Parliamentary Joint Committee on Human Rights

Human rights scrutiny report

Report 4 of 2024

15 May 2024

© Commonwealth of Australia 2024

ISSN 2204-6356 (Print)

ISSN 2204-6364 (Online)

PO Box 6100
Parliament House
Canberra ACT 2600

Phone: 02 6277 3823

Email: human.rights@aph.gov.au
Website: http://www.aph.gov.au/joint_humanrights/

This report can be cited as: Parliamentary Joint Committee on Human Rights, *Report 4 of 2024*; [2024] AUPJCHR 20

This document was prepared by the Parliamentary Joint Committee on Human Rights and printed by the Senate Printing Unit, Department of the Senate, Parliament House, Canberra.

Membership of the committee

Members

Mr Josh Burns MP, Chair	Macnamara, Victoria, ALP
Mr Henry Pike MP, Deputy Chair	Bowman, Queensland, LNP
Senator Karen Grogan	South Australia, ALP
Senator Matt O'Sullivan	Western Australia, LP
Ms Alicia Payne MP	Canberra, Australian Capital Territory, ALP
Mr Graham Perrett MP	Moreton, Queensland, ALP
Senator Gerard Rennick	Queensland, LNP
Senator Jana Stewart	Victoria, ALP
Senator Lidia Thorpe	Victoria, IND
Ms Kylea Tink MP	North Sydney, New South Wales, IND

Secretariat

Anita Coles, Committee Secretary

Charlotte Fletcher, Principal Research Officer

Rebecca Preston, Principal Research Officer

Rashmi Chary, Legislative Research Officer

Committee legal adviser

Associate Professor Jacqueline Mowbray

Contents

Membership of the committee .... **iii**

Committee information .... **vi**

Report snapshot **1**

Chapter 1 : New and ongoing matters **11**

Bills **11**

Crimes and Other Legislation Amendment (Omnibus No. 1) Bill 2024 11

National Disability Insurance Scheme Amendment (Getting the NDIS Back on Track No. 1) Bill 2024 24

Legislative instruments **46**

Australian Border Force (Prohibited Drugs) Instrument 2024 46

Commonwealth Places (Application of Laws) Regulations 2024 51

Migration (Code of Behaviour for Public Interest Criterion 4022) Instrument (LIN 24/031) 2024 55

National Occupational Respiratory Disease Registry Determination 2024 66

Social Security (Assurances of Support) Amendment Determination 2024 73

Work Health and Safety (Operation Sovereign Borders) Declaration 2024 80

Coalition Members Additional Comments **87**

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.

---

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 in Chapters 1 and 2.

Bills

Chapter 1: New and continuing matters	
Bills previously deferred[2]	2
Bills commented on in report[3]	2
Private members or senators' bills that may engage and limit human rights	0
Chapter 2: Concluded	
Bills committee has concluded its examination of following receipt of ministerial response	0

Crimes and Other Legislation Amendment (Omnibus No. 1) Bill 2024

Advice to Parliament	**Searching, seizing or freezing digital assets** *Rights to privacy and fair trial* Schedule 1 of the bill seeks to amend the *Crimes Act 1914* and *Proceeds of Crimes Act 2002* to provide that a search warrant may authorise the search for, and seizure of, digital assets (including, for example, cryptocurrency), and may empower an officer to use a computer device to search for digital assets, including remotely. Schedule 2 would amend the Proceeds of Crime Act to provide for the freezing of digital assets. The committee notes that if this regime

1 This section can be cited as Parliamentary Joint Committee on Human Rights, Report snapshot, *Report 4 of 2024*; [2024] AUPJCHR 21.

2 Crimes and Other Legislation Amendment (Omnibus No. 1) Bill 2024, which was previously deferred in *Report 3 of 2024* (16 April 2024); National Disability Insurance Scheme Amendment (Getting the NDIS Back on Track No. 1) Bill 2024, which was previously deferred in *Report 3 of 2024* (16 April 2024).

3 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.

for the freezing, restraint or consequent forfeiture of property may be considered 'criminal' under international human rights law, it would engage the right to a fair trial, and so by seeking to expand the application of the regime to digital currency, this measure may also engage and limit the right to a fair trial.

The committee notes that it has considered the human rights compatibility of these search warrant regimes on numerous occasions. The committee reiterates its advice that, as both Acts were introduced prior to the establishment of the committee, a foundational human rights assessment of both of these Acts is required in order to fully assess the compatibility of the regimes with human rights. The committee recommends that the statement of compatibility be updated and otherwise draws its concerns to the attention of the Attorney-General and the Parliament.

Increasing Commonwealth penalty units

Criminal process rights

Schedule 3 of the bill seeks to amend the *Crimes Act 1914* to increase the amount of the Commonwealth penalty unit from $313 to $330, with effect from 1 July 2024. The committee considers that, because this bill would have the effect of increasing the maximum possible civil penalty in respect of every Commonwealth civil penalty expressed in terms of penalty units, there is a risk that this may in some cases create, and in other cases further exacerbate, the risk that certain civil penalty 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.

The committee notes that it has raised concerns regarding the compatibility of existing civil penalty provisions with criminal process rights on numerous occasions and cautions that it cannot comprehensively quantify the total level of risk given the number of civil penalty provisions this bill would amend. The committee recommends that the statement of compatibility be updated and otherwise draws its concerns to the attention of the Attorney-General and the Parliament.

Expansion of interception orders

Rights to privacy and fair trial

Schedule 5 would amend the *Telecommunications (Interception and Access) Act 1979* to enhance the ability of a number of state anti-corruption bodies to receive intercepted information and interception warrant information. The committee notes that this engages and limits the right to privacy and may engage and limit the right to a fair trial, and notes that the statement of compatibility fails to provide a comprehensive analysis. The committee recommends a foundational human rights assessment be undertaken of the *Telecommunications (Interception and Access) Act 1979* to assess its compatibility with human rights. It also recommends that the statement of compatibility be updated and otherwise draws its

concerns to the attention of the Attorney-General and the Parliament.

National Disability Insurance Scheme Amendment (Getting the NDIS Back on Track No. 1) Bill 2024

Seeking Information

Definition of NDIS support

Rights of persons with disability; rights to an adequate standard of living, health and social security; and rights of the child

This bill seeks to introduce a new definition of NDIS support and allow NDIS rules to potentially narrow the scope of that definition. In doing so, the measure may have the effect of reducing the type of supports that will be funded by the NDIS and thus available for participants. To the extent that this results in an adverse impact on participants' independence and quality of life, the measure would engage and may limit the rights of persons with disability as well as the rights to an adequate standard of living and health. Insofar as the NDIS may be considered a form of social security, the measure would also engage and may limit the right to social security. Additionally, to the extent that the measure applies to children, the rights of the child would be engaged and possibly limited. The committee is seeking further information from the Minister for the National Disability Insurance Scheme with respect to the compatibility of the measure with these rights.

NDIS access requirement rules

Rights of persons with disability; rights to an adequate standard of living, health and social security; and rights of the child

This measure seeks to remake the provision that allows NDIS rules to be made in relation to the disability requirements and early intervention requirements. Insofar as the NDIS rules will relate to requirements to access the NDIS, the measure engages the rights of persons with disability, the rights to an adequate standard of living, health and social security as well as the rights of the child to the extent that the measure applies to children. Depending on the content of any such NDIS rules, these rights may be promoted or limited. If the NDIS rules were to have the effect of restricting access to the NDIS, these rights may be limited. The committee considers there to be a risk of this occurring having regard to the overarching objective of the bill, which is to ensure the long-term integrity and sustainability of the NDIS. The committee considers that it is not possible to conclude on the human rights compatibility of the measure as such an assessment will depend on the content of future NDIS rules. The committee will scrutinise any future NDIS rules and related legislative instruments for their compatibility with human rights. The committee draws these human rights concerns to the attention of the minister and the Parliament.

Requests for information

Right to privacy

The measure seeks to expand the circumstances in which the Chief Executive Officer (CEO) of the NDIA may request information and reports from a participant, including for the purposes of deciding whether or not to revoke a participant's status and assessing whether or not a participant meets the access requirements for the NDIS. The CEO may request that the participant provide information that is reasonably necessary for the purpose of making the particular decision and undergo an assessment or medical examination and provide the report to the CEO. By allowing the CEO to request information and reports from a participant, including sensitive medical information, the measure engages and may limit the right to privacy. The committee is seeking further information from the Minister for the National Disability Insurance Scheme to assess the compatibility of the measure with this right.

Working out total funding amounts for NDIS participants

Rights of persons with disability; rights to an adequate standard of living, health and social security; and rights of the child

The measures seek to require the minister to have regard to the financial sustainability of the NDIS in determining matters relating to working out total funding amounts and assessing participants' need for supports. To the extent that this results in fewer supports being approved and funded for participants and has an adverse impact on participants' independence and quality of life, the measures would engage and may limit the rights of persons with disability, the rights to an adequate standard of living, health and social security as well as the rights of the child (if the measures applied to children). The committee notes that the statement of compatibility does not address these measures. The committee is therefore seeking further information from the minister to assess the compatibility of the measures with these rights.

Approved quality auditor conditions

Right to work

The measure seeks to introduce a new power to enable the NDIS rules to specify conditions that must be complied with for the purposes of being approved as an 'approved quality auditor'. A condition may have the effect of requiring an approved quality auditor to not employ or engage, or continue to employ or engage, a person against whom a banning order has been made; or have, or continue to have, such a person as a member of the approved quality auditor's key personnel. By requiring an auditor to terminate or not employ persons who have had a banning order made against them, the measure would engage and may limit the right to work.

While the measure likely pursues a legitimate objective, the committee notes that it is not clear that the measure would be rationally connected to the stated objective, noting that the employees in question would not directly work with people with disability and so may not pose a direct risk to the safety of people with disability. The committee also notes that there is a risk that the measure may result in the dismissal of employees in circumstances where it may not necessarily be proportionate, noting that there does not appear to be any flexibility to consider individual circumstances or apply exceptions where reasonable and appropriate, or any apparent avenues to review or appeal the termination decision. The committee considers that much will depend on the individual circumstances of the case and draws these human rights concerns to the attention of the minister and the Parliament.

Legislative instruments

Chapter 1: New and continuing matters

Legislative instruments registered on the Federal Register of Legislation between 8 March to 4 May 2024[4]	206
Legislative instruments commented on in report[5]	6

Chapter 2: Concluded

Legislative instruments committee has concluded its examination of following receipt of ministerial response	0

Australian Border Force (Prohibited Drugs) Instrument 2024

Advice to Parliament

Drug testing workers

Rights to privacy; just and favourable conditions of work

The legislative instrument specifies a number of drugs for which Immigration and Border Protection staff and contractors may be tested. The committee considers that this engages and risks impermissibly limiting the rights to privacy and to just and favourable conditions of work. This is because it would appear to only be capable of addressing a risk of staff corruption in relation to a subset of workers for whom the illicit use of these specified drugs is related to corruption and other criminal activity, the power is insufficiently circumscribed, and it is not clear that there are adequate safeguards.

The committee has recommended an amendment to assist proportionality, that the statement of compatibility be updated, and otherwise draws its human rights concerns to the attention of the minister and the Parliament.

---

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

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

Commonwealth Places (Application of Laws) Regulations 2024

Advice to Parliament

Use of investigatory powers at specified airports

Right to privacy; rights of people with disability; rights of the child; fair trial

These regulations provides for the exercise of specified investigatory powers in the *Crimes Act 1914*, including all search powers in Part IAA and forensic procedures set out in Part ID, by the Australian Federal Police at seven state airports. This engages and limits several human rights. The committee has previously raised concerns as to compatibility of Division 3A of Part IAA (stop, search and seizure powers in relation to terrorist acts and terrorism offences) with human rights. Further, Part ID (relating to the taking, use, sharing, storage and destruction of forensic samples) raises complex human rights considerations, which the statement of compatibility does not sufficiently assess, and which have not been subject to a foundational human rights assessment.

The committee recommends that the statement of compatibility be updated and recommends that a foundational human rights assessment of Part ID of the *Crimes Act 1914* be undertaken.

Legislation (Autonomous Sanctions Instruments) Sunset-altering Declaration 2024

This declaration defers (to 2 October 2027) the sunsetting of four sanctions legislative instruments relating to the imposition of autonomous sanctions, including the Autonomous Sanctions Regulations 2011. The committee has previously found that there is a risk that the autonomous sanctions regime may be incompatible with the rights to a fair hearing, privacy, protection of the family, adequate standard of living and freedom of movement. 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 (see, most recently, *Report 2 of 2024*, p. 20).

Migration (Code of Behaviour for Public Interest Criterion 4022) Instrument (LIN 24/031) 2024

Seeking Information

Code of behaviour

Multiple rights

This legislative instrument specifies an enforceable code of behaviour which applies to some applicants for the Subclass 050 (Bridging (General)) visa (BVE), for the purposes of Public Interest Criterion 4022. It appears that this would apply to persons previously held in immigration detention where the minister has decided to grant the detainee a visa. Requiring certain BVE holders to sign an enforceable code of behaviour, and subsequently enforcing the code (which may result in visa cancellation and subsequent immigration detention or reduction in social security benefits), engages and may limit numerous human rights.

The legislative instrument is exempt from disallowance, meaning that no statement of compatibility is required to be provided. The committee notes that it raised several human rights concerns in relation to previous such measure in 2013, and is seeking further information from the minister as to its compatibility with human rights.

Migration (Granting of Contributory Parent Visas, Parent Visas and Other Family Visas During Financial Year 2023-2024) Instrument (LIN 24/004) 2024

This legislative instrument determines the maximum number of parent visas and other family visas that may be granted for certain classes of visas between 1 July 2023 and 30 June 2024 (inclusive). Capping the number of such 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.

The committee reiterates the recommendation it made in relation to the previous version of this measure (that the cap not preclude flexibility by the department) in *Report 9 of 2023* at pp.179–180.

Migration Amendment (Bridging Visas) Regulations 2024

This legislative instrument makes a technical amendment to the Migration Regulations 1998 to enable eligible non-citizens in the NZYQ-affected cohort to be granted either an initial Bridging R (Class WR) visa (BVR) following their release from immigration detention as an unlawful non-citizen, or a subsequent BVR where they are in the community. The explanatory materials states that may mean that additional persons in the NZYQ-affected cohort may be granted a BVR than previously. The committee refers to its previous comments regarding the conditions attached to such visas in *Report 1 of 2024* at pp. 43–93.

National Occupational Respiratory Disease Registry Determination 2024

Advice to Parliament

Requiring the provision of personal information for inclusion on registry

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

This determination sets out the personal information which must, or in some cases which may, be notified to the National Occupational Respiratory Disease Registry. The committee considers that establishing this registry is an important measure in addressing the health risks associated with respiratory diseases. However, as the determination provides that a significant amount of personal health information of patients, and their identifying details, must be included on a national register without the patient's consent, this limits the right to privacy. While the committee is pleased that some of its recommendations in relation to the privacy implications of the bill which established this scheme have been implemented, there remain concerns that the determination is not sufficiently constrained, accompanied by sufficient safeguards, or subject to appropriate independent review mechanisms such that it would constitute a proportionate limit on the right to privacy.

The committee recommends a minor amendment to the determination to assist with its proportionality, and recommends that the statement of compatibility be updated.

Social Security (Assurances of Support) Amendment Determination 2024

Advice to Parliament

Making assurances of support ongoing

Right to protection of the family and rights of the child

This legislative instrument requires the payment of an upfront bond for certain visas, including requiring all applications for parent visas (including parents of those *under* 18 years old) to have an Australian sponsor who is an adult, who meets set income requirements and can provide an upfront payment of a bond of up to $10,000.

While States have a right to control their migration program, international human rights law requires Australia to create the conditions conducive to family formation and stability, and this includes the interest of family reunification. The committee also notes that the measure may engage the rights of the child, which requires that the best interests of the child must be a primary consideration, and applications by a child or his or her parents for the purpose of family reunification must be dealt with in a positive, humane and expeditious manner.

While the committee considers there will be many cases of family reunification where requiring an assurance of support does not limit the right to protection of the family or the rights of the child (as the family member in question is not part of the assurer's core family), the committee is concerned that no consideration is given to these rights when an assurance of support is imposed. As such, the committee considers there is a risk that requiring an assurance of support for certain family members may not be compatible with the right to protection of the family and the rights of the child. The committee has recommended some amendments to improve the proportionality of this measure and otherwise draws its concerns to the attention of the minister and the Parliament.

Work Health and Safety (Operation Sovereign Borders) Declaration 2024

Seeking Information

Disapplication of work health and safety provisions

Just and favourable conditions of work, life, security of the person

This legislative instrument declares that certain provisions of the *Work Health and Safety Act 2011* do not apply to specified activities undertaken under Operation Sovereign Borders (boat interceptions and turn-backs). This engages and may limit the right to just and favourable conditions of work for those employed to carry out Operation Sovereign Borders, and as the activities specified would involve circumstances in which people on boats who are suspected

of not having a valid Australian visa may be intercepted and turned back, it may also engage the right to life and security of the person, if the turn-back of boats occurs in circumstances that are unsafe.

The committee considers further information is required to assess the compatibility of this measure with these rights, and is seeking further information from the minister.

Chapter 1
New and ongoing matters

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

Bills

Crimes and Other Legislation Amendment (Omnibus No. 1) Bill 2024[1]

Purpose	Schedules 1 and 2 seek to amend the *Crimes Act 1914*, the *Proceeds of Crime Act 2002*, and the *National Anti-Corruption Commission Act 2022* in relation to the search for, and seizing or freezing of, digital assets. Schedule 3 seeks to amend the *Crimes Act 1914* to increase the value of a Commonwealth penalty unit. Schedule 4 seeks to amend the *Telecommunications (Interception and Access) Act 1979* and *Telecommunications Act 1997* to clarify the functions of the Communications Access Coordinator in the Attorney-General's Department and create the position of Communications Security Coordinator in the Department of Home Affairs. Schedule 5 seeks to amend the *Telecommunications (Interception and Access) Act 1979* to enable specified state integrity agencies to access and use interception information and interception warrant information for the purposes of their statutory oversight functions.
Portfolio	Attorney-General
Introduced	House of Representatives, 27 March 2024
Rights	Privacy; fair trial; criminal process rights

Searching, seizing or freezing digital assets

1.2 Schedule 1 of the bill would amend the *Crimes Act 1914* (Crimes Act) and *Proceeds of Crimes Act 2002* (Proceeds of Crimes Act) to provide that a warrant may authorise the search for, and seizure of, digital assets (including, for example,

1 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Crimes and Other Legislation Amendment (Omnibus No. 1) Bill 2024, *Report 4 of 2024*; [2023] AUPJCHR 22.

cryptocurrency).[2] Such warrants would, for example, authorise the officer to use a computer found in the course of the search for the purpose of seizing a digital asset under the warrant, and to add, copy, delete or alter data in the computer if necessary to achieve that purpose.[3] It would also authorise them to use a device in order to determine whether the relevant data suggests the existence of a digital asset that may be seized, and may authorise the use of any communication in transit to access the relevant data. It would also permit actions undertaken in relation to a warrant to be done remotely, and would not require that they be done at a premises specified in a warrant, or in the presence of a person if a person is specified.[4] Schedule 1 would also apply these proposed powers in relation to the *National Anti-Corruption Commission Act 2022*, empowering the National Anti-Corruption Commission to seize digital assets that afford evidential material of: the offence or corruption issue in relation to which the warrant was issued; any indictable offence; or a corruption issue being investigated other than the one to which the warrant relates.[5]

1.3 In addition, schedule 2 of the bill would amend the Proceeds of Crime Act to extend current investigative and freezing powers (that currently only apply to financial institutions) so that they may also be exercised in relation to certain digital currency exchanges (that is, a person or business that exchanges digital currency for Australian or foreign currency, and vice versa).

International human rights legal advice

Right to privacy

1.4 Providing for the exercise of search and seizure powers in relation to digital assets 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.[6] It also includes the right to control the dissemination of information about one's private life. The right to privacy may be subject to permissible limitations which are provided by law and are not arbitrary. In order for limitations not to be arbitrary, the measure must pursue a legitimate objective and be rationally connected to (that is, effective to achieve) and proportionate to achieving that objective. In order to be proportionate, a limitation on the right to privacy should only be as extensive as is strictly necessary

---

[2] These amendments would apply in relation to search warrants issued under Part IAA of the *Crimes Act 1914* (Schedule 1, items 1–26) and Part 3–5 of the *Proceeds of Crimes Act 2002* (Schedule 1, items 27–42).

[3] Schedule 1, item 6, proposed section 3FA (*Crimes Act 1914*), and proposed section 228A (*Proceeds of Crime Act 2002*).

[4] Schedule 1, item 6, proposed subsections 3FA(11)–(12) (*Crimes Act 1914*), and proposed section 228A(9) (*Proceeds of Crime Act 2002*).

[5] Schedule 1, items 44–47.

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

to achieve its legitimate objective and must be accompanied by appropriate safeguards.

1.5 The statement of compatibility identifies that this measure engages and limits the right to privacy by enabling law enforcement agencies to conduct a search of a person, or at or in relation to a person's premises or conveyance, or allow access to a person's digital wallet, and to seize a digital asset or a thing that suggests the existence of the digital asset identified in the course of those searches.[7] It states that to the extent that the measure limits the right to privacy, these limitations are not arbitrary, and are reasonable, necessary and proportionate to ensure law enforcement agencies are able to continue to effectively detect, disrupt and deter serious and organised crime.[8] Disrupting serious and organised crime would constitute a legitimate objective under international human rights law. Further, the Attorney-General's statement that the use of cryptocurrency and other digital assets is 'an avenue that criminals are increasingly using to benefit financially from their crimes' would appear to indicate that there is a pressing and substantial concern to be addressed.[9] Extending existing search powers to apply to digital assets would appear to be rationally connected to (that is, capable of achieving) that objective.

1.6 The key question is whether the proposed powers would be a proportionate means of achieving that objective. In this regard, several considerations arise. In order to constitute a proportionate limitation on the right to privacy, measures must only go so far as is strictly necessary to achieve the stated objectives of the measures. Search warrants which relate to digital assets would authorise a number of measures which may significantly interfere with a person's privacy. Both the Crimes Act and Proceeds of Crime Act already provide for the issue of search warrants that permit searches of a person or premises.[10] This bill would expand each of those search warrant regimes to permit an officer or constable to: use and operate electronic equipment (meaning a computer, or data storage device found in the course of the search, or a telecommunication facility operated or provided by the Commonwealth or a carrier, or any other electronic equipment) to seize a digital asset; to add, copy delete or alter data if necessary to achieve that purpose; to use any other communications or computer in transit; and do any other thing reasonably incidental to this.[11] It would also enable an officer or constable to use electronic equipment to access data in order to determine whether a digital asset exists that may be seized under the warrant, and in order to obtain access to account-based data of a person who is (or who has previously) used or leased the computer to determine whether it suggests the

---

7 Statement of compatibility, pp. 6–7.

8 Statement of compatibility, p. 7.

9 See, *Attorney-General's second reading speech*, 27 March 2024.

10 See, Crimes Act 1914, Parat IAA had Proceeds of Crime Act, Part 3–5.

11 Schedule1, item 6, proposed section 3FA (Crimes Act) and item 30, proposed section 228A (Proceeds of Crime Act).

existence of a digital asset that may be seized. It would also permit all of these activities to be done remotely. These activities are, of their nature, very intrusive. For example, it would appear that an officer may access a computer owned by a third party who is not themselves suspected of committing any criminal offence. Further, while the use of data in a computer device would be subject to the requirement that it be reasonable in the circumstances and that the relevant decision maker consider other methods of obtaining access, it is not clear these safeguards are sufficient in light of the very substantial interference with the right to privacy associated with these measures. This is particularly the case given the broad definition of computer, such that many types of devices may be caught within the scope of these measures, including mobile phones and communications devices which use computers or computing technology as their functional basis (such as security systems, internet protocol cameras and digital video recorders). These considerations raise concerns that the measure may not be sufficiently circumscribed to constitute a proportionate limitation on the right to privacy.[12]

1.7 Further, to seek a warrant, the executing officer must 'reasonably suspect' the digital asset to be evidential material in relation to an offence or tainted property under the Proceeds of Crime Act. The threshold of reasonable suspicion is lower than the current applicable threshold that the officer 'believes on reasonable grounds' the digital asset is relevant evidential material.[13] The explanatory memorandum states that this different threshold 'reflects the unique challenges that the discovery of digital assets creates when located during the exercise of search warrant powers'.[14] It gives the example that finding a significant amount of cash on premises might more easily lead to a reasonable belief that the cash is tainted property, but holding large amounts of digital assets is unlikely on its own to be as suspicious as holding large amounts of cash. The lowering of the threshold by which an executing officer can seize digital assets goes to the proportionality of the measure, yet the statement of compatibility does not reference this.

1.8 The statement of compatibility states that the bill provides that safeguards in the existing legislation that govern the time periods law enforcement can retain things moved or seized under warrant will also apply to the digital asset seizure measure, which is intended to balance criminal justice outcomes with the effects of depriving a person of their property may have.[15] Restricting the length of time during which

---

12 The committee has previously raised similar concerns in relation to computer access warrants under the *Surveillance Devices Act 2004*. See, for example, Parliamentary Joint Committee on Human Rights, *Report 11 of 2018* (16 October 2018), Telecommunications and Other Legislation Amendment (Assistance and Access) Bill 2018, p. 40.

13 See existing *Crimes Act 1914*, paragraph 3F(1)(d) compared to Schedule 1, item 6, proposed paragraph 3FA(1)(b). See, *R v Rondo* [2001] NSWCCA 540, at [53] which held that a reasonable suspicion involves less than a reasonable belief but more than a possibility.

14 Explanatory memorandum, p. 18.

15 Statement of compatibility, p. 7.

property may be seized has some safeguard value in relation to the exercise of this power, but does not prevent the power from being exercised (and a person's privacy being interfered with). However, this information is insufficient to fully assess the proportionality of the measure with the right to privacy. In this regard, it is noted that search warrants are issued by a magistrate or justice of the peace,[16] a safeguard providing a degree of judicial oversight of the scheme. However, as no foundational assessments of the human rights compatibility of either the Crimes Act or Proceeds of Crime Act search warrant schemes as a whole have been conducted to date, it is not possible to form a concluded view as to whether a limit on the right to privacy would be proportionate.

Right to a fair trial

1.9 If the regime established by the Proceeds of Crime Act for the freezing, restraint or consequent forfeiture of property may be considered 'criminal' under international human rights law, it would engage the right to a fair trial. By seeking to expand the application of the regime to digital currency, this measure may also engage and limit the right to a fair trial.

1.10 The right to a fair trial encompasses notions of equality in proceedings, the right to a public hearing and the requirement that hearings are conducted by an independent and impartial body. Specific guarantees of the right to a fair trial in criminal proceedings include the presumption of innocence,[17] the right not to incriminate oneself,[18] and the guarantee against retrospective criminal laws.[19] The statement of compatibility accompanying this bill does not identify the engagement of this right.

1.11 The committee has previously raised concerns that the underlying regime established by the Proceeds of Crime Act for the freezing, restraint or forfeiture of property may be considered 'criminal' for the purposes of international human rights law.[20] For example, a forfeiture order may be made against property where (relevantly) a court is satisfied that the property is 'proceeds' of an indictable offence or an 'instrument' of one or more serious offences.[21] The fact a person has been acquitted of an offence with which the person has been charged does not affect the

---

16 *Proceeds of Crime Act 2002*, section 225 and Crimes Act, section 3C (definition of 'issuing officer').

17 ICCPR, article 14(2).

18 ICCPR, article 14(3)(g).

19 ICCPR, article 15(1).

20 Parliamentary Joint Committee on Human Rights, *Thirty-First Report of the 44th Parliament* (24 November 2015) pp. 43–44; *Twenty-Sixth Report of the 44th Parliament* (18 August 2015) p. 7-11; *Report 1 of 2017* (16 February 2017); *Report 2 of 2017* (21 March 2017) p. 6; *Report 4 of 2017* (9 May 2017) pp. 92–93; *Report 1 of 2018* (6 February 2018) pp. 112–122.

21 *Proceeds of Crime Act 2002*, section 49.

court's power to make such a forfeiture order.[22] Further, a finding need not be based on a finding that a particular person committed any offence.[23] The committee has previously considered that the freezing, restraint or forfeiture of property may, in some circumstances, be considered to be imposing a penalty or sanction that is 'criminal' in nature under international human rights law, but has cautioned that it is difficult to reach a concluded view on this without undertaking a full review of the provisions of the Proceeds of Crime Act.[24] By expanding the operation of parts of the Proceeds of Crime Act to digital currency, this measure may also engage and limit the right to a fair trial, and it is difficult to reach a concluded view as to its compatibility.

1.12 As the Proceeds of Crime Act was enacted prior to the establishment of the committee, and no statement of compatibility was provided for that legislation, the committee has previously recommended that the minister undertake a detailed assessment of the Proceeds of Crime Act to determine its compatibility with the right to a fair trial and a fair hearing.[25]

Committee view

1.13 The committee considers that expanding the operation of existing search and seizure warrant schemes under the *Crimes Act 1914* (Crimes Act) and the *Proceeds of Crime Act 2002* (Proceeds of Crime Act) engages and limits the right to privacy, and may also (in relation to the Proceeds of Crime Act) engage and limit the right to a fair trial.

1.14 The committee notes that it has considered the human rights compatibility of the search warrant regime under the Crimes Act and Proceeds of Crime Act and related measures on numerous occasions.[26] The committee notes that both the Crimes Act and the Proceeds of Crime Act were introduced prior to the establishment of the committee and no statement of compatibility was provided in relation to them. As such, the committee reiterates its advice that a foundational human rights assessment

---

22 *Proceeds of Crime Act 2002*, sections 51 and 80.

23 *Proceeds of Crime Act 2002*, section 49(2)(a).

24 See, Parliamentary Joint Committee on Human Rights, Crimes Legislation Amendment (Economic Disruption) Bill 2020, *Report 11 of 2020* (24 September 2020), pp. 3–41 and *Report 13 of 2020* (13 November 2020) pp. 77–79.

25 See, most recently, Parliamentary Joint Committee on Human Rights, *Report 13 of 2020* (13 November 2020) pp. 77–79.

26 Parliamentary Joint Committee on Human Rights, *Thirty-First Report of the 44th Parliament* (24 November 2015) pp. 43–44; *Twenty-Sixth Report of the 44th Parliament* (18 August 2015) p. 7–11; *Report 1 of 2017* (16 February 2017); *Report 2 of 2017* (21 March 2017) p. 6; *Report 4 of 2017* (9 May 2017) pp. 92–93; *Report 1 of 2018* (6 February 2018) pp. 112–122; *Report 6 of 2019* (5 December 2019), p. 71–75; *Report 11 of 2020* (24 September 2020), pp. 3–41; and *Report 13 of 2020* (13 November 2020) pp. 77–79.

of both of these Acts is required in order to fully assess the compatibility of the regimes with human rights.

Suggested action

1.15 The committee recommends that a foundational assessment of the *Crimes Act 1914* and the *Proceeds of Crime Act 2002* with human rights be conducted.

1.16 The committee recommends that the statement of compatibility be updated to provide an assessment of the compatibility of this measure with the right to a fair trial, and provide additional information in relation to the right to privacy.

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

Increasing Commonwealth penalty units

1.18 Schedule 3 of the bill would amend the *Crimes Act 1914* to increase the amount of the Commonwealth penalty unit from $313 to $330, with effect from 1 July 2024.[27] The Crimes Act provides for the automatic Consumer Price Index adjustment of penalty units every three years,[28] and the bill would provide that this next indexation increase would occur on 1 July 2026.[29]

1.19 Commonwealth pecuniary criminal and civil penalty provisions are typically expressed in penalty units rather than individual dollar amounts.[30] A penalty unit determines the sum of money that a person may be penalised for both Commonwealth civil penalties and Commonwealth criminal offences carrying a pecuniary penalty. This means that the effect of this measure would be to uniformly adjust the maximum civil and criminal penalties expressed in penalty units contained in all Commonwealth legislation. For example, a criminal offence or civil penalty punishable by up to 2000 penalty units currently may be punishable by a fine of up to $626,000.[31] The effect of this bill would be that such a penalty would increase to a fine of up to $660,000 from 1 July 2024.

---

27 Schedule 3, items 1–3. Note the Crimes (Amount of Penalty Unit) Instrument 2023 sets the current amount of a penalty unit at $313.

28 Crimes Act 1914, section 4AA.

29 Schedule 3, item 2.

30 In this regard, the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (September 2011 edition) notes that this is a principle of framing penalties. See, p. 42.

31 2000 x $313.

International human rights legal advice

Criminal process rights

1.20 Increasing the value of a penalty unit, and correspondingly increasing the maximum available penalty for Commonwealth civil penalty provisions expressed in terms of penalty units, may engage criminal process rights in some instances. This is because civil penalties may be considered criminal in nature under international human rights law in certain circumstances.

1.21 The statement of compatibility does not identify the engagement of any human rights, and so no assessment of the compatibility of this measure is provided.[32] The explanatory memorandum states that maintaining the value of the penalty unit over time is necessary to ensure that financial penalties for Commonwealth offences reflect community expectations and continue to remain effective in deterring unlawful behaviour.[33]

1.22 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 a civil penalty as applicable to individuals is regarded as 'criminal' for the purposes of international human rights law, it would engage the criminal process rights under articles 14 and 15 of the International Covenant on Civil and Political Rights, including the right not to be tried or punished twice[34] and the right to be presumed innocent until proven guilty according to law,[35] which requires that the case against the person be demonstrated on the criminal standard of proof of beyond reasonable doubt.

1.23 The test for whether a civil penalty should be characterised as 'criminal' for the purposes of international human rights law relies on three criteria: the domestic classification of the offence as civil or criminal; the nature of the offence; and the severity of the penalty.[36] This bill would increase the value of a penalty unit, and therefore the maximum potential severity of all Commonwealth civil penalty provisions expressed as penalty units. As such, in circumstances where a particular civil penalty provision may be almost, or already, so severe as to be considered criminal in nature under international human rights law, increasing the penalty units would further exacerbate that risk.

---

32 Statement of compatibility, p. 10.

33 Explanatory memorandum, p. 3.

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

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

36 For further detail, see the Parliamentary Joint Committee on Human Rights, *Guidance Note 2: Offence provisions, civil penalties and human rights* (December 2014).

1.24 By way of example, the *Biosecurity Act 2015* includes numerous penalties applying specified criminal offences and civil penalty provisions relating to the management of risk of pests and diseases entering Australian territory. For example, the maximum civil penalty for bringing or importing prohibited or suspended goods into Australian territory is currently 1,000 penalty units (currently $313,000).[37] Given that those penalties would apply to the public at large, and noting their potential severity and the stated legislative intention for them to serve as a deterrent, the committee previously noted there was a risk that these penalties could be regarded as 'criminal' under international human rights law.[38] Because this bill would increase that potential maximum penalty from the current maximum of $313,000 to $330,000, this would have the effect of further increasing the risk that this specific penalty may be regarded as criminal. It is not possible to comprehensively quantify the total level of risk of civil penalties engaging and limiting criminal process rights given the number of civil penalty provisions this measure would increase.

Committee view

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

1.26 The committee considers that, because this bill would have the effect of increasing the maximum possible civil penalty in respect of every Commonwealth civil penalty expressed in terms of penalty units, there is a risk that this may, in some cases create, and in other cases further exacerbate, the risk that certain civil penalty 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

---

[37] *Biosecurity Act 2015,* subsection 185(3). This provision was last increased from a maximum of 120 to 1000 penalty units in 2021 pursuant to the Biosecurity Amendment (Strengthening Penalties) Bill 2021 (now an Act).

[38] See, *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).

numerous occasions, including due to their potential severity,[39] and cautions that it cannot comprehensively quantify the total level of risk given the number of civil penalty provisions this bill would amend.[40]

Suggested action

1.27 The committee recommends that the statement of compatibility with human rights be updated to reflect the potential engagement and limitation of criminal process rights by this bill.

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

Expansion of interception orders

1.29 Schedule 5 would amend the *Telecommunications (Interception and Access) Act 1979* (TIA Act) to enhance the ability of the Inspector of the Independent Commission Against Corruption (New South Wales), the Inspector of the Law Enforcement Conduct Commission (NSW), the Inspector of the Independent Commission Against Corruption (South Australia), the Parliamentary Inspector of the Corruption and Crime Commission (West Australia) and the Victorian Inspectorate, to receive intercepted information and interception warrant information under the TIA Act.

1.30 It would do so by expanding the definition of 'permitted purpose' under subsection 5(1) of the TIA Act to align with the definition within the oversight bodies' respective enabling legislation to encompass their oversight functions.[41] For example, it would provide that the WA Parliamentary Inspector of the Corruption and Crime Commission may use these statutory powers to assess the effectiveness and appropriateness of the Western Australia Corruption and Crime Commission's procedures.[42] It also seeks to expand the scope of purposes for which the integrity agencies and oversight bodies are able to share interception information and

39 See, for example, 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). See also, Online Safety Bill 2021 and Online Safety (Transitional Provisions and Consequential Amendments) Bill 2021, *Report 3 of 2021* (17 March 2021), pp. 27–29.

40 See also Parliamentary Joint Committee on Human Rights, *Report 6 of 2022* (24 November 2022) in relation to the Crimes Amendment (Penalty Unit) Bill 2022, pp. 34–37.

41 Schedule 5, items 65, 70, 75, 76, 105, section 5(1), definition of 'permitted purpose'.

42 Schedule 5, item 75, proposed paragraph 5(1)(h).

interception warrant information under section 68 of the TIA Act to include sharing for the purposes of their oversight functions.[43]

1.31 It would also provide that the Inspector of the Independent Commission Against Corruption (SA) is an 'eligible authority' under the TIA Act, and so empower it to share information pursuant to the TIA Act.[44]

International human rights legal advice

Rights to privacy and a fair trial

1.32 This measure would expand the capacity of state and territory integrity agencies and oversight bodies to receive intercepted information and interception warrant information under the TIA Act. Where this would result in personal information being shared with those agencies, this would engage the right to privacy.

1.33 The right to privacy includes the right not to be subject to arbitrary or unlawful interference with a person's family, home or correspondence.[45] It may be permissibly limited where a limitation pursues a legitimate objective, is rationally connected to that objective and is a proportionate means of achieving that objective.

1.34 The statement of compatibility states that this measure promotes the right to privacy because the amendments are intended to allow oversight bodies to receive and use interception information and interception warrant information in ensuring that agencies with significant and covert powers (including the power to access personal information) are using those powers appropriately.[46] However, it also identifies that the countervailing consideration is that the amendments may also limit a person's privacy where personal information held by an integrity agency is shared with its oversight body for audit and oversight purposes. It states that allowing oversight bodies to receive and use interception material will ultimately promote the protection of individual rights as it will result in greater scrutiny about integrity agencies' use of intrusive powers. This would likely constitute a legitimate objective and that the measure would be rationally connected. As to proportionality, the statement of compatibility states that the amendments limit the permitted purposes for information sharing to those purposes which the oversight bodies require to be able to carry out their functions and fulfil their statutory obligations. This would circumscribe the extent of this information sharing power, which may assist with the proportionality of the measure, though noting that the statement of compatibility

---

[43] Schedule 5, items 142–152, relating to section 68 of the TIA Act (Chief officer may communicate information obtained by agency).

[44] Schedule 5, items 32, 47, 58, 96, 103 relating to definitions included in subsection 5(1) of the TIA Act. See also items 128 and 162, 172 and 179 (which would amend section 157 of Schedule 1 of the TIA Act relating to the disclosure of protected information relating to international production orders).

[45] International Covenant on Civil and Political Rights (ICCPR), article 17.

[46] Statement of compatibility, pp. 12–13.

does not identify the numerous statutory purposes for which the sharing of information would now be permitted. Further, this is the sole safeguard identified in relation to this measure, and is an incomplete answer to whether the extension of existing interception powers to these oversight agencies would be a permissible limit on the right to privacy.[47]

1.35 The statement of compatibility also states that this measure may engage the right to a fair trial 'as it relates to integrity agencies' use of their existing information-gathering powers for their statutory functions under the TIA Act'.[48] The right to a fair trial is set out above. The statement of compatibility states that information gathered by integrity agencies through use of their existing powers may be used for a range of purposes, including in the prosecution of criminal offences, and states that these amendments would promote the right to a free and fair trial by providing greater scrutiny of the use of these covert powers.[49] However, the statement of compatibility does not identify whether any of the state oversight bodies may, themselves, use this information in order to prosecute criminal offences or undertake other enforcement activity, and so whether providing for the access to, and use of, interception information and interception warrant information in relation to those activities may engage the right to a fair trial.

1.36 Without a foundational assessment of the TIA Act, and the sufficiency of the safeguards provided therein, it is difficult to assess the full human rights implications of measures seeking to extend or otherwise alter its provisions.[50]

Committee view

1.37 The committee notes that expanding the capacity of state and territory integrity agencies and oversight bodies to receive intercepted information and interception warrant information under the *Telecommunications (Interception and Access) Act 1979* (TIA Act) for the purposes of their oversight activities engages and limits the right to privacy and may engage and limit the right to a fair trial.

1.38 The committee notes that the statement of compatibility accompanying this bill briefly acknowledges how the expansion of these powers engages human rights, but

---

[47] In assessing the proportionality of a limit on a human right, it is necessary to consider a number of factors, including: whether a proposed limitation is sufficiently circumscribed; whether it is accompanied by sufficient safeguards; whether any less rights restrictive alternatives could achieve the same stated objective; and whether there is the possibility of oversight and the availability of review.

[48] Statement of compatibility, p. 13.

[49] Statement of compatibility, p. 12.

[50] See, for example, Parliamentary Joint Committee on Human Rights, Telecommunications (Interception and Access) Regulations 2017, *Report 3 of 2018* (27 March 2018) pp. 129–137; Law Enforcement Legislation Amendment (State Bodies and Other Measures) Bill 2016, *Report 9 of 2017* (22 November 2016) pp. 2–8 and the National Security Legislation Amendment (Espionage and Foreign Interference) Bill 2017, *Report 2 of 2018* (13 February 2018) pp. 2–36.

fails to provide a comprehensive analysis of its compatibility. The committee acknowledges that expanding the capacity of integrity agencies to access interception information for the purposes of their oversight roles would serve as an important safeguard on the agencies that are gathering and sharing that information.

1.39 However, the committee notes that many of the powers set out in the TIA Act were enacted prior to the establishment of the committee, and so have not been reviewed by the committee for compliance with Australia's human rights obligations. Of those powers that have been reviewed by the committee, the committee notes it has previously raised concerns as to the compatibility of a number of these powers with human rights, particularly the right to privacy.

1.40 The committee reiterates its long-held view that without a foundational assessment of the TIA Act and the sufficiency of the safeguards provided therein, it is difficult to assess the full human rights implications of measures seeking to amend those powers.[51]

Suggested action

1.41 The committee recommends a foundational human rights assessment of the powers in the *Telecommunications (Interception and Access) Act 1979* to assess its compatibility with human rights, in particular the right to privacy.

1.42 The committee recommends that the statement of compatibility with human rights be updated to provide a more fulsome analysis of the compatibility of the measure with the rights to privacy and a fair trial.

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

---

51 See, for example, Parliamentary Joint Committee on Human Rights, Telecommunications (Interception and Access) Regulations 2017, *Report 3 of 2018* (27 March 2018) pp. 129–137; Law Enforcement Legislation Amendment (State Bodies and Other Measures) Bill 2016, *Report 9 of 2017* (22 November 2016) pp. 2–8 and the National Security Legislation Amendment (Espionage and Foreign Interference) Bill 2017, *Report 2 of 2018* (13 February 2018) pp. 2–36.

National Disability Insurance Scheme Amendment (Getting the NDIS Back on Track No. 1) Bill 2024[52]

Purpose	The bill seeks to make various amendments to the *National Disability Insurance Scheme Act 2013* including to introduce a new definition of 'NDIS supports'; expand National Disability Insurance Scheme rules relating to access requirements; empower the CEO to request information and reports relating to the participant; provide for new framework plans; and allow for the imposition of conditions on approval of quality auditors
Portfolio	National Disability Insurance Scheme
Introduced	House of Representatives, 27 March 2024
Rights	Adequate standard of living; children's rights; health; privacy; rights of persons with disability; social security; work

Definition of NDIS support

1.44 The bill seeks to introduce a new definition of 'NDIS support'.[53] A support will be an NDIS support if:

- the support meets one or more exhaustive criteria, such as the support will facilitate personal mobility of the person, is a health service that the person needs because of the person's impairment, or is a rehabilitation service;[54] and
- the support is declared by the National Disability Insurance Scheme (NDIS) rules to be a support that is appropriately funded or provided through the NDIS; and
- the support is not a support declared by the NDIS rules to be a support that is *not* appropriately funded or provided through the NDIS.

1.45 Currently, the NDIS will fund 'reasonable and necessary supports' for participants provided the CEO is satisfied of specified matters in relation to the funding of each support.[55] These matters are set out in section 34 of the *National Disability Insurance Scheme Act 2013* (the Act). This bill seeks to amend section 34 of the Act to insert additional matters that the CEO must be satisfied of in relation to the funding of

52 This entry can be cited as: Parliamentary Joint Committee on Human Rights, National Disability Insurance Scheme Amendment (Getting the NDIS Back on Track No. 1) Bill 2024, *Report 4 of 2024*; [2023] AUPJCHR 23.

53 Schedule 1, item 14.

54 This criteria is set out in Schedule 1, item 14, new subsection 10(a).

55 *National Disability Insurance Scheme Act 2013* (NDIS Act), sections 33 and 34.

reasonable and necessary supports. These additional matters are that 'the support is necessary to address needs of the participant arising from an impairment in relation to which the participant meets the disability requirements (see section 24) or the early intervention requirements (see section 25)' and 'the support is an NDIS support for the participant' (as per the new definition that the bill seeks to introduce).[56]

1.46 Additionally, the bill would amend the provision requiring a participant to spend an NDIS amount in accordance with their plan to also require that the participant spend money only on NDIS supports.[57]

Preliminary international human rights legal advice

Rights of persons with disability; rights to an adequate standard of living, health and social security; and rights of the child

1.47 By defining NDIS supports and allowing NDIS rules to potentially narrow the scope of that definition, the measure may have the effect of reducing the type of supports that will be funded by the NDIS and thus available for participants. In doing so, the measure may have an adverse impact on participants' independence and quality of life, and so would engage and may limit the rights of persons with disability as well as the rights to an adequate standard of living and health. Insofar as the NDIS may be considered a form of social security in that it provides a benefit to people with disability to ensure disability supports and services are accessible and affordable, the measure would also engage and may limit the right to social security. Additionally, to the extent that the measure applies to children, the rights of the child would be engaged and possibly limited.

1.48 The Convention on the Rights of Persons with Disabilities (CRPD) reaffirms that all persons with disability are guaranteed all human rights without discrimination, including those rights set out in other human rights treaties. Of particular relevance to this measure are the rights to live independently and be included in the community, the right to personal mobility and the right to habilitation and rehabilitation.[58] These rights require States parties to take effective measures to facilitate full enjoyment of these rights, including by:

- ensuring that people with disability have 'access to a range of in-home, residential and other community support services, including personal assistance necessary to support living and inclusion in the community, and to prevent isolation or segregation from the community';[59]

---

56 Schedule 1, items 46 and 47, new paragraphs 34(1)(aa) and (f).

57 Schedule 1, item 75.

58 Convention on the Rights of Persons with Disabilities, articles 19, 20 and 26.

59 Convention on the Rights of Persons with Disabilities, article 19(b).

- ensuring that people with disability have access to 'quality mobility aids, devices, assistive technologies and forms of live assistance and intermediaries, including by making them available at affordable cost';[60]
- 'facilitating the personal mobility of persons with disabilities in the manner and at the time of their choice, and at affordable cost'; and
- enabling people with disability to attain and maintain maximum independence, full physical, mental, social and vocational ability, and full inclusion and participation in all aspects of life through organising, strengthening and extending comprehensive habilitation and rehabilitation services and programmes.[61]

1.49 The right to an adequate standard of living requires that the State party take steps to ensure the availability, adequacy and accessibility of food, clothing, water and housing for all people in its jurisdiction.[62] The CRPD elaborates on the content of this right for people with disability, providing that States parties should take appropriate steps to ensure access to appropriate and affordable services, devices and other assistance for disability-related needs and, for those living in poverty, access to assistance from the State with disability-related expenses.[63] The right to health is the right to enjoy the highest attainable standard of physical and mental health and includes the right to access adequate health care as well as to live in conditions that promote a healthy life (such as access to safe drinking water, housing, food, and a healthy environment).[64] With respect to people with disability, the CRPD reaffirms that this right is to be guaranteed without discrimination and obliges States parties to provide 'those health services needed by persons with disabilities specifically because of their disabilities, including early identification and intervention as appropriate, and services designed to minimize and prevent further disabilities, including among children and older persons'.[65] The right to social security recognises the importance of adequate social benefits in reducing the effects of poverty.[66] This right plays an important role in realising many other economic, social and cultural rights, including the other rights engaged by this measure.

---

60 Convention on the Rights of Persons with Disabilities, article 20(b).

61 Convention on the Rights of Persons with Disabilities, article 20(a).

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

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

64 International Covenant on Economic, Social and Cultural Rights, article 12(1). See also UN Economic, Social and Cultural Rights Committee, *General Comment No. 14: the right to the Highest Attainable Standard of Health* (2000) [4].

65 Convention on the Rights of Persons with Disabilities, article 25.

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

1.50 Children have special rights under human rights law taking into account their particular vulnerabilities.[67] Children's rights are protected under a number of treaties, particularly the Convention on the Rights of the Child. All children under the age of 18 years are guaranteed these rights, including all rights set out above, without discrimination on any grounds.[68]

1.51 Under international human rights law, Australia has obligations to progressively realise social and economic rights, which includes aspects of the rights of persons with disabilities (such as the right to access individualised, assessed support services and service facilities) as well as the rights to an adequate standard of living and health, using the maximum of resources available.[69] Australia has a corresponding duty to refrain from taking retrogressive measures, or backwards steps, in relation to the realisation of these rights.[70] A retrogressive measure is a type of limitation on an economic or social right.[71] If this measure had the effect of reducing the availability of supports for people with disability, it may constitute a retrogressive measure.

1.52 Limitations on the above rights, including retrogressive measures, may be permissible provided that they address a legitimate objective, are effective to achieve (that is, rationally connected to) that objective and are a proportionate means to achieve that objective. In this context, the Committee on the on the Rights of Persons with Disabilities has stated that 'the State is obliged to demonstrate that such [retrogressive] measures are temporary, necessary and non-discriminatory and that they respect its core obligations'.[72]

1.53 The statement of compatibility states that the new definition of NDIS supports will provide a clear definition for all participants of the authorised supports that will be funded by the NDIS and those that will not.[73] The explanatory memorandum explains that this definition will serve two purposes. First, it provides constitutional underpinning for the new framework plans (another measure sought to be introduced by the bill and discussed below) by setting out what kinds of supports the

---

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

68 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.

69 See, UN Committee on the Rights of Persons with Disabilities, *General comment No. 5 (2017) on living independently and being included in the community* (2017) [39]–[41].

70 See, for example, UN Committee on the Rights of Persons with Disabilities, *General comment No. 5 (2017) on living independently and being included in the community* (2017) [43]–[45].

71 See, for example, UN Committee on the Rights of Persons with Disabilities, *General comment No. 5 (2017) on living independently and being included in the community* (2017) [38(f)], [44].

72 UN Committee on the Rights of Persons with Disabilities, *General comment No. 5 (2017) on living independently and being included in the community* (2017) [43]. See more generally UN Committee on Economic, Social and Cultural Rights, *General Comment 13: the Right to education* (1999) [45].

73 Statement of compatibility, p. 1.

Commonwealth is constitutionally able to fund. Second, the definition will allow NDIS rules to narrow the scope of valid supports that are appropriately funded by the NDIS.[74] The explanatory memorandum states that in effect only those supports that a participant has a need for as a result of their impairment will be an NDIS support.[75]

1.54 Providing greater clarity as to what supports people with disability can access through the NDIS may be an important objective, particularly if there is currently uncertainty in this regard. In its final report, the NDIS Review, which reviewed the design, operations and sustainability of the NDIS, found that the current approach—of supports needing to meet the criteria of being reasonable and necessary in order to be funded—has been a key driver of challenges with planning.[76] The report stated:

> Reasonable and necessary was deliberately kept broadly defined in the legislation to enable the scheme to flexibly respond to individual need and circumstance. This flexibility of response has come at a price. There is a lack of clarity and confusion and what the scheme should fund is contested. This means reasonable and necessary can play out in inconsistent ways and creates an expectation gap for participants between what supports are wanted and what the NDIS can sustainably deliver.[77]

1.55 The NDIS Review stated that in practice, planners rely on external evidence from treating professionals and providers to assess whether supports are reasonable and necessary and this results in supports being 'approved (or not) on the basis of the sufficiency of evidence and/or the ability of the individual or their family and supporters to advocate', which 'means funding is not always directly linked to need'.[78] The NDIS Review recommended that the basis for setting a budget be changed to a 'whole-of-person level, rather than for individual support items'.[79] It stated that this would require redefining 'reasonable and necessary' in the Act and NDIS Rules as 'the total amount of funding determined to meet the support needs of a participant'. The NDIS Review further stated that '[t]he whole-of-person reasonable and necessary budget should be based primarily on supports needs and intensity, rather than

---

74 Explanatory memorandum, pp. 2–3.

75 Explanatory memorandum, p. 3.

76 NDIS Review, *Working together to deliver the NDIS: Independent Review into the National Disability Insurance Scheme, Final Report* (2023) p. 83.

77 NDIS Review, *Working together to deliver the NDIS: Independent Review into the National Disability Insurance Scheme, Final Report* (2023) p. 83.

78 NDIS Review, *Working together to deliver the NDIS: Independent Review into the National Disability Insurance Scheme, Final Report* (2023) p. 84.

79 NDIS Review, *Working together to deliver the NDIS: Independent Review into the National Disability Insurance Scheme, Final Report* (2023) Recommendation 3, action 3.3, p. 92.

functional impairments' and 'should be sufficient to cover the amount and type of support needed to enable the participant to participate in an inclusive life'.[80]

1.56 Having regard to the findings of the NDIS Review, it appears that the objective of providing greater clarity as to what supports are to be funded by the NDIS is necessary and addresses a pressing social need such that it would likely constitute a legitimate objective for the purposes of international human rights law. By defining what supports are and are not to be funded by the NDIS, the measure appears to be rationally connected to the stated objective.

1.57 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 whether a proposed limitation is accompanied by sufficient safeguards, including whether there is sufficient flexibility to treat different cases differently. The breadth of the measure is relevant in this regard. The first criterion of the definition of NDIS support is drafted in relatively broad terms. For example, the support 'is necessary to support the person to live and be included in the community, and to prevent isolation or segregation of the person from the community'; or the support 'will facilitate personal mobility…in the manner and at the time of the person's choice'; or the support will 'prevent' or 'minimise the prospects of the person acquiring a further impairment'.[81] Depending on how the criteria are interpreted in practice, it may be sufficiently broad and flexible to cover a wide range of supports.

1.58 However, the bill would also enable the NDIS rules to narrow the scope of supports that will be funded by the NDIS.[82] The extent to which the rules will narrow the measure is unclear as they are yet to be made, although the explanatory materials provide some guidance. The explanatory memorandum states that 'things such as holidays, groceries, payment of utility bills, online gambling, perfume, cosmetics, standard household appliances and whitegoods will not qualify as NDIS supports'.[83] It is not clear whether all of these items are currently funded through the NDIS. For example, NDIS guidelines suggest that whitegoods, such as a washing machine or dishwasher, are not typically funded as they are considered ordinary household items and are not likely to meet the funding criteria for supports.[84] However, there appears to be some flexibility to fund these items if the current funding criteria are met—for instance, if the participant provides evidence that the item is a disability-related support and the cost of the item is due to a participant's disability support needs.[85] If

---

80 NDIS Review, *Working together to deliver the NDIS: Independent Review into the National Disability Insurance Scheme, Final Report* (2023) Recommendation 3, action 3.3, p. 92.

81 Schedule 1, item 14, new paragraph 10(a)(i), (ii) and (viii).

82 Schedule 1, item 14, new subsections 10(b) and (c). See explanatory memorandum, p. 3.

83 Explanatory memorandum, p. 4.

84 NDIS, *Household items* (20 April 2021).

85 NDIS, *Household items* (20 April 2021); National Disability Insurance Scheme (Supports for Participants) Rules 2013, rules 5.1 and 5.2.

the NDIS rules were to declare whitegoods as a support that is not appropriately funded through the NDIS, there does not appear to be any flexibility (as there is now) for that support to nonetheless be funded even if the participant needed that support as a result of their impairment. For example, a combination washer/dryer machine may facilitate personal mobility for a participant by assisting them to undertake laundry independently whereas a standard washing machine may mean the participant requires a support person to help lift heavy washing out of the machine and hang it on a clothesline.[86] In this example, while a washer/dryer machine is arguably necessary to facilitate the personal mobility of a participant, thus meeting the first criterion of the new definition of NDIS support, it would nevertheless not be considered an NDIS support and therefore not funded if the item was declared in NDIS rules to be a support not appropriately funded through the NDIS. If those supports identified in the explanatory memorandum as not qualifying as NDIS supports, such as whitegoods, utility bills or groceries, are currently being funded through the NDIS, it is not clear whether this measure would result in those supports being taken away from the participant. If this were the case, the potential interference with human rights would be greater.

1.59 Further, the measure does not appear to be consistent with the approach recommended by the NDIS Review, despite the explanatory memorandum referring to the NDIS Review in its justification for the measure.[87] As noted above, the NDIS Review recommended redefining the concept of reasonable and necessary supports as 'the total amount of funding determined to meet the support needs of a participant'. This 'whole-of-person reasonable and necessary budget should be based primarily on a participant's supports needs and intensity' and 'should be sufficient to cover the amount and type of support needed to enable the participant to participate in an inclusive life'.[88] The NDIS Review recommended that the amount and type of supports be determined through a structured needs assessment, undertaken by a Needs Assessor (who would be a representative of the National Disability Insurance Agency (NDIA)).[89] The total cost of supports recommended by the Needs Assessor would then be translated into a budget that could be used flexibly by the participant to meet their needs.[90] Having regard to the NDIS Review's emphasis on focusing on the whole person, their circumstances and their support needs, it is not clear how

---

86 For other examples see Professor Helen Dickinson, *Are whitegoods disability supports? Here's what proposed NDIS reforms say*, UNSW Newsroom (15 April 2024).

87 See explanatory memorandum, p. 4.

88 NDIS Review, *Working together to deliver the NDIS: Independent Review into the National Disability Insurance Scheme, Final Report* (2023) Recommendation 3, action 3.3, p. 92.

89 NDIS Review, *Working together to deliver the NDIS: Independent Review into the National Disability Insurance Scheme, Final Report* (2023) Recommendation 3, action 3.3, p. 92 and action 3.4, p. 93.

90 NDIS Review, *Working together to deliver the NDIS: Independent Review into the National Disability Insurance Scheme, Final Report* (2023) Recommendation 3, action 3.4, p. 93.

introducing an exhaustive definition of NDIS supports without flexibility to take into account a participant's individual support needs—the result potentially being a reduction in the amount of support available for people with disability—is consistent with the NDIS Review's recommendations.

1.60 Another relevant factor in assessing proportionality is whether any less rights restrictive alternatives could achieve the same stated objective. Noting that proposed subsection 10(a) sets out what supports will be an NDIS support (such as those that facilitate personal mobility), it is not clear why this definition needs to be further narrowed by the NDIS rules (as provided for under proposed subsections 10(b) and (c)). As the NDIS rules could make the definition of NDIS supports more prescriptive and thus in effect reduce the flexibility of the measure, questions arise as to whether this aspect of the measure is necessary.

Committee view

1.61 The committee notes that by introducing a definition of NDIS support and allowing NDIS rules to potentially narrow the scope of that definition, the measure may have the effect of reducing the type of supports that will be funded by the NDIS and thus available for participants. To the extent that this results in an adverse impact on participants' independence and quality of life, the measure would engage and may limit the rights of persons with disability as well as the rights to an adequate standard of living and health. Insofar as the NDIS may be considered a form of social security, the measure would also engage and may limit the right to social security. Additionally, to the extent that the measure applies to children, the rights of the child would be engaged and possibly limited. The committee notes that while the measure appears to pursue a legitimate objective and be rationally connected to that objective, questions arise as to proportionality. The committee therefore considers further information is required to assess the compatibility of this measure with these human rights, and as such seeks the minister's advice in relation to the following:

(a) of those items listed in the explanatory memorandum as not qualifying as NDIS supports, including holidays, groceries, payment of utility bills, online gambling, perfume, cosmetics, standard household appliances and whitegoods, which items, if any, are currently funded through the NDIS;

(b) if a support that is currently funded through the NDIS does not meet the new definition of NDIS support (for example the item is declared by NDIS rules to be a support that is not appropriately funded through the NDIS), will that support be taken away from an existing participant or no longer funded;

(c) whether there is flexibility to take into account a participant's individual support needs in assessing whether a support meets the definition of an NDIS support; and

(d) why is it necessary to enable the definition of NDIS support to be narrowed by way of NDIS rules (as per subsections 10(b) and (c)).

NDIS access requirement rules

1.62 Currently, section 27 of the Act allows for NDIS rules to be made in relation to the disability requirements and early intervention requirements (together referred to as the access requirements). In particular, section 27 allows NDIS rules to prescribe circumstances in which, or criteria to be applied in assessing whether, certain elements of the access requirements are met, such as whether one or more impairments are permanent or whether the provision of early intervention supports is likely to benefit a person by reducing their future need for supports. This bill seeks to repeal and substitute section 27.[91] New section 27 would similarly allow NDIS rules to be made in relation to the access requirements but would be drafted in comparatively broader terms. In particular it would allow the rules to determine any matter for the purposes of the access requirements (in sections 24 and 25 of the Act), including prescribing the methods or criteria to be applied or matters that may, must, or must not be taken into account for the purposes of the access requirements, or prescribing the circumstances in which a matter is taken to exist or not exist in relation to a person.

International human rights legal advice

Rights of persons with disability; rights to an adequate standard of living, health and social security and rights of the child

1.63 The human rights implications of this measure are difficult to fully assess as much will depend on the content of any NDIS rules made for the purposes of section 27. The explanatory memorandum provides some information in this regard. It states that the measure allows for flexibility for tailored NDIS rules, which will provide clarity about whether a person is eligible and should apply for the NDIS or whether supports should be sought outside of the NDIS.[92] The explanatory memorandum notes that the rules will also clarify how certain criteria should be applied and provide clear guidance to participants on what to do if their circumstances change. It further notes that the new early intervention pathway will primarily be operationalised through future rules made under section 27.[93]

1.64 In general terms, as the measure relates to the methods or criteria to be applied for the purposes of assessing whether a person meets the disability or early intervention requirements and thus may access the NDIS, the measure would engage the rights of persons with disability as well as the rights to an adequate standard of

---

91 Schedule 1, item 25.

92 Explanatory memorandum, p. 7.

93 Explanatory memorandum, p. 7.

living, health and social security. The rights of the child would also be engaged to the extent the measure applies to children. These rights are described above.

1.65 If the NDIS rules made for the purposes of the measure had the effect of making it easier for people with disability to access the NDIS, these rights may be promoted. In this regard, the statement of compatibility states that the measure promotes the right to health by allowing for NDIS rules to be made which guide the making of access decisions relating to people with progressive conditions.[94] It notes that this will ensure that NDIS participants who meet the early intervention requirements continue to receive the supports that are best targeted to their needs.[95]

1.66 However, if the NDIS rules had the effect of restricting access to the NDIS, then these rights may be limited. The statement of compatibility appears to acknowledge that the measure may limit rights. It states that the 'inclusion of additional factors for consideration when deciding whether a person meets the access or early intervention requirements may limit the rights' of persons with disability, including the right to equality and non-discrimination, in certain circumstances.[96] It states that the measure does not change the criteria for accessing the NDIS, but rather helps to clarify broad and potentially ambiguous terminology.[97] However, clarifying the meaning of key concepts and providing guidance as to how the access requirements are to be interpreted could, in practice, change the way the requirements are being applied to the detriment of participants (whose status is reassessed under proposed section 30A) and prospective participants. There therefore appears to be a risk that the measure may restrict access to the NDIS, particularly in light of the overarching objective of the bill, which is to 'ensure the long term integrity and sustainability of the NDIS, for the benefit of all persons with disability who have access to the NDIS'.[98] It is noted that the NDIS Review acknowledged the need for clearer access requirements and consistency around determining whether a person meets the eligibility criteria. However, it also noted that such legislative reform 'should be complemented by reforms to significantly increase support outside of the NDIS'.[99]

---

94 Statement of compatibility, p. 6.

95 Statement of compatibility, p. 6.

96 At p. 3 the statement of compatibility refers to limitations on the rights contained in articles 3, 4, 5 and 12 of the Convention on the Rights of Persons with Disabilities and articles 2, 16 and 26 of the International Covenant on Civil and Political Rights – broadly grouped under the heading of the right to equality and non-discrimination.

97 At p. 3 the statement of compatibility refers to limitations on the rights contained in articles 3, 4, 5 and 12 of the Convention on the Rights of Persons with Disabilities and articles 2, 16 and 26 of the International Covenant on Civil and Political Rights – broadly grouped under the heading of the right to equality and non-discrimination.

98 Statement of compatibility, p. 7.

99 NDIS Review, *Working together to deliver the NDIS: Independent Review into the National Disability Insurance Scheme, Final Report* (2023), p. 87.

1.67 The statement of compatibility states that the proposed amendments 'are reasonable, proportionate and necessary to ensure that participants and prospective participants have a clear understanding of what is required to gain access to the NDIS, which also respects their inherent dignity'.[100] However, it is not possible to conclude on the human rights compatibility of the measure as such an assessment will depend on the content of future NDIS rules.

Committee view

1.68 The committee notes that insofar as the NDIS rules will relate to access requirements to the NDIS, the measure engages the rights of persons with disability as well as the rights to an adequate standard of living, health and social security. The rights of the child would also be engaged to the extent the measure applies to children. The committee notes that whether these rights may be promoted or limited will depend on the content of any NDIS rules made for the purposes of the measure. If the NDIS rules were to have the effect of restricting access to the NDIS, these rights may be limited. The committee considers there to be a risk that this may occur having regard to the information in the explanatory materials, particularly noting the overarching objective of the bill is to ensure the long-term integrity and sustainability of the NDIS. The committee considers that it is not possible to conclude on the human rights compatibility of the measure as such an assessment will depend on the content of future NDIS rules. The committee notes that as part of its usual scrutiny process, it will scrutinise any future NDIS rules and related legislative instruments for their compatibility with human rights.

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

Requests for information

1.70 The bill seeks to expand the circumstances in which the Chief Executive Officer (CEO) of the NDIA may request information and reports from a participant, including for the purposes of:

- deciding whether or not to revoke the participant's status as a participant in the NDIS;[101]
- deciding whether or not the participant meets the early intervention requirements or disability requirements;[102]
- undertaking an assessment for a participant;[103]

---

[100] Statement of compatibility, p. 3.

[101] Schedule 1, item 30 and item 31, new paragraph 30A(1)(c).

[102] Schedule 1, item 31, new section 30A.

[103] Schedule 1, item 52.

- preparing a statement of participant supports for a participant;[104] and
- deciding whether to approve a statement of participant supports for a participant.[105]

1.71 Under the current Act, the CEO may only request information and reports for the purposes of preparing a statement of participant supports, or deciding whether to approve a statement of participant supports.[106]

1.72 As to what information may be requested, the CEO may request that the participant, or another person, provide information that is reasonably necessary for the purpose of making the particular decision, such as deciding whether the participant meets the access requirements, or whether their status should be revoked. The CEO may also request that the participant undergo an assessment and/or undergo, whether or not at a particular place, a medical, psychiatric, psychological or other examination conducted by an appropriately qualified person and provide the report of that assessment or examination to the CEO in the approved form.[107] The requested information must be returned to the CEO within 90 days, or a longer period if specified. Once the information is received, the CEO may request more information or make the relevant decision. The consequence for not complying with a request for information will depend on the context in which the information is requested. For example, in the context of a revocation or assessment decision, the CEO may revoke a participant's status without receiving the information unless the CEO is satisfied that it was reasonable for the person to not have complied with the request.[108] If the CEO requests information for the purposes of undertaking an assessment or preparing or approving a statement of participant supports and that information is not received within the specified timeframe, the CEO must suspend the preparation of the new framework plan unless the CEO is satisfied that it was reasonable for the person to not have complied with the request, in which case a further request may be made.[109]

Preliminary international human rights legal advice

Right to privacy

1.73 By allowing the CEO to request that a participant undergo an assessment or examination and provide personal information, including sensitive medical information, to the CEO, the measures would engage and may limit the right to

---

104 Schedule 1, item 52.

105 Schedule 1, item 52.

106 NDIS Act, subsection 36(1).

107 See e.g. Schedule 1, item 20, subsection 30(3).

108 Schedule 1, item 20, subsections 30(5) and (6) and item 31, subsection 30A(7).

109 Schedule 1, item 54, paragraph 36(3)(b).

privacy.[110] The right to privacy prohibits arbitrary or unlawful interference with a person's privacy.[111] It includes respect for informational privacy, including the right to respect for private and confidential information, particularly the storing, use and sharing of such information. The right to privacy also includes the right to personal autonomy and physical and psychological integrity.[112] 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. It is noted that the statement of compatibility does not address the human rights implications of these measures and so provides no assessment as to their compatibility with the right to privacy.

1.74 The explanatory memorandum states that the new information gathering powers will allow the CEO to make decisions based on up-to-date and current information about a participant.[113] It says that this will improve the quality and consistency in decision-making by the NDIA. In relation to decisions about supports, the explanatory memorandum states that improved decision-making will ensure the delivery of evidence-based and outcomes focused NDIS supports.[114] In relation to revocation decisions, the explanatory memorandum states that allowing the CEO to request information will allow the CEO to determine the state of a participant's functional capacity (which can change over time) having regard to the best available information to ensure they are receiving the most appropriate supports.[115]

1.75 The objective of improving the quality and consistency of NDIA decisions and ensuring decisions are based on current information is capable of constituting a legitimate objective for the purposes of international human rights law. Insofar as the measure would facilitate the provision of current information about a participant to the CEO for the purposes of making the relevant decision, the measures are rationally connected to that objective.

---

110 If, as a consequence of the request for and provision of information, a participant's status was revoked, this may affect other rights of the participant. As a result, the measure may also indirectly limit the rights of people with disability, the rights to an adequate standard of living, health and social security as well as the rights of the child (if the participant was a child). As this measure does not directly relate to those provisions in the NDIS Act that allow for revocation, this entry does not address these more indirect human rights implications.

111 International Covenant on Civil and Political Rights, article 17; Convention on the Rights of Persons with Disabilities, article 22; and Convention on the Rights of the Child, article 16.

112 See generally UN Human Rights Committee, *General Comment No. 16: Article 17* (1988) [3]–[4], and *MG v Germany*, UN Human Rights Committee Communication No. 1428/06 (2008) [10.1]

113 Explanatory memorandum, pp. 9 and 29.

114 Explanatory memorandum, p. 29.

115 Explanatory memorandum, p. 9.

1.76 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.[116] The purposes for which the CEO may request information, such as to assess a participant's need for supports or to decide whether to revoke a participant's status, are clearly set out in the legislation. This assists with proportionality. However, it is not apparent on the face of the legislation the circumstances in which the making of certain decisions are triggered, particularly revocation and reassessment decisions. For instance, it is not clear what circumstance, information or event would trigger the CEO to consider whether to revoke a participant's status under section 30 of the Act (and consequently make a request for information).[117] In relation to a decision to reassess a participant's status, the circumstances in which the CEO must assess whether the participant meets the access requirements and, if not, revoke the participant's status, are to be prescribed by NDIS rules.[118] In addition to prescribing these circumstances, the rules may prescribe requirements with which the CEO must comply, criteria that must be applied or matters that may, must, or must not be taken into account.[119] The explanatory memorandum does not indicate the types of circumstances that are to be prescribed in the NDIS rules. It simply states that the rules may prescribe circumstances in which the CEO must check in with a participant in the early intervention pathway, noting that currently the NDIA cannot check if the supports are working, are still necessary, or if the participant is still in need of early intervention.[120] Without clarity as to the circumstances in which certain decisions will likely arise, and thus how likely or frequently the CEO would request information from a participant, it is difficult to assess the extent of the potential interference with a participant's right to privacy. The more frequently a request was made, the greater the interference would be. While the explanatory memorandum states that the measures will not result in participants having to repeatedly prove their disability, the effect of the measure nevertheless appears to allow for this, as a participant would undergo an assessment or medical examination for the purposes of satisfying the CEO that they still have an impairment and need support under the NDIS and therefore still meet the access requirements.[121] There is no limit in the bill as to how often the CEO could exercise this power.

---

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

117 Section 30 of the NDIS Act empowers the CEO to revoke a person's status if the CEO is satisfied that the person no longer meets the access requirements.

118 Schedule 1, item 31, new subsections 30A(1)–(3).

119 Schedule 1, item 31, new subsection 30A(2).

120 Explanatory memorandum, p. 10.

121 Explanatory memorandum, p. 9.

1.77 A participant's ability to exercise control over the assessment process is also relevant in considering the extent of any potential interference with a participant's right to privacy. The explanatory memorandum states that the participant will be able to choose the person from whom they obtain information and reports, as long as that information is provided in the form requested by the CEO.[122] If this is the case, it would assist with proportionality. As the legislation is currently drafted, however, a request to undergo an examination could be quite prescriptive and this may reduce a participant's sense of autonomy and control. The measures would allow the CEO to request that a participant 'undergo, *whether or not at a particular place*, a medical, psychiatric, psychological or other examination, conducted by an appropriately qualified person'.[123] It is not clear what is meant by 'place' – whether it refers to a city or geographic location, or a particular clinic or hospital. If a particular place was specified and that place was not serviced by the participant's usual treating practitioners, the participant may be unable to choose the person who they would like to undertake the examination and provide the report.

1.78 Further, while it is not mandatory for the participant to comply with a request for information, failure to comply may result in the CEO making a decision without up-to-date information from the participant that would have adverse impacts on the participant, such as revoking the participant's status or suspending the preparation of the new framework plan. Where the participant is unable to comply with a request within the specified timeframe, the CEO must not revoke a participant's status if they are satisfied that it was reasonable for the participant or other person not to have complied with the request.[124] The explanatory memorandum explains that a participant may be unable to comply, for example, because they are hospitalised during the specified period or cannot obtain an appointment with a relevant medical professional within the specified period. It states that the measures allow the CEO to take into account circumstances outside the participant's control, such as a specialist not providing the required information within the timeframe.[125] To the extent that these provisions provide some flexibility with respect to the timeframes for compliance with a request and safeguard against the CEO making a decision before the participant is able to comply (if the non-compliance is reasonable), they would assist with proportionality.

Committee view

1.79 The committee notes that allowing the CEO to request information and reports from a participant, including sensitive medical information, engages and may limit the right to privacy. While the measure appears to pursue a legitimate objective and be

[122] Explanatory memorandum, p. 9.

[123] See e.g. item 30, subparagraph 30(3)(b)(ii).

[124] Schedule 1, item 30, new subsection 30(6) and item 31, new subsection 30A(7).

[125] Explanatory memorandum, p. 9.

rationally connected to that objective, questions arise as to proportionality. The committee therefore considers further information is required to assess the compatibility of this measure with this right, and as such seeks the minister's advice in relation to:

(a) what circumstances would trigger the CEO considering whether to revoke a participant's status under section 30 of the Act;

(b) what circumstances are likely to be prescribed for the purposes of proposed section 30A;

(c) how likely or frequently would the CEO make a request for information and reports from a participant and why does the bill not provide any limit on how often the CEO could make such requests of participants;

(d) what types of places could the CEO specify in requesting that a participant undergo an examination (under proposed subparagraph 30(3)(b)(ii)); and

(e) if the CEO specified a place, whether a participant could choose an appropriately qualified person to undertake an examination even if that person was not able to perform the examination at the place specified.

Working out total funding amounts for NDIS participants

1.80 By way of background, the bill seeks to introduce new framework plans, which must include a participant's statement of goals and aspirations and a statement of participant supports.[126] The statement of participant supports must, among other things, specify the participant's reasonable and necessary budget.[127] The reasonable and necessary budget would provide for flexible funding (that is, an amount that may be flexibly spent on NDIS supports) and/or funding for a particular stated support or a particular class of stated supports (that is, an amount that must be spent on specific high-cost items such as assistive technology).[128] Whether a participant is entitled to flexible funding and/or funding for stated supports would be based on the needs assessment report for the plan (which would be prepared following an assessment of the participant's needs for supports in respect of the impairments for which they gained access to the NDIS).[129]

1.81 Proposed section 32K would specify how the total funding amount for flexible funding and/or funding for a stated support in a participant's plan must be worked

---

126 Schedule 1, item 6 and item 36, new subsection 32A(1) and 32D(1).

127 Schedule 1, item 9 and item 36, paragraph 32D(2)(a).

128 Schedule 1, item 36, new sections 32E–32G.

129 Schedule 1, item 6 defines 'needs assessment report' as 'the report of an assessment undertaken in accordance with section 32L for the purposes of the plan'.

out. In particular, it would require that the total funding amount be worked out by applying the information in the needs assessment report and would allow the minister to determine, by legislative instrument, methods for working out a total funding amount.[130] In making any such determination, the minister must have regard to certain principles, including that people with disability should be supported to receive reasonable and necessary supports, and the need to ensure the financial sustainability of the NDIS.[131] Likewise, the minister must have regard to these same matters in making any determinations with respect to assessments of participants' need for supports, such as the assessment tools that must be used or certain requirements for undertaking assessments.[132] It is noted that the financial sustainability of the NDIS is not currently a specific matter that must be taken into account when assessing a participant's need for supports or approving funding. Rather, the concept must be considered more generally in giving effect to the objects of the Act.[133]

Preliminary international human rights legal advice

Rights of persons with disability; rights to an adequate standard of living, health and social security; and rights of the child

1.82 By requiring that the minister have regard to the financial sustainability of the NDIS in determining (by way of legislative instrument) matters relating to working out total funding amounts and assessing participants' need for supports, there appears to be a risk that the measures may result in fewer supports being approved and funded for participants. If this were the case, the measures may have an adverse impact on participants' independence and quality of life, and so would engage and may limit the rights of persons with disability, and rights to an adequate standard of living, health and social security. The content of these rights are set out above. In addition, as the measures would apply to children and it is not clear that the best interests of the child would be a primary consideration in working out the total funding amount or determining matters relating to assessments, the measures would engage and may limit the rights of the child. Australia is required to ensure that, in all actions concerning children, the best interests of the child are a primary consideration.[134] This requires legislative, administrative and judicial bodies and institutions to systematically consider how children's rights and interests are or will be affected

---

[130] Schedule 1, item 36, new subsections 32K(1) and (2).

[131] Schedule 1, item 36, new subsection 32K(3). The principles referred to are those set out in subsections 4(5) and (11) of the NDIS Act.

[132] Schedule 1, item 36, subsections 32L(8) and (10).

[133] NDIS Act, section 3.

[134] Convention on the Rights of the Child, article 3(1).

directly or indirectly by their decisions and actions.[135] The UN Committee on the Rights of the Child has explained that:

> …the expression "primary consideration" means that the child's best interests may not be considered on the same level as all other considerations. This strong position is justified by the special situation of the child.[136]

1.83 The statement of compatibility does not address these specific measures and so provides no assessment as to whether requiring the minister to consider the financial sustainability of the NDIS in making key decisions is compatible with the rights of people with disability and children. 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. If the measures did have the effect of reducing the total funding amounts and supports available for people with disability, they could be considered retrogressive – a type of limitation.

1.84 The objective underpinning these specific measures is not clearly articulated in the explanatory materials. More generally, the statement of compatibility states that the new framework plans, which it describes as plans developed in accordance with the budget requirements of the bill, may limit the right of people with disability to an adequate standard of living and social protection.[137] It states that this limitation is necessary to ensure that needs which are not the responsibility of the NDIS are dealt with through alternative means and to ensure the financial sustainability of the NDIS.[138] If the objective of the measures were to ensure the financial sustainability of the NDIS, it is not clear that this objective alone would be sufficient to constitute a legitimate objective for the purposes of international law. The Committee on the Rights of Persons with Disabilities has emphasised that when a State seeks to introduce retrogressive measures, for example in response to an economic or financial crisis, it is 'obliged to demonstrate that such measures are temporary, necessary and non-discriminatory and that they respect its core obligations'.[139] After acknowledging the importance of disability allowances provided by the State as a way of supporting

---

[135] 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).

[136] 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].

[137] Statement of compatibility, p. 5, referring to article 28 of the Convention on the Rights of Persons with Disabilities.

[138] Statement of compatibility, p. 5.

[139] UN Committee on the Rights of Persons with Disabilities, *General comment No. 5 (2017) on living independently and being included in the community* (2017) [43]. See more generally UN Committee on Economic, Social and Cultural Rights, *General Comment 13: the Right to education* (1999) [45].

people with disability and facilitating their full inclusion in the community, the Committee cautioned:

> States parties must not add to the hardship faced by persons with disabilities by reducing their income in times of economic or financial crisis or through austerity measures that are inconsistent with human rights standards [namely, the minimum core elements of economic and social rights].[140]

1.85 In assessing proportionality, it is relevant to consider how the measures are likely to operate in practice. The matters that the minister must have regard to appear to be competing – namely, ensuring people with disability are supported to receive reasonable and necessary supports and ensuring the financial sustainability of the NDIS. It is unclear how the minister will balance these matters or which of these matters would be given greater weight in practice. If greater weight was given to ensuring the financial sustainability of the NDIS, there is a risk that this could result in fewer supports being assessed as necessary and the total funding amounts being reduced. Where children are involved, there does not appear to be any scope for the minister to consider the best interests of the child, as the provisions are drafted in exhaustive terms – that is, the minister must have regard only to the two specified matters. As international human rights law requires the best interests of the child to be a *primary* consideration, it follows that the financial sustainability of the NDIS must be a secondary consideration – which is not how the provisions are currently drafted. Further information as to how the measures are likely to operate in practice is therefore required to properly assess proportionality.

Committee view

1.86 The committee notes that the measure requires the minister to have regard to the financial sustainability of the NDIS in determining matters relating to working out total funding amounts and assessing participants' need for supports. To the extent that this results in fewer supports being approved and funded for participants and has an adverse impact on participants' independence and quality of life, the measures would engage and may limit the rights of persons with disability, the rights to an adequate standard of living, health and social security as well as the rights of the child (if the measures applied to children). The committee notes that the statement of compatibility does not address these measures and so considers further information is required to assess the compatibility of the measures with these rights, and as such seeks the minister's advice in relation to:

(a) what is the objective of the measures and how does this objective address a pressing and substantial social or public concern;

[140] UN Committee on the Rights of Persons with Disabilities, *General comment No. 5 (2017) on living independently and being included in the community* (2017) [62].

(b) how much weight is to be given to each matter (namely, the principles set out in section 4 of the Act and the financial sustainability of the NDIS) and whether guidance will be prepared to assist the minister in this regard;

(c) whether there is flexibility for the minister to have regard to other matters, such as the best interests of the child;

(d) whether the measures could result in a participant's total funding amount being reduced and consequently having supports taken away from them;

(e) what, if any, safeguards accompany the measures to ensure that the NDIS continues to provide sufficient supports to people with disability such that the minimum core obligations with respect to key economic and social rights, including the rights to social security, health and an adequate standard of living, are satisfied; and

(f) what, if any, safeguards are there to ensure the measures are not retrogressive.

Approved quality auditor conditions

1.87 Schedule 2 of the bill seeks to make various amendments to section 73U of the Act, which relates to approved quality auditors. Approved quality auditors audit NDIS providers against the components of the relevant NDIS Practice Standards. All providers must undergo an audit in order to register with the NDIS Quality and Safeguards Commission (NDIS Commission).[141] The bill seeks to introduce a new power to enable the NDIS rules to specify conditions that must be complied with for the purposes of being approved as an 'approved quality auditor'.[142] A condition may have the effect of requiring an approved quality auditor to not employ or engage, or continue to employ or engage, a person against whom a banning order has been made; or have, or continue to have, such a person as a member of the approved quality auditor's key personnel.[143] The bill would require the NDIS Commission to notify approved quality auditors if a banning order is made against a person who is employed or otherwise engaged by the auditor, or is a member of the key personnel of the auditor.[144] Further, the bill would allow NDIS rules to prescribe key requirements with

141 NDIS Quality and Safeguards Commission, *Understanding what is involved in an audit* (11 January 2024).

142 Schedule 2, item 1.

143 Schedule 2, item 2.

144 Schedule 2, item 5.

which the NDIS Commissioner must comply or criteria that must be applied in deciding certain matters, such as whether or not to make an approval subject to conditions.[145]

Preliminary international human rights legal advice

Right to work

1.88 If approved quality auditors were required to terminate employees or key personnel or not employ persons who have had a banning order made against them, the measure would engage and may limit the right to work.[146] The right to work provides that everyone must be able to freely accept or choose their work, and includes a right not to be unfairly deprived of work.[147] This right may be subject to permissible limitations where the limitation pursues a legitimate objective, is rationally connected to that objective and is a proportionate means of achieving that objective.

1.89 The statement of compatibility states that the objective of the measure is to provide safe and high quality supports and services to people with disability and protect people with disability from exploitation, violence and abuse, as well as provide equal recognition before the law.[148] The explanatory memorandum states that the measure would prevent banned persons from being able to move from the NDIS provider sector to the NDIS auditing sector and continuing to engage in activities that had them banned from the provider market.[149] It states that strengthening the quality and integrity of auditing within the NDIS is consistent with the recommendations of the NDIS Review with respect to risk-based registration of NDIS providers.[150] The stated objective of the measure is legitimate for the purposes of international human rights law. However, noting that employees of approved quality auditors do not work directly with people with disability and so would not pose a direct risk to the safety of people with disability, it is not clear how terminating those employees against whom a banning order has been made would protect people with disability from exploitation, violence and abuse. It is therefore not clear whether the measure would be rationally connected to the stated objective.

---

145 Schedule 2, item 4.

146 It is noted that requiring the NDIS Commission to share personal information (with respect to banning orders) of an employee with their employer would also engage and limit the right to privacy. This limitation is sufficiently justified in the statement of compatibility and so is not addressed in this report. See statement of compatibility, p. 7.

147 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].

148 Statement of compatibility, p. 7.

149 Explanatory memorandum, p. 51.

150 Explanatory memorandum, p. 51.

1.90 In relation to the potential termination of an employee as a consequence of the information sharing, the explanatory materials do not identify any safeguards accompanying the measure with respect to the right to work. It is not clear whether there is any flexibility for an auditor to not comply with a condition to terminate an employee against whom a banning order has been made if the non-compliance was reasonable. For example, if a banning order had been made against an employee several years ago because they were bankrupt[151] and since that time the employee has been successfully employed by an approved quality auditor without any performance or compliance issues and the employee has been discharged from bankruptcy, it may be reasonable for that employee to continue in their employment. It is also noted that the grounds on which a banning order may be made are quite broad and do not necessarily require a person to have contravened the Act – as the NDIS Commissioner may make an order if they reasonably believe the person is likely to contravene the Act.[152] If this were the case, there is a risk that the measure may unfairly deprive a person of work. It is also not clear whether the person would have any avenue to review or appeal the termination decision, as if the person was terminated in compliance with a condition, it is not clear that they could apply for unfair dismissal under the *Fair Work Act 2009*.[153] Without any flexibility to consider the individual circumstances of the case or apply exceptions where reasonable and appropriate, or any apparent avenues to review or appeal the termination decision, there is a risk that the measure could result in dismissal in circumstances where it may not necessarily be proportionate.

Committee view

1.91 The committee notes that requiring an approved quality auditor to terminate an employee or key personnel against whom a banning order has been made engages and may limit the right to work. While the committee notes that the measure likely pursues a legitimate objective, it is not clear that the measure would be rationally connected to the stated objective, noting that the employees in question would not directly work with people with disability and so may not pose a direct risk to the safety of people with disability. The committee also notes that there is a risk that the measure may result in the dismissal of employees in circumstances where it may not necessarily be proportionate, noting that there does not appear to be any flexibility to consider individual circumstances or apply exceptions where reasonable and appropriate, or any apparent avenues to review or appeal the termination decision. The committee considers that much will depend on the individual circumstances of the case and draws these human rights concerns to the attention of the minister and the Parliament.

---

151 NDIS Act, paragraph 73ZN(2)(c).

152 NDIS Act, subparagraph 73ZN(2)(a)(i) and (ii).

153 *Fair Work Act 2009*, Part 3-2.

Legislative instruments

Australian Border Force (Prohibited Drugs) Instrument 2024[154]

FRL No.	F2024L00383
Purpose	This instrument prescribes a list of drugs for the purposes of paragraph (b) of the definition of prohibited drug in subsection 4(1) of the *Australian Border Force Act 2015*.
Portfolio	Department of Home Affairs
Authorising legislation	*Australian Border Force Act 2015*
Disallowance	15 sitting days after tabling (tabled in the House of Representatives on 27 March 2024 and in the Senate on 14 May 2024). Notice of motion to disallow must be given by 1 July 2024 in the House and 19 August 2024 in the Senate[155]
Rights	Just and favourable conditions of work; privacy

Drug testing workers

1.92 The *Australian Border Force Act 2015* (ABF Act) empowers an authorised person to direct an 'Immigration and Border Protection worker'[156] who is in the course of performing their duties, a written direction requiring them to provide a body sample for a prohibited drug test.[157] The term 'prohibited drugs' refers to a narcotic substance within the meaning of the *Customs Act 1901*, and any other drugs specified by legislative instrument.[158]

1.93 This legislative instrument specifies 37 drugs (and types of drugs) for which workers may be tested. It repeals and replaces the previous such instrument without amendment. The drugs specified include: natural and manufactured gonadotrophins, including Follicle Stimulating Hormone; anabolic substances; natural and manufactured growth hormones; and a series of Benzodiazepines.

154 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Australian Border Force (Prohibited Drugs) Instrument 2024, *Report 4 of 2024*; [2023] AUPJCHR 24.

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

156 This term is defined in section 4 of the ABF Act to include departmental APS employees, customs officers, officers under the *Migration Act 1958*, public servants performing work for the department, or people engaged by the department as consultants or contractors.

157 Australian Border Force Act 2015, Part 5.

158 Australian Border Force Act, section 4.

1.94 Failure to comply with a direction to provide a body sample may constitute a breach of the Australian Public Service (APS) Code of Conduct and may result in sanction or termination.[159] The results of a drug test are admissible against the worker in relation to specified legal proceedings, including proceedings in relation to their employment termination.[160]

International human rights legal advice

Rights to just and favourable conditions of work; privacy

1.95 Requiring workers to provide body samples for the purposes of drug testing engages and limits the right to privacy, and may engage and limit the right to just and favourable conditions of work.[161]

1.96 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.[162] It also includes the right to control the dissemination of information about one's private life. The right to just and favourable conditions of work includes the right of all workers to safe working conditions.[163] 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.

1.97 By way of background, when the committee considered the Australian Border Force Bill 2015 (now Act), which established the power to prescribe the drugs for which people are tested, the committee stated that privacy concerns arose, including because no limitation is placed on the power to prescribe a drug as prohibited, such as a requirement that the ABF Commissioner or Secretary must be satisfied that the drug is illegal and/or has a demonstrated deleterious effect on an individual's ability to perform their functions as an immigration and border protection worker.[164] The committee also considered a similar legislative instrument in 2022 relating to

---

159 ABF Act, subsection 35(3). See further, *Public Service Act 1999* subsection 13(4) and sections 15, 28 and 29.

160 ABF Act, section 40. Results are also admissible in proceedings under the *Safety, Rehabilitation and Compensation Act 1988*, and proceedings in tort against the Commonwealth that are instituted by the worker.

161 Further, if workers with certain attributes or medical conditions were more likely to be required to take some of the prohibited substances (e.g. people with intersex variations and those people transitioning genders are more likely to undergo hormone replacement therapy, and females are more likely to be receiving treatment for polycystic ovarian syndrome), it may also engage and limit the right to equality and non-discrimination.

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

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

164 Parliamentary Joint Committee on Human Right, Australian Border Force Bill 2015, *37th Report of the 44th Parliament* (16 October 2016), pp. 17–18.

Australian Defence Force personnel, concluding that by listing a number of drugs it risked impermissibly limiting a worker's rights to work, a private life and equality and non-discrimination.[165]

1.98 In relation to this legislative instrument, the statement of compatibility only recognises that the legislative instrument engages and limits the right to privacy.[166] In relation to a legitimate objective, it states that the objective of the measure is to enhance the department's capacity to assess the extent of the risk of organised criminal influence on workers. This would likely constitute a legitimate objective under international human rights law. However, it is also necessary to demonstrate that a legitimate objective is one that constitutes a pressing and substantial concern that justifies limiting the rights in question. In this regard, no supporting information is provided as to the extent to which this type of criminal influence on workers likely occurs in practice.

1.99 In relation to rational connection (that is, the extent to which this measure is capable of achieving the objective of enhancing the capacity of assessing organised criminal influence on workers), the statement of compatibility states:

> It is necessary for the Department to have the ability to test for a broad range of drugs where required, because, like the classes of drugs defined as a narcotic substance, [performance and image enhancing drugs] and benzodiazepines are trafficked in illicit markets. Immigration and Border Protection workers who involve themselves in illicit markets for drugs make themselves and the Australian Border Force (ABF) vulnerable to corruption. Transactions in any markets include contact among buyer and seller. Should one party discover that the other is an Immigration and Border Protection worker, an opportunity presents itself for that party to use that knowledge to influence or coerce the Immigration and Border Protection worker to assist with criminal activity or risk having the drug-taking activity exposed.

1.100 Drug testing could be rationally connected to the objective of identifying and addressing the risk of staff corruption, but only where a worker is using one of the listed drugs for illicit purposes, and the fact that they are doing so is in fact being used to influence or coerce them to assist with criminal activity. The drug testing would not appear to be effective where, for example, any worker involved in drug trafficking or corruption is not actually taking the drugs themselves. In such cases, the worker would pass the drug test, whereas any worker taking one of the listed substances for legitimate medical reasons, or for non-medical reasons but where they are not in fact corrupt, would be captured. Consequently, it may be that this legislative instrument is only effective to identify and address corrupt or compromised workers in only a narrow subset of cases.

---

165 Parliamentary Joint Committee on Human Rights, Defence (Prohibited Substances) Determination 2021 [F2021L01452], *Report 2 of 2022* (25 March 2022), pp. 113–124.

166 Statement of compatibility, p. 7.

1.101 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. Another relevant factor in assessing whether a measure is proportionate is whether there is the possibility of oversight and the availability of review. The statement of compatibility does not explicitly address these factors.

1.102 As to whether the measure is sufficiently circumscribed, the statement of compatibility does not identify why each of the drugs listed, and the three categories of drugs, is required to be included. All of the listed drugs may be prescribed for legitimate medical purposes (and so a direction to undergo a test, and/or a positive test result, would necessitate the worker disclosing that medical purpose to their employer). Consequently, the interference with a worker's privacy may be substantial. The statement of compatibility does not identify why all departmental workers and contractors (and not merely those in certain higher risk roles) are subject to the requirement to undergo testing. Further, the ABF Act does not confine the circumstances in which a worker may be directed to undergo a test (for example, where some issue has arisen in relation to their work performance or personal manner).[167] Consequently, it would appear that there are less rights restrictive alternatives to this mechanism (if the ABF Act were amended to confine such circumstances). It is also unclear what safeguards (if any) would apply to the requirement to undergo a test, and no information is provided as to whether the exercise of these testing requirements is subject to independent oversight, and whether a worker may challenge or otherwise seek review of a testing direction or test result. The statement of compatibility does not provide information in relation to these factors.

1.103 Consequently, there is a risk that this legislative instrument constitutes an impermissible limit on the right to privacy, and the right to just and favourable conditions of work.

Committee view

1.104 The committee notes that specifying several drugs (which may be prescribed for medical reasons) for which all Immigration and Border Protection staff and contractors may be tested, engages and limits the right to privacy and the right to just and favourable conditions of work.

1.105 The committee considers that, while the legislative instrument is directed to the important objective of ensuring that workers are not liable to corruption, it would

---

167 While section 36 of the ABF Act provides that a drug test direction may be given where a workplace incident has occurred (e.g. a death), section 35 provides for a general power to direct a worker to undergo a drug test.

appear to only be capable of addressing such a risk in relation to a subset of workers for whom the illicit use of these specified drugs is related to corruption and other criminal activity. The committee also considers that this power is insufficiently circumscribed, and that it is not clear that there are adequate safeguards, or that the power is subject to independent oversight or subject to review. As such, the committee considers that this legislative instrument risks impermissibly limiting the rights to privacy and to just and favourable conditions of work.

1.106 The committee considers that the information provided in the statement of compatibility is insufficient. The committee expects statements to be able to be read as stand-alone documents, that is, for the reader to understand the legislation without needing to refer to other parts of the explanatory materials (or other legislation).

Suggested action

1.107 The committee considers the proportionality of this measure may be assisted were the *Australian Border Force Act 2015* amended to provide that a direction to undergo a drug test may only be given in relation to a concern that has arisen regarding a person's work performance, potential criminal or corruption concerns, or where there is a specific operational risk.

1.108 The committee recommends that the statement of compatibility be updated to provide a more comprehensive explanation in relation to the right to privacy, and to outline the compatibility of the measure with the right to just and favourable conditions of work.

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

Commonwealth Places (Application of Laws) Regulations 2024[168]

FRL No.	F2024L00325
Purpose	The regulations permit the Australian Federal Police to use specified investigatory powers under the *Crimes Act 1914* in relation to applied state offences at seven designated state airports
Portfolio	Attorney-General
Authorising legislation	*Commonwealth Places (Application of Laws) Act 1970*
Disallowance	15 sitting days after tabling (tabled in the House of Representatives on 19 March 2024 and in the Senate on 20 March 2024). Notice of motion to disallow must be given by 6 June 2024 in the House and by 4 July 2024 in the Senate[169]
Rights	Privacy; rights of people with disability; rights of the child; fair trial

Use of investigatory powers at specified airports

1.110 These regulations permit the Australian Federal Police (AFP), who are responsible for policing and security at major Australian airports, to use specified investigatory powers under the *Crimes Act 1914* (Crimes Act) in relation to applied state offences at seven designated State airports.[170] They repeal and remake the previous regulations, which were due to sunset.[171]

1.111 The regulations enable the AFP to use the following investigatory powers in the Crimes Act in relation to applied State offences at the specified airports:

---

168 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Commonwealth Places (Application of Laws) Regulations 2024, *Report 4 of 2024*; [2023] AUPJCHR 25.

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

170 Section 6 prescribes the following airports as designated State airports: Adelaide Airport, Brisbane Airport, Coolangatta (Gold Coast) Airport, Hobart Airport, Melbourne (Tullamarine) Airport, Perth Airport, and Sydney (Kingsford Smith) Airport. The explanatory statement sets out the interaction between the *Commonwealth Places (Application of Laws) Act 1970*, which applies the laws of a State as Commonwealth laws in Commonwealth places, and the *Aviation Crimes and Policing Legislation Amendment Act 2011*, which enables the AFP to access certain specified investigatory powers in the *Crimes Act 1914* at the designated airports prescribed by the regulations.

171 The previous legislative instrument was the Commonwealth Places (Application of Laws) Regulation 2014.

- Part IAA (dealing with search, information gathering, arrest and related powers);
- Part ID (dealing with forensic procedures); and
- section 9 (which provides for the seizure and condemnation of forfeitable goods), section 13 (allowing the institution of proceedings in respect of offences), and section 15 (dealing with remand of defendants).

International human rights legal advice

Right to a fair trial; rights of people with disability; rights of the child; right to privacy

1.112 Providing for the exercise of these specified investigatory powers, including all search powers in Part IAA and forensic procedures set out in Part ID, by the AFP at these state airports engages and may limit numerous human rights.

1.113 The statement of compatibility with human rights identifies that the investigatory powers engage the rights to privacy, liberty, security of the person, freedom of movement, and life, stating that all relevant limitations are reasonable and proportionate and are necessary for law enforcement to protect national security, maintain airport security and uphold community safety.[172] It also states that the legislative instrument engages the prohibition on torture and cruel, inhuman or degrading treatment or punishment, and that any potential limitations on the right as a result of the regulations are reasonable, necessary and proportionate.[173] However, the prohibition on torture and cruel, inhuman or degrading treatment or punishment is absolute and may never be subject to any permissible limitations.

1.114 As the exercise of these powers relates to the gathering of evidence relevant to criminal charges, it also engages and limits the right to a fair trial, which the statement of compatibility does not identify. The right to a fair trial provides that in the determination of any criminal charge against a person, that person shall be entitled to certain minimum guarantees including the right to be informed of the charge and to understand the nature of the charge, and to have adequate time and facilities to prepare a defence.[174] Specific guarantees of the right to a fair trial in relation to a criminal charge include the presumption of innocence, the right not to incriminate oneself, and the guarantee against retrospective criminal laws.

1.115 In relation to Part IAA of the Crimes Act, the committee has previously raised concerns as to compatibility of Division 3A of Part IAA (stop, search and seizure powers in relation to terrorist acts and terrorism offences) with Australia's international

---

172 Statement of compatibility, pp. 3–6.

173 Statement of compatibility, pp. 3–6.

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

human rights law obligations.[175] It has also noted that as these powers have never been used, questions arise as to their necessity.

1.116 In relation to Part ID of the Crimes Act, these regulations enable the AFP to draw on a substantial part of the Crimes Act, which provides for all aspects of the taking, storage, sharing, use and destruction of forensic samples from persons (e.g. saliva, hair samples). Part ID is extensive and contains numerous provisions that raise complex human rights questions. For example, it provides for the taking of forensic samples from children and 'incapable persons',[176] measures which engage the rights of the child and the rights of people with disability (including the right to equality before the law). Children have special rights under human rights law taking into account their particular vulnerabilities.[177] Children's rights are protected under a number of treaties, particularly the Convention on the Rights of the Child. All children under the age of 18 years are guaranteed these rights, without discrimination on any grounds.[178] In addition, article 5 of the Convention on the Rights of Persons with Disabilities guarantees equality for all persons under and before the law and the right to equal protection of the law. It expressly prohibits all discrimination on the basis of disability. Article 12 of the Convention on the Rights of Persons with Disabilities requires state parties to refrain from denying persons with disabilities their legal capacity, and to provide them with access to the support necessary to enable them to make decisions that have legal effect.

1.117 Part ID also provides for the supply of material to, and use of material on, DNA databases, and the provision of foreign samples to foreign countries, which engages the right to privacy. The information set out in the statement of compatibility does not sufficiently assess the compatibility of providing for the use of these powers by the AFP pursuant to these regulations. These provisions also engage, more generally, the right to privacy as it relates to a person's personal autonomy and physical and psychological integrity,[179] an aspect of the right which the statement of compatibility does not fully address. Further, as Part ID was made before the requirement to make a statement of compatibility with human rights existed, no foundational assessment of its compatibility with human rights exists.

---

[175] See, most recently, Parliamentary Joint Committee on Human Rights, Counter-Terrorism and Other Legislation Amendment Bill 2023, *Report 11 of 2023* (18 October 2023), pp. 63–85.

[176] Crimes Act, section 23XWU. Section 23WA defines an 'incapable person' as an adult who is incapable of understanding the general nature and effect of, and purposes of carrying out, a forensic procedure; or is incapable of indicating whether he or she consents or does not consent to a forensic procedure being carried out.

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

[178] 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.

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

1.118 Consequently, it is not possible to fully assess the compatibility of these regulations, in applying these powers, with human rights without reviewing the existing compatibility of the relevant provisions of the Crimes Act applied by these regulations.

Committee view

1.119 The committee considers that providing for the exercise of specified investigatory powers under the *Crimes Act 1914*, including all search powers in Part IAA and forensic procedures set out in Part ID, by the Australian Federal Police at seven state airports, engages and limits numerous human rights.

1.120 The committee notes that it has previously raised concerns as to the compatibility of Division 3A of Part IAA (stop, search and seizure powers in relation to terrorist acts and terrorism offences) with Australia's international human rights law obligations.[180] The committee also notes that Part ID (relating to the taking, use, sharing, storage and destruction of forensic samples) raises complex human rights considerations, which the statement of compatibility does not sufficiently assess, and which have not been subject to a foundational human rights assessment.

1.121 In relation to the application of the stop, search and seizure powers, the committee refers to its previous analysis as to their compatibility with human rights.[181] In relation to the application of the powers in Part ID, the committee considers numerous human rights are likely engaged by the measure. The committee is unable to fully assess the compatibility of applying these powers without undertaking a full assessment of the powers in the Crimes Act.

Suggested action

1.122 The committee recommends that a foundational human rights assessment of Part ID of the *Crimes Act 1914* be undertaken.

1.123 The committee recommends that the statement of compatibility be updated to assess the compatibility of the regulations with the right to a fair trial, and the compatibility of Part ID of the Crimes Act with the rights of the child, the rights of people with disability to equality before the law, and the right to privacy in relation to bodily integrity.

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

[180] See, most recently, Parliamentary Joint Committee on Human Rights, Counter-Terrorism and Other Legislation Amendment Bill 2023, *Report 11 of 2023* (18 October 2023), pp. 63–85.

[181] See, most recently, Parliamentary Joint Committee on Human Rights, Counter-Terrorism and Other Legislation Amendment Bill 2023, *Report 11 of 2023* (18 October 2023), pp. 63–85.

Migration (Code of Behaviour for Public Interest Criterion 4022) Instrument (LIN 24/031) 2024[182]

FRL No.	F2024L00381
Purpose	This legislative instrument specifies, for the Subclass 050 (Bridging (General)) visa, a code of behaviour for the purposes of Public Interest Criterion 4022.
Portfolio	Home Affairs
Authorising legislation	*Migration Regulations 1994*
Disallowance	Exempt from disallowance
Rights	Liberty; privacy; freedom of expression; freedom of association freedom of assembly; social security; adequate standard of living; protection of the family; criminal process rights; equality and non-discrimination

Code of behaviour

1.125 This legislative instrument specifies a code of behaviour which applies to some applicants for the Subclass 050 (Bridging (General)) visa (BVE), for the purposes of Public Interest Criterion (PIC) 4022.

1.126 The BVE is a temporary bridging visa that permits an unlawful non-citizen to stay in Australia until their immigration matter is finalised or arrangements have been made for their departure from Australia. Only certain applicants for a BVE are required to satisfy PIC 4022, namely, people aged at least 18 years old at the time of application, and who hold or have previously held a Bridging E (Class WE) visa granted by the minister under section 195A of the *Migration Act 1958* (the Migration Act).[183] It appears this would apply to persons previously held in immigration detention where the minister has decided to grant the detainee a visa.[184] To satisfy PIC 4022, either the applicant must sign a code of behaviour, or the minister does not require them to sign the code of behaviour.[185]

---

182 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Migration (Code of Behaviour for Public Interest Criterion 4022) Instrument (LIN 24/031) 2024, *Report 4 of 2024*; [2023] AUPJCHR 26.

183 See, Migration Regulations 1998, clause 050.225 of Schedule 2. Section 195A of the Act provides the minister with a personal and non-compellable power to grant a visa of any class to a person in immigration detention, if the minister thinks it is in the public interest to do so.

184 See *Migration Act 1958*, section 195A.

185 Migration Regulations 1998, Schedule 4, PIC 4022.

1.127 The code of behaviour states that it 'contains a list of expectations about how [the applicant] will behave at all times while in Australia'. It cautions that if the individual is found to have breached the code:

> [Y]ou could have your income support reduced, or your visa may be cancelled. If your visa is cancelled, you may be taken into immigration detention and may be transferred to a regional processing country.

1.128 The code states that while the individual is living in the Australian community they must:

- not disobey any Australian laws including Australian road laws; and cooperate with all lawful instructions given by police and other government officials;
- not make sexual contact with another person without that person's consent, regardless of their age or make sexual contact with someone under the age of consent;
- 'not take part in, or get involved in' any kind of criminal behaviour in Australia, including violence against any person; deliberately damage property; give false identity documents or lie to a government official;
- not 'harass, intimidate or bully any other person' or group of people or engage in any 'anti-social or disruptive activities that are inconsiderate, disrespectful or threaten the peaceful enjoyment of other members of the community';
- not refuse to comply with any health undertaking given to the Department of Home Affairs or direction issued by a Medical Officer of the Commonwealth to undertake treatment for a health condition for public health purposes;
- co-operate with all reasonable requests from the Department of Home Affairs or its agents in regard to the resolution of their status, including requests to attend interviews or to provide or obtain identity and/or travel documents.

1.129 This legislative instrument is made pursuant to clause 4.1 of Schedule 4 to the Migration Regulations 1994 (the Migration Regulations). It repeals and replaces the previous code,[186] which was made in 2013 and was due to sunset. This legislative instrument will self-repeal on 31 March 2025.

[186] Code of Behaviour for Public Interest Criterion 4022 – IMMI 13/155 (F2013L02105).

Preliminary international human rights legal advice

Rights engaged by imposing the code of behaviour

Multiple rights

1.130 Requiring certain BVE holders to sign an enforceable code of behaviour engages and may limit numerous human rights, including the right to equality and non-discrimination (as the measure would apply only to non-citizens, and may disproportionately apply to non-citizens of certain nationalities in practice); freedom of expression, association and assembly (if it prevented visa-holders from engaging in lawful acts of public protest); and privacy (as it may require a person to disclose personal information and would regulate aspects of their personal life).

1.131 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.[187] 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).[188] 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.[189] The right to freedom of association protects the right of all persons to group together voluntarily for a common goal and to form and join an association.[190] This includes the right to join political parties, trade unions, professional and sporting clubs and non-governmental organisations. This right supports many other rights, such as freedom of expression, religion, assembly and political rights. The right to freedom of expression extends to the communication of information or ideas through any medium, including written and oral communications, the media, public protest, broadcasting, artistic works and commercial advertising.[191]

---

[187] 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.

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

[189] *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].

[190] International Covenant on Civil and Political Rights, article 22.

[191] International Covenant on Civil and Political Rights, article 19.

The right to freedom of assembly protects the right of individuals and groups to meet and engage in peaceful protest and other forms of collective activity in public.[192] 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.[193] It also includes the right to control the dissemination of information about one's private life.

Rights engaged by consequences for breaching the code

Rights to liberty, social security, adequate standard of living, protection of the family; criminal process rights

1.132 Enforcement of the code may engage and limit the right to liberty (if it resulted in a person being returned to immigration detention, or sent to a regional processing centre); and the rights to social security and an adequate standard of living (if non-compliance resulted in a reduction in social security payments). If visa cancellation resulted in a person being taken away from their family it may also engage and limit the right to protection of the family, which requires the state not to arbitrarily or unlawfully interfere in family life and to adopt measures to protect the family.[194] Further, if the penalty for non-compliance was regarded as being 'criminal' under international human rights law, it would also engage criminal process rights.

1.133 The right to liberty prohibits the arbitrary and unlawful deprivation of liberty.[195] The notion of 'arbitrariness' includes elements of inappropriateness, injustice and lack of predictability. Accordingly, any detention must not only be lawful, it must also be 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, including immigration detention.

1.134 The right to social security recognises the importance of adequate social benefits in reducing the effects of poverty and plays an important role in realising many other economic, social and cultural rights, in particular the right to an adequate

---

192 International Covenant on Civil and Political Rights, article 21, UN Human Rights Committee, *General Comment No 25: Article 25 (Participation in public affairs and the right to vote)* [8]. The Committee notes that citizens take part in the conduct of public affairs, including through the capacity to organise themselves.

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

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

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

standard of living and the right to health.[196] The right to an adequate standard of living requires that the State party take steps to ensure the availability, adequacy and accessibility of food, clothing, water and housing for all people in its jurisdiction.[197]

1.135 If visa cancellation led to immigration detention for a protracted period,[198] the consequences of breaching this visa condition may be considered so severe as to constitute a 'criminal' penalty for the purposes of international human rights law. If so, this would mean that the relevant provisions, which empower the minister to cancel a visa and re-detain a person who has not complied with a visa condition,[199] 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,[200] and the right to be presumed innocent until proven guilty according to law.[201]

Assessment of the limitation on rights

1.136 Most of the above rights may be subject to permissible limitations where the limitation is prescribed by law, pursues a legitimate objective, is rationally connected to that objective and is a proportionate means of achieving that objective.

---

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

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

198 It is unclear if all persons whose visas are cancelled for breach of these conditions could be detained for long periods in light of the High Court decision in *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs* [2023] HCA 37 that held it was unconstitutional to detain people in immigration detention where there is no real prospect of the removal of the person from Australia becoming practicable in the reasonably foreseeable future.

199 *Migration Act 1958*, subsections 116(1)(b) and 133C(3). Note that section 118 provides that the powers to cancel a visa under sections 116 (general power to cancel) and 133C (Minister's personal powers to cancel visas on section 116 grounds) are not limited, or otherwise affected, by each other.

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

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

1.137 This legislative instrument is exempt from disallowance, meaning that a statement of compatibility with human rights is not required to be provided.[202] Consequently, there is no assessment of the compatibility of the code with human rights.

1.138 By way of background, the committee examined the measures which created the requirement to sign a code of behaviour when they were introduced in 2013.[203] It observed that while the legislative instrument specifying the text of the code of behaviour was exempt from disallowance (and so included no human rights assessment), the legislative instrument amending the Migration Regulations to establish the requirement for a code was subject to disallowance and so included a statement of compatibility.[204] It identified that providing for an enforceable code of behaviour engaged and may limit numerous human rights.[205] The committee concluded in 2013 that the two legislative instruments raised human rights concerns, and in particular that the code of behaviour did not satisfy the 'quality of law test' and did not constitute a proportionate limit on a number of human rights.[206]

Quality of law test

1.139 Human rights standards require that interferences with rights must have a clear basis in law (that is, they must be prescribed by law). To meet the quality of law test, the law must be 'accessible to the persons concerned and formulated with sufficient precision to enable them…to foresee, to a degree that is reasonable in the

---

202 *Human Rights (Parliamentary Scrutiny) Act 2012*, section 9. When the committee examined the 2013 version of the Code of Behaviour, it observed that 'it would be good practice for all legislative instruments, particularly where they limit human rights to be accompanied by a statement of compatibility, irrespective of whether such a statement is technically required'. See, Parliamentary Joint Committee on Human Rights, *Second Report of the 44th Parliament* (February 2014) pp. 110–111.

203 The Migration Amendment (Bridging Visas – Code of Behaviour) Regulation 2013 [F2013L02102] established the requirement for PIC 4022, and the Code of Behaviour for Public Interest Criterion 4022 – IMMI 13/155 [F2013L02105] specified the text of the code of behaviour itself. See, Parliamentary Joint Committee on Human Rights, Migration Amendment (Bridging Visas – Code of Behaviour) Regulation 2013 [F2013L02102] and Code of Behaviour for Public Interest Criterion 4022 – IMMI 13/155 [F2013L02105], *Reports 2, 4 and 7 of the 44th Parliament*.

204 Migration Amendment (Bridging Visas—Code of Behaviour) Regulation 2013, *statement of compatibility.*

205 Migration Amendment (Bridging Visas—Code of Behaviour) Regulation 2013, *statement of compatibility*, pp. 4–14.

206 See, Parliamentary Joint Committee on Human Rights, Migration Amendment (Bridging Visas – Code of Behaviour) Regulation 2013 [F2013L02102] and Code of Behaviour for Public Interest Criterion 4022 – IMMI 13/155 [F2013L02105] *Seventh Report of the 44th Parliament* (June 2014) pp. 90–96.

circumstances, the consequences which a given action may entail and to regulate their conduct'.[207]

1.140 The code of behaviour includes several terms which are ambiguous and appear to potentially encompass a broad range of behaviours. It is unclear whether the requirement that a signatory not 'take part in, or get involved in' any kind of criminal behaviour applies only in relation to a crime of which the person has been charged and convicted, or merely conduct they are suspected of having engaged in, including where they have not been charged. Further, the requirement that a person must not 'harass, intimidate or bully any other person' or group of people or engage in any 'anti-social or disruptive activities that are inconsiderate, disrespectful or threaten the peaceful enjoyment of other members of the community' would also appear to encompass a broad range of actions, though the breadth is not clear. For example, it would appear that a person may be regarded as being in non-compliance with the code for attending a lawful public protest, or engaging in a loud argument with another person in a public place. The official departmental form required to be used to sign the code states that the terms in the code 'take their ordinary meanings' and provides some examples that appear to indicate that this item, in particular, may encompass a very broad range of conduct.[208] The use of broad and ambiguous terms raises concerns as to whether the conditions are sufficiently precise to enable visa holders to understand what is expected of them and in what circumstances a breach is likely to occur.

1.141 Noting that the consequences of breaching a condition may be severe (involving potentially the loss of liberty), it is important that holders understand how conditions are to be interpreted, applied and enforced so that they may regulate their conduct. The visa cancellation powers in the Migration Act confer a broad discretion on the minister, authorising them to cancel a visa if they are satisfied that the holder has not complied with a visa condition.[209] It is unclear what standard of proof must be met in order for the minister to be satisfied that a condition has been breached, and in what circumstances the minister will elect to exercise their discretion to cancel a visa. As noted by the United Nations Human Rights Committee, laws should not confer 'unfettered discretion on those charged with their execution' and should indicate 'with reasonable clarity the scope and manner of exercise of the relevant discretion conferred on the public authorities'.[210] Further information is required in order to determine whether the code satisfies the quality of law test.

---

207 *Gorzelik and others v Poland*, European Court of Human Rights (Grand Chamber), Application No. 44158/98 (2004) [64]. See also, *Pinkney v Canada,* United Nations (UN) Human Rights Communication No.27/1977 (1981) [34].

208 Department of Home Affairs, *Form 1443* (accessed 24 April 2024).

209 *Migration Act 1958*, subsections 116(1)(b) and 133C(3).

210 *General Comment No. 27, Freedom of Movement (Art. 12)* (1999) [13]; *Rotaru v Romania*, European Court of Human Rights (Grand Chamber), Application No. 28341/95 (2000) [61].

Legitimate objective and rational connection

1.142 Any limitation on a right must be shown to be aimed at achieving a legitimate objective. A legitimate objective is one that is necessary and addresses an issue of public or social concern that is pressing and substantial enough to warrant limiting the right. It is not sufficient, therefore, that a measure simply seeks an outcome regarded as desirable or convenient. In this regard, it is unclear whether there exists a pressing and substantial issue of public or social concern that warrants the code of behaviour applying in relation to certain persons who hold a BVE, particularly noting that some of the conduct to which the code would apply is already subject to civil penalties or criminal offences. The explanatory statement states that it extends the operation of this requirement for 12 months 'pending further consideration and review', but does not provide further context as to this consideration.[211] Further, the Migration Act and the Migration Regulations have undergone substantial legislative amendment since this requirement was established in 2013. Consequently, it is not clear whether information which the minister provided to the committee in 2013 in relation to the necessity for the requirement to sign this code of behaviour remain relevant.[212]

1.143 Further, under international human rights law, it must also be demonstrated that any limitation on a right has a rational connection to the objective sought to be achieved. The key question is whether the relevant measure is likely to be effective in achieving the objective being sought. In this regard, it is not clear whether the requirement to sign a code of behaviour would be effective to achieve its objective, including having regard to whether it has been demonstrated to be effective to achieve its objective since it was introduced in 2013.[213]

Proportionality

1.144 A key aspect of whether a limitation on a right can be justified is whether the limitation is proportionate to the objective being sought. The requirement of proportionality means that even if the objective of the limitation is of sufficient importance and the measures in question are rationally connected to the objective, it may still not be justified, because of the severity of the effects on individuals. In this respect, it is necessary to consider several factors, including whether a proposed

---

211 Explanatory statement, p. 2.

212 See, letter from the Hon Scott Morrison MP, Minister for Immigration and Border Protection, to Senator Dean Smith, Chair PJCHR (28 February 2014), *Fourth Report of the 44th Parliament* (March 2014) p. 93.

213 It appears that limited information is publicly available regarding the use of these powers. A 2019 Monash University research brief examined raw data regarding alleged breaches of the code of behaviour from 2014–16, the outcome of the allegation, and the source of the allegation. The data includes alleged breaches of the code of behaviour including alleged breaches relating to self-harm (3 alleged breaches) and having an overseas criminal history (1 alleged breach). It states that this information was released under a Freedom of Information request to the Department of Home Affairs in December 2016.

limitation is sufficiently circumscribed; whether it is accompanied by sufficient safeguards; and whether any less rights restrictive alternatives could achieve the same stated objective. Another relevant factor in assessing whether a measure is proportionate is whether there is the possibility of oversight and the availability of review.

1.145 As to whether the measure is sufficiently circumscribed, it is not clear how many visa applicants this measure may operate in relation to. Only adults who hold or have previously held a Bridging E (Class WE) visa granted by the minister under section 195A of the Migration Act are required to satisfy PIC 4022 in applying for a BVE, and some of those persons may be regarded as satisfying the criterion without needing to sign the code of behaviour. It is not clear in what circumstances the minister will decide that a person does not need to sign the code. If the minister's discretionary power was exercised in all cases this would operate as a safeguard. However, discretionary or administrative safeguards alone may not be sufficient for the purpose of a permissible limitation under international human rights law.[214] 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.

1.146 As noted above, several of the code of behaviour conditions are drafted in broad and ambiguous terms and it is unclear how these conditions will be interpreted, applied and enforced in practice. For example, it appears that the requirement to 'not disobey' Australian traffic laws would mean a person would breach the code if they failed to fully stop their vehicle at a stop sign. It is not clear whether, in practice, such persons would have their visa cancelled in such circumstances. Further, if a person is regarded as having breached the code, it is unclear whether and when their visa may be cancelled, or whether (and to what extent) their social welfare payment may be reduced (and if so, whether they would still be able to meet their basic needs). Further, it is unclear whether there is a less rights restrictive way of achieving the objective, or whether there is the possibility of oversight and the availability of review.

1.147 As such, further information is required in order to assess whether the legislative instrument meets the quality of law test, seeks to achieve an objective that is legitimate under international human rights law, and would constitute a proportionate limit on the human rights identified.

Committee view

1.148 The committee notes that requiring certain Subclass 050 (Bridging (General)) visa holders to sign an enforceable code of behaviour engages and limits numerous rights and that the enforcement of the code (resulting in visa cancellation and potential immigration detention) may result in the limitation of further human rights.

---

214 See, for example, Human Rights Committee, *General Comment 27, Freedom of movement (Art.12)* (1999).

1.149 The committee notes that this measure repeals and replaces the previous legislative instrument, which was made in 2013. The committee notes that this measure will operate for 12 months pending further consultation and review, and that this is the first opportunity the committee has had to examine the compatibility of this measure since it was last made in 2013. The committee notes that it raised numerous human rights concerns in 2013 and concluded it had not been established that the measure was compatible with multiple human rights. The committee considers that as the *Migration Act 1958* and related legislation has undergone substantial amendment since that time, and given the time that has elapsed, it is appropriate to seek further contemporaneous information from the minister in relation to this measure.

1.150 As such the committee seeks the minister's advice in relation to:

(a) how many people are currently subject to the requirement to satisfy Public Interest Criterion 4022 (the code of behaviour);

(b) whether the measure has a disproportionate impact on people of certain national backgrounds in practice;

(c) whether and how the legislative instrument satisfies the 'quality of law' test, in particular, what is meant by not 'take part in, or get involved in' any kind of criminal behaviour (does it only apply where the person has been convicted of a crime, or does it apply where they are suspected of involvement, and if so, whose suspicion); not 'harass, intimidate or bully any other person' (who determines if the visa holder has bullied someone); or not engage in any 'anti-social or disruptive activities that are inconsiderate, disrespectful or threaten the peaceful enjoyment of other members of the community' (according to what standard);

(d) whether the measure is directed towards a legitimate objective (and in particular, whether there exists a pressing and substantial issue of public or social concern that warrants the code of behaviour in relation to certain BVE-holders);

(e) the necessity of each item included on the code of behaviour (including whether there is evidence demonstrating an increased risk of certain behaviours by persons who would be subject to it);

(f) whether, and in accordance with what criteria, the requirement to sign a code of behaviour has been demonstrated to be effective to achieve its objective since it was introduced in 2013;

(g) how many times a breach of PIC 4022 has resulted in a reduction in social welfare payment (since 2013), what reduction was applied, whether affected persons were able to still meet their basic needs, and what guidelines regulated the exercise of this discretion;

(h) how many times a breach of PIC 4022 has resulted in cancellation of a person's visa (since 2013);

(i) the circumstances in which breach of PIC 4022 which results in cancellation of a person's visa may result in them being detained in immigration detention (and for how long) or removed to a regional processing centre;

(j) whether there is a less rights restrictive way of achieving the objective; and

(k) what independent oversight would apply to the exercise of this power, and what review rights an affected person would have.

National Occupational Respiratory Disease Registry Determination 2024[215]

FRL No.	F2024L00288
Purpose	Determines 'minimum notification information' and 'additional notification information' for the purposes of the National Occupational Respiratory Disease Registry
Portfolio	Department of Health and Aged Care
Authorising legislation	*National Occupational Respiratory Disease Registry Act 2023*
Disallowance	15 sitting days after tabling (tabled in the House of Representatives and the Senate on 18 March 2024). Notice of motion to disallow must be given by 5 June 2024 in the House and by 2 July 2024 in the Senate[216]
Rights	Privacy; health; just and favourable conditions of work

Requiring the provision of personal information to a registry

1.151 This determination sets out the personal information which must, or in some cases which may, be notified to the National Occupational Respiratory Disease Registry (the registry) pursuant to the *National Occupational Respiratory Disease Registry Act 2023* (the Act) for diagnoses of occupational respiratory diseases. Personal information on the registry may be collected, recorded, disclosed or otherwise used in a range of circumstances.[217]

1.152 Section 14 of the Act provides that information which constitutes 'minimum notification information' must be notified to the registry by a prescribed medical practitioner. However, until the term was defined by this determination, that requirement had not been enlivened. This determination operationalises that requirement to provide information to the registry. Division 1 provides that the term 'minimum notification information' includes a range of personal information about an individual, information relating to the person's exposure to a disease-causing agent,[218]

[215] This entry can be cited as: Parliamentary Joint Committee on Human Rights, National Occupational Respiratory Disease Registry Determination 2024, *Report 4 of 2024*; [2023] AUPJCHR 27.

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

[217] *National Occupational Respiratory Disease Registry Act 2023*, subsection 21(2).

[218] This includes the occupation where the last exposure to this agent occurred, and the contact information of the business or employer where that exposure occurred.

information about their diagnosed disease,[219] and information about the notifying doctor.[220]

1.153 The personal information about a person which must be provided to the registry is:

- name;
- date of birth;
- telephone number;
- healthcare identifier (within the meaning of *the Healthcare Identifiers Act 2010*); Medicare number (within the meaning of Part VII of the *National Health Act 1953*); or the number (if any) allocated to the individual by the Department of Veterans' Affairs;
- if the individual usually lives in Australia—the individual's postal address in Australia (or otherwise the fact that the individual usually lives outside Australia);

and (if provided by the individual):

- sex;
- Indigenous status;
- country of birth;
- languages spoken at home; and
- email address.[221]

1.154 Division 2 sets out additional notification information, which is information that a person may choose to provide, but which may not be provided without their consent.[222]

International human rights legal advice

Rights to health and just and favourable conditions of work

1.155 Facilitating the provision of information to a registry to track instances of occupational respiratory diseases 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

---

219 This includes the date of diagnosis, tests used to diagnose the person, and details of the person's lung impairment.

220 This includes the doctor's name and contact information, the details of their employer, and reason for cessation of treatment (if the doctor ceases to treat the patient for the relevant disease).

221 Section 6.

222 Division 2, sections 10–12. Section 18 of the Act makes clear that additional notification information may be requested, but an individual is not obliged to comply with a request.

the highest attainable standard of physical and mental health.[223] The right to just and favourable conditions of work includes the right of all workers to safe working conditions.[224] The statement of compatibility identifies that these rights are promoted by this determination.[225]

Right to privacy

1.156 Requiring the provision of personal information, which may identify affected workers by name on the registry without their consent, and permitting the use and disclosure of that personal information, engages and limits the right to privacy.

1.157 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.[226] It also includes the right to control the dissemination of information about one's private life. The right to privacy may be subject to permissible limitations which are provided by law and are not arbitrary. In order for limitations not to be arbitrary, the measure must pursue a legitimate objective and be rationally connected to (that is, effective to achieve) and proportionate to achieving that objective.

1.158 When the committee considered the bill (now Act) to establish the registry it concluded that the establishment of a registry to capture and share data on the incidence of respiratory diseases was directed towards a legitimate objective for the purposes of international human rights law (namely, to reduce instances of the disease), and that the creation of this registry would appear to be rationally connected with that objective.[227] The committee ultimately concluded that, as drafted, the bill was not sufficiently constrained, nor was it accompanied by sufficient safeguards or independent review mechanisms, to enable it to be considered a proportionate limit on the right to privacy.[228] The committee recommended that the bill be amended to define key terms in the bill; establish a mechanism by which the patient may request not to provide some information to the registry; and require a review within 12 months. The committee also recommended that the statement of compatibility be updated. An addendum to the explanatory memorandum was subsequently prepared,

---

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

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

225 Statement of compatibility, pp. 8–9.

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

227 Parliamentary Joint Committee on Human Rights, National Occupational Respiratory Disease Registry Bill 2023, *Report 8 of 2023* (2 August 2023) p. 92.

228 Parliamentary Joint Committee on Human Rights, National Occupational Respiratory Disease Registry Bill 2023, *Report 9 of 2023* (6 September 2023) p. 154.

including in response the committee's concerns.[229] However, the text of the bill itself was not relevantly amended.[230] As such, the committee's concerns are still pertinent to the consideration of this determination.

1.159 In considering proportionality, it is necessary to consider several factors, including whether a proposed limitation is sufficiently circumscribed; whether it is accompanied by sufficient safeguards; whether any less rights restrictive alternatives could achieve the same stated objective; and whether there is the possibility of oversight and the availability of review.

1.160 The statement of compatibility briefly identifies that this determination engages the right to privacy 'by limiting the scope of information that can be notified' to only include information which is necessary and proportionate to achieving the purposes of the registry.[231] It states that the mandatory notification of minimum notification information seeks to balance the protection of an individual's privacy with the need for the National Registry to collect sufficient information about the industries, occupations, job tasks and workplaces where exposures are believed to have occurred. The addendum to the explanatory memorandum relating to the bill (now Act), states:

> In determining minimum and additional notification information, the Commonwealth Chief Medical Officer will take into consideration:
>
> - the potential reporting burden on prescribed medical practitioners and their willingness to report non-prescribed occupational respiratory diseases and additional notification information
> - the resourcing needs to implement changes to the functionality of the National Registry
> - the outcomes of any consultations undertaken in compliance with s 17 of the Legislation Act 2003 (which requires appropriate and reasonably practical consultation).[232]

1.161 The explanatory statement accompanying this determination indicates that consultation was undertaken with numerous peak bodies and other stakeholders, and states that 'The scope of minimum and additional notification information balances the burden of reporting by physicians with the benefits of understanding the incidence of disease and the industries, occupations, job tasks and workplaces where exposure may have occurred'.[233] However, it is not clear that the right of relevant patients to

---

229 National Occupational Respiratory Disease Registry Bill 2023, *addendum to the explanatory memorandum*.

230 One minor amendment was agreed to in the Senate.

231 Statement of compatibility, pp. 9–10.

232 National Occupational Respiratory Disease Registry Bill 2023, *addendum to the explanatory memorandum*, p. 2.

233 Explanatory statement, p. 3.

privacy was expressly considered. In this regard, the statement of compatibility does not state why each of the 12 items of personal information, as well as the additional items of information related to their exposure to a disease-causing agent, are necessary to achieve the objective of the registry. For example, it is not clear why a person's country of birth, languages spoken at home and Indigenous status are required. Further, the scheme provides for more respiratory diseases to be prescribed for the purposes of the registry. If this occurred, the measure would apply to a greater number of people. This raises questions as to whether the measure is sufficiently circumscribed.

1.162 As to safeguards, the statement of compatibility states that while it is mandatory to collect minimum notification information, individuals 'may also choose not to provide a response to select fields' if the information is unknown or they do not wish to provide it. Indeed, several of the mandatory fields include the qualifier 'if provided by the individual' or 'if known'.[234] This appears to partially respond to a recommendation of the committee in its consideration of the bill,[235] and may assist with the proportionality of the measure. It would appear to provide a degree of control to the medical practitioner filling out the form over some of the personal information about the patient which is provided to the registry. However, the safeguard value of this flexibility would appear to depend on the extent to which that flexibility is communicated to patients by the medical practitioner, who is responsible for gathering and inputting the information. Further, no such control in relation to the provision of key identifying information, including a person's name, date of birth, and contact information, is provided.

1.163 The statement of compatibility provides no information as to any oversight and review of this measure. The minister has previously advised that the operation of the registry would be overseen by the Minister for Health and Aged Care with the support of senior departmental staff and the Commonwealth Chief Medical Officer, and that its ongoing operation would be supported by the establishment of a departmental operational advisory group taking into consideration feedback from key stakeholders.[236] As the committee previously observed, this may provide important oversight of the scheme's operation, but these do not appear to be independent oversight mechanisms, meaning their safeguard value is limited. As the statement of compatibility does not reference these, it is not clear if such mechanisms remain.

1.164 Consequently, while the determination does appear to provide for a degree of flexibility in providing some of the information which is required to be reported to the

---

234 Section 6.

235 The committee recommended that the enabling bill (now Act) 'establish a mechanism by which the patient (and their relevant physician) may request, or otherwise elect, not to provide all or some information to the registry (including personal information)'. See, *Report 9 of 2023* (6 September 2023) p. 158.

236 *Report 9 of 2023* (6 September 2023)

registry, the determination itself (when examined in light of the relevant Act) is not sufficiently constrained, nor is it accompanied by sufficient safeguards or independent review mechanisms such that it would constitute a proportionate limit on the right to privacy.

Committee view

1.165 The committee considers that establishing a National Occupational Respiratory Diseases Registry, to help identify risks of exposure to respiratory disease-causing agents, is an important measure in addressing the health risks associated with respiratory diseases. However, the committee is concerned that the determination provides that a significant amount of personal health information of patients, and their identifying details, are to be mandatorily included on a national register without the patient's consent.

1.166 The committee notes that it considered the National Occupational Respiratory Disease Registry Bill (now Act), including writing to the minister in relation to privacy concerns. The committee is pleased that some of its recommendations in relation to that measure appear to have been implemented, including an amendment to the statement of compatibility accompanying that bill, and the inclusion in the determination of a mechanism by which the patient (and their relevant physician) may be able not to provide some personal information to the registry. The committee considers that, while the effectiveness of the mechanism contained in this determination appears to rely heavily on a medical practitioner communicating the ability of a patient to not provide some 'mandatory' information, it nevertheless may assist with the proportionality of the measure in practice.

1.167 However, the committee considers that, when examined in the broader context of the registry scheme, there remain concerns that the determination is not sufficiently constrained, accompanied by sufficient safeguards, or subject to appropriate independent review mechanisms such that it would constitute a proportionate limit on the right to privacy.

Suggested action

1.168 Noting the instrument provides that the following information is only required if provided by the individual (the person's sex; Indigenous status; country of birth; languages spoken at home; and email address), the committee considers the proportionality of this measure may be assisted were the legislative instrument amended to make this information 'additional information', meaning that the information would not be *required* to be provided.

1.169 The committee recommends that the statement of compatibility be updated to provide a more fulsome assessment of the compatibility of the determination with the right to privacy.

1.170 The committee draws its concerns to the attention of the minister and the Parliament.

Social Security (Assurances of Support) Amendment Determination 2024[237]

FRL No.	F2024L00367
Purpose	This instrument amends the Social Security (Assurances of Support) Determination 2018 to remove the self-repeal date (which was 31 March 2024) and make minor changes to improve the administration of certain assurance of support settings
Portfolio	Social Services
Authorising legislation	*Social Security Act 1991*
Disallowance	15 sitting days after tabling (not yet tabled in the House of Representatives, tabled in the Senate on 26 March 2024). Notice of motion to disallow must be given by 14 August 2024 in the Senate and 15 days after tabling in the House)[238]
Rights	Children's rights; protection of the family

Making assurances of support ongoing

1.171 This instrument removes the self-repeal date (of 31 March 2024) of an existing determination which specifies requirements to be met for assurances of support. Previously the determination requiring assurances of support was implemented for a specific time periods (such as three years) with then consideration given as to whether it was appropriate to remake them, whereas as a result of this instrument they are made ongoing until it is subject to the usual 10 year sunsetting arrangement (or repealed earlier).[239]

1.172 An assurance of support is an undertaking by a person (the assurer) that they will repay the Commonwealth the amount of any social security payments received during a certain period by a migrant seeking to enter Australia.[240] This period could be up to ten years. This would appear to include any class of visa, including child and parent visas. The Social Security (Assurances of Support) Determination 2018, which this instrument extends, specifies the social security payments subject to these

[237] This entry can be cited as: Parliamentary Joint Committee on Human Rights, Social Security (Assurances of Support) Amendment Determination 2024, *Report 4 of 2024*; [2023] AUPJCHR 28.

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

[239] See *Legislation Act 2003*.

[240] Section 1061ZZGA(a) of the *Social Security Act 1991*.

assurances of support;[241] the requirements that assurers must meet to give assurances of support; the period for which assurances of support remain valid; and the value of securities to be given. In particular, it specifies that the period the assurances of support remain valid ranges from 12 months to 10 years, with most valid for 4 years.[242] In addition, it specifies that the value of securities to be provided by an individual (i.e. payment of an upfront bond) for a parent visa is up to $10 000, and for all other types is up to $5 000.[243]

International human rights legal advice

Right to protection of the family and rights of the child

1.173 A measure which limits the ability of certain family members to join others in a country is a limitation on the right to protection of the family.[244] Insofar as the visa classes affected by the requirement for an assurance of support include child visas and adoption visas, the measure also engages the rights of children.

1.174 An important element of protection of the family[245] is to ensure family members are not involuntarily separated from one another. Laws and measures which prevent family members from being together will engage this right. 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 manner.[246]

1.175 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.

---

241 Recoverable social security payments for the purpose of assurances of support include widow allowance, parenting payment, youth allowance, Austudy payment, jobseeker payment, mature age allowance, sickness allowance, special benefit and partner allowance. Social Security (Assurances of Support) Determination 2018, section 6.

242 For an assurance of support for aged parent visas, the period is 10 years; for an assurance of support for a Community Support Programme entrant, the period is 12 months; for an assurance of support for remaining relative, and orphan relative visas, the period is 2 years; and in any other case the period is 4 years. Social Security (Assurances of Support) Determination 2018, section 24.

243 Social Security (Assurances of Support) Determination 2018, section 19.

244 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].

245 Protected by articles 17 and 23 of the International Covenant on Civil and Political Rights (ICCPR) and article 10 of the International Covenant on Economic, Social and Cultural Rights (ICESCR).

246 Article 3(1) and 10 of the Convention on the Rights of the Child.

1.176 The statement of compatibility states that the primary objective of the assurance of support scheme is to 'protect social security outlays while allowing the migration of people who might otherwise not normally be permitted to come to Australia'.[247] These may be capable of constituting legitimate objectives under international human rights law and the measure appears to be rationally connected to that objective.[248]

1.177 In respect of proportionality it is necessary to consider if there is flexibility to treat different cases differently and safeguards to help to protect the right to protection of the family and the rights of the child. The statement of compatibility does not provide any detail in relation to this. It states that migrants will continue to be able to apply for a visa to come to, or remain in, Australia permanently (including to reunite with family) and have their visa application granted, 'subject to meeting the eligibility criteria including, where relevant, obtaining an assurance of support'. It states that to the extent that the assurance of support scheme limits the right to the protection of the family, and rights of parents and children, this is reasonable and proportionate to achieving the legitimate purpose of the scheme.[249]

1.178 The previous Minister for Social Services had advised the committee that mandatory assurances of support are required for parent visas, dependent relative visas and remaining relative visas.[250] For all such visas an assurer in Australia must provide an upfront monetary bond of between $5,000 to $10,000 for the primary applicant and between $2,000 to $4,000 for any secondary applicant. The assurer must also assume financial responsibility for supporting that applicant for up to 10 years.

1.179 The previous minister had also advised that discretionary assurances of support may be required for child visas, adoption visas, former resident visas, orphan relative visas and Global Special Humanitarian visas. An upfront monetary bond is not required for these types of visas. However, if the Department of Home Affairs considers the applicant is likely to access Australia's social security system, an assurer will be required to assume financial responsibility for supporting that applicant for up to four years.[251]

---

247 Statement of compatibility, p. 5.

248 The committee has previously considered the assurance of support scheme, see Parliamentary Joint Committee on Human Rights, *Report 7 of 2021* (16 June 2021) pp. 135–144; *Report 5 of 2018* (19 June 2018) pp. 41–46, *Report 7 of 2018* (14 August 2018) pp. 126–133, *Report 2 of 2019* (2 April 2019) pp. 83–89 and *Report 5 of 2019* (17 September 2019) pp. 76–83.

249 Statement of compatibility, p. 6.

250 See Parliamentary Joint Committee on Human Rights, *Report 7 of 2021* (16 June 2021) pp. 135–144.

251 See Parliamentary Joint Committee on Human Rights, *Report 7 of 2021* (16 June 2021) pp. 135–144.

1.180 The Social Security (Assurances of Support) Determination 2018, which the instrument under consideration extends, provides that individuals will only be able to provide an assurance of support if they are an Australian resident, an adult, and meet the income test requirements.[252] The income test requirements differ depending on the number of people being given an assurance of support, and whether the assurer has children of their own. For example, a single person sponsoring their single parent, would need to demonstrate an annual minimum income of $39,660.[253] A partnered parent with three children in Australia wanting to sponsor their child would need to demonstrate a combined annual minimum income of $47,639.83 if required to provide an assurance of support.[254]

1.181 The right to protection of the family is found in both the International Covenant on Civil and Political Rights and 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'.[255] While the state has a right to control immigration, the right does require Australia to create the conditions conducive to family formation and stability, including the interest of family reunification.[256] The term 'family' is to be understood broadly as to include all those comprising a family as understood in the society concerned,[257] and is not necessarily displaced by geographical separation if there is a family bond to protect.[258] This clearly includes couples and the parent-child

[252] Social Security (Assurances of Support) Determination 2018, sections 11 and 15.

[253] Social Security (Assurances of Support) Determination 2018, section 15, based on the applicable rate of jobseeker (being $19,830 as at May 2024) multiplied by the total number of the assurer and the assuree (two).

[254] Social Security (Assurances of Support) Determination 2018, section 15, based on the applicable rate of jobseeker (being $19,830 as at May 2024) multiplied by two (if giving a joint assurance) plus the base FTB child rate ($68.46 per fortnight per child) and the applicable supplement amount ($879.65 per year per child) multiplied by the total number of the assurer's children (three). See also Guide to Social Policy Law, Social Security Guide, version 1.317, 9.4.3.20 (released 6 May 2024).

[255] International Covenant on Civil and Political Rights, article 23 and the International Covenant on Economic, Social and Cultural Rights, article 10.

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

[257] 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.

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

relationship, and may include parents and their adult children[259] and other family members,[260] depending on the level of dependency, shared life and emotional ties.

1.182 In addition, the Convention on the Rights of the Child requires that the best interests of the child must be a primary consideration, and children should not be separated against their will from their parents (except if in their best interests), and States should respect the primary responsibility of parents or guardians for promoting the development of children.[261] In particular, article 10 of the Convention on the Rights of the Child requires that applications by a child or his or her parents for the purpose of family reunification must be dealt with in a positive, humane and expeditious manner.

1.183 It is not clear if the department considers the right to the protection of the family and the rights of the child when determining whether to require payment of an upfront bond. In the case of mandatory assurances of support, it appears there is no flexibility, and all assurers for visas in this category will be required to meet the residency, age and income test requirements, and provide an upfront monetary bond, in order to be eligible to sponsor family members in such visa categories. As such, it would appear a child would not be eligible to sponsor their parent, for example, where they were living with their father in Australia but wanted to sponsor their mother to join, or stay with them (in circumstances where the parents were now separated) – as children cannot provide assurances of support. The only possible safeguard is that if an individual cannot afford to provide an assurance of support, they have the option of entering into a joint arrangement, whereby up to three people, if they meet the assurance requirements, will be held equally liable for any social security debts that arise. In addition, businesses and unincorporated bodies (such as community groups) may also be able to provide an assurance of support. However, if a family member cannot find others willing to provide such an assurance, there appears to be no flexibility for those in the visa categories subject to mandatory assurances of support to be able to be reunited with their family member.

1.184 In addition, in relation to discretionary assurances of support, it does not appear that the department would consider the assurer's family ties to the applicant, or in the case of children within Australia's jurisdiction, the best interests of the child. In such cases, the rights of the child or the right to protection of the family does not appear to be a factor that is considered when making this determination.

---

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

260 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.

261 Convention on the Rights of the Child, articles 2, 3, 5, 8–10, 18 and 27.

1.185 Where assurances are sought to be made for family members who do not have a shared life with the assurer (for example, parents and their adult children who may not have lived with, or relied on, one another for many years), a requirement for an assurance of support is unlikely to engage the right to protection of the family. However, the right is likely to be engaged and limited when family members can demonstrate a close family bond and shared life together but are unable to meet the assurance of support requirements. In these circumstances, the assurance of support could prevent family reunification. In addition, the rights of the child will be limited where children in Australia are unable to be reunited with their parent, or other close relative, if an assurance of support is required but cannot be met. In these circumstances, noting the lack of any flexibility in relation to those visa categories subject to mandatory assurances of support; that the family ties of members, or the rights of the child, do not appear to be considered when a decision is made to impose a discretionary assurance of support; and the lack of any safeguards to protect the rights of those who cannot meet the age or income requirements or the payment of an upfront bond, there is a risk that extending this measure may not be compatible with the right to protection of the family and the rights of the child.

Committee view

1.186 The committee considers that requiring the payment of an upfront bond may limit the ability of certain family members, including potentially children, to join others in Australia. While States have a right to control their migration program, international human rights law requires Australia to create the conditions conducive to family formation and stability, and this includes the interest of family reunification. The committee also notes that the measure may engage the rights of the child, which requires that the best interests of the child must be a primary consideration, and applications by a child or his or her parents for the purpose of family reunification must be dealt with in a positive, humane and expeditious manner.

1.187 The committee notes that this measure requires all applications for parent visas (including parents of those *under* 18 years old) to have an Australian sponsor who is an adult, who meets set income requirements and can provide an upfront payment of a bond of up to $10,000. The committee also notes the measure enables the Department of Home Affairs to exercise its discretion to impose similar requirements (although without payment of the bond) for child visas (for example, where a parent in Australia is seeking to sponsor their child).

1.188 While the committee considers there will be many cases of family reunification where requiring an assurance of support does not limit the right to protection of the family or the rights of the child (as the family member in question is not part of the assurer's core family), the committee is concerned that no consideration is given to these rights when an assurance of support is imposed. As such, the committee considers there is a risk that requiring an assurance of support

for certain family members may not be compatible with the right to protection of the family and the rights of the child.

1.189 The committee notes it has raised these concerns on numerous occasions[262] and is concerned that the statement of compatibility with human rights does not reflect the concerns previously raised by the committee.

Suggested action

1.190 The committee considers the proportionality of this measure may be assisted if:

(a) the Social Security (Assurances of Support) Determination 2018 is amended to provide that an assurance of support is not required where to do so would arbitrarily limit the right to protection of the family or the rights of the child;

(b) as a matter of policy, all assurances of support are made discretionary in order to assess the family circumstances of each application; and

(c) guidelines are developed to guide officials in assessing whether an assurance of support would be likely to limit the right to protection of the family or the rights of the child in each individual case.

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

262 See Parliamentary Joint Committee on Human Rights, *Report 7 of 2021* (16 June 2021) pp. 135–144; *Report 5 of 2018* (19 June 2018) pp. 41–46, *Report 7 of 2018* (14 August 2018) pp. 126–133, *Report 2 of 2019* (2 April 2019) pp. 83–89 and *Report 5 of 2019* (17 September 2019) pp. 76–83.

Work Health and Safety (Operation Sovereign Borders) Declaration 2024[263]

FRL No.	F2024L00425
Purpose	This legislative instrument declares that certain provisions of the *Work Health and Safety Act 2011* do not apply to specified activities undertaken under Operation Sovereign Borders
Portfolio	Department of Employment and Workplace Relations
Authorising legislation	*Work Health and Safety Act 2011*
Disallowance	15 sitting days after tabling (tabled in the House of Representatives and the Senate on 14 May 2024). Notice of motion to disallow must be given by 2 July 2024 in the House and by 19 August 2024 in the Senate[264]
Rights	Just and favourable conditions of work; life; security of the person

Disapplication of work health and safety provisions

1.192 This legislative instrument declares that certain provisions of the *Work Health and Safety Act 2011* (WHS Act) do not apply to specified activities undertaken under Operation Sovereign Borders. Operation Sovereign Borders is a military-led, whole-of-government border security operation established in 2013.[265] The instrument disapplies the duties of a worker (or other person at the workplace) to take reasonable care for their own health and safety, and to take reasonable care 'that his or her acts or omissions do not adversely affect the health and safety of other persons'.[266] It also disapplies the duty of a person with management or control of a workplace to preserve an incident site where a 'notifiable incident has occurred'.[267] It provides that these requirements do not apply to:

- the interception, boarding, control or movement, under Operation Sovereign Borders, of a vessel suspected of carrying an illegal maritime

[263] This entry can be cited as: Parliamentary Joint Committee on Human Rights, Work Health and Safety (Operation Sovereign Borders) Declaration 2024, *Report 4 of 2024*; [2023] AUPJCHR 29.

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

[265] Explanatory statement, p. 1.

[266] Section 5 in relation to *Work Health and Safety Act 2011*, subsections 28(a) and (b), and 29(a) and (b).

[267] Section 5 in relation to *Work Health and Safety Act 2011*, section 39.

arrival as part of deciding whether to move the vessel to a place outside Australia, or moving the vessel to a place outside Australia; or

- the control or movement at sea, under Operation Sovereign Borders, of a person suspected of being an illegal maritime arrival as part of:
  - deciding whether to move the person to a place outside Australia; or
  - moving the person to a place outside Australia; or
  - moving the person to or from a vessel in the course of either of those activities (and not including the transfer or movement of a person to an offshore regional processing centre).

1.193 The declaration repeals and remakes the previous version of the declaration, which was made in 2013.[268] This declaration is made pursuant to subsection 12D(2) of the WHS Act. Section 12D provides that nothing in the WHS Act requires or permits a person to take any action, or to refrain from taking any action, that would be, or could reasonably be expected to be, prejudicial to Australia's defence. Subsection 12D(2) empowers the Chief of the Defence Force to declare that specified provisions of the WHS Act do not apply in relation to specified activities.[269]

Preliminary international human rights legal advice

Rights to just and favourable conditions of work; life; and security of the person

1.194 By disapplying specified provisions of the WHS Act to certain activities undertaken pursuant to Operation Sovereign Borders on boats, the legislative instrument engages and may limit the right to just and favourable conditions of work for those employed to carry out Operation Sovereign Borders. Further, as the activities specified would involve circumstances in which people on boats who are suspected of not having a valid Australian visa may be intercepted and turned back, it may also engage the right to life and security of the person, if the turn-back of boats occurs in circumstances that are unsafe.[270]

---

[268] Item 1 of Schedule 1 to the instrument repeals the Work Health and Safety (Operation Sovereign Borders) Declaration 2013 [F2013L02166].

[269] Sections 12C, 12D and 12E provide for several exceptions to be made to the *Work Health and Safety Act 2011* relating to national security, defence, and certain police operations. The only other exception which has been made pursuant to these provisions relates to defence force personnel. See, Work Health and Safety Act 2011 (application to Defence activities and Defence members) Declaration 2023 [F2023L00399].

[270] Further, Australia's policy of boat interceptions and turn-backs has been subject to sustained criticism from the United Nations, including in relation to its inconsistency with the international principle of non-refoulement and with Australia's search and rescue obligations arising under international maritime law. See, for example, Special Rapporteur on the human rights of migrants, Felipe González Morales*, Report on means to address the human rights impact of pushbacks of migrants on land and at sea* (12 May 2021) A/HRC/47/30.

1.195 The right to just and favourable condition of work includes the right of all workers to safe working conditions.[271] The right to life imposes an obligation on the state to protect people from being killed by others or identified risks.[272] The right to security of the person requires the state to take steps to protect people against interference with personal integrity by others.[273]

1.196 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.

1.197 The statement of compatibility with human rights identifies that the measure engages and limits the right to just and favourable working conditions.[274] It states that the objective of the measure is to 'ensure Australia's defence and security through the control of Australia's maritime borders as part of Operation Sovereign Borders'. The statement of compatibility sets out the stated necessity of the measure:

> As part of [Operation Sovereign Borders] (OSB), operational personnel are required to operate in a hazardous, uncertain and high-tempo operational environment, having to potentially board and control vessels, and control and transfer uncooperative persons. In the absence of the instrument, the perceived risk of liability being imposed on individual personnel could undermine their *[sic]* ability for those personnel to confidently discharge their duties to the best of their ability. It is also considered that the uncertainty created by the absence of an exemption from these duties could give rise to perceptions of apparent conflicting obligations, leading to misjudgement in high-pressure situations and consequential adverse outcomes.[275]

1.198 The statement of compatibility states that this does not mean that the right to safe workplaces is 'abandoned':

> Operational personnel engaged in the specified activities as part of OSB are highly trained and equipped to intercept, board and control vessels in a safe and secure manner. However, throughout this process, there are numerous potential mishaps that may eventuate. Operational personnel can neither

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

[272] International Covenant on Civil and Political Rights, article 6(1) and Second Optional Protocol to the International Covenant on Civil and Political Rights, article 1. UN Human Rights Committee, *General Comment No. 36: article 6 (right to life)* (2019) [3]: 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'.

[273] International Covenant on Civil and Political Rights, article 9(1).

[274] Statement of compatibility, pp. 7-9.

[275] Statement of compatibility, p. 8.

> foresee nor prepare for all eventualities, particularly in circumstances where illegal maritime arrivals may react in an unsafe way, as has happened in the past. Senior officials and the Commonwealth as an entity will remain responsible for providing safe workplace conditions for OSB personnel and anyone else present at the workplace.[276]

1.199 It also states that the disapplication of these provisions 'will not substantively alter the safety of the workplace'.[277]

1.200 As to the disapplication of the duties to take reasonable care at work, the statement of compatibility states that Operation Sovereign Borders operations typically involve 'highly unusual' workplace circumstances, and that as such 'it is not reasonable or appropriate to apply WHS health and safety duties to operational personnel in this context'.[278] It states that if these duties are not excluded, there is a concern that personnel will not be confident in applying their training and that this could adversely affect safety. It states that personnel will still have ongoing duties to comply with organisational WHS policies and training requirements, and will be subject to effective supervision through the chain of command providing necessary oversight. In relation to the disapplication of the requirement to preserve a site, the statement of compatibility states that these requirements are 'highly impracticable' in a maritime operations context. It states that most activities under Operation Sovereign Borders will take place at sea, 'which makes it particularly challenging, if not impossible', to preserve a site, including due to 'hazardous sea and weather conditions, uncooperative or agitated unauthorised maritime arrivals and potentially unseaworthy vessels upon which the notifiable incident has occurred'.[279]

1.201 The stated objective of the measure is to protect Australia's defence and security through the control of Australia's maritime borders as part of Operation Sovereign Borders. Protecting national security is a legitimate objective for the purposes of international human rights law. However, questions arise as to whether this measure is rationally connected to, that is, effective to achieve that objective. It is not clear how disapplying parts of the WHS Act would help to protect national security. The disapplication of these provisions of the WHS Act mean that a worker (or other person on the worksite) would not be liable for an offence for a failure to take reasonable care for health and safety, and a person in control of the worksite would not be liable for a failure to preserve the site of a workplace incident.[280] However, it is not clear what other legal effect, if any, this declaration would have, and what other

---

276 This aspect of the statement of compatibility is identical to that provided in 2013. See, Work Health and Safety (Operation Sovereign Borders) Declaration 2013 [F2013L02166], statement of compatibility.

277 Statement of compatibility, p. 9.

278 Statement of compatibility, pp. 8-9.

279 Statement of compatibility, pp. 8-9.

280 *Work Health and Safety Act 2011*, Division 5 (offences and penalties) and section 39.

legal frameworks (such as maritime law, common law, or other regulatory frameworks) would be applicable to ensure that people's right to just and favourable working conditions is not breached, and whether any such frameworks would provide recourse to remedies for either workers, or people on boats that are being intercepted or turned back, where their health and safety has been adversely affected.

1.202 In addition, it is not clear what practical effect, if any, this declaration has. While the statement of compatibility suggests that the intention of the declaration is for it to ensure that personnel can confidently discharge their duties (and, therefore, effectively defend maritime borders) without concern about a risk of personal liability under the WHS Act for a failure to take reasonable care, no information is provided to indicate that the disapplication of these duties to these activities has been demonstrated to change the behaviour of workers, impact the frequency of safety incidents during boat interceptions, or otherwise influence the overall outcomes of the activities. It is noted that the requirement under the WHS Act is to take 'reasonable care' to protect their own, and others', safety. The requirement of reasonableness means this requirement can be altered when circumstances reasonably require it. It is not clear why guidance and training could not be provided to relevant personnel to fully explain to them what is required when taking reasonable care, and why this could not alleviate concerns that personnel would 'not be confident in applying their training'. This raises the question of why the declaration is necessary, and to what extent it is rationally connected (that is, effective to achieve) the stated objective. Finally, it is not clear that defending Australia's maritime borders from those attempting to reach Australia by boat without a valid visa is rationally connected to Australia's national security, as those targeted by Operation Sovereign Borders appear to be those seeking asylum, rather than those seeking to affect Australia's national security.[281]

1.203 As to the proportionality of the measure, the factors cited in the statement of compatibility to justify the disapplication of these duties all relate to the physical environment in which boat interceptions occur, which raises two considerations. First, the physical and environmental hazards outlined in the statement of compatibility relating to the interception of boats at sea arguably highlight the importance of these WHS duties to take reasonable care. The more hazardous a workplace activity, the greater the practical significance of WHS duties to take reasonable care for one's own safety and that of others. Second, workers engaged in the 'hazardous, uncertain and high-tempo' activities on these boats may be exposed to risks to their psychological health and safety in these workplaces independently of those physical factors, such as through bullying or harassment from colleagues. It is not clear that the physical

---

281 The Operation Sovereign Borders website states it applies to unauthorised maritime arrivals and refers people wishing to lawfully migrate to Australia to the Immigration and Citizenship website. In the 2022-2023 financial year, 113 people on board four vessels were returned to their country of departure as part of Operation Sovereign Borders, see Department of Home Affairs, *2022-2023 Annual Report*, p. 82.

environment of a boat justifies excluding the duty to take reasonable care that acts or omissions do not adversely affect the health and safety of other persons insofar as that duty would protect workers from bullying, harassment or related activities.[282]

1.204 As to safeguards, the statement of compatibility states that all notifiable incidents will continue to be reported within the government departments and agencies contributing personnel and assets to Operation Sovereign Borders, and that records of those reports and investigations will be made available to Comcare.[283] These may have some safeguard value in relation to the right to just and favourable conditions of work, although it would occur after an event. Further, it is not clear whether the disapplication of these laws is subject to independent oversight and review.

1.205 As to the rights of people on boats being intercepted to life and security of the person, the statement of compatibility does not address this issue. In particular, it does not explain what effect the disapplication of the WHS obligation, which requires operational personnel to take reasonable care to ensure their acts or omissions do not adversely affect the health and safety of other persons, may have on the people on boats being turned back. Further, as stated above, it is not clear what other legal frameworks (such as maritime law or common law) would regulate these activities and provide recourse to remedies for people on boats that are being intercepted or turned back, where their health and safety has been adversely affected. It is therefore unclear whether the legislative instrument may limit the rights to life and security of the person in practice, and if so, whether such a limit would be permissible.

Committee view

1.206 The committee notes that disapplying certain provisions of the *Work Health and Safety Act 2011* in relation to specified activities by Operation Sovereign Borders engages and may limit the rights to just and favourable conditions of work, life and security of the person. 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 and how the legislative instrument is compatible with the rights to life and security of the person;

(b) whether and how the legislative instrument is rationally connected (that is, effective to achieve) the stated objective. In particular:

---

282 In this regard, it is noted that recent media reports have indicated that a report by the Australian Human Rights Commission has raised significant concerns regarding inappropriate workplace behaviours including sexual harassment and bullying, and indicated that 100 per cent of women in the 'marine unit' had witnessed sex discrimination and harassment. See, The Guardian Australia, *Secret report warns Australian Border Force's marine unit is 'not safe for women* (Wednesday, 24 April 2024).

283 Statement of compatibility, p. 9.

(i) how disapplying parts of the WHS Act would be effective to protect national security (including evidence which has demonstrated that the disapplication of these duties to these boat interception activities has changed the behaviour of workers, impacted the frequency of safety incidents during boat interceptions, or otherwise influenced the overall outcomes of the activities);

(ii) how turning back people seeking asylum in Australia is effective to protect national security;

(c) whether the measure is a proportionate means by which to achieve the stated objective, and in particular;

(i) what specific safeguards apply to ensure that reasonable care is taken to protect the safety of operational personnel involved in Operation Sovereign Borders;

(ii) what safeguards apply to ensure that operational personnel take reasonable care to ensure their acts or omissions do not adversely affect the health and safety of other persons, particularly those on the vessels being turned back;

(iii) noting that it appears likely that boat interceptions occur on the high seas, what legal and regulatory frameworks would apply in relation to actions undertaken on and in relation to intercepted boats, including where a person’s right to safe working conditions, or the rights of persons to life and security of the person, have been affected during these activities;

(iv) whether the exercise of Operation Sovereign Borders powers is subject to independent oversight and review; and

(v) why other less rights restrictive alternatives (including not disapplying these provisions in relation to all activities during boat interceptions, or giving workers guidance so they know how to apply their training within the confines of being required to exercise reasonable care) would be ineffective to achieve the stated objective of the declaration.

Mr Josh Burns MP

Chair

Coalition Members Additional Comments[284]

Work Health and Safety (Operation Sovereign Borders) Declaration 2024

1.1 Coalition members recognise the critical work being undertaken by the Australians engaged in Operation Sovereign Borders, and the important role this Operation plays in protecting Australia's national security.

1.2 The Work Health and Safety (Operation Sovereign Borders) Declaration has limited the extent to which certain individuals, not having a sufficient degree of control in the exceptional circumstances under consideration, can be held responsible for any incidents which may occur, and removes requirements relating to site preservation which would be extremely and impracticably onerous, or impossible, under the circumstances of the operation. The renewal of this declaration is a welcome measure.

1.3 Coalition members consider this declaration to be an appropriate means of protecting Australians who must overcome challenging conditions to effectively deal with illegal maritime arrivals in a safe and secure manner.

Henry Pike MP	**Senator Matt O'Sullivan**	**Senator Gerard Rennick**
Member for Bowman	Senator for Western Australia	Senator for Queensland

[284] This section can be cited as Parliamentary Joint Committee on Human Rights, Additional Comments, *Report 4 of 2024;* [2024] AUPJCHR 30.