Parliamentary Joint Committee on Human Rights

Human rights scrutiny report

Report 8 of 2023

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Committee information

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

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

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

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

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

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

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

Report snapshot[1]

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

Bills

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Appropriation Bills 2023-2024[3]

Advice to Parliament

Appropriation of money to fund public services

Multiple rights

These bills (now Acts) appropriate money from the Consolidated Revenue Fund for a range of services. Proposed government expenditure to give effect to particular policies may engage, limit or promote multiple human rights, including civil and political rights and economic, social and cultural rights. The rights of

1 This section can be cited as Parliamentary Joint Committee on Human Rights, Report snapshot, *Report 8 of 2023*; [2023] AUPJCHR 69.

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.

3 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.

vulnerable groups, including women, Aboriginal and Torres Strait Islander people, people with disability, children and ethnic minorities, may be engaged where policies have a particular, direct impact on these groups. However, the statements of compatibility accompanying these bills state that no rights are engaged.

The committee received a response from the Finance Minister in relation to this. The committee considers that the allocation of funds via appropriation bills is susceptible to a human rights assessment. The committee's expectation is that statements of compatibility with human rights accompanying appropriations bills should address the compatibility of measures which directly impact human rights and which are not addressed elsewhere in legislation. In particular, the committee expects that where the appropriations bills propose a real reduction in funds available for expenditure on certain portfolios or activities that may impact human rights, the statement of compatibility should identify this and explain why this is a permissible limit.

Australian Capital Territory (Self-Government) Amendment Bill 2023

No comment

Biosecurity Amendment (Advanced Compliance Measures) Bill 2023

Seeking information

Accessing information to assess biosecurity risk

Right to privacy and equality and non-discrimination

This bill seeks to amend the *Biosecurity Act 2015* to expand the Director of Biosecurity's power to require a class of persons (such as, all passengers on a particular plane) to produce a travel document (including a passport), which would be scanned and identify any relevant information about a passenger held by the Department of Agriculture (including a history of compliance with biosecurity laws). This information would be used to either asses the passenger's level of biosecurity risk or that of a good they possess, or for future profiling or assessment of biosecurity risks.

This engages and limits the right to privacy, and may limit the right to equality and non-discrimination. The committee considers further information is required to assess the compatibility of the measure with these rights, and is seeking further information from the Minister for Agriculture, Fisheries and Forestry.

Increased civil penalties

Criminal process rights

The bill seeks to increase several civil penalties in the Biosecurity Act, some by up to 900 per cent. For example, the maximum penalty for failure to comply with an entry or exit requirement under the Act would increase from 30 penalty units (currently $9,390) to 150 penalty units (currently $46,950).

There is a risk that penalties applying to members of the public may be considered criminal in nature under international human rights law, including because of their potential severity. The committee recommends that when civil penalties, which may apply to members of the public, are so severe such that there is a risk that they may be regarded as 'criminal' under international human rights law, consideration should be given to applying a higher standard of proof in the related civil penalty proceedings.

Broadcasting Services Amendment (Ban on Gambling Advertisements During Live Sport) Bill 2023

No comment

Broadcasting Services Amendment (Healthy Kids Advertising) Bill 2023

No comment

Classification (Publications, Films and Computer Games) Amendment (Industry Self-Classification and Other Measures) Bill 2023

No comment

Crimes Legislation Amendment (Combatting Foreign Bribery) Bill 2023

No comment

Counter-Terrorism Legislation Amendment (Prohibited Hate Symbols and Other Measures) Bill 2023

Seeking information

Criminalising the public display and trading of prohibited symbols

Rights to life, security of person, prohibition against inciting national, racial or religious hatred, rights to freedom of expression and religion, equality and non-discrimination, and rights of the child

The bill seeks to introduce new criminal offences relating to the public display and trading of prohibited symbols, namely the Islamic State flag, the Nazi hakenkreuz, the Nazi double sig rune, and something that so nearly resembles these things that it is likely to be confused with, or mistaken for, that thing.

The committee notes with deep concern the rising number of disturbing events involving the public display of Nazi symbols and emphasises that these displays of hate have no place in Australia. The committee notes that Australia has obligations under international human rights law to prohibit by law any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence and to eliminate all incitement to, or acts of, racial discrimination. As such, the committee considers that if criminalising the public display and trading of prohibited symbols deters and prevents the commission of violent offences and reduces the harm caused to others by the display of symbols associated with racial and religious hatred, this would promote a number of human rights, including the rights to life and security of person and the prohibition against inciting national, racial or religious hatred.

However, by criminalising certain forms of expression, the measures would also engage and limit the right to freedom of expression and, insofar as they apply to children, the rights of the child. Further, if the measures had the effect of restricting the ability of people of certain religious groups to worship, practise or observe their religion (such as Buddhists displaying the sacred Swastika and Muslims using the words of the shahada in the Islamic flag), it may engage and limit the right to freedom of religion and possibly the right to equality and non-

discrimination. The committee is seeking further information from the Attorney-General to assess the compatibility of the measures with these rights.

Criminalising the accessing or possession of 'violent extremist material'

Rights to life, security of person, prohibition against inciting national, racial or religious hatred, right to freedom of expression and rights of the child

The bill seeks to introduce new criminal offences relating to the use of a carriage service (such as an internet or mobile telephone service) for accessing or possessing 'violent extremist material', which among other things, would describe or depict or support or facilitate 'serious violence'. Serious violence captures a broad range of acts, including material that describes serious damage to property, the serious electronic interference with a financial system or disruption of a transport system.

To the extent that criminalising conduct relating to the use of a carriage service for violent extremist material may deter and prevent terrorist-related conduct and violence, the measure could promote a number of human rights, including the rights to life and security of person and the prohibition against inciting national, racial or religious hatred.

However, by criminalising the use of a carriage service to, among other things, access, share, and possess certain material, the measure would engage and limit the right to freedom of expression and, insofar as it applies to children, the rights of the child. The committee is concerned that the new offences appear to capture conduct that does not appear to be illegitimate (for example, criminalising a person accessing material via social media of footage of protestors overseas taking action to overthrow unlawful regimes). As such, the committee is seeking further information from the Attorney-General to assess the compatibility of the measures with these rights.

Expanding the offence of advocating terrorism

Rights to life, security of person, freedom of expression and rights of the child

The bill seeks to expand the existing offence of advocating terrorism to include providing instruction on the doing of a terrorist act or offence; or praising the doing of a terrorist act or offence in circumstances where there is a substantial risk that such praise might lead other persons to commit terrorist acts or offences.

To the extent that broadening the offence of advocating terrorism would deter and prevent terrorist acts and offences, the measure could promote the rights to life and security of person.

However, by criminalising certain forms of expression the measure would engage and limit the right to freedom of expression and, insofar as it applies to children, the rights of the child. The committee is seeking further information from the Attorney-General to assess the compatibility of the measures with these rights.

Environment Protection (Sea Dumping) Amendment (Using New Technologies to Fight Climate Change) Bill 2023

No comment

Freeze on Rent and Rate Increases Bill 2023

No comment

Greenhouse and Energy Minimum Standards Amendment (Administrative Changes) Bill 2023

No comment

Home Affairs Bill 2023

No comment

Inspector-General of Live Animal Exports Amendment (Animal Welfare) Bill 2023

Advice to Parliament

Collection, use and disclosure of personal information

Right to privacy

This bill seeks to amend the *Inspector-General of Live Animal Exports Act 2019* (the Act) to expand the functions of the Inspector-General of Animal Welfare (Inspector-General) in relation to their powers of review. Under the current Act, the Inspector-General may require a person to give information or documents to them if they reasonably believe it is relevant to the review.

By expanding the matters in relation to which the Inspector-General may conduct a review, the measure would have the effect of expanding the scope of information, including personal information, that may be obtained, used and disclosed by the Inspector-General, which engages the right to privacy. On the basis of the advice provided by the Minister for Agriculture, Fisheries and Forestry the committee considers there are sufficient safeguards to ensure that any limitation on the right to privacy is likely to be proportionate.

Intellectual Property Laws Amendment (Regulator Performance) Bill 2023

No comment

Intelligence Services Legislation Amendment Bill 2023

Seeking information

Exemption from civil and criminal liability for defence officials and others

Right to privacy and right to an effective remedy

This bill seeks to amend the *Criminal Code Act 1995* to exempt defence officials and others from civil and criminal liability for certain 'computer related conduct'.

This engages and may limit the right to an effective remedy, should the relevant conduct result in a breach of the civil and political rights of a person in Australia (such as the right to privacy). The statement of compatibility states that these amendments may indirectly create a risk that a person's right to privacy may be violated, including where conduct has inadvertently affected a computer or device inside Australia. However, it does not identify whether this would constitute a permissible limit on the right to privacy, and does not recognise that the right to an effective remedy may be engaged.

The committee is seeking further information from the Attorney-General to assess the compatibility of the measure with these rights.

Interactive Gambling Amendment (Ban on Gambling Advertisements) Bill 2023

No comment

International Organisations (Privileges and Immunities) Amendment Bill 2023

Seeking information

Extending privileges and immunities

Right of access to courts and tribunals, right to an effective remedy and prohibition against torture and inhuman treatment

This bill seeks to allow regulations to be made to extend privileges and immunities under the *International Organisations (Privileges and Immunities) Act 1963* to international organisations to which Australia is not a member and to persons representing such organisations, as well as other categories of officials that are to be prescribed by regulations.

By extending immunities to a broader range of organisations and officials, including an immunity from personal arrest or detention and from suit and other legal processes, the bill would engage and limit the right of access to courts and tribunals as well as the right to an effective remedy and potentially Australia's obligations to investigate and prosecute (or extradite) persons alleged to have committed torture. The committee is seeking further information from the Minister for Foreign Affairs and Trade to assess the compatibility of the bill with these rights.

Migration Amendment (Overseas Organ Transplant Disclosure and Other Measures) Bill 2023

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

Migration Amendment (Strengthening Employer Compliance) Bill 2023

Seeking information

Employer sanctions for coercive practices

Right to just and favourable conditions of work; prohibition against slavery; rights to equality and non-discrimination and privacy

The bill seeks to establish new offences and civil penalties for coercing or otherwise pressuring a person to breach a work-related condition of their visa, or accept an exploitative work arrangement to meet a work-related condition of their visa. This engage and promote several human rights, including the rights to just and favourable conditions of work, equality and non-discrimination and the prohibition against slavery.

The bill also seeks to expand the circumstances in which an inspector may exercise their existing powers. These powers include the power to enter premises, ask questions and require the provision of documents and information. This engages and may limit the right to privacy. The committee is seeking the Minister for Home

Affairs' advice as to whether the measure constitutes a permissible limit on the right to privacy.

Publication of information about prohibited employers

Multiple rights

The bill would allow the minister to prohibit employers from employing any additional non-citizens where they have been subject to a 'migrant worker sanction'. The minister would be required to publish on the department's website the names of such employers.

The publication of information about prohibited employers may promote the right to just and favourable conditions of work, the absolute prohibition against slavery and servitude, and the right to equality and non-discrimination. However, requiring the publication of information identifying prohibited employers online also engages and limits the right to privacy. The committee seeks the Minister for Home Affairs' advice as to the compatibility of the measure with the right to privacy.

Murdoch Media Inquiry Bill 2023

The committee notes that this private senator's bill appears to engage and may limit human rights (particularly in relation to the information sharing powers and offence provisions). Should this bill proceed to further stages of debate, the committee may request further information from the senator as to the human rights compatibility of the bill.

National Occupational Respiratory Disease Registry (Consequential Amendments) Bill 2023

No comment

National Occupational Respiratory Disease Registry Bill 2023

Seeking information

Establishment of a registry containing personal data

Rights to health; just and favourable conditions of work; privacy

The bill seeks to establish a National Occupational Respiratory Disease Registry to capture and share data on respiratory diseases thought to be occupationally caused or exacerbated, and the agents that are believed to have caused them.

This would likely promote the rights to health and to just and favourable conditions of work. However, requiring the provision of personal information, including potentially identifying affected workers by name on the registry without the person's consent, and permitting the use and disclose of that personal information, also engages and limits the right to privacy. It is not clear that the measure would constitute a proportionate limit on the right to privacy, including noting that several key terms are not defined in the bill, the potential scope of information that may be included on the registry is unclear, why the bill does not provide doctors with the flexibility to provide only limited information about patients, and the lack of clarity as to how access to the registry would occur.

The committee is seeking the Minister for Health and Aged Care's advice as to whether the measure constitutes a permissible limit on the right to privacy.

Public Service Amendment Bill 2023

No comment

Social Services Legislation Amendment (Child Support Measures) Bill 2023

Advice to Parliament

Departure authorisation certificates

Right to freedom of movement

This bill (now Act) expands 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, and may limit the right to equality and non-discrimination. The Minister for Social Services provided detail advice to the committee in relation to this measure. The committee notes the importance of seeking to ensure that parents pay their outstanding child support debt, and considers that, in many circumstances, the measure would constitute a proportionate limit on the right to freedom of movement. However, the committee considers that if an outstanding debt consisted largely of late fees and penalties, but the child support debt itself had been largely paid back, an ongoing departure prohibition order may not constitute a proportionate limit on the right to freedom of movement. Further, the committee considers that restricting the circumstances in which a debtor may travel overseas may risk disproportionately impacting persons on the basis of nationality, and that such differential treatment may not be permissible in some circumstances. However, as the bill has passed the committee makes no further comment.

Treasury Laws Amendment (2023 Law Improvement Package No. 1) Bill 2023

No comment

Treasury Laws Amendment (2023 Measures No. 3) Bill 2023

No comment

Treasury Laws Amendment (Making Multinationals Pay Their Fair Share – Integrity and Transparency) Bill 2023

No comment

Legislative instruments

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Autonomous Sanctions (Designated Persons and Entities and Declared Persons – Russia and Ukraine) Amendment (No. 7) Instrument 2023 [F2023L00762]

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

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 Migration (Granting of contributory parent visas, parent visas and other family visas in financial year 2022/2023) Instrument (LIN 23/016) 2023 [F2023L00609], deferred in *Report 7 of 2023* (21 June 2023).

6 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.

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

Extradition (Republic of North Macedonia) Regulations 2023 [F2023L00447]

Advice to Parliament

Extraditions to the Republic of North Macedonia

Rights to life; prohibition against torture and other cruel, inhuman or degrading treatment or punishment; rights to liberty; fair trial; presumption of innocence

These regulations declare the Republic of North Macedonia to be an 'extradition country' for the purposes of the *Extradition Act 1988*. Facilitating the extradition of persons in Australia to the Republic of North Macedonia to face proceedings in relation to serious offences (including alleged offences) engages and may limit multiple rights. In order to assess the compatibility of the instrument with rights it is necessary to consider the compatibility of the Extradition Act with multiple rights.

The Attorney-General provided advice in relation to this to the committee. Noting the importance of the rights that may be affected by extradition, such as the prohibition against torture and other cruel, inhuman or degrading treatment or punishment and the rights to a fair hearing and equality and non-discrimination the committee is concerned that many of the specified safeguards in relation to extradition rely on the exercise of ministerial discretion. The committee also considers the presumption against bail in the Extradition Act, and the lack of any ability to challenge the lawfulness of such continued detention is incompatible with the rights to liberty and effective remedy. The committee has made recommendations to amend the Extradition Act to improve its human rights compatibility and draws this to the attention of the Attorney-General and Parliament.

Migration (Granting of contributory parent visas, parent visas and other family visas in financial year 2022/2023) Instrument (LIN 23/016) 2023 [F2023L00609]

Seeking information

Capping numbers of parent visas

Right to protection of the family and rights of the child

This legislative instrument determines the maximum number of visas that may be granted for certain classes of visas between 1 July 2022 and 30 June 2023 (inclusive).

Capping the number of parent visas and other family visas, which may limit the ability of certain family members (including parents of children aged under 18) to join others in Australia, engages and may limit the right to protection of the family and the rights of the child.

Noting that the instrument is not accompanied by a statement of compatibility (as this is not required as a matter of law), the committee is seeking further information from the Minister for Home Affairs to assess the compatibility of this measure with these rights.

Migration (Specification of evidentiary requirements – family violence) Instrument (LIN 23/026) 2023 [F2023L00382]

Advice to Parliament

Evidence of family violence

Right to equality and non-discrimination

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. 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. If they are unable to make out such a claim, they may be required to leave Australia.

The Minister for Immigration, Citizenship and Multicultural Affairs provided further information to the committee. The committee considers there is a risk that applicants from non-English speaking backgrounds or certain cultural backgrounds may face more difficulties obtaining evidence of family violence and, consequently, the measure appears to limit the right to equality and non-discrimination. As it is not clear that the measure provides sufficient flexibility, or is accompanied by sufficient safeguards, it is not clear that this would constitute a permissible limit on the right.

The committee recommends that a review of this measure to be conducted in the next 12 months consider the concerns noted in this report (including consideration of whether people from non-English speaking backgrounds or certain cultural backgrounds are more frequently unable to provide evidence of non-judicially determined family violence in practice).

Public Service Regulations 2023 [F2023L00368]

Advice to Parliament

Direction to attend medical examination

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

These regulations allow an Agency Head to direct an 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. 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. To the extent that the measure has a disproportionate impact on people with disability, it may engage and limit the rights of people with disability and the right to equality and non-discrimination. Depending on the outcome of the medical examination and any consequential action taken by the employer, the measure may also engage and limit the right to work.

The Minister for the Public Service provided advice to the committee making clear the legitimate objective of the measure of enabling heads of the public service to meet their work, health and safety obligations by ensuring people only return to work when it is safe to do so. The committee notes that there are several safeguards accompanying the measure and were the power to be used in the specific circumstances set out in the minister's response, it would likely be reasonable and proportionate. However, the committee is concerned that the measure is drafted in broad terms that could allow the power to be used in circumstances that may be an impermissible limit on the right to privacy and may unlawfully discriminate against persons with disabilities. The committee considers that it is likely that the measure does not impermissibly limit the right to work as existing discrimination and fair work protections continue to apply. The committee has made recommendations to

assist with the proportionality of the measure and otherwise draws its concerns to the attention of the minister and the Parliament.

Use and disclosure of personal information

Right to privacy

The regulations authorise an Agency Head, the Australian Public Service Commissioner and the Merit Protection Commissioner to use and disclose personal information that is in their possession or under their control in certain circumstances. This engages and limits the right to privacy.

The committee considers the measure pursues the legitimate objective of effectively managing employment related matters across the APS and maintaining public confidence in the APS, and is accompanied by sufficient safeguards that assist with proportionality. On this basis, the committee considers that the measure would likely constitute a permissible limitation on the right to privacy.

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

Advice to Parliament

Access to telecommunications data by corrective service authorities

Right to privacy

The *Telecommunications (Interception and Access) Act 1979* (TIA Act) provides that an authorised officer in an enforcement agency can authorise the disclosure of telecommunications 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. 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 the TIA Act.

The power to declare a corrective services authority as an enforcement body, meaning it may access telecommunications data, engages and limits the right to privacy. The Attorney-General provided advice as to the necessity of this power, and the committee acknowledges the importance of correctional facilities being able to investigate criminal activity or threats to the order of the prison. However, noting that all other corrective services agencies access such data via the police, and that Corrective Services NSW has traditionally done so, the committee considers the necessity of this power has not been established. Further, as 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 declaration appears insufficiently defined. As such, the committee considers this declaration is not compatible with the right to privacy. The committee recommends that at a minimum the declaration be amended to specify only those staff members who require access to telecommunications data to be officers for the purposes of the Act, and draws this to the attention of the Attorney-General and Parliament.

Chapter 1

New and ongoing matters

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

Bills

Biosecurity Amendment (Advanced Compliance Measures) Bill 2023[1]

Purpose	This bill seeks to amend the *Biosecurity Act 2015* to: provide for greater access to information related to the biosecurity risk of travellers; alter provisions relating to approved arrangements; increase certain civil penalties; and create strict liability offences.
Portfolio	Agriculture, Fisheries and Forestry
Introduced	House of Representatives, 21 June 2023
Rights	Privacy, equality and non-discrimination, criminal process rights

Accessing information to assess biosecurity risk

1.2 Schedule 1 of the bill seeks to amend section 196 of the *Biosecurity Act 2015* (Biosecurity Act) to alter the Director of Biosecurity's (director's) existing power to require a person on an incoming aircraft or vessel to provide information to assess the biosecurity risk associated with them or goods in their possession. Item 7 would provide that the director may require a person or class of persons to produce a travel document (including a passport) to either asses their level of biosecurity risk or that of a good they possess, or for future profiling or assessment of biosecurity risks.[2]

1 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Biosecurity Amendment (Advanced Compliance Measures) Bill 2023, *Report 8 of 2023*; [2023] AUPJCHR 70.

2 Schedule 1, item 7, proposed subsection 196(3A). 'Biosecurity risk' is defined in section 9 of the *Biosecurity Act 2015* to mean the likelihood of a disease or pest entering Australian territory or establishing itself or spreading in Australia, and the potential for it to cause harm to: human, animal or plant health or the environment; or economic consequences associated with its entry, establishment or spread.

1.3 Currently, the director can only require the provision of information from an individual person, including by answering questions, and so the requirement to produce information may only occur in a one-to-one interaction between a biosecurity officer and an individual.[3] The explanatory memorandum states that the proposed amendments would allow the director to require information from classes of persons, for example by requiring *each* person on a particular flight or a vessel originating from a place that has high biosecurity risk associated with it at a particular point in time to provide specified information.[4]

1.4 The director would be empowered to scan relevant documents (such as passports) for either assessing biosecurity risk or for future profiling or assessment of biosecurity risks, and collect and retain personal information. Failure to comply with the requirement to produce a document would be a civil penalty punishable by up to 120 penalty units (currently $37,560).[5] The explanatory memorandum states that, having scanned a travel document, a biosecurity officer could then access information from the Department of Agriculture, Fisheries and Forestry's systems about the individual which is relevant to their risk profile from a biosecurity perspective.[6]

Preliminary international human rights legal advice

Rights to privacy and equality and non-discrimination

1.5 Enabling the director to require the provision of travel documents for a class of persons, and to use those documents to obtain information from the department relating to their biosecurity risk, engages and limits the right to privacy.[7]

1.6 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.[8] It also includes the right to control the dissemination of information about one's private life. The right to privacy may be subject to permissible limitations where the limitation pursues a legitimate objective, is rationally connected to that objective and is a proportionate means of achieving that objective.

3 Explanatory memorandum, p. 9. See, *Biosecurity Act 2015*, section 196.

4 Explanatory memorandum, p. 10.

5 As of 1 July 2023, the value of one penalty unit increased to $313, in accordance with subsection 4AA(3) of the *Crimes Act 1914*, which provides for indexation of penalty units.

6 Explanatory memorandum, p. 11.

7 In seeking to reduce the risk of diseases spreading into Australia, the bill may also promote the right to health. This is noted in the statement of compatibility, pp. 94-95.

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

1.7 The statement of compatibility also states that this measure engages the right to equality and non-discrimination (although it does not specify exactly how).[9] The explanatory memorandum states that the bill would allow the director to include each person on a flight or a vessel (including a cruise ship) in a class.[10] It would appear that, depending on the vessel (or series of vessels) in question and where the vessel is originating from, this may have a disproportionate impact on passengers of a particular race, or national origin. 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.[11] It prohibits discrimination on several bases including race, national or social origin, and nationality. 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).[12] 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.[13]

1.8 If the measure may have an indirectly discriminatory impact in practice, it is necessary to consider whether any differential treatment would be permissible under international human rights law. Where a measure impacts on a particular group disproportionately, it establishes *prima facie* that there may be indirect discrimination.[14] 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

9 Statement of compatibility, pp. 93–94.

10 Explanatory memorandum, p. 7.

11 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.

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

13 *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].

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

serves a legitimate objective, is rationally connected to that objective and is a proportionate means of achieving that objective.[15]

1.9 The statement of compatibility states that having the flexibility to require classes of persons, rather than just individuals, to produce documents would be a significant additional tool for biosecurity officers to assess biosecurity risks, and where appropriate, manage any risk arising.[16] It states that the proposed amendments would allow for the more efficient and effective management of biosecurity risks in order to protect Australia's economy, environment, flora and fauna, and the agricultural sector from diseases and pests, which could have a devastating effect should they enter Australian territory.[17] This constitutes a legitimate objective for the purposes of international human rights law, and the proposed measures would appear to be rationally connected to that objective.

1.10 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 making this assessment 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.

1.11 The statement of compatibility states that the proposed measure would be appropriately constrained in its scope.[18] It states that the proposed power could only be exercised for the 'discrete and limited purposes' of assessing the level of biosecurity risk associated with the person and any goods they have, and the future profiling, or future assessment, of biosecurity risks. Assessing the level of risk associated with an individual would appear to be a constrained purpose, however the future profiling, or future assessment, of biosecurity risks would appear to be broader (noting that such risks do not appear to relate to the individual traveller in question). Further, while the potential range of documents which may be required to be provided (a passport or other travel document) is limited, the range of information that is subsequently made available to assess a person's level of biosecurity risk is unclear. As such, further information is required as to whether the proposed measure is sufficiently circumscribed.

1.12 It is also unclear whether the exercise of the proposed measure would mean that the department is gathering more information about individuals (for example, a record of the dates, ports of departure and ports of arrival that an individual has travelled). The statement of compatibility states that depending on the nature and

15 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].

16 Statement of compatibility p. 93.

17 Statement of compatibility, p. 93.

18 Statement of compatibility, p. 94.

scope of the relevant information, including a person's history of compliance with biosecurity laws, this would enable the officer to subsequently undertake more targeted intervention and investigation.[19] However, the nature and scope of information which would be visible to a biosecurity worker having scanned a person's travel document pursuant to this measure is not clear. It is also unclear whether such information would be recorded by the department on each occasion the power is exercised, including where a person's travel document is scanned and no information about their history of compliance with biosecurity laws appears. Further, the explanatory materials do not identify whether the Department of Agriculture, Fisheries and Forestry already has the legislative authority to access information about an individual's passport under the Biosecurity Act or other legislation, or whether this bill seeks to establish that legislative authority.

1.13 As to safeguards, the statement of compatibility states that it is intended that the information obtained using proposed subsection 196(3A) will only be held as long as is necessary to meet the purposes outlined above. However, the statement of compatibility does not explain whether this would be a legislative limitation (for example, under the *Privacy Act 1988*), and how long that period of time would be in practice. It also notes that offences and a civil penalty provision for the unauthorised use or disclosure of protected information would apply to this proposed power, and that the information obtained would be protected by the information management framework in the Biosecurity Act.[20] These offences and civil penalty have the capacity to serve as important safeguards. However, broader concerns have been raised by this committee regarding the proportionality of this information management framework as a whole.[21] In particular, sections 582, 583 and 586 of the Biosecurity Act authorise the disclosure of relevant information for specified purposes without limiting to whom any such disclosures may be made. Limiting the persons who are authorised to disclose relevant information and the purposes for which information may be disclosed, has the effect of limiting the persons to whom information may be disclosed. However, as the text of the legislation does not itself limit to whom information may be disclosed, the extent of the potential limit on privacy is not clear. Further information is therefore required in order to assess whether this proposed measure would constitute a proportionate limit on the right to privacy and equality and non-discrimination.

Committee view

1.14 The committee notes that enabling the director to require the provision of travel documents for a class of persons, and to use those documents to obtain

19 Statement of compatibility, p. 90.

20 Statement of compatibility, p. 91.

21 See, Parliamentary Joint Committee on Human Rights, Biosecurity Amendment (Strengthening Biosecurity) Bill 2022, *Report 6 of 2022* (25 November 2022), pp. 16–33, and *Report 1 of 2023* (8 February 2023), pp. 61–93.

information relating to their biosecurity risk, engages and limits the right to privacy, and engages and may limit the right to equality and non-discrimination.

1.15 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, in practice, the measure may disproportionately impact people based on their ethnicity or national or social origin;

(b) what personal information would be visible to a biosecurity worker or other officer who has scanned a person's travel document pursuant to this measure;

(c) whether the department already has legislative authority to access information about a person's travel document, or whether this bill seeks to establish that authority;

(d) whether the exercise of this power would result in the department collecting more information about individuals (for example, the dates of their travel or departure port, including where an assessment is made on the spot to not investigate them further);

(e) the meaning of 'the future profiling, or future assessment, of biosecurity risks', and whether it is intended that information gathered under this power be used to profile biosecurity risks in general;

(f) to whom information obtained under this measure may be disclosed; and

(g) how long information obtained under this proposed power would be held, and whether this would be subject to a legislative limitation.

Increased civil penalties

1.16 Schedule 3 of the bill seeks to significantly increase a number of civil penalties that apply in the Biosecurity Act, some by up to 900 per cent. For example, the maximum penalty for failure to comply with an entry or exit requirement in section 44 of the Biosecurity Act would increase from 30 penalty units (currently $9,390) to 150 penalty units (currently $46,950).[22] The maximum penalty for failure to comply with a requirement of a human health response zone determination would increase from 30 to 120 penalty units (currently $37,650).[23] Further, the maximum penalties for providing false or misleading information or documents in purported compliance with the Act, or to a biosecurity industry participant, would

22 Schedule 3, items 1 and 3, section 46.

23 Schedule 3, item 6, section 116.

increase to 600 penalty units (currently $187,800).[24] Currently, the maximum penalties for these breaches range from 60 penalty units (currently $18,780) to 120 penalty units.

International human rights legal advice

Criminal process rights

1.17 The proposed significant increase in civil penalties raises the risk that these penalties may be considered criminal in nature under international human rights law.

1.18 Under Australian law, civil penalty provisions are dealt with in accordance with the rules and procedures that apply in relation to civil matters (the burden of proof is on the balance of probabilities). However, if the new civil penalties are regarded as 'criminal' for the purposes of international human rights law, they will engage the criminal process rights under articles 14 and 15 of the International Covenant on Civil and Political Rights.

1.19 In assessing whether a civil penalty may be considered criminal, it is necessary to consider:

- the domestic classification of the penalty as civil or criminal (although the classification of a penalty as 'civil' is not determinative as the term 'criminal' has an autonomous meaning in international human rights law);
- the nature and purpose of the penalty: a civil penalty is more likely to be considered 'criminal' in nature if it applies to the public in general rather than a specific regulatory or disciplinary context, and where there is an intention to punish or deter, irrespective of the severity of the penalty; and
- the severity of the penalty.

1.20 If the civil penalty provisions were considered to be 'criminal' for the purposes of international human rights law, this does not mean that the relevant conduct must be turned into a criminal offence in domestic law, nor does it mean that the civil penalty is illegitimate. Instead, it means that the civil penalty provisions in question must be shown to be consistent with the criminal process guarantees set out in articles 14 and 15 of the International Covenant on Civil and Political Rights, including the right not to be tried twice for the same offence,[25] and the right to be presumed innocent until proven guilty according to law.[26]

1.21 The statement of compatibility notes the potential engagement of these rights. It states that the penalties are expressly classified as civil penalties, and thereby create solely pecuniary penalties in the form of a debt payable to the

24 Schedule 3, items 7-8, sections 438, 439, 532 and 533.

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

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

Commonwealth.[27] As noted, however, the domestic classification of a penalty as being civil is not determinative. The statement of compatibility does not directly address whether the penalties may apply to the public, however it would appear that several of the civil penalties in the bill (for example, failure to comply with an entry or exit requirement, or the provision of false or misleading information) would apply to the general public. As to the intention behind the penalties, the statement of compatibility states that the increased penalties would be commensurate with the potential harm that could be caused as a result of the contravening conduct and are intended to deter non-compliance with the requirements.[28] As to the potential severity of these penalties, it is noted that these represent the maximum penalty payable. In practice, a civil penalty provision enables a judicial officer to exercise their discretion in determining an appropriate sum in the particular circumstances, and there may be circumstances in which the maximum possible penalty is not handed down. However, because judicial officers would have the discretion to impose the maximum penalty, the risk that the application of some penalties may nevertheless be considered criminal in nature under international human rights law remains.

1.22 Noting that some of these civil penalty provisions would apply to the general public (and not only those operating in a regulatory context), that the penalty is intended to deter certain conduct and that the increased penalty may now be considered sufficiently severe, there is a risk that some of these penalties may be considered to be criminal penalties for the purposes of international human rights law. As such, such provisions must be shown to be consistent with international human rights law criminal process guarantees, including the right not to be tried twice for the same offence,[29] and the right to be presumed innocent until proven guilty according to law.[30] However, civil penalty provisions, which require proof of the conduct on the balance of probabilities, do not meet the guarantee that a person be proved guilty beyond all reasonable doubt.

Committee view

1.23 The committee notes that civil penalties (as applicable to individuals) may be regarded as 'criminal' for the purposes of international human rights law, if they meet certain criteria, including if they apply to the general public and because of their potential severity. The committee notes that, where this is the case, these penalties must be shown to be consistent with criminal process guarantees, including the right to be presumed innocent until proven guilty according to law, which requires that the case against the person be demonstrated on the criminal standard

27 Statement of compatibility, p. 81.

28 Statement of compatibility, p. 79.

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

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

of proof of beyond reasonable doubt (not the lower civil standard of on the balance of probabilities).

1.24 The committee considers that, as this bill would significantly increase the maximum civil penalty for several provisions which would be applicable to members of the public, and noting that the intention is for these penalties to act as deterrents, there is a risk that these provisions may be regarded as criminal under international human rights law, and so not comply with the criminal process rights under international human rights law. In this regard, the committee notes that it has raised concerns regarding the compatibility of existing civil penalty provisions with criminal process rights on numerous occasions, including due to their potential severity.[31]

Suggested action

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

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

31 See, relevantly, Biosecurity Amendment (Strengthening Penalties) Bill 2021 in *Report 2 of 2021* (24 February 2021) (initial consideration of the bill), and *Report 4 of 2021* (31 March 2021) (concluding advice on the bill).

Counter-Terrorism Legislation Amendment (Prohibited Hate Symbols and Other Measures) Bill 2023[1]

Purpose	This bill seeks to make various amendments to the *Crimes Act 1914, Criminal Code Act 1995* and *Legislation (Exemptions and Other Matters) Regulation 2015*, including to: • establish new criminal offences for the public display of prohibited symbols and for using a carriage service for violent extremist material; • expand the offence of advocating terrorism and increase the maximum penalty for this offence from 5 to 7 years imprisonment; • remove the sunsetting requirement for instruments which list terrorist organisations.
Portfolio	Attorney-General
Introduced	House of Representatives, 14 June 2023
Rights	Life; security of person; prohibition against inciting national, racial or religious hatred; freedom of expression; freedom of religion; equality and non-discrimination; rights of the child

Criminalising the public display and trading of prohibited symbols

1.27 This bill seeks to create a new criminal offence relating to the public display of prohibited symbols.[2] A 'prohibited symbol' is defined as the Islamic State flag, the Nazi hakenkreuz, the Nazi double sig rune, and something that so nearly resembles these things that it is likely to be confused with, or mistaken for, that thing.[3] A prohibited symbol is 'displayed in a public place' if it is capable of being seen by a member of the public who is in a public place or the prohibited symbol is included in a document, such as a newspaper or magazine, film, video or television program, that is available or distributed to the public or a section of the public (including via the internet).[4] This includes, for example, the wearing of a prohibited symbol as part of a costume to a public place, the display of a poster or flag containing the

1 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Counter-Terrorism Legislation Amendment (Prohibited Hate Symbols and Other Measures) Bill 2023, *Report 8 of 2023*; [2023] AUPJCHR 71.

2 Schedule 1, item 5, new section 80.2H. The maximum penalty applicable for this new offence would be 12 months imprisonment.

3 Schedule 1, item 5, new section 80.2E.

4 Schedule 1, item 5, new section 80.2F.

prohibited symbol in a private home but visible from the street, the display of a prohibited symbol on a sticker on a motor vehicle or the circulation of a newsletter or other content which contains a prohibited symbol to subscribers.[5]

1.28 In particular, a person would commit an offence if they intentionally[6] caused a prohibited symbol to be displayed in a public place and one of the following circumstances apply, namely, a reasonable person would consider the conduct of publicly displaying the symbol either:

- involves dissemination of ideas based on racial superiority or racial hatred; or could incite another person or group of persons to offend, insult, humiliate or intimidate a targeted person or group because of their race; or
- involves advocacy of hatred of a targeted group or member of the group and constitutes incitement to offend, insult, humiliate, intimidate or use force or violence against the targeted group or member of that group; or
- is likely to offend, insult, humiliate or intimidate a reasonable person who is a member of a group of persons distinguished by race, colour, sex, language, religion, political or other opinion or national or social origin because of their membership of that group.[7]

1.29 There would be specific circumstances in which the offence would not apply, namely where a reasonable person would consider that the public display of the prohibited symbol is for a religious, academic, educational, artistic, literary or scientific purpose and not contrary to the public interest; or for the purposes of making a news report or a current affairs report that is in the public interest and made by a professional journalist.[8]

1.30 There would also be several defences to the offence, including where the conduct is necessary for enforcing, monitoring compliance with, or investigating contravention of, a law; is part of court or tribunal proceedings; the conduct is in connection with the performance of a public official's duties or functions; or the person displaying the symbol genuinely engages in conduct for the purpose of

5 Explanatory memorandum, pp. 26–27.

6 Section 5.6 of the *Criminal Code Act 1995* states that if the law creating the offence does not specify a fault element for a physical element that consists only of conduct, intention is the fault element for that physical element. By application of this section, the fault element of intention would apply to the conduct in paragraph 80.2H(1)(a). See also explanatory memorandum, p. 29.

7 Schedule 1, item 5, new section 80.2H. The circumstance elements of the offence are set out in subsections 80.2H(3), (4) or (7) (as referred to in paragraph 80.2H(1)(c)). See explanatory memorandum, pp.29–34.

8 Schedule 1, item 5, new subsection 80.2H(9).

opposing Nazi or global jihadist ideology, fascism or related ideologies.[9] The defendant bears an evidential burden in relation to these defences.

1.31 The bill also seeks to create a new offence relating to the trade of prohibited symbols.[10] A person would commit an offence if they trade in goods; the goods depict or contain a prohibited symbol; the person knows that, or is reckless as to whether, the prohibited symbols are associated with Nazi ideology or global jihadist ideology; and one or more jurisdictional requirements apply. A person trades in goods if they sell or prepare for supply, transport, guard or conceal, or possess the goods with the intention of selling the goods.[11] There would be specific circumstances in which the offence would not apply. It would not apply where a reasonable person would consider that the traded goods are intended to serve a religious, academic, educational, artistic, literary or scientific purpose and the trading is not contrary to the public interest. It would also not apply if the traded goods contain news or current affairs reports, the prohibited symbol only appears in such a report and a reasonable person would consider that the report was made by a professional journalist and disseminating the report is in the public interest.[12] There would also be several defences to the offence, including if the traded goods contain commentary on public affairs, the prohibited symbol only appears in the commentary and the making of the commentary is in the public interest; or if the trading is necessary for enforcing, monitoring compliance with, or investigating a contravention of, a law or the administration of justice.[13]

1.32 Additionally, a police officer may direct a person to cease displaying a prohibited symbol in a public place in certain circumstances, including, for example, if the police officer reasonably suspects that the display of the symbol involves dissemination of ideas based on racial superiority or racial hatred, or could incite another person to offend, insult, humiliate or intimidate a targeted person because of their race.[14] The direction given must specify a reasonable time by which the prohibited symbol must cease to be displayed.[15] The direction may be given orally or in writing and may be left on, or at, land or premises at which the prohibited symbol is displayed, or affixed or placed in a conspicuous manner on an aircraft, vehicle or vessel on, or from which, the prohibited symbol is displayed.[16] The police officer may

9 Schedule 1, item 5, new subsection 80.2H(10).

10 Schedule 1, item 5, new section 80.2J. The maximum penalty applicable for this new offence would be 12 months imprisonment.

11 Schedule 1, item 5, new section 80.2G.

12 Schedule 1, item 5, new subsections 80.2J(4) and (5).

13 Schedule 1, item 5, new subsections 80.2J(6)–(8).

14 Schedule 1, item 5, new sections 80.2K–80.2M.

15 Schedule 1, item 5, new subsection 80.2K(8).

16 Schedule 1, item 5, new section 80.2L.

give the direction if they suspect on reasonable grounds that the person either caused the prohibited symbol to be displayed; or the person is an owner or an occupier of the land or premises, or aircraft, vehicle or vessel on which the symbol is displayed; and there are steps the person can take to cause the prohibited symbol to cease to be displayed.[17]

1.33 A person would commit an offence if they were given such a direction and they do not cease to display the prohibited symbol.[18] The maximum penalty applicable is 20 penalty units. It would be a defence to this offence if the conduct was genuinely engaged in for a religious, academic, educational, artistic, literary or scientific purpose and is not contrary to the public interest; or for the purposes of making a news report or current affairs report that is in the public interest and made by a professional journalist.[19] It would also be a defence to this offence if both the person who received the direction (the recipient) did not cause the prohibited symbol to be displayed and when the direction is given, they are not an owner or occupier of the land or premises at which the symbol is displayed; or the recipient takes all reasonable steps to cause the prohibited symbol to cease to be displayed or there are no such steps that can be taken by the recipient.[20] The defendant would bear an evidential burden in relation to these defences.[21]

1.34 Further, the new offences of publicly displaying, or trading in, prohibited symbols would have retrospective effect insofar as a person who caused a symbol to be displayed in a public place before the commencement of this bill, and, on commencement, the symbol had not ceased to be displayed in a public place, the person would be taken to cause, on that commencement date, the symbol to be displayed in a public place.[22] This means, for example, that a person who displayed a prohibited symbol on their fence prior to the commencement of these provisions, and the symbol remained displayed on the fence after the commencement date, would be captured by the offence and potentially liable for up to 12 months imprisonment.[23]

17 Schedule 1, item 5, new subsection 80.2L(2).

18 Schedule 1, item 5, new section 80.2M.

19 Schedule 1, item 5, new subsection 80.2M(3).

20 Schedule 1, item 5, new subsection 80.2M(5).

21 Schedule 1, item 5, new subsections 80.2M(3) and 80.2M(5).

22 Schedule 1, item 8.

23 Explanatory memorandum, p. 50.

Preliminary international human rights legal advice

Rights to life and security of person and prohibition against inciting national, racial or religious hatred

1.35 The statement of compatibility states that the rights to life and security of person are promoted by establishing new criminal offences to deter and prevent the public display and dissemination of symbols – conduct which intelligence and operational agencies advise may radicalise individuals and incite them to commit offences that would risk a person's life or physical security.[24] It notes that the bill would also enhance the capabilities of law enforcement agencies to manage the risk posed by those seeking to radicalise others and mobilise vulnerable Australians to violence.[25]

1.36 To the extent that criminalising certain conduct relating to prohibited symbols would deter and prevent the commission of violent offences, the measures could promote a number of human rights, including the rights to life and security of person.[26] The right to life imposes an obligation on the state to protect people from being killed by others or identified risks.[27] The United Nations (UN) Human Rights Committee has stated the duty to protect life requires States parties to 'enact a protective legal framework that includes effective criminal prohibitions on all manifestations of violence or incitement to violence that are likely to result in the deprivation of life'.[28] The right to security of person requires the state to take steps to protect people against interference with personal integrity by others. This includes protecting people who are subject to death threats, assassination attempts, harassment and intimidation.

1.37 By criminalising the public display and trading of symbols associated with racial and religious hatred, extreme violence and terrorism, the measures would also

24 Statement of compatibility, p. 7.

25 Statement of compatibility, p. 7.

26 International Covenant on Civil and Political Rights, articles 6 (right to life) and 9 (right to security of person).

27 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'.

UN Human Rights Committee, *General Comment No. 6: article 6 (right to life)* [5]: the right should not be understood in a restrictive manner. It requires States to adopt positive measures, noting that it would be desirable for State parties to take all possible measures to reduce infant mortality and increase life expectancy.

28 United Nations Human Rights Committee, *General Comment No. 36: article 6 (right to life)* (2019) [20].

promote the right to be free from racial and religious discrimination and hatred.[29] Indeed, the stated object of a number of the provisions is to give effect to articles 20 and 26 of the International Covenant on Civil and Political Rights and article 4 of the International Convention on the Elimination of All Forms of Racial Discrimination.[30] Article 20 of the International Covenant on Civil and Political Rights obliges states to prohibit by law any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence.[31] Article 26, which protects the right to equality and non-discrimination, also requires the state to prohibit by law any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race and religion.[32] The International Convention on the Elimination of All Forms of Racial Discrimination further describes the content of these obligations and the specific elements that States parties are required to take into account to ensure the elimination of discrimination on the basis of race, colour, descent, national or ethnic origin.[33] In particular, article 4 obliges States parties to adopt immediate and positive measures designed to eradicate all incitement to, or acts of, discrimination, including declaring an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination and acts of violence or incitement to such acts against any groups of a particular race, as well as declaring illegal propaganda activities and participation in such activities which promote and incite racial discrimination.

1.38 The statement of compatibility states that the measures would promote the above rights by preventing members of the community from experiencing discrimination, hatred, violence and racism through the public display or trade of Nazi and Islamic State symbols, which inherently represent discriminatory and hateful ideologies, and through exposure to violent extremist material. It states that

29 International Covenant on Civil and Political Rights, articles 20 and 26; and International Convention on the Elimination of All Forms of Racial Discrimination, article 4.

30 See notes accompanying new subsections 80.2H(3) and (7) and subsections 80.2K(2), (3) and (6) in Schedule 1.

31 Article 20 of the International Covenant on Civil and Political Rights places limits on the rights to freedom of expression and freedom to manifest religion, providing that any expression or manifestation of religion or beliefs must not amount to propaganda for war or advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence.

32 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.

33 See articles 1, 2, 4 and 5 of the International Convention on the Elimination of All Forms of Racial Discrimination.

these rights would also be promoted by empowering law enforcement agencies to disrupt the use of prohibited symbols to perpetuate extremist ideologies.[34]

1.39 Insofar as the measures would protect the above rights, other human rights may also be consequently promoted, such as the right to freedom of religion, which encompasses the right to hold a religious or other belief or opinion and manifest religious or other beliefs by way of worship, observance, practice and teaching.[35] The UN Human Rights Committee has stated that measures taken in respect of article 20, namely laws prohibiting the advocacy of national, racial or religious hatred, 'constitute important safeguards against infringements of the rights of religious minorities and of other religious groups to exercise the rights guaranteed by articles 18 and 27, and against acts of violence or persecution directed toward those groups'.[36] The statement of compatibility states that the bill would promote the right to freedom of religion by supporting faith communities to worship, observe, practice and teach their religions without fear of harm or vilification and risks to personal safety.[37]

Rights to freedom of expression, freedom of religion and equality and non-discrimination and rights of the child

1.40 By criminalising certain forms of expression, including the display of, and trade in, prohibited symbols, which in effect would restrict a person's ability to seek, receive and impart certain information and ideas, the measures also engage and limit the right to freedom of expression.[38] This is acknowledged in the statement of compatibility.[39] The right to freedom of expression includes the freedom to seek, receive and impart information and ideas of all kinds, either orally, in writing or print, in the form of art, or through any other media of an individual's choice.[40] The UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression has stated that 'the right to freedom of expression includes expression of views and opinions that offend, shock or disturb'.[41] The UN Human

34 Statement of compatibility, pp. 17–19.

35 International Covenant on Civil and Political Rights, article 18. See UN Human Rights Committee, *General Comment No. 22: Article 18 (Freedom of thought, conscience or religion)* (1993) [4].

36 UN Human Rights Committee, *General Comment No. 22: Article 18 (Freedom of thought, conscience or religion)* (1993) [9].

37 Statement of compatibility, p. 12. The statement of compatibility also states that the bill promotes the right to enjoy and benefit from culture and take part in cultural life, and the right to education: pp. 13–16, 19.

38 International Covenant on Civil and Political Rights, article 19.

39 Statement of compatibility, pp. 13–16.

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

41 UN Human Rights Council, *Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue*, A/HRC/17/27 (2011) [37].

Rights Committee has also stated that the right to freedom of expression encompasses expression that may be regarded as deeply offensive and insulting, although such expression may be restricted in accordance with articles 19(3) and 20 of the International Covenant on Civil and Political Rights (which obliges States parties to prohibit by law any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence).[42]

1.41 The right to freedom of expression carries with it special duties and responsibilities and accordingly may be subject to limitations that are necessary to protect the rights or reputations of others,[43] national security, public order, or public health or morals.[44] Such limitations must be prescribed by law, be rationally connected to the objective of the measures and be proportionate.[45] Noting the important status of this right under international human rights law, restrictions on the right to freedom of expression must be construed strictly and any restrictions must be justified in strict conformity with the limitation clause in article 19(3), including restrictions justified on the basis of article 20.[46]

1.42 Additionally, as the new offences would apply to children (from the age of 10),[47] the measures would engage and limit the rights of the child. Children have special rights under human rights law taking into account their particular vulnerabilities.[48] All children under the age of 18 years are guaranteed these rights, without discrimination on any grounds, including the right to freedom of expression.[49] In particular, Australia is required to ensure that, in all actions concerning children, the best interests of the child are a primary consideration.[50] This

42 UN Human Rights Committee, *General comment No. 34: Article 19: Freedoms of opinion and expression*, CCPR/C/GC/34 (2011) [11] and [38].

43 Restrictions on this ground must be constructed with care. See UN Human Rights Committee, *General Comment No. 34: Article 19: Freedoms of Opinion and Expression* (2011) [28].

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

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

46 UN Human Rights Committee, *General comment No. 34: Article 19: Freedoms of opinion and expression*, CCPR/C/GC/34 (2011) [2]–[3], [21]–[22], [52].

47 *Crimes Act 1914*, sections 4M and 4N provide that a child under 10 cannot be liable for an offence and a child aged 10–14 can be liable but only if they know their conduct is wrong.

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

49 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. The right to freedom of expression is protected by article 13 of the Convention on the Rights of the Child.

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

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.[51]

1.43 International human rights law recognises that children have different levels of emotional, mental and intellectual maturity and psychological development than adults, and so are less culpable for their actions.[52] In this way, the Convention on the Rights of the Child provides that States parties should establish a minimum age of criminal responsibility of at least 14 years of age and, where appropriate and desirable and in a manner that respects human rights, deal with children accused of a crime without resorting to judicial proceedings, such as by way of diversionary programs.[53] This reflects the importance attributed to prevention and early intervention under international human rights law and the view that exposing a child to the criminal justice system causes them harm, limiting their chances of becoming a responsible adult.[54] The UN Committee on the Rights of the Child has emphasised the importance of non-judicial alternatives to prosecution and detention in relation to children accused of, and charged with, terrorism offences.[55] The Committee has urged States parties to 'refrain from charging and prosecuting [children] for

51 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). The UN Committee on the Rights of the Child has said: 'the expression "primary consideration" means that the child's best interests may not be considered on the same level as all other considerations. This strong position is justified by the special situation of the child'. See also *IAM v Denmark*, UN Committee on the Rights of the Child Communication No.3/2016 (2018) [11.8].

52 Committee on the Rights of the Child, *General Comment No. 24 (2019) on children's rights in the child justice system* (2019) [2]; *United Nations Standard Minimum Rules for the Administration of Juvenile Justice ('The Beijing Rules')* (1985) [4.1].

53 Convention on the Rights of the Child, article 40(3). The UN Committee on the Rights of the Child has encouraged States parties to increase the minimum age of criminal responsibility to at least 14 years of age and has commended States parties that have a higher minimum age, such as 15 or 16 years of age. This recommendation is based on scientific findings that the 'maturity and the capacity for abstract reasoning is still evolving in children aged 12 to 13 years due to the fact that their frontal cortex is still developing. Therefore, they are unlikely to understand the impact of their actions or to comprehend criminal proceedings. They are also affected by their entry into adolescence…[which] is a unique defining stage of human development characterized by rapid brain development, and this affects risk-taking, certain kinds of decision-making and the ability to control impulses': *General Comment No. 24 (2019) on children's rights in the child justice system* (2019) [22].

54 Committee on the Rights of the Child, *General Comment No. 24 (2019) on children's rights in the child justice system* (2019) [2] and [6].

55 Committee on the Rights of the Child, *General Comment No. 24 (2019) on children's rights in the child justice system* (2019) [100].

expressions of opinion or for mere association with a non-State armed group, including those designated as terrorist groups'.[56]

1.44 Further, if the prohibition on publicly displaying and trading Nazi symbols or the Islamic flag (or something resembling them) had the effect of restricting the ability of people of certain religious groups to worship, practise or observe their religion, it may engage and limit the right to freedom of religion, particularly the right to demonstrate or manifest religious or other beliefs.[57] The freedom to manifest religion or belief in worship, observance, practice and teaching encompasses a broad range of acts, including ritual and ceremonial acts, the building of places of worship, the wearing of religious dress,[58] and preparing and distributing religious texts or publications.[59]

1.45 The statement of compatibility states that the new offences are not intended to capture persons or religious groups who genuinely display a prohibited symbol for religious reasons.[60] It states that a religious purpose would include the display of the sacred Swastika in connection with the Buddhist, Hindu and Jain religions, noting that this ancient symbol represents peace and good fortune.[61] The explanatory memorandum further notes that the bill specifies the Nazi hakenkreuz rather than the Swastika to acknowledge the immense significance of the sacred Swastika to people of Buddhist, Hindu and Jain religions.[62] On this basis, the statement of compatibility states that the measures would promote the right to freedom of religion by ensuring that the sacred Swastika may continue to be used in connection with religious observance.[63] If the provisions were to be applied consistently with the explanatory materials, that is, the public display of the sacred Swastika for the purposes of Buddhist, Hindu or Jain religions would not constitute a criminal offence, the right to freedom of religion for those of Buddhist, Hindu and Jain faith may be adequately protected. However, it is noted that the bill itself does not

56 Committee on the Rights of the Child, *General Comment No. 24 (2019) on children's rights in the child justice system* (2019) [101].

57 International Covenant on Civil and Political Rights, article 18. See UN Human Rights Committee, *General Comment No. 22: Article 18 (Freedom of thought, conscience or religion)* (1993).

58 See *Yaker v France*, UN Human Rights Committee Communication No.2747/2016 (2018) [8.3]; *Türkan v Turkey*, UN Human Rights Committee Communication No.2274/2013 (2018) [7.2]–[7.3]; *FA v France,* UN Human Rights Committee Communication No.2662/2015 (2018) [8.3].

59 UN Human Rights Committee, *General Comment No. 22: Article 18 (Freedom of thought, conscience or religion)* (1993) [4].

60 Statement of compatibility, p. 12.

61 Statement of compatibility, pp. 12–13.

62 Explanatory memorandum, pp. 24–25.

63 Statement of compatibility, p. 13.

contain a specific exception with respect to displaying the sacred Swastika in connection with Buddhist, Hindu and Jain religions.

1.46 It is also not clear if people of Muslim faith would be afforded the same protections. The words inscribed on the Islamic State flag form the shahada and represent one of the five pillars of Islam.[64] The shahada is said to be a sacred symbol of the Islamic faith and is written by Muslims as part of their daily practice.[65] However, in contrast to the sacred Swastika, the explanatory materials do not acknowledge the sacred value of the shahada or make clear that the genuine use of the shahada by Muslim people or groups for religious reasons is not intended to be captured by the offences. There may therefore be a risk that people of Muslim faith who display, or trade material containing, the shahada are inadvertently captured by the new offences, as the shahada may be a symbol that so nearly resembles, or may be mistaken for, the Islamic State flag. If people of Muslim faith were disproportionately impacted by the measures, the rights to freedom of religion and equality and non-discrimination on the ground of religion would be limited.

1.47 The right to equality and non-discrimination provides that everyone is entitled to enjoy their rights without discrimination of any kind, including on the grounds of religion,[66] and that all people are equal before the law and entitled without discrimination to equal and non-discriminatory protection of the law.[67] 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.[68] Differential treatment (including the differential effect of a measure that is neutral on its face) will not constitute unlawful

64 Kerem Doruk, 'Canberra Muslim community labels Islamic flag ban unfair, calls for review', *Canberra Times* (3 July 2023).

65 Kerem Doruk, 'Canberra Muslim community labels Islamic flag ban unfair, calls for review', *Canberra Times* (3 July 2023).

66 For jurisprudence of the European Court of Human Rights in relation to discrimination on the grounds of religion see *Yaker v France*, UN Human Rights Committee Communication No.2747/2016 (2018) [8.13]–[8.17]; *Türkan v Turkey*, UN Human Rights Committee Communication No.2274/2013 (2018) [7.7]–[7.8]; *FA v France,* UN Human Rights Committee Communication No.2662/2015 (2018) [8.10]–[8.13].

67 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.

68 *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'.

discrimination if the differential treatment is based on reasonable and objective criteria.[69]

1.48 The above rights may generally 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. This analysis will now consider if any limits on the above-mentioned rights are permissible as a matter of international human rights law.

Legitimate objective and rational connection

1.49 The statement of compatibility states that the measures seek to protect the right of members of the Australian community not to be intimidated or harassed, and to prevent the incitement of others to hatred, discrimination and violence.[70] It notes that the symbols prohibited represent racist and hateful ideologies, which cause significant harm to members of targeted groups in Australia, and are used as tools of vilification and radicalisation.[71] The explanatory memorandum states that the measures are intended to reduce the prevalence of these symbols in public spaces and commercial profiting from goods that bear these symbols[72]

1.50 In general terms, the stated objective of the measure has been recognised as constituting a legitimate objective for the purposes of international human rights law, noting that protecting the rights of others is a specified ground on which restrictions on the rights to freedom of expression and freedom of religion may be permitted, as well as Australia's obligations under article 20 to prohibit advocacy of national, racial and religious hatred.[73] By criminalising conduct that may incite racial and/or religious hatred, discrimination and violence, the measures appear to be rationally connected to (that is, effective to achieve) the stated objective.

1.51 However, in order to establish whether this objective is legitimate in the context of these specific measures, it must also be demonstrated that the measures

69 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].

70 Statement of compatibility, p. 14.

71 Statement of compatibility, p. 14.

72 Explanatory memorandum, p. 23.

73 International Covenant on Civil and Political Rights, articles 18(3) and 19(3)(a). See UN Human Rights Committee, *General Comment No.34: Article 19: Freedoms of Opinion and Expression* (2011) [28]. National security and public order are also specified grounds on which restrictions on the right to freedom of expression may be permitted.

are necessary.[74] In this regard, the statement of compatibility states that the measures are necessary to protect the rights of others, particularly in light of the significant harm that the public display and trade of prohibited symbols causes to specific groups in the Australian community.[75] The explanatory memorandum states that the Australian Security Intelligence Organisation (ASIO) has advised that nationalist and racist violent extremists, including neo-Nazis, adopt specific imagery and terminology to indicate and perpetuate their ideology. It notes that symbols are a powerful tool to build belonging to the group and to intimidate or threaten ideological opponents to the group. Such extremists have used symbols to convey complex ideologies that transcend language, cultural and ethnic divides, and the specific symbols prohibited by the bill have been used as effective tools to recruit and radicalise due to their significant association with violent ideologies.[76]

1.52 While the statement of compatibility provides relevant information regarding the necessity of the measures, it does not fully address why current laws are insufficient to achieve the stated objective. In particular, section 18C of the *Racial Discrimination Act 1975* makes it unlawful for a person to do an act in public that is reasonably likely, in all the circumstances, to offend, insult, humiliate or intimidate another person or a group of people and the act is done because of the race, colour or national or ethnic origin of the other person or of some or all of the people in the group.[77] An act is done in public, that is, otherwise than in private, if it causes words, sounds, images or writing to be communicated to the public; or is done in a public place; or is done in the sight or hearing of people who are in a public place.[78] This provision would appear to capture some of the conduct sought to be criminalised by the measures, including publicly displaying a Nazi symbol or Islamic State flag in circumstances where such conduct is likely to offend, insult, humiliate or intimidate a reasonable person who is a member of a group distinguished by a protected attribute such as race, colour or national origin because of their membership of that group.[79] While the *Racial Discrimination Act 1975* does not criminalise such conduct,

74 UN Human Rights Committee, *General Comment No.34: Article 19: Freedoms of Opinion and Expression* (2011) [33]. See also *Ross v Canada*, UN Human Rights Committee Communication No. 736/1997 (2000), where the UN Human Rights Committee found that the test of necessity was satisfied in the case of a teacher who had published materials that expressed hostility toward a religious community and was consequently transferred to a non-teaching position in order to protect the rights and freedoms of others. In particular, the Committee considered the views expressed by the teacher to be discriminatory towards persons of Jewish faith and thus restricting his freedom of expression was 'necessary to protect the right and freedom of Jewish children to have a school system free from bias, prejudice and intolerance': [116].

75 Statement of compatibility, p. 14; explanatory memorandum, p. 23.

76 Explanatory memorandum, p. 23.

77 *Racial Discrimination Act 1975*, subsection 18C(1).

78 *Racial Discrimination Act 1975*, subsection 18C(2).

79 Schedule 1, item 5, new subsections 80.2H(1) and (7).

it makes it unlawful and enables a person to make a complaint to the Australian Human Rights Commission, and subsequently to the Federal Court or Federal Circuit Court.[80] If a court finds a breach of section 18C (and no defences apply) it may order a range of outcomes including an order that the conduct not be repeated and payment of compensation.[81]

1.53 The statement of compatibility does not make any reference to the existing powers under section 18C and why these are insufficient. With respect to police powers to issue a direction to cease displaying a prohibited symbol, the explanatory memorandum states that this provision would address a gap in the application of existing police powers in relation to the new offence of publicly displaying a prohibited symbol.[82] It states that providing police with this power is necessary to ensure the central purpose of the offence is not frustrated and to ensure police have an appropriate tool to minimise the harm occasioned by publicly displaying the symbol. It is not clear whether current laws also deal with conduct relating to trading in prohibited symbols.

Proportionality

1.54 The key issue as to whether the proposed limitations are permissible is whether the limitations are 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.

1.55 As to whether the measures are sufficiently circumscribed, it is necessary to consider the breadth of the measures, including the form of expression that is to be prohibited and the means of its dissemination.[83] The UN Human Rights Committee has noted that restrictions on the right to freedom of expression must not be overly broad.[84] It has observed that:

> When a State party invokes a legitimate ground for restriction of freedom of expression, it must demonstrate in specific and individualized fashion

80 See *Racial Discrimination Act 1975*, section 26, which provides that unlawful acts are not offences unless expressly so provided; *Australian Human Rights Commission Act 1986*, section 46P, which allows people to make complaints to the Australian Human Rights Commission about unlawful acts.

81 *Australian Human Rights Commission Act 1986*, section 46PO.

82 Explanatory memorandum, p. 43.

83 In the case of restrictions on online communication, including restrictions on internet service providers, the UN Human Rights Committee has stated that 'restrictions generally should be content-specific' rather than 'generic bans on the operation of certain sites and systems': *General Comment No. 34, Article 19: Freedoms of opinion and expression* (2011) [33] and [43].

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

> the precise nature of the threat, and the necessity and proportionality of the specific action taken, in particular by establishing a direct and immediate connection between the expression and the threat.[85]

1.56 The forms of expression that are sought to be prohibited are the Islamic State flag, the Nazi hakenkreuz and the Nazi double-sig rune as well as a symbol that so nearly resembles or is likely to be confused with, or mistaken for, one of these symbols.[86] While the bill specifies the forms of expression that are to be prohibited and the circumstances in which such expression would be prohibited, it does not define each of the prohibited symbols or provide a graphic depiction of the symbols. Rather, the symbols are described in the explanatory memorandum. The Islamic State flag is described as 'a rectangular, black emblem with white Arabic writing, and below the white Arabic writing is a white circle containing black Arabic writing'.[87] The Nazi hakenkreuz is described as a 'cross with the arms bent at right angles in a clockwise direction' and the Nazi double sig rune is described as 'a stylised depiction of two lightning-bolt-like symbols with flat ends positioned side-by-side'.[88] As to symbols that are likely to be confused with, or mistaken for, these symbols, the explanatory memorandum states that this could include any figure, drawing, symbol, pattern or design substantially similar to one of the prohibited symbols and capable of being reasonably recognised as derived from, or a modified version of, one of those symbols.[89] For example, an image would be substantially similar to the Nazi hakenkreuz, and thus a prohibited symbol, if it depicted a hooked cross but with lines skewed at slightly different angles.[90] The explanatory memorandum states that the legislation is intended to not be so prescriptive as to exclude variations in the ways in which the prohibited symbols are depicted.[91]

1.57 While the explanatory memorandum provides some guidance, it is not clear why a written definition and/or graphic depiction of the symbols that are sought to

85 UN Human Rights Committee, *General Comment No.34: Article 19: Freedoms of Opinion and Expression* (2011) [35]. See also [33] regarding the test of necessity in relation to limitations on the right to freedom of expression. See, e.g. *Faurisson v France*, UN Human Rights Committee Communication No. 550/1993 (1996) separate opinions of Mrs Evatt, Mr Kretzmer and Mr Klein, [8]: 'The restriction [on freedom of expression] must be necessary to protect the given value [such as the rights of others]. This requirement of necessity implies an element of proportionality. The scope of the restriction imposed on freedom of expression must be proportional to the value which the restriction serves to protect. It must not exceed that needed to protect the value…the restriction must not put the very right itself in jeopardy'. See also *Ross v Canada*, UN Human Rights Committee Communication No. 736/1997 (2000), [116].

86 Schedule 1, item 5, new section 80.2F.

87 Explanatory memorandum, p. 24.

88 Explanatory memorandum, pp. 24–25.

89 Explanatory memorandum, p. 25.

90 Explanatory memorandum, p. 25.

91 Explanatory memorandum, pp. 25–26.

be prohibited are not included in the legislation itself. Without clear legislative guidance, and noting that an assessment of whether a symbol is likely to be confused with, or mistaken for, a prohibited symbol is inherently subjective, there may be substantial variation in the way the legislation is interpreted and applied in practice. As a result, the scope of expression that may be captured by the offences could be potentially wide. This may cause particular difficulties for the police who would be empowered to make directions that certain symbols be taken down. It is therefore not clear that in all circumstances in practice the expression that would be restricted by the measures would meet the threshold of racial or religious hate speech that incites discrimination, hostility or violence

1.58 Further, as outlined above (in paragraph [1.28]), the public display of a prohibited symbol would only constitute an offence if certain circumstances were to apply. Some of these circumstances may ensure that the expression prohibited is appropriately limited to expression that reaches the threshold of hate speech.[92] International human rights law jurisprudence has found limitations on freedom of expression to be permissible in such circumstances. Indeed, the Committee on the Elimination of Racial Discrimination has stated that:

> the principle of freedom of speech has been afforded a lower level of protection in cases of racist and hate speech dealt with by other international bodies, and that the Committee's own General recommendation No 15 clearly states that the prohibition of all ideas based upon racial superiority or hatred is compatible with the right to freedom of opinion and expression.[93]

1.59 In particular, UN treaty bodies have found restrictions on freedom of expression may be permitted in circumstances where the expression is of a 'nature as to raise or strengthen anti-Semitic feeling, in order to uphold the Jewish communities' right to be protected from religious hatred'.[94]

1.60 However, it is not clear whether speech captured by the circumstances contained in paragraph 80.2H(3)(b) and subsection 80.2H(7) – namely, where a

92 Notably, proposed paragraph 80.2H(3)(a) and subsection 80.2H(4) provide that it would be an offence to publicly display a prohibited symbol where a reasonable person would consider that such conduct either involves dissemination of ideas based on racial superiority or racial hatred; or advocacy of hatred of a targeted group or member of the group and constitutes incitement to offend, insult, humiliate, intimidate or use force or violence against the targeted group or member of that group.

93 *Jewish Community of Oslo v Norway*, UN Committee on the Elimination of Racial Discrimination Communication No. 30/2003 (2005) [10.5].

94 See *Ross v Canada*, UN Human Rights Committee Communication No. 736/1997 (2000); *Jewish Community of Oslo v Norway*, UN Committee on the Elimination of Racial Discrimination Communication No. 30/2003 (2005); *Faurisson v France*, UN Human Rights Committee Communication No. 550/1993 (1996), [2.5], [9.6]–[9.7]; *JRT and the WG Party v Canada*, UN Human Rights Committee Communication No. 104/1981 (1983).

reasonable person would consider that the conduct could incite another person or group of persons to offend, insult, humiliate or intimidate a targeted person or group because of their race; or the conduct is likely to offend, insult, humiliate or intimidate a reasonable person who is a member of a group of persons distinguished by a protected attribute such as race or religion because of their membership of that group – would necessarily reach the level of hate speech. It is noted that certain unpopular or offensive speech is afforded protection under international human rights law.[95] In this regard, it is relevant to consider how the phrase 'offend, insult, humiliate or intimidate' is likely to be interpreted. In the context of section 18C of the *Racial Discrimination Act 1975*, this phrase has been interpreted by Australian courts to collectively mean 'profound or serious effects, not to be likened to mere slights'.[96] This judicial interpretation suggests that expression captured by the circumstances in paragraph 80.2H(3)(b) and subsection 80.2H(7) would need to be more than merely offensive or insulting speech to justify prohibition. This would assist with the proportionality of the measures.

1.61 As to the means of dissemination, a prohibited symbol must be 'displayed in a public place' in order to constitute an offence. As set out above (in paragraph [1.27]), a symbol is taken to be displayed in a public place if it is capable of being seen by a member of the public who is in a public place or it is included in a document that is available or distributed to the public or a section of the public (including via the internet).[97] The bill clarifies that if a symbol is included in a document that is available to the public or a section of the public on a website, it is taken to be displayed in a public place.[98] The explanatory memorandum states that the term 'document' is intended to operate broadly, consistent with the definition in the *Acts Interpretation Act 1901*, that is, any record of information, including

95 UN Human Rights Committee, *General comment No. 34: Article 19: Freedoms of opinion and expression*, CCPR/C/GC/34 (2011) [11] and [38]. See, also *Faurisson v France*, UN Human Rights Committee Communication No. 550/1993 (1996) separate opinions of Mrs Evatt, Mr Kretzmer and Mr Klein, [8]: 'The power given to States parties under article 19, paragraph 3, to place restrictions on freedom of expression, must not be interpreted as license to prohibit unpopular speech, or speech which some sections of the population find offensive. Much offensive speech may be regarded as speech that impinges on one of the values mentioned in article 19, paragraph 3 (a) or (b)…The Covenant therefore stipulates that the purpose of protecting one of those values is not, of itself, sufficient reason to restrict expression. The restriction must be necessary to protect the given value'.

96 *Creek v Cairns Post Pty Ltd* [2001] FCA 1007, Kiefel J at [16]; *Bropho v Human Rights and Equal Opportunity Commission* [2004] FCAFC 16, French J at [70] Eatock v Bolt [2011] FCA 1103, Bromberg J at [268].

97 Schedule 1, item 5, new section 80.2F.

98 Schedule 1, item 5, new section 80.2F, example.

symbols, images, drawings and photographs.[99] The terms 'available' and 'distributed' are to mean 'available or distributed as of right or by invitation, whether express or implied, and whether or not a charge is made'.[100] The explanatory memorandum provides a non-exhaustive list of examples, such as displaying a Nazi hakenkreuz on a sticker on a motor vehicle or on a poster outside a university library, or wearing a Nazi double rig rune symbol on a hat worn as part of a party costume in a public place.[101] It is not clear, however, whether the meaning of 'displayed in a public place' would extend to documents (including photographs and images) posted on social media, in particular private accounts. For example, would a photograph posted on a private social media account of a group of people, with one wearing a Nazi double rig rune symbol on a hat as part of a party costume, be taken to be a prohibited symbol displayed in a public place?

1.62 Regarding the provisions relating to directions to cease displaying a prohibited symbol, elements of these provisions are also drafted in broad terms, raising questions as to how the measure will likely operate in practice and whether, in all circumstances, it is sufficiently circumscribed. The time specified by which a direction must be complied with must be 'reasonable'.[102] The explanatory memorandum states that this requirement acknowledges that there are circumstances in which it may take time to comply with a direction to cease the display of a prohibited symbol.[103] For example, if the symbol is painted on a wall visible to the public, the occupier of the premises would need time to obtain paint or some other means to cover the symbol. Whereas a person holding a poster with the sign would be able to cease displaying the symbol immediately.[104] The explanatory memorandum states that it is intended that police have the discretion in selecting a time period that is reasonable in the circumstances, having considered the practicalities of complying with the direction as well as the harm being caused by the continued display of the symbol.[105] Noting that the concept of a reasonable period of time is vague, it is not clear why the legislation itself does not, at a minimum, include the factors that the issuing police officer must have regard to when determining what is reasonable in the circumstances, such as those factors mentioned in the

99 *Acts Interpretation Act 1901*, section 2B. 'Any record of information' includes: anything on which there is writing; and anything on which there are marks, figures, symbols or perforations having a meaning for persons qualified to interpret them; and anything from which sounds, images or writings can be reproduced with or without the aid of anything else; and a map, plan, drawing or photograph.

100 Schedule 1, item 5, new subsection 80.2F(4).

101 Explanatory memorandum, p. 26.

102 Schedule 1, item 5, new subsection 80.2K(8).

103 Explanatory memorandum, p. 44.

104 Explanatory memorandum, p. 44.

105 Explanatory memorandum, p. 44.

explanatory memorandum. It is also not clear whether a person has access to review with respect to the time period specified in the direction. For example, if a prohibited symbol in a home is visible from the street and a police officer issues a direction to cease displaying the symbol within 3 days – if the notice is affixed to the house when the occupier is temporarily not present they may be unable to comply with the direction in the specified timeframe. If the occupier did not receive the direction until after the time specified in the direction had lapsed, would they be able to rely on any defence for non-compliance with the direction or seek review of the time period specified in the direction?

1.63 Proposed section 80.2M provides that it is not an offence to fail to comply with a direction if the recipient of the direction did not cause the symbol to be displayed and when the direction is given they are not an owner or occupier of the premises; or the recipient takes all reasonable steps to cause the symbol to be not displayed or there are no such steps that can be taken.[106] The explanatory memorandum notes that a recipient who is overseas or unable to remove the symbol because it would place them in a dangerous situation may be able to rely on the defence in paragraph 80.2M(5)(b) (that is, there being no reasonable steps that the recipient can take). However, noting that the concept of 'reasonable' is vague, it is not clear what would constitute 'reasonable steps' in all circumstances. For example, if a person had a tattoo depicting a prohibited symbol or something that so nearly resembled a symbol on a part of their body that was generally visible to the public, such as their hand, neck, face or ankle, would it be considered reasonable for them to remove the tattoo in order for them to go out in public and not be criminally liable? In circumstances where a symbol is displayed on a premises that is tenanted, what steps would the landlord need to take in order to cease the display of a prohibited symbol that was caused by the tenant or by graffiti?

1.64 As to the existence of safeguards, the measures include specific exceptions, namely where a reasonable person would consider that the conduct is engaged in for a religious, academic, educational, artistic, literary or scientific purpose and not contrary to the public interest, or for the purposes of making a news or current affairs report that is in the public interest and made by a professional journalist, as well as various defences to the offences (as set out above in paragraphs [1.29]–[1.31]). The inclusion of specific exceptions and defences to the offences would operate as a safeguard, although some questions arise as to whether this safeguard would be adequate in all circumstances. With respect to displaying or trading symbols for a religious purpose, the explanatory memorandum states that the requirement for the prosecution to establish that a reasonable person would consider that the public display or trade of the symbol was not done for a religious purpose in the public interest would ensure that the display or trade of the sacred Swastika in connection with Hindu, Buddhist and Jain religions would not be

106 Schedule 1, item 5, new subsection 80.2M(5).

captured by the offences.[107] However, as noted above (in paragraph [1.57]), if the offences are not intended to prohibit the display and trade of the sacred Swastika or other genuine religious symbols, it is not clear why such exceptions are not set out in the legislation itself.

1.65 With respect to displaying a prohibited symbol or trading goods containing a prohibited symbol for the purposes of a news or current affairs report, the report must be made by a professional journalist in order to be exempted from the offence. The explanatory memorandum states that the requirement that the journalist be working in a professional capacity is intended to operate to exclude the displaying of prohibited symbols for the purpose of, for example, inciting violence or promoting hatred, while purporting to be journalism.[108] It notes that a news program live broadcasting a protest at which people held signs displaying a prohibited symbol would fall within the exception as it would be inappropriate for journalists and broadcasters to have to censor their report in order to avoid criminal liability.[109] While the inclusion of an exception to the offences for professional journalists assists with proportionality, questions arise as to whether the scope of this exception is too narrow, noting the UN Human Rights Committee's observation that:

> journalism is a function shared by a wide range of actors, including professional full-time reporters and analysts, as well as bloggers and others who engage in forms of self-publication in print, on the internet or elsewhere.[110]

1.66 For example, if a citizen journalist filmed an event at which people held signs displaying a prohibited symbol and then posted that video online or shared the video with news outlets via social media, it would appear they would be unable to rely on the journalism defence and liable to conviction of an offence involving up to 12 months imprisonment.

1.67 Another relevant factor in assessing proportionality is whether there are less rights restrictive ways to achieve the stated objective. A less rights restrictive alternative may be to require police to first issue a direction to cease displaying the symbol before charging a person with the offence of publicly displaying a prohibited symbol. If a person complied with the direction, they would not then also be criminally liable for the conduct of displaying the symbol in the first instance. This

107 Explanatory memorandum, p. 14.

108 Explanatory memorandum, pp. 34 and 40.

109 Explanatory memorandum, p. 34.

110 With respect to counter-terrorism measures that may restrict the freedom of expression of journalists, the UN Human Rights Committee has stated: 'The media plays a crucial role in informing the public about acts of terrorism and its capacity to operate should not be unduly restricted. In this regard, journalists should not be penalized for carrying out their legitimate activities'. See *General Comment No. 34, Article 19: Freedoms of opinion and expression* (2011) [46].

approach appears capable of achieving the stated objective of preventing and reducing the harm caused to others by the public display of the symbol.

1.68 The question of less rights restrictive alternatives is particularly relevant in relation to children, noting the position under international human rights law that states should implement non-judicial alternatives to prosecution and detention of children accused of, and charged with, terrorism offences.[111] This is because of the significant harm caused to children who are exposed to the criminal justice system.[112] Having regard to the obligations on States parties with respect to the rights of the child (as outlined above in paragraphs [1.42]–[1.43]), it is not clear why it is appropriate to subject children to criminal liability with respect to the offences of publicly displaying or trading in prohibited symbols or failing to comply with a direction to cease displaying a symbol. It would appear a less rights restrictive alternative would be to subject children to a diversionary program in order to avoid exposing children to the criminal justice system.

1.69 Additionally, at a minimum, it would be a lesser restriction on the rights of the child if the offences were to only apply to children over the age of 14 years, as per the recommended age of criminal responsibility under international human rights law.[113] Currently, the age of criminal responsibility for Commonwealth offences is 10 years of age, with children aged 10 years or more but under 14 years old held liable for an offence only if the prosecution proves that the child knows his or her conduct is wrong.[114] It is also not clear why the Attorney-General's consent is not required prior to commencing proceedings against a child defendant, noting that this safeguard is included with respect to offences relating to the use of a carriage service for violent extremist material (see below paragraphs [1.78] and [1.94]).

Committee view

1.70 The committee notes with deep concern the rising number of disturbing events involving the public display of Nazi symbols. The committee emphasises that these displays of hate have no place in Australia. The committee considers there is a need to support law enforcement to help protect the community from those who plan, prepare and inspire others to do harm. Indeed, the committee notes that

111 Committee on the Rights of the Child, *General Comment No. 24 (2019) on children's rights in the child justice system* (2019) [100]. At [101], the Committee urged States parties to 'refrain from charging and prosecuting [children] for expressions of opinion or for mere association with a non-State armed group, including those designated as terrorist groups'.

112 Committee on the Rights of the Child, *General Comment No. 24 (2019) on children's rights in the child justice system* (2019) [2], [6].

113 The UN Committee on the Rights of the Child has encouraged States parties to increase the minimum age of criminal responsibility to at least 14 years of age and has commended States parties that have a higher minimum age, such as 15 or 16 years of age: *General Comment No. 24 (2019) on children's rights in the child justice system* (2019) [22].

114 *Crimes Act 1914*, sections 4M and 4N.

Australia has obligations under international human rights law to prohibit by law any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence and to eliminate all incitement to, or acts of, racial discrimination. As such, the committee considers that if criminalising the public display and trading of prohibited symbols deters and prevents the commission of violent offences and reduces the harm caused to others by the display of symbols associated with racial and religious hatred, Schedule 1 of the bill would promote a number of human rights, including the rights to life and security of person and the prohibition against inciting national, racial or religious hatred. The committee considers that the measures represent an important step towards implementing Australia's obligations under international human rights law.

1.71 However, the committee notes that criminalising certain forms of expression would also necessarily engage and limit the right to freedom of expression. As the new offences would apply to children, the measures would also engage and limit the rights of the child. Further, if the measures had the effect of restricting the ability of people of certain religious groups to worship, practise or observe their religion (such as Buddhists displaying the sacred Swastika and Muslims using the words of the shahada in the Islamic flag), it may engage and limit the right to freedom of religion and possibly the right to equality and non-discrimination on the ground of religion.

1.72 The committee considers that the measures pursue a vitally important objective, namely, to protect members of the community from intimidation, hatred and discrimination. However, some scrutiny questions arise as to the scope of the proposed offence and the applicable safeguards. The committee therefore considers further information is required to assess their compatibility with the rights to freedom of expression and religion and equality and non-discrimination as well as the rights of the child, and as such seeks the Attorney-General's advice in relation to:

(a) why current laws are insufficient to achieve the stated objective, noting that section 18C of the *Racial Discrimination Act 1975* appears to deal with some of the conduct sought to be criminalised;

(b) why each of the prohibited symbols are not defined in the legislation itself, including a written description of the symbols (such as that contained in the explanatory memorandum) and a graphic depiction of the symbols;

(c) why the bill does not contain a specific exception with respect to displaying the sacred Swastika in connection with Buddhist, Hindu and Jain religions;

(d) what safeguards are in place to mitigate the risk that people of Muslim faith who are displaying the shahada for religious purposes are not inadvertently captured by the new offences, noting that the words of the shahada may constitute a symbol that so nearly resembles, or may be mistaken for, the Islamic State flag;

(e) whether the meaning of 'displayed in a public place' would extend to documents (including photographs and images) posted on social media, including private accounts (for example, would a photograph posted on a private social media account of a group of people, with some wearing a Nazi costume, be taken to be displayed in a public place);

(f) with respect to the requirement in subsection 80.2K(8) that a direction to cease displaying a prohibited symbol specify a reasonable time by which the direction must be complied with:

(i) why the legislation does not include the factors that the issuing police officer must have regard to when determining what is reasonable in the circumstances; and

(ii) whether a person has access to review with respect to the time period specified in the direction. For example, if a recipient of a direction did not receive the direction until after the time specified in the direction had lapsed, would they be able to rely on any defence for non-compliance with the direction or seek review of the time period specified in the direction;

(g) whether there is any guidance regarding what would constitute 'reasonable steps' in the context of a person causing the prohibited symbol to cease to be displayed (as per paragraph 80.2M(5)(b)). For example, what would constitute reasonable steps to cause the symbol to cease to be displayed in the following circumstances:

(i) where a person has a tattoo depicting a prohibited symbol on a part of their body that is generally visible to the public, such as their hand, neck, face or ankle (including where the tattoo predated the commencement of this bill);

(ii) where a symbol is displayed by tenants and the landlord is issued with a direction as the owner of the premises;

(iii) where the symbol is on premises as a result of graffiti that is difficult to remove;

(h) why the exceptions to the offence of publicly displaying a prohibited symbol in subsection 80.2H(9) do not extend to citizen journalists where their intention is to display the prohibited symbol only in the context of genuine dissemination of an event (for example, where a citizen journalist filmed neo-Nazis and posted that video online for informational purposes);

(i) what other safeguards beyond the exceptions and defences to the offences are in place to ensure the proposed offences do not unduly restrict a person's freedom of expression (for example, will police be

issued with training and guidance about how to exercise their directions power);

(j) why is it not required that police first issue a direction to cease displaying the symbol, and for that not to be complied with, before the offence of publicly displaying a prohibited symbol would apply;

(k) why is it appropriate to subject children to criminal liability with respect to the offences of publicly displaying or trading in prohibited symbols or failing to comply with a direction to cease displaying a symbol;

(l) why, at a minimum, the Attorney-General's consent is not required prior to commencing proceedings against a child defendant, noting that this safeguard is included with respect to offences relating to the use of a carriage service for violent extremist material; and

(m) whether the ban on trading goods containing a prohibited symbol is a proportionate limit on the right to a private life.

Criminalising the accessing or possession of 'violent extremist material'

1.73 The bill seeks to create offences relating to the use of a carriage service[115] (such as an internet or mobile telephone service) for violent extremist material.[116] Violent extremist material is defined as material that:

- describes or depicts, or provides instruction on engaging in, or supports or facilitates, serious violence; and
- a reasonable person would consider that, in all the circumstances, the material is intended to:
  - directly or indirectly advance a political, religious or ideological cause; and
  - assist, encourage or induce a person to engage in, plan or prepare for an intimidatory act; or do a thing that relates to engaging in, planning or preparing for an intimidatory act; or join or associate with an organisation that is directly engaged in the doing of any intimidatory act, or that is preparing, planning, assisting in or fostering the doing of any intimidatory act.[117]

115 Carriage service means a service for carrying communications by means of guided and/or unguided electromagnetic energy: *Telecommunications Act 1997*, section 7 and *Criminal Code Act 1995*, Dictionary.

116 Schedule 2, item 3.

117 Schedule 2, item 3, new subsection 474.45A(1).

1.74 'Serious violence' is defined as an action that falls within the elements of the existing definition of 'terrorist act' in the *Criminal Code Act 1995* (Criminal Code).[118] That is, an action that causes serious physical harm to a person; serious damage to property; causes a person's death; endangers a person's life; creates a serious risk to the health or safety of the public; or seriously interferes with, seriously disrupts, or destroys an electronic system (including a telecommunications, financial or transport system).

1.75 An 'intimidatory act' is defined as a violent action, or threat of violent action, where the action is done, or the threat is made, with the intention of coercing, or influencing by intimidation, the government of the Commonwealth or a state, territory or foreign country (or part of the government); or intimidating the public or a section of the public.[119]

1.76 A person would commit an offence if they use a carriage service to access violent extremist material; cause material or a link to material to be transmitted to a person; transmit, make available, publish, distribute, advertise or promote material; or solicit material.[120] A person would also commit an offence if they obtain violent extremist material using a carriage service and possess or control the material and store the material in data held in a computer or in a data storage device.[121] It would not matter whether the person obtained or accessed the material using a carriage service before, on or after the commencement of the relevant provision.[122] This means that if a person used a carriage service to obtain or access violent extremist material before the offence provisions commenced and they still possessed or controlled the material after the offence provisions commence, they could be held criminally liable.[123] The relevant fault elements that would apply to the offences would be intention with respect to the conduct (such as accessing, possessing or controlling the material) and recklessness with respect to whether the material is

118 Schedule 2, item 3, new subsection474.45A(2); *Criminal Code Act 1995*, subsection 100.1(2).

119 Schedule 2, item 3, new subsection 474.45A(3).

120 Schedule 2, item 3, new section 474.45B.

121 Schedule 2, item 3, new section 474.45C.

122 Schedule 2, item 6.

123 Explanatory memorandum, p. 62.

violent extremist material.[124] A maximum penalty of five years imprisonment would apply to these offences.

1.77 There would be several defences available in respect of the offences, including, for example, that the material relates to a news report or current affairs report that is in the public interest and was made by a professional journalist; the conduct is necessary for, or of assistance in, conducting scientific, medical, academic or historical research and the conduct is reasonable in the circumstances; or the conduct relates to the development, performance, exhibition or distribution, in good faith, of an artistic work.[125]

1.78 In relation to proceedings for an offence relating to violent extremist material involving a child, that is, a defendant under 18 years of age, proceedings must not be commenced without the Attorney-General's consent.[126] However, a child may be arrested for, charged with, or remanded in custody or on bail[127] in connection with an offence before the necessary consent has been given.[128]

1.79 Further, the bill seeks to expand the definition of 'terrorism offence' to include these new offences relating to the use of a carriage service for violent extremist material.[129] There are a number of implications of classifying these new offences as terrorism offences, including that the Australian Federal Police would have access to control orders under Division 104 of the Criminal Code to prevent or

124 Schedule 2, item 3. Subsections 474.45B(2) and (3) clarify that intention is the fault element that applies to the action and recklessness is the fault element that applies to the material being violent extremist material, and absolute liability applies to the element that the person uses a carriage service. Subsections 474.45C(2)–(4) provide that intention is the fault element for possessing or controlling material; recklessness is the fault element for the type of material; strict liability applies to storing material and absolute liability applies to how the material was obtained. Subsection 474.45C(5) provides that if the prosecution proves possession or control of violent extremist material in the form of computer data, a presumption applies that the person used the carriage service to obtain or access the material, unless the defendant proves to the contrary. The defendant would bear the legal burden to rebut the presumption. The statement of compatibility notes that this provision engages the right to presumption of innocence but that this aspect of the offence is a jurisdictional element (to ensure the Commonwealth has constitutional capacity to legislate) and does not relate to the substance of the offence, pp. 10–11. Noting this explanation, and the likelihood that the Senate Standing Committee for the Scrutiny of Bills is likely to raise concerns regarding the reversal of legal burden this report entry makes no comment on this aspect of the offence.

125 Schedule 2, item 3, new section 474.45D. The defendant would bear an evidential burden in relation to the defences.

126 Schedule 2, item 3, new subsection 474.45E(1).

127 Although it is noted that there would be a presumption against bail with respect to this offence, see *Crimes Act 1914*, section 15AA, as discussed below.

128 Schedule 2, item 3, new subsection 474.45E(2).

129 Schedule 2, items 1 and 2.

respond to the commission of these offences, and advocating the commission of either of these offences would constitute an offence under section 80.2C (advocating terrorism) of the Criminal Code.[130]

Preliminary international human rights legal advice

Right to life, right to security of person and prohibition against inciting national, racial or religious hatred

1.80 To the extent that criminalising conduct relating to the possession, use and sharing of violent extremist material may deter and prevent terrorist-related conduct and violence, the measure could promote a number of human rights, including the rights to life and security of person and the prohibition against inciting national, racial or religious hatred (as set out above in paragraphs [1.35] to [1.39]).[131]

1.81 The statement of compatibility states that the rights to life and security of person are promoted by establishing new criminal offences to deter and prevent terrorist-related conduct and by enhancing the capabilities of law enforcement agencies to manage the risk posed by those seeking to radicalise others and mobilise vulnerable Australians to violence.[132] It states that violent extremist material may depict actions and advocate beliefs that undermine the rights to life and security of person, such as beheading videos and written guides on how to cause physical harm to a person. It notes that such material plays a role in radicalising individuals to violent extremism and terrorism, and such individuals may carry out acts which risk lives and physical security.[133]

1.82 The statement of compatibility states that the right to be free from racial and religious discrimination and hatred would be promoted by preventing members of the community from experiencing discrimination, hatred, violence and racism through exposure to violent extremist material.[134] It notes that violent extremist material often encourages or incites a person to coerce or influence others through violence or threats of violence, and this is often based on national, racial or religious grounds.[135] By criminalising the use of a carriage service to deal with such material, the statement of compatibility states that it would make it more difficult for

130 Explanatory memorandum, p. 50.

131 International Covenant on Civil and Political Rights, articles 6 (right to life), 9 (right to security of person), 20 (prohibition against racial and religious discrimination and hatred) and 26 (right to equality and non-discrimination); Convention on the Elimination of All Forms of Racial Discrimination, article 4.

132 Statement of compatibility, p. 7.

133 Statement of compatibility, p. 8.

134 Statement of compatibility, p. 19.

135 Statement of compatibility, p. 19.

discriminatory and hateful ideas to be developed, circulated and gain additional support.[136]

Rights to freedom of expression and rights of the child

1.83 By criminalising the use of a carriage service to, among other things, access, obtain, share, possess and control certain material, the measure engages and limits the right to freedom of expression, which includes freedom to seek, receive and impart information and ideas (as set out in paragraphs [1.40] and [1.41]).[137] This is acknowledged in the statement of compatibility.[138] Additionally, as the offences would apply to children, the measure would engage and limit the rights of the child (as set out in paragraphs [1.42] and [1.43]).[139] These rights may generally 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.

Legitimate objective and rational connection

1.84 The statement of compatibility states that the general objectives pursued by the measure are to protect national security, public order and the rights and freedoms of others.[140] It states that the measure seeks to prevent the use of extremist material to encourage and instruct individuals in the commission of violent acts and radicalise vulnerable individuals to violent extremist ideologies.[141] It notes that the offences seek to disrupt the radicalisation process before individuals are incited to commit violence in the community.[142]

1.85 The stated objectives are capable of constituting legitimate objectives for the purposes of international human rights law, noting that restrictions on the right to

136 Statement of compatibility, p. 19.

137 International Covenant on Civil and Political Rights, article 19.

138 Statement of compatibility, pp. 13–16.

139 The statement of compatibility also states that the measure engages and limits the right to privacy because the new criminal offences relate to conduct potentially undertaken in the private home and would interfere with a person's private life and property: pp. 11–12. The statement of compatibility has sufficiently justified the potential limitation on the right to privacy and as such this issue will not be addressed in this report entry.

140 Statement of compatibility, p. 11.

141 Statement of compatibility, p. 14.

142 Statement of compatibility, p. 11.

freedom of expression may be permitted on the grounds of national security,[143] public order and the rights of others. However, in order to establish whether these are legitimate objectives in the context of this measure, it must also be demonstrated that the measure is necessary and addresses an issue of public or social concern that is pressing and substantial enough to warrant limiting rights. In this regard, it is relevant to consider whether the current laws are sufficient to achieve the stated objectives. The explanatory memorandum states that the measure seeks to address a gap in the offence regime in the *Criminal Code Act 1995*. In particular, it states:

> Existing offences criminalise the possession of things connected with terrorist acts (section 101.4), and collecting or making documents likely to facilitate terrorist acts (section 101.5). These provisions attach criminality to the circumstances in which material is possessed, however there is currently no Commonwealth offence that attaches criminality to the nature of material possessed or dealt with. These existing offences also require a connection to a terrorist act, which means law enforcement may be unable to intervene at an earlier stage.
>
> The current legislative regime dealing with abhorrent violent material in the Criminal Code (Subdivision H) targets persons or companies who provide content services or hosting services (as opposed to any person who uses such a service), who fail to expeditiously remove, or cease to host, that material. The new offences in Subdivision HA would target individuals who deal with violent extremist material.[144]

1.86 The explanatory memorandum states that the new offences would facilitate law enforcement intervention at an earlier stage in an individual's progression to violent radicalisation and provide greater opportunity for the disruption of violent extremist networks.

1.87 While the statement of compatibility provides some information regarding the necessity of the measure and the pressing and substantial concern which the measure seeks to address, questions remain as to whether it is necessary to criminalise all the circumstances that these proposed offences may apply to. The explanatory material states that attaching criminality to the nature of the material possessed is important to reflect the harm that is inherent in violent extremist

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

144 Explanatory memorandum, p. 51.

material insofar as it facilitates radicalisation and may encourage and assist in planning violent acts. Such acts can threaten public safety and Australia's core values and principles, and adversely affect social cohesion.[145] However, this assumes that all material that constitutes violent extremist material is in fact of such a nature as to be likely to facilitate violent radicalisation and the planning of violent acts. As discussed further below (at paragraphs [1.88] and [1.89]), the definition of 'violent extremist material' is broad and encompasses acts that cause harm to persons as well as serious damage to property or serious interference with, or disruption to, various electronic systems, including transport and financial systems. It could include, for example, material that describes the serious interference with a financial system of a foreign country by a foreign organisation seeking to advance its political cause and encourage others to associate with it. It is therefore not clear that all material potentially captured by this offence would in fact be of such a nature as to justify prohibition on the grounds of national security, public order or the rights of others.

Proportionality

1.88 A key factor in assessing proportionality is whether the proposed limitations are sufficiently circumscribed. The breadth of the measure, including the forms of expression that would be restricted, is relevant in this regard. The bill seeks to prohibit 'violent extremist material', which among other things, would describe or depict, provide instruction on engaging in, or support or facilitate 'serious violence'. As outlined above (in paragraph [1.74]), 'serious violence' captures a broad range of acts, including material that describes serious damage to property, the serious interference with a financial system or the serious disruption of a transport system. The explanatory memorandum states that the term 'material' includes material in any form or combination of forms, capable of constituting a communication, including text, audio, visual or audio-visual material, such as text or internet-based messages, content on social media applications, email, radio or online chat forums.[146] The explanatory memorandum states that the material captured is intended to be 'extremist', including material that espouses or promotes extreme ideas, beliefs and attitudes and may be used to radicalise others to a particular ideology.[147] The explanatory memorandum states that the term 'serious violence', which uses the existing definition of 'terrorist act', has been defined in this way to ensure that violent extremist material includes only material that deals with conduct so serious as to engender public harm purely through its possession or distribution.[148] The explanatory memorandum gives examples of material that may be captured as including images and videos depicting terrorist incidents such as violent extremist manifestos and propaganda; and instructional material covering

145 Explanatory memorandum, p. 51.

146 Explanatory memorandum, pp. 52 and 56.

147 Explanatory memorandum, p. 52.

148 Explanatory memorandum, p. 53.

topics such as how to build a bomb, attack a person, or manufacture harmful chemicals.[149]

1.89 Notwithstanding statements in the explanatory memorandum that the offences are intended to only capture material of an 'extremist character', as currently drafted the measure would encompass a considerably wider range of material, including material that arguably falls outside of the ordinary meanings of 'violent' and 'extremist'.[150] It is noted there are many political regimes that may be characterised as oppressive and non-democratic, and people may hold different opinions as to the desirability or legitimacy of such regimes. Accessing material that depicts the advocacy of regime change or the planning of civil disobedience or acts of political protest, even if possibly contentious or extreme, may therefore be captured by the proposed offences. For example, it appears that the following actions may subject a person to criminal liability for the offence of using a carriage service for violence extremist material, punishable by up to five years' imprisonment:

- accessing a blog post written by a member of a Ukrainian citizen army who describes the serious disruption of electronic systems used for or by the Russian army with the intention of advancing the political cause of Ukrainian independence from Russia and encouraging persons to associate with their organisation, which assists in the intimidation of the Russian government;
- sharing a link on social media of footage of protestors in Iran depicting serious damage to government property that is intended to advance the political cause of the protestors and the footage is intended to encourage others to associate with the organisation the protestors are part of;
- possessing on a computer an article written by a member of the Provisional Irish Republican Army (IRA) from the 1970s that describes violent actions by the IRA, where the article was intended to advance the IRA's political cause and encourage others to join the IRA – in circumstances where the person possessing the article downloaded it onto their computer before these

149 Explanatory memorandum, p. 55.

150 The Oxford English Dictionary defines 'violent' as an 'action, behaviour etc characterized by the doing of deliberate harm or damage; carried out or accomplished using physical violence; (law) involving an unlawful exercise or exhibition of force'; 'characterized by the prevalence of physical violence; involving, depicting, or notable for acts of violence; and 'of a person: using or disposed to use physical force or violence, esp. in order to injure or intimidate; committing harm or damage in this way'. 'Extremist' is defined as 'a person who tends to go to the extreme; [especially] a person who holds extreme political or religious views, or who advocates illegal, violent, or other extreme measures' or of 'relating to extremists or extremism; having or characterized by extreme political views, or advocacy of illegal, violent, or other extreme measures'.

offence provisions commenced[151] and did so for personal interest (rather than academic or historical research).[152]

1.90 Further, the fault element of recklessness applies to whether the material is violent extremist material. A person is reckless if they are aware of a substantial risk that the circumstance exists (in this case, that certain material is violent extremist material), or will exist, and having regard to the circumstances known to them, it is unjustifiable to take the risk.[153] The explanatory memorandum notes that by operation of the fault element of recklessness, a person who accidentally comes across violent extremist material on the internet without any warning from the context would not be caught by the offence, because they would not have been reckless as to the nature of the material.[154] However, given the breadth of material covered by the offences and the fact that such material does not necessarily align with the ordinary meaning of the phrases 'violent' and 'extremist' (such as, for example, being unaware that accessing citizen-journalist footage of Ukrainians fighting back against Russian forces would constitute violent extremist material), there may be a risk that the threshold for satisfying this fault element is reasonably low in practice.

1.91 Additionally, the circumstances in which dealing with such material would be prohibited are broad. Indeed, the explanatory memorandum states that the offences are intended to cover a broad range of activities that a person could undertake in relation to violent extremist material, such as sending an electronic link that can be used to access the material.[155] It would include making the material available, which is defined in the Criminal Code as including, but not limited to, describing how to obtain access, or describing methods that are likely to facilitate access, to the material. For example, it would include setting out the name of a website, a password or the name of a newsgroup.[156] The explanatory memorandum states that other key terms in the measure would take on their ordinary meaning.[157] The ordinary meaning of the term 'accesses', for instance, is to obtain, to acquire, to get hold of, to retrieve data or a file, or to gain access to a system or network.[158] It is not clear, however, if this would include circumstances where a person views violent

151 See Schedule 2, item 6, which provides that it does not matter whether the person obtained or accessed the material before the commencement of the provision.

152 Noting that the defences in proposed section 474.45D only apply to conducting scientific, medical, academic or historical research, and not mere personal interest.

153 *Criminal Code Act 1995,* section 5.4.

154 Explanatory memorandum, p. 56.

155 Explanatory memorandum, p. 56.

156 Explanatory memorandum, p. 56.

157 Explanatory memorandum, p. 56.

158 See Oxford English Dictionary.

extremist material on a social media platform, in a situation where the material automatically appears on a person's feed, or a person views material as a result of searching for news content with respect to a violent situation overseas, such as the war in Ukraine. With respect to possessing or controlling such material, the explanatory memorandum states that the scope of the offence would include control of violent extremist material in the form of data, including material stored in remote data storage, such as cloud hosting, that may be physically located in Australia or overseas.[159]

1.92 The broad scope of expression captured by the offences and the wide range of circumstances in which such expression would be prohibited therefore raises significant questions as to whether the measure is sufficiently circumscribed. The breadth of the measure also raises concerns regarding the extent of potential interference with rights, noting that the greater the interference, the less likely the measure is to be considered proportionate. Other factors that may exacerbate the potential interference with rights include the retrospective effect of the measure, insofar as it would not matter whether the person obtained or accessed the material using a carriage service before, on or after the commencement of the relevant offence provision.[160] In addition, the new offences are to be defined as terrorism offences, meaning that police may issue control orders against a person convicted of these offences. It is noted that the Parliamentary Joint Committee on Human Rights has previously raised concerns regarding the likely incompatibility of the control order regime with multiple rights.[161] The fact that the new offences are to be defined as terrorism offences also means that advocating the commission of the offences (e.g. 'share this link to support Ukraine's fight against Russia') may constitute the offence of advocating terrorism (discussed further below from paragraph [1.98]).

1.93 As to the existence of safeguards, the statement of compatibility states that the defences (as outlined in paragraph [1.77]) to the offences would ensure that limitations on the right to freedom of expression are proportionate.[162] The inclusion of express defences to the offences would operate as a safeguard, although questions arise as to whether this safeguard would be adequate in all circumstances. For example, with respect to the journalist defence, the requirement that journalists must be working in a professional capacity may operate to exclude good faith citizen or independent journalists, raising questions as to whether the scope of this defence is too narrow. Further, the defence where the conduct is of 'scientific, academic or historical research' is unclear. The explanatory memorandum gives the example of

159 Explanatory memorandum, p. 57.

160 Schedule 2, item 6.

161 See, e.g. Parliamentary Joint Committee on Human Rights, *Report 10 of 2018* (18 September 2019) pp. 21–36; *Report 10 of 2021* (25 August 2021) pp. 2–7; *Report 4 of 2022* (28 September 2022) pp. 7-11.

162 Statement of compatibility, p. 14.

where material is included in 'academic papers' or research into the use and impact of violent extremist material.[163] As such, it is unclear if someone could satisfy this defence if they were researching a current event out of personal interest but not in the context of formal academic studies.

1.94 Another safeguard in relation to the rights of the child identified in the explanatory memorandum is the requirement that the Attorney-General provide their consent to a prosecution of a child for offences relating to the use of violent extremist material.[164] It states that this would allow the Attorney-General to consider the appropriateness of a prosecution having considered the circumstances of the case, including the context of the conduct, the circumstances of the child, and the need to protect the broader community from the impacts of violent extremist material.[165] While this safeguard may assist with proportionality, it is noted that a child may still be arrested and remanded in custody in connection with an offence before the necessary consent has been given.[166] As outlined above (in paragraph [1.43]), exposing children to the criminal justice system causes significant harm and detention, including pre-trial detention, should be a last resort and for the shortest time possible. The UN Committee on the Rights of the Child has stated that '[p]retrial detention should not be used except in the most serious cases, and even then only after community placement has been carefully considered'.[167] As a consequence of classifying the new offences as terrorism offences, there would be a presumption against bail unless exceptional circumstances are established to justify bail.[168] In determining whether exceptional circumstances exist to justify granting bail to a child, the bail authority must have regard to the protection of the community as the paramount consideration; and the best interests of the person as a primary consideration.[169] Prioritising the protection of the community above the best interests of the child does not appear to be compatible with Australia's obligation to ensure that, in all actions concerning children, the best interests of the child are a primary consideration, meaning 'the child's best interests may not be considered on the same level as all other considerations'.[170] Thus, requiring the Attorney-General's

163 Explanatory memorandum, p. 60.

164 Explanatory memorandum, p. 62.

165 Explanatory memorandum, p. 62.

166 Schedule 2, item 3, new subsection 474.45E(2).

167 Committee on the Rights of the Child, *General Comment No. 24 (2019) on children's rights in the child justice system* (2019) [86].

168 *Crimes Act 1914*, section 15AA.

169 *Crimes Act 1914*, subsection 15AA(3AA).

170 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].

consent prior to commencing prosecution does not appear to operate as a sufficient safeguard with respect to the rights of the child.

1.95 Further, as discussed above (in paragraphs [1.68] and [1.69]), it is not clear that the measure would pursue the least rights restrictive approach with respect to the rights of the child, noting the position under international human rights law that states should implement non-judicial alternatives to prosecution and detention of children accused of, and charged with, terrorism offences, and increase the age of criminal responsibility to at least 14 years of age.[171]

Committee view

1.96 The committee notes that to the extent that criminalising conduct relating to the use of a carriage service for violent extremist material would deter and prevent terrorist-related conduct and violence, the measure could promote a number of human rights. However, the committee also notes that by criminalising the use of a carriage service to, among other things, access, obtain, share, possess and control certain material, the measure would engage and limit the right to freedom of expression. As the offences would apply to children, the measure would engage and limit the rights of the child.

1.97 The committee is concerned that these proposed new offences could capture conduct that does not appear to be illegitimate (for example, criminalising a person accessing material via social media of footage of protestors overseas taking action to overthrow unlawful regimes). As such, the committee considers further information is required to assess the compatibility of this measure with these rights, and seeks the Attorney-General's advice in relation to:

(a) whether a person would be likely to be found guilty of an offence in the following circumstances:

(i) accessing a blog post written by a member of a Ukrainian citizen army who describes the serious disruption of electronic systems used by the Russian army, with the intention of advancing the political cause of Ukrainian independence from Russia and encouraging persons to associate with their organisation, which assists in the intimidation of the Russian government;

(ii) sharing a link on social media of footage of protestors in Iran depicting serious damage to government property that is intended to advance the political cause of the protestors and the footage is intended to encourage others to associate with the organisation the protestors are part of;

171 Committee on the Rights of the Child, *General Comment No. 24 (2019) on children's rights in the child justice system* (2019) [100]. At [101], the Committee urged States parties to 'refrain from charging and prosecuting [children] for expressions of opinion or for mere association with a non-State armed group, including those designated as terrorist groups'.

(iii) possessing on a computer an article written by a member of the Provisional Irish Republican Army (IRA) from the 1970s that describes violent actions by the IRA, where the article was intended to advance the IRA's political cause and encourage others to join the IRA – in circumstances where the person possessing the article downloaded it onto their computer before these offence provisions commenced and did so for personal interest (rather than academic or historical research)

(b) whether a person would be considered to have 'accessed' violent extremist material in the following situations:

(i) where a person views violent extremist material on a social media platform, in a situation where the material automatically appears on a person's feed; and

(ii) where a person views material (that is not an official news source) as a result of searching for news content with respect to an unfolding situation overseas, such as the war in Ukraine;

(c) why it is necessary for the definition of 'serious violence' in the context of the new offences to encompass all acts that currently constitute a terrorist act, noting that some acts would not fall within the ordinary meanings of 'violent' and 'extremist', such as serious electronic interference with financial systems;

(d) whether viewing or sharing material relating to the advocacy of regime change or the planning of civil disobedience or acts of political protest, even if possibly contentious or extreme, would be captured by the proposed offences;

(e) with respect to the journalist defence, why is it necessary to exclude citizen or independent journalists working in good faith but not strictly in a professional capacity;

(f) with respect to the defence of action done for 'scientific, academic or historical research', would this apply to people conducting research in a non-professional context but out of personal interest;

(g) what other safeguards beyond the defences to the offences are in place to ensure the proposed offences do not unduly restrict a person's right to freedom of expression;

(h) what other, less rights restrictive approaches have been considered and why are they not appropriate to achieve the stated objectives; and

(i) why is it appropriate to subject children to criminal liability with respect to the offences relating to the use of a carriage service for violent extremist material, noting the position under international human rights law that non-judicial alternatives should be implemented, and

the minimum age of criminal responsibility should be at least 14 years of age.

Expanding the offence of advocating terrorism

1.98 The bill seeks to expand the existing offence of advocating terrorism[172] and increase the applicable penalty from five to up to seven years imprisonment.[173] Currently, under section 80.2C of the Criminal Code, a person commits an offence if they advocate the doing of a terrorist act or the commission of a terrorism offence, and they engage in that conduct reckless as to whether another person will engage in a terrorist act or commit a terrorism offence.[174] A person advocates the doing of a terrorist act or the commission of a terrorism offence if they counsel, promote, encourage or urge the doing of a terrorist act or the commission of a terrorism offence.[175] This bill seeks to expand this definition of 'advocates' to include additional conduct that would constitute advocating a terrorist act. In particular, it would add: providing instruction on the doing of a terrorist act or the commission of a terrorist offence; or praising the doing of a terrorist act or the commission of a terrorism offence in circumstances where there is a substantial risk that such praise might lead other persons to commit terrorist acts or offences.[176]

Preliminary international human rights legal advice

Rights to life and security of person

1.99 To the extent that broadening the offence of advocating terrorism would deter and prevent terrorist acts and offences, the measure could promote the rights to life and security of person (as set out above in paragraphs [1.35]).[177] The statement of compatibility states that the measure would promote these rights by criminalising conduct that instructs on, or engenders a substantial risk that a person

172 *Criminal Code Act 1995*, section 80.2C.

173 The maximum period of imprisonment would be for seven years or for the maximum term of imprisonment for the terrorism offence advocated if it is less than seven years. Schedule 3, items 1 and 2. Subsection 80.2C(2) of the *Criminal Code Act 1995* provides that the offence of advocating terrorism applies to terrorism offences that are punishable on conviction by imprisonment for five years or more and the offence is not one that is specified in paragraph 80.2C(2)(b).

174 *Criminal Code Act 1995*, subsection80.2C(1).

175 *Criminal Code Act 1995*, subsection80.2C(3).

176 Schedule 3, item 2.

177 International Covenant on Civil and Political Rights, articles 6 (right to life) and 9 (right to security of person).

might be led to engage in, an action which could cause a person's death or endanger a person's life.[178]

Right to freedom of expression and rights of the child

1.100 By criminalising certain forms of expression, including praising the doing of a terrorist act or offence, the measure would engage and limit the right to freedom of expression, which includes freedom to seek, receive and impart information and ideas (as set out in paragraphs [1.40] and [1.41]).[179] This is acknowledged in the statement of compatibility.[180] Additionally, as the new offences would apply to children, the measures would engage and limit the rights of the child (as set out in paragraphs [1.42] and [1.43]). The statement of compatibility does not provide an assessment as to the compatibility of the measure with the rights of the child.

1.101 These rights may generally 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.

Legitimate objective and rational connection

1.102 The statement of compatibility states that the measure serves the objective of preventing the commission of terrorist acts or offences. It notes advice from law enforcement and intelligence agencies that glorification of terrorism online has an impact on radicalising Australians, particularly youth, to violence.[181]

1.103 The general objective of preventing terrorism is capable of constituting a legitimate objective for the purposes of international human rights law, and criminalising the instruction and praising of a terrorist act or offence may be effective to achieve this objective. However, it must also be demonstrated that the measure is necessary to achieve the legitimate objective.[182] The explanatory memorandum states that the glorification of terrorism and violent extremism through praise has been of increasing concern to Commonwealth law enforcement and intelligence agencies in recent years, particularly in relation to young people online.[183] It notes that following the March 2019 Christchurch mosque shooting, numerous individuals used the internet to share video footage of the atrocity, and the perpetrator's manifesto – idealising the perpetrator and his actions and ideologies. The explanatory memorandum states that the inclusion of praising terrorism in the offence recognises that conduct of this nature could lead a person to engage in

178 Statement of compatibility, p. 8.

179 International Covenant on Civil and Political Rights, article 19.

180 Statement of compatibility, pp. 13–16.

181 Statement of compatibility, p. 15.

182 UN Human Rights Committee, *General Comment No.34: Article 19: Freedoms of Opinion and Expression* (2011) [33].

183 Explanatory memorandum, p. 64.

terrorism, and where it occurs in circumstances where there is a substantial risk of this, it is justifiably criminal.[184]

1.104 While the explanatory materials have articulated the substantial public concern that the measure seeks to address, it is not clear why existing legislation is inadequate to address this concern. In particular, there appear to be existing provisions in the Criminal Code that may capture the kind of conduct sought to be criminalised by this measure. For example, it is currently an offence to urge violence against the Commonwealth, a State or a Territory or an authority of the Commonwealth government; or a targeted group or a person of a targeted group distinguished by their race, religion, nationality, national or ethnic origin or political opinion.[185] There are also various offences relating to the provision and receipt of training in connection with the planning of a terrorist act or in connection with a terrorist organisation, as well as other offences relating to the planning or preparation for a terrorist act.[186] These existing offences may capture conduct relating to providing instruction on, or praising, terrorism.

1.105 Further, it is not clear why the existing definition of 'advocates' is insufficient, as arguably the terms 'counsels, promotes, encourages or urges' could encompass the instruction on, or the praising of, the doing of a terrorist act or the commission of a terrorism offence. The explanatory memorandum accompanying the bill that first introduced the offence of advocating terrorism explained that the expressions counselling, promoting, encouraging or urging have their ordinary meaning and should be interpreted broadly.[187] Further information is therefore required to demonstrate why the measure is necessary in light of existing offences that appear to capture the conduct sought to be criminalised.

Proportionality

1.106 A key consideration in assessing proportionality is whether the measure is sufficiently circumscribed. This requires consideration of the breadth of the measure.

184 Explanatory memorandum, p. 64.

185 *Criminal Code Act 1995*, sections 80.2–80.2B.

186 Section 101.2 of the *Criminal Code Act 1995* makes it an offence for a person to provide or receive training in connection with the preparation for, or engagement or assistance in, a terrorist act. Section 101.6 makes it an offence for a person to do any act in preparation of, or planning, a terrorist act. Section 102.5 makes it an offence for a person to intentionally provide training to, receive training from, or participate in training with, a terrorist organisation.

187 Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014, explanatory memorandum, [721]. The explanatory memorandum stated: 'some examples of the ordinary meaning of each of the expressions follow: to ‘counsel’ the doing of an act (when used as a verb) is to urge the doing or adoption of the action or to recommend doing the action; to ‘encourage’ means to inspire or stimulate by assistance of approval; to ‘promote’ means to advance, further or launch; and ‘urge’ covers pressing by persuasion or recommendation, insisting on, pushing along and exerting a driving or impelling force'.

The explanatory memorandum states that the terms 'instruction' and 'praises' are intentionally not defined in the bill and should take their ordinary meaning.[188] As to whether 'praise' has occurred in circumstances where there is a substantial risk that it might lead to another person committing terrorism, the explanatory memorandum states that it is a matter to be considered on a case-by-case basis and the legislation is intentionally silent on how this is to be determined to give the court maximum discretion in making this assessment.[189]

1.107 As currently drafted, the proposed definition of 'advocates' is very broad, as it encompasses a wide range of conduct and there is no clear legislative guidance as to how key terms, such as 'praises', are to be interpreted. It is also noted that the actions to which the conduct of praising etc would relate, namely actions constituting a terrorist act or terrorism offence, are also very broad, including, for example, causing serious property damage and seriously disrupting an electronic information system (as set out above in paragraph [1.74]).[190] As such, there may be a risk that the scope of expression restricted by the measure is overly broad. This is of particular concern when noting the UN Human Rights Committee's advice in the context of counter-terrorism measures that:

> Such offences as "encouragement of terrorism" and "extremist activity" as well as offences of "praising", "glorifying", or "justifying" terrorism, should be clearly defined to ensure that they do not lead to unnecessary or disproportionate interference with freedom of expression. Excessive restrictions on access to information must also be avoided.[191]

1.108 It is also noted that the Parliamentary Joint Committee on Human Rights raised concerns regarding the breadth of the original offence of advocating terrorism when it was first introduced.[192] In particular, concerns were raised that the offence is overly broad in its application and may result in the criminalisation of speech and expression that does not genuinely advocate the commission of a terrorist act or terrorism offence. This is because the offence itself requires only that a person is 'reckless' as to whether their words will cause another person to engage in terrorism (rather than the person 'intends' that this be the case). Given the measure in this bill

188 Explanatory memorandum, p. 64.

189 Explanatory memorandum, p. 64.

190 *Criminal Code Act 1995*, subsections 80.2C(2) and (3). Terrorism offence is defined in subsection 3(1) of the *Crimes Act 1914* and terrorist act is defined in section 100.1 of the *Criminal Code Act 1995*.

191 UN Human Rights Committee, *General Comment No. 34, Article 19: Freedoms of opinion and expression* (2011) [46].

192 Parliamentary Joint Committee on Human Rights, *Fourteenth Report of the 44th Parliament*, Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014 (28 October 2014) pp. 50–52.

expands the forms of expression that may be captured by this offence, these concerns remain relevant.

1.109 The primary safeguard identified in the statement of compatibility is the 'substantial risk' qualifier, that is, the praising of terrorism will only constitute an offence if there is a substantial risk that such praise *might* have the effect of leading another person to engage in a terrorist act or to commit a terrorism offence.[193] The statement of compatibility states that this qualifier would assist with proportionality as where there is no such substantial risk, the praising of a terrorist act and offence would not be criminalised.[194] However, it is not clear how 'substantial risk' is to be interpreted and the inclusion of the term 'might' suggests that the threshold for establishing whether praise would lead another person to engage in terrorism may not be particularly high. The explanatory materials do not identify any other safeguards accompanying the measure. As such, it is not clear that the 'substantial risk' qualifier alone would be a sufficient safeguard.

1.110 Further, as discussed above (in paragraphs [1.68] and [1.69]), it is not clear that the measure would pursue the least rights restrictive approach with respect to the rights of the child, noting the position under international human rights law that states should implement non-judicial alternatives to prosecution and detention of children accused of, and charged with, terrorism offences, and increase the age of criminal responsibility to at least 14 years of age.[195]

Committee view

1.111 The committee notes that expanding the existing offence of advocating terrorism may promote human rights, including the rights to life and security of person, to the extent that it would prevent terrorist-related conduct and violence. However, the committee also notes that the measure would expand the scope of expression that would be restricted and so would engage and limit the right to freedom of expression, and as the offences would apply to children, the measure would also engage and limit the rights of the child.

1.112 The committee considers that while the measure generally pursues the important aim of preventing terrorism, it is not clear why existing legislation is insufficient to achieve this objective and whether the measure represents a proportionate limitation on the right to freedom of expression and the rights of the child. Further information is therefore required to assess the compatibility of this

193 Statement of compatibility, p. 15; explanatory memorandum, p. 64.

194 Statement of compatibility, p. 15.

195 Committee on the Rights of the Child, *General Comment No. 24 (2019) on children's rights in the child justice system* (2019) [100]. At [101], the Committee urged States parties to 'refrain from charging and prosecuting [children] for expressions of opinion or for mere association with a non-State armed group, including those designated as terrorist groups'.

measure with these rights, and as such the committee seeks the Attorney-General's advice in relation to:

(a) why the measure is necessary and in particular, why the existing legislation is insufficient to achieve the stated objective, noting that there are a number of existing offences in the Criminal Code that appear to capture the conduct sought to be criminalised by the measure;

(b) whether there will be any guidance provided with respect to the interpretation of key terms in the measure, including 'instruction', 'praises' and whether there is a 'substantial risk that such praise might have the effect of leading another person to engage in a terrorist act or commit a terrorism offence';

(c) what other safeguards exist to ensure the measure does not unduly restrict a person's right to freedom of expression;

(d) what other, less rights restrictive approaches have been considered and why are they not appropriate to achieve the stated objectives; and

(e) how the measure is compatible with the rights of the child, noting that the statement of compatibility does not provide an assessment with respect to these rights.

Intelligence Services Legislation Amendment Bill 2023[1]

Purpose	The bill seeks to amend the *Intelligence Services Act 2001*, *Inspector-General of Intelligence and Security Act 1986* and other legislation for a number of purposes. Schedule 1 would expand the oversight jurisdictions of the Inspector-General of Intelligence and Security, and the Parliamentary Joint Committee on Intelligence and Security to include: the Australian Criminal Intelligence Commission, Australian Federal Police, Australian Transaction Reports and Analysis Centre, and Home Affairs. Schedule 2 would make a series of amendments consequential to this proposed expanded oversight jurisdiction. Schedule 3 would designate Australian Criminal Intelligence Commission records relating to a criminal intelligence assessment as exempt security records for the purposes of the *Administrative Appeals Tribunal Act 1975.* Schedule 4 would amend the *Criminal Code Act 1995* to introduce an exemption from certain civil and criminal liability for defence officials. Schedule 5 would make several application and transitional amendments.
Portfolio	Attorney-General
Introduced	House of Representatives, 22 June 2023
Rights	Privacy, effective remedy

Exemption from civil and criminal liability for defence officials and others

1.113 This bill seeks to amend 21 Acts to make a range of amendments, many of which relate to expanding the oversight powers of the Inspector-General of Intelligence and Security and the Parliamentary Joint Committee on Intelligence and Security. The committee makes no comment on these broader measures, but focuses on Schedule 4. Schedule 4 seeks to amend the *Criminal Code Act 1995* (Criminal Code) to exempt defence officials from civil and criminal liability for certain 'computer related conduct'.[2]

1 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Intelligence Services Legislation Amendment Bill 2023, *Report 8 of 2023*; [2023] AUPJCHR 72.

2 Schedule 4, item 4, proposed section 476.7.

1.114 Computer related conduct would be defined to mean a range of acts, events, circumstances or results involving the use of computers.[3]

1.115 Proposed subsection 476.7(1) provides that a defence official would not be liable for engaging in conduct inside or outside Australia where there was a reasonable belief that it is likely to cause a computer-related act, event, circumstance or result to take place outside Australia (whether or not it in fact takes place outside Australia). Proposed subsection 476.7(6) states that if this conduct causes material damage, interference or obstruction to a computer in Australia, and would otherwise constitute an offence against Part 10.7 of the Criminal Code, the person must provide written notice of the fact to the Australian Defence Force (ADF) as soon as practicable. The explanatory materials state that this proposed measure would ensure that the ADF can use offensive and defensive cyber capabilities for activities connected with the defence and security of Australia, as required as part of modern warfare.[4] As to the type of conduct that may constitute computer-related conduct in this context, the explanatory memorandum states that this may include 'routine activities such as computer intelligence gathering and exploitation'.[5]

1.116 'Defence official' refers to a wide range of persons, and would include a member of the ADF, a defence civilian, an employee of the Department of Defence, a consultant or contractor to the department, or any other person specified in a class of persons by the secretary or Chief of the ADF by legislative instrument.[6]

1.117 Proposed subsection 476.7(2) would further provide an exemption from civil or criminal liability for people who engage in activities, inside or outside Australia, that are preparatory to, in support of, or otherwise directly connected to overseas computer- related activities.[7]

3 Schedule 4, item 1, proposed amendment to subsection 476.1(1) would insert a definition of 'computer related conduct'. Computer related conduct means an act, event, circumstance or result involving: the reliability, security or operation of a computer; access to, or modification of, data held in a computer or on a data storage device; electronic communication to or from a computer; the reliability, security or operation of any data held in or on a computer, computer disk, credit card, or other data storage device; possession or control of data held in a computer or on a data storage device; or producing, supplying or obtaining data held in a computer or on a data storage device.

4 Statement of compatibility, p. 14, and explanatory memorandum, pp. 159–160.

5 Explanatory memorandum, p. 159.

6 Schedule 4, item 4, proposed subsection 476.7(8).

7 Schedule 4, item 4, proposed subsection 476.7(3) states that this is not intended to permit any conduct in relation to premises, persons, computers, things, or carriage services in Australia being conduct which the Australian Security Intelligence Organisation (ASIO) could not engage with or obtain under specified legislation.

Preliminary international human rights legal advice

Rights to privacy and an effective remedy

1.118 Exempting persons from civil or criminal liability for computer related conduct engages and may limit the right to an effective remedy, should that conduct result in a breach of the civil and political rights of a person in Australia (such as the right to privacy).

1.119 The statement of compatibility states that these amendments may 'indirectly create a risk that' a person's right to privacy may be violated, including where conduct has inadvertently affected a computer or device inside Australia.[8] This suggests that the exercise (or purported exercise) of this power may result in a limitation of the right to privacy in Australia.[9] It is therefore necessary to consider whether such a limitation on the right to privacy would be permissible should this take place, and whether an affected person would have access to an effective remedy. 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 prohibits arbitrary and unlawful interferences with an individual's privacy, family, correspondence or home.[11] The right may be subject to permissible limitations which are provided by law and are not arbitrary. In order for limitations not to be arbitrary, the measure must pursue a legitimate objective and be rationally connected to (that is, effective to achieve) and proportionate to achieving that objective. In 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 interferences with privacy may be permitted.[12]

1.120 The statement of compatibility states why it is necessary to provide exemptions from liability for officials engaging in a computer related act. But it does not explain how enabling officials to engage in such conduct is a permissible limit on the right to privacy (only why they need to be protected from liability). In particular, the explanatory memorandum states that this amendment is intended to address

8 Statement of compatibility, p. 14.

9 In this regard, it is noted that Schedule 4, item 4, proposed subsection 476.7(2) would exempt 'a person' from liability for conduct preparatory to computer-related conduct (whereas proposed subsection 476.7(1) would exempt a defence official), and so would appear to potentially exempt a far broader range of persons from liability. It may also be that, in practice, computer-related conduct may directly or indirectly limit other rights, as a consequence of a particular breach of the right to privacy, depending on the nature of the conduct and the context.

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

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

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

recommendation 72 of the *Comprehensive Review of the Legal Framework of the National Intelligence Community* by Mr Dennis Richardson AC.[13] However, that review recommended only a limited immunity (applying only to ADF members, limited to immunity from the criminal offences set out in Part 10.7 of the Criminal Code, and applying only to acts done outside of Australia in the course of approved ADF operations and within legally approved rules of engagement). The proposed amendment—which would extend to both civil and criminal liability, apply to any defence official, whether inside or outside Australia, who holds a reasonable belief that their conduct is likely to cause a computer-related act to take place outside Australia—would be much broader than that recommended in the review.

1.121 The right to an effective remedy requires the availability of a remedy which is effective with respect to any violation of rights and freedoms recognised by the International Covenant on Civil and Political Rights.[14] It includes the right to have such a remedy determined by competent judicial, administrative or legislative authorities or by any other competent authority provided for by the legal system of the state. While limitations may be placed in particular circumstances on the nature of the remedy provided (judicial or otherwise), States parties must comply with the fundamental obligation to provide a remedy that is effective.[15]

1.122 The statement of compatibility does not identify that the right to an effective remedy may be engaged in respect of this measure. As such, no information is provided as to whether and how this proposed amendment is consistent with the right, and in particular, whether:

- where the exercise of this power may limit a person in Australia's right to privacy, this would constitute a permissible limitation on the right to privacy, (and whether any other rights may be limited in such circumstances);
- proposed subsection 476.7(2) would exempt a broader range of persons (beyond defence officials) from liability, and if so what persons;
- a person in Australia whose rights have been breached as a result of computer-related conduct by a defence official or other person would be aware of the breach and its cause;

13 Explanatory memorandum, pp. 159–160.

14 International Covenant on Civil and Political Rights (ICCPR), article 2(3). See, *Kazantzis v Cyprus,* UN Human Rights Committee Communication No. 972/01 (2003) and *Faure v Australia,* UN Human Rights Committee Communication No. 1036/01 (2005), State parties must not only provide remedies for violations of the ICCPR, but must also provide forums in which a person can pursue arguable if unsuccessful claims of violations of the ICCPR. Per *C v Australia* UN Human Rights Committee Communication No. 900/99 (2002), remedies sufficient for the purposes of article 5(2)(b) of the ICCPR must have a binding obligatory effect.

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

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

Committee view

1.123 The committee notes that exempting persons from civil or criminal liability for computer related conduct engages and may limit the right to privacy of a person in Australia, and consequently may also engage the right to an effective remedy.

1.124 The committee notes that the statement of compatibility does not identify the engagement of these rights, and therefore seeks the Attorney-General's advice as to:

(a) whether, where the exercise of this power limits a person in Australia's right to privacy, this would constitute a permissible limitation on the right to privacy, and whether any other human rights may be limited in such circumstances;

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

(c) what alternative remedies are available to persons where conduct contemplated by proposed section 476.7 results in a violation of their human rights.

International Organisations (Privileges and Immunities) Amendment Bill 2023[1]

Purpose	This bill seeks to amend the *International Organisations (Privileges and Immunities) Act 1963* to provide a legislative basis for the enactment of regulations to: • declare an organisation of which Australia is not a member as an international organisation under the Act; • confer privileges and immunities on categories of officials not prescribed in the Act, where requested by an international organisation and agreed to by Australia; and • increase flexibility in granting privileges and immunities to international organisations and connected persons
Portfolio	Foreign Affairs and Trade
Introduced	Senate, 21 June 2023
Rights	Right of access to courts and tribunals; right to an effective remedy; torture and inhuman treatment

Extending privileges and immunities

1.125 This bill seeks to amend the *International Organisations (Privileges and Immunities) Act 1963* (the Act) to permit an organisation of which two or more countries other than Australia are members, or that is constituted by two or more persons representing countries other than Australia, to be declared, by way of regulations, to be an international organisation to which the Act applies.[2] This would have the effect of permitting Australia to confer privileges and immunities under the Act on international organisations of which Australia is not a member.[3]

1.126 The bill also seeks to amend the Act to permit the conferral of privileges and immunities under the Act,[4] by way of regulations, on persons connected in a specified way with an international organisation and on persons who have ceased to

1 This entry can be cited as: Parliamentary Joint Committee on Human Rights, International Organisations (Privileges and Immunities) Amendment Bill 2023, *Report 8 of 2023*; [2023] AUPJCHR 73.

2 Schedule 1, item 5.

3 Explanatory memorandum, p. 4.

4 The relevant privileges and immunities are those specified in Parts 1 and 2 of the Second to Fifth Schedules of the *International Organisations (Privileges and Immunities) Act 1963*.

be connected with such an organisation.[5] The effect of this amendment would be to extend immunities and privileges to categories of officials not prescribed in the Act, where requested by an international organisation and agreed to by Australia.[6] The Act allows for the grant of both functional immunity (that is, immunity that attaches to those acts or functions undertaken by an individual in their official capacity as an officer of an international organisation) and personal immunity (that is, an absolute immunity attaching to all acts undertaken in an official or private capacity both before and during office).[7] The Act therefore allows individuals to be conferred with immunity from personal arrest or detention, and from suit and from other legal process.[8]

Preliminary international human rights legal advice

Right of access to courts and tribunals, right to an effective remedy and obligations under the Convention Against Torture

1.127 By extending privileges and immunities to international organisations to which Australia is not a member and to persons representing such organisations, as well as other categories of officials that are to be prescribed by regulations, the bill would engage and limit the right of access to courts and tribunals – an element of the right to equality before courts and tribunals, as well as the right to an effective remedy and Australia's obligations to investigate and prosecute (or extradite) persons alleged to have committed torture.[9] This is acknowledged in the statement of compatibility.[10]

5 Schedule 2, item 3.

6 Explanatory memorandum, pp. 5–6.

7 Personal immunities which may be granted to representatives of international organisations are set out under Part 1 of the Second to Fifth Schedules of the *International Organisations (Privileges and Immunities) Act 1963*. Personal and functional immunities are also granted under other legislation, such as those accorded to a diplomatic agent, under the *Diplomatic Privileges and Immunities Act 1967*, specifically the Schedule – Vienna Convention on Diplomatic Relations. The *Foreign States Immunities Act 1985* also provides functional immunity to foreign states and their representatives in civil proceedings, and personal immunity from both civil and criminal proceedings for foreign heads of state (s 36).

8 See Parts 1 and 2 of the Second to Fifth Schedules of the *International Organisations (Privileges and Immunities) Act 1963.*

9 International Covenant on Civil and Political Rights, articles 2(3) and 14.

10 Statement of compatibility, p. 2–4. The statement of compatibility also states that the right to freedom of movement is engaged. However, it is not clear that enabling the continued application of immigration laws would engage and limit the right to freedom of movement as a matter of international human rights law, and as such, this right has not been addressed in this report entry.

1.128 The right to equality before courts and tribunals encompasses the right of access to the courts in cases of determination of criminal charges and rights and obligations in a suit at law.[11] The UN Human Rights Committee has stated that:

> The failure of a State party to establish a competent tribunal to determine such rights and obligations or to allow access to such a tribunal in specific cases would amount to a violation of article 14 if such limitations are not based on domestic legislation, are not necessary to pursue legitimate aims such as the proper administration of justice, or are based on exceptions from jurisdiction deriving from international law such, for example, as immunities, or if the access left to an individual would be limited to an extent that would undermine the very essence of the right.[12]

1.129 The right to an effective remedy requires the availability of a remedy which is effective with respect to any violation of rights and freedoms recognised by the International Covenant on Civil and Political Rights.[13] It includes the right to have such a remedy determined by competent judicial, administrative or legislative authorities or by any other competent authority provided for by the legal system of the state. This may take a variety of forms, such as prosecutions of suspected perpetrators or compensation to victims of abuse. While limitations may be placed in particular circumstances on the nature of the remedy provided (judicial or otherwise), States parties must comply with the fundamental obligation to provide a remedy that is effective.[14]

1.130 In the context of this bill, the granting of immunities, including immunity from personal arrest or detention and from suit and other legal processes, to international organisations and other categories of officials, would involve an exclusion of the jurisdiction of Australian courts in criminal, civil and administrative cases. This, in effect, would restrict an individual's access to courts and tribunals, including for the purposes of determining an effective remedy for potential violations of human rights.

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11 UN Human Rights Committee, *General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial* [9].

12 UN Human Rights Committee, *General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial* [18]. See also UN Human Rights Committee, *Concluding observations on Zambia*, CCPR/C/79/Add.92 (1996) [10], where the UN committee found that it was incompatible with article 14 for persons to be vested with total immunity from suit.

13 International Covenant on Civil and Political Rights, article 2(3). See, *Kazantzis v Cyprus,* UN Human Rights Committee Communication No. 972/01 (2003) and *Faure v Australia,* UN Human Rights Committee Communication No. 1036/01 (2005), State parties must not only provide remedies for violations of the ICCPR, but must also provide forums in which a person can pursue arguable if unsuccessful claims of violations of the ICCPR. Per *C v Australia* UN Human Rights Committee Communication No. 900/99 (2002), remedies sufficient for the purposes of article 5(2)(b) of the ICCPR must have a binding obligatory effect.

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

1.131 In addition, as a State party to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Australia has an obligation to investigate and prosecute (or extradite) such cases of torture as defined in the Convention if an alleged torturer is found in Australia.[15] This obligation is enlivened even in a case where the alleged torturer may have enjoyed immunity from criminal proceedings in Australia and continues to enjoy immunity in relation to acts carried out in that person's official capacity.[16] Thus, by extending personal immunity to a broader range of organisations and individuals, including potentially those alleged to have committed torture, the bill would have implications for Australia's obligation to investigate and prosecute allegations of torture.

1.132 Restricting access to courts and tribunals and consequently the availability of a remedy for potential rights violations (other than in relation to torture) may not amount to a violation under international human rights law if such restrictions are

15 Convention Against Torture, articles 5–8. The UN Human Rights Committee has stated that: 'States have granted amnesty in respect of acts of torture. Amnesties are generally incompatible with the duty of States to investigate such acts; to guarantee freedom from such acts within their jurisdiction; and to ensure that they do not occur in the future. States may not deprive individuals of the right to an effective remedy, including compensation and such full rehabilitation as may be possible': *General Comment No. 20: Article 7 (Prohibition of torture, or other cruel, inhuman or degrading treatment or punishment* (1992) [15]. See also *Suleymane Guengueng et al. v Senegal*, UN Committee Against Torture Communication No. 181/2001 (2006), which found the failure by Senegal to prosecute the former head of state of Chad to be a violation of the Torture Convention.

16 The view that immunity may be limited as a result of the Convention against Torture is supported by jurisprudence, particularly the *Pinochet* case, and the views of the UN Committee against Torture. In the *Pinochet* case the House of Lords considered an extradition request for the surrender of the former President of Chile to face a number of charges of torture. As a former head of state, Pinochet enjoyed immunity for acts undertaken in his capacity as President of Chile. The House of Lords held that, even if the alleged acts of torture had been performed in his capacity as President, the effect of the Convention against Torture was that this immunity was abrogated in relation to alleged acts of torture as defined in that convention and to which the convention applied temporally. See *R v Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No 3)* [2000] 1 AC 147. Regarding the UN Human Rights Committee's views, see UN Committee Against Torture, *Consideration of reports submitted by states parties under article 19 of the Convention,* CAT/C/SR.354 (1998) [39]–[40], [46], where the UN Committee stated that article 5, paragraph 2 of the Convention Against Torture 'conferred on States parties universal jurisdiction over torturers present in their territory, whether former heads of State or not, in cases where it was unable or unwilling to extradite them. Whether they decided to prosecute would depend on the evidence available, but they must at least exercise their jurisdiction to consider the possibility'. See also *Conclusions and recommendations on the third periodic report of the United Kingdom of Great Britain and Northern Ireland and Dependent Territories*, CAT/C/SR.360 (1999) [11] and *Report of the Committee against Torture: United Kingdom of Great Britain and Northern Ireland and Dependent Territories*, CAT A/54/44 [77(f)] (1999)).

based on immunities that are accepted as a matter of international law.[17] The granting of privileges and immunities to international organisations is commonly accepted practice in international law. Australia is bound under a number of multilateral and bilateral treaties to confer privileges and immunities on various international organisations and their officials, as well as on foreign States and their diplomatic and consular representatives. The extent of the privileges and immunities conferred varies among the different categories of conferee (a diplomatic representative has more extensive accepted immunities than a consular official, for example). Under customary international law Australia is also under additional obligations to afford immunity to certain types of high-level foreign officials, both personal immunity while they are in office and, functional immunity after they have left office.[18]

1.133 The statement of compatibility states that the purpose of the bill is threefold: to more closely align Australia's domestic legislation with its international obligations; to increase flexibility in the granting of privileges and immunities; and to assist in deepening Australia's international cooperation.[19] It notes that enabling Australia to declare an organisation of which Australia *is not a member* to be an 'international organisation', for the purposes of conferring privileges and immunities on that organisation and those connected with it, would benefit Australia by broadening the range of organisations with which Australia could partner and expanding the opportunities for cooperation.[20] In particular, the statement of compatibility notes that the proposed amendments would facilitate Australia giving effect to a Framework Agreement relating to the Organisation for Joint Armament Cooperation (OCCAR). According to the statement of compatibility, this Framework Agreement requires Australia to extend 'the full range of privileges and immunities to the OCCAR and connected persons in order to host meetings and receive program

17 UN Human Rights Committee, *General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial* [18]. While the law remains unsettled and continues to evolve at the international level, it has not yet been accepted that there exists a 'human rights exception' to immunity under international law. See, eg, the rejection of this argument by the House of Lords in *Jones v Ministry of the Interior of the Kingdom of Saudi Arabia and another* [2007] 1 AC 270. For an earlier discussion of this issue, see Parliamentary Joint Committee on Human Rights, *International Organisations (Privileges and Immunities) Amendment Bill 2013, Fourth Report of 2014* (20 March 2013) pp. 42–47 and *Sixth Report of 2013* (15 May 2013) pp. 228–243.

18 *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium),* International Court of Justice (ICJ), 14 February 2002 [2002] ICJ Rep 3, especially at [51]-[55]

19 Statement of compatibility, p.1.

20 Statement of compatibility, p. 2.

benefits.'[21] Further, the statement of compatibility states that the flexibility to grant privileges and immunities to a broader range of officials will ensure those immunities conferred are more accurate and will assist Australia in implementing its international obligations.[22]

1.134 While Australia has an obligation to grant certain immunities to international organisations to which Australia is a member, it is not clear that such an obligation exists under international law with respect to organisations (and associated officials) to which Australia is not a member. In order for such an obligation to exist, it must be derived from either a treaty commitment or because there is a relevant customary international law rule that applies. While Australia is not a member of OCCAR, it has a treaty obligation to grant immunities to OCCAR under the Framework Agreement. However, it is not clear that such a treaty commitment would exist with respect to other international organisations that may be declared under future regulations (as the bill envisages) for the purposes of conferring immunities. Without a treaty commitment, it is not clear that Australia would have an obligation to confer immunities on international organisations of which it is not a member, noting that there is insufficient evidence of a customary international law rule requiring states to confer immunities on international organisations of which they are not members.[23] Further information is therefore required to establish the source of Australia's obligation under international law to confer immunities in these circumstances.

1.135 Further, it is not clear whether the bill would enable the conferral of privileges and immunities on a broader category of individuals than those recognised as entitled to immunity under international law. The bill would allow immunities to be conferred by regulations on general classes of persons connected with international organisations. The immunities that may be conferred include full personal immunities, such as immunity from arrest and detention in Australia. This would appear to preclude Australian courts exercising jurisdiction over persons alleged to have committed torture or other serious human rights abuses, even where

21 Statement of compatibility, p. 2; *Framework Agreement between the Government of Australia and the Organisation for Joint Armament Cooperation (Organisation Conjointe de Coopération en Matière d'Armement (OCCAR)) for the participation of Australia in OCCAR-managed programmes* [2022] ATS 3, article 3.3. The privileges and immunities that are to be granted are those in Annex I of the OCCAR Convention, which includes personal immunity for representatives of member states (article 13) and functional immunity for staff of OCCAR (article 15).

22 Statement of compatibility, p. 2.

23 In fact, it remains unsettled whether there is a rule of customary international law that international organisations enjoy immunity even with respect to states which *are* members of the international organisation. Michael Wood, Do International Organizations Enjoy Immunity Under Customary International Law? (2013) 10 *International Organizations Law Review* 287-318, especially at 316-17; Edward Chukwuemeke Okeke, *Jurisdictional Immunities of States and International Organizations* 2018, especially at 269, 275 and 278; Jan Klabbers, *An Introduction to International Organizations Law*, 4th ed 2022, 152.

such persons would not otherwise fall within the general category of individuals covered by personal immunity under general international law (e.g. heads of state).[24] The statement of compatibility states that the conferral of privileges and immunities on categories of officials would occur where requested by an international organisation and agreed to by Australia. It notes that the conferral of immunities would require a rational connection with the international organisation and its functions, thereby limiting the categories and number of persons benefiting from these protections.[25]

1.136 Questions therefore arise as to how the amendments in the bill are necessary to align Australia's domestic legislation with its international obligations. Further, in relation to the Framework Agreement with OCCAR in particular, the International Organisations (Privileges and Immunities) (Declaration of Organisation for Joint Armament Co-operation Related Meetings) Regulations 2022 already confer immunities on OCCAR representatives and staff under section 7 of the Act. Interestingly, the immunities conferred under these regulations appear to extend beyond those required under both customary international law and the Framework Agreement with OCCAR. The effect of the regulations is that representatives of OCCAR are entitled to the same immunities granted to diplomatic agents, including personal immunity from criminal jurisdiction and most civil jurisdiction;[26] yet the OCCAR Convention, which Australia is required to implement pursuant to article 3.3 of the Framework Agreement, requires only immunity from arrest and detention and functional immunity from jurisdiction for representatives of Member States,[27] and functional immunity for staff members of OCCAR.[28] In light of the privileges and immunities conferred by these regulations under the Act, questions arise as to whether the amendments in the bill are necessary to enable Australia to fulfil its international obligations, both in the specific case of the Framework Agreement with OCCAR and more generally.

1.137 As to the scope of immunities to be granted, the statement of compatibility states that it 'is expected that, for the most part, the officials benefiting from privileges and immunities will have functional immunity, meaning that their immunities are restricted by reference to the functions undertaken by the

24 The category of individuals includes heads of state, heads of government, foreign ministers and other high-ranking ministers.

25 Statement of compatibility, p. 3.

26 Section 7(2)(a) of the Act. Further, official staff of representatives are also given personal immunity from criminal jurisdiction and functional immunity from civil jurisdiction: this is the effect of section 7(2)(b), which gives these individuals 'the privileges and immunities accorded to a member of the administrative and technical staff of a diplomatic mission' (set out in article 37(2) of the Vienna Convention on Diplomatic Relations 1961, which section 7 of the Diplomatic Privileges and Immunities Act 1967 gives the force of law in Australia).

27 OCCAR Convention, art 13.

28 OCCAR Convention, art 15.

international organisation'.[29] It states that while the bill is unlikely to give rise to situations involving Australia's obligations under international human rights law, including under the Convention Against Torture, if such cases were to arise, it 'would be open to the Australian Government to take a range of responses, including request that the organisation in question waive the immunity of the individual concerned'.[30] However, it is noted that such a waiver would not have to be granted by the organisation, and it would not appear that leaving this matter to the discretion of the organisation would be consistent with Australia's obligations under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

1.138 Further, while the statement of compatibility states that functional immunity will generally be conferred, there is nothing in the legislation itself to prevent personal immunity being granted. Indeed, the stated purpose of the amendments are to provide the Australian government with greater flexibility to confer immunities to categories of officials not prescribed in the Act. Without legislative safeguards to restrict the persons to whom personal immunity may be granted, there appears to be a risk that personal immunity from arrest and detention could be conferred on persons alleged to have committed torture or other serious human rights abuses. This may occur, for example, where an international organisation requests personal immunity for a person who is connected with the organisation and is also alleged to have committed torture, and Australia agrees to that request due to broader benefits that it may gain by cooperating with the organisation. The immunity in such cases would prevent Australia from complying with its international obligation to investigate and prosecute persons alleged to have committed torture.

Committee view

1.139 The committee notes that by extending privileges and immunities, including an immunity from personal arrest or detention and from suit and other legal processes, to international organisations of which Australia is not a member as well as other categories of officials that are to be prescribed by regulations, the bill would engage and limit the right of access to courts and tribunals, as well as engage the right to an effective remedy and Australia's obligations to investigate and prosecute (or extradite) persons alleged to have committed torture.

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

(a) which classes of persons are likely to receive personal immunity by way of regulations;

29 Statement of compatibility, p. 4.

30 Statement of compatibility, p. 4.

(b) are there any safeguards to limit who can be accorded personal immunity;

(c) whether requesting an international organisation to waive immunity to enable investigation and prosecution of an individual accused of torture, rather than having a statutory exception to allow such investigation, prosecution or extradition, is consistent with Australia's obligations under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; and

(d) does Australia currently have any obligations under international law, other than under the Framework Agreement with OCCAR, to confer privileges and immunities on organisations of which it is not a member, and if so, what are the sources of those obligations.

Migration Amendment (Strengthening Employer Compliance) Bill 2023[1]

Purpose	The bill seeks to amend the *Migration Act 1958* to establish new employer sanctions including criminal offences and civil penalties related to exploitative work arrangements and to increase existing maximum penalties relating to sponsorship obligations.
Portfolio	Home Affairs
Introduced	House of Representatives, 22 June 2023
Rights	Just and favourable conditions of work; equality and non-discrimination; privacy

Employer sanctions for coercive practices

1.141 Schedule 1, Part 1 of the bill seeks to establish new criminal offences and civil penalties for a person who unduly influences, unduly pressures, or coerces a non-citizen to breach a work-related condition of their visa, or accept an exploitative work arrangement to meet a work-related condition of their visa.[2]

1.142 Additionally, Schedule 1, Part 5 of the bill would expand the circumstances in which an inspector may exercise their existing powers. This includes authorising the giving of an enforceable compliance notice, which may be issued where an officer holds a reasonable belief that a person has contravened a work or sponsorship related offence provision, or a related provision,[3] and authorising the inspector to exercise their powers for the purpose of investigating whether another person who is, or was, an approved work sponsor has contravened that proposed provision.[4]

1.143 The inspector has existing powers to: enter business premises or another place without force at any time necessary, inspect things, interview persons, require the production of documents or records, and to inspect and make copies of documents or records.[5]

1 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Migration Amendment (Strengthening Employer Compliance) Bill 2023, *Report 8 of 2023*; [2023] AUPJCHR 74.

2 Schedule 1, item 2, proposed sections 245AA–245AAC.

3 Schedule 1, item 31, proposed section 140RB.

4 Schedule 1, item 32, proposed subsection 140X(aaa).

5 *Migration Act 1958*, sections 140XB–XF.

International human rights legal advice

Just and favourable conditions of work; prohibition against slavery; right to equality and non-discrimination

1.144 The establishment of new offences and civil penalties for coercing or otherwise pressuring a person to breach a work-related condition of their visa, or accept an exploitative work arrangement to meet a work-related condition of their visa, engages and promotes several human rights, including the rights to just and favourable conditions of work, equality and non-discrimination and the prohibition against slavery.

1.145 The right to just and favourable conditions of work includes the right of all workers to adequate and fair remuneration, and safe working conditions.[6] The prohibition against slavery, servitude and forced labour prohibits exploiting or dominating another and subjecting them to 'slavery-like' conditions, or requiring a person to undertake work which he or she has not voluntarily consented to, but does so because of threats made, either physical or psychological. [7]

1.146 The statement of compatibility states that the measure would promote these rights by ensuring that employers do not misuse the migration program as an alternative source of cheap and exploitable labour.[8] With respect to slavery, the statement of compatibility states that these measures would address potential gaps in existing laws to address the issue of modern slavery, and would further the goal of protecting temporary migrant workers from the serious offences of slavery, slavery-like practices and trafficking in persons.[9]

1.147 Further, the measures would also engage and promote the right to equality and non-discrimination, insofar as they would establish additional protections for non-citizen workers who may be vulnerable to particular types of exploitation at work by virtue of their visa status, or otherwise because of their status as non-citizens. 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

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

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

8 Statement of compatibility, p. 96.

9 Statement of compatibility, p. 97.

non-discriminatory protection of the law.[10] The prohibited grounds of discrimination include gender, race, and national or social origin.[11]

Right to privacy

1.148 Expanding the inspector's existing powers to include their exercise in relation to an enforceable compliance notice, engages and may 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.[12] It also includes the right to control the dissemination of information about one's private life, and protects against arbitrary and unlawful interferences with an individual's privacy and attacks on reputation.[13]

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

1.150 The statement of compatibility does not identify that the proposed expansion of these existing powers engages and limits these rights, and so no analysis is provided. Enabling the inspector to enter premises, ask questions and require the provision of documentation in order to enforce compliance notices would facilitate the enforcement of provisions intended to protect workers. This would constitute a legitimate objective under international human rights law, and would be rationally connected to that objective. As to proportionality, the Migration Act constrains the circumstances in which, and purposes for which, an inspector may exercise their investigatory powers.[14] However, it also provides that the Secretary or Australian Border Force Commissioner may disclose any information the inspector has gathered for a broad range of purposes, including where they reasonably believe that it will assist in the administration of a law of the Commonwealth, or a state or

10 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.

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

13 There is international case law to indicate that this protection only extends to attacks which are unlawful. See *RLM v Trinidad and Tobago*, UN Human Rights Committee Communication No. 380/89 (1993); and *IP v Finland,* UN Human Rights Committee Communication No. 450/91 (1993).

14 For example, sections 140X–XA.

territory.[15] It is unclear what safeguards would apply, and whether the exercise of these relevant powers would be subject to oversight and review.

Committee view

1.151 The committee considers that establishing new mechanisms to prevent exploitative work practices, to protect vulnerable migrant workers, promotes the rights to just and favourable conditions of work, equality and non-discrimination and the prohibition against slavery and servitude. The committee considers the statement of compatibility should reflect that the measures would promote the right to equality and non-discrimination.

1.152 The committee notes that expanding the application of the inspector's investigatory powers may also engage and limit the right to privacy. The committee notes that the statement of compatibility does not identify the engagement of this right, and therefore seeks the minister's advice as to whether the measure constitutes a permissible limit on the right to privacy, including the presence of safeguards, the circumstances in which information gathered by the inspector may be disclosed, and relevant oversight and review mechanisms.

Publication of information about prohibited employers

1.153 Schedule 1, Part 2 would allow the minister or an authorised delegate to prohibit certain employers from employing any additional non-citizens, and would require the minister to make that decision public. Such a declaration may be made where the person is subject to a 'migrant worker sanction', and the sanction was imposed no more than five years prior.[16] 'Migrant worker sanction' refers to a person being sanctioned for certain work-related offences, civil penalties or contraventions of the *Fair Work Act 2009* or contraventions of enforceable undertakings,[17] but also includes sanctions imposed on the basis of the minister being satisfied of certain matters, such as:

(a) where a bar has been placed on an approved sponsor on the basis that the 'minister is satisfied' that the person had failed to satisfy their sponsorship obligations (such as an obligation to keep certain records);[18]

15 Section 140XJ.

16 Schedule 1, Part 2, item 5, proposed section 245AYK.

17 Schedule 1, Part 2, item 5, proposed sections 245AYE–245AYJ. These would include: being barred as an approved work sponsor; conviction or work-related offences under the Criminal Code; certain contravention of the *Fair Work Act 2009* or compliance notices pursuant to that Act; and certain contraventions of undertakings given to the Fair Work Ombudsman.

18 Schedule 1, Part 2, item 5, proposed section 245AYE, read together with section 140M of the *Migration Act 1958* and sections 2.89 of the Migration Regulations 1994.

(b) where an inspector has given the person a compliance notice under the Fair Work Act 2009 and the 'minister is satisfied' that the person has failed to comply with the notice and does not have a reasonable excuse.[19]

1.154 A declaration that a person is a prohibited employer would have effect for the period specified in the declaration.[20] It would prevent a person from employing additional non-citizens, or having a material role in decisions by a body corporate or other body that allows a non-citizen to begin work.[21] Breach of the prohibition would be an offence punishable by imprisonment for two years or 360 penalty units (currently $112,680)[22] or both, or a civil penalty punishable by 240 penalty units (currently $75,120). After a person ceases to be a prohibited employer, for the following 12 months they would be required to advise the department where they have employed non-citizens.[23] The minister would be required to publish identifying information in relation to a prohibited employer online, except in prescribed circumstances.[24]

Preliminary international human rights legal advice

Multiple rights

1.155 The establishment of new mechanisms to prevent exploitative work practices against non-citizens in Australia, including the prohibition of certain employers from employing further non-citizens, engages and promotes the right to just and favourable conditions of work, the absolute prohibition against slavery and servitude, and the right to equality and non-discrimination. The publication of information about prohibited employers may also promote these rights, insofar as it protects temporary migrant workers from employers found to have breached workplace laws. The content of these rights is outlined at paragraphs [1.144] to [1.147].

19 Schedule 1, Part 2, item 5, proposed section 254AYJ.

20 Schedule 1, Part 2, item 5, proposed subsection 245AYK(8).

21 Schedule 1, Part 2, item 5, proposed section 245AYL.

22 As of 1 July 2023, the value of one penalty unit increased to $313, in accordance with subsection 4AA(3) of the *Crimes Act 1914*, which provides for indexation of penalty units.

23 Schedule 1, Part 2, item 5, proposed section 245AYN. This would require that the employer tell the department the name of the non-citizen and their visa details. Contravention of this requirement would be a civil penalty of 48 penalty units (currently $15,024)

24 Schedule 1, Part 2, item 5, proposed section 245AYM.

1.156 The statement of compatibility acknowledges that these rights are engaged.[25] It states that the measures in the bill may limit the right to equality and non-discrimination insofar as they would treat non-citizens differently to citizens.[26] It states that certain factors can make migrant workers particularly vulnerable to unscrupulous practices at work, including a poor knowledge of their workplace rights, being young and inexperienced, having low English language proficiency, and trying to fit in with cultural norms and expectation of other people from their home countries.[27] It states that this differential treatment would enhance the right of temporary migrant workers to enjoy equitable conditions at work. In this way, the measures would appear to promote the right to equality and non-discrimination. Further, aspects of these measures may have a particular impact on female non-citizen workers who are employed for the purposes of sexual exploitation, noting that the explanatory memorandum states that the measure may capture work in conditions of sexual servitude and in brothels.[28] In this regard, the United Nations (UN) Convention on the Elimination of all forms of Discrimination Against Women requires States Parties to take all appropriate measures to suppress all forms of traffic in women and exploitation of prostitution of women,[29] and recognises sexual exploitation as a form of gender-based violence and discrimination against women.[30] As such, the measure is likely to promote the rights of women.

25 Statement of compatibility, pp. 93–96, and 101. It also states, at page 94, that prohibiting an employer from employing additional temporary migrants may limit a temporary worker's opportunity to work for a certain business, and so limit the right to work. However, it states that the primary focus is the protection of those workers and on regulating the behaviour of the employer.

26 Statement of compatibility, p. 101.

27 Statement of compatibility, p. 101.

28 See, for example, the proposed broad definition of 'work' in proposed section 245AYB, which the explanatory memorandum states is intended to capture work in conditions of sexual servitude with no remuneration, and the proposed definition of 'premises' in proposed section 245AYC, which is intended to capture persons who lease or licence premises for the provision of sexual services in brothels. See, explanatory memorandum pp. 30–31.

29 Article 6.

30 See, UN Committee on the Elimination of all forms of Discrimination Against Women, *General recommendation No. 19: Violence Against Women* (1992); *General recommendation No. 28 on the core obligations of States parties under article 2 of the Convention on the Elimination of All Forms of Discrimination against Women* (16 December 2010).

1.157 However, requiring the publication of information identifying prohibited employers online, also engages and limits the right to privacy.[31] The content of this right, and the circumstances in which it may be permissibly limited, are outlined at paragraphs [1.148] to [1.149].

1.158 The statement of compatibility states that the publication of information about prohibited employers is intended to visibly demonstrate that the minister will take action to protect vulnerable workers and act as a deterrent to other employers.[32] Protecting vulnerable migrant workers by publishing information about prohibited employers is a legitimate objective for the purposes of international human rights law. The publication of this information may be rationally connected (that is, effective to achieve) those objectives. However, it is not clear whether information about prohibited employers needs to be accessible to the general public in order to achieve the stated objective of protecting migrant workers, particularly given that failure to comply with a prohibition order would itself be a serious criminal offence. In addition, the statement of compatibility states that 'much of the information to be published will have already been publicly available through the publication of court findings, or entries on the [Australian Border Force] Register of Sanctioned Employers'. [33] In those circumstances, it is not clear whether the additional publication of that information would be necessary to achieve the stated objectives.

1.159 A key question is whether the measure is proportionate. In this regard, the circumstances in which an employer may be declared a prohibited employer (and so have their information published online) is relevant. The bill provides that an employer may be prohibited on numerous grounds, but the circumstances in which conviction for a particular offence, or in which an order has been made against them, may result in prohibition would be set out in regulations and not all of this is set out in the bill itself.[34] Further, there are some provisions that do not require a finding of fault by a court or other independent body but rather rely on the minister being

31 Schedule 1 Part 5 would extend the existing powers of an inspector under the Act to include the exercise of powers for the purpose of investigating whether another person who is or was an approved work sponsor has contravened proposed subsection 140RB(5). The inspector has investigatory powers including the power to enter premises, inspect things, and require the provision of information or documents. Information they acquire may then be disclosed by the Secretary or Australian Border Force Commissioner where they believe it is necessary for the performance of specific functions or to assist in the administration or enforcement of a law of Australia (section 140XJ). The statement of compatibility does not identify that the proposed expansion of these existing powers would engage and limit the right to privacy, and may engage and limit other human rights.

32 Statement of compatibility, p. 87.

33 Statement of compatibility, p. 88.

34 For example, proposed subsection 245AYF((3)(a) provides that a person is subject to a migrant worker sanction if they have been convicted of an offence under the *Fair Work Act 2009* that has been prescribed by the regulations, and in any circumstances specified in the regulations.

satisfied that the person has failed in their obligations or compliance.[35] The statement of compatibility states that the circumstances in which a person may be declared a 'prohibited employer' are set at a high threshold, and that these are aimed at employers with a history of deliberate, repeated or serious non-compliance with relevant laws and obligations in their treatment of migrant workers.[36] It states that it aims to target employers that have a disregard of their employment obligations and the law, as well as deter those who are considering exploiting temporary migrant workers as a means of sourcing an artificially cheap workforce. This may mean that, in practice, an employer may only be liable to a prohibition declaration in restricted circumstances. However, the scope of those circumstances is not clear on the face of the bill. Further, an employer may be declared a prohibited employer because of conduct for which they were sanctioned up to five years prior. The explanatory materials do not explain why this period of time, and not a shorter period, is proposed, and why it is proportionate.

1.160 As to the potential severity of a prohibition declaration, the bill does not specify the maximum length of time for which a declaration may be in force, meaning that there would be no legislative bar to their imposition for lengthy periods. Further, while an employer would be able to make a written submission as to why a declaration should not be made, it is not clear that they could make a submission in relation to the length of time a declaration may be in force. The statement of compatibility does state that the minister must consider not only any written submissions, but any other matters prescribed by regulations. It states that this may include consideration of the person's history of non-compliance, the seriousness of the contravention giving rise to the prohibition being considered, and any extenuating circumstances.[37] Considerations of these matters could assist with the proportionality of the measure in practice, though it is not clear why these considerations are not required in the bill itself. In addition, proposed section 245AYN would require that in the year after a prohibition period has ended, the employer would be required to provide information (including personal information) to the department about each non-citizen they employ during that period. The statement of compatibility states that this is to ensure that the employer is aware of and complying with their obligations. However, it is not clear why less rights restrictive alternatives (such as the ability to seek a waiver of this requirement, or requiring such reporting for a shorter overall period) would not be as effective to achieve that objective.

1.161 Further, proposed subsection 245AYM(5) states that the minister is not required to arrange for the removal from the department's website of information

35 Schedule 1, Part 2, item 5, proposed section 245AYE, read together with section 140M of the *Migration Act 1958* and sections 2.89 of the Migration Regulations 1994, and proposed section 254AYJ.

36 Statement of compatibility pp. 85–86.

37 Statement of compatibility, p. 87.

published about a prohibited employer. It is not clear why the bill would not require the removal of information where, for example, a prohibition declaration has expired, is subject to appeal, or has been successfully appealed. It is also unclear whether the minister would be required to amend information about a prohibited employer which was inaccurate or otherwise misleading.

1.162 The scope of personal information published is also relevant in considering whether the limitation on the right to privacy is only as extensive as is strictly necessary. The statement of compatibility states that the intention is for the website to list the minimum details necessary for implementation.[38] Proposed section 245AYM would require the minister to publish the person's name, the reasons for the declaration, the period in which it is in force, and 'any other information that the minister considers is reasonably necessary to identify the person'. It is not clear what other information may be published about a person (for example, where two employers of the same name are declared to be prohibited, whether details about their state of residence or the name of their business would be included).

1.163 As to whether the measure would have the flexibility to treat different cases differently, the bill would provide some flexibility as to the publication of information. The minister would be empowered to prescribe in regulations the circumstances in which publication is not required.[39] This has the capacity to serve as an important safeguard, however it is not clear what circumstances those may include, and whether considerations of the employer's right to privacy would be relevant. In addition, the statement of compatibility notes that a decision to declare a person to be a prohibited employer would be subject to review by the Administrative Appeals Tribunal.[40] The availability of independent review also assists with the proportionality of the measure.

1.164 As to safeguards, the statement of compatibility states that the department has commissioned a Privacy Impact Assessment to support the publication process to ensure privacy concerns are addressed, and that procedures will be considered to adhere to the recommendations of that assessment. [41] This has the capacity to serve as a safeguard, however without knowing the content of that assessment, its safeguard value is unclear. The statement of compatibility also states that the requirement to seek a submission from an employer in advance of declaring them to be a prohibited employer—described as the 'show cause process'–gives the employer an opportunity to respond and to outline any extenuating circumstances.[42] This process has the capacity to serve as an important safeguard, however as noted

38 Statement of compatibility, p. 100.

39 Statement of compatibility, p. 100.

40 Statement of compatibility, p. 88.

41 Statement of compatibility, p. 88.

42 Statement of compatibility, p. 87.

above, the consideration of extenuating circumstances described is not contained in the bill itself, but may be prescribed by delegated legislation.

1.165 Finally, it is not clear that other, less rights restrictive alternatives (such as providing relevant information to the public on a request basis, or facilitating access to the information only to non-citizens as part of the visa application process) would be ineffective to achieve the stated objective of the measure. The statement of compatibility does not provide information in this regard.

Committee view

1.166 The committee considers that establishing new mechanisms to prevent exploitative work practices against non-citizens in Australia, including by prohibiting certain employers from employing further non-citizens, are directed towards the important objective of protecting vulnerable migrant workers. The committee notes that these proposed measures would promote the right to just and favourable conditions of work, the absolute prohibition against slavery and servitude, and the right to equality and non-discrimination.

1.167 The committee notes one aspect of these proposed measures would be the publication of declarations that a person is a prohibited employer. The committee considers that the publication of this information may also promote those human rights, insofar as it may protect temporary migrant workers from employers found to have breached workplace laws. The committee considers that this also 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 information identifying a prohibited employer, and the grounds for their prohibition, needs to be published online in order to achieve the stated objectives;

(b) why it is proposed that regard may be had to migrant worker sanctions issued in the previous five years, and not a shorter period;

(c) what is the maximum period for which a person may be declared to be a prohibited employer;

(d) whether an employer would be permitted to make submissions relating to the potential length of a prohibition declaration, and whether such a submission would be relevant to an assessment of how long a declaration may remain in force;

(e) why the minister does not have the discretion to determine that an employer may not be required to provide additional information in the twelve months after a prohibition declaration has ended, or that this requirement may be otherwise altered in certain circumstances;

(f) why the bill would not require the minister to correct inaccurate or misleading information relating to a prohibition declaration; and

(g) whether other, less rights restrictive alternatives (such as providing relevant information to the public on a request basis, or facilitating access to the information only to non-citizens as part of the visa application process) would be ineffective to achieve the stated objective of the measure.

National Occupational Respiratory Disease Registry Bill 2023[1]

Purpose	The bill seeks to establish a National Occupational Respiratory Disease Registry, to which specified physicians would be required to provide information about persons diagnosed with, or being treated for, occupational respiratory diseases
Portfolio	Health and Aged Care
Introduced	House of Representatives, 21 June 2023
Rights	Health; just and favourable conditions of work; privacy

Establishment of a registry containing personal data

1.168 This bill seeks to establish a National Occupational Respiratory Disease Registry (registry). The registry would capture and share data on respiratory diseases thought to be occupationally caused or exacerbated, and the agents that are believed to have caused them.

1.169 The bill would require a prescribed medical practitioner[2] to notify diagnoses of a prescribed occupational respiratory disease[3] and would allow for the voluntary notification of other occupational respiratory diseases.[4] A medical practitioner who fails to notify of a diagnosis or treatment of a prescribed occupational respiratory disease would be liable to a civil penalty of up to 30 penalty units (currently $9 390),[5] regardless of whether or not the patient has themselves consented to the notification.[6] The register must include 'minimum notification information', and may include 'additional notification information', both of which may be determined by

1 This entry can be cited as: Parliamentary Joint Committee on Human Rights, National Occupational Respiratory Disease Registry Bill 2023, *Report 8 of 2023*; [2023] AUPJCHR 75.

2 Clause 8, definition of 'prescribed medical practitioner' means a medical practitioner of a kind prescribed in the rules.

3 Clause 8, definition of 'prescribed occupational respiratory disease' means an occupational respiratory disease as prescribed by the rules. An 'occupational respiratory disease' is defined to mean a medical condition associated with an individual's respiratory system that is likely to have been caused or exacerbated, in whole or in part, by the individual's work or workplace.

4 Clauses 1415. Where a practitioner is treating a patient for a prescribed occupational respiratory disease (which the patient was diagnosed with before this bill were to commence) they may, with the patient's consent, provide information about the patient to the registry if that information is not already included.

5 As of 1 July 2023, the value of one penalty unit increased to $313, in accordance with subsection 4AA(3) of the *Crimes Act 1914*, which provides for indexation of penalty units.

6 Clause 14.

the Commonwealth Chief Medical Officer (CMO) by legislative instrument.[7] An individual may ask the CMO to correct personal information about them in the registry, and the CMO must correct the registry if they receive a request to do so.[8]

1.170 A person would be permitted to collect, make a record of, disclose or otherwise use protected information on the registry in a range of circumstances, including where:

(a) they are an officer or employee of a Commonwealth authority or are engaged to perform work relating to the purposes of the registry, and are doing so for the purposes of the registry;

(b) they are a prescribed medical practitioner accessing information about a diagnosis or progression of an occupational respiratory disease in relation to an individual and it is for the purposes of providing healthcare to that person, or checking whether that information is already on the registry;

(c) the person does so for the purposes of performing functions or duties, or exercising powers, under this bill;

(d) they are required or authorised to do so by or under a law of the Commonwealth, or a state or territory;[9]

(e) they are the CMO and are doing so for the purposes of disclosing information to an enforcement body;

(f) the information is disclosed to the person for the purpose of including information in the registry (under clause 21), and the collection, recording, disclosure or use is for the purpose for which the information was disclosed to the person; or

(g) pursuant to a court, tribunal or coronial order.[10]

1.171 Subclause 21(3) would restrict the type of information that may be disclosed to a person where it is for the purposes of research. In these circumstances, the person must not be provided with information that identifies or could identify the most recent workplace (or main workplace) where they were exposed to a

7 Clause 12.

8 Clause 19.

9 In this regard, the minister's second reading speech states that Queensland and New South Wales have existing registers that require the mandatory reporting of some occupational respiratory diseases by physicians, and the bill allows for states with such registers to provide in their state legislation that the notification of these diseases will occur through the National Registry so that there is no need for a physician in those states and territories to notify twice: Ms Ged Kearney, *Senate Hansard*, Wednesday 21 June 2023, p. 9..

10 Subclause 21(2). A note related to subclause 21(2) states that this subclause is an authorisation for the purposes of other laws, including the Australian Privacy Principles.

respiratory disease-causing agent, or the prescribed medical practitioner who notified the information.[11]

1.172 The CMO, or a contracted service provider, would also be permitted to disclose any minimum notification information in relation to an individual on the registry to a Commonwealth authority prescribed by the rules for purposes connected with the performance of its functions or exercise of its powers.[12] That authority could then collect, make a record of, disclose or otherwise use that information for any of the purposes for which it was disclosed.[13]

1.173 Clause 23 would provide, with some exceptions, that it is an offence to record, disclose or otherwise use protected information other than as the bill authorises.[14]

1.174 The CMO would be required to publish an annual report containing statistical information relating to the registry, and may publish other reports at any time relating to information included on the registry and of a kind prescribed by legislative instrument.[15] If protected information were to be published or otherwise made available, the CMO would be required to 'take such steps as are reasonable in the circumstances to ensure that the information is de-identified' (meaning that the information is no longer about an identifiable or reasonably identifiable person, workplace, employer or business).[16]

Preliminary international human rights legal advice

Rights to health and just and favourable conditions of work

1.175 By establishing a registry to track instances of occupational respiratory diseases, this measure would likely promote the right to health and the right to just and favourable conditions of work. The right to health is the right to enjoy the highest attainable standard of physical and mental health.[17] The right to just and favourable conditions of work includes the right of all workers to safe working

11 Subclause 21(3) states that further restrictions may be set out in the rules. Subclause 21(4) further provides that if guidelines approved under section 95 or 95A of the *Privacy Act 1988* would apply to a disclosure, the use of the information must be in accordance with the guidelines.

12 Clause 22.

13 Subclause 22(2). Subclause 22(3) further provides for disclosure to state or territory authorities where the information relates to a person residing in that state or territory.

14 See also clauses 2425.

15 Clause 26.

16 Subclauses 26(4)(5).

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

conditions.[18] The statement of compatibility notes that these rights would be promoted by this measure.[19] The statement of compatibility states that the bill assists the advancement of these rights as the registry would help identify industries, occupations, job tasks and workplaces where there is a risk of exposure to respiratory disease-causing agents and this would enable the application of timely and targeted interventions and prevention activities to reduce worker exposure and disease.[20]

Right to privacy

1.176 Establishing a registry which requires the provision of personal information, including potentially identifying affected workers by name on the registry without their consent, and permitting the use and disclosure of that personal information, also engages and limits the right to privacy.

1.177 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.[21] It also includes the right to control the dissemination of information about one's private life.

1.178 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.

1.179 The statement of compatibility identifies that the right to privacy would be limited by this bill.[22] With respect to the objective of the bill, it states that the registry will capture and share data on the incidence of respiratory diseases thought to be occupationally caused or exacerbated and that this information will aid the detection of new and emerging threats to workers' respiratory health, inform incidence trends, and assist in targeting and monitoring the effectiveness of interventions and prevention strategies.[23] This is a legitimate objective for the purposes of international human rights law, and the creation of this registry would appear to be rationally connected with that objective.

1.180 In considering the proportionality of the proposed limitation on the right to privacy, in order to be proportionate, a limitation should only be as extensive as is strictly necessary to achieve its legitimate objective and must be accompanied by

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

19 Statement of compatibility, p. 8.

20 Statement of compatibility, p. 8.

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

22 Statement of compatibility, pp. 4–8.

23 Statement of compatibility p. 3.

appropriate safeguards.[24] In making this assessment, it is necessary to consider several factors, including whether a proposed limitation is sufficiently circumscribed; whether it is accompanied by sufficient safeguards; and whether any less rights restrictive alternatives could achieve the same stated objective.

1.181 As to the medical conditions to which this registry may operate, the registry would distinguish between prescribed and non-prescribed occupational respiratory diseases, and would provide that conditions which have been prescribed by the legislative instrument must be notified to the registry, regardless of whether the patient consents. The statement of compatibility states that initially, silicosis will be the only prescribed occupational respiratory disease, reflecting a recommendation of the Final Report of the National Dust Disease Taskforce[25], and states that the minister would be able to prescribe further occupationally caused or exacerbated respiratory diseases after consultation with the CMO and state and territory authorities.[26] It would appear, therefore, that the scope of the registry will expand in future beyond the initial prescription of silicosis, and that more information about more people would therefore be provided to it.[27]

1.182 As to the scope of information which would be included on the register, the bill would provide for the making of a legislative instrument defining two categories of information to be included: minimum and additional notification information. These terms are not defined in the bill. The statement of compatibility states that 'minimum notification information' (which would be required to be provided) will include 'information identifying the individual diagnosed with an occupational respiratory disease, the respiratory disease, the individual's lung function, and the individual's belief as to where the last and main exposures occurred'.[28] However, it does not specify what 'identifying information' would include. The statement of compatibility further states that 'additional notification information' (which may only be provided with a patient's consent) may include 'information about an individual's relevant medical test results, demographic and lifestyle information including their smoking history, and details on each job where the individual believes they had an exposure to a respiratory disease-causing agent'.[29] Given the specificity with which

24 The United Nations (UN) Human Rights Committee has stated that legislation must specify in detail the precise circumstances in which interferences with privacy may be permitted *NK v Netherlands*, UN Human Rights Committee Communication No.2326/2013 (2018) [9.5].

25 Australian Government Department of Health and Aged Care, *National Dust Disease Taskforce Final Report to Minister for Health and Aged Care*, June 2021.

26 Statement of compatibility, p. 8.

27 For example, Safe Work Australia lists the following other occupational respiratory diseases: aluminosis, asbestosis, byssinosis, coal workers' pneumoconiosis, hard metal pneumoconiosis, talcosis, work-related asthma, chronic obstructive pulmonary disease, chronic bronchitis.

28 Statement of compatibility, p. 4.

29 Explanatory statement, p. 13.

these two categories of information are described in the explanatory materials, it is not clear why these definitions are not included in the bill itself. As drafted, the bill does not constrain the information which may be included in these categories.

1.183 The bill would require prescribed medical practitioners to notify the registry of the minimum notification information associated with diagnoses of occupational respiratory diseases prescribed by legislative instrument.[30] The scope of medical practitioners who may be required to provide this information is not clear, as they may be prescribed by legislative instrument. The explanatory memorandum states that initially, this will be limited to those practitioners with a medical speciality of respiratory and sleep medicine or occupational and environmental medicine.[31] However, it is not clear why this is not set out in the bill itself.

1.184 The bill further proposes requiring the provision of personal information to the registry without the consent of the individual, however the explanatory materials do not explain why this is necessary and proportionate. It is unclear why information which identifies a person, and not merely information identifying their respiratory condition and the circumstances in which they believe it was caused (including the type of workplace), is necessary to be provided to the register in order for it to achieve its stated objective (including given that the mechanism proposed would mean that the individual is already connected with medical treatment). In this regard, it is also unclear whether there may be a risk that persons could avoid seeking medical treatment or diagnoses because of these mandatory notification obligations. It is also unclear why an individual may not object to the provision of their personal information (or some of their personal information) to this registry. In addition, the explanatory materials do not explain why it is necessary for this information to be required to be provided in circumstances where the person in question objects, and why it does not establish a mechanism by which the person (or the relevant physician) may request their case be treated differently (for example, where they are afraid of an employer finding out they allege they contracted the lung illness at their workplace, or because of other privacy concerns).

1.185 The bill would provide that a person must consent to the undefined 'additional notification information' being provided to the registry. However, it is not clear whether patients would be advised that the information they agree to provide (for example, about their medical test results) may then be accessed and disclosed by a range of agencies for a range of purposes. As such, further information is required in order to establish whether the bill would ensure that patients provide informed consent. It is also unclear why the bill does not allow flexibility to provide only limited information where, for example, a doctor considers it to be in the best interests of the patient.

30 Clause 14.

31 Explanatory memorandum, p. 16.

1.186 As to how access to the registry would function, clause 21 provides that a range of persons may access, disclose or otherwise use information on the registry. The minister's second reading speech states that the registry would be maintained as an online portal.[32] However, it is not clear how that information would be accessed (for example, whether a person authorised to access the registry would be able to see all entries on the registry and scroll through them, whether they could search by name or other identifying information to see individual entries, or whether they would be required to submit a request in relation to an individual entry and would see no information if no such entry existed).

1.187 An additional consideration in assessing the proportionality of the measure is whether it is subject to oversight and review. In this regard, the bill does not provide for a review of the scheme to be undertaken, nor does it establish a mechanism by which a person may seek a review of the inclusion of their information on the registry, or subsequent decisions relating to its use or disclosure. Consequently, further information is required to assess the proportionality of this proposed measure.

Committee view

1.188 The committee considers that establishing a National Occupational Respiratory Diseases Registry, to help identify risks of exposure to respiratory disease-causing agents, promotes the rights to health and to just and favourable conditions of work, but also engages and limits the right to privacy. The committee considers further information is required to assess the compatibility of this measure with the right to privacy, and as such seeks the minister's advice in relation to:

(a) why the bill does not define key terms (including listing silicosis as an occupational respiratory disease, and defining categories of medical practitioner and minimum and additional notification information to which the registry would apply);

(b) why information which identifies a person is necessary to be provided to the register in order for it to achieve its stated objective;

(c) why the bill does not establish a mechanism by which the patient (or their relevant physician) may request they not be required to provide all or some information to the registry;

(d) whether individuals would be advised of how their information could be disclosed and used if they elected to provide additional notification information;

(e) why the bill does not provide flexibility to provide only limited information where, for example, a doctor considers it to be in the best interests of the patient;

32 See, the minister's second reading speech.

(f) the process by which information on the registry would be accessed, and whether persons required to provide information to the registry, or those empowered to access the registry, would be able to see the content on the registry generally; and

(g) what oversight and review mechanism of the proposed scheme, and decisions made in relation to it, would apply.

Legislative instruments

Migration (Granting of contributory parent visas, parent visas and other family visas in financial year 2022/2023) Instrument (LIN 23/016) 2023 [F2023L00609][1]

Purpose	This legislative instrument determines the maximum number of visas that may be granted for certain classes of visas in the financial year from 1 July 2022 to 30 June 2023
Portfolio	Home Affairs
Authorising legislation	*Migration Act 1958*
Last day to disallow	Exempt from disallowance
Rights	Protection of the family; rights of the child

Capping numbers of parent visas

1.189 This legislative instrument determines the maximum number of visas that may be granted for certain classes of visas[2] between 1 July 2022 and 30 June 2023 (inclusive). In particular, the instrument specifies that a maximum of 6,700 contributory parent visas, 1,700 parent visas and 500 other family visas may be granted in the 2022–2023 financial year.[3]

Preliminary international human rights legal advice

Right to protection of the family and rights of the child

1.190 Capping the number of parent visas and other family visas, which may limit the ability of certain family members (including parents of children aged under 18) to join others in Australia, engages and may limit the right to protection of the family

[1] This entry can be cited as: Parliamentary Joint Committee on Human Rights, Migration (Granting of contributory parent visas, parent visas and other family visas in financial year 2022/2023) Instrument (LIN 23/2016) 2023 [F2023L00609], *Report 8 of 2023*; [2023] AUPJCHR 76.

[2] The classes of visas are 'contributory parent visa', 'parent visa' and 'other family visa'. The types of visas that fall within each class are set out in subsection 3(1).

[3] Sections 4–6. Subsections 4(2) and 5(2) provide that of the maximum number of contributory parent visas and parent visas, a specified maximum number of visas may be granted to applicants who satisfy additional criteria set out in the Migration Regulations 1994 relating to investor retirement and retirement subclass visas.

and the rights of the child.[4] An important element of protection of the family[5] is to ensure family members are not involuntarily separated from one another. Laws and measures which prevent family members from being together will therefore engage this right. While the state has a right to control immigration, the right to protection of the family requires Australia to create the conditions conducive to family formation and stability, including the interest of family reunification.[6] The term 'family' is to be understood broadly as to include all those comprising a family as understood in the society concerned,[7] and is not necessarily displaced by geographical separation if there is a family bond to protect.[8] This includes couples and the parent-child relationship, and may include parents and their adult children[9] and other family members,[10] depending on the level of dependency, shared life and emotional ties. As such, in relation to those applicants who can demonstrate that there is a family bond with persons in Australia to protect, a failure to allow for their family reunification due to the visa caps set by this instrument limits the right to protection of the family.

1.191 Additionally, Australia is required to ensure that, in all actions concerning children, the best interests of the child are a primary consideration, and to treat applications by minors for family reunification in a positive, humane and expeditious

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4 See, for example, *Sen v the Netherlands,* European Court of Human Rights Application no. 31465/96 (2001); *Tuquabo-Tekle And Others v The Netherlands,* European Court of Human Rights Application no. 60665/00 (2006) [41]; *Maslov v Austria,* European Court of Human Rights Application no. 1638/03 (2008) [61]-[67]. The Parliamentary Joint Committee of Human Rights has raised these human rights concerns in relation to similar instruments in previous years. See, e.g. Migration (Granting of contributory parent visas, parent visas and other family visas in the 2020/2021 financial year) Instrument (LIN 21/025) 2021 [F2021L00511], *Report 6 of 2021* (13 May 2021) and *Report 7 of 2021* (16 June 2021).

5 Protected by articles 17 and 23 of the International Covenant on Civil and Political Rights and article 10 of the International Covenant on Economic, Social and Cultural Rights. Those treaties state that the family 'is the natural and fundamental group unit of society and is entitled to protection by society and the State' and that the 'widest possible protection and assistance should be accorded to the family'.

6 See *Ngambi and Nebol v France,* United Nations Human Rights Committee, Communication No. 1179/2003 (2004) [6.4]–[6.5].

7 See General Comment No. 16, *The right to respect of privacy, family, home and correspondence, and protection of honour and reputation (Art. 17)*, 8 April 1988.

8 See *Ngambi and Nebol v France,* United Nations Human Rights Committee, Communication No. 1179/2003 (2004) [6.4].

9 See *Warsame v Canada*, United Nations Human Rights Committee, Communication No. 1959/2010 (2011) [8.8].

10 See *Nystrom v Australia*, United Nations Human Rights Committee, Communication No. 1557/2007 (2011) [7.8], where the Committee referenced the applicant's family life with his mother, sister and nephews.

manner.[11] As such, capping the number of parent visas for parents of children aged under 18, which may result in the separation, or continued separation, of children from their parent (such as where a child is in Australia with one parent but the other parent is in another country and is ineligible for any other type of visa), engages and limits the rights of the child.

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

1.193 As this legislative instrument is exempt from disallowance by the Parliament, it is not required to be accompanied by a statement of compatibility with human rights.[12] As such, no assessment of the compatibility of this measure with the rights to protection of the family or the rights of the child has been provided. It is therefore not clear what is the legitimate objective of this measure, nor whether the measure is proportionate to that objective. Further information is therefore required to assess the compatibility of this instrument with these rights.

Committee view

1.194 The committee notes that capping the number of parent visas and other family visas for the 2022–2023 financial year engages and may limit the right to protection of the family and the rights of the child. Noting that the instrument is not accompanied by a statement of compatibility (as this is not required as a matter of law), 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 setting a cap on the number of parent and other family visas seeks to achieve a legitimate objective for the purposes of international human rights law;

(b) whether the cap on the number of visas is a reasonable and proportionate measure to achieve the stated objective;

(c) whether any children under 18 years would be likely to be separated from their parents as a result of caps imposed on the numbers of parent visas granted;

(d) whether there is any discretion to ensure family members are not involuntarily separated as a result on the cap of the number of parent and other family visas;

(e) what is the average length of time for visas capped under this legislative instrument to be finally processed, and are these timeframes

[11] Convention on the Rights of the Child, articles 3(1) and 10.

[12] *Human Rights (Parliamentary Scrutiny) Act 2011*, section 9.

consistent with the right to protection of the family and the rights of the child; and

(f) whether the right to the protection of the family and the rights of the child were considered when these capped numbers were determined.

Chapter 2

Concluded matters

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

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

Bills

Appropriation Bills 2023-2024[2]

Purpose	These six bills[3] seek to appropriate money from the Consolidated Revenue Fund for services
Portfolio	Finance
Introduced	House of Representatives, 9 May 2023. Received Royal Assent on 19 June 2023
Rights	Multiple rights

2.3 The committee requested a response from the minister in relation to the bills in *Report 6 of 2023*.[4]

Appropriation of money

2.4 These bills (now Acts) 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.

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

2 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Appropriation Bills 2023-2024, *Report 8 of 2023*; [2023] AUPJCHR 77.

3 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.

4 Parliamentary Joint Committee on Human Rights, *Report 6 of 2023* (14 June 2023), pp. 9-15.

Summary of initial assessment

Preliminary international human rights legal advice

Multiple rights

2.5 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).[5] The rights of people with disability, children and women may also be engaged where policies have a particular impact on vulnerable groups.[6]

2.6 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.[7]

2.7 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.

2.8 The statements of compatibility accompanying these bills do not identify that any rights are engaged by the bills.

Committee's initial view

2.9 The committee sought the advice of the Minister for Finance as to whether the appropriation bills (now Acts) 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

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

6 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.

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

retrogressive measure) in the realisation of economic, social and cultural rights; and

(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).

2.10 The full initial analysis is set out in *Report 6 of 2023*.

Minister's response[8]

2.11 The minister advised:

> As set out in the statements of compatibility with human rights in explanatory memoranda to the Appropriation Bills, given the limited legal effect of the Appropriation Bills, they do not engage or otherwise affect the rights or freedoms relevant to the *Human Rights (Parliamentary Scrutiny) Act 2011* (the Act). This position is consistent with that of successive Governments as previously expressed to the committee.
>
> The detail of proposed Government expenditure and the Budget generally, appears in the Budget Papers rather than Appropriation Bills, with more specific detail provided in the Portfolio Budget Statements prepared for each portfolio and authorised by the responsible Minister. This allows the examination of proposed expenditure and budgetary processes through the Senate Estimates process.
>
> The annual Appropriation Acts do not generally provide legislative authority for Commonwealth expenditure on particular activities. This authority is provided in other legislation or legislative instruments. It is more appropriate that an assessment of the impact of proposed Commonwealth expenditure on human rights, including those of vulnerable groups, be incorporated in explanatory documentation accompanying that other legislation, as per the current practice.
>
> It is neither practicable nor appropriate for explanatory memoranda to the Appropriation Bills to include an assessment of overall trends in Australia's progressive realisation of economic, social and cultural rights; the impact of budget measures on vulnerable groups; and an assessment of human rights compatibility for key individual measures.

Concluding comments

International human rights legal advice

2.12 The minister stated that appropriation bills do not affect human rights and it is not appropriate for the explanatory memoranda to the appropriation bills to include an assessment of overall trends in Australia's progressive realisation of

8 The minister's response to the committee's inquiries was received on 26 June 2023. This is an extract of the response. The response is available in full on the committee's website.

economic, social and cultural rights; the impact of budget measures on vulnerable groups; and an assessment of human rights compatibility for key individual measures. However, as set out in the initial analysis, 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.

2.13 Further, the Office of the United Nations High Commissioner for Human Rights emphasises the close relationship between public budgets and human rights, and highlights instances in which international human rights oversight bodies have identified the importance of state budgets in their assessment of compliance with human rights obligations.[9] It states that:

> If governments are to use the budget to effectively realize people's rights, they need to understand the relationship of the budget to the human rights guarantees in their country's constitution and laws, and in the…international human rights treaties the government has ratified. They need to understand in detailed and concrete terms how they can meet their human rights obligations in the way they raise revenue, allocate, spend and audit the budget.[10]

2.14 The appropriation of any funds, or more funds in comparison with earlier amounts, may promote human rights. The provision of no funds, or a reduction in funding in comparison with earlier appropriated sums, may limit rights. Such a limit will not necessarily be impermissible, but it would require that the limit be identified, and explanation given as to whether the limitation is reasonable, necessary and proportionate.

2.15 The minister stated that the details of proposed government expenditure appear in the Budget Papers, and that more specific details appear in Portfolio Budget Statements. However, these documents do not identify whether specific measures promote or limit human rights. For example, the 2023-24 Department of Social Services Portfolio Budget Statement states that increased funding was provided to the housing and homelessness program as part of the indexation

9 UN Office of the High Commissioner for Human Rights, *Realising Human Rights through Government Budgets* (2017) p. 7.

10 UN Office of the High Commissioner for Human Rights, *Realising Human Rights through Government Budgets* (2017) p. 12.

framework.[11] However, it then indicates a reduction in funding relating to housing and homelessness outcomes pursuant to Appropriation Bill No. 1 in comparison with the prior financial year, and predicts further reductions in funding to the 2026-27 financial year.[12] The document does not explain whether a greater or lesser amount is being budgeted for this particular outcome overall, nor does it explain why the budgeted expenditure relating to housing and homelessness is intended to decrease, and how this is compatible with the right to housing (as an aspect of the right to an adequate standard of living).[13]

2.16 The minister also stated that legislation and legislative instruments provide legislative authority for Commonwealth expenditure on particular activities, and that it is more appropriate that an assessment of the impact of proposed Commonwealth expenditure on human rights, including those of vulnerable groups, be incorporated in explanatory documentation accompanying that other legislation. One source of legislative authority to spend appropriated funds is the *Financial Framework (Supplementary Powers) Act 1997* and legislative instruments made pursuant to it. However, because these individual legislative instruments facilitate the spending of already appropriated money on specific activities, the statements of compatibility with human rights will typically state that they will promote human rights. They do not consider the individual measures within their broader budgetary context and as such, if there is a reduction in spending (via a lower amount of appropriation), this will not be reflected in the statement of compatibility that accompanies the legislative instrument that allocates the funding that is available.

2.17 For example, the Financial Framework (Supplementary Powers) Amendments (Social Services Measure No. 2) Regulations 2023 established legislative authority for the funding of two disability services for two years.[14] The explanatory statement states that both of these services had existed prior to this legislation.[15] The statement of compatibility states that funding these services for two years will 'ensure these important services continue to operate', and concludes

11 Portfolio Budget Statements 2023–24, *Budget Related Paper No. 1.14, Social Services Portfolio* (2023) p. 18.

12 Portfolio Budget Statements 2023–24, *Budget Related Paper No. 1.14, Social Services Portfolio* (2023) pp. 69–71.

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

14 See Financial Framework (Supplementary Powers) Amendments (Social Services Measure No. 2) Regulations 2023 [F2023L00544]. Of note, the explanatory statement indicates that the constitutional authority for the making of this legislative instrument includes the external affairs power to support implementing Australia's obligations under the UN Convention on the Rights of Persons with Disabilities.

15 The explanatory statement notes that these services were established more than 20 years prior to this legislative instrument.

therefore that the measure promotes rights of people with disability.[16] However, the explanatory materials do not explain whether, viewed in its broader context, this specific funding constitutes a real increase, decrease, or maintenance in funding. Consequently, in this example, it is not clear at what stage consideration of the level of funding given to these specific services would have identified a real increase or reduction over time. This raises questions as to the sufficiency of the assessment of the impact of proposed Commonwealth expenditure on human rights in legislation authorising the expenditure, post appropriation.

2.18 It follows from the fact that appropriations may engage human rights for the purposes of international human rights law, that 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:

- overall trends in the progressive realisation of economic, social and cultural rights (including any retrogressive trends or measures);[17]
- 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);[18] and
- key individual measures which engage human rights, including a brief assessment of their human rights compatibility.

2.19 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.[19]

16 Statement of compatibility, p. 1.

17 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.

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

Committee view

2.20 The committee thanks the minister for their response. As the committee has consistently stated since 2013,[20] the appropriation of funds facilitates the taking of actions which may affect the progressive realisation of, 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.

2.21 The committee acknowledges that appropriation bills may present particular difficulties given their technical and high-level nature as they generally include appropriations for a wide range of programs and activities across many portfolios. The committee notes the minister's advice that further information about expenditure can be found in budget statements and legislation authorising expenditure. However, as the budget itself is not legislation liable to this committee's scrutiny, and because individual legislation may not identify whether funding for specific measures is being increased or decreased, the committee considers that these are not sufficient alternatives.

2.22 The committee notes that it may not be appropriate to assess human rights compatibility for each individual measure in appropriation bills. 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 committee considers that appropriation bills are a

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19 There are a range of resources to assist in the preparation of human rights assessments of budgets. See, e.g. 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).

20 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.

key opportunity for the Parliament (and for this committee) to consider the compatibility of these measures with human rights within the overall budgetary context.

Suggested action

2.23 The committee's expectation is that statements of compatibility with human rights accompanying appropriations bills should address the compatibility of measures which directly impact human rights and which are not addressed elsewhere in legislation. In particular, the committee expects that where the appropriations bills propose a real reduction in funds available for expenditure on certain portfolios or activities that may impact human rights, the statement of compatibility should identify this and explain why this is a permissible limit.

2.24 The committee draws these human rights concerns to the attention of the minister and the Parliament for consideration when statements of compatibility are prepared for future appropriations bills.

Inspector-General of Live Animal Exports Amendment (Animal Welfare) Bill 2023[1]

Purpose	The bill seeks to make a number of amendments to the *Inspector-General of Live Animal Exports Act 2019*, including to expand the office of the Inspector-General and rename it the 'Inspector-General of Animal Welfare and Live Animal Exports'; expand the objects of the Act and the functions of the Inspector-General; expand the ways in which a review may be started; provide for the independence of the Inspector-General; clarify administrative arrangements; and make consequential amendments to the *National Anti-Corruption Commission Act 2022* to reflect the renaming of the Inspector-General.
Portfolio	Agriculture, Fisheries and Forestry
Introduced	House of Representatives, 24 May 2023
Right	Privacy

2.25 The committee requested a response from the minister in relation to the bill in *Report 7 of 2023*.[2]

Collection, use and disclosure of personal information

2.26 This bill seeks to amend the *Inspector-General of Live Animal Exports Act 2019* (the Act) to expand the functions of the Inspector-General of Animal Welfare (Inspector-General) in relation to their powers of review.[3] In particular, the Inspector-General would, among other things, be empowered to review the performance of functions, or exercise of powers, by livestock export officials under the animal welfare and live animal export legislation and standards in relation to the export of livestock.[4] A livestock export official means: an authorised officer (such as an employee of a Commonwealth body); an accredited veterinarian; or the Secretary of the Department of Agriculture, Fisheries and Forestry or a delegate of the

1 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Inspector-General of Live Animal Exports Amendment (Animal Welfare) Bill 2023, *Report 8 of 2023*; [2023] AUPJCHR 78.

2 Parliamentary Joint Committee on Human Rights, *Report 7 of 2023* (21 June 2023), pp. 7-12.

3 Items 11 and 12.

4 Item 11, proposed paragraph 10(1)(a).

Secretary.[5] The Inspector-General would also be conferred ancillary powers to do all things necessary or convenient to be done for, or in connection with, the performance of the Inspector-General's functions.[6] The Act currently confers information gathering powers on the Inspector-General, enabling them to require a person to give information or documents if they reasonably believe the person has information or documents relevant to the review.[7] The Act also requires the Inspector-General to publish a report on each review conducted.[8]

Summary of initial assessment

Preliminary international human rights legal advice

Right to privacy

2.27 By expanding the Inspector-General's review powers, including broadening the scope of matters which may be subject to review, and conferring ancillary powers on the Inspector-General, the measure would have the effect of expanding the scope of information, including personal information, that may be obtained, used and disclosed by the Inspector-General in performance of these functions. The collection, use and disclosure of personal information engages and limits the right to privacy. The statement of compatibility acknowledges this, and notes that the Inspector-General may require the provision of information or documents from various persons in undertaking a review and must then, under the current Act, publish a report for each review undertaken.[9]

2.28 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

5 *Inspector-General of Live Animal Exports Act 2019*, section 5. An authorised officer and an accredited veterinarian have the meaning given in the *Export Control Act 2020*, see sections 12, 291 and 312.

6 Item 12.

7 *Inspector-General of Live Animal Exports Act 2019*, section 11. The Inspector-General may also make copies of, or take extracts from, a document produced. A person may be liable to a civil penalty if they do not comply with the requirement to answer questions, give information or produce documents: subsection 11(3). A person may commit an offence or be liable to a civil penalty if the person gives false or misleading information or produces false or misleading documents: see sections 34 and 35 and sections 137.1 and 137.2 of the *Criminal Code*.

8 *Inspector-General of Live Animal Exports Act 2019*, subsection 10(3).

9 Statement of compatibility, pp. 26–27.

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

dissemination of information about one's private life.[11] 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.

2.29 Expanding the Inspector-General's functions and review powers, in order to improve compliance with legislation and enhance accountability and transparency of public officials in the performance of their functions, is capable of constituting a legitimate objective for the purposes of international human rights law. The collection, use and disclosure of personal information appears likely to be effective to achieve this objective.

2.30 However, questions remain in relation to proportionality. In order to be proportionate, a limitation on the right to privacy should only be as extensive as is strictly necessary to achieve its legitimate objective and must be accompanied by appropriate safeguards. The United Nations Human Rights Committee has stated that legislation must specify in detail the precise circumstances in which interferences with privacy may be permitted.[12]

Committee's initial view

2.31 The committee noted that the collection, use and disclosure of personal information engages and limits the right to privacy, and sought the minister's advice in relation to:

(a) the likely type or scope of personal information that may be obtained, used or disclosed by the Inspector-General in performance of their functions;

(b) the specific safeguards in the Privacy Act and in the information management framework under the current Act that would operate to protect the right to privacy in the context of this measure; and

(c) whether, where the report relating to a review conducted by the Inspector-General is required to be published, it would be publicly available, and if so, whether it would contain personal or identifying information.

2.32 The full initial analysis is set out in *Report 7 of 2023*

11 Every person should be able to ascertain which public authorities or private individuals or bodies control or may control their files and, if such files contain incorrect personal data or have been processed contrary to legal provisions, every person should be able to request rectification or elimination. UN Human Rights Committee, *General Comment No. 16: Article 17* (1988) [10]. See also, *General Comment No. 34 (Freedom of opinion and expression)* (2011) [18].

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

Minister's response[13]

2.33 The minister advised:

The likely type or scope of personal information that may be obtained, used or disclosed by the Inspector-General in the performance of their functions

It is likely that the type and scope of personal information that may be obtained, used or disclosed by the Inspector-General in the performance of their expanded functions will be substantially similar to what the Inspector-General of Live Animal Exports currently collects, which is described below.

Currently, the type and scope of personal information collected by the Inspector-General of Live Animal Exports includes names and contact details received through submissions from stakeholders made as part of a review process, and information regarding officials and exporters during the undertaking of a review, which may include the names of contact details of officials and exporters. Additionally, under the Act, the Inspector-General can compel any person (excluding a foreign person or body) to provide information or documents relevant to a review. There are appropriate safeguards around how information is handled, which are discussed below.

The Bill expands both the functions of the Inspector-General and the objects of the Act. The effect of this is that the Inspector-General may conduct reviews on a wider range of matters, all of which are critical to the performance of functions by the Inspector-General in that office's role to provide additional assurance and oversight on animal welfare within the livestock export industry.

As the Statement of Compatibility of the Bill acknowledges, the expansion of the Inspector General's functions (and therefore the expansion of the reviews the Inspector-General may conduct) may require the provision of information or documents from various persons.

However, whilst the Bill proposes to expand the functions of the Inspector-General, they are exhaustively delineated in new subsection 10(1) of the Bill. Further, each function is necessarily constrained by its express terms in subsection 10(1). Therefore, whilst the Inspector-General would be able to undertake reviews into an expanded set of matters (which may require the provision of personal information), the scope of those reviews are reasonably, appropriately and proportionately constrained by the Bill's provisions. This would, in turn, mean that any information collected as part of a review would be in pursuance of a legitimate objective and would similarly be reasonably, appropriately and proportionately constrained.

13 The minister's response to the committee's inquiries was received on 4 July 2023. This is an extract of the response. The response is available in full on the committee's website.

The ancillary powers under subsection 10(2A) of the Bill may only be exercised if necessary or convenient for, or in connection with, the performance of the Inspector-General's functions. As such, any ancillary powers may only be exercised in pursuance of the exhaustively defined functions, which are limited in scope in the legislation.

Further, the Bill provides expanded objects for the Act under new section 3. Similarly, these objects are exhaustively delineated and are to be achieved with a view to ensuring that the animal welfare and live animal export legislation and standards in relation to the export of livestock are complied with. As such, the performance of the Inspector-General's functions and the exercise of the Inspector-General's powers under the Act are by necessity reasonably, appropriately and proportionately constrained by the objects of the Act and may only be performed or exercised in pursuance of these objects.

The Bill does not impact on how the Inspector-General may conduct a review and does not specifically outline what specific information may be collected as it would not be appropriate to do so.

Therefore, it is unlikely that the proposed new objects and functions, and ancillary powers, will result in significantly different types, or a significantly different scope, of information being collected by the Inspector-General compared to what is currently collected.

The specific safeguards in the Privacy Act and in the information management framework under the current Act that would operate to protect the right to privacy in the context of this measure.

The Committee has requested advice on specific safeguards in the *Privacy Act 1988* (Privacy Act), and on the existing information management framework under the Act, that would operate to protect the right to privacy in the context of this Bill.

As noted in the Explanatory Memorandum, any information or documentation, required by the Inspector-General to be provided in order to conduct a review (including personal information), will be managed in compliance with both the Act and the Privacy Act.

The Act contains an existing information management framework in sections 23 to 31 which provide robust protection for information provided under or in accordance with the Act (defined as "protected information"). Protected information includes personal information collected under, or in accordance with, the Act. The Act's information management framework allows only for limited disclosure of protected information, for the below specified purposes and circumstances:

- for the purposes of performing functions or exercising powers under the Act (section 24)
- for the purposes of law enforcement or court proceedings (sections 25 and 26)

- where required to do so by an Australian law (section 27)
- with the consent of the person to whom the information relates (section 28)
- to the person who gave the information (section 29).

The effect of the Act's information management framework is that protected information may only be used or disclosed for, and in, these exhaustively delineated and limited purposes and circumstances. The framework is further supported by an offence provision for unauthorised use or disclosure (described below). This provides robust protection. Further, the purposes for which, and the circumstances in which, disclosure of protected information may occur are reasonable, appropriate and proportionate. They are also in pursuance of legitimate objectives - for example, where information is ordered to be disclosed by a court as it is relevant for proceedings, or where the information is reasonably necessary for, or directly related to, one or more enforcement related activities being conducted by, or on behalf of, that enforcement body.

Section 30 of the Act provides that rules (made by the Minister under section 41) may authorise a person to use or disclose the information for purposes other than those referred to in sections 24 to 29, however there are currently no rules made pursuant to section 30. If the Minister does make rules pursuant to section 30, such rules will be subject to Parliamentary scrutiny and may be disallowed, as provided by the *Legislation Act 2003,* as the rules are to be made by legislative instrument under section 41.

Section 31 of the Act contains an offence provision for the unauthorised disclosure of protected information. A person who contravenes this provision may face a maximum of 2 years imprisonment or a penalty of 120 penalty units, or both. As such, the Inspector-General's ability to use and disclose personal information will be constrained by both the Act and the Privacy Act.

It is not appropriate to further constrain the Inspector-General's management of information, without adversely impinging on the office's independence which is critical for the performance of its functions under the Act.

Relevantly, the Privacy Act also provides specific protections under the following Australian Privacy Principles (APPs):

- APP 5 - notification of the collection of personal information. APP 5 requires that entities must take reasonable steps to notify the individual on a number of matters as applicable in the circumstances in relation to the collection of personal information, including the purpose for which the entity collects the personal information.
- APP 6 - use or disclosure of personal information. If an entity holds personal information about an individual that was collected for a

particular purpose (the primary purpose), the entity must not use or disclose the information for another purpose (the secondary purpose) unless, relevantly:

- the individual has consented to the use or disclosure of the information; or
- one of the following exceptions applies:
    - the individual would reasonably expect the APP entity to use or disclose the personal information for the secondary purpose and the secondary purpose is related to the primary purpose.
    - the use or disclosure of the information is required or authorised by or under an Australian law or a court/tribunal order.
    - the APP entity reasonably believes that the use or disclosure of the information is reasonably necessary for one or more enforcement related activities conducted by, or on behalf of, an enforcement body.

While other exceptions are provided by the Privacy Act under APP 6, they would not generally be applicable in the context of the Inspector-General undertaking a review.

From a broader perspective, APP 1 also requires entities to take reasonable steps to implement practices, procedures and systems that will ensure compliance with the APPs and enable them to deal with enquiries or complaints about privacy compliance. In line with APP 1**,** the Inspector-General of Animal Welfare and Live Animal Exports will need to conduct an assessment of the impact of reviews and review reports on the privacy of individuals (beginning with preliminary or threshold assessment) to ensure that any impact on the privacy of individuals are appropriately managed to minimise or eliminate that impact. This will help ensure that the impact of any proposed disclosure of personal information is minimised or eliminated, while ensuring that the objects of the Act are met. For example, anonymous or redacted personal information in review reports could be effective safeguards where appropriate.

Whether, where a report relating to a review conducted by the Inspector-General is required to be published, it would be publicly available, and if so, whether it would contain personal or identifying information

Currently, the Inspector-General publishes reviews on their website, at www.iglae.gov.au. This is in line with requirements under the Act, including reports under subsection 10(3) (the Inspector General must publish a report on each review conducted). This requirement under the Act would continue to apply.

Furthermore, the information management provisions under the Act, and the Privacy Act, as outlined above, would also apply to these published

reviews. This would include with respect to personal or identifying information.

Concluding comments

International human rights legal advice

2.34 The minister advised that the proposed expansion of the Inspector-General's review powers is unlikely to result in significantly different types, or a significantly different scope, of information being collected by the Inspector-General compared to what is currently collected. The minister advised that currently, the type and scope of personal information collected includes names and contact details received through submissions from stakeholders during a review process, and information regarding officials and exporters during the undertaking of a review, which may include the names of contact details of officials and exporters. The minister states that the proposed new functions are comprehensively set out in the bill and as the scope of those reviews are reasonably, appropriately and proportionately constrained in the bill, any information collected as part of a review would be similarly constrained.

2.35 The minister gave detailed advice as to the applicable privacy protections in the Act and under the Privacy Act, including in relation to the notification of the collection of personal information; the use or disclosure of personal information; and the requirement to take reasonable steps to implement practices, procedures and systems that will ensure compliance with the privacy principles. In this regard, the minister advised that the Inspector-General will need to conduct an assessment of the impact of reviews and review reports on the privacy of individuals to ensure that any impact on the privacy of individuals is appropriately managed to minimise or eliminate that impact. The minister stated, as an example, that anonymous or redacted personal information in review reports could be effective safeguards where appropriate. Further, the minister advised that these privacy safeguards would also apply to published reviews by the Inspector-General.

2.36 Noting that the scope of the Inspector-General's review powers are constrained by the bill, the type of personal information likely to be obtained is relatively narrow, and the privacy protections that are applicable, it appears likely that any limitation on the right to privacy by this measure would be permissible.

Committee view

2.37 The committee thanks the minister for this response. The committee considers that expanding the Inspector-General's functions and review powers, to improve compliance with legislation and enhance accountability and transparency of public officials in the performance of their functions, pursues a legitimate objective for the purposes of international human rights law. The collection, use and disclosure of personal information also appears likely to be effective to achieve this objective. The committee considers there are sufficient safeguards to ensure that any limitation on the right to privacy is likely to be proportionate.

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

Suggested action

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

Social Services Legislation Amendment (Child Support Measures) Bill 2023[1]

Purpose	This bill seeks to amend *the Child Support (Registration and Collection) Act 1988* 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 (received Royal Assent on 23 June 2023)
Rights	Freedom of movement; equality and non-discrimination

2.40 The committee first considered this bill in *Report 5 of 2023*, seeking a response from the minister. The minister responded to the committee's initial questions and the committee considered this response and requested a further response in *Report 6 of 2023*.[2]

Departure authorisation certificates

2.41 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

1 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Social Services Legislation Amendment (Child Support Measures) Bill 2023, *Report 8 of 2023*; [2023] AUPJCHR 79.

2 Parliamentary Joint Committee on Human Rights, *Report 6 of 2023* (14 June 2023) pp. 16-25.

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

(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]

2.42 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 previous assessment

Preliminary international human rights legal advice

Rights to freedom of movement and equality and non-discrimination

2.43 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.

2.44 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 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.[6]

2.45 Relevant 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 based on nationality. As such, the measure also appears

3 These are the bases on which the Registrar must revoke a departure prohibition order pursuant to section 72I of the *Child Support (Registration and Collection) Act 1988*.

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 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: Article 12 (Freedom of Movement)* (1999) [13].

likely to engage 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.[7] 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).[8] 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.[9] 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.[10]

Committee view

2.46 The committee considered that further information was required to more fully assess the compatibility of this measure with the rights to freedom of movement and equality and non-discrimination, and in particular sought the minister's further advice in relation to:

(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

7 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.

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

9 *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].

10 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].

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.

2.47 This full analysis is set out in *Report 6 of 2023*.

Minister's response[11]

2.48 The minister advised:

Departure authorisation certificate

The measure amends the *Child Support (Registration and Collection) Act 1988* (the Act) to 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 (the certificate being necessary for them to leave Australia for another country).

The measure engages with the person's right to freedom of movement because the amendment provides the Child Support Registrar with an ability to refuse a departure authorisation certificate where a person

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

offers security, but the Registrar is not satisfied that arrangements will likely be made to wholly discharge the relevant outstanding child support or carer liability.

a. What other steps are taken to recover a debt while a departure prohibition order is in place?

While a departure prohibition order is in place, Services Australia will continue to pursue collection of outstanding amounts owed by the debtor using a range of powers, including:

• negotiated arrangements for voluntary payment by instalments;

• deducting child support from a parent's salary or wage;

• intercepting tax refunds;

• collecting via third parties such as banks;

• deducting payments from social security and other government payments;

• litigation action to recover the debt in any court with family law jurisdiction.

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?

In some cases, a person applies for a departure authorisation certificate (section 72K) before the Registrar has made a decision about whether a departure prohibition order must be revoked (section 721) on the basis the liability is completely irrecoverable (paragraph 72I(l)(c)). The Registrar may require a person to give security for their return to Australia to guard against that person departing Australia with a child support liability that is not completely irrecoverable.

The Registrar may consider it *likely* (but not certain) that they will be required to revoke a departure prohibition order in the future (paragraph 72L(3)(a)(i)). The requirement to give security for the person's return to Australia (paragraph 72L(3)(a)(ii)) provides for this uncertainty. Note, the Registrar may decide a security is not required if satisfied the person is likely to comply with the requirements of the departure authorisation certificate, if issued (paragraph 72L(2)(b)).

Otherwise, if the Registrar is satisfied that a person's child support liability *is* completely irrecoverable, then the Registrar must revoke the person's departure prohibition order (paragraph 72I(l)(c)). If the Registrar revokes the departure prohibition order, the person need not apply for a departure authorisation certificate to depart Australia for a foreign country (subsection 72K(l)) negating the need to provide security.

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)?

The Registrar is able to accept security where that security is raised by way of borrowed funds. Policy guidance is provided in Chapter 5.2.11 of the Child Support Guide which states "Security can be given by a bond or a deposit or by other means".

The Registrar will only accept a security that:

• is in a form that is readily convertible to cash, for example, bank cheque

• is offered by the debtor rather than third parties on the debtor's behalf

• is generally not significantly less in value than the amount of the debt owing.

Note: Security arising from a loan obtained by a debtor from a financial institution or a third party is not considered to be a payment from a third party.

d. What other steps must be taken to recover a child support debt prior to making a departure prohibition order?

The making of a departure prohibition order will only be considered by the Registrar once all other collection avenues have been investigated. This includes, but is not limited to the actions set out in the response to (a) above.

In addition, the Registrar also undertakes action to ensure the accuracy of the debt prior to making a departure prohibition order, including, but not limited to:

• resolving outstanding applications or changes that may affect the debt;

• ascertaining more accurate incomes for both parents;

• determining if a residence decision is required to be made; and

• advising the parent of their appeal rights if they disagree with a decision that led to the creation of the debt.

e. What is the average length of time that a departure prohibition order remains in place?

As at 23 June 2023, the average period of time a departure prohibition order was or has been in force (for all departure prohibition orders issued between 2017-18 and 2021-22) is:

• 463 days for departure prohibition orders which have been revoked.

• 1,275 days for departure prohibition orders which are still in force.

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?

When Services Australia receives a payment towards a child support parent's child support debt, the payment is allocated in priority to the debt first, and only then will any remainder be applied to late payment penalties or any other debt to the Commonwealth.

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?

The average debt amount indicated in the Explanatory Memorandum was inclusive of penalties, costs and fines. The average amount owed by a child support debtor subject to a departure prohibition order exclusive of penalties is **$27,320** (as at 23 June 2023).

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?

Paragraph 72l(l)(c) of the Act provides that the Registrar must revoke a departure prohibition order in respect of a person if 'the Registrar is satisfied that the liability is *completely* irrecoverable.' The word 'completely' presents a high threshold to be satisfied *(Naboush and Child Support Registrar* [2014) AATA 930 (15 December 2014), at [13]).

The Administrative Appeals Tribunal applied Naboush and expanded the test in *Peters and Child Support Registrar* (Child support second review) [2019] AATA l 719 (5 July 2019) (at [27] to [28]).

> *A debt is completely irrecoverable when there is no prospect that the debtor will be able to make any payment towards it. A high threshold must be satisfied to prove that a debt is completely irrecoverable. Even where a debtor has not received any income from work or income support payments for many years, their debt will not be regarded as completely irrecoverable if it is possible that the debtor could obtain work or financial assistance at some time in the future to meet at least part of the debt.*
>
> *…*
>
> *The test is whether the liability is "completely irrecoverable" and is not whether the total amount can be recovered.*

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.

As outlined in the response to question (b) above, the Registrar may permit a person subject to a departure prohibition order to travel on a number of grounds. The amendments made by the *Social Services Legislation Amendments (Child Support Measures) Act 2023* do not

substantively alter the existing provisions of the Act. That is, the nationality of a parent is not a relevant consideration in determining whether to revoke a departure prohibition order or issue a departure authorisation certificate.

Further, while some parents may have a greater need to travel due to their nationality, relevant considerations apply no more or less strenuously to those parents and do not operate, in intent or practice, to limit their travel more than any other parent.

The intent of the amendments, particularly those to subsection 72L(3) of the Act, is to prevent parents with financial means from exploiting a loophole of providing security to travel despite making no suitable arrangements to discharge their debt, and then having that security returned to them upon their return to Australia. The Act already permits the Registrar to issue a departure prohibition order upon a child support debtor limiting their right to freedom of movement; as such, these amendments do not create new restrictions on travel. Rather, they provide the Registrar greater discretion to consider the likelihood that the parent will discharge, or at least make suitable arrangements to discharge their debt when their travel concludes.

Concluding comments

International human rights legal advice

2.49 Further information was sought in relation to whether the measure would permissibly limit the right to freedom of movement. As to other steps that are taken to recover a debt while a departure prohibition order is in place, the minister advised that Services Australia will pursue outstanding debts using a range of powers, including: negotiated arrangements; deducting payments from a salary or government payment; intercepting tax refunds; collecting funds via third parties; or through litigation. As noted previously, 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.[12] The fact that Services Australia continues to use other powers to pursue outstanding child support debts while a departure prohibition order is in place makes the restriction on freedom of movement more likely to meet the threshold of exceptional circumstances, and therefore be permissible.

2.50 Further information was sought as to why, if a debt is likely to be deemed to be irrecoverable within a period that the Registrar considers appropriate, the debtor would also need to provide a security to be allowed to leave Australia (as required by

12 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: Article 12 (Freedom of Movement)* (1999) [13].

this bill). The minister stated that there may be circumstances where a person applies for a departure authorisation certificate before the Registrar has determined whether a departure prohibition order must be revoked on the basis the liability is completely irrecoverable, and in these circumstances the Registrar may require them to give security for their return to guard against that person departing Australia with a child support liability that is not completely irrecoverable. Requiring security to be provided in these limited circumstances would appear to be directed towards the legitimate objective of improving the ability to enforce the payment of child support debts.

2.51 As to whether the measure is rationally connected to (that is, effective to achieve) the objective, further information was sought in relation to how requiring security to only be paid by the debtor (and not allow them to borrow the money for the security from a third party) would achieve the objective of encouraging payment of the debt (noting they would appear not to have the money available to raise a security themselves). The minister stated that the Registrar can accept security raised by way of borrowed funds and clarified that security arising from a loan obtained by a debtor from a financial institution or a third party is not precluded (as it is not considered to be a payment from a third party). Noting that if a debtor were to borrow money in order to travel, and therefore obtain a security in order to receive a certificate to travel, this would not appear to restrict travel in circumstances where a person does not themselves have the funds to pay for their travel. Consequently, the measure may be rationally connected to (that is, effective to achieve) the stated objective of encouraging payment of child support debts.

2.52 As to the proportionality of the measure, further information was sought regarding the average length of time that departure prohibition orders remain in place, and the average debt amount excluding fees. The minister stated that since 2017, departure prohibition orders that have since been revoked remained in place for 463 days on average, and that orders remaining in force have been in place for an average of 1,275 days (approximately 3.5 years). The minister advised that the average debt amount indicated in the explanatory memorandum includes penalties, costs and fines owed by a child support debtor subject to a departure prohibition order, and that excluding those penalties, the average debt is $27,320.[13] The minister advised that when Services Australia receives a payment towards a debt, the payment is allocated in priority to the debt first, and only then will any remainder be applied to late payment penalties or any other debt to the Commonwealth. This assists with the proportionality of the measure, noting the importance of providing outstanding funds to the family members concerned. However, it remains unclear

13 The explanatory materials state that this measure is expected to impact around 110 parents with an average child support debt of $43,100. The minister advised that this includes an average child support debt of $27,320, which indicates that late fees and penalties make up approximately 37 per cent of these total outstanding debts.

whether a departure prohibition order would be revoked where an outstanding debt consists only or largely of late payment fees and penalties. This is a relevant consideration noting the minister's advice that such late payment fees and penalties make up, on average, approximately 37 per cent of the average total debts cited in the explanatory materials. If a person's ability to travel overseas was limited *after* they had repaid the original child support debt, on the basis that they still owed late payment fees and other penalties to the Commonwealth, this would be unlikely to constitute a proportionate limit on the right to freedom of movement.

2.53 Further information was also sought regarding what other steps must be taken to recover a child support debt prior to making a departure prohibition order. In this regard, the minister stated that a departure prohibition order will only be considered after all other avenues have been investigated, and after steps have been taken to confirm the accuracy of the debt. While this would not appear to be a legislative requirement, it would appear that a departure prohibition order is treated as a method of last resort in practice, which assists with its proportionality.

2.54 As to safeguards, further information was sought as to when a child support debt may be regarded as irrecoverable, meaning that a departure prohibition order would need to be revoked. The minister stated that jurisprudence indicates that the threshold the Registrar must use to be satisfied that the liability is 'completely irrecoverable' is a high one: that is, where there is no prospect that the debtor will be able to make any payments towards the debt. They noted jurisprudence stating that a debt will not be regarded as irrecoverable even where a debtor has had no income from work or income support payments for many years, if it is possible that they could obtain work or financial assistance at some time in the future to meet at least part of the debt. Consequently, the power to write off child support debts (and therefore cancel the departure prohibition order) on the basis that they are completely irrecoverable would appear to have very limited safeguard value.

2.55 Based on the minister's advice, it appears that the measure seeks to achieve a legitimate objective, is rationally connected to that objective, and in some cases this measure may constitute a proportionate limit on the right to freedom of movement, noting the relevant safeguards and the practice of making departure prohibition orders only as a last resort. However, if a departure prohibition order were to remain in place on the basis that part of the debt may be recoverable at some time in the future (despite the debtor not currently having any income), and an outstanding debt consisted largely or solely of late fees and penalties, such circumstances may not constitute a proportionate limit on the right to freedom of movement.

2.56 Further information was also sought as to whether this measure limits the right to equality and non-discrimination and in particular, 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. The minister stated that the nationality of a parent is not a

relevant consideration in determining whether to revoke a departure prohibition order or issue a departure authorisation certificate. The minister stated that, while some parents may have a greater need to travel due to their nationality, relevant considerations apply no more or less strenuously to those parents and do not operate, in intent or practice, to limit their travel more than any other parent. This indicates that the measure does not have a directly discriminatory intent (that is, that the measure is neutral on its face). However, as noted previously, the right to equality encompasses 'indirect' discrimination, which 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.[14] The minister did not advise whether the denial to issue a departure authorisation certificate has a disproportionate impact on persons on the basis of nationality in practice. As such, it is unclear whether there is a risk that this occurs. 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.[15] As set out above, noting that this measure may, in some circumstances, not always constitute a proportionate limit on the right to freedom of movement, there may be a risk that, in some circumstances, the measure does not constitute permissible differential treatment, and so risks impermissibly limiting the right to equality and non-discrimination.

Committee view

2.57 The committee thanks the minister for the responses she has provided in relation to this measure. The committee notes the importance of seeking to ensure that parents pay their outstanding child support debt. In this regard, the committee considers that the measure seeks to achieve a legitimate objective for the purposes of international human rights law and would likely be rationally connected to (that is, effective to achieve) the stated objective.

2.58 The committee considers that, in many circumstances, the measure would constitute a proportionate limit on the right to freedom of movement, noting the

14 *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].

15 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].

many safeguards that apply to the operation of the measure, and the fact that it is used only as a last resort. The committee notes, in particular, that repayments towards debts are first directed towards the child support debt owed to the child and their carer, rather than to late payment penalties and fees owing to Services Australia. However, the committee considers that if an outstanding debt consisted largely of late fees and penalties, but the child support debt itself had been largely paid back, an ongoing departure prohibition order may not constitute a proportionate limit on the right to freedom of movement.

2.59 The committee further considers that restricting the circumstances in which a debtor may travel overseas may risk disproportionately impacting on persons on the basis of nationality in practice (noting that they may be more likely to seek to travel outside Australia). Noting the risk that this measure may, in some circumstances, not constitute a proportionate limit on the right to freedom of movement, the committee considers that there may also be a risk that, in some circumstances, the measure does not constitute permissible differential treatment.

2.60 However, as the bill has now passed, the committee makes no further comment in relation to this bill.

Legislative instruments

Extradition (Republic of North Macedonia) Regulations 2023 [F2023L00447][1]

Purpose	These regulations declare the Republic of North Macedonia to be an 'extradition country' for the purposes of section 5 of the Extradition Act 1988 and repeal the Extradition (Former Yugoslav Republic of Macedonia) Regulations 2009
Portfolio	Attorney-General
Authorising Legislation	*Extradition Act 1988*
Last Day to Disallow	15 sitting days after tabling (tabled in the House of Representatives and Senate on 9 May 2023. Notice of motion to disallow must be given by 7 August 2023 in the Senate)[2]
Rights	Life; torture and other cruel, inhuman or degrading treatment or punishment; liberty; fair hearing; presumption of innocence

2.61 The committee requested a response from the minister in relation to the instrument in *Report 7 of 2023*.[3]

Extradition to the Republic of North Macedonia

2.62 To reflect Australia's recognition that the country previously known as the Former Yugoslav Republic of Macedonia has changed its name to the Republic of North Macedonia, these regulations repeal regulations declaring the Former Yugoslav Republic of Macedonia to be 'an extradition country' for the purposes of the *Extradition Act 1988* ('the Act'), and instead declare the Republic of North Macedonia to be 'an extradition country' for the purposes of the Act.

2.63 The effect of this is that Australia can consider and progress extradition requests from the Republic of North Macedonia relating to persons in Australia. A person may be subject to extradition where either a warrant is in force for their

1 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Extradition (Republic of North Macedonia) Regulations 2023 [F2023L00447], *Report 8 of 2023*; [2023] AUPJCHR 80.

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

3 Parliamentary Joint Committee on Human Rights, *Report 7 of 2023* (21 June 2023), pp. 13-24.

arrest in relation to an alleged serious offence;[4] or where they have been convicted of such an offence and there is either an intention to impose a sentence on them, or the whole or a part of a sentence imposed on the person as a consequence of the conviction remains to be served.[5] The Act also establishes that a person may be prosecuted in Australia for the conduct for which they may have been extradited, rather than being subject to extradition.[6]

2.64 A person may object to their extradition on limited grounds,[7] including where: the surrender of the person is actually sought for the purpose of prosecuting or punishing the person on account of their race, sex, sexual orientation, religion, nationality or political opinions or for a political offence in relation to the extradition country; or where, on surrender, the person may be prejudiced at their trial, or punished, detained or restricted in their liberty because of their race, sex, sexual orientation, religion, nationality or political opinions.[8]

Summary of initial assessment

Preliminary international human rights legal advice

2.65 Facilitating the extradition of persons in Australia to the Republic of North Macedonia to face proceedings in relation to serious offences (including alleged offences) pursuant to the Act engages and may limit multiple rights.[9] Assessing the compatibility of the regulations with international human rights law requires consideration of the compatibility of the Act as relevant to these regulations in relation to the multiple rights.[10]

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4 Section 5 of the *Extradition Act 1988* provides that an extradition offence means an offence for which the maximum penalty is death or imprisonment or other deprivation of liberty for 12 months or more, or conduct which, under an extradition treaty, is required to be treated as an offence for which the surrender of persons is permitted by the requesting country and Australia.

5 *Extradition Act 1988*, section 6.

6 Section 45.

7 Sections 19 and 22 provide that a magistrate or Judge, or the Attorney-General may consider extradition objections.

8 Section 7. Further bases include where the extradition is for a political offence, where the conduct would not have constituted an offence under Australian criminal law, where the person has been pardoned or acquitted for the offence, and where the person has already been punished for the offence.

9 Note that the initial analysis incorrectly stated that the regulations were exempt from disallowance and that no statement of compatibility with human rights was provided, when the regulations are subject to disallowance and a detailed statement of compatibility accompanied the regulations.

10 Parts of the *Extradition Act 1988* apply only to extradition proceedings with New Zealand, and extradition to Australia.

2.66 As extradition would facilitate removal to a country in relation to an offence or alleged offence for which the punishment may include the death penalty, the measure engages and may limit the right to life. The right to life[11] imposes an obligation on the state to protect people from being killed by others or identified risks.[12] While the International Covenant on Civil and Political Rights does not completely prohibit the imposition of the death penalty, international law prohibits states which have abolished the death penalty (such as Australia) from exposing a person to the death penalty in another state. This prohibits states such as Australia from deporting or extraditing a person to a country where that person may face the death penalty.[13]

2.67 Noting that persons extradited to foreign countries may be at risk of torture and other poor treatment, this measure also engages the prohibition against torture. Australia has an obligation not to subject any person to torture or to cruel, inhuman or degrading treatment or punishment.[14] This prohibition is absolute and may never be subject to any limitations. The United Nations (UN) Human Rights Committee has held that this prohibits extradition of a person to a place where that person may be in danger of torture or cruel, inhuman or degrading treatment or punishment.[15]

2.68 Further, in not allowing for an extradition objection on the basis that a person may suffer a flagrant denial of justice in the extradition country, the measure engages and may limit the right to a fair hearing. The right to a fair trial and fair hearing requires that all persons shall be equal before the courts and that everyone has the right to a fair and public hearing in the determination of any criminal charge. Article 14 of the International Covenant on Civil and Political Rights in turn sets out a series of minimum guarantees in criminal proceedings, such as the right to be tried without undue delay.

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11 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.

12 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'.

13 *Judge v Canada*, UN Human Rights Committee Communication No.929/1998 (2003) [10.4]; *Kwok v Australia*, UN Human Rights Committee Communication No.1442/05 (2009) [9.4], and [9.7].

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

15 UN Human Rights Committee, *General Comment No.20: Article 7 (Prohibition of Torture, or other Cruel, Inhuman or Degrading Treatment of Punishment)* (1992) [9]; UN Human Rights Committee, *General Comment No. 3: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant* (2004) [12]. See also UN Committee against Torture, *General Comment No.4 on the implementation of article 3 of the Convention in the context of article 22* (2018) [26].

2.69 An extradition request of itself does not amount to determination of a criminal charge.[16] However, jurisprudence from the European Court of Human Rights has recognised that fair trial rights may be engaged where a person is extradited in circumstances where there is a real risk of a flagrant denial of justice in the country to which the individual is to be extradited.[17] Such circumstances, the Court has stated, would render proceedings 'manifestly contrary to the provisions of Article 6 [the right to a fair trial in the European Convention] or the principles embodied therein'.[18] This means that, in the European context, the right to a fair hearing and fair trial includes an obligation not to return a person (*non-refoulement*) to a country where they risk a flagrant denial of justice.

2.70 The UN Human Rights Committee has not yet ruled on whether article 14 engages non-refoulement obligations.[19] However, the interpretation of the right to a fair trial and fair hearing under the European Convention on Human Rights is instructive.[20] Further, the position in European human rights law jurisprudence is consistent with the UN Model Treaty on Extradition, which includes a mandatory ground of refusing extradition if the person whose extradition is requested would not receive the minimum guarantees in criminal proceedings.[21]

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16 *Griffiths v Australia*, UN Human Rights Committee Communication No. 193/2010 (2014) [6.5].

17 See, *Al Nashiri v Poland*, European Court of Human Rights Application No.28761/11 (2014) [562]-[569]; *Othman (Abu Qatada) v United Kingdom*, European Court of Human Rights Application No. no. 8139/09 (2012), [252]-[262]; *R v Special Adjudicator ex parte Ullah* [2004] 2 AC 323, per Lord Steyn at [41].

18 See, *Stoichkov v Bulgaria*, European Court of Human Rights, Application No. 9808/02 (24 March 2005) at [54].

19 The question has been raised in several individual complaints to the UN Human Rights Committee; however, the committee has decided these complaints on other bases without ruling on the question: see, for example, *ARJ v Australia*, UN Human Rights Committee Communication No. 692/1996 (1997) [6.15]; *Kwok v Australia*, UN Human Rights Committee Communication No. 1442/2005 (2009) [9.8]; and *Alzery v Sweden*, UN Human Rights Committee Communication No. 1416/2005 (2006) [11.9].

20 In 2007 the UN Working Group on Arbitrary Detention noted the reluctance of states to extend the application of the prohibition of refoulement to articles 9 and 14. However the Working Group continued by stating that 'to remove a person to a State where there is a genuine risk that the person will be detained without legal basis, or without charges over a prolonged time, or tried before a court that manifestly follows orders from the executive branch, cannot be considered compatible with the obligation in article 2 of the International Covenant on Civil and Political Rights, which requires that States parties respect and ensure the Covenant rights for all persons in their territory and under their control': see *Report of the Working Group on Arbitrary Detention to the Human Rights Council*, UN Doc. A/HRC/4/40 (2007) [44]–[49].

21 *Model Treaty on Extradition*, adopted by the UN General Assembly resolution 45/116 as amended by General Assembly resolution 52/88.

2.71 In addition, the imposition of absolute liability in subsection 45(2) engages the right to a fair trial. The right to a fair trial protects the right to be presumed innocent until proven guilty according to law.[22] It usually requires that the prosecution prove each element of the offence beyond reasonable doubt (including fault elements and physical elements). Absolute liability offences engage the presumption of innocence because they allow for the imposition of criminal liability without the need to prove fault.

2.72 The Act also establishes a presumption against bail except in special circumstances. This presumption applies with respect to all stages of the extradition process: holding persons arrested under an extradition warrant on remand; committing a person to prison where they have consented to the surrender; where a magistrate or Judge is determining whether the person is eligible for surrender; where review of an order of a magistrate or Judge relating to extradition surrender is sought; and where judicial review is sought of a determination by the Attorney-General that the person is to be surrendered for extradition.[23] As such, a person subject to an extradition warrant will be presumed to be held in jail until the matter is resolved. In addition, extradition may result in lengthy detention in the foreign country while the person is awaiting trial. Consequently, the measure engages and limits the right to liberty.

2.73 The right to liberty prohibits the arbitrary and unlawful deprivation of liberty.[24] The notion of 'arbitrariness' includes elements of inappropriateness, injustice and lack of predictability. Accordingly, any detention must be lawful as well as reasonable, necessary and proportionate in all of the circumstances. Detention that may initially be necessary and reasonable may become arbitrary over time if the circumstances no longer require detention. In this respect, regular review must be available to scrutinise whether the continued detention is lawful and non-arbitrary. The right to liberty applies to all forms of deprivations of liberty.

2.74 The right to liberty includes the right to release pending trial. Article 9(3) of the International Covenant on Civil and Political Rights provides that the 'general rule' for people awaiting trial is that they should not be detained in custody. The UN Human Rights Committee has stated on several occasions that pre-trial detention should remain the exception and that bail should be granted except in circumstances where the likelihood exists that, for example, the accused would abscond, tamper

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

23 See, remand (subsection 15(6)); consent to surrender (subsection 18(3)); determination of eligibility for surrender (subsection 19(9A)); review (section 21); and judicial review (section 49C).

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

with evidence, influence witnesses or flee from the jurisdiction.[25] Measures that expand the circumstances in which there is a presumption against bail engage and limit this right.[26] Where a person poses a flight risk, refusing the grant of bail may be a proportionate limitation on the right to liberty.[27] However, a presumption against bail fundamentally alters the starting point of an inquiry as to the grant of bail.

2.75 Finally, the legislation establishes grounds for an extradition objection where a person may be prosecuted or punished on the basis of certain personal attributes. However, the list of personal attributes is limited and does not cover all attributes protected under international law. As such, the measure engages and may limit 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.[28] 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).[29] Indirect discrimination occurs where 'a rule or measure

25 *Smantser v Belarus,* UN Human Rights Committee Communication No. 1178/03 (2008); *WBE v the Netherlands,* UN Human Rights Committee Communication No. 432/90 (1992); and *Hill and Hill v Spain,* UN Human Rights Committee Communication No. 526/93 (1997).

26 See, *In the Matter of an Application for Bail by Isa Islam* [2010] ACTSC 147 (19 November 2010): the ACT Supreme Court declared that a provision of the *Bail Act 1992* (ACT) was inconsistent with the right to liberty under section 18 of the ACT *Human Rights Act 2004* which required that a person awaiting trial not be detained in custody as a 'general rule'. Section 9C of the *Bail Act 1992* (ACT) required those accused of murder, certain drug offences and ancillary offences, to show 'exceptional circumstances' before having a normal assessment for bail undertaken.

27 *Smantser v Belarus,* UN Human Rights Committee Communication No. 1178/03 (2008); *WBE v the Netherlands,* UN Human Rights Committee Communication No. 432/90 (1992); and *Hill and Hill v Spain,* UN Human Rights Committee Communication No. 526/93 (1997).

28 International Covenant on Civil and Political Rights, articles 2 and 26. Article 2(2) of the International Covenant on Economic, Social and Cultural Rights also prohibits discrimination specifically in relation to the human rights contained in the International Covenant on Economic, Social and Cultural Rights.

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

that is neutral at face value or without intent to discriminate' exclusively or disproportionately affects people with a particular protected attribute.[30]

Committee's initial view

2.76 The committee considered that the measure engages and may limit multiple rights, and sought the advice of the Attorney-General as to:

(a) whether the statutory requirements in the Act meet Australia's obligations under international human rights law with respect to the death penalty, and whether and how compliance with diplomatic assurances relating to non-use of the death penalty are monitored in practice;

(b) whether the measure is consistent with Australia's obligations under article 7 of the International Covenant on Civil and Political Rights and article 3 of the Convention against Torture, and why the Act does not explicitly prohibit extradition where there is a risk of cruel, inhuman or degrading treatment or punishment;

(c) whether the Act is consistent with the right to fair trial and fair hearing, and in particular:

(i) why the Act does not include an extradition objection if, on surrender, a person may suffer a flagrant denial of justice in contravention of article 14 of the International Covenant on Civil and Political Rights;

(ii) whether, not requiring any evidence to be produced before a person can be extradited, and preventing a person subject to extradition from producing evidence about the alleged offence is compatible with the right to a fair trial and fair hearing; and

(iii) whether section 45 of the Act, in applying absolute liability, is consistent with the right to be presumed innocent;

(d) noting that extradition largely results in the detention of a person pending extradition and often lengthy detention in the foreign country while awaiting trial, whether allowing the extradition and detention of

30 *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].

someone without first testing the basic evidence against them, is consistent with the right to liberty;

(e) whether the presumption against bail except for in 'special circumstances' is a permissible limit on the right to liberty; and

(f) whether the measure is consistent with the right to equality and non-discrimination, including why the Act does not permit an objection to extradition where a person may be persecuted because of personal attributes set out in international human rights law, including disability, language, opinions (other than political opinions), or social origin.

2.77 The full initial analysis is set out in *Report 7 of 2023*.

Attorney-General's response[31]

2.78 The Attorney-General advised:

(a) whether the statutory requirements in the Act meet Australia's obligations under international human rights law with respect to the death penalty, and whether and how compliance with diplomatic assurances relating to non-use of the death penalty are monitored in practice;

As the Committee has noted, Australia is a party to the *International Covenant on Civil and Political Rights* (ICCPR) and its Second Optional Protocol, which obliges it to ensure that no person within its jurisdiction is executed and that the death penalty is abolished. Article 6 of the ICCPR contains an implied *non-refoulement* obligation (to refrain from removing persons from Australia to another country) where there are substantial grounds for believing that there is a real risk of the person being subjected to the death penalty.

The Extradition Act requires the Attorney-General to consider death penalty risks before determining whether to surrender a person in response to an incoming extradition request. Paragraph 22(3)(c) of the Extradition Act provides that a person is only able to be surrendered for an offence that carries the death penalty if the requesting country provides an undertaking that either the person will not be tried for the offence; or if the person is tried for the offence, the death penalty will not be imposed; or if the death penalty is imposed on the person, it will not be carried out. This practically operates as a mandatory ground for which the Attorney-General must otherwise refuse extradition, and implements Australia's non-refoulement obligations under Article 6 of the ICCPR. Where a person elects to waive the extradition process, paragraph 15B(3)(b) of the Extradition Act also provides a safeguard by stipulating that the Attorney-General may only make a surrender determination where satisfied that

31 The minister's response to the committee's inquiries was received on 3 July 2023. This is an extract of the response. The response is available in full on the committee's website.

there is no real risk that the death penalty will be carried out on the person in relation to any offence should they be surrendered to the extradition country.

The use of death penalty undertaking is a well-established tool in international extradition. Undertakings are written government assurances and a breach of an undertaking would have serious consequences for both Australia's extradition relationship and broader bilateral relationship with the relevant foreign country. Breach of an undertaking may also have reputational consequences and negatively impact the relevant foreign country's law enforcement relationship with other countries. It is the Australian Government's long-standing experience that undertaking in relation to the death penalty in extradition cases have always been honoured.

The Attorney-General considers the reliability of any death penalty undertaking on a case by case basis, in line with the test for an acceptable death penalty undertaking in the Full Federal Court decision of *McCrea v Minister for Justice and Customs.*[32] The test requires that the Attorney-General be satisfied that 'the undertaking is one that, in the context of the system of law and government of the country seeking surrender, has the character of an undertaking by value of which the death penalty would not be carried out'.[33] If, notwithstanding the receipt of an undertaking, the Attorney-General considered that a real risk remained that the person will be subject to the death penalty, it would be open to the Attorney-General to refuse extradition as an exercise of the general discretion under paragraph 22(3)(f) of the Extradition Act.

Given the public nature of extradition, the Australian Government would most likely be made aware of a breach of a death penalty undertaking. The Australian Government monitors compliance with undertakings through the Department of Foreign Affairs and Trade. Australia also monitors Australian citizens who have been extradited through its consular network, in accordance with the Vienna Convention on Consular Relations.

The Attorney-General's Department has provided information on extradition matters in its annual reports to Parliament since the establishment of the Extradition Act, including whether there have been any breaches of undertakings by a foreign country in relation to a person extradited from Australia. No breaches of death penalty undertakings have been recorded to date.

Further detail on the monitoring of Australian citizens who have been extradited is outlined at paragraphs 40-41 of the Statement of Compatibility with Human Rights.

32 (2005) 145 FCR 269.

33 Ibid, 275.

(b) whether the measure is consistent with Australia's obligations under article 7 of the International Covenant on Civil and Political Rights and article 3 of the Convention against Torture, and why the Act does not explicitly prohibit extradition where there is a risk of cruel, inhuman or degrading treatment or punishment;

Both the measure and the Extradition Act more broadly are consistent with Australia's *non-refoulement* obligations under Article 3 of the Convention against Torture (CAT) and Article 7 of the ICCPR in relation to torture and cruel, inhuman or degrading treatment or punishment (CIDTP). The measure does not change the substance of Australia's existing extradition regime nor its consistency with obligations under the CAT or the ICCPR.

Torture

Paragraphs 15B(3)(a) and 22(3)(b) of the Extradition Act provide that the Attorney-General may only surrender a person if, among other things, the Attorney-General does not have substantial grounds for believing that, if the person were surrendered, they would be in danger of being subjected to torture.

When making a decision under section 15B or subsection 22(3) of the Extradition Act, the Attorney-General may consider all material reasonably available to assist in determining whether the person may be subjected to torture. This may include relevant international legal obligations, any representations or assurances from the requesting country, country-specific information, reports prepared by government or non-government sources, information provided through the diplomatic network and those matters raised by the person who is the subject of the extradition request.

Therefore, the decision on whether to surrender a person is made by the Attorney-General on a case-by-case basis, in accordance with the safeguards in the Extradition Act which are consistent with Australia's international obligations in Article 3 of the CAT and Article 7 of the ICCPR, with respect to torture.

CIDTP

As the Committee has noted, Australia also has *non-refoulement* obligations under Article 7 of the ICCPR in relation to CIDTP.

Although the Extradition Act does not explicitly reference CIDTP, the Attorney-General practically considers risks of CIDTP when determining whether to surrender a person under the Extradition Act. In particular, the Attorney-General's general discretion under subsection 15B(2) and paragraph 22(3)(f) of the Extradition Act provides a basis to refuse extradition where the Attorney-General has concerns based on CIDTP considerations.

The Extradition Act does not contain an exhaustive list of circumstances in which the Attorney-General may refuse surrender or factors that the

Attorney-General must consider. This ensures that decisions can be made on a case-by-case basis. In relation to paragraph 22(3)(f), the Federal Court of Australia has held that the Attorney-General's discretion 'is unfettered, and the Minister may, in the exercise of the discretion, take into account any matters, or no matters, provided that the discretion is exercised in good faith and consistently with the objects, scope and purpose of the [Extradition] Act.'[34]

The Attorney-General therefore makes surrender determinations on a case-by-case basis in accordance with the safeguards in the Extradition Act and in line with Australia's international legal obligations, including under Article 7 of the ICCPR. Subsection 15B(2) and paragraph 22(3)(f) therefore provide a mechanism for compliance with Australia's international obligations in relation to CIDTP.

(c) whether the Act is consistent with the right to fair trial and fair hearing, and in particular:

(i) why the Act does not include an extradition objection if, on surrender, a person may suffer a flagrant denial of justice in contravention of article 14 of the International Covenant on Civil and Political Rights;

Article 14 of the ICCPR sets out fair trial rights and a number of specific minimum guarantees in criminal proceedings.

As the Committee has noted, the UN Human Rights Committee has not yet provided views on whether Article 14 engages non-refoulement obligations.[35] Scholars, such as Manfred Nowak, note that in the ICCPR context, it is well accepted that the principle against *refoulement* applies to Articles 6 and 7, with no consistent opinion as to the application to Article 14.[36]

It is the Australian Government's view that Article 14 of the ICCPR does not extend to an obligation not to return a person to a country where they face a real risk of an unfair trial which could breach the obligations under

34 *Rivera v Minister/or Justice and Customs* (2007) 160 FCR 115, 119 [14] (Emmett J, with whom Conti J agreed). This position has been subsequently affirmed by the Full Court of the Federal Court of Australia: *Snedden v Minister for Justice (Cth) & Anor* (2014) 145 ALD 273,297 [150] (Middleton and Wigney JJ).

35 As noted by the Committee in footnote 21 of their report, the question of whether Article 14 contains a *non-refoulement* obligation has been raised in multiple complaints to the UN Human Rights Committee, and each time the Committee has make their decision on other bases. The question was raised in the Australian immigration context in *Kwok v Australia* UN HRC No. 1442/2005 (2009) "Having found a violation of article 9, paragraph 1, with respect to the author's detention, and potential violations of article 6 and article 7 ... the Committee does not consider it necessary to address whether the same facts amount to a violation of article 6, paragraph 2, article 9, paragraph 4, or article 14 of the Covenant" [9.8]

36 Manfred Nowak, *UN Covenant on Civil and Political Rights CCPR Commentary,* ed William A. Schabas (N.P. Engel, 2019), 48.

Article 14. In other words, the Australian Government considers that Article 14 does not contain *non-refoulement* obligations and therefore is not engaged in the context of Australia potentially surrendering a person to another country under the Extradition Act.

Nonetheless, as noted above, the Attorney-General has a general discretion to refuse surrender under subsection 15B(2) and paragraph 22(3)(f) of the Extradition Act. This enables the Attorney-General to consider fair trial or other human rights concerns where these arise.

Considerations may include whether an extradited individual would have access to a fair trial or whether to surrender a person convicted *in absentia* (and whether a person tried *in absentia* will have an opportunity to be retried). It is therefore not necessary to include an explicit extradition objection for this concern.

Further detail on the protections under the Extradition Act relevant to fair trial protections is outlined at paragraphs 66-71 of the Statement of Compatibility with Human Rights.

(ii) whether, not requiring any evidence to be produced before a person can be extradited, and preventing a person subject to extradition from producing evidence about the alleged offence is compatible with the right to a fair trial and fair hearing

The guarantee to a fair and public hearing by a competent, independent and impartial tribunal under Article 14(1) of the ICCPR is not engaged in relation to extradition proceedings in Australia, including in relation to the evidentiary standard that magistrates and eligible Judges apply to determine surrender eligibility under section 19 of the Extradition Act. This is because extradition is not a criminal process or trial designed to assess guilt or innocence, but rather an administrative process to determine whether a person in to be surrendered to face justice in the Requesting Party.

The United Nations Human Rights Committee has noted in its General Comment No. 32 that the right to a fair hearing by a court or tribunal under Article 14(1) of the ICCPR does not apply to extradition proceedings (amongst other types of proceedings) as, in these circumstances, there is no determination of criminal charges nor presence of a suit at law.[37]

However, the United Nations Human Rights Committee noted that other procedural guarantees may apply in extradition proceedings, including judicial review by an independent and impartial tribunal and, in these circumstances, guarantees of impartiality, fairness and equality as

37 Human Rights Committee, *General Comment No. 32: Article 14: Right to equality before courts and tribunals and to a fair trial,* UN HRC, 90th session, UN Doc CCPR/C/GC/32 (23 August 2007), para 17.

provided for in the first sentence of Article 14(1) of the ICCPR.[38] The availability of independent judicial review under section 39B of the Judiciary Act 1903 and section 75(v) of the Constitution at various stages of the extradition process satisfies these requirements.

(iii) whether section 45 of the Act, in applying absolute liability, is consistent with the right to be presumed innocent;

Section 45 of the Extradition Act enables the Attorney-General to consent to the prosecution of a person in Australia for conduct constituting an offence in another country where Australia has refused extradition. This is consistent with the principle that States should prosecute a person who has committed serious crimes in lieu of extradition (this exists as an obligation under a range of multilateral treaties for specific offences).

It also assists in preventing Australia from becoming an attractive safe haven for fugitives from countries whose criminal justice systems might give rise to grounds for refusal under the Extradition Act.

To achieve this, subsection 45(1) creates an offence to facilitate a person's prosecution in Australia. In order to establish this offence, the prosecution must prove that the person has been remanded in a State or Territory by order of a magistrate under section 15 of the Extradition Act (paragraph 45(1)1(a)). This establishes a nexus to the extradition process, as remand can only occur pursuant to section 15 if a person is arrested under an extradition arrest warrant issued in response to a request made by a foreign country.

Second, the prosecution must prove that the person has engaged in conduct outside Australia at an earlier time (paragraph 45(1)(b)), which would have constituted an offence had the conduct or equivalent conduct occurred in Australia (paragraph 45(1)(c)). This is referred to as the 'notional Australian offence'.

Subsection 45(2) provides that absolute liability attaches to the conduct described in paragraphs 45(1)(a) and 45(1)(b) and to the circumstances in paragraph 45(1)(c). This means that the prosecution need not prove that the person was reckless as to the elements required to establish the offence under subsection 45(1). These paragraphs are effectively factual preconditions for the existence of the offence. This ensures that the prosecution is not required to prove that the person intended to engage in conduct outside Australia at an earlier time or that the person was reckless as to whether that conduct would have constituted an offence in Australia had the conduct or equivalent conduct occurred in Australia.

38 Ibid, para 62. See further: Manfred Nowak, *UN Covenant on Civil and Political Rights CCPR Commentary*, ed William A. Schabas (N.P. Engel, 2019), 362-363; *Griffiths v Australia*, Communication No. 1973/2010, Views adopted 21 October 2012, UN Doc CCPR/C/l l 2/D/1973/2010, paragraph 6.5.

However, the prosecution is still required to establish physical and fault elements to make out the offence, in line with subsection 45(3).

Subsection 45(3) provides how the prosecution is to prove the notional Australian offence. Paragraph 45(3)(a) requires the prosecution to prove the physical and fault elements applicable to the notional Australian offence, which are the physical and fault elements for the relevant offence in the State or Territory in which the person is on remand. Paragraph 45(3)(b) provides that any defences or special liability provisions that apply in relation to the notional Australian offence will have effect.

The use of absolute liability in this provision is consistent with the right to the presumption of innocence. As noted above, the relevant paragraphs in section 45 attracting absolute liability are factual pre-conditions rather than substantive elements of the offence. There is still a requirement to establish the relevant physical and fault elements of the notional Australian offence.

This approach is consistent with the Guide to Framing Commonwealth Offences, which notes that strict or absolute liability may be appropriate for certain kinds of physical elements, such as jurisdictional elements which link the offence to the relevant legislative power of the Commonwealth.[39]

(d) noting that extradition largely results in the detention of a person pending extradition and often lengthy detention in the foreign country while awaiting trial, whether allowing the extradition and detention of someone without first testing the basic evidence against them, is consistent with the right to liberty;

Australia has an obligation under Article 9(1) of the ICCPR to protect the right to freedom from arbitrary detention. Further, Article 9(4) of the ICCPR imposes an obligation on States to ensure that persons who are arrested and detained are entitled to take proceedings before a court to decide the lawfulness of their detention.

As a matter of law, Australia considers the determining factor for arbitrary detention is not the length of the detention, but whether the grounds for detention are justifiable.

The test for whether detention is arbitrary under Article 9(1) of the ICCPR is whether, in all the circumstances, detention is reasonable, necessary and proportionate to the end that is sought.[40]

Factors relevant to assessing whether detention is arbitrary include the existence of avenues of review on the appropriateness of detention, as

39 Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers, page 21.

40 See, for example *Av Australia,* Communication No 560/1993, Views adopted 30 April 1997, UN Doc CCPR/C/59/D/560/1993, paragraph 9.2.

well as whether less intrusive alternatives to detention have been considered.[41]

An assessment of the compatibility of extradition detention with Article 9 of the ICCPR is set out below in response to paragraph (e) of the Committee's request.

(e) whether the presumption against bail except for in 'special circumstances' is a permissible limit on the right to liberty;

The presumption against bail as currently in place in the Extradition Act is reasonable, necessary and proportionate to the achieve the purposes of the Extradition Act and to comply with Australia's international obligations.

Bail is available as a statutory right at each stage of the extradition process, namely under section 15, subsection 18(3), subsection 19(9), paragraph 21(6)(f) and section 49C of the Act. At each stage, the test for grant of bail is whether there exist 'special circumstances' justifying release on bail. Where a person has elected to waive the extradition process, bail is not available, noting that a waiver will typically be chosen by the individual to facilitate return as soon as possible to the requesting country.

As outlined in paragraphs 51 to 63 of the Statement of Compatibility with Human Rights, the 'special circumstances' test is clearly defined in case law and is applied by decision-makers on a case-by-case basis, where the decision-maker is required to carefully consider whether the circumstances relied upon by a person, either individually or in combination, meet the test.

Notwithstanding the nature of the 'special circumstances' test, bail is available as a statutory right at various stages of the extradition process[42] and applicants can and do successfully obtain bail in Australia during the extradition process. The bail test is necessary as the 'special circumstances' test for bail upholds Australia's international obligations to secure the return of alleged offenders to face justice, given the serious flight risk posed in many extradition matters.

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41 *Bakhtiyari v Australia,* Communication No. 1069/2002, Views adopted 29 October 2003, UN Doc CCPR/C/79/D/1069/2002, paragraphs 9.2-9.4.

42 In addition to the statutory rights to bail under the Extradition Act, the Australian Government recognises that the Federal Court of Australia has the power to grant bail in the context of proceedings for judicial review of an extradition decision under section 39B of the *Judiciary Act 1903.* This power arises by virtue of section 23 of the *Federal Court Act 1976* (as confirmed in *Adamas v The Hon Brendan O'Connor (No 3)* [2012] FCA 365, [16]-[17] (Gilmour J)). Further, the High Court of Australia has the power to grant bail in extradition proceedings as an incident of its appellate jurisdiction granted by section 73 of the Constitution (as confirmed in *Cabal,* 182-183 [44] (Gleeson CJ, McHugh and Gummow JJ)).

The case-by-case nature of these decisions, as well as the established review mechanisms, ensure that the bail test is reasonable, necessary and proportionate to the overall legitimate objective of facilitating the apprehension and surrender of individuals for the purposes of criminal prosecution or to serve a prison sentence in another country, upholding Australia's international legal obligations and ultimately combatting serious transnational crime. Accordingly, the bail test ensures that detention is not arbitrary for the purposes of Article 9(1).

The Extradition Act and the Regulations are therefore consistent with the right to freedom from arbitrary detention in Article 9 of the ICCPR. To the extent that the Extradition Act and the Regulations may limit these rights, any limitation is reasonable, necessary and proportionate to achieve the legitimate objectives of the Extradition Act and Australia's extradition regime.

(f) whether the measure is consistent with the right to equality and non-discrimination, including why the Act does not permit an objection to extradition where a person may be persecuted because of personal attributes set out in international human rights law, including disability, language, opinions (other than political opinions), or social origin.

The Extradition Act is consistent with Australia's obligations under Articles 2 and 26 of the ICCPR to respect the right to equality and non-discrimination.

The Extradition Act contains safeguards to protect rights of equality and non-discrimination.

Sections 7(b) and 7(c) set out that there is an 'extradition objection' in relation to an extradition offence for which a person's surrender is sought if:

• the person is actually sought for the purpose of prosecuting or punishing the person on account of his or her race, sex, sexual orientation, religion, nationality or political opinions; or

• the person may be prejudiced at his or her trial, or punished, detained or restricted in his or her personal liberty, by reason of his or her race, sex, sexual orientation, religion, nationality or political opinions.

The presence of an extradition objection, including on the grounds listed above, has the effect of preventing both a finding by a magistrate or eligible Judge that a person is eligible for surrender pursuant to paragraph 19(2)(d), and a surrender determination by the Attorney-General pursuant to paragraph 22(3)(a) in those circumstances.

While the Extradition Act does not provide an extradition objection where a person may be persecuted because of other personal attributes set out in international human rights law, including disability, language, opinions (other than political opinions), or social origin, the Attorney-General would practically consider all relevant protected attributes when determining

whether to surrender a person under the Extradition Act, including when exercising the general discretion in paragraph 22(3)(f).

Further, any person subject to extradition has an opportunity to make representations to the Attorney-General on any matter before the Attorney-General makes a surrender determination, including in relation to any of the protected attributes in Article 26 of the ICCPR, so that such matters can be taken into consideration before reaching a decision.

As noted above in response to paragraph (b) of the Committee's request, paragraph 22(3)(f) provides the Attorney-General 'unfettered' discretion when determining whether to surrender a person, and provides an appropriate mechanism to consider any factor relevant to the individual case at hand. The Extradition Act is therefore consistent with the rights of equality and non-discrimination, notwithstanding that all protected attributes are not expressly listed in the Extradition Act.

Concluding comments

International human rights legal advice

Right to life

2.79 The Extradition Act provides that the Attorney-General may determine that a person can be surrendered to an extradition country where the relevant offence is punishable by the death penalty, but only where the Attorney-General is satisfied there is 'no real risk' that the death penalty will be carried out[43] and where the extradition country has given an undertaking that it will not be imposed, or if imposed, will not be carried out.[44] In this regard, the UN Human Rights Committee has cautioned that States Parties must: ensure that they monitor individuals who have been extradited, refrain from relying on diplomatic assurances where they cannot effectively monitor the treatment of people concerned, and take appropriate remedial action where assurances are not fulfilled.[45]

2.80 In this regard, the Attorney-General advised that the grounds for refusal in the Extradition Act practically operate as mandatory grounds for refusal. The Attorney-General advised that there are reputational and relationship consequences for governments in breaching undertakings and no breaches of death penalty undertakings have occurred to date. The Attorney-General advised that he considers each death penalty undertaking on a case-by-case basis in the context of the system of law and government of the country seeking surrender. The advice provided was that the government monitors compliance with undertakings through the Department of Foreign Affairs and Trade and monitors extradited citizens through its

43 Extradition Act, subsection 15B(3)(b).

44 Subsection 22(3)(c).

45 See, UN Human rights Committee, *Concluding observations on the second periodic report of Kazakhstan,* CCPR/C/KAZ/CO/2 (9 August 2016), at [44].

consular network. The Attorney-General's Department's annual reports also report to Parliament on extradition matters, including any breaches of undertakings.[46]

2.81 Noting that undertakings are regularly monitored, there has never been a breach of a death penalty undertaking provided to Australia and the requirement that the Attorney-General must be satisfied that there is no real risk that the death penalty will be imposed should the person be extradited, it appears that there is limited risk that the Extradition Act would enable the extradition of a person where there is a real concern they may be subject to the death penalty.

Prohibition on torture and other cruel, inhuman or degrading treatment or punishment

2.82 The Extradition Act also provides that the Attorney-General cannot determine that a person be surrendered to an extradition country if they have substantial grounds for believing that the person would be in danger of being subjected to torture.[47] The Act also provides a broad discretion for the Attorney-General not to surrender a person in relation to an offence.[48] However, it does not explicitly require the Attorney-General to consider whether there are substantial grounds to believe there is a real risk that a person may be subjected to other cruel, inhuman or degrading treatment or punishment, and does not explicitly prohibit extradition where such a risk is established.

2.83 In relation to torture, the Attorney-General explains that he may consider a wide range of information that may assist in determining if a person may be subjected to torture and such decisions are made on a case-by-case basis in accordance with the safeguards in the Extradition Act, which are consistent with Australia's international obligations. Given the prohibition in the Extradition Act on surrender if there are substantial grounds for believing the person would be in danger of being subjected to torture, this aspect of the prohibition against torture appears to be appropriately protected.

2.84 However, Australia's non-refoulement obligations apply to the prohibition against torture *and other cruel, inhuman or degrading treatment or punishment* in its entirety. The Extradition Act does not expressly provide that extradition must be refused where there are substantial grounds for believing a person may be in danger of being subject to cruel, inhuman or degrading treatment or punishment. The Attorney-General advised that, in practice, this risk is considered under the Attorney-General's general discretion to refuse extradition as considered on a case-by-case basis.

46 Statement of compatibility, p. 19.

47 Section 15B.

48 Subsection 22(3)(f).

2.85 However, where a measure limits a human right, discretionary or administrative safeguards alone may not be sufficient for the purpose of a permissible limitation under international human rights law. This is because an administrative or discretionary safeguard is less stringent than the protection of statutory processes as there is no requirement to follow it. This is particularly relevant when considering that the prohibition against torture and other cruel, inhuman or degrading treatment or punishment is absolute and can never be permissibly limited. While it may be that the Attorney-General *may* refuse extradition on the basis that a person may be subjected to cruel, inhuman or degrading treatment or punishment, there is no requirement that extradition be refused on this basis, and as such there is a risk that the Extradition Act is incompatible with this aspect of the prohibition against torture and other cruel, inhuman or degrading treatment or punishment.

Right to a fair trial and fair hearing

2.86 The Extradition Act does not provide that the risk of denial of a fair trial in the extradition country is a ground for an extradition objection. Although the Act provides a broad discretion for the Attorney-General not to surrender a person in relation to an offence,[49] it is not clear that such a non-compellable discretion would be a sufficient safeguard to protect the right to a fair trial and fair hearing. While the European Court of Human Rights has found countries should not return a person to a country where there is a real risk of an unfair trial, the UN Human Rights Committee has not definitively ruled on this issue. However, it has said that the risk of an unfair trial is a matter than must be given 'due weight' in considering whether deportation may result in a breach of the prohibition against torture and other cruel, inhuman or degrading treatment or punishment.[50] The Attorney-General advised that he do not consider that the right to a fair trial or hearing contains non-refoulement obligations. However, the Attorney-General advised that he may consider such concerns using his general discretionary power to refuse surrender to extradition and as such it is not necessary to include an explicit extradition objection for this concern.

2.87 As noted above, discretionary powers are not as stringent as legislative safeguards, and future Attorneys-General may not consider it necessary to consider such matters when exercising their discretion to allow surrender to extradition. Further, while the UN Human Rights Committee has not considered whether returning a person to face a flagrant denial of justice is a breach of the right to a fair trial, it has not ruled out that returning persons in such circumstances would be incompatible with rights. Given that this is a matter of settled law in the context of

49 Subsection 22(3)(f).

50 *Kwok Yin Fong v. Australia*, UN Human Rights Committee Communication No. 1442/2005 (2009), paragraph [9.7].

the European Convention on Human Rights[51] (which is substantially similar to the International Covenant on Civil and Political Rights), there is a risk that sending a person to a country where they may suffer a flagrant denial of justice would not be compatible with the right to a fair trial. As such, as there is no requirement in the Extradition Act that the Attorney-General consider the right to a fair trial when making decisions regarding surrender for extradition, the Extradition Act may not be compatible with this right.

2.88 In relation to whether not requiring any evidence to be produced before a person can be extradited, and preventing a person subject to extradition from producing evidence about the alleged offence, is consistent with the right to a fair hearing, the Attorney-General advised that this right is not engaged as extradition is an administrative process. The UN Human Rights Committee has stated that while principles of impartiality, fairness and equality of arms in article 14 of the International Covenant on Civil and Political Rights apply to extradition proceedings, the other guarantees do not apply to extradition procedures.[52] As such, the question of not requiring a prima facie case to answer before a person can be extradited is considered below in relation to the right to liberty pending extradition.

2.89 In relation to whether section 45 of the Extradition Act, in applying absolute liability, is consistent with the right to be presumed innocent, the Attorney-General provided a comprehensive explanation of how absolute liability attaches only to a jurisdictional element of the offence, applying to factual pre-conditions rather than the substantive element of the offence. On the basis of this advice, it appears that the application of absolute liability in this context is compatible with the right to the presumption of innocence.

Rights to liberty and effective remedy

2.90 The Extradition Act establishes a presumption that a person subject to extradition proceedings be held in jail at each stage of the extradition process, unless 'special circumstances' exist. Australian jurisprudence has established that 'special circumstances' are to be interpreted narrowly,[53] and that considerations of whether

51 See *R v Special Adjudicator ex parte Ullah* [2004] 2 AC 323, per Lord Steyn at [41].

52 UN Human Rights Committee, *General Comment No. 32: Article 14: Right to equality before courts and tribunals and to a fair trial,* UN HRC, 90th session, UN Doc CCPR/C/GC/32 (23 August 2007), paragraphs [17] and [62]

53 The High Court of Australia has stated that: '[I]t is an error in a bail application in an extradition matter to take into account that there is "a predisposition against unnecessary or arbitrary detention in custody". The Parliament has made it plain that bail is not to be granted unless special circumstances are proved...[I]t is erroneous to take into account "those circumstances which ordinarily would fall for consideration on an application for bail where a person is charged domestically for the commission of a crime". Those circumstances …can play no part in determining whether the applicant has established special circumstances.' See, *United Mexican States v Cabal* [2001] HCA 60 at [72].

a person poses a flight risk are not relevant to an assessment of special circumstances.[54]

2.91 The Attorney-General advised that notwithstanding the nature of the 'special circumstances' test, bail is available as a statutory right at various stages of the extradition process and applicants can and do successfully obtain bail in Australia during the extradition process. The Attorney-General argued that the presumption against bail is necessary as it upholds Australia's international obligations to secure the return of alleged offenders to face justice, given the serious flight risk posed in many extradition matters. Further, the Attorney-General refers to the statement of compatibility which states that the Australian Government does not consider that detention pending extradition ordinarily falls within the scope of the prohibition against arbitrary detention in article 9 of the International Covenant on Civil and Political Rights.[55]

2.92 However, the UN Human Rights Committee in *Griffiths v Australia*[56] found a breach of the right to liberty in relation to a person detained under the Extradition Act. In this case, the UN Committee noted that extradition is not limited in time under Australian law and as a general rule in extradition cases, persons are to be held in custody whether or not their detention is necessary. It noted the 'special circumstances' test in the Extradition Act and that the length of detention does not amount to 'special circumstances' under the case law of the High Court. Under the right to liberty and the right to an effective remedy, the UN Committee held that judicial review of the lawfulness of detention is not limited to mere compliance of the detention with domestic law but must include the possibility to order a release if the detention is incompatible with these rights, with such a review needing to be, in its effects, real and not merely formal. As there is no opportunity under the Extradition Act to obtain substantive judicial review of the continued compatibility of detention with the rights to liberty and effective remedy, the UN Committee found there was a breach of these rights.[57]

2.93 The limitation on the right to liberty is exacerbated by the fact that the Extradition Act contains no requirement to require the requesting State to produce any evidence to demonstrate there is a case to answer before a person is extradited, and prohibits the person who may be subject to the extradition from producing any evidence to contradict an allegation that the person has engaged in conduct

54 See, most recently *Pauga v Chief Executive of Queensland Corrective Services* [2023] FCAFC 58 (13 April 2023).

55 Statement of compatibility, p. 22, paragraph [53].

56 *Griffiths v Australia*, UN Human Rights Committee, Communication no. 1973/2010 (2014).

57 *Griffiths v Australia*, UN Human Rights Committee, Communication no. 1973/2010 (2014), paragraphs [7.2] – [7.5].

constituting an extradition offence.[58] As such, a person may be subject to lengthy imprisonment pending extradition for an offence of which they ultimately may not have any prospect of being convicted.

2.94 Noting the lack of any time limits on detention pending extradition, the presumption against bail and the UN Human Rights Committee's findings in relation to this matter, the Extradition Act appears to be incompatible with the rights to liberty and an effective remedy. As such, this instrument, by enabling extradition pursuant to the Extradition Act to the Republic of North Macedonia, also risks incompatibility with these rights.

Right to equality and non-discrimination

2.95 A person may object to extradition where they will be prosecuted or punished, or may be prejudiced at trial or have their liberty restricted, on account of their 'race, sex, sexual orientation, religion, nationality or political opinions'. This is an important safeguard against limits on the right to equality and non-discrimination on those grounds. However, the list does not include all the grounds on which discrimination is prohibited under international human rights law, including disability, language, opinions (other than political opinions), or social origin. The Attorney-General advised that while the Extradition Act does not provide an extradition objection where a person may be persecuted because of other personal attributes set out in international human rights law, he would practically consider all relevant protected attributes when determining whether to surrender a person.

2.96 As noted above, discretionary powers are not as stringent as legislative safeguards, and future Attorneys-General may not consider it necessary to consider such matters when exercising their discretion to allow surrender to extradition. As such, there is a risk that a person may be extradited in circumstances where they may be unlawfully discriminated against, and as such, the Extradition Act may not fully protect the right to equality and non-discrimination.

Committee view

2.97 The committee thanks the minister for this response. The committee notes that in considering this legislative instrument for compatibility with human rights it has been necessary to consider the overall compatibility of the extradition framework under the Extradition Act. The committee notes it has considered the

58 Extradition Act, subsections 19(5) and 21A(4).

compatibility of the Extradition Act on previous occasions.[59] The committee is concerned that many of the safeguards referred to by the Attorney-General in relation to extradition are discretionary, relying on the Attorney-General to exercise their general discretion not to surrender a person for extradition in the following circumstances:

(a) where there are substantial grounds for believing that the person would be in danger of being subjected to cruel, inhuman or degrading treatment or punishment;

(b) where there are substantial grounds for believing that, if the person were surrendered to the extradition county, the person would suffer a flagrant denial of justice in the extradition country;

(c) where a person may be prosecuted, punished or detained or restricted in their liberty on the basis of personal attributes such as disability, language, non-political opinions, or social origin.

2.98 Noting the importance of the prohibition against torture and other cruel, inhuman or degrading treatment or punishment and the rights to a fair hearing and equality and non-discrimination, the committee is concerned that leaving protection of such matters to ministerial discretion is not sufficient to adequately protect these rights. The committee also considers that the presumption against bail in the Extradition Act, and the lack of any ability to challenge the lawfulness of such continued detention, is incompatible with the rights to liberty and effective remedy. As such, the committee considers that this instrument, by enabling extradition pursuant to the Extradition Act to the Republic of North Macedonia, also risks incompatibility with these rights.

Suggested action

2.99 The committee considers the human rights compatibility of the *Extradition Act 1988* would be improved were it amended:

59 Parliamentary Joint Committee on Human Rights, *First Report of 2013* (6 February 2013), p. 111; *Sixth Report of 2013*, pp. 149–160; *Tenth Report of 2013*, pp. 56–75; *Twenty-second Report of the 44th Parliament* (13 May 2015), Extradition (Vietnam) Regulation 2013 [F2013L01473] pp. 108–110; *Report 2 of 2017* (21 March 2017), Crimes Legislation Amendment (International Crime Cooperation and Other Measures) Bill 2016, pp. 8–9; *Report 4 of 2017* (9 May 2017), Extradition (People's Republic of China) Regulations 2017 [F2017L00185], pp. 70-73, and Crimes Legislation Amendment (International Crime Cooperation and Other Measures) Bill 2016, pp. 90–98; *Report 3 of 2018* (27 March 2018), Extradition (El Salvador) Regulations 2017 [F2017L01581] and Extradition Legislation Amendment (2017 Measures No. 1) Regulations 2017 [F2017L01575], pp. 16–29; and *Report 5 of 2018* (19 June 2018) Extradition (El Salvador) Regulations 2017 [F2017L01581] and Extradition Legislation Amendment (2017 Measures No. 1) Regulations 2017 [F2017L01575], pp. 77–108.

(a) to expand the existing prohibition against torture to provide that the Attorney-General may only determine that a person be surrendered for extradition if they do not have substantial grounds for believing that the person would be in danger of being subjected to cruel, inhuman or degrading treatment or punishment;[60]

(b) to require the Attorney-General to be satisfied that there are no substantial grounds for believing that, if the person were surrendered to the extradition county, the person would suffer a flagrant denial of justice in the extradition country;

(c) to remove the presumption against bail[61] and require that detention pending extradition be subject to ongoing merits review considering the necessity of the continued detention; and

(d) to expand the meaning of an 'extradition objection' to include where a person may be prosecuted, punished or detained or restricted in their liberty on the basis of a broader range of personal attributes (such as disability, language, non-political opinions, or social origin).

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

60 *Extradition Act 1988*, paragraphs 15B(3)(a) and 22(3)(b).

61 *Extradition Act 1988*, subsection 15(6).

Migration (Specification of evidentiary requirements – family violence) Instrument (LIN 23/026) 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

2.101 The committee requested a response from the minister in relation to the instrument in *Report 6 of 2023*.[2]

Evidence of family violence

2.102 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.[3] If they are unable to make out such a claim, the consequences may be that they would be required to leave Australia.

2.103 Regulation 1.23 and 1.24 of the Migration Regulations require that where a person is applying for a visa and alleges they are a victim of family violence – where that violence has not been judicially determined – that they 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

1 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Migration (Specification of evidentiary requirements – family violence) Instrument (LIN 23/026) 2023, *Report 6 of 2023*; [2023] AUPJCHR 81.

2 Parliamentary Joint Committee on Human Rights, *Report 6 of 2023* (14 June 2023) pp. 26-29.

3 See the Department of Home Affairs webpage on Domestic and family violence and your visa.

welfare officers, family violence support service providers, social workers, psychologists, and education professionals.[4] 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 evidence must be in writing, in English, on a professional letterhead, and include the contact details of the relevant professional.[5]

Summary of initial assessment

Preliminary international human rights legal advice

Right to equality and non-discrimination

2.104 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.

2.105 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 the equal and non-discriminatory protection of the law.[6] 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).[7] 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.[8]

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

5 Subsection 4(3).

6 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.

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

8 *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].

2.106 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.[9]

2.107 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.

Committee's initial view

2.108 The committee considered further information is required to assess the compatibility of this measure with the right to equality and non-discrimination, and therefore sought the advice of the minister 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.

2.109 The full initial analysis is set out in *Report 6 of 2023*

Minister's response[10]

2.110 The minister advised:

> **(a) why applicants are required to provide a minimum of two pieces of evidence from two separate categories;**
>
> The requirement for applicants to provide a minimum of two pieces of evidence from two separate categories has been in place since November 2012, when IMMI 12/116 was implemented.
>
> Given the extensive changes implemented with LIN 23/026 and the removal of the requirement for professionals and service providers to

9 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].

10 The minister's response to the committee's inquiries was received on 17 July 2023. This is an extract of the response. The response is available in full on the committee's website.

provide a statutory declaration, the Department considers maintaining the requirement for two pieces of evidence to provide the appropriate balance between providing more flexibility to applicants and retaining some basic integrity settings. Requiring evidence from two separate categories ensures the evidence is from at least two independent sources, who are employed or suitably trained in identifying family violence. LIN 23/026 is expected to make it easier for applicants to obtain evidence from professionals and service providers that they are already engaged with, rather than having to seek out specific services to provide evidence for the purposes of the instrument, potentially at added expense and potential re-traumatisation. It may also encourage applicants who are not already engaged with services to come forward to seek assistance from suitably qualified professionals and service providers who can help them to access appropriate support and assistance. Other people such as friends and neighbours may not be able to do this.

Where the applicant has not engaged with such professionals and service providers, the intent is for the applicant to engage with two independent sources who are employed or suitably trained in identifying family violence, to produce evidence that supports their claims.

The professionals and service providers listed against LIN 23/026 are employed in the family violence sector, or in health, policing and education roles where they may encounter or identify family violence. The Department must make a determination on whether family violence occurred, and evidence from two separate sources supports this assessment.

The Government has committed to a further review of LIN 23/026 in the next 12 months to ensure it continues to reflect community expectations and address any issues raised by stakeholders and applicants.

The Department has been monitoring feedback from stakeholders and any impacts on caseload processing since the commencement of LIN 23/026. Some stakeholders have raised that the requirement to provide evidence from two separate categories may present a challenge for some applicants. As such, concerns regarding the requirement for applicants to provide a minimum of two pieces of evidence from two separate categories will be considered as part of this review.

(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);

Applicants are able to provide additional information to support their non-judicial family violence claim, as long as the minimum evidentiary requirements are met. This additional information must be taken into consideration by the decision-maker as part of a holistic assessment of the evidence.

The Department needs to maintain basic integrity settings and give decision-makers confidence in the evidence before them. Any widening of the instrument to include 'non-official' sources has been considered against expected uptake of this evidentiary pathway by applicants and impact on the assessment process. In practice, widening the scope may nullify the current intent of LIN 23/026.

A widening of the scope of evidence in the instrument to 'non-official' sources would need to be balanced against decision-makers being satisfied of family violence. While decision-makers are suitably trained in visa processing and sensitivities attached to family violence claims, they are not family violence professionals.

Consistent with paragraph 1.23(10)(c), if the Minister is not satisfied that the alleged victim has suffered the relevant family violence, the Minister must seek the opinion of an independent expert. Consideration must therefore be given to financial constraints of the current contract with the independent expert that is utilised where the decision-maker is unable to be satisfied family violence has occurred based on the evidence before them. The number of referrals to the independent expert and consequently costs to the Commonwealth could be expected to increase with a widening of scope.

On balance, the above factors are mitigated by relying on professionals and services providers listed against LIN 23/026 who are employed or suitably trained in identifying family violence.

The Department's Procedural Instruction *[Div1.5] Division 1.5 – Special provisions relating to family violence* provides information and guidance to decision-makers on assessing family violence claims under the family violence provisions. This includes instructions on considering additional evidence that may have been submitted as part of the claim (section 3.12.3).

The Department's website has recently been updated to advise applicants that they can provide other evidence to support their non-judicial family violence claim, in addition to the minimum evidentiary requirements. For more information see Family Violence Provisions (homeaffairs.gov.au)

(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

Decision-makers do have discretion to consider a range of evidence and all decisions are made on a case-by-case basis. Decision-makers are required to consider all evidence provided by the applicant as part of a holistic assessment of the evidence.

As noted above, the Department's Procedural Instruction *[Div1.5] Division 1.5 – Special provisions relating to family violence* provides information and guidance to decision-makers on assessing family violence claims under the family violence provisions. This includes instructions on

considering additional evidence that may have been submitted as part of the claim (section 3.12.3).

> 3.12.3. Additional evidence
>
> Under policy, any other evidence may also be provided in support of a non-judicial family violence claim, so long as the minimum evidentiary requirements prescribed above *[a statutory declaration by the alleged victim and at least two prescribed documents in accordance with the current legislative instrument]* are met.
>
> If relevant, additional evidence may be taken into consideration by the decision maker and given appropriate weighting (depending on the type and quality of the evidence provided) at the stage at which the decision maker must determine whether they are satisfied that relevant family violence did in fact take place.
>
> Evidence by objective, official and credible sources should be given more weight than more subjective forms of evidence, such as letters and testimonies from friends and relatives.

(d) whether people from non-English speaking backgrounds are more frequently unable to provide evidence of non-judicially determined family violence in practice.

The Department is unable to confirm whether people from non-English speaking backgrounds are more frequently unable to provide evidence of non-judicially determined family violence in practice.

Under policy, decision-makers should be mindful of the sensitivity of family violence claims and the complexity of obtaining required evidence when deciding how to proceed with cases that do not appear to meet the evidentiary requirements.

Where an applicant has submitted a non-judicial family violence claim that does not meet the evidentiary requirements, decision-makers must notify the applicant and give them the opportunity to submit further evidence consistent with the requirements of LIN 23/026 or to make a judicial claim under one of subregulations 1.23(2), (4) or (6). Decision-makers are also encouraged to be flexible in offering reasonable extensions of time to provide evidence.

In recognition of some of the additional challenges faced by applicants from non-English speaking or certain cultural backgrounds, the Department added ‘community, multicultural or other crisis support services providing domestic and family violence assistance or support’ to LIN 23/026 as part of the category of ‘Family violence support service provider’. This category in IMMI 12/116 was limited to ‘women's refuge or family/domestic violence crisis centre’. This has been well received by stakeholders.

Concluding comments

International human rights legal advice

2.111 As set out in the initial analysis, family violence has a disproportionate impact on women generally, and women may more generally seek to rely on these visa protection provisions.[11] Further, women from culturally and linguistically diverse backgrounds are particularly vulnerable to family violence.[12] 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. In this regard, the minister stated that they were unable to advise whether people from non-English speaking backgrounds are more frequently unable to provide evidence of non-judicially determined family violence in practice. However, they also noted that in recognition of some of the additional challenges faced by applicants from non-English speaking or certain cultural backgrounds, the department had added 'community, multicultural or other crisis support services providing domestic and family violence assistance or support' as an official source of information. The minister stated that the previous version of the legislative instrument was limited to 'women's refuge or family/domestic violence crisis centre'. Based on this information, there would appear to be a risk that, because people from non-English speaking backgrounds face additional challenges in accessing relevant services, they may more frequently face challenges in providing evidence of non-judicially determined family violence in practice. As such, there would appear to be a risk that this measure may have an indirectly discriminatory impact against certain non-citizens based on their ethnicity or national origin (both protected characteristics).

2.112 As noted in the preliminary analysis, differential treatment will not constitute unlawful discrimination if it 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]

2.113 In this regard, the measure specifies the items of acceptable evidence for a non-judicially determined claim of family violence for the purposes of assessing whether the applicant is eligible for a visa independent of their visa sponsor, where that sponsor is alleged to be the perpetrator. Facilitating the administration of this visa system constitutes a legitimate objective under international human rights law,

11 See, Australian Bureau of Statistics, *Personal Safety, Australia* (2016).

12 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.

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].

and specifying the items of acceptable evidence is rationally connected to (that is, effective to achieve) that objective.

2.114 The key question is whether this measure constitutes a proportionate limit on the right to equality and non-discrimination. This requires consideration of several factors, including whether a proposed limitation is sufficiently circumscribed, whether it is accompanied by sufficient safeguards, whether it provides the flexibility to treat different cases differently, and the availability of review.

2.115 As to why applicants are required to provide a minimum of two pieces of evidence from two separate categories (and not two pieces of evidence from the same source), the minister stated that the department considers that this provides the appropriate balance between providing more flexibility to applicants and retaining basic integrity settings. The minister stated that the relevant professionals and service providers are employed in the family violence sector, or in health, policing and education roles where they may encounter or identify family violence. The minister stated that this ensures the evidence is from at least two independent sources, who are employed or suitably trained in identifying family violence. The minister stated that the measure is expected to make it easier for applicants to obtain evidence from professionals and service providers that they are already engaged with, rather than having to seek out specific services to provide evidence for the purposes of the visa application process, and requiring two separate sources may encourage applicants who are not already engaged with services to come forward to seek assistance. In this regard, requiring official evidence from a broad range of services may make it easier for some people to obtain the minimum two forms of acceptable evidence of family violence. However, there may also be instances where persons are connected with few or no relevant services, and so obtaining such evidence may therefore be more challenging for them.

2.116 As to the absence of a discretion for decision-makers to consider 'non-official' sources of information if the requisite two sources are not available (for example, statutory declarations from a neighbour or friend), the minister stated that the department needs to maintain basic integrity settings and give decision-makers confidence in the evidence before them. They stated that while decision-makers are suitably trained in visa processing and sensitivities attached to family violence claims, they are not family violence professionals. However, it is not clear why such departmental decision-makers may not be provided with training in identifying evidence of family violence (or otherwise have access to trained professionals to inform their decision-making) such that they are able to assess evidence more readily.

2.117 The minister further noted that where the requisite two sources of evidence are available and decision-makers are not satisfied that a person has suffered family violence (that has not been determined by a court), they are required to seek the opinion of an independent expert, which incurs an expense to the department. Currently, the safeguard of having an expert opinion is only enlivened where a

person had submitted a valid application, including providing a minimum of two pieces of evidence from two categories of official information. As such, it has no safeguard value with respect to individuals who cannot provide two separate categories of official evidence. As to why such an expert could not be consulted to determine claims of family violence in the absence of the two sources of official evidence, the minister stated that consideration must be given to 'financial constraints of the current contract with the independent expert that is utilised where the decision-maker is unable to be satisfied family violence has occurred based on the evidence before them'. The minister stated that the number of referrals to the independent expert and consequently costs to the Commonwealth could be expected to increase with a widening of the scope of acceptable evidence. Noting that Australia has obligations to immediately realise the rights under the International Covenant on Civil and Political Rights, including the right to equality and non-discrimination, the financial implications of enlivening an existing legislative safeguard are not relevant to an assessment of whether this measure is a proportionate limit on this right.

2.118 Further information was sought as to why the measure does not give a decision-maker the discretion to consider a range of evidence provided to them about alleged family violence and to make a case-by-case determination. The minister stated that decision-makers do have the discretion to consider a range of evidence, and make a holistic assessment of all evidence, but only if the minimum evidentiary requirements from two official sources have been met. The minister also highlighted internal procedural instructions which provide information and guidance to decision-makers on assessing family violence claims.[14] These instructions advise decision-makers that additional relevant evidence may be taken into consideration, but that 'evidence by objective, official and credible sources should be given more weight than more subjective forms of evidence, such as letters and testimonies from friends and relatives.' However, as in relation to the above safeguard, a decision-maker's ability to consider additional evidence would only be enlivened once a person had already satisfied the minimum two sources of evidentiary requirements. As such, this does not assist with the proportionality of the measure as it provides no additional flexibility to applicants who are unable to procure the requisite two sources of evidence from two different official sources.

2.119 Noting that there appears to be a risk that this measure may have a disproportionate impact on non-citizens for whom English is a second language or from certain cultural backgrounds, and that there is no flexibility to treat different cases differently (if the applicant cannot obtain the necessary two items of evidence) and that there are less rights-restrictive alternatives available (such as allowing

14 See, *[Div1.5] Division 1.5 – Special provisions relating to family violence*. The LEGEND database is not directly available to the public. To access it, individuals must themselves subscribe (costing between $730 and $800 per year) or via a library scheme.

decision-makers to make decisions on a case-by-case basis and, if necessary, seeking the advice of an expert) there is a risk that this measure impermissibly limits the right to equality and non-discrimination.

Committee view

2.120 The committee thanks the minister for this response. The committee considers that there is a risk that applicants from non-English speaking backgrounds or certain cultural backgrounds may face more difficulties obtaining evidence of family violence and, consequently, the measure appears to limit the right to equality and non-discrimination. The committee considers that it is not clear the measure provides sufficient flexibility, or is accompanied by sufficient safeguards, such that this would constitute a permissible limit on the right to equality and non-discrimination.

2.121 The committee notes that the minister stated the department has monitored feedback from stakeholders and some stakeholders have raised that the requirement to provide evidence from two separate categories may present a challenge for some applicants. The minister stated that the government has committed to a further review of this measure in the next 12 months.

Suggested action

2.122 The committee recommends that a review of this measure to be conducted in the next 12 months to consider the concerns noted in this report (including consideration of whether people from non-English speaking backgrounds or certain cultural backgrounds are more frequently unable to provide evidence of non-judicially determined family violence in practice).

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

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	*Public Service Act 1999*
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 7 August 2023 in the Senate)[2]
Rights	Privacy; work; equality and non-discrimination; people with disability

2.124 The committee requested a response from the minister in relation to the instrument in *Report 6 of 2023*.[3]

Direction to attend medical examination

2.125 Section 11 of the regulations allows an Agency Head[4] 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.[5] 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

1 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Public Service Regulations, *Report 8 of 2023*; [2023] AUPJCHR 82.

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 Parliamentary Joint Committee on Human Rights, *Report 6 of 2023* (14 June 2023), pp. 30-38.

4 An Agency Head is defined as the Secretary of a Department, the Head of an Executive Agency of the Head of a Statutory Agency. See section 7 of the *Public Service Act 1999*.

5 Subsection 11(2).

may cause, an extended absence from work;[6] may be a danger to the employee; has 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.[7] 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.[8]

Summary of initial assessment

Preliminary international human rights legal advice

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

2.126 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.[9]

2.127 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.[10] This right encompasses both 'direct' discrimination (where measures have a discriminatory intent) and 'indirect' discrimination (where measures have a

6 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 four weeks.

7 Paragraph 11(1)(a).

8 Paragraph 11(1)(b)–(c).

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

10 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.

discriminatory effect on the enjoyment of rights).[11] 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.[12]

2.128 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 accommodations are provided.[13] 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.[14]

2.129 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.[15] 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

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

12 *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].

13 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).

14 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].

15 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].

disability with regard to all employment matters.[16] The UN Committee on the Rights 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.[17]

2.130 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] Further information is required as to whether there is a pressing and substantial concern which gives rise to the need for the specific measure, how the measure is likely to be effective in achieving the objective being sought and whether the limitation is proportionate.

Committee's initial view

2.131 The committee sought the minister's advice to assess the compatibility of the measure with the rights to privacy, work, equality and non-discrimination and the rights of persons with disability, in particular:

(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;

16 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).

17 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].

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.

(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.

2.132 The full initial analysis is set out in *Report 6 of 2023*.

Minister's response[19]

2.133 The minister advised:

> *(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 this measure effective to achieve the objective being sought*
>
> Agency Heads have a duty of care under the *Work Health and Safety Act 2011* towards their employees and must comply with the *Safety, Rehabilitation and Compensation Act 1988.* The power to direct an employee to attend a medical examination is necessary to give effect to the duties and obligations under both Acts.
>
> Some of the circumstances where it is necessary to provide an Agency Head with information in relation to an employee's state of health include:
>
> - if the employee presents with a severe injury and/or the employee has limitations for work capacity;
> - if clarification is required about the employee's physical/mental capabilities and any activities that must be avoided;
> - if there is medical evidence suggesting a possibility of re-injury at work;
> - where there is conflicting medical information particularly in relation to an employee's work capacity and treatment;
> - factors in the work environment, including any perceived or actual adverse relationships with supervisors or co-workers;
> - if the injury is slow onset and the symptoms have developed over a period of time;

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

- if there is a significant change in the employee's certified capacity for work or participation in rehabilitation;
- uncertainty on diagnosis of the employee's condition;
- there is insufficient or conflicting medical evidence;
- the treatment being received does not appear to be clinically justified and/or an opinion on treatment needs is required;
- an employee has developed a new or secondary condition (that may, or may not be, related to their work environment);
- an employee has submitted a claim, including for permanent impairment (subject to the use and application of powers in the SRC Act with respect to the claim);
- concerns about the current medical evidence;
- the condition seems to have stabilised; or
- recovery has stalled.

For example, an Agency Head may direct an employee to attend a medical examination following an extended absence from the workplace. The medical examination will provide the Agency Head with information to develop a return to work plan that may include recommendations on modified duties or a modified work pattern. The information from the medical examination assists the Agency Head to address the pressing or substantial concern to meet their duty of care and ensure the employee is able to return to the workplace successfully. If an employee makes a claim, this is likely to be in conjunction with the powers in the SRC Act, and Comcare publishes guidance on the use of those powers on its website.

An Agency Head may also direct an employee to attend a medical examination where the employee has notified the Agency Head that they have a medical condition influencing their ability to undertake their duties. In this situation, the Agency Head may direct the employee to attend a medical examination to ensure the employee remains safe in the workplace. The medical examination will ensure the Agency Head has the necessary information to understand the type of support required, or any changes required to the employee's role and address the pressing or substantial concern to make reasonable accommodation for the employee. This may include providing the employee with modified duties or, in consultation with the employee, moving them to an alternative role that is more suited to their current needs. This can be particularly pertinent in dangerous work environments, noting the public service undertakes a diverse range of roles across a breadth of work environments and workplaces, for example, abattoirs, national parks, the Antarctic, ports, wharfs, ships and vessels, and so forth.

The examples described above on the use of the power to attend a medical examination serve a legitimate objective, to assist Agency Heads to meet their duty of care towards employees under the WHS Act. They

are rationally connected to that objective, and are a proportionate means of achieving that objective. Likewise, the ability to direct an employee to attend a medical examination is instrumental to supporting the effective operation of the SRC Act in parallel to the powers in the Regulations.

(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'

In determining whether an employee's heath may be affecting their work performance or standard of conduct, an Agency Head will usually make this determination following information received from the employee. An employee may volunteer this information with the aim of seeking support or assistance, or following a performance or conduct discussion, an employee may provide a health concern as the explanation for their behaviour. Where an employee raises their health as the explanation for a performance concern, a medical examination will assist an Agency Head to ensure any action taken is reasonable. For example, if a medical examination demonstrated an employee's underperformance may be attributable to, or the result of, a medical condition.

(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

All ongoing, non-ongoing and casual APS employees (other than SES employees) can seek review of certain decisions or actions that relate to their employment. This right to seek a review is an entitlement built into section 33 of the *Public Service Act 1999*.

A written notice under section 11 must be a lawful and reasonable direction. Procedural fairness necessitates that where an Agency Head provides written notice to an employee to attend a medical examination they must include a reason for the decision.

However, should an Agency Head not provide sufficient detail in the written notice, this would not limit the employee's ability to seek a review in accordance with the review provisions in the Regulations.

(e) why is it 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 and (f) whether it is possible for an employee to submit to an Agency head a shadow report from a medical practitioner of their choice

The ability to nominate the medical practitioner who will undertake a medical examination does not limit an Agency Head from nominating a practitioner of the employee's preference. However, there are circumstances where an Agency Head may wish to nominate an alternative

practitioner. For example, in circumstances where the information provided by an employee's preferred medical practitioner does not align with the information provided by the employee, an Agency Head may need to seek further guidance from an independent medical practitioner.

For example, where an employee informs the Agency Head that the reason for their underperformance is due to a medical condition, an Agency Head may ask for evidence from the employee's doctor. However, if the employee's doctor confirms that the employee's medical condition should not impair the employee's performance but the employee still maintains their performance is impacted by their medical condition, the Agency Head may wish to seek an independent medical examination prior to deciding whether to commence an underperformance process. The Regulations do not limit an employee from providing a shadow medical report to the Agency Head. A shadow report would form part of the materials for consideration by an Agency Head prior to undertaking any action.

(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

The information in the medical report will inform the Agency Head in decisions made relating to the employee. For example in the development of a return to work plan or a return to full time duties plan. The information could determine whether alternative duties or workplace support is necessary. While termination is possible, to terminate an employee on the ground of inability to perform duties because of physical or mental incapacity, the Agency Head would also need to ensure they have met their obligations under all relevant laws, including for example the *Disability Discrimination Act 1992* and SRC Act. This includes taking all reasonable steps to provide the injured employee with suitable employment or to assist the injured employee to find such employment. Therefore, information contained in the medical report would not be sufficient in isolation to terminate an employee's employment.

Concluding comments

International human rights legal advice

2.134 The minister advised that the power to direct an employee to attend a medical examination is necessary to give effect to work health and safety duties and obligations. The minister gave several examples of when such a power might be used and noted that this power serves the legitimate objective of assisting Agency Heads to meet their duty of care towards employees under work, health and safety legislation. Enabling heads of the public service to meet their work, health and safety obligations by ensuring people only return to work when it is safe to do so constitutes a legitimate objective for the purposes of international human rights law, and the direction power would appear rationally connected to this objective.

2.135 In relation to proportionality, and in particular whether the measure is sufficiently circumscribed, the circumstances in which an Agency Head may direct an employee to undergo a medical examination are drafted in broad terms, such as where an employee's state of health may affect their work performance or standard of conduct. The minister advised that in determining whether an employee's heath may be affecting their work performance or standard of conduct, an Agency Head will usually make this determination following information received from the employee. The minister advised that an employee may volunteer this information and where an employee raises their health as the explanation for a performance concern, a medical examination will assist an Agency Head to ensure that any action taken is reasonable. If the measure was restricted to only directing a medical examination, where an employee themselves has raised health concerns, this would appear to be appropriately circumscribed. However, the power in the regulations is not so limited. Rather, section 11 provides that the Agency Head may direct the medical examination if they 'believe' the state of health of the employee may be affecting the employee's work performance, has caused them (or may cause them) to have an extended absence from work, or may be a danger to the employer or others, or when assigning new duties. This would allow the Agency Head to unilaterally make such a direction, with limited criteria as to when the power can be exercised. As the minister's response did not address any circumstance other than voluntary disclosure by the employee, it is unclear in what other circumstances an Agency Head make may such a direction. For example, could an Agency Head make a direction to attend a medical examination for an employee on the basis that they believed there was an undiagnosed neurodivergent disorder which is affecting the employee's work performance? The effect of such a direction on a person's right to privacy, and particularly on the rights of persons with disability, may be significant.

2.136 In relation to whether the employee's medical practitioner could be asked to complete the report, the minister advised that the regulations do not specify the medical practitioner who can be nominated, so an Agency Head may nominate a practitioner of the employee's preference. However, the minister set out why there may be circumstances where an Agency Head may wish to nominate an alternative practitioner. The minister also advised that the regulations do not prevent an employee from providing a shadow medical report to the Agency Head, which could form part of the materials for consideration by an Agency Head prior to undertaking any action. In relation to what the report may be used for, the minister advised that the information in the medical report will inform the Agency Head in decisions made relating to the employee, such as in the development of a return to work plan or a return to full time duties plan. The minister advised that while termination of employment is possible, to terminate an employee on the ground of inability to perform duties because of physical or mental incapacity, the Agency Head would also need to ensure they have met their obligations under all relevant laws, including, for example, the *Disability Discrimination Act 1992*. As such, the information in the

medical report would not be sufficient in isolation to terminate an employee's employment.

2.137 In relation to applicable safeguards, the minister advised that procedural fairness requires an Agency Head to include reasons for the decision to direct an employee to undergo a medical examination. The minister also advised that all APS employees (other than SES employees) can seek review of certain decisions or actions that relate to their employment.[20] The availability of merits review serves as an important safeguard.

2.138 In conclusion, while the measure pursues a legitimate objective and appears rationally connected to this objective, concerns remain with respect to proportionality. The minister's response has provided detail as to the safeguards that apply and examples of when the direction is likely to be used. Noting these safeguards and the examples provided by the minister, were the power to only be used in the circumstances set out in the minister's response, it would be likely that the measure would be a proportionate limit on rights. However, section 11 is drafted in terms that allow a broader basis for issuing a direction than the circumstances set out in the minister's response. Noting that a medical report could form part of the basis on which a person's employment could be terminated (although noting discrimination laws continue to apply) and the significance this could have on a person's rights to work, it has not been fully established that any limitation on the right to privacy by this measure would be proportionate. As the measure does not appear to be sufficiently circumscribed it is also not clear whether any differential treatment of persons on the basis of disability would be based on reasonable and objective criteria, and as such there is a risk the measure may impermissibly limit the rights to equality and non-discrimination and the rights of persons with disabilities. However, as other existing discrimination and fair work protections continue to apply, it is likely that the measure does not impermissibly limit the right to work.

Committee view

2.139 The committee thanks the minister for this response. The committee considers that directing an APS employee to undergo a medical examination and providing an Agency Head with the results of that examination seeks to achieve the legitimate objective of upholding work, health and safety obligations and helping to ensure that people only return to work when it is safe to do so. The committee considers that the minister has detailed a number of safeguards that apply to the measure and the circumstances set out by the minister as to when this power is likely to be used, appear to be reasonable and proportionate. However, the committee is concerned that section 11 is drafted in broad terms that could allow an Agency Head to direct a person to undergo a medical examination in circumstances that may be an

20 *Public Service Act 1999*, section 33.

impermissible limit on the right to privacy and may unlawfully discriminate against persons with disabilities.

Suggested action

2.140 The committee considers the proportionality of this measure may be assisted were section 11 of the regulations amended to more clearly define the precise circumstances as to when an Agency Head may come to 'believe' that the state of health of an APS employee may be a relevant workplace consideration.

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

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

Use and disclosure of personal information

2.143 Section 103 authorises an Agency Head, the 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.[21] 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.[22] An Agency Head may also disclose personal information where the disclosure is necessary for, or relevant to, the exercise of certain powers or functions.[23] The APS Commissioner may use personal information where the 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.[24] 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.[25]

21 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.

22 Subsection 103(2).

23 Subsection 103(3).

24 Subsection 103(4).

25 Subsections 103(5)–(6).

Summary of initial assessment

Preliminary international human rights legal advice

Rights to privacy

2.144 By authorising the use and disclosure of personal information, the measure engages and limits the right to privacy. 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.[26] 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.

2.145 Further information is required as to whether there is a pressing and substantial concern which gives rise to the need for the specific measure, how the measure is likely to be effective in achieving the objective being sought and if it is proportionate.

Committee's initial view

2.146 The committee sought the minister's advice to assess the compatibility of the measure with the right to privacy, in particular:

(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.

Minister's response[27]

2.147 The minister advised:

> *(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;*
>
> The Commonwealth is the sole employer of Australian Public Service employees regardless of which agency engages them. Under section 20 of the *Public Service Act 1999,* Agency Heads have all the rights, duties and

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

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

powers of an employer in respect of employees in their agency. However, the *Privacy Act 1988* treats each APS agency as a wholly separate entity for the purposes of handling personal information. This means that sharing personal information about APS employees between Commonwealth agencies-for example, when a staff member moves between agencies, or when a person applies for a job in another agency- would be a disclosure for the purposes of the Privacy Act. Historically this created significant administrative difficulty for Agency Heads to perform and give full effect to their employer powers for the benefit of both their employees, and the Commonwealth.

As a result, the PS Act and Regulations provide for authorised disclosures in certain circumstances between APS agencies under section 9.2. This ensures a common understanding of employment-related personal information disclosure across the APS. This expanded in 2013 to enable Agency Heads to use or disclose personal information necessary or relevant to any of their employer powers under the PS Act.

Section 103 is therefore an authorising provision for the purposes of the Privacy Act, to enable sharing of personal information where appropriate between and within agencies.

The personal information records of employees can transfer with the employee from one agency to another for a range of, ordinary employer purposes:

- recruitment, including promotion decisions;
- movements within agencies under a Machinery of Government process pursuant to section 72 of the PS Act;
- permanent or temporary transfers pursuant to section 26 of the PS Act;
- case management and provision of rehabilitation services to ill or injured employees;
- remuneration, tax, superannuation and other financial administration purposes; and
- where Code of Conduct or other personnel management processes might require appropriate disclosure to and use by non-employing agencies.

All APS employees must comply with common standards of behaviour through the APS Values, Employment Principles, and Code of Conduct, which reflect the expectations the Commonwealth has of APS employees in respect of their performance and behaviour, and ultimately maintain public confidence in the integrity of the APS.

Public confidence is likely to be undermined if Agency Heads are not able to manage APS employees in a practical, sensible way and consistent with the common standards set by Parliament in the PS Act. Should information about employee behaviour calling into question their adherence to the

common standards come to the attention of the Commonwealth, it is appropriate that the agency responsible for managing that employee consider and address it. Employees should have a reasonable expectation that this will occur, and the broader community would expect that public servants be treated fairly and not be protected by technical procedural requirements.

The provision also has the effect of providing clarity for employees seeking to report suspected misconduct, including suspected corruption. There is an expectation across the APS that employees will report behaviour suspected of breaching the Code of Conduct, or suspected breaches of other legislation, such as work health and safety or anti-discrimination law. Staff and agencies need assurance that making such a report within an agency, or to another agency, constitutes a disclosure or use of information that is 'required or authorised' by law.

(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;

An Agency Head, the APS Commissioner, and the Merit Protection Commissioner may disclose information both within and outside the Commonwealth. In practice, this includes their delegates and authorised employees who may exercise their relevant powers, functions or duties. In some circumstances, Agency Heads may need to consider disclosing personal information to a member of the public, for example to a non-APS complainant regarding the outcome of their complaint. The Commission has provided guidance to agencies on disclosing information to complainants (Circular 2008/3: Providing information on Code of Conduct investigation outcomes to complainants: currently under review).

Authorised use and disclosure of personal information under section 103 must still be consistent with the Privacy Act in all other respects. This includes notification to employees upon engagement of how their agency may disclose and use their personal information, in accordance with Australian Privacy Principle 5.

(c) what other safeguards, if any, accompany the measure.

I expect that APS agencies have regard to Australian Public Service Commission guidance in considering employment actions and decisions. The Commission has issued guidance, after consultation with the Office of the Australian Information Commissioner, on the application of section 103 of the Regulations (which is unchanged in substance from regulation 9.2 of the Public Service Regulations 1999). That guidance is in Circular 2016/2: Use and disclosure of employee information. The guidance sets out principles underpinning appropriate use and disclosure of information under section 103 of the Regulations:

> *4. Section 103 provides agencies with significant flexibility in the use and disclosure of personal information, including very sensitive*

personal information, of their employees. The personal information of employees should be used or disclosed carefully. Generally, personal information should not be used or disclosed for a *reason other than that for which it was collected.*

[...]

6. The use and disclosure of employees' personal information requires careful, balanced consideration in each case. On one hand, employees have a *right to expect that their personal information is held in confidence and only used or disclosed for proper, defensible reasons. On the other, APS agencies need to be able to:*

a. *use information they hold about their employees to make employment decisions that are lawful, sensible and based on the available evidence, and*

b. disclose employee information to other APS agencies to support their decision-making.

The further information and safeguards explained above recognise that the use and disclosure of personal information provided for by section 103 is not arbitrary, pursues a legitimate object, and is effective, and proportionate to achieving that objective.

Concluding comments

International human rights legal advice

2.148 The minister has provided further advice regarding why it is necessary to authorise the use and disclosure of personal information in these regulations. The minister advised that while the Commonwealth is the sole employer of APS employees, the *Privacy Act 1988* treats each APS agency as a separate entity for the purposes of handling personal information. This means that sharing personal information about APS employees between Commonwealth agencies, such as when employees move agencies, would be a disclosure for the purposes of the Privacy Act but for the existence of these authorised disclosure provisions. As such, these provisions ensure a common understanding of employment-related personal information disclosure across the APS. The minister advised that public confidence is likely to be undermined if Agency Heads are not able to manage APS employees in a practical, sensible way and consistent with common standards, and as such personal information about employees (including adherence to the Code of Conduct) may need to be shared between agencies. The minister advised that the broader community would expect that public servants be treated fairly and not be protected by technical procedural requirements. The minister also advised that this provision also provides clarity for employees seeking to report suspected misconduct, and this will constitute a disclosure or use of information that is 'required or authorised' by law.

2.149 Permitting the use and disclosure of personal information for the purposes of the effective management of employment related matters across the APS, including to manage any suspected misconduct and ensure public confidence in the

public service, is likely to constitute a legitimate objective for the purposes of international human rights law, and this provision appears rationally connected to that objective.

2.150 In relation to proportionality, 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 purposes for which personal information may be used and disclosed are drafted in reasonably specific terms, relating to employer powers or to specific powers or functions of the APS Commission. In relation to whom the information may be disclosed, the minister advised that an Agency Head, the APS Commissioner and the Merit Protection Commissioner 'may disclose information both within and outside the Commonwealth'. The minister advised that in practice this will be to other APS employees, but in some circumstances Agency Heads may disclose personal information to a member of the public, for example to a non-APS complainant regarding the outcome of their complaint. The minister advised that guidance is available in relation to this situation, and this guidance states that in considering what information to provide to complainants, agencies need to balance individual employees' right to privacy and the need to take reasonable steps to be transparent and accountable, with the identity of an individual employee not revealed unless it is necessary, appropriate and reasonable to do so.[28] The minister also advised that authorised use and disclosure of personal information must still be consistent with the Privacy Act in all other respects. The minister also advised that the Australian Public Service Commission has also issued guidance in relation to the principles underpinning the appropriate use and disclosure of information under section 103. This guidance provides that personal information of employees should be used or disclosed carefully, and generally should not be used or disclosed for a reason other than that for which it was collected.[29]

2.151 The availability of guidance with respect to disclosing personal information to a member of the public and within an agency and with other APS agencies would serve as an important safeguard. The guidance relating to disclosure of information under section 103, for example, states that information should generally not be used or disclosed for a reason other than that for which it was collected and where appropriate, consent from the employee may be sought to provide them with an opportunity to raise any concerns they may have regarding the use or disclosure of their personal information.[30] This safeguard, combined with the Privacy Act, may

28 Australian Public Service Commission, Circular 2008/3: Providing information on Code of Conduct investigation outcomes to complainants (currently under review).

29 Australian Public Service Commission, Circular 2016/2: Use and disclosure of employee information.

30 Australian Public Service Commission, Circular 2016/2: Use and disclosure of employee information, [4], [27]–[29].

assist to ensure that any limitation on the right to privacy is only as extensive as is strictly necessary. The measure therefore appears to be accompanied by sufficient safeguards to ensure that any limitation on the right to privacy would likely be permissible in practice.

Committee view

2.152 The committee thanks the minister for this response. 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 permitting the use and disclosure of personal information for the purposes of the effective management of employment related matters across the APS and to maintain public confidence in the APS is likely to constitute a legitimate objective for the purposes of international human rights law. The committee considers that the availability of guidance with respect to using and disclosing personal information, as well as existing safeguards in the Privacy Act, would assist to ensure that any limitation on the right to privacy is likely only as extensive as is strictly necessary. On this basis, the committee considers that the measure would likely constitute a permissible limitation on the right to privacy in practice.

Suggested action

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

2.154 The committee considers that its concerns have therefore been addressed and makes no further comment in relation to these regulations.

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 Senate by 7 August 2023[2]
Authorising legislation	*Telecommunications (Interception and Access) Act 1979*
Right	Privacy

2.155 The committee requested a response from the Attorney-General in relation to the instrument in *Report 6 of 2023*.[3]

Access to telecommunications data by corrective services authorities

2.156 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.[4] 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.[5] 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, *Report 8 of 2023*; [2023] AUPJCHR 83.

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 Parliamentary Joint Committee on Human Rights, *Report 6 of 2023* (14 June 2023) pp. 39-44.

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

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

is defined as a criminal law enforcement agency[6] or an authority or body that the Attorney-General declares, by legislative instrument, to be an enforcement body.[7] 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.[8]

2.157 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.[9] The declaration is subject to the condition that officers cannot apply for a journalist information warrant, and it only applies to Corrective Services NSW.[10]

Summary of initial assessment

Preliminary international human rights legal advice

Right to privacy

2.158 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.[11] 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.[12] 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

6 *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.

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

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

9 Section 3.

10 Section 4.

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

12 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].

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

2.159 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.

2.160 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.

Committee's initial view

2.161 The committee considered that further information is required to assess the compatibility of this measure with the right to privacy and sought the advice of the Attorney-General in relation to:

(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.

2.162 The full initial analysis is set out in *Report 6 of 2023*

Attorney-General's response[13]

2.163 The Attorney-General advised:

> ***Question a: Why it is not sufficient for Corrective Services NSW to seek access to telecommunications data via NSW law enforcement agencies?***
>
> While NSW Police are able to access telecommunications data when the statutory threshold prescribed under the TIA Act is met, there are a

13 The Attorney-General's response to the committee's inquiries was received on 10 July 2023. This is an extract of the response. The response is available in full on the committee's website.

number of reasons why it should not be relied on to seek access to telecommunications data on behalf of Corrective Services NSW.

Corrective Services NSW plays a critical role in the detection, investigation and prosecution of serious crime and corruption under State and Commonwealth legislation, as well as the detection and disruption of terrorist activity. Direct access to telecommunications data and information, as facilitated by enforcement agency status under the TIA Act, is of immeasurable importance to the agency in supporting these functions and ensuring the good order and security of the correctional system.

Access to this critical information may be required within very tight timeframes, as it could mean the difference between a successful escape from custody, or violent/terrorist attack.

Relying on NSW Police to access telecommunications data on behalf of Corrective Services NSW would result in further privacy intrusions and cause unnecessary delays.

Such a process would require the resources of both NSW Police and Corrective Services NSW to request and access the relevant telecommunications data, and Corrective Service NSW investigations would be at the mercy of the knowledge, workload and priorities of the NSW Police.

NSW Police makes on average approximately 100,000 authorisations under the TIA Act annually and a particular officer may not have the ability to appropriately prioritise requests for data from Corrective Services NSW over its own agency activity at any given time. This may result in a significant delay in Corrective Services NSW accessing the required data, resulting in harm to an inmate, the good order of the correctional facility, or members of the community.

Further, the doubling [sic] handling of a request could result in further privacy intrusion, as a police officer who would not otherwise require knowledge of the Corrective Services NSW investigation would become privy to the details of that investigation, and the personal details and telecommunications data of the target.

Accordingly, I consider that it is appropriate for Corrective Services NSW to have the ability to access telecommunications data directly from a telecommunications service provider.

Question 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?

Corrective Services NSW has accessed telecommunications data twice since February 2022, with one authorisation currently on foot. Corrective Services NSW has advised that the ability to access telecommunications

data continues to be necessary to support its law enforcement, intelligence and investigative functions as set out above.

Corrective Services NSW has advised its judicious use of telecommunications data to date has been limited due to a number of factors. In particular, the February 2022 declaration was the first time Corrective Services NSW had been an enforcement agency in 7 years and required processes, policies, procedures and training to be developed, tested and refined to ensure the appropriate use of the powers.

As part of that process, the Office of the Commonwealth Ombudsman (OCO) undertook a health check of those processes, policies and procedures. Corrective Services NSW advised it took about 6 months for the OCO's recommendations to be actioned, approved, and fully implemented. Corrective Services NSW also advised that it did not use its powers, on the advice of the OCO, until those recommendations had been implemented. Corrective Services NSW was also delayed in its use of the powers as it needed to negotiate arrangements with service providers to be able to access such data.

With these matters now settled, Corrective Services NSW advises it is now in a strong position to use the powers when necessary and appropriate.

Further, the number of times that telecommunications data has been accessed and used is not reflective of the need for Corrective Services NSW to be able to seek access for operational and safety reasons. Use of this power correlates directly to illegal (or suspected) activity by staff and inmates. For example, there may be periods where such activity is minimal and can be addressed by existing, and less intrusive, search and intelligence capacity.

Conversely, there may be periods where such activity is high in volume, cannot be supported by existing intelligence capacity and access to telecommunications data may be required. As noted, telecommunications data is especially vital in establishing the ownership, use and location of mobile phones which cannot easily be established via other methods.

I do not consider Corrective Services NSW's judicious use of the powers to be reflective of a lack of utility and consider it appropriate for Corrective Services NSW to have authority to access telecommunication data when the relevant thresholds are met.

Question 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?

Under sections 5AB and 178 of the TIA Act, the ability to authorise the release of telecommunications data is limited to senior officers authorised by the Secretary of the NSW Department of Communities and Justice (NSW DCJ). As of 28 June 2023, the Secretary of the NSW DCJ has declared

six senior Corrective Services NSW positions that can authorise access to telecommunications data, significantly limiting the scope of access. Further, Corrective Services NSW has advised the ability to access and use telecommunications data is limited to two specific units within the organisation which have a specific need for the data.

In addition, and as noted above, Corrective Services NSW has also undergone a health check by the Commonwealth Ombudsman. This health check examined the policies and procedures in place to limit and guide the authorisation, access and use of telecommunications data. Corrective Services NSW has implemented all of the Ombudsman's recommendations.

The declaration of all members of Corrective Services NSW as 'officers' for the purposes of the TIA Act is consistent with the approach taken in the TIA Act for other agencies. For example, the definition of' officer' in paragraph 5(c) of the TIA Act in relation to a police force of a state or territory includes all officers of the police force. However, agencies limit this through internal policies and procedures to ensure only appropriate personnel can make authorisations and access data.

Concluding comments

International human rights legal advice

2.164 As stated in the initial analysis, 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. In this context, the Attorney-General advised that Corrective Services NSW plays a critical role in the detection, investigation and prosecution of serious crime and corruption and direct access to telecommunications data and information is of immeasurable importance. The Attorney-General also advised that access to this information may be required within very tight timeframes, 'as it could mean the difference between a successful escape from custody, or violent/terrorist attack' and relying on NSW Police to access telecommunications data on behalf of Corrective Services NSW would cause unnecessary delays.

2.165 However, the Attorney-General also advised that in the past year Corrective Services NSW has only accessed telecommunications data twice. The Attorney-General advised that its use was limited due to a number of factors, including that this was the first time Corrective Services NSW had been declared an enforcement agency in seven years. Noting this advice, it appears that prior to the previous

declaration[14] Corrective Services NSW had not been able to directly access telecommunications data and since February 2022 has only accessed it twice. This raises questions as to whether direct access to such data is as critical as stated, and whether it addresses a pressing and substantial concern. It is also noted that other state correctional facilities are not declared enforcement agencies under the TIA Act; and these entities therefore investigate serious crime within their correctional facilities without being directly declared as an enforcement agency. While 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,[15] it 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'.[16]

2.166 The Attorney-General also stated that if Corrective Services NSW were not declared to be an enforcement agency this could result in further privacy intrusions as relying on the police would mean the police would need to access the personal details and telecommunications data of the target, in addition to Corrective Services NSW. The TIA Act provides that telecommunications data under this power can only be disclosed for the purposes of enforcing the criminal law, administering a law imposing a pecuniary penalty or relating to protection of the public revenue.[17] As such, noting the Attorney-General's advice that such data is necessary to prevent serious concerns such as a prison escape or a violent/terrorist attack, it is unclear why the police would not be involved in accessing such data to investigate and/or enforce such matters in prisons. Further, it does not appear to be a less rights restrictive approach to declare the entirety of Corrective Services NSW to be an enforcement agency to better protect the privacy of those whose telecommunications data is accessed, rather than relying on the police (who already

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

15 Mr Dennis Richardson AC , *'Comprehensive Review of the Legal Framework of the National Intelligence Community, Volume 2: Authorisations, Immunities and Electronic Surveillance,'* December 2019, recommendation 78.

16 Mr Dennis Richardson AC , *'Comprehensive Review of the Legal Framework of the National Intelligence Community, Volume 2: Authorisations, Immunities and Electronic Surveillance,'* December 2019, p. 278.

17 See *Telecommunications (Interception and Access) Act 1979*, subsection 176A(3B).

have such power) to access the relevant data and pass on only that which is relevant to the investigation.

2.167 The Attorney-General was also asked why all staff of Corrective Services NSW are 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. The Attorney-General advised that under the TIA Act the ability to authorise the release of telecommunications data is limited to senior authorised officers.[18] However, the declaration states that 'each staff member' of Corrective Services NSW are 'officers' of the NSW Department of Communities and Justice for the purposes of the TIA Act. It appears that this would mean that each staff member could be an officer authorised to access telecommunications data for the purposes of the TIA Act. The Attorney-General stated that to date only six senior Corrective Services NSW positions can authorise access to telecommunications data and the ability to access and use telecommunications data is limited to two specific units within the organisation that have a specific need for the data. It may assist with proportionality that access to the data is limited in practice to only certain officers, however, as a matter of law any of the over 10,000 officers[19] within Corrective Services NSW could be authorised to access this private telecommunications data. Where a measure limits a human right, discretionary or administrative safeguards alone may not be sufficient for the purpose of a permissible limitation under international human rights law. This is because administrative and discretionary safeguards are less stringent than the protection of statutory processes and can be amended or removed at any time.

2.168 Noting that it has not been clearly established that there is a pressing and substantial concern that warrants Corrective Services NSW having direct access to telecommunications data (rather than partnering with the police) and that the declaration is broadly framed and not limited only to those officers that require access to the data, there is a significant risk that this declaration does not constitute a permissible limitation on the right to privacy.

18 The Attorney-General's response referenced *Telecommunications (Interception and Access) Act 1979*, sections 5AB and 178. However, this declaration is made under subsection 176A(3) which states that the minister may, by legislative instrument, declare an authority or body to be an enforcement agency and persons specified in the declaration to be 'officers of the enforcement agency for the purposes of this Act'. This would suggest the declaration defines who is the authorised officer for the purposes of authorising access to information or documents under section 178, 179 and 180.

19 See NSW Department of Communities and Justice, 'Corrective Services NSW celebrates its staff,' Media Release, 10 January 2022, which stated that there were 10,000 corrective services staff.

Committee view

2.169 The committee thanks the Attorney-General for this response. The committee acknowledges the importance of correctional facilities being able to investigate criminal activity or threats to the order of the prison. 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, noting that all other corrective services agencies access such data via the police, and that Corrective Services NSW has traditionally done so, the committee considers the necessity of this power has not been established. Further, as 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 declaration appears insufficiently circumscribed. As such, the committee considers this declaration is not compatible with the right to privacy.

Suggested action

2.170 At a minimum, the committee considers the proportionality of this measure may be assisted were the declaration amended to specify only those staff members who require access to telecommunications data to be officers for the purposes of the Act.

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

Mr Josh Burns MP

Chair