Chapter 1
New and ongoing matters

1.1 The committee comments on the following bills.

Bills

Administrative Review Tribunal (Consequential and Transitional Provisions No. 2) Bill 2024[9]

Purpose	This bill seeks to make consequential amendments to 110 Commonwealth Acts that interact with the *Administrative Appeals Tribunal Act 1975*. It would also amend the *Criminal Code Act 1995* to remove administrative review of preventative detention order decisions.
Portfolio	Attorney-General
Introduced	House of Representatives, 7 February 2024
Rights	Effective remedy

Review of preventative detention order decisions

1.2 This bill seeks to remove administrative review of decisions to make, extend or further extend preventative detention orders. By way of background, a preventative detention order is an order that the person specified be taken into custody and detained for up to a maximum total period of 48 hours.[10] The purpose of a preventative detention order is to prevent a terrorist act that is capable of being carried out, and could occur, within the next 14 days from occurring or to preserve evidence of, or relating to, a recent terrorist act.[11] To make an order, the issuing authority (a senior Australian Federal Police (AFP) member or judge) must be satisfied of various matters, including that there are reasonable grounds to suspect the person will engage in a terrorist act or is preparing for or planning a terrorist act; an order would substantially assist in preventing the terrorist act; and the order is reasonably

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9 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Administrative Review Tribunal (Consequential and Transitional Provisions No. 2) Bill 2024, *Report 2 of 2024*; [2024] AUPJCHR 9.

10 *Criminal Code Act 1995*, sections 105.8–105.14. An initial preventative detention order may be made by a senior AFP member for a maximum period of 24 hours but this period may be extended for an additional 24 hours if a continued preventative detention order is made by a judge or retired judge.

11 *Criminal Code Act 1995*, section 105.1.

necessary.[12] The Parliamentary Joint Committee on Human Rights has considered the human rights compatibility of the preventative detention order regime on a number of occasions.[13] The committee has consistently raised concerns that preventative detention orders are likely to be incompatible with a range of human rights and questioned the necessity of such orders given they have never been used since their introduction.[14]

1.3 This bill would repeal subsections 105.51(5)–(9) of the *Criminal Code Act 1995* (Criminal Code), which provide that an application may be made to the Administrative Appeals Tribunal (AAT) for review of a decision to make, extend or further extend a preventative detention order. Under the current law, the AAT can declare the decision void (if the Tribunal would have set the decision aside if an application for review of the decision had been able to be made while the order was in force) and award compensation to the applicant. By repealing these subsections of the Criminal Code, a person would only be able to apply to a court (and not the tribunal) for a remedy in relation to a preventative detention order or the treatment of a person in connection with their detention under that order.[15] An application may only be made once the order is no longer in force.[16]

1.4 Additionally, the bill seeks to make consequential amendments to the Administrative Review Tribunal Bill 2024 to remove references to preventative detention order decisions.[17] In effect, the new Administrative Review Tribunal, which seeks to replace the AAT, would not have jurisdiction to review preventative detention order decisions.

International human rights legal advice

Right to an effective remedy

1.5 As the committee has previously found, preventative detention orders are likely to be incompatible with a range of human rights. In particular, a preventative detention order may violate a person's right to liberty, which prohibits the arbitrary

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12 *Criminal Code Act 1995*, section 105.4.

13 See e.g. Parliamentary Joint Committee on Human Rights, Counter-Terrorism and Other Legislation Amendment Bill 2023, *Report 9 of 2023* (6 September 2023) pp. 13–27 and *Report 11 of 2023* (18 October 2023) pp. 63–85; Parliamentary Joint Committee on Human Rights, Counter-Terrorism Legislation Amendment (AFP Powers and Other Matters) Bill 2022, *Report 4 of 2022* (28 September 2022) pp. 7–11.

14 See e.g. Parliamentary Joint Committee on Human Rights, Counter-Terrorism and Other Legislation Amendment Bill 2023, *Report 11 of 2023* (18 October 2023) pp. 65–66, 68–69.

15 *Criminal Code Act 1995*, subsection 105.51(1).

16 *Criminal Code Act 1995*, subsection 105.51(2).

17 The Parliamentary Joint Committee on Human Rights commented on the Administrative Review Tribunal Bill 2024 and Administrative Review Tribunal (Consequential and Transitional Provisions No. 1) Bill 2024 in *Report 1 of 2024* (7 February 2024) pp. 15–42.

and unlawful deprivation of liberty.[18] The UN Human Rights Committee has stated that security detention, that is detention not in contemplation of prosecution on a criminal charge, 'presents severe risks of arbitrary deprivation of liberty'.[19] If a preventative detention order violated a person's right to liberty, they have a right to an effective remedy with respect to that violation.[20] This 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 must comply with the fundamental obligation to provide a remedy that is effective.[21]

1.6 Removing administrative or merits review of preventative detention order decisions may have implications for the right to an effective remedy. This is acknowledged in the statement of compatibility.[22] This states, however, that the impact on the right will be minimal as the remedies currently available to an affected individual through administrative review are also available through judicial review, which is provided for in sections 105.51 and 105.52 of the Criminal Code as well as section 39B of the *Judiciary Act 2093* and section 75(v) of the Constitution.[23] The explanatory memorandum states that providing for only judicial review is appropriate and reflects the seriousness and extraordinary nature of preventative detention order decisions, and the courts' expertise in handling such matters.[24] As to the reasons for the measure, the statement of compatibility notes that the powers to void an order and order compensation are not typically a function of an administrative tribunal and the amendments would result in these powers being vested exclusively in the courts.[25] In doing so, the measure would address the risk that the relevant subsections of the Criminal Code could be construed as vesting federal judicial power in a body other than a court, contrary to Chapter III of the Constitution.[26]

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

19 UN Human Rights Committee, *General Comment 35: Liberty and security of person* (2014) [15].

20 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): States 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.

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

22 Statement of compatibility, p. 7.

23 Statement of compatibility, p. 7.

24 Explanatory memorandum, p. 134.

25 Statement of compatibility, p. 7.

26 Statement of compatibility, p. 7 and explanatory memorandum, p. 134.

1.7 While judicial review remains available, the key question is whether this would be an *effective* remedy in practice.[27] Judicial review in Australia represents a limited form of review in that it allows a court to consider only whether the decision was lawful (that is, within the power of the relevant decision maker). The court cannot undertake a full review of the facts (that is, the merits), as well as the law and policy aspects of the original decision to determine whether the decision is the correct or preferable decision. In contrast, a tribunal could set aside or declare void a decision if it was not the correct or preferable one. Additionally, compensation is not an available remedy in judicial review proceedings. A person may seek compensation in proceedings for an alleged tortious act (such as false imprisonment), but such proceedings would be more costly and less timely than merits review and would place a plaintiff at risk of a costs order being made against them. These access to justice concerns may, in practice, undermine the effectiveness of the remedies available through the courts. Whether judicial review alone will be sufficient for the purposes of the right to an effective remedy will ultimately depend on the circumstances in each case.

Committee view

1.8 While noting the importance of measures intended to prevent terrorist attacks, the committee notes it has previously raised concerns regarding preventative detention orders. The committee considers that given these human rights concerns, any reduction in the availability of possible remedies requires careful consideration. The committee notes that while judicial review remains available, merits review is not. Judicial review represents a more limited form of review in that it allows a court to consider only whether the decision was lawful, not whether the decision was the correct or preferable decision. The committee also notes that compensation is not an available remedy in judicial review proceedings, although compensation may be sought in proceedings for an alleged tortious act, such as false imprisonment. The committee notes that such proceedings, however, are more costly and less timely. These access to justice challenges may, in practice, undermine the effectiveness of remedies available through the courts. The committee considers that the sufficiency of judicial review for the purposes of the right to an effective remedy will ultimately depend on the circumstances of the case.

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27 It is noted that in other contexts, such as non-refoulement decisions, international human rights law jurisprudence has found the availability of judicial review alone (without consideration of the merits) to be insufficient for the purposes of ensuring persons have access to an effective remedy. See *Singh v Canada*, UN Committee against Torture Communication No.319/2007 (2011) [8.8]–[8.9]; *Agiza v Sweden*, UN Committee against Torture Communication No.233/2003 (2005) [13.7]; *Josu Arkauz Arana v France*, UN Committee against Torture Communication No.63/1997 (2000); *Alzery v Sweden*, UN Human Rights Committee Communication No.1416/2005 (2006) [11.8].

1.9 The committee draws these human rights concerns to the attention of the Attorney-General and the Parliament.

Autonomous Sanctions Amendment Bill 2024[28]

Purpose	This bill seeks to amend the *Autonomous Sanctions Act 2011* to confirm that individuals and/or entities can be validly sanctioned based on past conduct or status, and retrospectively seeks to validate sanctions that were made based on past conduct or status. It also seeks to confirm that sanctions are valid even where it is not explicitly clear that the minister considered their discretion, also with retrospective effect.
Portfolio	Foreign Affairs and Trade
Introduced	House of Representatives, 15 February 2024 *(Passed House of Representatives on 28 February 2024)*
Rights	Fair hearing; privacy; protection of the family; adequate standard of living; freedom of movement

Retrospective validation of sanctions

1.10 The bill seeks to amend the *Autonomous Sanctions Act 2011* (the Act) to provide that individuals and/or entities can be validly sanctioned based on past conduct or status.[29] It would confirm that sanctions imposed on individuals or entities based on sanctions criteria containing past conduct/status, and the sanctions criteria containing past conduct/status themselves, are valid and cannot be invalidated on the basis that the ability to impose sanctions is not constrained by a temporal limit.[30] It also seeks to validate any instrument imposing sanctions on individuals or entities based on past conduct/status, where the sanction was made under sanctions criteria in the Autonomous Sanctions Regulations 2011 (the regulations) containing temporal limits on the scope of past conduct/status, and which exceeded those limits.[31]

1.11 In addition, the bill would retrospectively validate prior sanctions even where it is not explicitly clear that the minister had considered their discretion to sanction the person/entity at all, or to decide whether to only designate a person for targeted financial sanctions or only declare them for travel bans, or both.[32] This proposed

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28 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Autonomous Sanctions Amendment Bill 2024, *Report 2 of 2024*; [2024] AUPJCHR 10.

29 Schedule 1, Part 1, item 1, proposed s 10A.

30 Schedule 1, Part 1, item 1, proposed s 10A.

31 Schedule 1, Part 2, item 4.

32 Schedule 1, Part 2, item 5.

provision would appear to be in direct response to a recent Federal Court of Australia judgment.[33]

International human rights legal advice

Rights to a fair hearing; privacy; protection of the family; freedom of movement

1.12 The explanatory memorandum states that the proposed amendments would 'clarify but not alter' the autonomous sanctions framework and are 'unlikely to have more than a minor regulatory impact'.[34] However, it also notes that the amendments would apply to current court matters:

> The Bill will apply to matters currently before the Court. This is appropriate as the Bill will provide interpretive guidance to the Court on provisions of the Act whose operations may otherwise be in dispute. The validation provisions remove any ambiguity that may exist with regards to sanctions listings decisions.[35]

1.13 It would appear, therefore, that the capacity for the current regime to validly sanction persons in relation to certain prior conduct, and in cases where it is not apparent that the minister has considered their discretionary powers, has been called into question in some respect.[36] Consequently, the proposed amendments would either confirm the existing capacity to sanction persons, or extend that capacity (depending, it would appear, on the legal interpretation that may have been made by a court). In either case, by amending provisions relating to how the sanctions regime operates, it is necessary to examine the sanctions regime as a whole when considering its compatibility with human rights law. This committee has, for over a decade, raised concerns regarding the human rights compatibility of the sanctions regime.[37]

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33 *Deripaska v Minister for Foreign Affairs* [2024] FCA 62. See, in particular, paragraphs [122]–[176] in which the court considered an argument regarding whether the minister misunderstood the nature of the power being exercised by failing to appreciate the scope of her discretion, and whether she was aware of her discretion to designate and declare, neither designate nor declare, and designate or declare the applicant and other matters.

34 Explanatory memorandum, p. 2.

35 Explanatory memorandum, p. 4.

36 In this regard it is noted that Kennett J, of the Federal Court of Australia, in *Deripaska v Minister for Foreign Affairs* [2024] FCA 62, did not accept the arguments made by the applicant (the sanctioned person) in relation to the exercise of the minister's discretion.

37 This includes consideration of sanctions imposed under the *Autonomous Sanctions Act 2011* and the *Charter of the United Nations Act 1945.* See, most recently, Parliamentary Joint Committee on Human Rights, *Report 1 of 2024* (7 February 2024) pp. 94–110; *Report 15 of 2021 (8 December 2021)*, pp. 2–11; See also *Report 2 of 2019* (2 April 2019) pp. 112–122; *Report 6 of 2018* (26 June 2018) pp. 104–131; *Report 4 of 2018* (8 May 2018) pp. 64–83; *Report 3 of 2018* (26 March 2018) pp. 82–96; *Report 9 of 2016* (22 November 2016) pp. 41–55; *Thirty-third Report of the 44th Parliament* (2 February 2016) pp. 17–25; *Twenty-eighth Report of the 44th Parliament* (17 September 2015) pp. 15–38; *Tenth Report of 2013* (26 June 2013) pp. 13–19; and *Sixth Report of 2013* (15 May 2013) pp. 135–137.

1.14 Sanctions may operate variously to both limit and promote human rights. For example, sanctions targeting the proliferation of weapons of mass destruction will promote, in general terms, the right to life. Sanctions imposed to address serious violations or serious abuses of human rights could help to promote human rights globally. The statement of compatibility identifies that the sanctions regime promotes the protection of human rights.[38]

1.15 The mandate of this committee is to consider whether legislation is compatible with Australia's international human rights obligations under seven core international human rights law treaties.[39] Under those treaties, Australia has an obligation to uphold human rights to all those within its jurisdiction.[40] As such, for persons designated or declared under the sanctions regime who are not in Australian territory, or otherwise under Australia's effective control, limited human rights obligations apply. On this basis, the committee's examination of Australia's sanctions regimes has been, and is, focused on measures that impose restrictions on individuals that may be located in Australia. As the sanctions legislation empowers the minister to designate or declare a person within Australia as subject to the regime, it is necessary for the committee to consider the compatibility of the sanctions regime with human rights as it may apply to persons in Australia.

1.16 Under the autonomous sanctions regime, the effect of a designation is that it is an offence for a person to make an asset directly or indirectly available to, or for the benefit of, a designated person.[41] A person's assets are therefore effectively 'frozen' as a result of being designated. For example, a financial institution is prohibited from allowing a designated person to access their bank account. This can apply to persons living in Australia or could apply to persons outside Australia. A designation by the minister is not subject to merits review, and there is no requirement that an affected person be given any reasons for why a decision to designate them has been made. This bill, in validating sanctions made where the minister did not consider whether to exercise their discretion to designate a person, would appear to confirm concerns that designations may be made without reasons being provided.

1.17 The sanctions scheme also provides that the minister may grant a permit authorising the making available of certain assets to a designated person.[42] An application for a permit can only be made for basic expenses, to satisfy a legal

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38 Statement of compatibility, p. 2.

39 *Human Rights (Parliamentary Scrutiny) Act 2011*.

40 For instance, article 2(1) of the International Covenant on Civil and Political Rights requires states parties 'to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant'.

41 Autonomous Sanctions Regulations 2011, section 14.

42 Autonomous Sanctions Regulations 2011, section 18.

judgment or where a payment is contractually required.[43] A basic expense includes foodstuffs; rent or mortgage; medicines or medical treatment; public utility charges; insurance; taxes; legal fees and reasonable professional fees.[44]

1.18 The scheme also enables the minister to declare that persons are subject to a travel ban, which would prevent the person from travelling to, entering or remaining in Australia.[45]

1.19 The designation or declaration of a person in Australia under the sanctions regime may therefore limit a range of human rights,[46] in particular the right to a private life; right to an adequate standard of living; right to a fair hearing; protection of the family; and freedom of movement. The statement of compatibility states that the bill engages criminal process rights and the prohibition against retrospective criminal laws, but does not limit these rights, and that the bill otherwise does not limit human rights.[47]

1.20 The committee has previously held that the use of international sanctions regimes to apply pressure to governments and individuals in order to end the repression of human rights may be regarded as a legitimate objective for the purposes of international human rights law. However, there are concerns that the sanctions regime may not be regarded as proportionate, in particular because of a lack of effective safeguards to ensure that the regime, given its potential serious effects on those subject to it, is not applied in error or in a manner which is overly broad in the individual circumstances.[48]

1.21 For example, the minister may designate or declare a person as subject to sanctions on the basis that the minister is 'satisfied' of a number of broadly defined

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43 Autonomous Sanctions Regulations 2011, section 20.

44 Autonomous Sanctions Regulations 2011, paragraph 20(3)(b).

45 Autonomous Sanctions Regulations 2011, paragraphs 6(1)(b) and (2)(b).

46 If a declared person living in Australia had their visa cancelled, this may also engage Australia's non-refoulement obligations. Further, country-specific designations or declarations may engage and limit the right to non-discrimination. For further discussion, see Parliamentary Joint Committee on Human Rights, *Report 6 of 2018* (26 June 2018) pp. 104–131.

47 Statement of compatibility, pp. 3–4.

48 This includes consideration of sanctions imposed under the *Autonomous Sanctions Act 2011* and the *Charter of the United Nations Act 1945.* See, most recently, Parliamentary Joint Committee on Human Rights, *Report 1 of 2024* (7 February 2024) pp. 94–110; *Report 15 of 2021 (8 December 2021)*, pp. 2–11; See also *Report 2 of 2019* (2 April 2019) pp. 112–122; *Report 6 of 2018* (26 June 2018) pp. 104–131; *Report 4 of 2018* (8 May 2018) pp. 64–83; *Report 3 of 2018* (26 March 2018) pp. 82–96; *Report 9 of 2016* (22 November 2016) pp. 41–55; *Thirty-third Report of the 44th Parliament* (2 February 2016) pp. 17–25; *Twenty-eighth Report of the 44th Parliament* (17 September 2015) pp. 15–38; *Tenth Report of 2013* (26 June 2013) pp. 13–19; and *Sixth Report of 2013* (15 May 2013) pp. 135–137.

matters, with no legislative criteria as to how the minister determines these matters.[49] There is also no provision for merits review before a court or tribunal of the minister's decision. While the minister's decision is subject to judicial review under the *Administrative Decisions (Judicial Review) Act 1977* (ADJR Act), the effectiveness of judicial review as a safeguard within the sanctions regime relies, in significant part, on the clarity and specificity with which legislation specifies powers conferred on the executive. The scope of the power to designate or declare someone is based on the minister's satisfaction in relation to certain matters which are stated in broad terms. This formulation limits the scope to challenge such a decision on the basis of there being an error of law (as opposed to an error on the merits) under the ADJR Act. Judicial review will generally be insufficient, in and of itself, to operate as an adequate safeguard for human rights purposes in this context.

1.22 Further, the minister can make a designation or declaration without hearing from the affected person before the decision is made. While the initial listing may be necessary to ensure the effectiveness of the regime, as prior notice would effectively 'tip off' the person and could lead to assets being moved off-shore, there may be less rights-restrictive measures available, such as freezing assets on an interim basis until complete information is available including from the affected person.

1.23 Further, once the decision is made to designate or declare a person, this remains in force for three years and may be continued after that time.[50] The designation may be continued by the minister declaring in writing that it continues to have effect, but such a declaration is not a legislative instrument. It is not clear if designations are regularly reviewed and updated. There also does not appear to be any requirement that if circumstances change or new evidence comes to light the designation or declaration will be reviewed before the three-year period ends. Without an automatic requirement of reconsideration if circumstances change or new evidence comes to light, a person may remain subject to sanctions notwithstanding that the designation or declaration may no longer be required.

1.24 There is also no requirement to consider whether applying the ordinary criminal law to a person would be more appropriate than freezing the person's assets on the decision of the minister. While the imposition of targeted financial sanctions may be considered, internationally, to be a preventive measure that operates in parallel to complement the criminal law, without further guidance (such as when and in what circumstances complementary targeted action would be needed) there appears to be a risk that such action may not be the least restrictive of human rights in every case.

1.25 With respect to the proposed measures in this bill, confirming that past conduct/status is validly captured by the sanctions framework would allow, or otherwise continue to facilitate, the potentially broad application of sanctions. For

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49 Autonomous Sanctions Regulations 2011, section 6.

50 Autonomous Sanctions Regulations 2011, section 9.

example, it would confirm that a person may be subject to a sanction while in Australia, where their conduct which gave rise to the sanction occurred decades prior, and no concerns regarding current risk arise in relation to them. Further, by confirming the validity of sanctions 'in circumstances where the exercise of the Minister's discretion may not be explicitly clear' the bill would further confirm the minister's very broad discretionary power to order sanctions. In this regard, there are also existing concerns relating to the minister's unrestricted power to impose conditions on a permit to allow access to funds to meet basic expenses. Giving the minister an unfettered power to impose conditions on access to money for basic expenses does not appear to be the least rights restrictive way of achieving the legitimate objective.

1.26 The committee has previously found that there is a risk that the autonomous sanctions regime may be incompatible with the right to a fair hearing, right to privacy, right to protection of the family, right to an adequate standard of living and the right to freedom of movement. In the absence of legislative amendments to restrict the application of the autonomous sanctions regime to only those located outside Australia, or to implement safeguards such as those previously recommended by the committee[51], expanding (or otherwise confirming) the application of the autonomous sanctions regime as proposed by this bill also risks being incompatible with those rights.

Committee view

1.27 The committee considers that sanctions regimes operate as important mechanisms for applying pressure to regimes and individuals with a view to ending the repression of human rights internationally. The committee notes the importance of Australia acting in concert with the international community to prevent egregious human rights abuses arising from situations of international concern.

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51 The committee has previously recommended there be: (a) the provision of publicly available guidance in legislation setting out in detail the basis on which the minister decides to designate or declare a person; (b) regular reports to Parliament in relation to the sanctions regime including the basis on which persons have been designated or declared and what assets have been frozen, or the amount of assets; (c) provision for merits review before a court or tribunal of the minister's decision to designate or declare a person is subject to sanctions; (d) regular periodic reviews of designations and declarations; (e) automatic reconsideration of designations and declarations if new evidence or information comes to light; (f) limits on the power of the minister to impose conditions on a permit for access to funds to meet basic expenses; (g) review of individual designations and declarations by the Independent National Security Legislation Monitor; (h) provision that any prohibition on making funds available does not apply to social security payments to family members of a designated person (to protect those family members); and (i) consultation with operational partners such as the police regarding other alternatives to the imposition of sanctions. See most recently Parliamentary Joint Committee on Human Rights, *Report 1 of 2024* (7 February 2024) pp. 94–110; See also *Report 9 of 2016* (22 November 2016) p. 53; *Report 6 of 2018* (26 June 2018) pp. 128–129; and *Report 2 of 2019* (2 April 2019) p. 122.

1.28 However, the committee regards it as important to recognise that the sanctions regime operates independently of the criminal justice system, and can be used regardless of whether a designated or declared person has been charged with or convicted of a criminal offence. For those in Australia who may be subject to sanctions, requiring ministerial permission to access money for basic expenses could, in practice, impact greatly on a person's private and family life. The committee notes that the minister, in making a designation or declaration, is not required to hear from the affected person at any time; or provide reasons; and there is no provision for merits review of any of the minister's decisions (including any decision to grant, or not grant, a permit allowing access to funds). The committee considers that the measures proposed in this bill would further confirm this broad ministerial discretion. As the sanctions regime could be applied to persons ordinarily resident in Australia, the committee considers that confirming the basis on which sanctions can be imposed engages and limits a number of human rights. These rights may be subject to permissible limitations if they are shown to be reasonable, necessary and proportionate.

1.29 The committee has previously found that there is a risk that the autonomous sanctions regime may be incompatible with the right to a fair hearing, right to privacy, right to protection of the family, right to an adequate standard of living and the right to freedom of movement. As such, this bill, by validating actions taken under the autonomous sanctions regime, also risks being incompatible with those rights.

1.30 The committee reiterates its long-held view that the compatibility of the sanctions regime may be assisted were the autonomous sanctions legislation amended to include the safeguards previously recommended by the committee.[52]

1.31 The committee notes that recent amendments to the Autonomous Sanctions Act 2011 require the Joint Standing Committee on Foreign Affairs, Defence and Trade (JSCFADT) to undertake a review of the amendments made by the *Autonomous Sanctions Amendment (Magnitsky-style and Other Thematic Sanctions) Act 2021* as soon as possible after 8 December 2024.[53] The committee intends to draw its comments in relation to this bill to the attention of the JSCFADT.

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

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52 See footnote 43, and most recently Parliamentary Joint Committee on Human Rights, *Report 1 of 2024* (7 February 2024) pp. 94–110; See also *Report 9 of 2016* (22 November 2016) p. 53; *Report 6 of 2018* (26 June 2018) pp. 128–129; and *Report 2 of 2019* (2 April 2019) p. 122.

53 See, Autonomous Sanctions Amendment (Magnitsky-style and Other Thematic Sanctions) Bill 2021, clause 4.

Crimes Amendment (Strengthening the Criminal Justice Response to Sexual Violence) Bill 2024[54]

Purpose	This bill seeks to amend the *Crimes Act 1914* to expand the protections afforded to victims and survivors of child sexual abuse and vulnerable persons in Commonwealth criminal proceedings.
Portfolio	Attorney-General
Introduced	House of Representatives, 7 February 2024 *(third reading agreed to 15 February 2024)*
Rights	Rights of persons with disability

Strengthening protections for victim-survivors

1.33 This bill seeks to amend the *Crimes Act 1914* (Crimes Act) to strengthen the protections afforded to victims and survivors of child sexual abuse and vulnerable persons in Commonwealth criminal proceedings. It would expand the range of offences to which special rules for proceedings involving children and vulnerable adults apply in order to more comprehensively protect vulnerable persons.[55] It would limit the admissibility of evidence of a child's sexual experience, and would remove the court's current ability to give leave to hear evidence regarding the sexual reputation of a child witness or complainant.[56] It would provide that evidence of a vulnerable adult complainant's reputation with respect to sexual activities is inadmissible in a vulnerable adult proceeding,[57] and restrict the admissibility of sexual experience evidence of vulnerable adult complainants.[58]

1.34 The bill also seeks to introduce new provisions regarding 'evidence recording hearings' to allow a vulnerable person to have their evidence recorded, which can be

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54 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Crimes Amendment (Strengthening the Criminal Justice Response to Sexual Violence) Bill 2024, *Report 2 of 2024*; [2024] AUPJCHR 11.

55 Schedule 1, items 1–5, section 15Y of the *Crimes Act 1914*. See also Items 10–11, which would amend the definitions of a child complainant and child witness to capture now adults who were children at time of alleged conduct.

56 Schedule 1, Items 21–25, sections 15YB and 15YC.

57 A 'vulnerable adult proceeding' means a proceeding involving an adult complainant for specific offences as set out in s 15Y(2), including proceedings slavery, or trafficking in persons. Items 5 and 6 of the bill seek to expand that list of offences such that a vulnerable adult proceeding would also include offences such as those relating to sexual servitude, or female genital mutilation.

58 Schedule 1, item 26, proposed sections 15YCA and 15YCB.

tendered and relied on as evidence in any subsequent trial or retrial.[59] It also would introduce an offence to deter misuse of the recorded evidence of a vulnerable person.[60]

1.35 The bill would also amend section 15YR of the Crimes Act, which restricts the publication of information identifying child witnesses/complainants, or vulnerable adult complainants. It would expand these protections to include 'special witnesses'. The court may declare a person to be a 'special witness' in relation to the proceeding if satisfied that the person is unlikely to be able to satisfactorily give evidence in the ordinary manner, including because of a disability.[61] The bill would clarify that vulnerable persons who are complainants or witnesses in a criminal proceeding may publicly identify themselves.[62] It would also alter the circumstances in which another person may publish information which identifies such a vulnerable person in relation to a proceeding.[63]

International human rights legal advice

Promotion of multiple rights

1.36 As a whole, the measures in this bill would promote a range of human rights and offer greater protection to vulnerable victim-survivors. By expanding the range of offences in relation to which victim-survivors may be declared 'vulnerable adult complainants' to include more offences which may have a disproportionate impact on women, the measure promotes the right of women to be free from discrimination.[64] 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.[65]

1.37 Because it would operate in relation to child victim-survivors and witnesses, the bill would also promote the rights of the child, as contained in the Convention on the Rights of the Child. Further, by enabling vulnerable complainants to identify

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59 Schedule 1, item 27, proposed Division 2A.

60 Schedule 1, item 37, proposed subsection 15YM(5).

61 A court may also declare a person to be a special witness if satisfied that a person cannot give evidence in the ordinary manner, including because of intimidation, distress or emotional trauma arising from their cultural background. This may engage the right to equality and non-discrimination if it had a disproportionate impact on persons from particular cultural backgrounds. See, *Crimes Act 1914*, section 15YAB.

62 Schedule 1, item 52. See explanatory memorandum, p. 24.

63 Schedule 1, items 52–53, section 15YR of the *Crimes Act 1914*.

64 See, International Covenant on Civil and Political Rights, articles 2 and 26, and Convention on the Elimination All Forms of Discrimination Against Women, article 2.

65 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.

themselves as a child witness, child complainant, vulnerable adult complainant, or special witness in a criminal proceeding, the measure promotes the right to freedom of expression. This is 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.[66] Further, by streamlining the process by which another person may publish information identifying a vulnerable adult and vulnerable person who is a child where that vulnerable person has consented to that publication, proposed section 15YR would further promote the right to freedom of expression. It would also promote the right of such persons to privacy, in that they would retain control over whether they choose to disclose information that does, or which may, identify them. 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.[67] It also includes the right to control the dissemination of information about one's private life.

Rights of persons with disability

1.38 The amendments to section 15YR would require an assessment of the decision-making capacity of a vulnerable person and their ability to give informed consent. As a special witness would include a person with disability, the measures therefore engage the rights of persons with disabilities, and may limit the right to equal recognition before the law.[68] The statement of compatibility does not recognise that this measure engages the right of persons with disability to equal recognition before the law, and so provides no assessment of compatibility with this right.[69]

1.39 As noted, the court may declare a person to be a 'special witness' in relation to a proceeding if satisfied that the person is unlikely to be able to satisfactorily give evidence in the ordinary manner, including because of disability.[70] The court may also declare a person to be a 'vulnerable adult complainant' by virtue of the specific crime alleged to have been committed against them.[71] Publication of information about a court matter that identifies, or is likely to lead to the identification of, a vulnerable adult including a special witness would be permissible where:

(a) the vulnerable person has given 'informed consent', meaning that they understand the options available to them (including that they are not

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

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

68 UN Convention on the Rights of Persons with Disabilities, article 12.

69 Schedule 1, item 53, proposed paragraph 15YR(1)(c).

70 A court may also declare a person to be a special witness if satisfied that a person cannot give evidence in the ordinary manner, including because of intimidation, distress or emotional trauma arising from their cultural background.

71 *Crimes Act 1914*, section 15YAA.

required to give the consent) and understand the consequences of giving the consent;

(b) the publication accords with the limits, if any, set by the vulnerable person; and

(c) at the time the consent was given the vulnerable person had the 'decision-making capacity' to give such consent.[72]

1.40 The explanatory memorandum provides no information as to how disability and decision-making capacity would be assessed in practice. Neither the bill, nor the Crimes Act, define (or otherwise provide guidance in relation to) these terms.

1.41 In practice, persons with cognitive impairment are more likely to be considered to lack decision-making capacity and thus, in effect, the measure would almost exclusively apply to persons with disability.[73] The right to equal recognition before the law includes the right to enjoy legal capacity on an equal basis with others in all aspects of life; and in all measures that relate to the exercise of legal capacity, there should be appropriate and effective safeguards to prevent abuse.[74] There can be no derogation from this right under the Convention on the Rights of Persons with Disability, which describes the content of the general right to equality before the law under the International Covenant on Civil and Political Rights.[75] This means 'there are no permissible circumstances under international human rights law in which this right may be limited'.[76]

1.42 By starting with the presumption that a person does not have decision-making capacity and requiring an assessment of decision-making capacity in order for a person to exercise their right to make a certain legal decision (in this case, consenting to the publication of information that may identify them in relation to certain criminal proceedings), the bill would appear to deny such person's legal capacity to make

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72 Schedule 1, item 55, proposed subsection 15YR(2).

73 The Committee on the Rights of Persons with Disabilities has stated that 'persons with cognitive or psychosocial disabilities have been, and still are, disproportionately affected by substitute decision-making regimes and denial of legal capacity. The Committee reaffirms that a person's status as a person with a disability or the existence of an impairment (including a physical or sensory impairment) must never be grounds for denying legal capacity or any of the rights provided for in article 12. All practices that in purpose or effect violate article 12 must be abolished in order to ensure that full legal capacity is restored to persons with disabilities on an equal basis with others': *General comment No. 1 – Article 12: Equal recognition before the law* (2014) [5].

74 Convention on the Rights of Persons with Disabilities, article 12.

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

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

decisions. The UN Committee on the Rights of Persons with Disabilities has reiterated that all persons, including those with disability, have legal capacity by virtue of their humanity and 'perceived or actual deficits in mental capacity must not be used as justification for denying legal capacity'.[77] States parties are required to take appropriate measures to provide access to support for persons with disabilities in exercising their legal capacity, such as the provision of advocacy or assistance with communication. The UN Committee on the Rights of Persons with Disabilities has noted that '[s]upport in the exercise of legal capacity must respect the rights, will and preferences of persons with disabilities and should never amount to substitute decision-making'.[78] It noted that 'where, after significant efforts have been made, it is not practicable to determine the will and preferences of an individual, the "best interpretation of will and preferences" must replace the "best interests" determinations'.[79]

1.43 In addition, it is unclear why proposed subsection 15YR(2) would provide for two separate tests of a person's capacity to consent: whether they gave 'informed consent' (meaning that they understood the options available to them, including that they were not required to give the consent, and understood the consequences of giving the consent); and whether they had the 'decision-making capacity' to give such consent.[80] Both of the proposed tests would appear to essentially be making the same assessment.

1.44 It is not clear what approach a court would take in determining legal capacity as there is no guidance on the face of the legislation or in the statement of compatibility. No information is provided as to the supports available to persons with disability to make a decision and understand the consequences. International human rights law obliges States to take appropriate measures to provide access to support for persons with disabilities in exercising their legal capacity. The UN Committee on the Rights of Persons with Disabilities has emphasised that to comply with this requirement:

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

78 Committee on the Rights of Persons with Disabilities, *General comment No. 1 – Article 12: Equal recognition before the law* (2014) [15]–[17], [21]. The features of a supported decision-making regime are detailed in paragraph [29].

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

80 Schedule 1, item 55, proposed subsection 15YR(2).

> States parties must ensure that support is available at nominal or no cost to persons with disabilities and that lack of financial resources is not a barrier to accessing support in the exercise of legal capacity.[81]

1.45 It has also criticised assessments of legal capacity generally:

> The functional approach attempts to assess mental capacity and deny legal capacity accordingly. It is often based on whether a person can understand the nature and consequences of a decision and/or whether he or she can use or weigh the relevant information. This approach is flawed for two key reasons: (a) it is discriminatorily applied to people with disabilities; and (b) it presumes to be able to accurately assess the inner-workings of the human mind and, when the person does not pass the assessment, it then denies him or her a core human right — the right to equal recognition before the law. In all of those approaches, a person's disability and/or decision-making skills are taken as legitimate grounds for denying his or her legal capacity and lowering his or her status as a person before the law. Article 12 does not permit such discriminatory denial of legal capacity, but, rather, requires that support be provided in the exercise of legal capacity.[82]

1.46 Consequently, as to whether the measure is compatible with the rights of persons with disability to equal recognition before the law, much would depend on the criteria by which the court determines if a person has 'decision-making capacity', and whether any assistance is made available to a person with disability to support them in the exercise of their legal capacity.

Committee view

1.47 The committee considers that this bill would promote a number of rights, including the rights to privacy, freedom of expression, and equality and non-discrimination. The committee notes that these protections would operate in relation to children, and may have a particular effect in relation to female victim-survivors, and so would likely promote the rights of the child and rights of women.

1.48 In relation to the measure requiring an assessment of a person's decision-making capacity and their capacity to give informed consent, the committee considers that, given that adults with a cognitive disability would likely be the only persons at risk of being found to lack decision-making capacity, this measure engages and may limit the rights of persons with disability. The committee notes that the statement of compatibility was extremely brief, and did not identify the engagement of this right, meaning that it is not possible to form a concluded view as to the compatibility of the measure. Much will depend on the criteria by which the court determines if a person

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81 Committee on the Rights of Persons with Disabilities, *General comment No. 1 – Article 12: Equal recognition before the law* (2014) [29(e)].

82 Committee on the Rights of Persons with Disabilities, *General comment No. 1 – Article 12: Equal recognition before the law* (2014) [15].

has 'decision-making capacity', and whether any assistance is made available to a person with a cognitive disability to support them in the exercise of their legal capacity.

Suggested action

1.49 The committee recommends that the statement of compatibility be updated to provide an assessment of the compatibility of the measure with the rights of persons with disability, particularly in relation to the right to equality before the law, and set out information as to:

(a) why it is necessary for a court to assess, in proposed subsection 15YR(2), both whether a person has given 'informed consent' and whether they have decision-making capacity;

(b) how, and by reference to what guidance, decision-making capacity would be assessed (noting that the term is not defined in the Crimes Act 1914); and

(c) what supports would be provided to affected persons to support them to make a decision independently.

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

Mr Josh Burns MP

Chair