Chapter 2

Concluded matters

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

2.2 Correspondence relating to these matters is included at **Appendix 3**.

Crimes Legislation Amendment (Sexual Crimes Against Children and Community Protection Measures) Bill 2017

Purpose	To amend the *Crimes Act 1914* to allow parole to be revoked without notice; remove the requirement for the court to grant leave before admitting a video recording of an interview of a vulnerable witness into evidence; remove the requirement for vulnerable witnesses to be available to give evidence at committal proceedings and to be cross examined; strengthen child sexual abuse offences including introducing new offences; introduce increased maximum penalties for child abuse offences; introduce mandatory minimum sentences for certain offences; introduce a presumption against bail for a person alleged to have committed serious child sex offences; introduce matters in respect of which the court must have regard when sentencing an offender; insert a presumption in favour of cumulative sentences; provide child sex offenders serve full terms of imprisonment unless there are exceptional circumstances; provide additional sentencing options; provide that if an offender is refused parole on the basis of information that could prejudice national security this information does not need to be disclosed
Portfolio	Justice
Introduced	House of Representatives, 13 September 2017
Rights	Fair trial; presumption of innocence; liberty (see **Appendix 2**)
Previous report	11 of 2017
Status	Concluded examination

Background

2.3 The committee first reported on the Crimes Legislation Amendment (Sexual Crimes Against Children and Community Protection Measures) Bill 2017 (the bill) in

its *Report 11 of 2017*, and requested a response from the Minister for Justice by 1 November 2017.[1]

2.4 The minister's response to the committee's inquiries was received on 1 November 2017. The response is discussed below and is reproduced in full at **Appendix 3**.

Mandatory minimum sentencing

2.5 Schedule 6 of the bill seeks to introduce mandatory minimum sentences of imprisonment if a person is convicted of particular child sexual abuse offences under the commonwealth *Criminal Code Act 1995* (Criminal Code*)*.[2]

2.6 Where a person has previously been convicted of a Commonwealth child sexual abuse offence and is subsequently convicted of a further child sexual abuse offence, then mandatory minimum sentencing also applies to this subsequent offence.[3]

Compatibility of the measure with the right not to be arbitrarily detained

2.7 Article 9 of the International Covenant on Civil and Political Rights (ICCPR) protects the right to liberty including the right not to be arbitrarily detained. The United Nations Human Rights Committee has stated that 'arbitrariness' under international human rights law includes elements of inappropriateness, injustice and lack of predictability.[4] Depriving an individual of their liberty must be reasonable, necessary and proportionate in all the circumstances in order to avoid being arbitrary.

2.8 As outlined in the initial human rights analysis, an offence provision which requires mandatory minimum sentencing engages the right to be free from arbitrary detention.[5] Detention may be considered arbitrary where it is disproportionate to the crime that has been committed (for example, as a result of a blanket policy). Mandatory sentencing may lead to disproportionate or unduly harsh outcomes as it removes judicial discretion to take into account all of the relevant circumstances of a particular case in sentencing.

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1 Parliamentary Joint Committee on Human Rights, *Report 11 of 2017* (17 October 2017) 2-14.

2 See, Schedule 6, item 2, proposed section 16AAA. Mandatory minimum sentences would apply in relation to sections 272.8(1), 272.8(2), 272.9(1), 272.9(2), 272.10, 272.11, 272.18, 272.19, 273.7, 471.22, 474.23A, 474.25A(1), 474.25A(2), 474.25B of the Criminal Code.

3 See, Schedule 6, item 2, proposed section 16AAB.

4 United Nations Human Rights Committee, *General Comment No. 35: Article 9 (Liberty and Security of person)* (16 December 2014) [12].

5 See, for example, *A v Australia* (1997) 560/1993, UN Doc. CCPR/C/59/D/560/1993, [9.4]; UN Human Rights Committee, Concluding Observations on Australia in 2000 (2000) UN doc A/55/40, volume 1, [522] (in relation to mandatory sentencing in the Northern Territory and Western Australia).

2.9 The right to liberty 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 (that is, effective to achieve) and proportionate to achieving that objective.

2.10 The statement of compatibility acknowledges that the mandatory minimum sentences engage and limit the right to liberty but argues that this limitation is permissible.[6] The statement of compatibility provides the following information about the objective of the measure as:

> …ensuring that the courts are handing down sentences for Commonwealth child sex offenders that reflect the gravity of these offences and ensure that the community is protected from child sex offenders. Current sentences do not sufficiently recognise the harm suffered by victims of child sex offences. They also do not recognise that the market demand for, and commercialisation of, child abuse material often leads to further physical and sexual abuse of children.[7]

2.11 Reflecting the gravity of a particular offence at a general level appears to be a function of the maximum term of imprisonment as set out in legislation. As such, based on the information provided, the initial analysis stated that it was unclear that this identified objective relates to proposed mandatory sentencing. However, the analysis noted that the other identified objective of ensuring community protection may be capable of constituting a legitimate objective for the purposes of international human rights law in respect of the measure. While incapacitation through imprisonment could be capable of addressing this objective, no specific information was provided in the statement of compatibility about whether the measure will be rationally connected to this objective. It is possible that a mandatory minimum sentence may be unconnected to the specific risk posed by a particular offender and, therefore, it is not evident that a mandatory minimum is effective to achieve community protection.

2.12 Further, the initial analysis assessed that the statement of compatibility does not provide any specific information about the scope of the problem or why judicial discretion is insufficient to address these objectives. In particular, there is no analysis as to why the exercise of judicial discretion, by judges who have experience in sentencing, has been or is likely to be inappropriate or ineffective in achieving the objective of reflecting gravity of offences and ensuring community protection. This raises concerns that the measure may not be necessary to address such objectives.

2.13 In relation to the proportionality of the measure, the statement of compatibility states that mandatory sentencing is restricted to serious child sex offenders for a first offence and will only apply to less serious offences following a

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6 Statement of Compatibility (SOC) 9.

7 SOC 10.

previous conviction.[8] This may be a relevant factor in relation to the proportionality of the measure. However, regardless of the type of offence, there is a risk that mandatory sentencing could lead to unduly harsh sentencing in cases in which a court is unable to take into account the full circumstances of the offence and the offender. The committee has previously raised concerns in relation to mandatory sentencing on a number of occasions and has addressed this issue in its *Guidance Note 2*.[9]

2.14 The statement of compatibility argues that the measure maintains some of the court's discretion as to sentencing:

> ...because they only relate to the length of the head sentence, not the term of actual imprisonment that an offender will serve. Courts will retain discretion as to any term of actual imprisonment, and will retain access to sentencing alternatives that may be appropriate, for example where an offender has an intellectual disability that makes imprisonment inappropriate.[10]

2.15 However, in relation to the discretion as to setting the minimum non-parole period, the previous analysis noted that there is a concern that the mandatory minimum sentence may be seen by courts as a 'sentencing guidepost', which is to say the appropriate sentence for the least serious case, and accordingly may feel constrained to impose a non-parole period that is in the usual proportion to the head sentence. This is generally two-thirds of the head sentence (or maximum period of the sentence to be served).

2.16 The statement of compatibility further explains that mandatory sentencing will not apply to offenders who are under 18 years of age. This is a relevant safeguard in relation to the operation of the measure, however, concerns remain in relation to its application to adult offenders set out above.

2.17 The committee therefore sought the advice of the minister as to:

- how the measure is effective to achieve (that is, rationally connected to) its stated objective;
- whether the limitation is a reasonable and proportionate measure to achieve the stated objective, including:
    - why the exercise of judicial discretion, by judges who have experience in sentencing, is inappropriate or ineffective in achieving the stated objective;

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9 See, Appendix 4, *Guidance Note 2*; Parliamentary Joint Committee on Human Rights, *Report 8 of 2016* (9 November 2016) 30-32.

10 SOC 10.

- whether less rights restrictive alternatives are reasonably available;
- the existence of adequate and effective safeguards to ensure a person is not deprived of liberty where it is not reasonable, necessary and proportionate in all the circumstances;
- the scope of judicial discretion maintained by the measures; and

- if mandatory minimum sentencing is maintained, whether the bill could be amended to clarify to the courts that the mandatory minimum sentence is not intended to be used as a 'sentencing guidepost' and that there may be a significant difference between the non-parole period and the head sentence.

Minister's response

2.18 The minister's response provides some further information about the objective of the measure and its importance including related to the rights of the child. In relation to how the measure is effective to achieve its stated objective, the minister's response states:

> The Government considers that mandatory minimum sentences should be used only rarely and reserved for the most serious offences. Mandatory minimums are already in place for terrorist offenders and people smugglers, and the Government is firmly of the view that—with the safeguards set out in the Bill—the application of mandatory minimum sentences to offenders who commit serious or repeated sexual crimes against innocent children is reasonable, necessary and proportionate.
>
> Ensuring that perpetrators are adequately punished not only acknowledges the significant trauma caused by the offending behaviour, but also recognises the impact on the community if the individual reoffends. The Bill mitigates this risk by ensuring that serious child sex offenders serve a meaningful period of time in custody. This means offenders will be punished appropriately, reflecting the seriousness of their crimes. This also means that offenders will have access to targeted rehabilitation and treatment programs in prison, ultimately reducing the risks those offenders pose to the community. Importantly, time that a sex offender spends in prison is time they cannot offend in the community.

2.19 As such the minister's response appears to argue that, as the proposed mandatory minimum sentences are reserved for serious offences against children, they are generally connected to risks posed to the community. It argues that mandatory minimum sentencing will address these risks through incapacitation as well as allowing for access to targeted treatment programs while in prison. On this basis the measure may be rationally connected to its stated objective of ensuring community protection. However, it would have been useful if the minister had also provided information about the particular risks posed to the community in relation to offenders that have committed these particular categories of criminal offence.

2.20 The minister's response usefully responds to each of the questions asked by the committee that relate to whether the measure is reasonable, necessary and proportionate.

2.21 A measure will not be a proportionate limitation on human rights where it is not necessary to achieve the stated objective (that is, it is not the least rights restrictive approach). If the exercise of judicial discretion in sentencing is already effective to achieve the stated objective of the measure then mandatory sentencing will not be the less rights restrictive approach. In relation to why the exercise of judicial discretion is inappropriate or ineffective to achieve the stated objective of the measure, the minister's response argues that:

> Despite current Commonwealth child sex offences carrying significant maximum penalties, the courts are not handing down sentences that reflect the gravity of the offending, or the harm suffered by victims. Statistics on current Commonwealth child sex offences demonstrate the low rate of convictions resulting in a custodial sentence—meaning the majority of convicted offenders are released into the community. Of the 652 Commonwealth child sex offences committed since 2012, only 58.7% of charges resulted in a custodial sentence. The most common length of imprisonment for an offence was 18 months and the most common period of actual imprisonment was just 6 months.
>
> Current sentencing practice is inadequate and out of step with community expectations. These statistics demonstrate the clear need for legislation to stand as a yardstick for the courts in applying more appropriate penalties for Commonwealth child sex offences. The appropriateness of Parliament setting minimum sentences in addition to maximum penalties has been upheld by the High Court.

2.22 The statistics cited may indicate that judicial discretion is inadequate to address the legitimate objective of the measure. However, it is also possible that the percentage and length of custodial sentences may be an appropriate exercise of judicial discretion that takes into account all the circumstances of an individual case.

2.23 In relation to the committee's request as to whether less rights restrictive alternatives are reasonably available, the minister's response states:

> The mandatory minimum sentencing scheme provides the courts with enough discretion to enable individual circumstances to be taken into account while still ensuring that sentences for child sex offenders reflect the serious and heinous nature of the crimes.

2.24 While courts may still have a limited degree of discretion in setting the non-parole period, this does not appear to be sufficient for the measure to be the least rights restrictive approach. It would have been useful if the minister's response had considered whether less rights restrictive measures such as, for example, guidelines as to sentencing would have been sufficient to address the legitimate objective of the measure.

2.25 In relation to the existence of adequate and effective safeguards to ensure a person is not deprived of liberty where it is not reasonable, necessary and proportionate in all the circumstances, the minister's response states:

> The safety and protection of children is the Government's paramount concern. Individuals convicted of serious child sex offences or who are repeat offenders deserve to spend time in jail for their offences. This protects the community by ensuring that these offenders receive significant penalties and that they are removed from the streets.
>
> The Government understands that sentencing decisions involve the careful analysis of numerous factors and circumstances. That is why the mandatory minimum sentencing scheme includes mechanisms for courts to retain appropriate discretion in determining the most suitable sentence in each individual case.
>
> Additionally, under Commonwealth law, courts have the discretion to determine the appropriate treatment of people with cognitive disability or mental impairment in the criminal justice system. Mental impairment is defined in the Criminal Code Act 1995 (Criminal Code) as including senility, intellectual disability, mental illness, brain damage and severe personality disorder. These protections have not been limited by the Bill.

2.26 The minister's advice that the courts will maintain discretion as to the appropriate treatment of people with cognitive disabilities or mental impairment, is likely to be an important safeguard in respect of these individuals. However, outside these circumstances, based on the information provided there does not appear to be any other specific safeguards to ensure a person is not deprived of liberty for a length of time that is not reasonable, necessary and proportionate in all the circumstances. That is, even if the circumstances of the offence and the offender did not warrant the mandatory minimum sentence there are no additional safeguards to prevent the application of this sentence.

2.27 In relation to the scope of judicial discretion that will be maintained by the measure, the minister's response explains:

> The mandatory minimum sentencing scheme introduced by the Bill limits judicial discretion, but does not remove it. A court is able to take into account a guilty plea or an offender's cooperation with law enforcement agencies and to discount the minimum penalty by up to 25% respectively. Courts will also retain the ability to impose a sentence of a severity appropriate in all the circumstances of the offence through exercising judicial discretion over the length of the non-parole period. This means that courts will be able to take into account individual circumstances and any mitigating factors in considering the most suitable non-parole period.

2.28 Some discretion is retained by the court in relation to aspects of sentencing, however, it is significantly limited. While courts will retain the ability to set the minimum non-parole period, the sentence will still be required to be the mandatory minimum. In this respect, it is noted that the grant of parole after an offender has

served their minimum non-parole period is a manner of discretion. Further, while the court may be able to apply discounts by up to 25 percent to the mandatory minimum sentence on the basis of a guilty plea or for cooperation, the scope of this discretion appears to be limited with reference to the minimum penalty as well as in relation to grounds for a discount. Accordingly, it is unclear that the courts will be able to take fully into account the particular circumstances of the offence and the offender in determining an appropriate sentence.

2.29 The minister's response also provides the following information on whether the bill could be amended to clarify that the mandatory minimum sentence is not intended to be used as a 'sentencing guidepost':

> The introduction of the mandatory minimum sentencing scheme provides direction to the courts in relation to sentences for serious child sex offences. Importantly, the mandatory minimums are not intended to be seen as a suggested penalty but rather as a floor for penalties. The courts should exercise their discretion with regard to the [sic] both the minimum and maximum penalty for an offence and determine a sentence of a severity appropriate in all the circumstances of the case.
>
> With the exception of a limited number of offences (such as terrorism, treason and espionage), the Crimes Act 1914 does not prescribe how a non-parole period should be determined. Furthermore, there is no common law principle requiring a judicially determined norm or starting point, expressed as a percentage of the head sentence or otherwise, for setting the non-parole period. As such, there is no need to amend the Bill in the manner suggested.

2.30 In light of this explanation, should the bill proceed, the amendment or clarification is not required.

2.31 More generally, the UN Human Rights Committee found in *Nasir v Australia* that mandatory minimum sentencing is not *per se* incompatible with the right to be free from arbitrary detention.[11] Nevertheless mandatory sentencing involves a risk that the application of a mandatory minimum may not be reasonable, necessary and proportionate in the individual case.[12] Accordingly, there is a risk that the measure may operate in such individual cases in a manner which is incompatible with the right to liberty and the right to be free from arbitrary detention.

Committee response

2.32 The committee thanks the minister for his response and has concluded its examination of this issue.

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11 *Nasir v Australia*, UN Human Rights Committee (17 November 2016) [7.7].

12 See, UN Human Rights Committee, General comment 35, liberty and security of person; UN Human Rights Committee, Concluding observations on Australia 24/07/2000, A/55/40, paras. 498-528

2.33 The preceding analysis indicates that the measure may risk being incompatible with the right to liberty where the mandatory minimum sentence is not reasonable, necessary and proportionate in all the circumstances of the individual case.

Right to have a sentence reviewed by a higher tribunal

2.34 Mandatory sentencing is also likely to engage and limit article 14(5) of the ICCPR, which protects the right to have a sentence reviewed by a higher tribunal. This is because mandatory sentencing may prevent review of the severity or appropriateness of a minimum sentence. In this respect, when a trial judge imposes the prescribed mandatory minimum sentence, the appellate court is likely to form the view that there are limited matters in the sentencing processes to review. This is because the trial judge has imposed the mandatory minimum sentence. This was not addressed in the statement of compatibility.

2.35 The committee therefore requested the advice of the minister as to the compatibility of the measure with the right to have a sentence reviewed by a higher court.

Minister's response

2.36 The minister's response to the committee's inquiries in this regard states:

> The mandatory minimum sentencing regime set out in the Bill does not impact on the right to have a sentence reviewed by a higher court. All avenues of appeal remain available. Nor do the reforms impact the current requirement for the courts to consider all the circumstances, including the sentencing factors listed in section 16A of the Crimes Act 1914, when fixing a non-parole period. Additionally, although the Bill introduces mandatory minimums for certain child sex offences in respect of the head sentence, the courts will exercise discretion over the non-parole period. It is therefore not the case that appellate courts would have nothing to review.

2.37 The minister's response articulates that there will be some scope provided to an appellate court to review a sentence. However, when a trial judge imposes the prescribed mandatory minimum sentence, the scope of review provided by an appellate court will, as set out above, be more limited aside from the minimum non-parole period. Nevertheless, noting the information provided by the minister and that international human rights law jurisprudence has not directly addressed this issue, the measure engages, but may not limit, the right to have a sentence reviewed by a higher tribunal.

Committee response

2.38 The committee thanks the minister for his response and has concluded its examination of this issue.

2.39 The preceding analysis indicates that, based on international jurisprudence, the measure engages, but may not limit, the right to have a sentence reviewed by a higher tribunal.

Conditional release of offenders after conviction

2.40 Currently, section 20(1)(b) of the *Crimes Act 1914* provides that, following conviction for an offence, the court may sentence a person to imprisonment but direct that the person be released upon giving certain forms of security such as being of good behaviour, paying compensation or paying the commonwealth a pecuniary penalty or other conditions. This is sometimes referred to as a suspended sentence or recognisance order. Schedule 11 of the bill removes this sentencing option for child sex offenders unless there are exceptional circumstances. That is, it will mean that child sex offenders are required to serve a period of imprisonment that is not suspended.[13]

Compatibility of the measure with the right not to be arbitrarily detained

2.41 As noted above, the right to liberty includes the right not to be arbitrarily detained. The initial analysis stated that, by restricting sentencing options available to a court and requiring offenders to serve a sentence of imprisonment the measure engages the right not to be arbitrarily detained. The statement of compatibility states that:

> The presumption in favour of a term of actual imprisonment is… reasonable and necessary to achieve the legitimate objective of ensuring that the courts are handing down sentences for child sex offenders that reflect the gravity of these offences, and to ensure that the community is protected from child sex offenders.[14]

2.42 Ensuring community protection may be capable of constituting a legitimate objective for the purposes of international human rights law. While incapacitation through imprisonment could be capable of addressing this objective, no specific information was provided in the statement of compatibility about whether the measure will be rationally connected to this objective. The initial analysis noted that given the proposed presumption in favour of actual imprisonment, incarceration may be unconnected to the specific risk posed by a particular offender. Accordingly, it is not evident that the presumption is effective to achieve community protection.

2.43 The statement of compatibility argues that the measure is proportionate on the basis that it will only apply to child sex offenders who might otherwise be released on recognisance orders.[15] However, this does not explain why the exercise of judicial discretion as to sentencing is insufficient to achieve the stated objective of

13 See, proposed section 20(1)(b), schedule 11, item 1.

14 SOC 11.

15 SOC 11.

the measure. It also does not address whether the unavailability of recognisance orders could lead to injustice in a particular case such that a term of imprisonment is applied in circumstances where it amounts to arbitrary detention.

2.44 In relation to the proportionality of the measure, the statement of compatibility further notes that the court retains discretion as to how long the term of imprisonment should be.[16] The initial analysis stated that, while this is the case, incarceration and loss of liberty for any length of time is a serious matter and the presumption in favour of a term of actual imprisonment may alter a court's exercise of this discretion. In order for a loss of liberty not to be arbitrary it must generally be reasonable, necessary and proportionate in all the circumstances. By restricting the court's discretion in this respect there is a risk that such a deprivation of liberty may not be necessary in all the circumstances of each individual case.

2.45 The court will retain discretion to make a recognisance order in 'exceptional circumstances'. The statement of compatibility does not explain what types of circumstances are anticipated to engage this discretion, and whether this will operate as an effective safeguard in relation to the measure.

2.46 The committee therefore sought the advice of the minister as to:

- how the measure is effective to achieve (that is, rationally connected to) its stated objective; and
- whether the limitation is a reasonable and proportionate measure to achieve the stated objective, including:
    - why the exercise of judicial discretion, by judges who have experience in sentencing, is inappropriate or ineffective in achieving the stated objective;
    - whether less rights restrictive alternatives are reasonably available;
    - the existence of adequate and effective safeguards to ensure a person is not deprived of liberty where it is not reasonable, necessary and proportionate in all the circumstances;
    - what is anticipated to constitute 'exceptional circumstances' for the purpose of making a recognisance order; and
    - the scope of judicial discretion maintained by the measure.

Minister's response

2.47 In relation to whether the measure is effective to achieve its stated objective, the minister's response states:

> Yes, as the intention is to increase imprisonment of child sex offenders. Additionally, the presumption in favour of Commonwealth child sex

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> offenders serving an actual term of imprisonment is in line with community expectations that offenders serve a period of imprisonment for abusing children. The presumption ensures community protection and reduces risk of reoffending through imprisonment and will also allow greater time for rehabilitation programs to be undertaken while in custody.
>
> The presumption will provide clear guidance to courts for custodial sentences to be applied to predators who abuse children.

2.48 As such the minister's response appears to argue that being found guilty of this category of criminal offence is generally connected to risks posed to the community. It argues that mandatory minimum sentencing will address these risks through incapacitation as well as allowing for access to targeted treatment programs while in prison. On this basis the measure may be rationally connected to its stated objective of ensuring community protection.

2.49 The minister's response usefully responds to the questions asked by the committee that relate to whether the measure is reasonable, necessary and proportionate.

2.50 In relation to why the exercise of judicial discretion by judges who have experience in sentencing is inappropriate or ineffective in achieving the stated objective, the minister's response states:

> As discussed above, the issuing of wholly suspended sentences for child sex offenders has resulted in sentences that do not adequately reflect the gravity of child sex offending. Introducing a presumption in favour of imprisonment allows courts to consider all the circumstances when setting the pre-release period under a recognizance release order.

2.51 Given the category of offence, the issuing of wholly suspended sentences for child sex offences may indicate that judicial discretion is inadequate to address the legitimate objective of the measure. However, depending on the circumstances, it is also possible that sentencing an individual offender to a suspended sentence could be an appropriate exercise of judicial discretion that takes into account all the circumstances of an individual case.

2.52 In relation to whether less rights restrictive alternatives are reasonably available, the minister's response states that:

> This measure provides the courts with enough discretion in setting the pre-release period under a recognizance order to enable individual circumstances to be taken into account while still ensuring that sentencing of child sex offenders is of a level that reflects the serious and heinous nature of the crimes.

2.53 This approach will continue to provide courts with some degree of discretion in relation to length of incarceration. Further, as noted above, the court will retain discretion to make a recognisance order in 'exceptional circumstances'. In relation to

what is anticipated to constitute 'exceptional circumstances' for the purpose of making a recognisance order, the minister's response states:

> 'Exceptional circumstances' was deliberately not defined in the Bill. Given the variable circumstances which may mitigate against or support a sentence of imprisonment, it would impose practical constraints if 'exceptional circumstances' was defined. Firstly, the phrase is not easily subject to general definition as circumstances may exist as a result of the interaction of a variety of factors which, of themselves, may not be special or exceptional, but taken cumulatively, may meet this threshold. Second, a list of factors said to constitute 'exceptional circumstances', even if stated in broad terms, will have the tendency to restrict, rather than expand, the factors which might satisfy the requirements for 'exceptional circumstances'.

2.54 Accordingly, the minister's response provides a useful explanation as to why it may not be practical or desirable to define 'exceptional circumstances' in legislation. However, it does appear that the threshold of 'exceptional circumstances' is intended to operate as a significant hurdle to sentencing a person to a suspended sentence rather than imprisonment in custody. Much will also depend on how 'exceptional circumstances' are interpreted by the court as to whether this is a sufficient safeguard against the risk of arbitrary detention.

Committee response

2.55 The committee thanks the minister for his response and has concluded its examination of this issue.

2.56 The preceding analysis indicates that, noting the existence of safeguards, the measure may be compatible with the right not to be arbitrarily detained in a range of circumstances. However, depending on how these safeguards are applied, there is some degree of risk that the measure could operate so as to be incompatible with the right to liberty if incarceration is not reasonable, necessary and proportionate in all the circumstances of the individual case.

Presumption against bail

2.57 Schedule 7 of the bill would introduce a presumption against bail for persons charged with, or convicted of, certain Commonwealth child sex offences. Proposed section 15AAA of the *Crimes Act 1914* provides that a bail authority must not grant bail unless satisfied by the person that circumstances exist to grant bail.

2.58 The presumption against bail applies to persons charged with, or convicted of, serious child sex offences to which mandatory minimum penalties apply. It also applies to all offences subject to a mandatory minimum penalty on a second or

subsequent offence where the person has been previously convicted of child sexual abuse.[17]

Compatibility of the measure with the right to release pending trial

2.59 The right to liberty includes the right to release pending trial. Article 9(3) of the ICCPR provides that the 'general rule' for people awaiting trial is that they should not be detained in custody. The UN Human Rights Committee has stated on a number of occasions that pre-trial detention should remain the exception and that bail should be granted except in circumstances where the likelihood exists that, for example, the accused would abscond, tamper with evidence, influence witnesses or flee from the jurisdiction.[18] As the measure creates a presumption against bail it engages and limits this right.[19]

2.60 The initial human rights analysis assessed that the statement of compatibility argues generally that the measure pursues the objective of 'community protection from Commonwealth child sex offenders whilst they are awaiting trial or sentencing',[20] but does not provide any specific information as to how this measure addresses a pressing and substantial concern as is required in order to constitute a legitimate objective for the purposes of international human rights law. In a broad sense, incapacitation through imprisonment could be capable of addressing community protection, however, no specific information was provided in the statement of compatibility about whether the measure will be rationally connected to (that is, effective to achieve) the stated objective. In particular, it would be relevant whether the offences to which the presumption applies create particular risks while a person is on bail.

2.61 The presumption against bail applies not only to those convicted of child sex offences, but also those who are accused and in respect of which there has been no determination of guilt. That is, while the objective identified in the statement of compatibility refers to 'community protection from child sex offenders' it applies more broadly to those that are accused of particular offences.

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17 Explanatory Memorandum (EM) 41.

18 See, UN Human Rights Committee, *Smantser v Belarus* (1178/03); *WBE v the Netherlands* (432/90); *Hill and Hill v Spain* (526/93).

19 See, *In the Matter of an Application for Bail by Isa Islam* [2010] ACTSC 147 (19 November 2010) (ACT Supreme Court declared that a provision of the Bail Act 1992 (ACT) was inconsistent with the right to liberty under section 18 of the ACT *Human Rights Act 2004* which required that a person awaiting trial not be detained in custody as a 'general rule'. Section 9C of Bail Act required those accused of murder, certain drug offences and ancillary offences, to show 'exceptional circumstances' before having a normal assessment for bail undertaken.

20 SOC 10.

2.62 The statement of compatibility reasons that given the nature of online exploitation 'it is particularly important to ensure that any risk is mitigated through appropriate conditions. Where conditions cannot mitigate the risk to the community, witnesses, and victims, bail should not be granted'.[21] However, as noted in the previous analysis, the presumption against bail goes further than requiring that bail authorities and courts consider particular criteria, risks or conditions in deciding whether to grant bail. It is not evident from the information provided that the balancing exercise that bail authorities and courts usually undertake in determining whether to grant bail would be insufficient to address the stated objective of 'community protection' or that courts are failing to consider the serious nature of an offence in determining whether to grant bail.[22]

2.63 Further, to the extent that the concern is that issues of community risk are not being given sufficient weight in bail applications, it was unclear why this could not be addressed through adjusting the criteria to be considered in granting bail rather than imposing a presumption against bail. This raised a specific concern that the measure may not be the least rights restrictive alternative reasonably available, as required to be a proportionate limit on human rights.

2.64 In relation to the proportionality of the measure, the statement of compatibility further states that the measure provides courts with a 'starting point of a presumption against bail' but that the presumption is rebuttable.[23] However, the previous analysis stated that the bill does not specify the threshold for rebutting this presumption, including what constitutes 'exceptional circumstances' to justify bail.

2.65 While bail may continue to be available in some circumstances, based on the information provided, it was unclear that the presumption against bail is a proportionate limitation on the right to release pending trial.[24] The previous analysis outlined that, relevantly, in the context of the *Human Rights Act 2004* (ACT) (ACT HRA), the ACT Supreme Court considered whether a presumption against bail under section 9C of the *Bail Act 1992* (ACT) (ACT Bail Act) was incompatible with section 18(5) of the ACT HRA. Section 18(5) of the ACT HRA relevantly provides that a person awaiting trial is not to be detained in custody as a general rule. However, section 9C of the ACT Bail Act contains a presumption against bail in respect of particular offences and requires those accused of murder, certain drug offences and ancillary offences, to show 'exceptional circumstances' before the usual assessment as to whether bail should be granted is undertaken. *In the matter of an application for Bail by Isa Islam* [2010] ACTSC 147, the ACT Supreme Court considered these provisions

21 SOC 10.

22 See, *Crimes Act 1914* section 15AB.

23 SOC 10.

24 See, *In the Matter of an Application for Bail by Isa Islam* [2010] ACTSC 147 (19 November 2010);

and decided that section 9C of the ACT Bail Act was not consistent with the requirement in section 18(5) of the ACT HRA that a person awaiting trial not be detained in custody as a general rule.

2.66 The committee therefore sought the advice of the minister as to:

- whether there is reasoning or evidence that establishes that the stated objective addresses a pressing or substantial concern or whether the proposed changes are otherwise aimed at achieving a legitimate objective;
- how the measure is effective to achieve (that is, rationally connected to) its stated objective (including whether offences to which the presumption applies create particular risks while a person is on bail);
- whether the limitation is a reasonable and proportionate measure to achieve the stated objective including:
    - why the current balancing exercise undertaken by bail authorities and courts is insufficient to address the stated objective of the measure;
    - whether less rights restrictive alternatives are reasonably available (such as adjusting criteria to be applied in determining whether to grant bail rather than a presumption against bail);
    - the existence of adequate and effective safeguards to ensure a person is not deprived of liberty where it is not reasonable, necessary and proportionate in all the circumstances; and
    - advice as to the threshold for rebuttal of the presumption against bail including what is likely to constitute 'exceptional circumstances' to justify bail.

Minister's response

2.67 In relation to whether there is reasoning or evidence that establishes that the stated objective addresses a pressing or substantial concern and how the measure is effective to achieve that objective, the minister's response states:

> Not all child sex offences are subject to the presumption against bail. The measure only applies to offences that attract a mandatory minimum penalty, namely the most serious child sex offences and repeat offenders. The presumption against bail for this cohort of the most serious child sex offenders is a necessary and effective crime prevention measure for a crime that targets our children.

2.68 Accordingly, the minister's response appears to indicate that the offences to which the presumption applies create particular risks while a person is on bail. On this basis the presumption against bail would appear in broad terms to be rationally connected to the stated objective of 'community protection.'

2.69 The minister's response usefully responds to the questions asked by the committee that relate to whether the measure is reasonable, necessary and proportionate.

2.70 In relation to why the current balancing exercise undertaken by bail authorities and courts is insufficient to address the stated objective of the measure, the minister's response does not directly address whether the current regime is sufficient to address the stated objective of the measure. However, the minister explains that it is 'appropriate that child sex offenders take responsibility for explaining to the court why they do not pose a risk if released on bail'. The minister points to this being of particular importance in relation to 'Commonwealth child sex offences, which often concern emerging technologies that are often difficult to detect'.

2.71 In relation to whether less rights restrictive alternatives are reasonably available, the minister's response states:

> The Bill includes matters that a bail authority must have regard to in determining whether circumstances exist to grant bail to a person charged with a serious child sex offence or who is a repeat child sex offender, including considerations relating to rehabilitation. However, this on its own has not proven to be sufficient to protect the community.

2.72 Beyond this statement, no further information is provided as to why less rights restrictive approaches to achieving the objective of the measure are not reasonably available. As such there continues to be a specific concern that the measure may not be the least rights restrictive alternative reasonably available, as required to be a proportionate limit on human rights.

2.73 In relation to the existence of adequate and effective safeguards to ensure a person is not deprived of liberty where it is not reasonable, necessary and proportionate in all the circumstances, the minister's response states:

> The presumption against bail is rebuttable and provides judicial discretion determining whether a person's risk on bail can be mitigated through appropriate conditions which make the granting of bail appropriate in the circumstances. Flexibility is provided by the open nature of the presumption, which is not limited to specific criteria.

2.74 Providing a rebuttable presumption will continue to allow for judicial discretion as to whether pre-trial detention is warranted in a particular case. However, a presumption against bail fundamentally alters the starting point of an inquiry as to the grant of bail. That is, unless there is countervailing evidence, a person will be incarcerated pending trial. There is a potential risk that if the threshold for displacing the rebuttable presumption is too high it may result in loss of liberty where it is not reasonable necessary and proportionate in the individual case.

2.75 In relation to the committee's request for advice as to the threshold for displacing the rebuttal of the presumption against bail, the minister's response states:

> The Bill does not require there to be 'exceptional circumstances' to justify bail. Rather, the person charged or convicted of the child sex offence will need to satisfy the court that circumstances exist to grant bail. The presumption was deliberately not defined by reference to specific criteria to ensure that appropriate discretion is retained and that the courts can take individual circumstances into account.

2.76 It is acknowledged that there may be appropriate reasons for not providing a definition of what is needed to satisfy the court that circumstances exist for a grant of bail. The fact that the presumption is rebuttable is a relevant safeguard that may assist to ensure that a person is denied bail where it is not reasonable, necessary and proportionate in all the circumstances. However, as set out above, a rebuttable presumption against bail remains a serious limitation on the right to release pending trial. International jurisprudence indicates that pre-trial detention should remain the exception and that bail should be granted except in circumstances where the likelihood exists that, for example, the accused would abscond, tamper with evidence, influence witnesses or flee from the jurisdiction.[25] As set out above, *In the matter of an application for Bail by Isa Islam* [2010] ACTSC 147, the ACT Supreme Court considered that the presumption against bail in section 9C of the ACT Bail Act, in the circumstances, was not consistent with the requirement a person awaiting trial not be detained in custody as a general rule. In this case, there is a potential risk that if the threshold for displacing the rebuttable presumption is too high it may result in loss of liberty where it is not reasonable, necessary and proportionate in the individual case. Accordingly, the measure may not be a proportionate limitation on the right to be released pending trial.

Committee response

2.77 The committee thanks the minister for his response and has concluded its examination of this issue.

2.78 The preceding analysis indicates that there is a risk that if the threshold for displacing the rebuttable presumption against bail is too high, it may result in loss of liberty in circumstances that may be incompatible with the right to release pending trial.

Power to restrict information provided to offenders

2.79 Usually, in the course of making parole decisions, information adverse to an individual is put to that person for comment prior to making a decision. Schedule 13

25 See, UN Human Rights Committee, *Smantser v Belarus* (1178/03); *WBE v the Netherlands* (432/90); *Hill and Hill v Spain* (526/93).

of the bill would provide that information does not need to be disclosed to an offender where in the opinion of the Attorney-General this information is likely to prejudice national security.[26]

Compatibility of the measure with the right to a fair hearing

2.80 The right to a fair trial and fair hearing is protected by article 14 of the ICCPR and applies to both criminal and civil proceedings, including where rights and obligations are determined. Withholding information from a person which may be relevant to a decision to refuse that person parole engages and limits the right to a fair hearing. This is particularly because they will not be afforded the opportunity to respond to all adverse information in relation to them.

2.81 The statement of compatibility acknowledges that the right to a fair hearing is engaged but states that 'it is necessary to protect confidential information, such as intelligence information, that would prejudice national security'.[27] It was acknowledged that this is likely, in broad terms, to constitute a legitimate objective for the purposes of international human rights law.

2.82 In relation to the proportionality of the measure, the statement of compatibility states that the measure is reasonable and proportionate because 'it applies only if the Attorney-General is satisfied that disclosure of the information would be likely to prejudice national security'.[28] However, the initial analysis stated that it was unclear from the information provided that this necessarily ensures that the limitation is proportionate or rationally connected to its stated objective. It was noted that the assessment that information should not be disclosed is based merely on the Attorney-General's 'opinion' rather than objective criteria regarding risks to national security. There is also an absence of any standard against which the need for confidentiality of information is independently assessed or reviewed. There is also no assessment provided in the statement of compatibility as to whether less rights restrictive alternatives would be reasonably available (such as provision of information to a person's lawyer). The committee has previously raised concerns about measures that withhold information related to a decision from the person affected by a decision.[29]

2.83 It was further noted that the withholding of information from offenders in these circumstances may also have consequential impacts on other rights, such as the right to liberty.

2.84 The committee therefore sought the advice of the minister as to:

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26 EM 51.

27 SOC 12.

28 SOC 12.

29 See, for example, Parliamentary Joint Committee on Human Rights, *Report 10 of 2017* (12 September 2017) 5-26.

- how the measure is effective to achieve (that is, rationally connected to) its stated objective;
- whether the limitation is a reasonable and proportionate measure to achieve the stated objective including:
    - the inability of affected individuals to contest or correct information on which the refusal of parole is based;
    - the absence of any standard against which the need for confidentiality of information is independently assessed or reviewed;
    - whether a decision to withhold information on the basis that it prejudices national security could be based on objective criteria; and
    - whether there are less rights restrictive approaches which are reasonably available.

Minister's response

2.85 In relation to how the measure is effective to achieve its stated objective, the minister's response states:

> The Bill introduces a provision to protect the security of reports, documents and information obtained for the purposes of informing parole decisions and ensures that information that could prejudice national security is not disclosed as a result of the operation of Part 18 of the Crimes Act.
>
> It is in the public interest to restrict certain information used as part of the decision to release an offender from custody. For example, information may be provided to the Attorney-General's Department which relates to ongoing intelligence matters or investigations. The release of that information to the offender could jeopardise not only ongoing law enforcement matters but put the community at risk where that information relates to the capabilities or methodology of law enforcement or intelligence agencies.
>
> A person sentenced to imprisonment does not have a right to be granted parole. Parole decisions are made giving consideration to the protection of the community, the rehabilitation of the offender and their reintegration into the community. In practice, the measures are likely to only apply to offenders with terrorist links. It would be a perverse outcome if one of the fundamental pillars of parole considerations—the protection of the community—could be undermined because national security information that informed a parole refusal had to be disclosed to the offender in the notice of refusal.

2.86 This information provided by the minister indicates that the measure is likely to be rationally connected to its objective, and the minister's response usefully responds to the questions asked by the committee that relate to whether the measure is reasonable, necessary and proportionate. In relation to the inability of

affected individuals to contest or correct information on which the refusal of parole is based, the minister's response states:

> The reforms do not prevent the Attorney-General from providing a person with an overview of the information considered as part of making a parole decision. Such an overview could be given providing the information set out did not prejudice national security. All Commonwealth parole decisions, including those which are refused on national security grounds, are subject to judicial review in the *Federal Court under the Administrative Decisions (Judicial Review) Act 1977*.

2.87 While noting that nothing prevents the Attorney-General from providing an overview of relevant information, if it does not prejudice national security, there is nothing in the legislation which requires that this information be provided. Accordingly, a person may be unable to contest evidence in relation to the grant of the parole. This raises a particular concern that the measure contains insufficient safeguards to ensure it is no more rights restrictive than necessary. It is noted that the ability of a person to reply to adverse information against them is an important aspect of the right to a fair hearing.

2.88 The minister's response appears to point to the continued availability of judicial review as a relevant safeguard:

> A parole decision is an administrative decision that is made having regard to a range of matters that are listed in section 19ALA of the *Crimes Act 1914*. The decision of the Attorney-General is appealable and subject to review in the Federal Court. Once before a court, the ordinary rules of evidence in relation to a civil proceeding will apply. Proposed section 22B in the Bill is restricted to parole decisions made under Part IB of the *Crimes Act 1914* and will not bind a court reviewing the decision of the Attorney-General.

2.89 While the availability of judicial review may operate as an important safeguard, it does not fully address the concern that a person may be unable to respond to allegations in the context of a parole decision. As such, the measure may not be a proportionate limitation on the right to a fair hearing.

Committee response

2.90 The committee thanks the minister for his response and has concluded its examination of this issue.

2.91 The preceding analysis indicates that the measure may raise concerns in relation to the right to a fair hearing.

2.92 The committee recommends that consideration be given to amending the bill to require that, where information is being withheld and it would not prejudice national security, the person be provided with an overview of the relevant information or document, prior to the making of the parole decision.

Reverse burden offence

2.93 Items 16, 18, 37 and 39 of Schedule 4 propose to introduce new defences or add to existing defences in relation to two new offences being introduced by this bill. The changes would make it a defence for a defendant to a prosecution for certain child sex abuse offences if the defendant proves that at the relevant time the defendant believed that the child was at least 16 years of age or that another person was under 18. Pursuant to section 13.4 of the Criminal Code, the measure would thereby impose a legal burden of proof on the defendant, such that the defendant would need to prove, on the balance of probabilities, their belief at the relevant time.

Compatibility of the measure with the right to be presumed innocent

2.94 Article 14(2) of the ICCPR protects the right to be presumed innocent until proven guilty according to law. The right to be presumed innocent usually requires that the prosecution prove each element of the offence beyond reasonable doubt.

2.95 An offence provision which requires the defendant to carry an evidential or legal burden of proof (commonly referred to as 'a reverse burden') with regard to the existence of some fact engages and limits the presumption of innocence. This is because a defendant's failure to discharge the burden of proof may permit their conviction despite reasonable doubt as to their guilt. Where a statutory exception, defence or excuse to an offence is provided in legislation, these defences or exceptions may effectively reverse the burden of proof and must be considered as part of a contextual and substantive assessment of potential limitations on the right to be presumed innocent in the context of an offence provision.

2.96 Reverse burden offences will not necessarily be inconsistent with the presumption of innocence provided that they are within reasonable limits which take into account the importance of the objective being sought and maintain the defendant's right to a defence. In other words, such provisions must pursue a legitimate objective, be rationally connected to that objective and be a proportionate means of achieving that objective. The committee's *Guidance Note 2* sets out some of the key human rights compatibility issues in relation to reverse burden offences. The initial human rights analysis identified that the statement of compatibility has not addressed whether the reverse burden offences in this case are a permissible limit on the right to be presumed innocent. It is noted in particular that it is proposed to impose a legal burden of proof on the defendant. The imposition of an evidential burden of proof would appear to be an available less-rights restrictive alternative.

2.97 The committee therefore requested the advice of the minister as to:

- whether the reverse burden offence is aimed at achieving a legitimate objective for the purposes of international human rights law;

- how the reverse burden offence is effective to achieve (that is, rationally connected to) that objective; and
- whether the limitation is a reasonable and proportionate measure to achieve the stated objective.

Minister's response

2.98 In response to the committee's inquiries in this regard, the minister provided an explanation as to the elements of the offences and why they are appropriate:

> Items 5 and 27 of Schedule 4 of the Crimes Legislation Amendment (Sexual Crimes Against Children and Community Protection Measures) Bill 2017 introduce new offences into the Criminal Code to criminalise the grooming of a third party. The offences require the prosecution to prove, beyond reasonable doubt:
>
> - the defendant intended to use a carriage service or postal service to transmit a communication or article to a recipient
> - the sender did so with the intention of making it easier to procure a child under 16 years of age to engage in sexual activity with:
>   - the sender, or
>   - a participant who is, or who the sender believes to be, at least 18 years of age; or
>   - another person who is, or who the sender believes to be, under 18 years of age, in the presence of the sender or participant who is, or who the sender believes to be, over 18 years of age; and
> - the child was under 16, or the sender believed the child was under 16.
>
> Items 7, 8, 28 and 29 of Schedule 4 apply absolute liability to the elements of the offence relating to the age of the child and/or the participant (where relevant). This means that the prosecution will not be required to prove that the defendant knew these elements. Rather, the prosecution will have to demonstrate that the child and/or the participant were in fact under 16 years of age and over 18 years of age respectively when the communication or article was sent.
>
> Items 9 and 30 provide that evidence of representations made to the defendant that a person was under or over a particular age will serve as proof, in absence of evidence to the contrary, that the defendant believed the person to be under or over that age (as the case requires). These provisions offer a potential safeguard for the defendant in leading contradictory evidence as to his or her belief of the age of the child or participant.
>
> The effect of applying absolute liability to these elements is ameliorated by the introduction of specific defences based on the defendant's belief

about the child and/or participant's age (items 16, 18, 37 and 39). Section 13.4 and 13.5 of the Criminal Code provide that in the case of a legal burden of proof placed on the defendant, a defendant must discharge the burden on the balance of probabilities. If the defendant does this, it will then be for the prosecution to refute the matter beyond reasonable doubt.

The application of absolute liability, together with the belief about age defences, is consistent with the other grooming offences in the Criminal Code and is appropriate given the intended deterrent effect of these offences. Placing a legal burden of proof on the defendant in relation to belief about age defences is appropriate for these new offences as the defendant is best placed to adduce evidence about his or her belief that the child and/or participant was over the age of 16 and under the age of 18 respectively. The defendant's belief as to these circumstances at the relevant time is a matter peculiarly within his or her knowledge and not readily available to the prosecution.

It is important to note that an offence will still be committed where the defendant believes the child is under the age of 16 years, regardless of the actual circumstances of the offending. This is necessary to accommodate a standard investigatory technique where a law enforcement officer assumes the identity of a fictitious child, interacting with a potential predatory adult and arresting the adult before they have the opportunity to sexually abuse a real child. A person who engages in conduct to procure a child to engage in sexual activity is not able to escape liability for an offence even if their conduct was not ultimately directed towards an actual child.

The application of absolute liability, together with the belief about age defences, is appropriate as the defendant is best placed to adduce evidence about his or her belief. The defences in the Bill are a reasonable and proportionate way to achieve the intended deterrent effect of these offences.

2.99 The minister's response identifies the objective of the reverse burden and absolute liability aspects of the offences as having a deterrent effect. In light of the types of offences, this is likely to constitute a legitimate objective for the purposes of international human rights law. The minister's response further indicates that these measures are likely to be rationally connected to this objective with reference to the elements of the offences and investigatory techniques. In relation to the proportionality of the limitation on the right to be presumed innocent, the minister's response argues that the scope of these measures maintain the defendant's right to a defence. The minister's response explains that the defendant is best placed to adduce evidence about his or her belief that the child and/or participant was over the age of 16 or under the age of 18 respectively. This belief is a matter peculiarly within his or her knowledge and not readily available to the prosecution. Accordingly,

these reverse burden and absolute liability offences are likely to be a proportionate limitation on the right to be presumed innocent.

Committee response

2.100 The committee thanks the minister for his response and has concluded its examination of this issue.

2.101 The committee notes that the offences are likely to be compatible with the right to be presumed innocent.

Migration Amendment (Prohibiting Items in Immigration Detention Facilities) Bill 2017

Purpose	Seeks to enable the Minister for Immigration and Border Protection to prohibit certain items in immigration detention facilities. The bill also amends the search and seizure powers in immigration detention, including the use of strip searches to identify and seize prohibited items
Portfolio	Immigration and Border Protection
Introduced	House of Representatives, 13 September 2017
Rights	Privacy; family; freedom of expression; cruel, inhuman and degrading treatment; humane treatment in detention, children's rights (see **Appendix 2**)
Previous report	11 of 2017
Status	Concluded examination

Background

2.102 The committee first reported on the Migration Amendment (Prohibiting Items in Immigration Detention Facilities) Bill 2017 (the bill) in its *Report 11 of 2017*, and requested a response from the Minister for Immigration and Border Protection by 1 November 2017.[1]

2.103 The minister's response to the committee's inquiries was received on 2 November 2017. The response is discussed below and is reproduced in full at **Appendix 3**.

Prohibiting items in relation to persons in immigration detention and the immigration detention facilities

2.104 The bill seeks to amend the *Migration Act 1958* (the Migration Act) to regulate the possession of certain items in immigration detention facilities. Proposed section 251A(2) enables the minister to determine, by legislative instrument, whether an item is a 'prohibited thing'[2] if the minister is satisfied that:

1 Parliamentary Joint Committee on Human Rights, *Report 11 of 2017* (17 October 2017) 19-34.

2 Section 251A(1) provides that a thing is a *prohibited thing* in relation to a person in detention, or in relation to an immigration detention facility, if: (a) both: (i) possession of the thing is unlawful because of a law of the Commonwealth, or a law of the State or Territory in which the person is detained, or in which the facility is located; and (ii) the thing is determined under paragraph (2)(a); or (b) the thing is determined under paragraph (2)(b).

(a) possession of the thing is prohibited by law in a place or places in Australia; or

(b) possession or use of the thing in an immigration detention facility might be a risk to the health, safety or security of persons in the facility, or to the order of the facility.

2.105 The bill includes a note which states that examples of things that might be considered to pose a risk for the purposes of section 251(2)(b) are mobile phones, SIM cards, computers and other electronic devices such as tablets, medications or health care supplements in specific circumstances, or publications or other material that could incite violence, racism or hatred.

Compatibility of the measure with the right to privacy

2.106 Article 17 of the International Covenant on Civil and Political Rights (ICCPR) prohibits arbitrary and unlawful interferences with an individual's privacy, family, correspondence or home. This includes a requirement that states parties do not arbitrarily interfere with a person's private and home life.

2.107 A private life is linked to notions of personal autonomy and human dignity. It includes the idea that individuals should have an area of autonomous development; a 'private sphere' free from government intervention and excessive unsolicited intervention by others. Additionally, for persons in detention, the degree of restriction on a person's right to privacy must be consistent with the standard of humane treatment of detained persons under Article 10(1) of the ICCPR.[3] Article 10 provides extra protection for persons in detention who are particularly vulnerable as they have been deprived of their liberty, and imposes a positive duty on states parties to provide detainees with a minimum of services to satisfy basic needs, including means of communication and privacy.[4] Persons in detention, including those in detention serving a term of imprisonment for a criminal offence, have the right to correspond under necessary supervision with families and reputable friends on a regular basis.[5]

2.108 Where a person is detained for an immigration purpose, supervision of detainees' correspondence must be understood in the context that detainees are not being detained whilst serving a term of imprisonment but rather are in administrative detention pending determination of their visa application and/or removal from Australia.

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3 *Angel Estrella v Uruguay,* UN Human Rights Committee Communication No. 74/80, UN Doc. CCPR/C/18/D/74/1980 (1983) [9.2].

4 See UN Human Rights Committee, *General Comment No.21: Article 10 (Humane Treatment of Persons Deprived of their Liberty)* (1992)

5 *Angel Estrella v Uruguay,* UN Human Rights Committee Communication No. 74/80, UN Doc. CCPR/C/18/D/74/1980 (1983) [9.2].

2.109 The bill states that the items that will be declared as 'prohibited things' will be set out in a legislative instrument. However, as noted earlier, both the bill itself and the explanatory memorandum state that examples of items that might be considered to be a 'prohibited thing' includes mobile phones and SIM cards. The initial human rights analysis stated that, therefore, while the precise items to be prohibited remain to be determined by legislative instrument,[6] by establishing the mechanism by which the minister may declare certain items to be prohibited (including mobile phones), the bill engages and limits the right to privacy. In particular, this aspect of the bill may interfere with detainees' private life and right to correspond with others without interference.

2.110 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, they must seek to achieve a legitimate objective and be reasonable, necessary and proportionate to achieving that objective.

2.111 The statement of compatibility does not specifically acknowledge the engagement of the right to privacy in relation to the prohibition of items in immigration detention. However, the statement of compatibility acknowledges that the bill engages and limits the right to privacy in relation to the new search and seizure powers, which includes the power to search and seize 'prohibited things'.[7] In this respect, the statement of compatibility notes that the objective of the bill is to 'provide for a safe and secure environment for people accommodated at, visiting or working at an immigration detention facility'.[8] The statement of compatibility states that the limitation on the right to privacy is proportionate as it is 'commensurate to the risk that currently exists in immigration detention facilities',[9] and further states that:

> These amendments are also proportionate to the serious consequences of injury to staff and detainees, and the greater Australian community if these risks are not properly managed. Any limitations on this right, through the search and seizure for things which are prohibited in immigration detention facilities, are reasonable, necessary and proportionate and are directed at the legitimate objective of protecting the health, safety and security of people in immigration detention and or to the order of the facility.[10]

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6 The committee will consider the human rights compatibility of the proposed legislative instrument once it is received.

7 Statement of Compatibility (SOC) 25. The human rights compatibility of the search and seizure powers are discussed further below.

8 SOC 24.

9 SOC 25.

10 SOC 25.

2.112 The risk that is said to exist in immigration detention is described by the minister in the statement of compatibility as follows:

> More than half of the detainee population consists of high-risk individuals who do not hold a visa, pending their removal from Australia. This includes members of outlaw motorcycle gangs and other organised crime groups whose visas have been cancelled or refused.
>
> The change to the demographics of the detention population is due to the Government's successful border protection policy and the increase in visa refusal or cancellation on character grounds resulting from implementing the Government's commitment to protecting the Australian community from non-citizens of serious character concern. However, the changing nature of the detention population has seen an increase in illegal activities in immigration detention facilities across Australia…
>
> Currently mobile phones are enabling criminal activity within the immigration detention network. Activity facilitated or assisted by mobile phone usage includes:
>
> - drug distribution
> - maintenance of criminal enterprises in and out of detention facilities
> - commodity of exchange or currency
> - owners of mobile phones being subjected to intimidation tactics (including theft of the phone)
> - threats and /or assaults between detainees including an attempted contract killing.
>
> In addition to the above mobile phones have been used to coordinate disturbances and escapes.[11]

2.113 The initial analysis noted that protecting the health, safety and security of people in immigration detention and/or to the order of the facility is likely to be a legitimate objective for the purposes of international human rights law. Prohibiting certain items that may enable criminal activity within the immigration detention network also appears to be rationally connected to that objective.

2.114 To be a proportionate limitation on the right to privacy, the limitation should only be as extensive as is strictly necessary to achieve its legitimate objective and must be accompanied by appropriate safeguards. The initial analysis outlined that prohibiting items in immigration detention for *all* detainees in immigration detention appears to be broader than necessary to address the stated objective. The minister's explanatory memorandum and statement of compatibility note that immigration detention facilities accommodate a number of higher risk detainees who have

11 SOC 24.

entered immigration detention directly from a correctional facility, including child sex offenders and members of outlaw motorcycle gangs.[12] However, the bill applies to all detainees regardless of whether or not they pose a risk. This appears to include, for example, persons detained while awaiting determination of refugee or other status who may not pose any risk of the kind described in the statement of compatibility yet may have items that allow them to communicate with family and friends, such as mobile phones, prohibited. It is also noted that the requisite threshold for whether an item constitutes a risk is low, as the minister need only be satisfied that an item *might* pose a risk before making that item prohibited for all detainees. These matters were cited as raising serious concerns that the measure is overly broad and may not be the least rights restrictive way to achieve the stated objective for the purposes of international human rights law.

2.115 Further, the initial analysis stated that another relevant consideration in determining the proportionality of a measure is whether there are adequate safeguards or controls over the measures. In particular, laws that interfere with the right to privacy must specify in detail the precise circumstances in which such interferences may be permitted.[13] As noted earlier, proposed section 251A(2) provides that the minister may determine a thing be prohibited if she or he is 'satisfied' that (relevantly) possession or use of the thing in an immigration detention facility might be a risk to the health, safety or security of persons in the facility, or to the order of the facility. No information is provided in the statement of compatibility as to how, and under what circumstances, the minister may be 'satisfied' that an item may pose a risk. For example, it is not clear whether the minister's state of satisfaction is subject to any objective criteria, such as that of reasonable satisfaction, or that the risk is common to all detainees such that prohibition of the item is warranted in all cases.

2.116 The committee therefore sought the advice of the minister as to whether the measure is a proportionate limitation on the right to privacy, in particular:

- whether the measure is sufficiently circumscribed and the least rights restrictive way to achieve the stated objective for the purposes of international human rights law; and
- whether the measure is accompanied by adequate safeguards to protect against arbitrary application (including whether the minister's state of satisfaction when determining whether an item is to be prohibited must be 'reasonable' or that the risk arises in relation to all detainees).

12 Explanatory Memorandum 2; SOC 24.

13 UN Human Rights Committee, *General Comment No.16: The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation,* (1988), para 8.

Minister's response

2.117 In response to the committee's inquiries as to whether the measure is sufficiently circumscribed and the least rights restrictive way to achieve the stated objective, the minister explains in his response the difficulties associated with maintaining the current approach to the possession of mobile phones by detainees in which 'Illegal Maritime Arrival' detainees are not permitted mobile phones, but other detainees are permitted. In particular, the minister explains:

> Removing things such as mobile phones from the Immigration Detention Network (IDN) altogether, rather than providing only certain detainees with access, is operationally achievable and the most effective way to mitigate risk. This approach is essential to maintain the safety of all detainees, staff and the order of facilities. It is the least restrictive way to manage the threat that things such as mobile phones pose to the IDN, as any case-by-case or individual-risk-based access results in individuals seeking to obtain these things via trades or being susceptible to standover tactics from other detainees. The use of mobile phones as a commodity, and to facilitate illegal and antisocial behaviour, has been occurring across the IDN for a number of years, and has increased since Illegal Maritime Arrival detainees have not been permitted mobile phones in detention. This presents serious risks to both detainees and staff.

1.17 It appears from the minister's response that the current policy of prohibiting possession of mobile phones from a specific group, referred to as "Illegal Maritime Arrivals", has led to the use of mobile phones as a commodity within immigration detention. It is acknowledged that risks may be associated with applying a case-by-base or individual-risk-based approach, and a blanket policy may be operationally easier. However, the current 'two-tier' system is a policy which also appears not to be based on the risk posed by the individual,[14] and raises the same concerns regarding whether it is a proportionate limit on the right of affected persons to privacy and to correspond with family and friends. It is not clear from the minister's response why it is necessary to address the problems of current policy by expanding the prohibition to all detainees and to an even broader range of items, rather than allowing access to mobile phones to those persons who are currently denied such access.

2.118 In any event, significant concerns remain insofar as the proposed amendments could significantly restrict the reasonable expectation of privacy of low or no risk detainees due to the behaviour of high risk detainees. It follows from the information provided in the statement of compatibility and the minister's response that a substantial proportion of persons who are not high risk individuals and are in immigration detention will be subject to these amendments. There would appear to

14 This policy has been in force since 2010: for a summary, see *SZSZM v Minister for Immigration & Ors* [2017] FCCA 819 at [37]-[42].

be other, less rights restrictive, options available to mitigate risk, such as separate housing facilities for high risk detainees, whose behaviour is the stated rationale for the measures.

2.119 Further, concerns remain as to the adequacy of the safeguards to protect against arbitrary application. In this respect, the minister's response states:

> The Department of Immigration and Border Protection (the Department) uses an intelligence led, risk based approach to focus on mitigating the risks, including security risks, posed by the complex composition of the detention network. The Department has implemented a broad suite of program management initiatives aimed at defining its objectives and associated program requirements, in order to sufficiently identify emerging issues before they impact negatively on the IDN. These initiatives include the development and implementation of a risk management framework designed specifically to identify and counter associated risks. The Onshore Immigration Detention Network Risk Management Framework provides a range of tools, including a centrally administered national risk register that enables a standardised approach to both strategic and operational risk assessment and reporting.
>
> As part of the process of identifying emerging issues, the Department monitors detention population and capacity, incident analysis trends, intelligence reports and other statistics to support assessment of risks and associated decisions, as part of due diligence business processes. Sitting under the national risk framework, tactical risk assessments are also conducted in relation to the implementation of new business policies or procedures.
>
> Prior to making an item a 'prohibited thing' the Minister will need to be satisfied that possession of the thing is prohibited by law in a place or places in Australia; or possession or use of the thing in an immigration detention facility might be a risk to the health, safety or security of persons in the facility, or to the order of the facility. This satisfaction on the part of the Minister will be informed by intelligence-based briefings from the Department.
>
> As the proposed amendments will enable the Minister to determine, by legislative instrument, prohibited things in relation to immigration detention facilities; the Minister will be able to respond quickly if operational requirements change or as emerging risks are identified. However, as the prohibition is by way of legislative instrument, any decisions by the Minister to prohibit an item will be open to scrutiny by Parliament thus providing an appropriate balance of transparency.

2.120 It is noted that the minister's assessment of making an item a 'prohibited thing' is informed by the intelligence-based briefings pursuant to the Department of Immigration's risk management framework. However, concerns remain that the breadth of the minister's power means that the threshold to declare an item as a prohibited item is low, as the minister need only be satisfied that an item *might* pose

a risk. For this reason, concerns remain that the minister's power is overly broad. Further, it is noted that the proposed instrument appears to be exempt from disallowance.[15] For the purposes of international human rights law, serious concerns remain that prohibiting items through a non-disallowable legislative instrument is not a sufficient safeguard to protect detainees' right to privacy. It is also noted that broad powers and discretions conferred on the executive may themselves be incompatible with international human rights law where the scope of the power and manner of its exercise is not identified with sufficient clarity.[16]

Committee response

2.121 The committee thanks the minister for his response and has concluded its examination of this issue.

2.122 The preceding analysis indicates that, noting the broad scope of the proposed power to declare items as 'prohibited things' (including mobile phones), there is a risk that the operation of section 251A(2) would be incompatible with the right to privacy. This is because the scope of the power, and the absence of sufficient safeguards, is such that the power could be exercised in a way that is likely to be incompatible with the right to privacy.

2.123 Noting that the items to be prohibited will be determined by legislative instrument, if the bill is passed, the committee will consider the human rights implications of the legislative instrument further once it is received.

Compatibility of the measure with the right not to be subjected to arbitrary or unlawful interference with family

2.124 The right to respect for the family is protected by articles 17 and 23 of the ICCPR and article 10 of the International Covenant on Economic, Social and Cultural Rights (ICESCR). An important element of protection of the family, discussed above in relation to the right to privacy, includes the right to correspond with families when in detention. By providing that the minister will be able to specify by legislative instrument that items including mobile phones, computers and SIM cards will be 'prohibited things', the measure engages and limits the right to respect for the family. The statement of compatibility acknowledges that the right to respect for the family is engaged and limited by the bill. However, the statement of compatibility states that the measures 'do not represent an interference with family' on the following bases:

> The Department acknowledges that regular contact with family and friends supports detainee resilience and mental health and is committed to

15 See the minister's response to the Inquiries of the Scrutiny of Bills Committee in *Scrutiny of Bills Digest 13 of 2017* (15 November 2017) pp 118-119.

16 See *Hasan and Chaush v Bulgaria* (2000) ECHR Application no. 30985/96 (26 October 2000), [84].

> ensuring detainees have reasonable access to means of maintaining contact with their support networks. This contact will continue to be facilitated through the availability of landline telephones, internet access, access to facsimile machines and postal services. Additionally, immigration detention facilities will continue to facilitate visits by detainees' family members and other visitors.
>
> The Department has, and continues to, review the availability of telephone, internet and facsimile facilities for use by detainees across the immigration detention network, to ensure these facilities are adequate to contact and be contacted by family, friends and legal representatives. As a result of reviews, additional landline telephones have been installed at most immigration detention facilities. This has meant that detainees have even greater and more readily available access to means of communication with their families.
>
> The amendments do not represent an interference with family, given detainees have other readily available communication channels at their disposal to communicate with their families.[17]

2.125 However, it is noted that a mobile telephone, for example, may be an important mechanism for detainees and families to maintain regular and ongoing contact with each other. In this context, prohibiting this item would appear to limit the right to respect for the family.

2.126 As noted earlier, the stated objective of the measure (protecting the health, safety and security of people in immigration detention and/or to the order of the facility) is likely to be a legitimate objective for the purposes of international human rights law and the measure appears to be rationally connected to that objective.

2.127 However, the initial analysis explained that there are questions as to whether the measure is a proportionate interference with the right to respect for the family. In particular, while the minister states in the statement of compatibility that detainees have other available communication channels at their disposal to communicate with their families, the extent of that access was not clear from the information provided. For example, whereas the use of a mobile telephone could occur at any time of day and in a private setting (such as in a detainee's room), it was not clear that the availability of landline telephones, internet access, access to facsimile machines and postal services would provide a similar degree of privacy. In particular, no information was provided as to the ease, frequency and cost of access to landline telephones and the internet (and any restrictions upon that access), and the extent of supervision when accessing those facilities (including whether detainees can speak with family members in a private room or in a more public area). This raised questions as to whether the measure is the least rights restrictive way to achieve the stated objective for the purposes of international human rights law.

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2.128 Accordingly, the committee sought the advice of the minister as to whether the measure is a proportionate limitation on this right, in particular whether the measure is the least rights restrictive way to achieve the stated objective. It was noted that information regarding the extent of access to landline telephones, internet access, access to facsimile machines and postal services (including any restrictions on access, and the privacy afforded to detainees when accessing) would assist in determining the proportionality of the measure.

Minister's response

2.129 The minister's response firstly reiterates the government's view, outlined above in relation to the right to privacy, that prohibiting certain items for all detainees rather than on an individual case-by-case basis was 'the only way to implement such a measure without risking the health, safety or security of all persons in the facility'. The minister further explained that this provided 'a consistent single-tier policy that mitigates the risks associated with the current two-tier approach to the possession of mobile phones by detainees'. In this respect, the concerns raised above in relation to the right to privacy apply equally in the context of the right to protection of the family.

2.130 The minister's response also gave a detailed outline of the other communication avenues available to detainees to maintain contact with their families:

> Detainees are able to access a variety of communication avenues to maintain contact with family. These include landline phones, internet, fax, post services and visits from community members. Landline phones, fax and post facilities are available 24 hours a day, seven days a week with no limits on access. Internet is available to detainees through a booking system, generally between the hours of 6 am to 11.59 pm. Each facility has different visiting hours, which are available on the Department's website.
>
> Detainees are not required to lodge a request to use the landline phones, fax or post facilities. The booking system to access the internet is straightforward and there are no delays in this process. The application process for personal visits has a processing time of up to five business days. The application process for visits by legal representatives, agents or consular officials has a processing time of one business day. Visit applications are available via the Facilities and Detainee Services Provider (FDSP) and departmental websites.
>
> Landline to landline calls are free of charge. An Individual Allowance Program is in place within detention facilities, allowing detainees to earn up to 60 points per week (one point equals one dollar). Detainees can use these points to 'purchase' phone cards for international and mobile calls, and postage stamps, all of which are charged at standard rates. Use of internet and fax facilities are all free of charge.

> Detainees are able to access these communication channels in private settings. Landline phones are typically in private booths and in accommodation areas. Private rooms with phones can also be accessed by detainees. Private rooms for computer and internet use can also be accessed, under appropriate supervision as required. Any faxes received for detainees are treated with strictest confidence, are sealed in an envelope and provided to the detainee on the same day during business hours, or the next day if received after business hours. Any urgent faxes are delivered within four hours of receipt. Private interview rooms can also be used for detainees to meet with legal representatives, agents or any other meeting of a professional nature.

2.131 The further information provided by the minister provides more clarity as to the extent of access available to detainees to communicate with their families. These alternative communication channels are relevant to the question of proportionality. Concerns remain in relation to the extent to which detainees may have access to communication with family overseas as a result of the implementation of this measure. In particular, mobile telephones may allow detainees to receive calls and messages free of charge, including from those overseas and those on mobile devices. In contrast, requiring detainees to purchase phone cards for international and mobile calls (where such calls are charged at standard rates) through an Individual Allowance Program may involve considerably more expense for detainees. There may also be other practical difficulties which may limit or preclude contact with family members overseas, for example if the detainee has not earned sufficient points through the Individual Allowance Program to purchase a phone card.

2.132 Whether the other alternative communication channels are sufficiently extensive and offer sufficient privacy to allow detainees to communicate with their families will depend on the extent of access available in a specific immigration detention centre. For example, where private rooms with phones are accessible to detainees, and that access is readily available (for example, there are a sufficient number of private rooms available so that detainees can access the rooms at short notice and with little wait time), that may tend to suggest that the measure is a proportionate limitation on the right not to be subjected to arbitrary interference with family. However, if such facilities were limited or not readily available or accessible, it is unlikely that the availability of landline phones in private booths and in accommodation areas would overcome the significant impact on detainees' ability to privately communicate with their families, as such facilities do not offer the same level of privacy as the use of a mobile telephone which could be used at any time of day and in a private setting (such as in a detainee's room). As the minister's response indicates, visiting times for the detention centres differ by facility, and are subject to

the express stipulation that the opening times can vary, which is also relevant to the proportionality of the measure.[18]

Committee response

2.133 The committee thanks the minister for his response and has concluded its examination of this issue.

2.134 In light of the broad wording of the power to prohibit certain items from detention centres (including mobile phones and other electronic devices such as tablets), there is a serious risk that the implementation of this measure may impermissibly limit detainees' right not to be subjected to arbitrary or unlawful interference with family. The alternative means of communication available to detainees as a matter of policy may be capable of addressing some of these concerns. However, it is noted that providing for these alternative means of communication as a matter of policy rather than as legislative protections provides a less stringent level of protection.

2.135 The committee recommends that the implementation of the measure in each detention centre be monitored by government to ensure that individuals are able to maintain an adequate and sufficiently private level of communication with families that is consistent with the right not to be subjected to arbitrary or unlawful interference with family.

Compatibility of the measure with the right to freedom of expression

2.136 The right to freedom of expression is protected by article 19 of the ICCPR. The right to freedom of expression includes the freedom to seek, receive, and impart information and ideas of all kinds, either orally, in writing or in print or through any other media of a person's choice.[19] The initial analysis stated that, by restricting access to 'prohibited things' including mobile phones and SIM cards, the bill engages and limits the freedom of expression insofar as it limits the ability of detainees to seek, receive and impart information.

2.137 The minister acknowledges in the statement of compatibility that the freedom of expression is engaged by the bill. However, the minister considers that the freedom of expression is not limited on the following bases:

> Although mobile phones and SIM cards will be specified as 'prohibited things', a number of alternative communication avenues will remain available to detainees. These include landline telephones, access to the internet, access to facsimile machines and postal facilities. The Department has, and continues to, review the availability of these communication facilities for use by detainees across the immigration detention network to ensure these facilities are adequate to contact and

18 See https://www.border.gov.au/about/immigration-detention-in-australia/locations

19 ICCPR, article 19(2).

> be contacted by family, friends and legal representatives. As a result of reviews, additional landline telephones have been installed at most immigration detention facilities. Detainees therefore have even greater access to means of communication. Additionally, immigration detention facilities will continue to facilitate visits by detainees' family members and other visitors.
>
> The amendments do not limit the right to freedom of expression, given the various other avenues of communication that are readily available to detainees.[20]

2.138 Under article 19(3) of the ICCPR, freedom of expression may be subject to limitations that are necessary to protect the rights or reputations of others, national security, public order, or public health or morals. Limitations must be prescribed by law, pursue a legitimate objective, be rationally connected to the achievement of and proportionate to that objective.[21]

2.139 In determining whether limitations on the freedom of expression are proportionate, the UN Human Rights Committee has previously noted that restrictions on the freedom of expression must not be overly broad.[22] In particular, the UN Human Rights Committee has observed:

> When a State party invokes a legitimate ground for restriction of freedom of expression, it must demonstrate in specific and individualized fashion the precise nature of the threat, and the necessity and proportionality of the specific action taken, in particular by establishing a direct and immediate connection between the expression and the threat.[23]

2.140 As noted above in relation to the right to privacy, the restrictions on certain items in immigration detention appears to apply to all detainees regardless of whether or not those detainees pose a risk. While some alternative means of communication may be available (in some detention centres), it does not appear that these will be equivalent to current mechanisms. For example, mobile telephones have a range of functions such as taking photos and video that may be used to exercise freedom of expression including in relation to conditions of detention. Access to a mobile telephone may also allow detainees more ready access to legal advice or other support persons than alternative means of communication. The previous analysis outlined that this raised questions as to whether the measure is

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

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

23 UN Human Rights Committee, *General Comment No.34: Article 19: Freedoms of Opinion and Expression* (2011), [35].

sufficiently circumscribed and the least rights restrictive way to achieve the stated objective for the purposes of international human rights law.

2.141 The committee therefore sought the advice of the minister as to whether the measure is a proportionate limitation on the freedom of expression, in particular whether the measure is sufficiently circumscribed and the least rights restrictive way to achieve the stated objective.

Minister's response

2.142 The minister's response provides the following information in this regard:

> As noted in respect to the previous response regarding arbitrary or unlawful interference with family, the Government is of the view that the extensive nature of the facilities provided to detainees, their open availability and the manner in which they are provided ensures that the prohibition of certain items, such as mobile phones in immigration detention facilities is a proportionate limitation on the freedom of expression. The measure is sufficiently circumscribed and the least rights restrictive way to achieve the stated objective.

2.143 As noted earlier in relation to the right not to be subject to arbitrary or unlawful interference with family, whether the alternative communication facilities are sufficiently extensive so as to not impermissibly limit freedom of expression will depend on the extent of access available in a specific immigration detention centre. However, it is noted that the alternative communication facilities do not appear to provide an equivalent opportunity for individuals to be able to communicate (for example through writing, taking videos and photographs) on matters such as conditions of detention as that provided by mobile phones, computers and other electronic devices such as tablets. The alternative communication facilities also impose greater restrictions on possession of reading materials or publications that people in Australia may otherwise be free to access and read, which limits detainees' ability to seek and receive information and all kinds of ideas through media of their choice. Therefore, notwithstanding the alternative facilities available, serious concerns remain that the implementation of the measure may not be the least rights-restrictive way to achieve the stated objective of the measure.

Committee response

2.144 The committee thanks the minister for his response and has concluded its examination of this issue.

2.145 In light of the broad wording of the power to prohibit certain items from detention centres (including mobile phones, computers and other electronic devices such as tablets), there is a serious risk that the implementation of this measure may impermissibly limit detainees' right to freedom of expression. The alternative means of communication available to detainees as a matter of policy may be capable of addressing some of these concerns. However, it is noted that providing for these alternative means of communication as a matter of policy

rather than through legislative protections provides a less stringent level of protection.

2.146 The committee recommends that the implementation of the measure in each detention centre be monitored by government to ensure that individuals are able to maintain sufficient access to communication channels that are consistent with the right to freedom of expression.

Amended search and seizure powers in relation to prohibited things in relation to detainees and detention facilities

2.147 At present, searches on detainees may only be undertaken for limited purposes. For example, at present a strip search may only be conducted to find out whether a detainee has a weapon or other thing capable of being used to inflict bodily injury or to help a detainee escape.[24]

2.148 The bill seeks to strengthen the search and seizure powers in the Migration Act to allow for searches for a 'prohibited thing'. This includes the ability to search a person, the person's clothing and any property under the immediate control of the person for a 'prohibited thing',[25] the ability to take and retain possession of a 'prohibited thing' if found pursuant to search,[26] the ability to use screening equipment or detector dogs to screen a detainee's person or possessions to search for a 'prohibited thing',[27] and the ability to conduct strip searches to search for a 'prohibited thing'.[28] There is also an amendment to the powers to search and screen persons entering the immigration detention facility (such as visitors), including a power to request persons visiting centres to remove outer clothing (such as a coat) if an officer suspects a person has a prohibited thing in his or her possession, and to leave the prohibited thing in a place specified by the officer while visiting the immigration detention facility.[29]

2.149 A further search power introduced by the bill is the power for an authorised officer to, without warrant, conduct a search of an immigration detention facility including accommodation areas, common areas, detainees' personal effects, detainees' rooms, and storage areas.[30] In conducting such a search, an authorised officer who conducts a search 'must not use force against a person or property, or

24 Section 252A of the Migration Act.

25 Proposed section 252(2)(c).

26 Proposed section 252(4A).

27 Proposed amendment to sections 252AA(1),(3A),(3AA).

28 Proposed amendment to section 252A(1).

29 Proposed amendment to section 252G(3),(4).

30 Proposed section 252BA.

subject a person to greater indignity, than is reasonably necessary in order to conduct the search'.[31]

Compatibility of the measures with the right to freedom from torture, cruel, inhuman and degrading treatment or punishment and rights to humane treatment

2.150 Article 7 of the ICCPR provides that no person shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.[32] This right is an absolute right, and thus no limitations on this right are permissible under international human rights law. The aim of article 7 is to protect both the dignity and the physical and mental integrity of the individual.[33] Article 10 of the ICCPR, which guarantees a right to humane treatment in detention, complements article 7 such that there is a positive obligation on Australia to take actions to prevent the inhumane treatment of detained persons.[34]

2.151 The UN Human Rights Committee has indicated that United Nations standards applicable to the treatment of persons deprived of their liberty are relevant to the interpretation of articles 7 and 10 of the ICCPR.[35] In this respect, the *United Nations Standard Minimum Rules for the Treatment of Prisoners* (Mandela Rules) state that intrusive searches (including strip searches) should be undertaken only if absolutely necessary, that prison administrations shall be encouraged to develop and use appropriate alternatives to intrusive searches, and that intrusive searches shall be conducted in private and by trained staff of the same sex as the prisoner.[36] Further, the European Court of Human Rights (ECHR) has found that strip searching of detainees may violate the prohibition on torture and cruel, inhuman or degrading treatment or punishment where it involves an element of suffering or humiliation going beyond what is inevitable for persons in detention.[37] While the Court accepted that strip-searches may be necessary on occasion to ensure prison security or to prevent disorder or crime, the Court emphasised that prisoners must

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31 Proposed section 252BA(6).

32 The prohibition against torture, cruel, inhuman or degrading treatment or punishment is also protected by the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

33 UN Human Rights Committee, *General Comment No. 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment)* (1992) [2].

34 UN Human Rights Committee, *General Comment No. 21: Article 10 (Humane Treatment of Persons Deprived of their Liberty)* (1992) [3].

35 UN Human Rights Committee, *General Comment No. 21: Article 10 (Humane Treatment of Persons Deprived of their Liberty)* (1992) [10].

36 Rule 52(1) of the *United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules*).

37 *Frerot v France,* European Court of Human Rights Application No.70204/01, 12 June 2007 [35]-[49].

be detained in conditions which are compatible with respect for their human dignity.[38]

2.152 As noted in the initial analysis, the statement of compatibility does not acknowledge whether the right to freedom from torture, cruel, inhuman and degrading treatment or punishment is engaged. However, by providing the minister with the power to conduct strip searches to find out whether there is a 'prohibited thing' hidden on a detainee, it appears that this right is engaged. The right also appears to be engaged by the power in section 252BA to use force where reasonably necessary to conduct searches of immigration detention facilities.

2.153 The amended search and seizure powers also appear to engage the right to humane treatment of persons in detention in article 10 of the ICCPR. In this respect, the statement of compatibility acknowledges that the amendments to the search and seizure powers may engage article 10. The minister emphasises a number of current provisions and additional safeguards in place in relation to strip searches:

> ***Current provisions***
>
> With regard to strip searches under section 252A of the Migration Act, authorisation must continue to be obtained from the departmental Secretary or Australian Border Force Commissioner (or a Senior Executive Service Band 3 level delegate) prior to a strip search being undertaken. Strip searches will also remain subject to rules currently set out at section 252B of the Migration Act, which include (but are not limited to):
>
> (1) A strip search of a detainee under section 252A:
>
> - must not subject the detainee to greater indignity than is reasonably necessary to conduct the strip search;
> - must be conducted in a private area;
> - must not be conducted on a detainee who is under 10;
> - must not involve a search of the detainee's body cavities;
> - must not be conducted with greater force than is reasonably necessary to conduct the strip search.

38 *Frerot v France,* European Court of Human Rights Application No.70204/01, 12 June 2007 [35]-[49].

Additional protections

Additionally, the amendments seek to introduce a number of provisions to protect detainees and their property. These include section 252BA - Searches of certain immigration detention facilities - general. This section includes sub-paragraph 252BA(6) - an authorised officer who conducts a search under this section must not use more force against a person or property, or subject a person to greater indignity, than is reasonably necessary in order to conduct the search.

The use of detector dogs will be subject to a number of protections. For example, section 252AA(3A) provides that if an authorised officer uses a dog in conducting a screening procedure, the officer must:

(a) take all reasonable precautions to prevent the dog touching any person (other than the officer); and

(b) keep the dog under control while conducting the screening procedure.

The amendments also set out a number of provisions that seek to return certain 'prohibited things' to detainees on their release from detention. For example, section 252CA(2) will provide that an authorised officer must take all reasonable steps to return a 'prohibited thing' seized during a screening procedure, a strip search or a search of an immigration detention facility to the detainee on their release from detention, if it appears that the thing is owned or was controlled by the detainee.

2.154 The statement of compatibility contends that the amendments are consistent with the right under Article 10 as there are sufficient protections provided by law to ensure that respect for detainees' inherent dignity is maintained during the conduct of searches.[39]

2.155 The initial analysis assessed that the safeguards set out in the statement of compatibility and contained in section 252A of the Migration Act indicate that there is oversight of the conduct of strip searches. However, it was noted that the current power to conduct strip searches is limited to circumstances where there are reasonable grounds to suspect a detainee may have hidden in his or her clothing a weapon or other thing capable of being used to inflict bodily injury or to help the detainee escape from detention.[40] The amendments will extend this power to where an officer suspects on reasonable grounds that a person may have hidden on the person a 'prohibited thing', which is any item declared to be prohibited by the minister. Given the broad power of the minister to declare an item a 'prohibited thing' (discussed above), this considerably expands the bases upon which strip searches can be conducted, which raises serious questions as to whether the

39 SOC 28.

40 Section 252A(1) of the Migration Act.

expanded powers to conduct strip searches are consistent with the requirement under international human rights law that strip searches only be conducted when absolutely necessary.

2.156 Further, in relation to the power of authorised officers to use force to conduct searches of immigration detention facilities, while the power limits the use of force to 'not…more force…than is reasonably necessary in order to conduct the search', it was noted that no information is provided in the statement of compatibility as to whether there is any oversight over the exercise of that power, such as consideration of any particular vulnerabilities of the detainee who is subjected to the use of force (such as age, gender, disability or mental health concerns), and any access to review to challenge the use of force.

2.157 In relation to the prohibition on torture, or cruel, inhuman and degrading treatment or punishment, the committee sought the advice of the minister in relation to the compatibility of the measure with this right (including the sufficiency of any relevant safeguards, whether strip searches to seize 'prohibited items' are only conducted when absolutely necessary, and any monitoring and oversight over the use of force by authorised officers).

2.158 In relation to the right to humane treatment in detention, the committee sought the advice of the minister as to:

- the adequacy of the safeguards in relation to strip searches, in particular whether conducting strip searches to seize 'prohibited items' are conducted only when absolutely necessary; and
- whether there exists any monitoring and oversight over the use of force by authorised officers in section 252BA(6), including access to review for detainees to challenge the use of force.

Minister's response

2.159 The minister's response restates the safeguards that exist currently in the Migration Act that regulate the conduct of strip searches in immigration detention facilities and also reiterates that these existing safeguards are complemented by further safeguards proposed in the bill. The minister further explains that departmental operating procedures state that strip searches are a measure of last resort, that detainees must be treated with respect and dignity when being strip searched, and strip searches should be applied only when other less intrusive measures have proven inconclusive or insufficient. These operating procedures appear to be departmental policy rather than a legal requirement.

2.160 As to the safeguards in place relating to the use of force by authorised officers, the minister's response explains:

> In some cases the use of force and/or restraint while in held [sic] immigration detention may be necessary in order to achieve lawful and operational outcomes in the IDN.

> The Department has developed a set of principles that guide the application of use of force and/or restraint in the immigration detention environment. These principles ensure that any application of use of force or restraint used in immigration detention will not meet the threshold levels of severity of harm so as to be torture or cruel, inhuman or degrading treatment or punishment and are only used as a last resort. The principles set out that:
>
> - conflict resolution through negotiation and de-escalation is, where practicable, to be considered before the use of force and/or restraint is used
> - reasonable force and/or restraint should only be used as a measure of last resort
> - reasonable force and/or restraint may be used to prevent the detainee inflicting self-injury, injury to others, escaping immigration detention or destruction of property
> - reasonable force and/or restraint may only be used for the shortest amount of time possible to the extent that is both lawfully and reasonably necessary. If the management of a detainee can be achieved by other means, force must not be used
> - the use of force and/or restraint must not include cruel, inhumane or degrading treatments
> - the use of force and/or restraint must not be used for the purposes of punishment
> - the excessive use of force and/or restraint is unlawful and must not occur in any circumstances
> - the use of excessive force on a detainee may constitute an assault.
>
> It is important to note that all instances where use of force and/or restraint are applied (including any follow-up action), must be reported in accordance with the relevant reporting protocols.

2.161 The minister's response also provides information on the training that is provided to authorised officers who are authorised to conduct searches under proposed sections 252AA and 252A, as well as the relevant qualifications that must be obtained by authorised officers. In particular, the minister explains that authorised officers receive training in relation to the use of reasonable force, including training of legal responsibilities, duty of care and human rights, mental health awareness, and managing conflict through negotiation. There is also specific training in relation to conducting strip searches.

2.162 The advice from the minister as to the policies and procedures that govern the conduct of strip searches and use of force is relevant to the assessment of whether the proposed expanded search and seizure powers are of sufficient gravity to potentially breach the absolute prohibition on torture, or cruel, inhuman and

degrading treatment or punishment. It is also relevant in determining whether the proposed powers may constitute inhumane treatment contrary to article 10. It is noted that departmental policies and procedures are less stringent than legislation. Departmental policies can be removed, revoked or amended at any time, and are not subject to the same levels of scrutiny or accountability as if the policies governing strip searches (such as that such searches be a measure of last resort) were enshrined in legislation.

2.163 It is also noted that while the minister's response outlines the training curriculum and qualifications required to be obtained by authorised officers undertaking searches or using reasonable force in immigration detention, there is not sufficient information provided as to the substance of the training curriculum (for example, the content and extent of the training relating to 'duty of care and human rights') to determine whether that training is sufficient to meet Australia's obligations under articles 7 and 10 of the ICCPR.

2.164 The minister's response also outlines internal and external oversight mechanisms that govern the treatment of persons detained in immigration detention. The minister explains that internally, the department undertakes an internal audit of the detention control framework and has a 'Detention Assurance' team which works with stakeholders to ensure improvement of immigration detention services and processes. Externally, the Department works with several external bodies (the Minister's Council on Asylum Seekers and Detention, the Commonwealth Ombudsman, the Australian Human Rights Commission and the Australian Red Cross) to provide for regular access to immigration detention facilities to allow for review of the management of the facilities. The minister also provides the following information relating to complaints management processes available to detainees:

> Complaints and feedback are integral to the continuous improvement process for the Department and its contractors. Complaints might come from a number of sources, including detainees, visitors, departmental staff and contractors.
>
> Detainees have a right to lodge a complaint or provide feedback on any aspect of their immigration detention without hindrance or fear of reprisal. To that end, the FDSP is required to have in place a complaints management system to manage complaints or feedback from detainees as well as members from the community and other stakeholders.
>
> Detainees are also able to make complaints directly to the Commonwealth Ombudsman, the Australian Human Rights Commission, the police and state / territory child welfare authorities.
>
> All complaints are investigated and a written response provided to the complainant.

2.165 These internal and external mechanisms offer a degree of oversight and access to review for persons subject to the new search and seizure powers or use of

force provisions in the bill. It is noted, however, that these mechanisms may not be sufficient for the purpose of ensuring compliance with the prohibition on torture, cruel, inhuman and degrading treatment, particularly where the oversight mechanisms are internal and discretionary or administrative, and taken in the context of the broadened power to conduct strip searches or use force in the proposed law. The UN human rights committee has held that complaints against maltreatment must be investigated promptly and impartially by competent authorities,[41] that compensation must be available to victims of such treatment, and any perpetrators of such treatment be appropriately punished.[42] It is unclear that the policies meet these standards. This raises a further concern that there may not be adequate protection of the right to an effective remedy for violations of human rights. In the absence of legislative protections within the Migration Act for effective oversight of the search and seizure powers and the use of force (including compensation for any mistreatment), there remains a risk that the exercise of the proposed powers may be incompatible with the prohibition on torture, or cruel, inhuman and degrading treatment or punishment or may constitute inhumane treatment of persons in detention.

Committee response

2.166 The committee thanks the minister for his response and has concluded its examination of this issue.

2.167 While there are a number of safeguards in the Migration Act regulating the proposed search and seizure and use of force powers, concerns remain that a number of significant safeguards (including the requirement that strip searches only be conducted as a matter of last resort and that the use of force and/or restraint must not be excessive) are contained in departmental policies rather than in legislation. There is therefore a risk that the proposed powers may be exercised in a way that is incompatible with the prohibition on torture, cruel, inhuman and degrading treatment and which may constitute inhumane treatment of persons in detention.

2.168 It is also unclear that the available mechanisms to investigate complaints of mistreatment and provide remedies are sufficient to meet the standards required under international human rights law.

2.169 The committee recommends that the additional departmental safeguards governing the use of force and search and seizure powers that are currently included in departmental policy be included in the Migration Act.

41 *Kalamiotis v Cyprus,* UNHRC No. 1486/06 [7.3].

42 See *Guridi v Spain,* CAT 212/02 [6.6]-[6.8].

Compatibility of the measures with the right to bodily integrity

2.170 The right to privacy extends to protecting a person's bodily integrity. Body searches, and in particular strip searches, are an invasive procedure and may violate a person's legitimate expectation of privacy. The initial analysis assessed that the amendments to allow searches of persons, including strip searches, to seize prohibited items therefore engage and limit the right to bodily integrity. The UN Human Rights Committee has emphasised that personal and body searches must be accompanied by effective measures to ensure that such searches are carried out in a manner consistent with the dignity of the person who is being searched, and further that persons subject to body searches should only be examined by persons of the same sex.[43]

2.171 As noted above, limitations on the right to privacy and to bodily integrity may be permissible where it is pursuant to a legitimate objective, is rationally connected to (that is effective to achieve) that objective, and is proportionate to achieve that objective.

2.172 As noted at [2.111] above, the statement of compatibility acknowledges that the amended search and seizure powers engage and limit the right to privacy, but considers that any limitation on this right is proportionate 'to the serious consequences of injury to staff and detainees, and the greater Australian community if these risks are not properly managed'.[44] As noted above in relation to the right to freedom from torture, cruel, inhuman and degrading treatment or punishment and the right to humane treatment in detention, the statement of compatibility also identifies a number of safeguards that are in place when conducting strip searches, quoted in full at [2.153] above.

2.173 Limitations on the right to bodily integrity should only be as extensive as is strictly necessary to achieve the legitimate objective (that is, the limitation must be appropriately circumscribed). In relation to the power to strip search to locate and seize a 'prohibited thing', no information is provided in the statement of compatibility as to whether consideration is given to alternative and less-intrusive methods of searching for prohibited items prior to conducting a strip search. For example, in relation to mobile telephones, the initial analysis noted that it is unclear why it would be necessary to undertake a strip search when alternative and less intrusive screening methods, such as a walk-through metal detector, may adequately identify if a mobile phone is in a person's possession. It would appear that a strip search is not necessarily a method of last resort, as section 252A(7) provides that strip searches may be conducted irrespective of whether a search or screening procedure is conducted under sections 252 and 252AA (which are less intrusive).

43 UN Human Rights Committee, *General Comment No.16: The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation,* (1988) [8].

44 SOC 25.

This raised concerns as to whether this aspect of the bill is the least rights restrictive option available.

2.174 It was also noted that while there are limitations placed on the power to conduct strip searches (such as a requirement that an officer must suspect 'on reasonable grounds' that a person may have items hidden on them, and it is 'necessary' to conduct a strip search to recover the item[45]), the bases on which an officer may form a suspicion on reasonable grounds are broad. In particular, one of the bases upon which an officer may form a suspicion on reasonable grounds is based on 'any other information that is available to the officer'.[46] The statement of compatibility does not explain what 'any other information' may entail.

2.175 The committee therefore sought the advice of the minister as to whether the limitation on the right to bodily integrity is proportionate, in particular whether the power to conduct strip searches to locate and seize a 'prohibited item' is the least rights restrictive measure available, and whether the power to conduct a strip search is appropriately circumscribed.

Minister's response

2.176 In response to the committee's inquiries in this regard, the minister's response states:

> For the same reasons noted in the response to the prohibition on torture, or cruel, inhuman and degrading treatment or punishment, the Government is of the view that the limitation on the right to bodily integrity is proportionate. The power to conduct a strip search currently exists under section 252A of the Migration Act and importantly, strip searches conducted under section 252A will remain subject to rules currently set out at section 252B of the Migration Act, which include (but are not limited to) that a strip search of a detainee under section 252A:
>
> - must not subject the detainee to greater indignity than is reasonably necessary to conduct the strip search
> - must be conducted in a private area
> - must be conducted by an authorised officer of the same sex as the detainee
> - must not be conducted on a detainee who is under 10
> - must be conducted in the presence of an adult or person representing the detainee's interests, if the detainee is between the ages of 10 and 18 or is incapable of managing his or her affairs

45 Section 252A(3)(a) and (b) of the Migration Act.

46 Section 252A(3A)(c). The other grounds upon which suspicion on reasonable grounds may be formed are based on a search conducted under section 252 or a screening procedure conducted under section 252AA: section 252A(3A)(a) and (b).

- must not involve a search of the detainee's body cavities
- must not be conducted with greater force than is reasonably necessary to conduct the strip search.

2.177 As noted in the initial analysis and above in relation to the prohibition on torture, cruel, inhuman and degrading treatment or punishment, while section 252A of the Migration Act contains a number of safeguards, concerns remain in particular that a number of the circumstances that limit the exercise of power (such as the requirement that strip searches be a measure of last resort) are only addressed as matters of departmental policy rather than as a safeguard in the legislation. Concerns remain, therefore, that the measure is not the least rights restrictive measure and may be exercised in such a way that is incompatible with the right to bodily integrity.

2.178 It is also noted that the minister has not specifically addressed the committee's concerns raised in the initial analysis that the bases on which an officer may form a suspicion on reasonable grounds that a person may be in possession of a prohibited thing may not be sufficiently circumscribed. As noted in the initial analysis, in light of the broad nature of the power to prohibit, search for and seize 'prohibited things' that is introduced by the bill, and the obligation under international human rights law that limitations on privacy are appropriately circumscribed, serious concerns remain as to whether this aspect of the bill is a proportionate limitation on the right to privacy.

Committee response

2.179 The committee thanks the minister for his response and has concluded its examination of this issue.

2.180 There are serious concerns that the bases upon which an officer may form a suspicion on reasonable grounds that a person may be in possession of a prohibited thing may not be sufficiently circumscribed, and therefore may not be a proportionate limitation on the right to privacy.

2.181 While there are a number of safeguards in the Migration Act regulating the proposed search and seizure and use of force powers, concerns remain that a number of significant safeguards (including the requirement that strip searches only be conducted as a matter of last resort and that the use of force and/or restraint must not be excessive) are contained in departmental policies rather than in legislation. There is therefore a risk that the proposed powers may be exercised in a way that is incompatible with the right to privacy.

2.182 The committee recommends that the additional departmental safeguards governing the use of force and search and seizure powers that are currently included in departmental policy be included in the Migration Act.

Compatibility of the measures with the rights of children

2.183 While the Migration Act prohibits strip searches of children under the age of 10,[47] children detained in immigration facilities between the ages of 10 and 18 may be subject to the search and seizure powers, including strip searches, under specified conditions.[48] In this respect, a number of Australia's obligations under the Convention on the Rights of the Child (CRC) are engaged. In particular, the amended search and seizure powers may engage article 16 of the CRC, which provides that no child shall be subject to arbitrary or unlawful interference with his or her privacy. The bill may also engage article 37 of the CRC which provides (relevantly) that children must not be subjected to torture or other cruel, inhuman or degrading treatment or punishment,[49] and that every child deprived of their liberty shall be treated with humanity and respect for the inherent dignity of the human person.[50]

2.184 The initial analysis identified that, while the statement of compatibility discusses the right to privacy, the right to freedom from torture, cruel, inhuman or degrading treatment and the right to humane treatment in detention as they apply to all persons, it does not specifically acknowledge that the rights of the child in particular are engaged or limited by the bill.

2.185 The committee therefore sought the advice of the minister as to whether the amended search and seizure powers (in particular the power to strip search) are compatible with the rights of the child, in particular articles 16 and 37 of the CRC.

Minister's response

2.186 In relation to the compatibility of the measure with the rights of the child, the minister's response states:

> The Government has made significant efforts to ensure children are no longer in immigration detention. The Government is of the view that the amended search and seizure powers, with their associated internal and external oversight mechanisms are compatible with the rights of the child, in particular articles 16 and 37 of the Convention on the Rights of the Child. The amended search and seizure powers seek to reduce the risk to the health, safety and security of persons in the facility, or the order of the facility and complements the strip search powers currently in the Act.
>
> While the power to strip search a person between 10 and 18 years of age remains, the search can only occur by power of a Magistrate. It is clearly stated in departmental operating procedures that strip searches are a

47 Section 252B(1)(f) of the Migration Act.

48 For example, for a detainee who is at least 10 but under 18, only a magistrate may order a strip search: section 252A(3)(c)(ii).

49 Article 37(a).

50 Article 37(c).

measure of last resort, should be applied only when other less intrusive measures have proven inconclusive or insufficient and detainees must always be treated with the utmost respect and dignity when being strip searched. Other less intrusive measures include:

- screening procedures — such as walk-through devices, hand-held scanners or x-rays
- searching — such as a pat down search.

Strip searches under section 252A will also remain subject to rules currently set out at section 252B, which include (but are not limited to) that a strip search of a detainee under section 252A:

- Must not subject the detainee to greater indignity than is reasonably necessary to conduct the strip search
- Must be conducted in a private area
- Must be conducted by an authorised officer of the same sex as the detainee
- Must not be conducted on a detainee who is under 10
- Must be conducted in the presence of an adult or person representing the detainee's interests, if the detainee is between the ages of 10 and 18 or is incapable of managing his or her affairs
- Must not involve a search of the detainee's body cavities
- Must not be conducted with greater force than is reasonably necessary to conduct the strip search.

The Department has also developed 'The Child Safeguarding Framework' (the framework) which provides the blueprint for how the Department will continue to build and strengthen its policies, processes and systems to protect children in the delivery of all relevant departmental programmes, and asserts the pre-eminence of 'the best interests of the child' as a key consideration in decision-making processes that affect minors.

The framework clearly establishes the Department's expectations of staff and contracted service providers, who engage, interact and work with children. It outlines high-level actions and strategies that the Department and our contracted service providers will take to provide a safe environment for children and their families within the existing legislative and policy parameters. The policy requires that a departmental officer or contracted service provider must immediately report a child-related incident to their supervisor and the Department's Child Wellbeing Branch, in accordance with local operating procedures and within the relevant departmental system.

2.187 It is noted that there are a number of safeguards included in the Migration Act (such as the requirement that the strip search of a child may only occur by power of a Magistrate) and in departmental policies that are designed to protect the rights

of children in detention who may be subject to the proposed search and seizure powers and proposed use of force powers. However, it is also noted that a number of the safeguards, in particular the requirement that the bests interests of the child be a key consideration in decision-making processes and the requirement that strip searches be undertaken as a measure of last resort, are contained in a departmental framework rather than in legislation. As noted earlier, departmental policies and procedures are less stringent than legislation insofar as such policies can be removed, revoked or amended at any time, and are not subject to the same levels of scrutiny as if the safeguards were enshrined in legislation. Therefore, concerns remain that the proposed search and seizure powers and use of force provisions may be exercised in such a way that is incompatible with children's rights.

Committee response

2.188 The committee thanks the minister for his response and has concluded its examination of this issue.

2.189 While there are a number of safeguards in the Migration Act regulating the proposed search and seizure and use of force powers in relation to children, concerns remain that a number of significant safeguards (including the requirement that strip searches only be conducted as a matter of last resort and that the best interests of the child be a key consideration in the decision-making process) are contained in departmental policies and frameworks rather than in legislation. There is therefore a risk that the proposed powers may be exercised in a way that is incompatible with children's rights.

2.190 The committee recommends that the additional safeguards governing the use of force and search and seizure powers on children that are currently included in departmental policy and the Child Safeguarding Framework be included in the Migration Act.

Mr Ian Goodenough MP

Chair