

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

Appropriation Bills 2023-2024¹

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|-------------------|--|
| Purpose | These six bills ² seek to appropriate money from the Consolidated Revenue Fund for services |
| Portfolio | Finance |
| Introduced | House of Representatives, 9 May 2023 |
| Rights | Multiple rights |

Appropriation of money

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

Preliminary international human rights legal advice

Multiple rights

1.3 Proposed government expenditure to give effect to particular policies may engage and limit, or promote, a range of human rights, including civil and political rights and economic, social and cultural rights (such as the rights to housing, health, education and social security).³ The rights of people with disability, children and

1 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Appropriation Bills 2023-24, *Report 6 of 2023*; [2023] AUPJCHR 51.

2 Appropriation Bill (No. 1) 2023-2024; Appropriation Bill (No. 2) 2023-2024; Appropriation Bill (No. 3) 2022-2023; Appropriation Bill (No. 4) 2022-2023; Appropriation (Parliamentary Departments) Bill (No. 1) 2022-2023; and Appropriation (Parliamentary Departments) Bill (No. 2) 2022-2023.

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

women may also be engaged where policies have a particular impact on vulnerable groups.⁴

1.4 Australia has obligations to respect, protect and fulfil human rights, including specific obligations to progressively realise economic, social and cultural rights using the maximum of resources available; and a corresponding duty to refrain from taking retrogressive measures (or backwards steps) in relation to the realisation of these rights.⁵

1.5 Economic, social and cultural rights may be particularly affected by appropriation bills, because any increase in funding would likely promote such rights. Any reduction in funding for measures which realise such rights, such as specific health and education services, may be considered to be retrogressive with respect to the attainment of such rights. Retrogressive measures must be justified for the purposes of international human rights law.

1.6 The statements of compatibility accompanying these bills do not identify that any rights are engaged by the bills. They state that the High Court has emphasised that because appropriation Acts do not ordinarily confer authority to engage in executive action, they do not ordinarily confer legal authority to spend, and as such, do not engage human rights.⁶ However, because appropriations are the means by which the appropriation of money from the Consolidated Revenue Fund is authorised, they are a significant step in the process of funding public services. The fact that the High Court has stated that appropriation Acts do not create rights or duties as a matter of Australian law, does not address the fact that appropriations may nevertheless engage human rights for the purposes of international human rights law. As the committee has consistently stated since 2013,⁷ the appropriation of funds for government services facilitates the taking of actions which may affect the progressive realisation of, or failure to fulfil, Australia's obligations under international human rights law.

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

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

6 Statements of compatibility, p. 4.

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

1.7 The United Nations (UN) Office of the High Commissioner for Human Rights has noted the following with respect to human rights and budgets:

States are required to make use of the maximum of their available resources for the progressive realization of economic, social and cultural rights (International Covenant on Economic, Social and Cultural Rights, art. 2 (1)). Budgets (federal, national, provincial or local) are essential instruments of policymaking, and often involve various departments in the central Government as well as in the legislative bodies, regional governments and autonomous institutions. Through public budgeting, the State authorities establish priorities and express their commitment to concrete actions which may improve – or limit – the enjoyment of some social guarantees.⁸

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

1.9 Similarly, the UN Development Fund for Women has published guidance on monitoring government budgets for compliance with the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW). This identifies a government budget as a key government activity by which to measure the extent to which countries are implementing the CEDAW, because 'it also regulates how other

8 UN Office of the High Commissioner for Human Rights, [Manual on Human Rights Monitoring](#).

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

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

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

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

government activities - e.g. public programmes in relation to healthcare, employment, education, elimination of violence against women - will operate'.¹³

1.10 In this regard, it is noted that since 1985, Australia has published a 'Women's Budget Statement', a public document outlining the impact of the annual budget on gender equality. The most recent statement, published on 9 May 2023, itemises specific budget measures intended to support women, particularly in relation to housing, social welfare, gender-based violence, and supports for single parents. It states that gender equality has been considered in the policy development process in relation to the development of the 2023-24 budget, with key measures being subject to a more detailed gender impact assessment.¹⁴ In this way, it explicitly links the provision of money through budget measures with improvements in outcomes for women. This information is also relevant in assessing whether, and to what extent, via the corresponding appropriation bills, Australia is promoting human rights and realising its human rights obligations in relation to women. However, it is noted that the 'Women's Budget Statement' includes no information about whether any of the identified measures (or other measures in the budget) constitute a reduction in funding, and may therefore be a retrogressive measure requiring justification.¹⁵ The statements of compatibility accompanying the appropriation bills also make no mention of the 'Women's Budget Statement'.

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

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

13 Diane Elson, *Budgeting for Women's Rights: Monitoring Government Budgets for Compliance with CEDAW* (UNIFEM, 2006), p. 2.

14 Commonwealth of Australia, *Budget 2023-24 Women's Budget Statement* (9 May 2023) p. 1.

15 In this regard, in 2018, the UN Committee on the Elimination of Discrimination Against Women expressed concern that Australia had not conducted a gender-impact analysis of budget measures, including budget cuts. See, *Concluding observations on the eighth periodic report of Australia* (25 July 2018) [45].

- overall trends in the progressive realisation of economic, social and cultural rights (including any retrogressive trends or measures);¹⁶
- the impact of budget measures (such as spending or reduction in spending) on vulnerable groups (including women, Aboriginal and Torres Strait Islander people, people with disability, children and ethnic minorities);¹⁷ and
- key individual measures which engage human rights, including a brief assessment of their human rights compatibility.

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

- whether there are any specific budget measures that may disproportionately impact on particular groups (either directly or indirectly); and
- whether there are any budget measures or trends in spending over time that seek to fulfil the right to equality and non-discrimination for particular groups.¹⁸

Committee view

1.14 As the committee has consistently stated since 2013,¹⁹ the appropriation of funds facilitates the taking of actions which may affect the progressive realisation of,

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

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

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

or failure to fulfil, Australia's obligations under international human rights law. The committee considers that appropriations may, therefore, engage human rights for the purposes of international human rights law, because increased appropriation for particular areas may promote certain rights (such as housing, welfare, health or education) while reduced appropriations for particular areas may be regarded as retrogressive – a type of limitation on rights.

1.15 The committee acknowledges that appropriation bills may present particular difficulties given their technical and high-level nature, and as they generally include appropriations for a wide range of programs and activities across many portfolios. As such, it may not be appropriate to assess human rights compatibility for each individual measure. However, the committee considers that the allocation of funds via appropriation bills is susceptible to a human rights assessment that is directed at broader questions of compatibility, namely, their impact on progressive realisation obligations and on vulnerable minorities or specific groups. The 'Women's Budget Statement' demonstrates that it is possible to assess the impact of appropriations on the rights of specific groups, in this case women. The committee also considers that a statement of compatibility with human rights should address the compatibility of measures which directly impact human rights and which are not addressed elsewhere in legislation, as the appropriation bills may be a key opportunity for the Parliament to consider the compatibility of these measures with human rights.

1.16 The committee therefore seeks the advice of the Minister for Finance as to whether the appropriation bills are compatible with Australia's human rights obligations, and particularly:

- (a) whether and how the bills are compatible with Australia's obligations of progressive realisation with respect to economic, social and cultural rights;
- (b) if there are any reductions in the allocation of funding that affect human rights obligations, whether these are compatible with Australia's obligations not to unjustifiably take backward steps (a retrogressive measure) in the realisation of economic, social and cultural rights; and

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

- (c) whether and how the allocations are compatible with the rights of vulnerable groups (such as children; women; Aboriginal and Torres Strait Islander Peoples; persons with disabilities; and ethnic minorities).

Social Services Legislation Amendment (Child Support Measures) Bill 2023¹

| | |
|-------------------|--|
| Purpose | 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. |
| Portfolio | Social Services |
| Introduced | House of Representatives, 29 March 2023 |
| Right | Freedom of movement; equality and non-discrimination |

1.17 The committee requested a response from the minister in relation to the bill in [Report 5 of 2023](#).²

Departure authorisation certificates

1.18 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);³ 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

1 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Social Services Legislation Amendment (Child Support Measures) Bill 2023, *Report 6 of 2023*; [2023] AUPJCHR 52.

2 Parliamentary Joint Committee on Human Rights, *Report 5 of 2023* (9 May 2023), pp. 46–50.

3 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*.

- (c) if the person is unable to give a security, the Registrar is satisfied the certificate should be issued on humanitarian grounds or because refusing to issue the certificate will be detrimental to Australia's interests.⁴

1.19 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).⁵

Summary of initial assessment

Preliminary international human rights legal advice

Right to freedom of movement

1.20 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.

1.21 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.⁶ 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.

1.22 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.⁷ 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

4 Part VA, Division 4.

5 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.

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

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

precise criteria and may not confer unfettered discretion on those charged with their execution.⁸

1.23 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'. It is also not clear whether preventing child support debtors 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).

1.24 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.

Committee's initial view

1.25 The committee considered further information was required to assess the compatibility of the measure with the right to freedom of movement and therefore sought the advice of the minister 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.

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

1.26 The full initial analysis is set out in [Report 5 of 2023](#).

Minister's response⁹

1.27 The minister advised:

(a)(i) Whether the measure addresses an issue of public or social concern that is pressing and substantial enough to warrant limiting the right

The measure reinforces the efficacy of Part VA, which itself addresses an issue of public concern that is pressing and substantial enough to warrant limiting the right.

As noted by the Committee, the measure will only affect approximately 110 parents with a child support debt of \$43,500 each, on average. In view of this, the Committee has queried whether the small number of affected persons constitutes an issue of public or social concern that is pressing and substantial enough to warrant limiting the right.

Parents who persistently and without reasonable grounds fail to pay their child support debt present an issue of public concern that is pressing and substantial to warrant limiting that parent's right of freedom of movement. It is for this reason the Registrar can prevent a person from departing Australia by making departure prohibition orders under Part VA.

(a)(ii) 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

In this case, there are exceptional circumstances that warrant the limitation on the right to freedom of movement.

The Commonwealth faces an existing problem with a cohort of parents that persistently, and without reasonable grounds, fail to pay their child support debt. These parents have the means to discharge that debt. They have the means to travel overseas. They also have the means to give security to obtain a departure authorisation certificate that would enable them to do so (section 72L).

For this cohort of parents, the restriction on their freedom of movement occurs in exceptional circumstances and only in a limited way so as to protect the rights and freedoms of others.

The extent of the limitation on the parent's right to freedom of movement is marginal. A parent affected by the measure is already subject to a departure prohibition order preventing them from leaving Australia for a foreign country (section 72D). That order could be revoked if the person made arrangements for the child support liability to be discharged (and the measure only affects those with the means to pay that liability)

⁹ The minister's response to the committee's inquiries was received on 25 May 2023. This is an extract of the response. The response is available in full on the committee's [website](#).

(paragraph 721(1)(a)). This would also assist an application for a departure authorisation certificate (subparagraph 72L(2)(a)(ii)).

(b) Whether (or to what extent) preventing a parent from leaving the country will result in more timely payment of child support debt

Preventing a parent from departing Australia is one way the Commonwealth encourages a parent to pay their child support debt when they persistently, and without reasonable grounds, fail to do so.

For example, Part VA requires a parent to arrange for their child support liability to be discharged to avoid the making of orders prohibiting them from departing Australia (paragraph 72D(1)(b)). Part VA also provides an incentive for parents to arrange for their child support liability to be discharged so that their travel may be authorised by a departure authorisation certificate (subparagraph 72L(2)(a)(ii)).

Without the measure, the parent can simply give security for their return to Australia, and depart for a foreign country (subsection 72K(3)) with the child support debt unpaid.

(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

Although not expressly stated, when read as a whole, Part VA and the measure is circumscribed.

As noted by the Committee, in the second reading speech I observed departure prohibition orders prevent parents who do not pay child support on time from leaving Australia, in extreme cases after other avenues have failed. The Committee has raised its concern that, because this is not set out in the legislation, the measure is not circumscribed.

While the legislation does not expressly state departure prohibition orders are a last resort, Part VA operates to do so when viewed as a whole. For example, before making departure prohibition orders, the Registrar must have regard to action taken to recover the debt (paragraph 72D(2)(b)). The Registrar must also be satisfied the parent has persistently and without reasonable grounds failed to pay their child support debt (paragraph 72D(1)(c)).

The measure does not create broad unfettered discretion. It is an additional criterion to guide the Registrar's decision to issue a departure authorisation certificate. It would only affect a person already restricted from leaving Australia.

The measure also provides sufficient flexibility to treat different cases differently.

The Registrar's decision to make a departure prohibition order is discretionary (paragraph 72D(1)(c)). In doing so, the Registrar must have regard to the person's individual circumstances (subsection 72D(2)). Once a person is prohibited from departing Australia, the Registrar's decision to

then allow a person to depart Australia and issue a departure authorisation certificate is also discretionary (subsection 72L(2)). If the Registrar is not satisfied the person meets the criteria - including because of the measure proposed in this Bill, the Registrar may nevertheless issue a certificate on humanitarian grounds (paragraph 72L(3)(i)). In this way, the measure does not impose a blanket policy without regard to the merits of an individual case.

Comments on minister's response

International human rights legal advice

Right to freedom of movement and equality and non-discrimination

1.28 In relation to whether the measure addresses an issue of public or social concern that is pressing and substantial enough to warrant limiting the right, the minister stated that parents who persistently and without reasonable grounds fail to pay their child support debt present an issue of public concern that is pressing and substantial enough to warrant limiting that parent's right of freedom of movement. As to whether the circumstances contemplated would meet the threshold requirement of being 'exceptional circumstances' such as to warrant limiting the right to freedom of movement, the minister stated that there are a cohort of parents that persistently, and without reasonable grounds, fail to pay their child support debt. The minister stated that these parents have the means to discharge their debt, travel overseas, and give security to obtain a departure authorisation certificate. The minister noted that such a person is already subject to a departure prohibition order, which could be revoked if they arranged for the child support liability to be discharged.

1.29 The European Court of Human Rights has stated that a restriction on the right to leave one's country on grounds of unpaid debt can only be justified as long as it serves its aim of recovering a debt, and if action is not taken to recover the debt, then a continuing restriction may not be permissible.¹⁰ In this regard, it is not clear how long a departure prohibition order may remain in place, how long they tend to remain in place in practice, and whether other action is taken to recover the debt while an order remains in place. It is also unclear why, if a debt is deemed likely to be irrecoverable in the near future (as is provided for in the current legislation), the bill seeks to add an additional requirement that a debtor must also provide security, noting the jurisprudence that restrictions on the right to leave one's country are only justified where they serve the aim of recovering a debt. Without this information it is difficult to assess if the measure seeks to achieve a legitimate objective for the purposes of international human rights law.

10 See, *Napijalo v Croatia* (13 November 2003) [79] and *Democracy and Human Rights Resources Centre and Mustafayev v Azerbaijan* (14 October 2021) [94]. See also, UN Human Rights Committee, *General Comment No. 27*, [13].

1.30 Further information was also sought as to whether (or to what extent) preventing a parent from leaving the country will result in more timely payment of child support debt. The minister stated that preventing these parents from leaving Australia is one way in which the Commonwealth encourages the parent to pay their debt. The minister stated that without this measure, a parent can simply give security for their return to Australia and depart for a foreign country with the child support debt unpaid. This bill would instead require both that the person give 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).

1.31 However, it is noted that it appears that currently the circumstances in which such security is accepted is limited in practice. The Department of Social Services Social Security Guide states that the Secretary will only accept: a security that is offered by the debtor rather than third parties on the debtor's behalf; or a sum which is generally not significantly less in value than the total debt owed.¹¹ This suggests that where a person seeks to borrow, or is otherwise provided with, a sum of money to provide as security, or offers a sum significantly lower than their total debt, this money may not necessarily be accepted. For those with large debts, a high amount of security would currently need to be offered in order to be allowed to travel.

1.32 There is also case law indicating that money appears to only be accepted as security for the purposes of providing a departure certificate in limited circumstances. This is relevant in assessing whether the proposed measure would be effective to achieve the stated objective of recovering debts, and the proportionality of further restricting the exemptions for travel. For example, in a 2022 case, a debtor owing over \$200,000 (approximately \$140,000 of which was a late payment penalty) had been subject to a departure prohibition order for 15 years, and offered to provide \$30,000 he had borrowed so he could accompany his mother for medical treatment overseas.¹² The Registrar declined to accept this money as security on the basis that it would be borrowed, and the tribunal affirmed the decision.¹³ In this case, the imposition of a departure prohibition order for 15 years had not resulted in payment of child support debt.¹⁴ In another case in 2020, an Australian citizen who owed a child support debt of approximately \$20,000 returned to Australia briefly

11 *DSS Social Security Guide* (Version 1.307, released 8 May 2023), [part 6.7.2.100](#) Departure prohibition orders.

12 See, *Kado and Child Support Registry (Child support)* [2022] AATA 4801 (17 May 2022).

13 The tribunal also declined to permit departure on humanitarian grounds.

14 This is despite the debtor living in Australia – it is also unclear why the debt had not been written off on the basis that it was irrecoverable (noting the debtor's sole income was a pension for full-time care of his mother).

after having lived overseas for 12 years.¹⁵ He was then barred from leaving the country at the airport due to a departure prohibition order that had been made in 2008. By this point, his debt had accumulated to approximately \$100,000 including late penalties. The debtor was not employed in Australia, and it is therefore unclear how, in such circumstances, preventing the debtor from leaving Australia would result in payment of the debt.¹⁶ This case law raises questions as to whether preventing a parent from leaving the country is necessarily effective to achieve the payment of such debts in the restricted instances in which a departure prohibition order has been made. It is also unclear why a security is not currently accepted when the debtor borrows the money to pay the security. In such instances it would appear that the debtor is unable to raise the money themselves, and therefore may also be unable to pay the debt. If, for example, family members raise money to enable the debtor to travel for family reasons (as the debtor is not financially able to raise such money), it is unclear how preventing them from travelling in such cases would encourage payment of the debt.

1.33 The case law also raises the question of whether Australian citizens with family connections overseas are less likely to be able to secure a departure certificate in practice, and as such whether departure prohibition orders may have a disproportionate impact on the basis of ethnic origin.¹⁷ As such, the measure also appears likely to engage the right to equality and non-discrimination.¹⁸ 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.¹⁹ The right to equality encompasses both 'direct' discrimination (where measures have a discriminatory intent) and 'indirect' discrimination (where measures have a discriminatory effect on

15 *Shah and Child Support Registrar (Child support)* [2020] AATA 2644 (31 July 2020).

16 It is also unclear why the debt had not been written off in the intervening period. In this regard, the Department of Social Services *Child Support Guide* states that a debt may be irrecoverable at law where 'the debtor resides in a country that does not have reciprocal maintenance arrangements with Australia, and the payer does not derive any income or hold any assets in Australia'. See, Version 4.71 - Released 8 May 2023, at [\[5.7.1\]](#).

17 In *Kado and Child Support Registry (Child support)* [2022] AATA 4801 the parent appeared to be from a Lebanese-Australian family. In *Shah and Child Support Registrar (Child support)* [2020] AATA 2644 the parent was an Australian citizen originally from India. In *Baena and Child Support Registrar (Child support second review)* [2019] AATA 767 (29 March 2019) the parent was from the Philippines.

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

19 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.

the enjoyment of rights).²⁰ 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.²¹ 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.²²

1.34 With respect to proportionality, further information was sought as to 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. The minister stated that although not expressly stated, when read as a whole, Part VA is circumscribed. The minister noted that before making departure prohibition orders, the Registrar must have regard to action taken to recover the debt and be satisfied the parent has persistently and without reasonable grounds failed to pay their child support debt. However, it is not clear what other steps to recover the debt must be made prior to making a departure prohibition order, such that the making of an order would be a measure of last resort.

Committee view

1.35 The committee thanks the minister for this response. The committee notes the importance of seeking to ensure that parents pay their child support debt. However, the above analysis raises additional questions regarding whether the measure seeks to achieve a legitimate objective for the purposes of human rights law, whether it would be effective to achieve the stated objective and whether it is proportionate.

1.36 The committee considers that further information is required in order to more fully assess the compatibility of this measure with the right to freedom of movement and equality and non-discrimination, and in particular seeks the minister's advice in relation to:

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

21 *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*, 3rd edition, Oxford University Press, Oxford, 2013, [23.39].

22 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].

- (a) what other steps are taken to recover a debt while a departure prohibition order is in place;
- (b) if a debt is likely to be deemed, within a period that the Registrar considers appropriate, to be irrecoverable, why the debtor would also need to provide a security to be allowed to leave Australia;
- (c) noting that security is not currently accepted when the debtor borrows the money to pay the security, how is requiring the security to only be paid by the debtor effective to achieve the objective of encouraging payment of the debt (noting they would appear not to have the money available to raise a security);
- (d) what other steps must be taken to recover a child support debt prior to making a departure prohibition order;
- (e) what is the average length of time that a departure prohibition order remains in place;
- (f) noting the importance of recovering child support debts in order to provide maintenance for dependent children, where repayments are made towards a debt whether those repayments are directed first towards the outstanding maintenance amount or towards late penalties, and if the order remains in place if the debt mainly consists of late payment fees;
- (g) whether the average debt amount indicated in the explanatory materials include late penalties, and if so, what is the average debt excluding such penalties;
- (h) what threshold is applicable in determining when a child support debt is irrecoverable, and the circumstances in which a child support debt has been determined to be irrecoverable where a departure prohibition order is in place; and
- (i) whether the denial to issue a departure authorisation certificate has a disproportionate impact on persons on the basis of nationality who may have a greater need to travel to or from Australia for family reasons.

Legislative instruments

Migration (Specification of evidentiary requirements—family violence) Instrument (LIN 23026) 2023 [F2023L00382]¹

| | |
|--------------------------------|---|
| Purpose | This legislative instrument repeals the Migration Regulations 1994 - Specification of Evidentiary Requirements - IMMI 12/116 and specifies the type and number of items of evidence for the purposes of paragraph 1.24(b) of the Migration Regulations 1994 |
| Portfolio | Home Affairs |
| Authorising legislation | Migration Regulations 1994 |
| Last day to disallow | Exempt from disallowance |
| Rights | Equality and non-discrimination |

Evidence of family violence

1.37 This legislative instrument specifies the items of acceptable evidence for a non-judicially determined claim of family violence for the purposes of the Migration Regulations 1994 (Migration Regulations). If a person on a visa who was in a relationship with their sponsor can make out a claim of family violence they may be eligible for a permanent visa.² If they are unable to make out such a claim the consequences may be that they would be required to leave Australia.

1.38 Regulation 1.23 and 1.24 of the Migration Regulations require an alleged victim of family violence, which has not been judicially determined, (or a person acting on their behalf), who is applying for a visa, to provide a statutory declaration in relation to the alleged violence, as well as evidence specified by the minister as set out in a legislative instrument. This legislative instrument specifies the evidence that must be provided, namely that an applicant must provide a minimum of two items of official evidence of family violence. The categories of acceptable evidence types include reports from medical practitioners, police officers, child welfare officers, family violence support service providers, social workers, psychologists, and

1 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Migration (Specification of evidentiary requirements—family violence) Instrument (LIN 23026) 2023 [F2023L00382], *Report 6 of 2023*; [2023] AUPJCHR 53.

2 See the Department of Home Affairs webpage on [Domestic and family violence and your visa](#).

education professionals.³ Two items of evidence must be provided, each of which must be a different type of evidence. For example, a person could not provide two separate hospital reports from a medical practitioner as evidence of family violence. They would also have to provide a second piece of different evidence, for example a police report. Further, all items of evidence must be in writing in English on a professional letterhead, and include the contact details of the relevant professional.⁴

Preliminary international human rights legal advice

Right to equality and non-discrimination

1.39 Restricting the types of evidence which will be accepted to official sources of information, within the context of applications for a visa, engages and may limit the right to equality and non-discrimination, noting that applicants from non-English speaking backgrounds or certain cultural backgrounds may face more difficulties in obtaining such evidence.

1.40 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.⁵ The right to equality encompasses both 'direct' discrimination (where measures have a discriminatory intent) and 'indirect' discrimination (where measures have a discriminatory effect on the enjoyment of rights).⁶ 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.⁷

1.41 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

3 Schedule 1, item 1, table of types of evidence.

4 Subsection 4(3).

5 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.

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

7 *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*, 3rd edition, Oxford University Press, Oxford, 2013, [23.39].

legitimate objective, is rationally connected to that objective and is a proportionate means of achieving that objective.⁸

1.42 As this legislative instrument is exempt from disallowance, no statement of compatibility is required to be provided, and so no assessment of the measure's compatibility with the right to equality and non-discrimination is available.

1.43 Family violence has a disproportionate impact on women generally, and so women may more generally seek to rely on these visa protection provisions.⁹ Further, women from culturally and linguistically diverse backgrounds are particularly vulnerable to family violence.¹⁰ By virtue of their background, women within this cohort may face additional challenges in seeking to produce evidence from official sources. These barriers may include language barriers, social isolation, social and community pressure not to report violence, financial barriers to accessing services, and a lack of trust in official services. As such, it may be more difficult for people from culturally diverse backgrounds to produce reports from officials, such as the police, to support their claim of family violence, if the family violence was not officially reported.

1.44 It is unclear why applicants are required to provide two pieces of evidence from two separate categories of evidence (for example, a letter from a social worker *and* a letter from an education professional), rather than having the ability to provide two pieces of similar evidence (for example, two reports from medical professionals, for example, two separate hospital admissions). It is also unclear why there is no discretion to permit the consideration of 'non-official' sources of information (for example, statutory declarations from a neighbour or friend). In this regard it is also unclear why the measure does not provide the decision-maker with the discretion to consider a range of evidence provided to them about alleged family violence and make a case-by-case determination. As it stands, if a victim of family violence has compelling information from friends, family, neighbours and multiple reports from hospitals following admission after a violent attack, it would appear this evidence would not satisfy the requirements specified in this legislative instrument (as it only has one type of prescribed evidence).

Committee view

1.45 The committee notes that restricting the types of evidence which will be accepted as evidence of family violence to official sources of information, within the context of applications for a visa, engages and may limit the right to equality and

8 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].

9 See, Australian Bureau of Statistics, [Personal Safety, Australia](#) (2016).

10 See, for example, AMES Australia and Department of Social Services (Cth), [Violence against women in CALD communities: Understandings and actions to prevent violence against women in CALD communities](#) (2016).

non-discrimination, noting that applicants from non-English speaking backgrounds or certain cultural backgrounds may face more difficulties in obtaining such evidence.

1.46 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) why applicants are required to provide a minimum of two pieces of evidence from two separate categories;
- (b) why there is no discretion to permit the consideration of 'non-official' sources of information (for example, statutory declarations from a neighbour or friend);
- (c) why the measure does not provide the decision-maker with the discretion to consider a range of evidence provided to them about alleged family violence and make a case-by-case determination; and
- (d) whether people from non-English speaking backgrounds are more frequently unable to provide evidence of non-judicially determined family violence in practice.

Public Service Regulations 2023 [[F2023L00368](#)]¹

| | |
|--------------------------------|---|
| Purpose | These regulations provide for, among other things, the employer powers of Agency Heads; the review of Australian Public Service (APS) promotion and engagement decisions, and APS actions; the functions of the APS Commissioner and the Merit Protection Commissioner; entitlements on administrative arrangements and reorganisations; attachment of salaries to satisfy judgment debts and the authorisation of the use and disclosure of personal information |
| Portfolio | Prime Minister and Cabinet |
| Authorising legislation | <i>Public Service Act 1999</i> |
| Last day to disallow | 15 sitting days after tabling (tabled in the House of Representatives on 30 March 2023 and in the Senate on 9 May 2023. Notice of motion to disallow must be given by 20 June 2023 in the House and by 7 August 2023 in the Senate) ² |
| Rights | Privacy; work; equality and non-discrimination; people with disability |

Direction to attend medical examination

1.47 Section 11 of the regulations allows an Agency Head³ to direct an Australian Public Service (APS) employee to undergo a medical examination by a medical practitioner nominated by the Agency to assess the employee's fitness for duty and give the Agency Head a report of the examination within a specified period.⁴ Such a direction may be made in circumstances where an Agency Head believes that the employee's state of health may be affecting their work performance; has caused, or may cause, an extended absence from work;⁵ may be a danger to the employee; has

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- 1 This entry can be cited as: Parliamentary Joint Committee on Human Rights, *Public Service Regulations, Report 6 of 2023*; [2023] AUPJCHR 54.
 - 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 An Agency Head is defined as the Secretary of a Department, the Head of an Executive Agency or the Head of a Statutory Agency. See section 7 of the *Public Service Act 1999*.
 - 4 Subsection 11(2).
 - 5 The Note in section 11 provides the following examples of extended absences from work: an absence from work of at least four continuous weeks; and a combined total of absences from work, within a 13-week period, whether based on a single or separate illness or injury, of at least 4 weeks.

caused, or may cause, the employee to be a danger to other employees or members of the public; or may be affecting the employee's standard of conduct.⁶ An Agency Head may also direct an employee to attend a medical examination if the employee is to be assigned new duties and the employee's state of health may affect their ability to undertake the duties; or if the employee is to travel overseas as part of their employment.⁷

Preliminary international human rights legal advice

Rights to privacy, work and equality and non-discrimination and rights of people with disability

1.48 By directing an employee to undergo a medical examination and provide the results of that examination to their employer, the measure engages and limits the right to privacy. The right to privacy includes respect for informational privacy, including the right to respect for private and confidential information, particularly the storing, use and sharing of such information, as well as the right to personal autonomy and physical and psychological integrity.⁸

1.49 Further, to the extent that the measure has a disproportionate impact on people with disability, for example where a person's impairment may affect their work performance, it may engage and limit the rights of people with disability and the right to equality and non-discrimination. 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.⁹ This right encompasses both 'direct' discrimination (where measures have a discriminatory intent) and 'indirect' discrimination (where measures have a discriminatory effect on the enjoyment of rights).¹⁰ Indirect discrimination occurs where 'a rule or measure that is neutral at face value or without intent to

6 Paragraph 11(1)(a).

7 Paragraph 11(1)(b)–(c).

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

9 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. The Convention on the Rights of Persons with Disabilities also protects the right to equality and prohibits all discrimination on the basis of disability, see in particular article 5.

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

discriminate' exclusively or disproportionately affects people with a particular protected attribute.¹¹

1.50 The Convention on the Rights of Persons with Disabilities further describes the content of the right to equality and non-discrimination with respect to people with disability, including the various measures that state parties are required to take to guarantee the right to equality before and under the law for people with disabilities. This includes an obligation to take all appropriate steps to ensure that reasonable accommodation is provided.¹² 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.¹³

1.51 Further, depending on the outcome of the medical examination and any consequential action taken by the employer, for example, if the report was used as a basis for termination or any other adverse employment action, the measure may also engage and limit the right to work. The right to work includes a right to freely accept or choose work and not to be unfairly deprived of work, and must be made available in a non-discriminatory way.¹⁴ The Convention on the Rights of Persons with Disabilities elaborates on the content of this right with respect to people with disability. In particular, article 27 recognises the right of persons with disabilities to work on an equal basis with others and prohibits discrimination on the basis of disability with regard to all employment matters.¹⁵ The UN Committee on the Rights

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- 11 *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*, 3rd edition, Oxford University Press, Oxford, 2013, [23.39].
 - 12 Convention on the Rights of Persons with Disabilities, articles 4 and 5. See also UN Committee on Economic, Social and Cultural Rights, *General Comment No. 5: Persons with disabilities* (1994).
 - 13 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].
 - 14 International Covenant on Economic, Social and Cultural Rights, articles 6–7. See also, UN Committee on Economic, Social and Cultural Rights, *General Comment No. 18: the right to work (article 6)* (2005) [4] and *General Comment No. 5: People with Disabilities* (1994) [20] – [27].
 - 15 Convention on the Rights of Persons with Disabilities, article 27. See UN Committee on the Rights of Persons with Disabilities, *General comment No. 8 (2022) on the right of persons with disabilities to work and employment* (2022).

of Persons with Disabilities has emphasised that 'impairments must not be taken as legitimate grounds for the denial or restriction of human rights', including the right to work.¹⁶

1.52 The statement of compatibility states that the measure may limit article 27 of the Convention on the Rights of Persons with Disabilities where an Agency Head is concerned about how the state of health of a person with disability is affecting their performance, such as where the employee has a mental health condition.¹⁷ The statement of compatibility does not recognise that the measure may also engage the rights to privacy, work and equality and non-discrimination, and so does not provide an assessment as to the permissibility of these potential limitations.

1.53 The above rights may be subject to permissible limitations where the limitation pursues a legitimate objective, is rationally connected to that objective and is a proportionate means of achieving that objective.¹⁸

1.54 The statement of compatibility states that the purpose of the measure is to provide the Agency Head with information in relation to an employee's state of health.¹⁹ This appears to be more of a description of what the measure does rather than articulating the pressing or substantial concern the measure addresses as required to constitute a legitimate objective for the purposes of international human rights law. Further information is therefore required as to whether there is a pressing and substantial concern which gives rise to the need for the specific measure and how the measure is likely to be effective in achieving the objective being sought.

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

1.56 The circumstances in which an Agency Head may direct an employee to undergo a medical examination are drafted in quite broad terms, such as where an employee's state of health may affect their work performance or standard of conduct. It is not clear how work performance is measured and the extent to which

16 UN Committee on the Rights of Persons with Disabilities, *General comment No. 8 (2022) on the right of persons with disabilities to work and employment* (2022) [8].

17 Statement of compatibility, p. 3.

18 It is noted that while the Convention on the Rights of Persons with Disabilities contains no general limitation provision, the general limitation test under international human rights law is applicable, noting that many rights in the Convention on the Rights of Persons with Disabilities are drawn from the International Covenant on Economic, Social and Cultural Rights and International Covenant on Civil and Political Rights.

19 Statement of compatibility, p. 3.

an employee's performance must be affected in order to trigger the exercise of this power. The lack of clarity as to the scope of the power and the manner of its exercise raises questions as to whether the measure is sufficiently circumscribed.

1.57 As to the existence of safeguards, the statement of compatibility states that a direction made pursuant to section 11 is a reviewable APS action.²⁰ As such, an affected employee may apply to the relevant Agency Head for internal review and to the independent Merit Protection Commissioner.²¹ The availability of merits review serves as an important safeguard.

1.58 Jurisprudence of the International Labour Organization (ILO) Administrative Tribunal has also emphasised the importance of safeguards accompanying a measure that requires an employee to undergo a medical examination. While the ILO Constitution and conventions are not specified in the list of treaties against which the Parliamentary Joint Committee on Human Rights assesses the human rights compatibility of legislation,²² these ILO standards and jurisprudence are relevant to the committee's mandate, being the practice of the international organisation with recognised and long-established expertise in the interpretation and implementation of the right to work and associated rights which fall within the Committee's mandate. In the case of *G v EPO*, the ILO Administrative Tribunal stated that a measure 'requiring an employee to undergo a medical examination...should be hedged with safeguards', including providing the employee with precise information regarding the real reasons underpinning the decision taken by the employer, such that the employee may challenge the grounds for the decision in full knowledge of the facts.²³ In these regulations, the measure provides that the Agency Head may make the direction by written notice, which is to include the period within which the employee must undergo an examination, and details of the medical practitioner nominated by the Agency Head.²⁴ However, it is not clear whether the notice is required to set out the reasons underpinning the decision to direct an employee to attend a medical examination in sufficient detail such that the employee may challenge the decision and effectively seek review.

1.59 As to whether there is a less rights restrictive approach available, it may be less of an intrusion on an employee's private life if they were able to be examined by a medical practitioner of their choice or, at a minimum, provide a shadow report to the employer. For example, if the employee disagrees with a report prepared by a medical practitioner nominated by the Agency Head, they may wish to submit a

20 Statement of compatibility, p. 3. APS actions that are non-reviewable are set out in section 37.

21 See Public Service Regulations, Part 4.

22 Under the *Human Rights (Parliamentary Scrutiny) Act 2011*.

23 *G v EPO*, ILO Administrative Tribunal, Judgment No, 3617 (2016) [7]–[9].

24 Subsection 11(2).

shadow report prepared by an alternative medical practitioner of their choice in order to provide the employer with a contrary medical opinion. This may be particularly relevant if they have complex medical conditions and a long-standing medical practitioner who understands the various complexities of their condition.²⁵

1.60 A further consideration is the extent of any interference with human rights. The greater the interference, the less likely the measure is to be considered proportionate. The potential consequences that may result from the medical examination are relevant in assessing the potential interference with rights. For example, if an employee were to be terminated because of the results of the medical examination, it may constitute a significant interference with their right not to be unfairly deprived of work and not to be discriminated against on the basis of disability. The statement of compatibility states that any direction made by an Agency Head as a result of a medical examination must be lawful and reasonable, which would preclude an Agency Head sanctioning an employee because of their disability.²⁶ However, under the *Public Service Act 1999*, non-performance or unsatisfactory performance of duties and inability to perform duties because of physical or mental incapacity are both lawful grounds for termination of an ongoing APS employee.²⁷ It appears that the results of a medical examination may inform a decision as to whether an employee is satisfactorily performing their duties and information contained in the medical report may be used as evidence in support of one or more termination grounds. If this were the case, there would be a greater potential interference with rights.

Committee view

1.61 The committee notes that directing an APS employee to undergo a medical examination and provide an Agency Head with the results of that examination engages and limits the rights to privacy, work, equality and non-discrimination and the rights of persons with disability. 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:

25 For example, in family law proceedings it is common for shadow or adversarial reports to be produced by single experts following the permission of the court. This occurs in circumstances where there is contrary opinion presented by an appointed expert, and the points of contention relate to addressing substantial issues in the matter. These reports are commonly used where insight into the mental health of parties is a prominent issue for determination. See Federal Circuit and Family Court of Australia (Family Law) Rules 2021, rule 7.08.

26 Statement of compatibility, p. 3.

27 *Public Service Act 1999*, paragraphs 29(3)(c)–(d). The grounds for termination of the employment of a non-ongoing APS employee may be broader than the grounds specified in subsection 29(3), see subsection 29(5).

- (a) why is it necessary to provide the Agency Head with information in relation to an employee's state of health and what is the pressing or substantial concern this seeks to address;
- (b) how is the measure effective to achieve the objective being sought;
- (c) what considerations would an Agency Head take into account in forming a belief that an employee's health may be affecting their work performance or standard of conduct, for example, how would an Agency Head measure whether an employee's work performance is 'affected';
- (d) whether the written notice directing an employee to undergo a medical examination sets out the reasons underpinning the decision to issue such a direction in sufficient detail such that the employee may challenge the decision and effectively seek review, and why this requirement is not provided for in the regulations;
- (e) why it is necessary for the medical examination to be undertaken by a medical practitioner nominated by the Agency Head and is it possible for an employee to choose an alternative practitioner of their choice;
- (f) whether it is possible for an employee to submit to an Agency Head a shadow report from a medical practitioner of their choice; and
- (g) how will the information contained in the medical report be used by the Agency Head and what are the potential consequences of the medical examination and report, for example, is termination a possibility.

Use and disclosure of personal information

1.62 Section 103 authorises an Agency Head, the Australian Public Service (APS) Commissioner and the Merit Protection Commissioner to use and disclose personal information that is in their possession or under their control in certain circumstances.²⁸ In particular, an Agency Head may use personal information where the use is necessary for, or relevant to, the exercise of the employer powers of the Agency Head.²⁹ An Agency Head may also disclose personal information where the disclosure is necessary for, or relevant to, the exercise of certain powers or functions.³⁰ The APS Commissioner may use personal information where the

28 Subsection 103(2)–(3) relate to use and disclosure by an Agency Head; subsections 103(4)–(5) relate to use and disclosure by the APS Commissioner; and subsection 103(6) relates to disclosure by the Merit Protection Commissioner.

29 Subsection 103(2).

30 Subsection 103(3).

information was obtained as part of the Commissioner's review or inquiry functions and the use is necessary for, or relevant to, an inquiry relating to the Code of Conduct.³¹ The APS Commissioner and the Merit Protection Commissioner may disclose personal information where the information was obtained as part of a review or inquiry and the disclosure is necessary for, or relevant to, an Agency Head's consideration of alleged misconduct by an APS employee.³²

Preliminary international human rights legal advice

Right to privacy

1.63 By authorising the use and disclosure of personal information, the measure engages and limits the right to privacy. This is acknowledged in the statement of compatibility.³³ The right to privacy includes the right to respect for private and confidential information, particularly the storing, use and sharing of such information, and the right to control the dissemination of information about one's private life.³⁴

1.64 The right to privacy may be subject to permissible limitations which are provided by law and are not arbitrary. In order for limitations not to be arbitrary, the measure must pursue a legitimate objective and be rationally connected to (that is, effective to achieve) and proportionate to achieving that objective.

1.65 The explanatory statement states that the purpose of the measure is to authorise the use and disclosure of personal information in specific circumstances and specify those circumstances for the purposes of the *Privacy Act 1988* and the common law.³⁵ This appears to be more of a description of what the measure does rather than articulating the pressing or substantial concern the measure addresses, as required to constitute a legitimate objective for the purposes of international human rights law. The statement of compatibility does not provide any additional information as to the objective being sought. Further information is therefore required as to whether there is a pressing and substantial concern which gives rise to the need for the specific measure and how the measure is likely to be effective in achieving the objective being sought.

1.66 In order to be proportionate, a limitation on the right to privacy should only be as extensive as is strictly necessary to achieve its legitimate objective and must be accompanied by appropriate safeguards. The UN Human Rights Committee has stated that legislation must specify in detail the precise circumstances in which

31 Subsection 103(4).

32 Subsections 103(5)–(6).

33 Statement of compatibility, p. 4.

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

35 Explanatory statement, p. 31.

interferences with privacy may be permitted.³⁶ The statement of compatibility states that personal information is not authorised to be disclosed to the public and may only be collected for a specific purpose and disclosed where this is necessary or relevant to the exercise of the Agency Head's or Commissioners' powers.³⁷ The purposes for which personal information may be used and disclosed are drafted in reasonably specific terms. However, the measure does not specify to whom information may be disclosed. This raises questions as to whether the measure is sufficiently circumscribed. Without this information, it is difficult to assess whether the potential limit on the right to privacy is only as extensive as is strictly necessary. If personal information may be disclosed to a broad range of agencies and individuals, including those not in the public service, the potential interference with the right to privacy is less likely to be proportionate. The statement of compatibility does not identify any other safeguards accompanying the measure.

Committee view

1.67 The committee notes that authorising the use and disclosure of personal information in certain circumstances engages and limits the right to privacy. The committee considers that 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) why is it necessary to authorise the use and disclosure of personal information and what is the pressing or substantial concern this seeks to address;
- (b) to whom may an Agency Head, the APS Commissioner and the Merit Protection Commissioner disclose personal information, and why do the regulations not limit to whom information may be disclosed; and
- (c) what other safeguards, if any, accompany the measure.

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

37 Statement of compatibility, p. 4.

Telecommunications (Interception and Access) (Enforcement Agency—NSW Department of Communities and Justice) Declaration 2023 [[F2023L00395](#)]¹

| | |
|--------------------------------|---|
| Purpose | This legislative instrument declares the NSW Department of Communities and Justice to be an enforcement agency, and each staff member of Corrective Services NSW to be an officer, for the purpose of accessing telecommunications data |
| Portfolio | Home Affairs |
| Last day to disallow | 15 sitting days after tabling (tabled in the House of Representatives and the Senate on 9 May 2023). Notice of motion to disallow must be given in the House by 21 June 2023 and in the Senate by 7 August 2023 ² |
| Authorising legislation | <i>Telecommunications (Interception and Access) Act 1979</i> |
| Rights | Privacy |

Access to telecommunications data by corrective services authorities

1.68 The *Telecommunications (Interception and Access) Act 1979* (TIA Act) provides a legal framework for certain agencies to access telecommunications data for law enforcement and national security purposes. Telecommunications data is information about a communication – such as the phone number and length of call or email address from which a message was sent and the time it was sent – but does not include the content of the communication.³ The TIA Act provides that an authorised officer in an enforcement agency can authorise the disclosure of such data if it is for the purposes of enforcing the criminal law or a law imposing a pecuniary penalty, or for the protection of public revenue.⁴ An enforcement agency

1 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Telecommunications (Interception and Access) (Enforcement Agency – NSW Department of Communities and Justice) Declaration 2023 [2023L00395], *Report 6 of 2023*; [2023] AUPJCHR 55.

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 *Telecommunications (Interception and Access) Act 1979*, section 172.

4 *Telecommunications (Interception and Access) Act 1979*, Part 4.1, Division 4.

is defined as a criminal law enforcement agency⁵ or an authority or body that the minister declares, by legislative instrument, to be an enforcement body.⁶ A corrective services authority can be declared to be an enforcement body under this power. Such a declaration ceases to be in force 40 sitting days after it is made.⁷

1.69 This legislative instrument (the declaration) declares the New South Wales (NSW) Department of Communities and Justice (being that part known as Corrective Services NSW) to be an enforcement agency under the TIA Act. It also declares that each staff member of Corrective Services NSW is an officer for the purposes of the TIA Act – such that they can authorise the disclosure of telecommunications data.⁸ The declaration is subject to the condition that officers cannot apply for a journalist information warrant, and it only applies to Corrective Services NSW.⁹

Preliminary international human rights legal advice

Right to privacy

1.70 The power to declare a corrective services authority as an enforcement body, which means it may access telecommunications data, engages and limits the right to privacy. The right to privacy includes respect for informational privacy, including the right to respect for private and confidential information, particularly the storing, use and sharing of such information.¹⁰ It also includes the right to control the dissemination of information about one's private life. Communications data can reveal quite personal information about an individual, even without the content of the data being made available, by revealing who a person is in contact with, how often and where.¹¹ It is noted that a corrective services authority would be able to access information not only in relation to prisoners, but also anyone in contact with them. 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.

5 *Telecommunications (Interception and Access) Act 1979*, section 110A, which includes all state and territory police agencies, the Department of Home Affairs (for limited purposes), the Australian Competition and Consumer Commission, the Australian Securities and Investments Commission, the Australian Criminal Intelligence Commission, and various integrity and corruption Commissions.

6 *Telecommunications (Interception and Access) Act 1979*, subsection 176A(1).

7 *Telecommunications (Interception and Access) Act 1979*, paragraph 176A(10)(b).

8 Section 3.

9 Section 4.

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

11 See [Digital Rights Ireland Ltd \(C-293/12\) and Kärntner Landesregierung ors \(C-594/12\), v Minister for Communications, Marine and Natural Resources and ors](#), Court of Justice of the European Union (Grand Chamber), Case Nos. C-293/12 and C-594/12 (2014) [27]

1.71 The statement of compatibility acknowledges that the measure limits the right to privacy, but states that the measure seeks to achieve the legitimate objective of protecting national security, public order and the rights and freedoms of others.¹² In particular, it states that there is a threat posed by illicit mobile phones in correctional facilities, which are used to 'organise escape attempts, threaten the safety of victims and witnesses, organise trafficking of contraband, as well as facilitate behaviour contrary to national security interests'. It states that telecommunications data is vital in establishing the ownership or location of mobile phones used to commit offences within correctional facilities.¹³

1.72 The objective of addressing the threat posed by illicit mobile phones in prison is, in general, likely to constitute a legitimate objective. However, under international human rights law a legitimate objective must be one that is necessary and addresses an issue of public or social concern that is pressing and substantial enough to warrant limiting the right. It is noted that the *Comprehensive Review of the Legal Framework of the National Intelligence Community* recommended that corrective services authorities should be granted the power to access telecommunications data, if the relevant state or territory government considers it to be necessary.¹⁴ However, this review also stated that several police authorities questioned the need to enable corrective services authorities to access telecommunications data in their own right, as such data can already be sought from police authorities. The review stated that 'evidence from several states indicates that well-managed, cooperative and joint investigative arrangements between police forces, integrity bodies and corrections agencies can work well to investigate criminal activity in prisons'.¹⁵ The statement of compatibility does not fully address why it is insufficient to rely on the police to access telecommunications data to investigate alleged offences within correctional facilities. As such, this raises questions as to whether the declaration addresses a pressing and substantial concern. It is also noted that Corrective Services NSW has been declared to be an enforcement agency for the purposes of the TIA since 18 February 2022,¹⁶ but no information has been provided as to how many times since then telecommunications data has been accessed.

12 Statement of compatibility, p. 9.

13 Statement of compatibility, p. 9.

14 *Comprehensive Review of the Legal Framework of the National Intelligence Community* by Mr Dennis Richardson AC, [Volume 2: Authorisations, Immunities and Electronic Surveillance](#), December 2019, recommendation 78.

15 *Comprehensive Review of the Legal Framework of the National Intelligence Community* by Mr Dennis Richardson AC, [Volume 2: Authorisations, Immunities and Electronic Surveillance](#), December 2019, p. 278.

16 Telecommunications (Interception and Access) (Enforcement Agency—NSW Department of Communities and Justice) Declaration 2022 [[F2022L00154](#)].

1.73 Further, a key aspect of whether a limitation on a right can be justified is whether the limitation is proportionate to the objective being sought. In this respect, it is necessary to consider a number of factors, including whether a proposed limitation is sufficiently circumscribed; whether it is accompanied by sufficient safeguards; and whether any less rights restrictive alternatives could achieve the same stated objective.

1.74 The statement of compatibility states that the NSW Department of Communities and Justice (NSW department) is subject to NSW privacy laws, and the strict requirements in the TIA for the collection, use and disclosure of information. It notes that existing safeguards apply, including independent oversight by the Commonwealth Ombudsman and that the Attorney-General is required to report to Parliament on the operation of the data retention scheme. It also notes that the NSW department will be excluded from obtaining journalist access warrants. The statement of compatibility also states that the NSW department has processes and systems in place to ensure telecommunications data is only accessed as required and will be appropriately protected.¹⁷

1.75 These safeguards may operate, in practice, to help protect against arbitrary interference with the right to privacy. However, there are some questions as to the breadth of the existing measure. In particular, it is unclear why every officer of Corrective Services NSW has been designated as an authorised officer under the declaration. This would appear to apply to over ten thousand employees of Corrective Services NSW.¹⁸ It is not clear why all such officers need to be authorised to access telecommunications data, rather than restricting it to those persons performing particular roles who require it to perform their functions.

Committee view

1.76 The committee considers that seeking to address the threat posed by illicit mobile phones in correctional facilities is, in general terms, a legitimate objective. However, the committee considers that some questions remain as to the necessity of this power given that corrective services authorities could access such data via the police. Further, the committee notes that the declaration enables thousands of employees of Corrective Services NSW to access telecommunications data, rather than restricting this to only those with a specific need to access such data. The committee considers that further information is required to assess the compatibility of this measure with the right to privacy, and as such seeks the Attorney-General's advice in relation to:

17 Statement of compatibility, p. 9.

18 See Media Release, [Corrective Services NSW celebrates its staff](#), 10 January 2022 which stated that there were 10,000 corrective services staff.

- (a) why it is not sufficient for Corrective Services NSW to seek access to telecommunications data via NSW law enforcement agencies;
- (b) how many times has telecommunications data been accessed by Corrective Services NSW since it was declared to be an enforcement agency for the purposes of the TIA Act; and
- (c) why are all staff of Corrective Services NSW declared as able to access telecommunications data, rather than the declaration being restricted to only those staff members who require access to telecommunications data to perform their functions.