountry adoptions. The statement of compatibility also states that the bilateral arrangements with the Republic of Korea and Taiwan are compliant with the standards and principles in the Hague Convention on the Protection of Children and Co-operation in Respect of Intercountry Adoption (Hague Convention) and the Convention on the Rights of the Child. The committee considers that, to the extent that intercountry adoptions are facilitated in a manner that complies with international human rights law, the rights of the child and the right to protection of the family may be protected.

1.130 However, noting that intercountry adoption may involve the separation of families and involves the placement of a child in alternative care outside their country of origin, the committee considers there may be risk that the rights of the child and the right to protection of the family are also limited if the intercountry adoption is not undertaken in compliance with international human rights law.

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

- (a) whether the adoption laws of the Republic of Korea and Taiwan are compliant with the Hague Convention and the Convention on the Rights of the Child, and how the government confirms this compliance;
- (b) what safeguards are in place to ensure that intercountry adoptions facilitated under bilateral arrangements with overseas jurisdictions that are not party to the Hague Convention are nevertheless compliant with international human rights law, and why such safeguards are not contained in the legislation itself; and
- (c) noting that the Commonwealth-State Agreement says that the Commonwealth will provide states with a statement outlining partner countries' compliance with the requirements of the Hague Convention, are such statements publicly available, and if not, why.

## 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.<sup>1</sup>

### Bills

#### Social Security (Administration) Amendment (Income Management Reform) Bill 2023 and related instruments<sup>2</sup>

<p><b>Purpose</b></p>	<p>This bill seeks to make amendments to the enhanced income management regime under Part 3AA of the <i>Social Security (Administration) Act 1999</i>, including by directing all new participants to the Part 3AA regime and closing entry to the income management regime under Part 3B; and offering participants subject to the income management regime under Part 3B the choice to transition to the Part 3AA regime.</p> <p>The related instruments firstly set out the terms and conditions relating to the establishment, ongoing maintenance and closure of BasicsCard bank accounts and specifies the kinds of businesses in relation to which transactions involving BasicsCard bank accounts may be declined, and secondly specify the Ngaanyatjarra Lands as an area for the purposes of the eligibility criteria relating to vulnerable welfare payment</p>
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1 See [https://www.aph.gov.au/Parliamentary\\_Business/Committees/Joint/Human\\_Rights/Scrutiny\\_reports](https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Scrutiny_reports).

2 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Social Security (Administration) Amendment (Income Management Reform) Bill 2023, *Report 5 of 2023*; [2023] AUPJCHR 46.



	recipients and as a declared voluntary income management area. <sup>3</sup>
<b>Portfolio</b>	Social services
<b>Introduced</b>	House of Representatives, 9 March 2023
<b>Rights</b>	Social security; private life; adequate standard of living; equality and non-discrimination; rights of the child

2.3 The committee requested a response from the minister in relation to the bill in [Report 4 of 2023](#).<sup>4</sup>

### The enhanced income management regime

2.4 By way of background, the *Social Security (Administration) Amendment (Repeal of Cashless Debit Card and Other Measures) Act 2022* introduced the enhanced income management regime under Part 3AA of the *Social Security (Administration) Act 1999* (the Act). This Act also compulsorily transitioned former Cashless Debit Card (CDC) participants in the Northern Territory and Cape York region to this new enhanced income management regime (which took effect on 6 March 2023).<sup>5</sup> The enhanced income management regime provides participants with access to a BasicsCard bank account, which is accompanied by a debit card (known as a SmartCard).<sup>6</sup> A SmartCard will operate like a standard Visa debit card and participants will be able to purchase goods and services online and use mainstream banking functions including BPAY, and is said to be a 'superior banking product' to the existing BasicsCard.<sup>7</sup>

3 The related instruments are Social Security (Administration) (Declinable Transactions and BasicsCard Bank Accounts) Determination 2023 [F2023L00189] and Social Security (Administration) (Declared income management area — Ngaanyatjarra Lands) Determination 2023 [F2023L00190].

4 Parliamentary Joint Committee on Human Rights, *Report 4 of 2023* (29 March 2023), pp. 9–25.

5 See Parliamentary Joint Committee on Human Rights, *Social Security (Administration) Amendment (Repeal of Cashless Debit Card and Other Measures) Bill 2022*, [Report 3 of 2022](#) (7 September 2022) pp. 15–26 and [Report 5 of 2022](#) (20 October 2022) pp. 39–55.

6 Section 123SU of the *Social Security (Administration) Act 1999* provides that the Secretary may, by legislative instrument, determine a kind of bank account to be maintained by a person who is subject to the enhanced income management regime. Section 7 of the Social Security (Administration) (Declinable Transactions and BasicsCard Bank Accounts) Determination 2023 [F2023L00189] provides that a BasicsCard bank account established with Indue or Traditional Credit Union is the kind of bank account to be maintained by a person subject to the enhanced income management regime. The terms and conditions relating to the use of the BasicsCard bank account are set out in Schedule 4 of the Determination.

7 Explanatory statement, pp. 1, 4–5.

2.5 This bill seeks to expand access to the enhanced income management regime by introducing eligibility criteria for both compulsory and voluntary participation in the regime. These criteria largely mirror the existing eligibility criteria under Part 3B of the Act (which sets up the original income management regime), meaning that persons who may become subject to the enhanced income management regime are the same as those who are, or would be, subject to income management under Part 3B of the Act.<sup>8</sup> This bill also seeks to introduce additional eligibility criteria in relation to disengaged youth and long-term welfare payment recipients who reside within a state, a territory or an area other than the Northern Territory as specified by the minister by legislative instrument.<sup>9</sup> In particular, a person would be subject to the enhanced income management regime if, among other things, they meet the criteria relating to disengaged youth or long-term welfare payment recipient, they usually reside within a specified place and they are not subject to the enhanced income management regime under any other eligibility criteria, such as because they are a vulnerable welfare payment recipient or a child protection officer requires the person to be income managed.<sup>10</sup> In addition, the bill would direct all new entrants to income management to the enhanced income management regime and close entry to the old income management regime under Part 3B of the Act, as well as offer participants subject to income management under Part 3B the choice to voluntarily transition to the enhanced income management regime.<sup>11</sup>

2.6 The bill would also specify the portions of welfare payments that are to be 'qualified' (the amount that may be spent on non-excluded goods and services) and 'unqualified' (the amount that may be spent at the person's discretion).<sup>12</sup> The portions specified in this bill appear to mirror the 'deductible portions' set out under

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8 Schedule 1, item 17 remakes the eligibility criteria in relation to child protection, referrals by recognised state and territory authorities and vulnerable welfare payment recipients. Item 1 sets out all persons who may become subject to the enhanced income management regime.

9 Schedule 1, item 32, new section 123SDA. Section 123SD of the *Social Security (Administration) Act 1999* sets out eligibility criteria relating to persons who are disengaged youth and long-term welfare payment recipients whose usual place of residence is within the Northern Territory.

10 Schedule 1, item 32, new section 123SDA. This eligibility criteria mirrors sections 123UCB and 123UCC, which sets out the eligibility criteria for disengaged youth and long-term welfare payment recipients in relation to the income management regime under Part 3B of the *Social Security (Administration) Act 1999*.

11 Schedule 1 expands access to the enhanced income management regime and schedule 2 closes the income management regime under Part 3B to new entrants.

12 Scheduled 1, items 49–51.

Part 3B of the Act.<sup>13</sup> The qualified portions for welfare payments vary between 100 per cent and 50 percent depending on the type of welfare payment, unless another percentage is determined by the minister.<sup>14</sup> Restrictions on the use of the qualified portion of a person's welfare payment are set out in a related instrument.<sup>15</sup> In particular, the instrument declares the kinds of businesses in relation to which transactions involving a BasicsCard bank account (that is, a bank account subject to the enhanced income management regime) may be declined by a financial institution.<sup>16</sup> The instrument also sets out the terms and conditions relating to the establishment, ongoing maintenance and closure of BasicsCard bank accounts.<sup>17</sup> For example, cash cannot be withdrawn from a BasicsCard bank account and money cannot be used to purchase excluded goods and services or cash-like products (such as gift cards or vouchers). Limitations may also be placed on amounts that a person can spend and transfer out of their account.

2.7 Further, the bill would allow for the disclosure of information, including personal information, between relevant authorities for the purposes of the operation of the enhanced income management regime.<sup>18</sup> For example, new section 123STA would allow a child protection officer to give the secretary information about a person who is subject to the enhanced income management regime, or about a person who the child protection officer is considering requiring to be income managed.<sup>19</sup>

2.8 In addition, the Social Security (Administration) (Declared income management area — Ngaanyatjarra Lands) Determination 2023 continues the operation of voluntary income management arrangements under Part 3B of the Act and specifies the Ngaanyatjarra Lands as an area for the purposes of the eligibility

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13 Division 5 of Part 3B of the *Social Security (Administration) Act 1999* specifies the 'deductible portion' of welfare payments, that is, the amount that must be deducted from the welfare payment to be credited to the person's income management account.

14 Each welfare payment attracts a different portioning and whether a welfare payment is paid by instalments or as a lump sum will change the percentage that is qualified and unqualified.

15 Social Security (Administration) (Declinable Transactions and BasicsCard Bank Accounts) Determination 2023 [F2023L00189].

16 Social Security (Administration) (Declinable Transactions and BasicsCard Bank Accounts) Determination 2023 [F2023L00189], schedules 1–3. Schedule 1 declares the kinds of businesses by description, schedule 2 declares the kinds of businesses by merchant category and schedule 3 declares businesses by Australian and New Zealand Standard Industrial Classification codes.

17 Social Security (Administration) (Declinable Transactions and BasicsCard Bank Accounts) Determination 2023 [F2023L00189], schedule 4.

18 Schedule 1, item 68.

19 Schedule 1, item 68, new section 123STA.

criteria relating to vulnerable welfare payment recipients.<sup>20</sup> This means that if a person's usual place of residence is the Ngaanyatjarra Lands and they meet the other eligibility criteria relating to vulnerable welfare payment recipients, then they will be subject to the income management regime under Part 3B of the Act. This bill would give such persons the choice to transition to the enhanced income management regime under Part 3AA of the Act.<sup>21</sup>

## Summary of initial assessment

### *Preliminary international human rights legal advice*

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

2.9 As the committee has previously reported, measures relating to mandatory income management engage numerous human rights.<sup>22</sup> The committee has found that, to the extent that income management ensures a portion of an individual's welfare payment is available to cover essential goods and services, the income management regime could have the potential to promote rights, including the right to an adequate standard of living and the rights of the child.<sup>23</sup> However, the committee has also found that mandatory income management in Australia engages and limits a number of other human rights, including the rights to a private life,<sup>24</sup>

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20 Social Security (Administration) (Declared income management area — Ngaanyatjarra Lands) Determination 2023 [F2023L00190]

21 Schedule 1, item 17, new section 123SCL.

22 See Parliamentary Joint Committee on Human Rights, *Social Security (Administration) Amendment (Repeal of Cashless Debit Card and Other Measures) Bill 2022*, [Report 3 of 2022](#) (7 September 2022) pp. 15–26 and [Report 5 of 2022](#) (20 October 2022) pp. 39–55; [2016 Review of Strong Futures measures](#) (16 March 2016) pp. 37–62; [Eleventh Report of 2013: Stronger Futures in the Northern Territory Act 2012 and related legislation](#) (June 2013) pp. 45–62. The committee has made similar comments regarding measures relating to the Cashless Debit Card program. See, e.g. Parliamentary Joint Committee on Human Rights, *Thirty-first report of the 44th Parliament* (24 November 2015) pp. 21–36; [Report 7 of 2016](#) (11 October 2016) pp. 58–61; [Report 9 of 2017](#) (5 September 2017) pp. 34–40; [Report 11 of 2017](#) (17 October 2017) pp. 126–137; [Report 8 of 2018](#) (21 August 2018) pp. 37–52; [Report 2 of 2019](#) (2 April 2019) pp. 146–152; [Report 1 of 2020](#) (5 February 2020) pp. 132–142; [Report 14 of 2020](#) (26 November 2020) pp. 38–54; [Report 1 of 2021](#) (3 February 2021) pp. 83–102; [Report 14 of 2021](#) (24 November 2021) pp. 14–18.

23 International Covenant on Economic, Social and Cultural Rights, article 11, and Convention on the Rights of the Child. The statement of compatibility states that the bill promotes the right to an adequate standard of living by restricting individuals from spending a significant portion of their welfare payment to purchase excluded goods and services, such as alcohol, gambling products, pornography and tobacco, which ensures individuals will have sufficient funds available to meet their basic needs such as rent, food and household bills: p. 4. See also Social Security (Administration) (Declinable Transactions and BasicsCard Bank Accounts) Determination 2023 [F2023L00189], statement of compatibility, p. 3.

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

social security<sup>25</sup> and equality and non-discrimination.<sup>26</sup> Insofar as this bill and related instruments extend measures relating to income management under Part 3B to the enhanced income management regime under Part 3AA, including by introducing eligibility criteria for mandatory participation in the enhanced income management regime and restricting the way a person subject to this regime can spend the 'qualified' portion of their welfare payment, these same human rights are engaged and limited.

2.10 In particular, by subjecting an individual to mandatory income management under the Part 3AA regime and restricting how they may spend a portion of their social security payment (including, in some cases, portioning 100 per cent of a person's welfare payment as 'qualified'), the measure limits the rights to social security and a private life insofar as it interferes with an individual's freedom and autonomy to organise and make decisions about their private and family life, including making their own decisions about the way in which they use their social security payments.<sup>27</sup> The right to social security recognises the importance of adequate social benefits in reducing the effects of poverty and in preventing social exclusion and promoting social inclusion,<sup>28</sup> and enjoyment of the right requires that social support schemes must be accessible, providing universal coverage without discrimination.<sup>29</sup> The right to privacy is linked to notions of personal autonomy and human dignity. It includes the idea that individuals should have an area of autonomous development; a 'private sphere' free from government intervention and excessive unsolicited intervention by others.

2.11 Further, authorising the disclosure of personal information between relevant authorities, the consequences of which may be to subject a person to compulsory income management, would also limit the right to informational privacy, which includes the right to respect for private and confidential information, particularly the

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

26 International Covenant on Civil and Political Rights, articles 2, 16 and 26 and International Covenant on Economic, Social and Cultural Rights, article 2. It is further protected by the International Convention on the Elimination of All Forms of Racial Discrimination, articles 2 and 5.

27 The bill's statement of compatibility acknowledges the rights to social security and privacy are engaged: pp. 4–5. See also Social Security (Administration) (Declinable Transactions and BasicsCard Bank Accounts) Determination 2023 [F2023L00189], statement of compatibility, pp. 3–4.

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

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

storing, use and sharing of such information.<sup>30</sup> It also includes the right to control the dissemination of information about one's private life.

2.12 The measure may also engage and limit the right to an adequate standard of living. This right is often engaged simultaneously with the right to social security and requires that Australia take steps to ensure the availability, adequacy and accessibility of food, clothing, water and housing for all people in its jurisdiction.<sup>31</sup> The committee has previously noted that were persons subject to mandatory income management to experience difficulties in accessing and meeting their basic needs, such as food, clothing and housing, the right to an adequate standard of living may be engaged and limited.<sup>32</sup> The enhanced income management regime contains some safeguards that may mitigate the risk that individuals subject to income management under this regime may experience difficulties accessing and meeting their basic needs. In particular, participants will have access to a new SmartCard that can be used at over one million outlets across Australia and provides banking functions including 'tap and pay' payments, online shopping and BPAY.<sup>33</sup> The bill would also allow the secretary to vary the percentage of qualified and unqualified portions of a person's welfare payment if a person is unable to access their BasicsCard bank account as a direct result of a technological fault or malfunction with the card or account; a natural disaster; or a national emergency.<sup>34</sup>

2.13 However, it is not clear whether allowing any transaction with a specified kind of business to be declined by a financial institution could have an adverse impact on the ability of people in remote communities to access certain goods and services. The statement of compatibility notes that businesses that offer excluded goods and services can still be used by people subject to the enhanced income management regime if the business has systems to prevent the sale of excluded products or services to holders of an enhanced BasicsCard account.<sup>35</sup> However, if, for example, the only grocery store in a remote town did not have adequate systems in place to prevent the sale of excluded products such that transactions made at the store were able to be declined, it is not clear how a participant subject to income

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

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

32 See *Social Security (Administration) Amendment (Repeal of Cashless Debit Card and Other Measures) Bill 2022*, [Report 3 of 2022](#) (7 September 2022) pp. 15–26 and [Report 5 of 2022](#) (20 October 2022) pp. 39–5.

33 Statement of compatibility, p. 3.

34 Schedule 1, item 51, new subsections 123SLA(7)–(8), 123SLD(7)–(8), 123SLG(7)–(8), 123SLJ(7)–(8). See also *Social Security (Administration) Act 1999*, subsections 123SJ(4)–(5), 123SM(3)–(4), 123SP(3)–(4).

35 *Social Security (Administration) (Declinable Transactions and BasicsCard Bank Accounts) Determination 2023* [F2023L00189], statement of compatibility, p.3.

management could purchase groceries, noting that online grocery shopping may not be available in remote communities. If listing such businesses did prevent participants from being able to effectively access essential goods, this could have implications for the realisation of their right to an adequate standard of living.<sup>36</sup>

2.14 The measures also engage the right to equality and non-discrimination insofar as they would have a disproportionate impact on certain groups of people based on their protected attributes. This right provides that everyone is entitled to enjoy their rights without discrimination of any kind, which encompasses both 'direct' discrimination (where measures have a discriminatory *intent*) and 'indirect' discrimination (where measures have a discriminatory *effect* on the enjoyment of rights). Indirect discrimination occurs where 'a rule or measure that is neutral at face value or without intent to discriminate', exclusively or disproportionately affects people with a particular protected attribute.<sup>37</sup> The eligibility criteria set out in the bill include a criterion relating to a person's usual place of residence and, in the case of disengaged youth, a criterion relating to age. In this way, the measures would treat participants differently based on the protected attributes of place of residence within a state and age.<sup>38</sup> Further, due to the large number of Aboriginal and Torres Strait Islander persons participating in mandatory income management, the measures would have a disproportionate impact on this group, as acknowledged in the accompanying statements of compatibility.<sup>39</sup> In particular, the measure relating to the Ngaanyatjarra Lands would disproportionately impact Aboriginal and Torres

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36 This Parliamentary Joint Committee on Human Rights raised this issue in its consideration of the Social Security (Administration) Amendment (Trial of Cashless Welfare Arrangements) (Declinable Transactions and Welfare Restricted Bank Account) Determination 2021 [F2021L01473], [Report 14 of 2021](#) (24 November 2021).

37 *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'. See Sarah Joseph and Melissa Castan, *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary*, 3<sup>rd</sup> edition, Oxford University Press, Oxford, 2013, [23.39].

38 Age and place of residence have been recognised as constituting an 'other status' for the purposes of the right to equality and non-discrimination. Regarding age, see *Schmitz-De-Jong v Netherlands*, UN Human Rights Committee Communication No. 855/1999 (2001). Regarding place of residence, see *Lindgren et al v Sweden*, UN Human Rights Committee Communications Nos. 298/1988 and 299/1988 (1991).

39 Statement of compatibility, p. 2. See also Social Security (Administration) (Declinable Transactions and BasicsCard Bank Accounts) Determination 2023 [F2023L00189], statement of compatibility, p. 2.



Strait Islander peoples, noting that the majority of the population residing in this area are Aboriginal people.<sup>40</sup>

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

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40 For the purposes of the Social Security (Administration) (Declared income management area — Ngaanyatjarra Lands) Determination 2023 [F2023L00190], the Ngaanyatjarra Lands includes the shire of Ngaanyatjarraku in Western Australia and the remote community known as Kiwirrkurra Community located within the shire of East Pilbara in Western Australia: Explanatory statement, p. 1. According to the 2021 Census, there are 171 Aboriginal and/or Torres Strait Islander people living in [Kiwirrkurra](#) and 1,147 Aboriginal and/or Torres Strait Islander people living in the [Ngaanyatjarraku](#) Local Government Area (which represents 84.5 per cent of the total population). The [Ngaanyatjarra Lands School](#) also states that approximately 2,000 Aboriginal people live in eleven communities that comprise the Ngaanyatjarra Lands. Notwithstanding this, the accompanying statement of compatibility does not acknowledge that the right to equality and non-discrimination is limited, stating that the determination does not discriminate on the basis of race because anyone who resides in the Ngaanyatjarra Lands (regardless of race) will be eligible for the continuation of income management: p. 3.

41 Schedule 1, item 32, new subsection 123SDA(1).

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. 17: Article 24* (1989) [5]. See also International Covenant on Civil and Political Rights, articles 2 and 26.

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

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



consider how children's rights and interests are or will be affected directly or indirectly by their decisions and actions.<sup>46</sup>

2.16 Limits on the above rights may be permissible where a measure seeks to achieve a legitimate objective, is rationally connected to (that is, effective to achieve) that objective, and is proportionate to that objective.

### **Committee's initial view**

2.17 The committee considered further information was required to assess the compatibility of the measures contained in the bill and related instruments with multiple human rights, and as such sought the minister's advice in relation to:

- (a) whether, as previously indicated, the government intends to eventually introduce a voluntary income management regime and, if so, how extending compulsory participation in the enhanced income management regime is consistent with this broader intention;<sup>47</sup>
- (b) in relation to the eligibility criteria relating to disengaged youth and long-term welfare payment recipients, what other geographical areas are intended to be specified by the minister by legislative instrument;<sup>48</sup>
- (c) whether there is a risk that people in remote communities may experience difficulties accessing essential goods, particularly in situations where local businesses may not have adequate systems in place to prevent the sale of excluded products such that transactions made at these stores are able to be declined;
- (d) how mandatory participation in the enhanced income management regime is effective to achieve the stated objectives;
- (e) whether there are recent evaluations of the mandatory income management regime under Part 3B and/or Part 3AA;
- (f) the nature of the consultation that was undertaken with affected communities and individuals regarding those aspects of the bill that relate to compulsory participation in the enhanced income management regime, and the outcomes of such consultation;

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46 UN Committee on the Rights of the Child, *General Comment 14 on the right of the child to have his or her best interests taken as a primary consideration* (2013). See also *IAM v Denmark*, UN Committee on the Rights of the Child Communication No.3/2016 (2018) [11.8].

47 The minister previously advised the committee that the government intends to ultimately transition to a voluntary regime. See Parliamentary Joint Committee on Human Rights, *Social Security (Administration) Amendment (Repeal of Cashless Debit Card and Other Measures) Bill 2022*, [Report 5 of 2022](#) (20 October 2022) pp. 39–55.

48 Schedule 1, item 32.

- (g) noting that consultation is intended to continue regarding the future of mandatory income management, why the bill does not include a sunset date or other provision to ensure that mandatory participation in the regime is time-limited;
- (h) whether consideration was given to less rights restrictive ways to achieve the stated objective, including voluntary participation or only subjecting individuals to the regime based on individual circumstances;
- (i) what other safeguards would operate to assist proportionality; and
- (j) whether participants who will be compulsorily subjected to the enhanced income management regime will have an opportunity in the future to opt-out of this regime or cease their participation in mandatory income management.

2.18 The full initial analysis is set out in [Report 4 of 2023](#).<sup>49</sup>

### Minister's response<sup>50</sup>

2.19 The minister advised:

*(a) whether, as previously indicated, the government intends to eventually introduce a voluntary income management regime and, if so, how extending compulsory participation in the enhanced income management regime is consistent with this broader intention;*

The Government is working with communities on the future of income management and what it looks like for them. Any decisions about the future of income management will be based on genuine consultation with a wide range of stakeholders, including First Nations leaders, women's groups, service providers, communities, people receiving welfare payments, and our state and territory government counterparts.

During consultation on the *Social Security (Administration) Amendment (Repeal of Cashless Debit Card and Other Measures) Act 2022* (the Repeal Act) many communities and stakeholders raised the limitations of the BasicsCard, citing that it is out of date and no longer meets their needs. The *Social Security (Administration) Amendment (Income Management Reform) Bill 2023* (the Bill) will provide individuals subject to the enhanced income management regime (enhanced IM) access to modern banking technology to ensure the program is more in tune with their needs until consultation on the long-term future of the programs is complete.

*(b) in relation to the eligibility criteria relating to disengaged youth and long-term welfare payment recipients, what other geographical*

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49 Parliamentary Joint Committee on Human Rights, *Report 4 of 2023* (29 March 2023), pp. 9–25.

50 The minister's response to the committee's inquiries was received on 18 April 2023. This is an extract of the response. The response is available in full on the committee's [website](#).

*areas are intended to be specified by the minister by legislative instrument;*

The purpose of this Bill is to expand access to enhanced IM, and its associated improved technology, by mirroring the structure and content of income management (IM) in Part 3B of the *Social Security (Administration) Act 1999* (the Administration Act).

Proposed section 123SDA, which would allow for the operation of the disengaged youth and long-term welfare payment recipient measures in areas other than the Northern Territory reflects the current operation of IM under Part 3B. The Government does not intend to make a legislative instrument extending these measures beyond the Northern Territory, where they currently operate under IM and enhanced IM.

As stated above, there is no intent to change how and where enhanced IM and IM operate until meaningful consultation has occurred with affected individuals, communities and experts.

*(c) whether there is a risk that people in remote communities may experience difficulties accessing essential goods, particularly in situations where local businesses may not have adequate systems in place to prevent the sale of excluded products such that transactions made at these stores are able to be declined;*

This Bill does not impose any further risk to accessing goods than those already prevalent in remote communities. This Bill enables participants to shop at a wider range of merchants, including online merchants, to ensure they have better access to goods and services.

In most cases, merchants will be able to accept the SmartCard without taking any action and there will be no impact on the individual or the merchant. Merchants are categorised into three groups for the purpose of the SmartCard:

- Restricted Merchants - Merchants who primarily sell restricted items (bottle shops, TABs, casinos, cigar stores); the SmartCard is not accepted at these stores. This is done by using a Merchant Category Code or Merchant ID and is managed by the card issuer.
- Unrestricted Merchants - Those which do not sell any restricted items. These merchants will be able to accept the Smartcard without taking any action.
- Mixed Merchants - which sell both restricted and unrestricted items.

The SmartCard is also supported by Product Level Blocking (PLB), which removes the manual effort away from merchants and automatically blocks the purchase of excluded goods and services when the SmartCard is used to pay in a mixed merchant setting.

To deploy PLB, the merchant must have an integrated point of sale whereby the EFTPOS terminal is linked to the register so it can identify

when the SmartCard is used to make a purchase. In the event a business does not have access to this technology or is not willing to upgrade, Services Australia will work with the business to provide a Mixed Merchant Agreement (MMA).

The MMA is an agreement between the two entities that the business will uphold the intent of the Government's policy by manually preventing the sale of excluded goods and services. This ensures enhanced IM participants can continue to access essential goods, regardless of the technology available to merchants.

*(d) how mandatory participation in the enhanced income management regime is effective to achieve the stated objectives;*

As outlined above, the purpose of the Bill is to expand access to the improved technology associated with enhanced IM. It does not change the policy settings behind the IM regime. The Government is committed to consulting with affected communities on the future of IM and it will not make changes to the operation of IM until meaningful consultation has occurred.

The Bill provides existing and new enhanced IM participants with modern technology whilst that consultation occurs.

*(e) whether there are recent evaluations of the mandatory income management regime under Part 3B and/or Part 3AA;*

The enhanced IM regime commenced in the Northern Territory, Cape York and Doomadgee region on 6 March 2023 and, as such, has not yet been subject to evaluation. Following the passage of the Repeal Bill, the Government committed to conducting an evaluation of the transition to the enhanced IM measure, and work is underway to ensure we deliver on that commitment.

The IM regime under Part 3B of the Act has been subject to a number of evaluations. The findings of these evaluations are available from the Department of Social Services' [website](#).

The Government is committed to reforming IM and listening to the needs of communities. We did this when we abolished the Cashless Debit Card and introduced enhanced IM and we will continue to do so.

*(f) the nature of the consultation that was undertaken with affected communities and individuals regarding those aspects of the bill that relate to compulsory participation in the enhanced income management regime, and the outcomes of such consultation;*

This Bill was developed based on consultation with First Nations peoples, community members and their leaders, service providers and other stakeholders who called for a measured approach to reforming IM. This includes feedback provided during the Senate Community Affairs Legislation Committee inquiry into the Repeal Bill.

*(g) noting that consultation is intended to continue regarding the future of mandatory income management, why the bill does not include a sunset date or other provision to ensure that mandatory participation in the regime is time-limited;*

Both IM and enhanced IM will continue to operate in the existing 12 locations across Australia, and in the Northern Territory, in their current form until the Government has undertaken further consultation on the future of IM.

As outlined above, enhanced IM replicates the policy settings underpinning IM, but provides access to improved technology. It is not appropriate for the regime itself to sunset as this could have a range of unintended consequences if appropriate transitional legislation is not passed prior to the sunset date. To demonstrate the Government's commitment to ongoing and meaningful consultation on the future of IM, the legislative instruments that will operationalise enhanced IM will be self-repealing after a set period of time.

These instruments will be made concurrently with commencement of the Bill and will be subject to parliamentary scrutiny and disallowance.

*(h) whether consideration was given to less rights restrictive ways to achieve the stated objective, including voluntary participation or only subjecting individuals to the regime based on individual circumstances;*

The objective of the Bill is to expand access to modern banking technology to individuals currently subject to IM and to individuals who will become subject to enhanced IM in the future. The Bill does this by inserting new measures into Part 3AA of the Administration Act that mirror the measures and eligibility criteria for IM in Part 3B. This ensures accessibility to modern technology while further consultation is undertaken on the future of IM.

All individuals who become subject to IM and enhanced IM do so on the basis of their individual circumstances. While an individual's usual place of residence is relevant, it is only one of a number of criteria that must be satisfied.

*(i) what other safeguards would operate to assist proportionality*

As noted in the report, this Bill establishes a number of safeguards. All individuals who become subject to IM and enhanced IM do so on the basis of individual circumstances. If those circumstances change, they may exit IM or enhanced IM. Enhanced IM also significantly expands access to shopping outlets and mainstream banking functions, and the Secretary is able to vary the percentage of qualified portions of a person's welfare payment in certain circumstances that may affect an individual's ability to access money in their BasicsCard bank account.

The Government considers that the Bill, together with relevant legislative instruments provide sufficient safeguards at this time. We will continue to listen and respond to the needs of communities as we progress on the reform of Income Management, including identifying any other appropriate safeguard options.

*(j) whether participants who will be compulsorily subjected to the enhanced income management regime will have an opportunity in the future to opt-out of this regime or cease their participation in mandatory income management.*

The Government is committed to reforming IM across Australia and is working with communities, individuals and key stakeholders and experts to consider the best way forward. Consultation is central to everything the Government does and we will not make a decision on the future of income management until extensive and meaningful consultation has occurred.

We will continue to listen to a wide range of stakeholders to inform the future of IM and deliver a range of supports that communities can use when and how it best suits them.

## **Concluding comments**

### ***International human rights legal advice***

#### *Legitimate objective and rational connection*

2.20 The minister reiterated that the objective of the bill is to expand access to the enhanced income management regime and its associated improved technology. The minister stated that the bill does this by inserting new measures into Part 3AA of the Act that mirror the measures and eligibility criteria for income management in Part 3B of the Act. In this way, the bill does not change the policy settings underpinning the income management regime but rather replicates these settings in Part 3AA of the Act. As noted in the preliminary analysis, by replicating existing measures relating to income management in the enhanced income management regime, the bill and related legislative instruments would effectively remake the law relating to income management and possibly expand its scope. The general objective of the enhanced income management regime as a whole therefore needs to be scrutinised as well as the specific stated objective relating to the bill and instruments.

2.21 The preliminary analysis noted that while the general objective of the enhanced income management regime—to combat social harms caused by the use of harmful products—is capable of constituting a legitimate objective, it is not clear how expanding access to the enhanced income management regime and extending eligibility criteria for mandatory participation in this regime is consistent with the broader objective of making income management voluntary in the future. On this point, the minister stated that the government is working with communities on the future of income management and any decisions about its future will be based on genuine consultation with a wide range of stakeholders. The minister noted that the bill addresses previous concerns raised about the limitations of the BasicsCard by

expanding access to modern banking technology. In this way, the minister stated that the bill will help to ensure the income management regime is more in tune with the needs of participants until consultation on the long-term future of the regime is complete.

2.22 The minister's response indicates that consultation will continue, and the income management regime will not change until consultation has occurred. It therefore appears that, depending on the outcome of consultation, there is a possibility that the regime may not be made voluntary in the future, as previously indicated by the minister.<sup>51</sup> As such, it is not evident that expanding access to the enhanced income management regime, which in effect will extend mandatory income management into the foreseeable future, is, for the purposes of international human rights law, necessary and addresses a public or social concern that is pressing and substantial enough to warrant limiting human rights. While facilitating the transition to a regime that provides participants with access to superior technology and improved banking functions is, in itself, an important aim, it remains unclear why this transition must occur on a mandatory basis (or why legislation is required to improve this technology).

2.23 Under international human rights law, it must also be demonstrated that any limitation on a right has a rational connection to the objective sought to be achieved. The key question is whether the relevant measure is likely to be effective in achieving the objective being sought. As noted in the preliminary analysis, previous evaluations of mandatory income management, including the cashless debit card program, were inconclusive regarding its effectiveness, and whether it has caused or contributed to other harms.<sup>52</sup> Based on earlier evaluations of the income management regime, the

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51 It is noted that the minister made previous statements to this committee regarding the government's intention to make income management voluntary in the future. See Parliamentary Joint Committee on Human Rights, *Social Security (Administration) Amendment (Repeal of Cashless Debit Card and Other Measures) Bill 2022*, [Report 5 of 2022](#) (20 October 2022) pp. 48.

52 A summary of the evaluations of the Cashless Debit Card program is set out in Parliamentary Joint Committee on Human Rights, [Report 14 of 2020](#) (26 November 2020) pp. 38–54; [Report 1 of 2021](#) (3 February 2021) pp. 83–102. Studies have been conducted examining other specific elements of the cashless welfare trial, including its effects on: Indigenous mobility; homelessness; and perceptions of shame attached with use of the card. See, *Australian Journal of Social Issues*, vol. 55, no. 1, 2020. In particular: Eve Vincent et al, '“Moved on”? An exploratory study of the Cashless Debit Card and Indigenous mobility', pp. 27–39; Shelley Bielefeld et al, 'Compulsory income management: Combatting or compounding the underlying causes of homelessness?', pp. 61–72; Cameo Dalley, 'The “White Card” is grey: Surveillance, endurance and the Cashless Debit Card', pp. 51–60; and Elizabeth Watt, 'Is the BasicsCard “shaming” Aboriginal people? Exploring the differing responses to welfare quarantining in Cape York', pp. 40–50. See also Luke Greenacre et al, 'Income Management of Government payments on Welfare: The Australian Cashless Debit Card', *Australian Social Work* (2020) pp. 1–14.



committee found in 2016 that the compulsory income management regime does not appear to be an effective approach to addressing issues of budgeting skills and ensuring that an adequate amount of income support payments is spent on priority needs. It noted that while the income management regime may have some benefit for persons who voluntarily participated in the regime, it has limited effectiveness for the vast majority of people who are compelled to participate.<sup>53</sup>

2.24 As to whether there are more recent evaluations available, the minister advised that there are no evaluations of the enhanced income management regime but that work is underway to evaluate it, and otherwise referred to past evaluations of the income management regime under Part 3B of the Act, many of which have been considered by this committee.<sup>54</sup> Without more recent evaluations and noting earlier evaluations of mandatory income management were inconclusive regarding its effectiveness, it is not possible to conclude that the enhanced income management regime, which will continue to subject persons to mandatory income management, would be effective to achieve the stated objectives.

### *Proportionality*

2.25 The preliminary analysis noted that there appears to be little flexibility to consider the merits of an individual case in deciding whether to compulsorily subject a person to the enhanced income management regime and questions arise as to whether this approach is sufficiently individualised. The minister stated that all individuals who become subject to income management under both Part 3B and Part 3A do so on the basis of individual circumstances. If those circumstances change, they may exit income management. However, while some eligibility criteria may involve consideration of individual circumstances, such as with respect to persons subject to the enhanced income management regime on the basis of an individual referral by a state or territory child protection officer,<sup>55</sup> most criteria do not provide for an individualised assessment. Rather, participation is broadly based on geographical location and the type of social security payment received. For example, a young person aged between 15 and 25 years of age who resides in a specified place, receives a specified welfare payment (such as youth allowance or jobseeker)<sup>56</sup> for at least 13 weeks during the 26-week period ending immediately

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53 Parliamentary Joint Committee on Human Rights, [2016 Review of Strong Futures measures](#) (16 March 2016), p. 52.

54 The minister referred to the income management and Cashless Debit Card evaluations available on the Department of Social Services [website](#). Many of these evaluations were considered by the Parliamentary Joint Committee on Human Rights in its [Report 14 of 2020](#) (26 November 2020) pp. 38–54; [Report 1 of 2021](#) (3 February 2021) pp. 83–102.

55 Schedule 1, item 17, proposed subsection 123SCA(1).

56 Category C welfare payment, defined as: youth allowance; jobseeker payment; special benefit; pension PP (single); or benefit PP (partnered). See *Social Security A(Administration) Act 1999*, section 123SB definition of 'Category C'.



before the test time, and is not exempt, will be subject to the enhanced income management regime.<sup>57</sup> These criteria relating to disengaged youth do not allow for consideration of individual circumstances, such as whether an individual has a demonstrated need for assistance in managing their income or a history of using harmful products such that intervention is appropriate. Concerns therefore remain that the eligibility criteria applicable to the enhanced income management regime are insufficiently individualised.

2.26 The preliminary analysis noted that the general exemptions that apply to the income management regime, such as the ability to exempt certain welfare payment recipients,<sup>58</sup> may operate as a safeguard. The value of this safeguard will depend on how it operates in practice, including the nature and scope of any future legislative instruments that specify a class of persons who are to be exempt from income management.<sup>59</sup> As to the existence of other safeguards, the minister advised that individuals will be subject to income management based on individual circumstances. However, as noted above, many individuals are subject to compulsory income management without consideration of their individual circumstances and as such, this does not assist with proportionality.

2.27 Other safeguards identified by the minister were the secretary's ability to vary the percentage of the qualified portion of a person's welfare payment in certain circumstances, such as where a person is unable to access their BasicsCard bank account because of a technological fault or malfunction,<sup>60</sup> as well as the fact that the enhanced income management regime offers access to a greater number of businesses and outlets. While these safeguards may assist to ensure that any limitation on the right to an adequate standard of living is proportionate, questions were raised in the preliminary analysis as to whether allowing any transaction with a specified kind of business to be declined by a financial institution could have an adverse impact on the ability of people in remote communities to access certain goods and services and thus realise their right to an adequate standard of living. The minister advised that the bill does not impose any further risk to accessing goods than those already prevalent in remote communities. The minister stated that the SmartCard is supported by Product Level Blocking, which automatically blocks the

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57 Schedule 1, item 32, new subsection 123SDA(1).

58 Schedule 1, item 32, new section 123SDB.

59 It is noted that the Parliamentary Joint Committee on Human Rights has previously raised concerns about the adequacy and effectiveness of exemptions in the context of the Cashless Debit Card program and the income management regime. See Parliamentary Joint Committee on Human Rights, [Report 1 of 2021](#) (3 February 2021) pp. 98–102; [2016 Review of Strong Futures measures](#) (16 March 2016) pp. 54–56.

60 Schedule 1, item 51, new subsections 123SLA(7)–(8), 123SLD(7)–(8), 123SLG(7)–(8), 123SLJ(7)–(8). See also *Social Security (Administration) Act 1999*, subsections 123SJ(4)–(5), 123SM(3)–(4), 123SP(3)–(4).

purchase of excluded goods and services when the SmartCard is used to pay in a mixed merchant setting, that is, a merchant that sells both restricted and unrestricted items. Where the business does not have the technology to support Product Level Blocking, the minister stated that Services Australia will work with the business to provide a Mixed Merchant Agreement, that is, an agreement that the business will uphold the intent of the government's policy by manually preventing the sale of excluded goods and services. The minister stated that this ensures enhanced income management participants can continue to access essential goods, regardless of the technology available to businesses. The availability of mixed merchant agreements may mitigate the risk of participants in remote areas being unable to purchase basic goods because of technological limitations of the relevant business.

2.28 Another potential safeguard is community consultation. Further information was sought from the minister to assess the adequacy of the consultation undertaken to date. The minister advised that the bill was developed based on consultation with First Nations peoples, community members and their leaders, service providers and other stakeholders. The minister stated that these stakeholders called for a measured approach to reforming income management. The minister advised that consultation will continue and that a decision regarding the future of income management will not be made until extensive and meaningful consultation has occurred. It is evident that consultation regarding the bill generally has occurred, and there is an intention for further consultation to be undertaken, which is an important element of the requirement for free, prior and informed consent, which is a part of the right to self-determination.<sup>61</sup> However, it remains unclear whether, and to what extent, affected communities and individuals were consulted about those aspects of the bill which relate to mandatory participation in the enhanced income management regime, noting that it is these aspects of the bill which most significantly limit the rights of participants.

2.29 A further consideration is the extent of any interference with human rights, noting that the greater the interference the less likely the measure is to be proportionate. The preliminary analysis noted that compulsory income management, including under the enhanced income management regime, represents a significant interference with a person's autonomy and private and family life. The regime

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61 See United Nations Declaration on the Rights of Indigenous Peoples, article 19. While this Declaration is not one of the international texts listed as those which this committee is to consider when examining legislation for compatibility with human rights (see *Human Rights (Parliamentary Scrutiny) Act 2011*), it provides context as to how human rights standards under international law apply to the particular situation of Indigenous peoples. As such, it provides clarification as to how human rights standards under international law, including under the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, apply to the particular situation of Indigenous peoples.

imposes stringent conditions on the provision of income support payments, including what goods or services a person may purchase and where, as well as to whom a person may transfer money. In relation to participants who are subject to the regime due to receiving a written notice by a child protection officer or because they have failed to ensure that their child is enrolled at school or there is an unsatisfactory school attendance situation, 100 per cent of their welfare payment would be qualified (unless a lower percentage is determined by the minister by legislative instrument), meaning there may be no amount available to be used at the person's discretion.<sup>62</sup>

2.30 Regarding the sharing of personal information for the purposes of the operation of the enhanced income management regime, the resulting interference with privacy is significant because the consequences of this information sharing may be compulsory income management. While these information sharing provisions would be subject to the secrecy provisions in the Act, it is not clear that this safeguard would ameliorate these adverse effects.<sup>63</sup>

2.31 The length of time that compulsory income management may be in force is also relevant in considering the extent of any interference with rights. The minister advised that both income management and enhanced income management will continue to operate in the existing 12 locations across Australia and in the Northern Territory in their current form until the government has undertaken further consultation on the future of income management. The minister stated that it is not appropriate for the enhanced income management regime to sunset as this could have a range of unintended consequences if appropriate transitional legislation is not passed prior to the sunset date.

2.32 The minister stated that to demonstrate the government's commitment to ongoing and meaningful consultation on the future of income management, the legislative instruments that will operationalise enhanced income management will be self-repealing after a set period of time, although the minister does not indicate what this set period of time will be. The legislative instrument that operationalises key aspects of the enhanced income management regime, including the kind of bank account to be maintained by a person subject to the regime, the terms and conditions of that bank account and the kinds of businesses in relation to which transactions may be declined, is currently due to sunset in ten years, on 1 April 2033 and there is no earlier self-repealing date specified.<sup>64</sup> If this sunset date is indicative of the potential length of time in which the enhanced income management regime may operate, the resulting interference with rights is likely to be significant.

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62 Schedule 1, item 51, new sections 123SLA and 123SLD.

63 Statement of compatibility, p. 5.

64 Social Security (Administration) (Declinable Transactions and BasicsCard Bank Accounts) Determination 2023 [F2023L00189].

2.33 The potential interference with rights may also be greater if the enhanced income management regime is expanded to other geographical areas. The minister stated that while proposed section 123SDA (the eligibility criteria relating to disengaged youth and long-term welfare payment recipients) would allow the minister to specify areas other than the Northern Territory to which the enhanced income management regime may apply, the government does not intend to make a legislative instrument extending these measures beyond the Northern Territory. In terms of the impact on rights, not extending the measures beyond the Northern Territory is welcome. However, it is noted that a statement of intention not to exercise this discretionary power offers little safeguard value, as the power to expand the regime remains in the legislation itself, and were there to be a change of minister or government, a different approach may be taken.

2.34 Finally, it is necessary to consider whether any less rights restrictive alternatives could achieve the same stated objective. The preliminary analysis noted that it is not clear why the bill extends compulsory participation in the enhanced income management regime rather than introducing voluntary participation, or at a minimum, only subjecting individuals to the regime on the basis of individual circumstances. On this point, the minister stated that all individuals are subjected to income management based on individual circumstances and that an individual's usual place of residence is relevant but only one criterion that must be satisfied. As noted above, however, concerns remain that the eligibility criteria are not sufficiently individualised. It therefore appears that there may be less rights restrictive ways to achieve the stated objective, such as voluntary participation in the regime, incorporating individualised assessments in the eligibility criteria and making mandatory participation in the regime a time-limited measure.

2.35 In conclusion, while the general objective underpinning the enhanced income management regime—to combat social harms caused by the use of harmful products—is capable of constituting a legitimate objective, it is not evident that the specific objective of expanding access to this regime, which in effect extends mandatory income management into the foreseeable future, is necessary and addresses a public or social concern that is pressing and substantial enough to warrant limiting human rights. It is also not clear that the measure would be effective to achieve the general objective of combatting social harms, noting that earlier evaluations of mandatory income management were inconclusive regarding its effectiveness. As to proportionality, while there are some safeguards accompanying the legislation, it is not clear these are sufficient. There is also insufficient flexibility to consider individual circumstances, the interference with human rights is potentially significant and there appear to be less rights restrictive ways of achieving the stated objective. As such, the legislation risks impermissibly limiting the rights to social security, privacy, equality and non-discrimination and the rights of the child. With respect to the right to an adequate standard of living, the availability of mixed merchant agreements appears to mitigate the risk that this right would be disproportionately limited.

## Committee view

2.36 The committee thanks the minister for this response. The committee notes that the bill and related instruments seek to facilitate the transition to the enhanced income management regime, which provides participants with access to a BasicsCard bank account and accompanying debit card (known as a SmartCard) that offers superior technology and improved banking functions. The committee considers this aspect of the legislation to be a positive measure, noting that the new SmartCard will improve participants' access to businesses, including access to over one million outlets across Australia, and may reduce the stigma associated with the existing BasicsCard (that is, the debit card used under the Part 3B income management regime).

2.37 However, the committee also notes that in facilitating this transition, the bill and related instruments extend all measures relating to income management to the enhanced income management regime. Thus, in effect, the legislation remakes the law relating to income management. The committee therefore needs to scrutinise the enhanced income management regime more broadly (and not just the specific measures relating to improving the technology of the BasicsCard bank account and accompanying debit card).

2.38 For many years the committee has raised concerns regarding the compatibility of compulsory income management with multiple human rights.<sup>65</sup> Insofar as the enhanced income management regime would replicate existing measures relating to income management under Part 3B, these same human rights are engaged and limited by the bill and related instruments. In particular, by subjecting an individual to mandatory income management and restricting how they may spend a portion of their social security payment, the measure limits the rights to social security and a private life, and possibly the right to an adequate standard of living. By authorising the sharing of personal information between relevant authorities for the purposes of the operation of the enhanced income management regime, the right to informational privacy is also engaged and limited. Due to the

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65 See, e.g. Parliamentary Joint Committee on Human Rights, *Social Security (Administration) Amendment (Repeal of Cashless Debit Card and Other Measures) Bill 2022*, [Report 3 of 2022](#) (7 September 2022) pp. 15–26 and [Report 5 of 2022](#) (20 October 2022) pp. 39–55; [2016 Review of Strong Futures measures](#) (16 March 2016) pp. 37–62; [Eleventh Report of 2013: Stronger Futures in the Northern Territory Act 2012 and related legislation](#) (June 2013) pp. 45–62. The committee has made similar comments regarding measures relating to the Cashless Debit Card program. See, e.g. Parliamentary Joint Committee on Human Rights, [Thirty-first report of the 44th Parliament](#) (24 November 2015) pp. 21–36; [Report 7 of 2016](#) (11 October 2016) pp. 58–61; [Report 9 of 2017](#) (5 September 2017) pp. 34–40; [Report 11 of 2017](#) (17 October 2017) pp. 126–137; [Report 8 of 2018](#) (21 August 2018) pp. 37–52; [Report 2 of 2019](#) (2 April 2019) pp. 146–152; [Report 1 of 2020](#) (5 February 2020) pp. 132–142; [Report 14 of 2020](#) (26 November 2020) pp. 38–54; [Report 1 of 2021](#) (3 February 2021) pp. 83–102; [Report 14 of 2021](#) (24 November 2021) pp. 14–18.

disproportionate impact on certain groups with protected attributes, including Aboriginal and Torres Strait Islander peoples and children, the measures engage and limit the right to equality and non-discrimination and the rights of the child.

2.39 The committee notes that while the general objective of the enhanced income management regime is important, that is, to combat social harms caused by the use of harmful products, it is not clear that expanding access to this regime, which in effect extends mandatory income management into the foreseeable future, is, for the purposes of international human rights law, a necessary measure that addresses a pressing and substantial concern. The committee considers that, in the absence of adequate safeguards and sufficient flexibility to consider individual circumstances, as well as the potentially significant interference with human rights that may result from compulsory participation in the enhanced income management regime, the legislation risks impermissibly limiting the rights to social security, privacy, equality and non-discrimination and the rights of the child. With respect to the right to an adequate standard of living, the committee considers that the availability of mixed merchant agreements would appear to mitigate the risk that this right would be disproportionately limited.

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

## Legislative instruments

### Australian Immunisation Register Amendment (Japanese Encephalitis Virus) Rules 2022 [F2022L01712]<sup>1</sup>

<b>Purpose</b>	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
<b>Portfolio</b>	Health and Aged Care
<b>Introduced</b>	<i>Australian Immunisation Register Act 2015</i>
<b>Authorising legislation</b>	15 sitting days after tabling (tabled in the Senate and the House of Representatives on 6 February 2023).
<b>Rights</b>	Health; privacy

2.41 The committee requested a response from the minister in relation to the instrument in [Report 2 of 2023](#).<sup>2</sup>

#### Expansion of requirement to report vaccine information

2.42 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.<sup>3</sup>

2.43 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.<sup>4</sup>

1 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Australian Immunisation Register Amendment (Japanese Encephalitis Virus) Rules 2022 [F2022L01712], *Report 5 of 2023*; [2023] AUPJCHR 47.

2 Parliamentary Joint Committee on Human Rights, *Report 2 of 2023* (8 March 2023), pp. 34-37.

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

4 Australian Immunisation Register Rule 2015, section 9.

## Summary of initial assessment

### *Preliminary international human rights legal advice*

#### *Rights to health and privacy*

2.44 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.<sup>5</sup> 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).<sup>6</sup>

2.45 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.<sup>7</sup> The right to privacy 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 where the limitation pursues a legitimate objective, is rationally connected to that objective and is a proportionate means of achieving that objective.

#### *Committee's initial view*

2.46 The committee considered 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 noted 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.

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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.



2.47 The committee sought the minister's response to its previous recommendation that to better respect the right to privacy, 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.

2.48 The full initial analysis is set out in [Report 2 of 2023](#).

### Minister's response<sup>8</sup>

2.49 The minister advised:

The 2022 amendment to the Australian Immunisation Register Rules 2015 (AIR Rules) require recognised vaccination providers to report the administration of Japanese Encephalitis Virus (JEV) vaccines to the Australia Immunisation Register (AIR). This is an extension of current mandatory reporting requirements for COVID-19, influenza and National Immunisation Program vaccines.

Mandatory reporting of vaccinations for JEV administered in Australia will improve reporting of vaccinations to the AIR and ensure the AIR contains a complete and accurate dataset of vaccination information to better inform program delivery and respond to disease outbreaks.

Section 22 of AIR Act concerns 'protected information', which includes personal information obtained under, or in accordance with, the AIR Act. Section 22 of the AIR Act regulates how information may be collected, recorded, disclosed, or otherwise used. Section 23 of the AIR Act makes it an offence, punishable by imprisonment and/or penalty units, to obtain, make a record of, disclose or otherwise use protected information unless it is authorised under Section 22.

The changes to the AIR Rules do not impact or change the protections afforded to individuals under the above provisions. This instrument is compatible with the human rights and freedoms recognised or declared under section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Additionally, I, as Minister, (or my delegate) may only authorise the disclosure of protected information in response to a disclosure request

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8 The minister's response to the committee's inquiries was received on 31 March 2023. This is an extract of the response. The response is available in full on the committee's [website](#).

where I am satisfied it is in the public interest. All disclosure requests are considered in line with the secrecy provisions in Part 4 of the AIR Act and other under relevant legislation such as the *Privacy Act 1988*, specifically balancing the purpose of the disclosure against the privacy impact of disclosure on the affected individual.

I am satisfied that privacy protections in the AIR Act and AIR Rules are appropriate, and at this time I do not consider it necessary to specify classes of persons, or purposes, to which the disclosure should relate.

## Concluding comments

### *International human rights legal advice*

2.50 As stated in the initial analysis, the AIR Act 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.<sup>9</sup> 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'.

2.51 As set out in earlier analyses of related legislation,<sup>10</sup> 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. As a matter of law this empowers the minister or delegate 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.

2.52 The minister advised that the changes in this legislative instrument do not impact or change the protections afforded to individuals under the AIR Act. However, expanding the type of vaccinations required to be reported to the AIR, and thereby collecting more personal information means this power may now be exercised with respect to a larger volume of information. This therefore makes it necessary to consider whether existing safeguards in the legislation adequately protects the right to privacy.

2.53 The minister advised that he, or his delegate, will only authorise the disclosure of protected information when satisfied it is in the public interest. The minister further advised that all disclosure requests are considered in line with the secrecy provisions in the AIR Act and other under relevant legislation such as the

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

10 Parliamentary Joint Committee on Human Rights, [Thirty-Second Report of the 44<sup>th</sup> 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.

*Privacy Act 1988*, specifically balancing the purpose of the disclosure against the privacy impact of disclosure on the affected individual. However, it is noted that the ministerial power to disclose protected information in the public interest does not require the minister, or their delegate, to balance the purpose of the disclosure against the privacy impact on the individual. Further, the other secrecy provisions in the AIR Act do not apply should the minister choose to exercise their broad discretionary power under section 22 of the AIR Act. Finally, other privacy protections such as in the *Privacy Act 1988* do not apply when other legislation, such as the AIR Act, specifically enables the disclosure of such information. As such, all protected information under the AIR Act, which includes the personal information of all those who receive certain vaccinations, may be disclosed to any person, for any purpose, as long as the minister, or their delegate considers this to be in the public interest.

2.54 Noting this broad ministerial power to disclose protected personal information, there remains a risk that expanding the range of personal information that may be so disclosed may impermissibly limit the right to privacy.

### **Committee view**

2.55 The committee thanks the minister for this response. As previously stated, 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.

2.56 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. The committee also considers other privacy protections in legislation are insufficient noting that the broad discretionary ministerial power would override any such protections.

### **Suggested action**

2.57 The committee considers, in order to better respect the right to privacy, 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 a disclosure the minister must have regard to the extent to which the privacy of any person is likely to be affected by the disclosure.

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

## Social Security (Tables for the Assessment of Work-related Impairment for Disability Support Pension) Determination 2023 [F2023L00188]<sup>76</sup>

<b>Purpose</b>	This legislative instrument sets out the rules that decision-makers must use when assessing a person's work-related impairment for the disability support pension under the <i>Social Security Act 1991</i>
<b>Portfolio</b>	Social Services
<b>Authorising legislation</b>	<i>Social Security Act 1991</i>
<b>Last day to disallow</b>	15 sitting days after tabling (tabled in the House of Representatives on 6 March 2023 and in the Senate on 7 March 2023). Notice of motion to disallow must be given by 22 May 2023 in the House and by 13 June 2023 in the Senate) <sup>77</sup>
<b>Rights</b>	Social security; adequate standard of living; equality and non-discrimination; rights of persons with disability

2.59 The committee requested a response from the minister in relation to this instrument in [Report 4 of 2023](#).<sup>78</sup>

### Eligibility for the Disability Support Pension

2.60 This legislative instrument sets out the rules that must be used when assessing whether a person meets the work-related impairment level for the purposes of assessing eligibility for the Disability Support Pension (DSP) under section 94 of the *Social Security Act 1991* (Social Security Act). This legislative instrument replaces, with amendments, the previous such measure.<sup>79</sup>

76 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Social Security (Tables for the Assessment of Work-related Impairment for Disability Support Pension) Determination 2023 [F2023L00188], *Report 5 of 2023*; [2023] AUPJCHR 48.

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

78 Parliamentary Joint Committee on Human Rights, *Report 4 of 2023* (29 March 2023), pp. 35-42.

79 The Social Security (Tables for the Assessment of Work-related Impairment for Disability Support Pension) Determination 2011 [F2011L02716] was due to sunset on 1 April 2022. The Legislation (Deferral of Sunsetting – Social Security (Tables for the Assessment of Work-related Impairment for Disability Support Pension) Determination 2011) Certificate 2022 [F2022L00127] deferred this to 1 April 2023.

2.61 The instrument sets out 15 impairment tables, each of which are intended to measure the extent of the person's impairment level with respect to different bodily functions (these include, for example, visual impairment, mental health function, and communication function). The term 'impairment' refers to 'a loss of functional capacity affecting a person's ability to work that results from the person's condition'.<sup>80</sup> The tables describe functional activities, abilities, symptoms and limitations against which a person's impairments are to be assessed in order for an impairment rating (expressed as points) to be assigned.<sup>81</sup> For a person to be eligible for the DSP, the impairment must be rated at 20 points or above according to these tables.<sup>82</sup>

## Summary of initial assessment

### *Preliminary international human rights legal advice*

#### *Rights to social security, an adequate standard of living, equality and non-discrimination, and rights of persons with disability*

2.62 By setting out rules that must be used when assessing whether a person meets the work-related impairment level for the purposes of assessing eligibility for the DSP, this measure engages several human rights.

2.63 By supporting the provision of a social security payment specifically to support persons with disability, this measure promotes the rights to social security, an adequate standard of living, equality and non-discrimination and the rights of persons with disability for those who are eligible for the DSP.

2.64 The right to social security recognises the importance of adequate social benefits in reducing the effects of poverty and plays an important role in realising many other economic, social and cultural rights, in particular the right to an adequate standard of living and the right to health.<sup>83</sup> The right to social security plays an important role in realising many other economic, social and cultural rights,

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80 Section 5.

81 Explanatory statement, p. 12.

82 Eligibility for DSP is assessed according to several criteria, including relevantly the requirements that the person: has a physical, intellectual or psychiatric impairment; the impairment is of 20 points or more under the Impairment Tables; and either the person has a continuing inability to work, or the Secretary is satisfied that the person is participating in the program administered by the Commonwealth known as the supported wage system. Section 94 of the *Social Security Act 1991*, which also sets out further criteria including that the person has turned 16 and meets residency requirements.

83 International Covenant on Economic, Social and Cultural Rights, article 9. See also, UN Economic, Social and Cultural Rights Committee, *General Comment No. 19: The Right to Social Security* (2008).

particularly the right to an adequate standard of living.<sup>84</sup> The right to an adequate standard of living requires that Australia take steps to ensure the availability, adequacy and accessibility of food, clothing, water and housing for all people in its jurisdiction.<sup>85</sup> The United Nations (UN) Convention on the Rights of Persons with Disabilities recognises the equal rights of persons with disability to live in the community with choices equal to others,<sup>86</sup> and to enjoy an adequate standard of living.<sup>87</sup> The right to equality and non-discrimination provides that everyone is entitled to enjoy their rights without discrimination of any kind and that all people are equal before the law and entitled without discrimination to equal and non-discriminatory protection of the law.<sup>88</sup>

2.65 However, in restricting which persons may be eligible for the DSP according to the work-related impairment tables set out in the instrument, the measure also limits these human rights. In this regard the statement of compatibility with human rights states:

Disability support pension is designed to support people with disability if they are unable to work for at least 15 hours per week at or above the relevant minimum wage, due to a physical, intellectual or psychiatric impairment. This means not all people with a condition will be eligible for disability support pension.<sup>89</sup>

2.66 Australia is obliged to take reasonable measures within its available resources to progressively secure broader enjoyment of the right to an adequate standard of living and to social security. It also has immediate obligations to satisfy

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84 International Covenant on Economic, Social and Cultural Rights article 9; UN Committee on Economic, Social and Cultural Rights, *General Comment No. 19: The Right to Social Security* (2008).

85 International Covenant on Economic, Social and Cultural Rights, article 11. See also, UN Human Rights Committee, *General Comment No. 3: Article 2 (Implementation at a national level)*. The Committee explains that 'implementation [of the ICESCR] does not depend solely on constitutional or legislative enactments, which in themselves are often not per se sufficient. The Committee considers it necessary to draw the attention of States parties to the fact that the obligation under the Covenant is not confined to the respect of human rights, but that States parties have also undertaken to ensure the enjoyment of these rights to all individuals under their jurisdiction'.

86 Convention on the Rights of Persons with Disabilities, article 19.

87 Convention on the Rights of Persons with Disabilities, article 28.

88 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. See also Convention on the Rights of Persons with Disabilities, article 5.

89 Statement of compatibility, p. 72.

certain minimum aspects of the rights; not to unjustifiably take any backwards steps that might affect living standards; and to ensure the rights are made available in a non-discriminatory way.<sup>90</sup> In this regard, the UN Committee on Economic, Social and Cultural Rights has identified a 'minimum core' to the right to social security, which includes requiring that States parties ensure the right of access to social security systems or schemes on a non-discriminatory basis, especially for disadvantaged or marginalised individuals or groups.<sup>91</sup> The right to equality and non-discrimination provides that differential treatment (including the differential effect of a measure that is neutral on its face) will not constitute unlawful discrimination if the differential treatment is based on reasonable and objective criteria such that it serves a legitimate objective, is rationally connected to that objective and is a proportionate means of achieving that objective.<sup>92</sup>

2.67 The UN Committee on the Rights of Persons with Disabilities has stated that states parties should define eligibility criteria and procedures for accessing support services 'in a non-discriminatory way, objectively and focused on the requirements of the person rather than on the impairment, following a human rights-compliant approach'.<sup>93</sup> It has stated that where a state adopts specific measures to help achieve equality for persons with disability, such measures must be consistent with all principles and provisions of the Convention, and must not result in perpetuation of isolation, segregation, stereotyping, stigmatisation or otherwise discrimination against persons with disabilities.<sup>94</sup> The UN Committee on the Rights of Persons with Disabilities has expressed concern about the existence of eligibility restrictions for the DSP, and has recommended that Australia end these eligibility restrictions to ensure that persons with disabilities have access to an adequate standard of living.<sup>95</sup>

### **Committee's initial view**

2.68 By supporting the provision of a social security payment specifically to support persons with disability, the committee considered this measure promotes

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90 See, UN Committee on Economic, Social and Cultural Rights, *General Comment No. 19: The Right to Social Security* (2008) [40].

91 UN Committee on Economic, Social and Cultural Rights, *General Comment No. 19: The Right to Social Security* (2008) [59].

92 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].

93 UN Committee on the Rights of Persons with Disabilities, *General comment No. 5 (2017) on living independently and being included in the community*, [71].

94 UN Committee on the Rights of Persons with Disabilities, *General comment No. 6 (2018) on equality and non-discrimination*, [29].

95 UN Committee on the Rights of Persons with Disabilities, *Concluding observations on the combined second and third periodic reports of Australia* (2019), [51].



the rights to social security, an adequate standard of living, equality and non-discrimination and the rights of persons with disability for those who are eligible for the DSP. However, restricting which persons with disability may be eligible for the DSP also engages and limits these rights. The committee considered further information was required to assess the compatibility of this measure with these rights, and as such sought the minister's advice in relation to:

- (a) whether in restricting access to the DSP in the manner set out in the instrument, Australia is fulfilling its minimum core obligations regarding the rights to social security and an adequate standard of living, such that when persons are ineligible for the DSP they are still provided with a minimum essential level of benefits;
- (b) whether the measure is necessary and proportionate, in particular, whether a person who does not meet the eligibility criteria can have their individual circumstances considered and so nonetheless be provided access to the DSP; and
- (c) whether any of the amendments in this measure are retrogressive (in that they constitute a backwards step) when compared with the previous legislative instrument, and if so whether this is a permissible retrogressive measure.

2.69 The full initial analysis is set out in [Report 4 of 2023](#).

### **Minister's response<sup>96</sup>**

2.70 The minister advised:

*(a) whether in restricting access to the Disability Support Pension (DSP) in the manner set out in the instrument, Australia is fulfilling its minimum core obligations regarding the rights to social security and an adequate standard of living, such that when persons are ineligible for the DSP they are still provided with a minimum essential level of benefit.*

The Australian social security system is a non-contributory, means-tested, residence-based system, designed to provide income support to people who, for reasons such as age, unemployment or ill health, are unable to support themselves. All social security payments have eligibility requirements to target support to those most in need. DSP is not a universal basic income for people with disability. It provides targeted assistance to those who are unable to work to fully support themselves because of their disability or medical condition. Not all people with

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96 The minister's response to the committee's inquiries was received on 18 April 2023. This is an extract of the response. The response is available in full on the committee's [website](#).

disability are eligible for DSP, as many people with disability are able to and do work.

People who are found ineligible for DSP because they don't meet the eligibility requirements when they are assessed under the Impairment Tables may be eligible for other income support payments, such as JobSeeker Payment, with modified activity requirements.

Where recipients have additional costs, such as those associated with renting in the private market or raising children, supplementary payments such as Commonwealth Rent Assistance and Family Tax Benefit are available. Other supplementary benefits that may be payable include Pharmaceutical Allowance, Carer Allowance, Remote Area Allowance, Telephone Allowance and Mobility Allowance, as well as a concession card. Individuals may also be eligible for support through the National Disability Insurance Scheme.

*(b) whether the measure is necessary and proportionate, in particular, whether a person who does not meet the eligibility criteria can have their individual circumstances considered and so nonetheless be provided access to the DSP.*

To determine eligibility for the DSP, Services Australia uses the Social Security (Tables for the Assessment of Work-related Impairment for Disability Support Pensions) Determination 2023 to assess how a person's functional impairment affects their ability to work. Without this instrument in place there is no legal basis to assess and grant DSP to new applicants, as the Social Security Act 1991 (the Act) specifies one of the qualification criteria for DSP is for a person's impairment to be rated at 20 points or more under the Impairment Tables.

The 2011 Determination was due to expire by sunseting on 1 April 2023 and therefore it was necessary for a new instrument to be in place to ensure there remains a legal basis to assess and grant new DSP claims.

Assessments undertaken for the purposes of determining eligibility for DSP are individual assessments against the criteria, with a level of discretion for assessors to determine eligibility. For example, there is some discretion within the Determination as to what is considered reasonable treatment, taking into account the availability and cost of available treatments.

If Services Australia makes a decision a person disagrees with, they have the right under social security law to ask for a review of the decision by an Authorised Review Officer. The review system is designed to ensure correct decisions are made in accordance with the Act. If, after this, people still have concerns about the correctness of the decision, they can seek review by the Administrative Appeals Tribunal. The Tribunal is a review body that can provide an independent new decision that substitutes for Services Australia decisions. Each of these steps in the appeal process is free of charge.

*(c) whether any of the amendments in this measure are retrogressive (in that they constitute a backwards step) when compared with the previous legislative instrument, and if so whether this is a permissible retrogressive measure.*

None of the amendments to the Impairment Tables are retrogressive. The increase in the number of descriptors a person is required to meet under Table 7 - Brain Function could be misconstrued as a backward step. This change was a result of adding a social skills descriptor to this Table to address concerns around the representation of difficulties experienced by people with neurodiverse conditions. This addition has increased the number of available descriptors to 10.

Key organisations, including medical professionals have indicated that, while this is an increase in the requirement, it is important for social skills to be reflected and appropriate for the requirement to be raised as the vast majority of people assessed under Table 7 would experience difficulties with social skills and would be able to achieve at least 2 descriptors.

## **Concluding comments**

### ***International human rights legal advice***

2.71 In relation to whether, in restricting access to the DSP in the manner set out in the instrument, Australia is fulfilling its minimum core obligations regarding the rights to social security and an adequate standard of living, the minister stated that all social security payments have eligibility requirements to target support to those most in need, and that DSP is not a universal basic income for people with disability. The minister stated that DSP provides targeted assistance to those who are unable to work to fully support themselves because of their disability or medical condition, meaning that not all people with disability are eligible for DSP, as many people with disability are able to, and do, work. The minister stated that people who are found ineligible for DSP may be eligible for other income support payments, such as JobSeeker Payment, with modified activity requirements, and associated supplementary payments, a concession card, and potentially support through the National Disability Insurance Scheme.

2.72 As noted above, the Impairment Tables are used to determine whether a person meets an impairment threshold such that they may qualify for DSP. Each table, which corresponds with a type of condition, provides that a person may receive between zero and 30 points with respect to a condition, depending on whether the functional impact on them ranges from minimal to extreme. The threshold to be eligible for DSP is an impairment rating of 20 or more points under

the Impairment Tables. A person may meet this threshold under one single table,<sup>97</sup> meaning that their impairment will be classified as 'severe', and they will be regarded as having satisfied the requirement that they have a continuing inability to work.<sup>98</sup> A person may also satisfy this threshold through accruing points in relation to impairments assessed across multiple tables (for example, they may receive two sets of 'moderate' impairment ratings).<sup>99</sup> However, in these cases although they reach the requisite 20 points, their impairment will not be regarded as severe,<sup>100</sup> and so to satisfy the requirement that they have a continuing inability to work, they must also have participated in a program of support for at least 18 months (which may have occurred during the three years prior to their claim).<sup>101</sup> As such, a person with complex co-morbidities who does not accrue 20 points within a single impairment table, would need to meet this additional requirement before qualifying for DSP. This means that people with different types of disability, and intersecting types of disability, may be treated differently according to this DSP eligibility criteria. As such, the assessment criteria would appear to limit the right to equality and non-discrimination on the basis of the type of disability a person is experiencing.

2.73 Differential treatment (including the differential effect of a measure that is neutral on its face) will not constitute unlawful discrimination if the differential treatment is based on reasonable and objective criteria such that it serves a legitimate objective, is rationally connected to that objective and is a proportionate

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97 For example, there is found to be a severe functional impact resulting from a neurological or cognitive condition (including severe difficulties in relation to at least 2 specified matters, such as memory or comprehension, for example) under Table 7 – Brain Function, attracting 20 points.

98 *Social Security Act 1991*. Subsection 94(2) defines a 'continuing inability to work' for the purposes of qualifying for DSP.

99 For example, there may be found to be a moderate functional impact on activities using lower limbs under Table 3 – Lower Limb Function (an impairment attracting 10 points), and a moderate functional impact on activities involving mental health function (including difficulties with at least four specified matters, including interpersonal relationships, self-care and independent living, or decision-making for example) under Table 5 – Mental Health Function (also attracting 10 points). A person in these circumstances would accrue a total of 20 points.

100 A 'severe impairment' is defined in subsection 94(3B) of the *Social Security Act 1991* as an impairment of 20 points or more under the Impairment Tables, of which 20 points or more are under a single Impairment Table.

101 Section 94 of the *Social Security Act 1991* provides that a 'program of support' is designed to assist persons to prepare for, find or maintain work that is either funded (wholly or partly) by the Commonwealth, or is of a type that the Secretary considers is similar to a program that is designed to assist persons to prepare for, find or maintain work and that is funded (wholly or partly) by the Commonwealth. See also, section 12 of the instrument, which specifies how the tables are to be applied where multiple conditions are present. The Services Australia [website](#) states that these programs of support currently include ParentsNext and Workforce Australia.

means of achieving that objective.<sup>102</sup> The minister stated that the objective behind limiting eligibility for DSP is to provide targeted assistance to those who are unable to work to fully support themselves because of their disability or medical condition. Protecting the resources of a social security system by targeting assistance to people who cannot work to support themselves likely constitutes a legitimate objective.<sup>103</sup> However, it is not clear that this measure is rationally connected to (that is, effective to achieve) the stated objective of targeting assistance towards those who cannot fully support themselves. This is because people with complex co-morbidities which attract 20 points through multiple impairment tables, and who are unable to support themselves through work, are also required to meet the significant additional requirement of completing a program of support for 18 months, during which time they would not be eligible for DSP. Persons in this cohort would not receive targeted assistance intended for people who cannot work to support themselves.

2.74 Further information was sought as to whether the measure is necessary and proportionate, which is relevant to an assessment of whether the differential treatment of people with different disabilities is permissible. The minister stated that assessments undertaken for the purposes of determining eligibility for DSP are individual assessments against the criteria. They stated that there is a level of discretion for assessors to determine eligibility, for example, discretion as to what is considered reasonable treatment, taking into account the availability and cost of available treatments.<sup>104</sup> However, there would not appear to be flexibility to provide someone with immediate access to DSP where they have demonstrated complex co-morbidities across a range of impairment tables even though they have not accrued 20 points within one single table. The minister stated that a person can seek internal review of a decision, and if they still have concerns about the correctness of the decision, they can seek review by the Administrative Appeals Tribunal free of charge. While the availability of review is often an important safeguard, it is noted that if a decision were made correctly in accordance with the eligibility criteria, and only limited discretion is provided to assessors in determining that eligibility, it is not clear that the availability of review would provide significant safeguard value. Noting the requirement for persons with co-morbidities to undergo an 18 month program of support before they are eligible for DSP, the points in the impairment tables in this determination may not constitute a permissible limitation on the right to equality and non-discrimination on the basis of disability.

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102 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].

103 See, *Marcia Cecilia Trujillo Calero v. Ecuador*, UN Committee on Economic, Social and Cultural Rights, Communication No. 10/2015, E/C.12/63/D/10/2015 (26 March 2018).

104 Reasonable treatment is defined in section 8, which sets out how to apply the tables.

2.75 Further, the UN Committee on the Rights of Persons with Disabilities has cautioned that medicalised models of assessing disability are inappropriate and are not consistent with the Convention on the Rights of Persons with Disability:

Individual or medical models of disability prevent the application of the equality principle to persons with disabilities. Under the medical model of disability, persons with disabilities are not recognized as rights holders but are instead “reduced” to their impairments. Under these models, discriminatory or differential treatment against and the exclusion of persons with disabilities is seen as the norm and is legitimized by a medically driven incapacity approach to disability...The human rights model of disability recognizes that disability is a social construct and impairments must not be taken as a legitimate ground for the denial or restriction of human rights. It acknowledges that disability is one of several layers of identity. Hence, disability laws and policies must take the diversity of persons with disabilities into account.<sup>105</sup>

2.76 The UN Committee on the Rights of Persons with Disabilities has recommended that States parties adopt a human rights-based approach to disability rather than a medical model, and that definitions of disability make explicit reference to the barriers faced by persons with disabilities.<sup>106</sup> It has also recommended that eligibility criteria and assessments for specific social welfare benefits accord with the human rights model of disability,<sup>107</sup> and has made recommendations to Australia regarding eligibility for the NDIS in this respect.<sup>108</sup>

2.77 In relation to the rights to social security and an adequate standard of living, a person who would be required to complete a program of support for 18 months, or a person who is found to be ineligible for DSP on the basis of the assessment tables in this instrument, may be eligible for the Jobseeker income support payment. However, this social welfare payment is significantly lower than DSP.<sup>109</sup> In April 2023, Australia's Interim Economic Inclusion Advisory Committee advised that the

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105 UN Committee on the Rights of Persons with Disabilities, *General comment No. 6 (2018) on equality and non-discrimination*, [8]–[9].

106 For example: Committee on the Rights of Persons with Disabilities, *Concluding observations on the initial report of [Belgium](#)* (2014) [8]; *Concluding observations on the initial report of the [Czech Republic](#)* (2015) [8]; and *Concluding observations on the initial report of [Lithuania](#)* (2016) [5].

107 Committee on the Rights of Persons with Disabilities, *Concluding observations on the initial report of [the United Kingdom of Great Britain and Northern Ireland](#)* (2017) [58].

108 UN Committee on the Rights of Persons with Disabilities, *Concluding observations on the combined second and third periodic reports of [Australia](#)* (2019) [5].

109 The current maximum basic fortnightly payment rate for a single person on DSP is \$971.50. The current maximum fortnightly payment rate for a single person with no children on Jobseeker is \$693.10.

JobSeeker payment is not sufficient for a person to meet their basic needs.<sup>110</sup> As such, by restricting access to the DSP in the manner set out in the instrument, it appears there is a risk that Australia is not fulfilling its minimum core obligations regarding the rights to social security and an adequate standard of living, such that when persons are ineligible for the DSP they are still provided with a minimum essential level of benefits.<sup>111</sup>

2.78 Further information was also sought as to whether any of the amendments in this legislative instrument are retrogressive when compared with the previous legislative instrument. The minister advised that none of the amendments are retrogressive. The minister noted that the increase in the number of descriptors a person is required to meet under Table 7 - Brain Function, which could be misconstrued as a backward step, was a result of adding a social skills descriptor to this Table to address concerns around the representation of difficulties experienced by people with neurodiverse conditions. The minister stated that key organisations, including medical professionals have indicated that, while this is an increase in the requirement, it is important for social skills to be reflected and appropriate for the requirement to be raised as the vast majority of people assessed under Table 7 would experience difficulties with social skills and would be able to achieve at least 2 descriptors. Given that the inclusion of additional indicators in Table 7 expands the factors that may contribute to a person's impairment assessment, it appears the instrument is not retrogressive.

### **Committee view**

2.79 The committee thanks the minister for this response. The committee notes that by supporting the provision of a social security payment specifically to support persons with disability, this instrument (in setting out the rules for assessing eligibility for DSP) promotes the rights to social security, an adequate standard of living, equality and non-discrimination and the rights of persons with disability for those who are eligible. However, restricting which persons with disability may be eligible for the DSP also engages and limits these rights.

2.80 The committee notes the minister's advice that DSP is not a universal basic income for people with disability, but provides targeted assistance to those who are unable to work to fully support themselves because of their disability or medical

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110 Interim Economic Inclusion Advisory Committee, [2023–24 Report to the Australian Government](#). The Committee described the JobSeeker payment rate as 'seriously inadequate' when compared with pensions and other income poverty measures (p. 3).

111 There may also be a cohort of persons who are found not to be eligible for DSP because they can work for more than 15 hours a week (but who are unable to work full-time because of their disability), and will not be eligible for JobSeeker because they have part-time employment, and who do not earn sufficient money in order to have an adequate standard of living.

condition. The committee agrees that protecting the resources of a social security system by targeting assistance to people who cannot work to support themselves is a legitimate objective. However, noting the above advice, there are questions as to whether this assessment instrument is effective to achieve the stated objective of targeting assistance towards those who cannot fully support themselves – noting that those with complex co-morbidities may also need to complete a program of support for 18 months before being eligible for DSP. Therefore, in setting the Impairment Tables this instrument may not constitute a permissible limitation on the right to equality and non-discrimination based on disability. Further, noting that the JobSeeker payment is the available social security benefit for those ineligible for DSP, and noting concerns that have been raised as to whether that payment is sufficient to meet a person's basic needs, it is not clear if restricting access to the DSP in the manner set out in the instrument may result in Australia not fulfilling its minimum core obligations regarding the rights to social security and an adequate standard of living.

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

**Mr Josh Burns MP**

**Chair**