Chapter 1

New and continuing matters

1.1 This chapter provides assessments of the human rights compatibility of:

- bills introduced into the Parliament between 15 October and 15 November (consideration of 1 bill from this period has been deferred);[1]
- legislative instruments registered on the Federal Register of Legislation between 19 September and 18 October (consideration of 2 legislative instruments from this period has been deferred);[2] and
- bills and legislative instruments previously deferred.

1.2 The chapter also includes reports on matters previously raised, in relation to which the committee seeks further information following consideration of a response from the legislation proponent.

1.3 The committee has concluded its consideration of four instruments that were previously deferred.[3]

Instruments not raising human rights concerns

1.4 The committee has examined the legislative instruments registered in the period identified above, as listed on the Federal Register of Legislation. Instruments raising human rights concerns are identified in this chapter.

1.5 The committee has concluded that the remaining instruments do not raise human rights concerns, either because they do not engage human rights, they contain only justifiable (or marginal) limitations on human rights or because they promote human rights and do not require additional comment.

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1 See Appendix 1 for a list of legislation in respect of which the committee has deferred its consideration. The committee generally takes an exceptions based approach to its substantive examination of legislation.

2 The committee examines legislative instruments registered in the relevant period, as listed on the Federal Register of Legislation. See, https://www.legislation.gov.au/.

3 These are: Aged Care (Transitional Provisions) Amendment (September 2018 Indexation) Principles 2018 [F2018L01299]; National Health Security Regulations 2018 [F2018L01247]; Australian National Maritime Museum Regulations 2018 [F2018L01294]; and National Library Regulations 2018 [F2018L01295].

Response required

1.6 The committee seeks a response or further information from the relevant minister or legislation proponent with respect to the following bills and instruments.

Migration Amendment (Strengthening the Character Test) Bill 2018

Purpose	Seeks to amend the *Migration Act 1958* to provide additional grounds for visa cancellation or refusal where a non-citizen commits a 'designated offence'
Portfolio	Immigration, Citizenship and Multicultural Affairs
Introduced	House of Representatives, 25 October 2018
Rights	Non-refoulement; effective remedy; expulsion of aliens; liberty; protection of the family; rights of children; freedom of movement; privacy
Status	Seeking additional information

Background

1.7 The committee has previously considered the power of the minister to cancel or refuse a visa on character grounds pursuant to section 501 of the *Migration Act 1958* (Migration Act). In the *Thirty-Sixth Report of the 44th Parliament,* the committee concluded that the strengthened powers to cancel or refuse a person's visa introduced by the Migration Amendment (Character and General Visa Cancellation) Bill 2014 were likely to be incompatible with a number of human rights, including Australia's obligations in relation to non-refoulement and the right to an effective remedy, the right to liberty, and the right to freedom of movement. The committee also considered that the strengthened powers may be incompatible with the right to freedom of association, and the right to freedom of opinion and expression.[1]

1 Parliamentary Joint Committee on Human Rights, *Thirty-Sixth Report of the 44th Parliament* (16 March 2016) pp. 195–217. See also *Nineteenth Report of the 44th Parliament* (3 March 2015) pp. 13-28. The committee has also considered that measures introduced by the Migration Amendment (Validation of Decisions) Bill 2017, which retrospectively validated visa cancellation and refusal decisions that had been made in reliance on confidential information protected by a former provision of the Migration Act that had been found to be invalid by the High Court, was likely to be incompatible with a number of human rights: see *Report 11 of 2017* (17 October 2017) pp. 92-116; *Report 10 of 2017* (12 September 2017) pp. 5-26; *Report 8 of 2017* (15 August 2017) pp. 32-43.

Power to cancel or refuse a visa when a non-citizen commits a 'designated offence'

1.8 The bill seeks to introduce amendments to the character test in section 501 of the Migration Act so that the minister may cancel or refuse a non-citizen's visa where the non-citizen has been convicted of a 'designated offence'.[2] A 'designated offence' is an offence against a law in force in Australia or a foreign country where one or more of the physical elements of the offence involves:

- violence against a person, including (without limitation) murder, manslaughter, kidnapping, assault, aggravated burglary and the threat of violence; or
- non-consensual conduct of a sexual nature, including (without limitation) sexual assault and the non-consensual commission of an act of indecency or sharing of an intimate image; or
- breaching an order made by a court or tribunal for the personal protection of another person; or
- using or possessing a weapon[3]

1.9 The definition of 'designated offence' also includes ancillary offences in relation to the commission of a designated offence, such that a person may fail the character test and be liable for visa refusal or cancellation where a person is convicted of an offence where one or more of the physical elements of the offence involves:

- aiding, abetting, counselling or procuring the commission of an offence that is a designated offence; or
- inducing the commission of an offence that is a designated offence, whether through threats or promises or otherwise; or
- being in any way (directly or indirectly) knowingly concerned in, or a party to, the commission of an offence that is a designated offence; or
- conspiring with others to commit an offence that is a designated offence.[4]

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2 Section 501(6)(aaa) of the bill. Some of these powers to cancel a person's visa may be exercised by a delegate of the minister: see section 501(1) and 501(2).

3 Section 501(7AA)(a)(i)-(iv) of the bill. 'Weapon' is defined to include a thing made or adapted for use for inflicting bodily injury, and a thing where the person who has the thing intends or threatens to use the thing, or intends that the thing be used, to inflict bodily injury: section 501(7AB) of the bill.

4 Section 501(7AA)(a)(v)-(viii) of the bill.

1.10 Further, to be a 'designated offence', the offence must be punishable by imprisonment for life, for a fixed term of not less than two years, or for a maximum term of not less than two years.[5]

1.11 The minister may already cancel or refuse a person's visa on the basis of the person's past or present criminal conduct.[6] However the existing framework generally focuses on a sentence-based approach whereby, for example, the determination of whether a person has a 'substantial criminal record' is by reference to a person's sentence of imprisonment.[7] The proposed amendments provide additional bases upon which the minister may cancel or refuse a visa by reference to the length of time for which the 'designated offence' may be punishable, rather than the length of time for which the person is sentenced.

Compatibility of the measures with non-refoulement obligations and the right to an effective remedy

1.12 Australia has 'non-refoulement' obligations under the International Covenant on Civil and Political Rights (ICCPR) and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT). This means that Australia must not return any person to a country where there is a real risk that they would face persecution, torture or other serious forms of harm, such as the death penalty; arbitrary deprivation of life; or cruel, inhuman or degrading treatment or punishment.[8] Non-refoulement obligations are absolute and may not be subject to any limitations.

1.13 A consequence of a person's visa being cancelled or refused is that the person will be an unlawful non-citizen and will be liable to removal from Australia as

5 Section 501(7AA)(b)(i)-(iii) of the bill, in relation to offences against a law in force in Australia. For offences against the law in force in a foreign country, an offence will be considered a designated offence if it were assumed that the act or omission that formed the basis of the offence occurred in the Australian Capital Territory (ACT) and the act or omission would also have been an offence against a law in force in the ACT and the offence, if committed in the ACT, would have been punishable by life imprisonment, imprisonment for a fixed term of not less than two years or a maximum term of not less than two years: section 501(7AA)(c).

6 See, for example, Migration Act, section 501(6)(a) and (c).

7 Migration Act, section 501(7).

8 Committee against Torture, *General Comment No.4 (2017) on the implementation of article 3 in the context of article 22* (9 February 2018).

soon as reasonably practicable.[9] Such persons are also prohibited from applying for most other visas.[10]

1.14 The statement of compatibility acknowledges that the removal of a person from Australia following visa refusal or cancellation on character grounds engages Australia's non-refoulement obligations. However, it states that:

> Australia remains committed to its international obligations concerning non-refoulement. These obligations are considered as part of the decision whether to refuse or cancel a visa on character grounds. Anyone who is found to engage Australia's non-refoulement obligations during the refusal or cancellation decision or in subsequent visa or Ministerial Intervention processes prior to removal will not be removed in breach of those obligations.[11]

1.15 However, section 197C of the Migration Act provides that, for the purposes of exercising removal powers, it is irrelevant whether Australia has non-refoulement obligations in respect of an unlawful non-citizen. Therefore, notwithstanding the commitment in the statement of compatibility not to remove a person in breach of non-refoulement obligations, there is no statutory protection available to ensure that an unlawful non-citizen to whom Australia owes protection obligations will not be removed from Australia.[12] As the bill expands the bases upon which persons' visas can be refused or cancelled and consequently the circumstances under which a person may be removed from Australia, the human rights compatibility of the underlying removal provisions of the Migration Act, such as section 197C, is relevant in assessing whether the measures in the bill are compatible with Australia's non-refoulement obligations. The committee has previously considered that section 197C, by permitting the removal of persons from Australia unconstrained by Australia's non-refoulement obligations, is incompatible with Australia's obligations under the ICCPR and CAT.[13]

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9 Migration Act, section 198.

10 Migration Act, section 501E. While section 501E(2) provides that a person is not prevented from making an application for a protection visa, that section also notes that the person may be prevented from applying for a protection visa because of section 48A of the Migration Act. Section 48A provides that a non-citizen who, while in the migration zone, has made an application for a protection visa and that visa has been refused or cancelled, may not make a further application for a protection visa while the person is in the migration zone.

11 Statement of Compatibility (SOC), p.12.

12 The minister's power to cancel or refuse a visa on character grounds extends to persons on protection visas: see Note 1 to section 501 of the Migration Act which states that "Visa is defined by section 5 and includes, but is not limited to, a protection visa".

13 See the committee's analysis of the Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014 in Parliamentary Joint Committee on Human Rights, *Fourteenth Report of the 44th Parliament* (October 2014) pp. 77-78.

1.16 Further, the obligation of non-refoulement and the right to an effective remedy require an opportunity for independent, effective and impartial review of decisions to deport or remove a person.[14] Such review mechanisms are important in guarding against the potentially irreparable harm which may be caused by breaches of Australia's non-refoulement obligations.[15]

1.17 There is no right to merits review of a decision that is made personally by the minister to refuse or cancel a person's visa on character grounds.[16] The committee has considered on a number of previous occasions that in the Australian domestic legal context the availability of merits review would likely be required to comply with Australia's obligations under international law.[17] While judicial review of the minister's decision to cancel a person's visa on character grounds remains available, the committee has previously concluded that judicial review in the Australian context is not likely to be sufficient to fulfil the international standard required of 'effective review' of non-refoulement decisions.[18] This is because judicial review is only available on a number of restricted grounds and represents a limited form of review in that it allows a court to consider only whether the decision was lawful (that is, within the power of the relevant decision maker). The court cannot undertake a full review of the facts (that is, the merits), as well as the law and policy aspects of the

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14 ICCPR, article 2 (the right to an effective remedy). See, for example, *Singh v Canada,* UN Committee against Torture Communication No.319/2007 (30 May 2011) [8.8]-[8.9]; *Alzery v Sweden*, UN Human Rights Committee Communication No. 1416/2005 (20 November 2006) [11.8]. See, also, Parliamentary Joint Committee on Human Rights, *Report 11 of 2018* (16 October 2018) pp. 82-98; *Report 2 of 2017* (21 March 2017) pp. 10-17; *Report 4 of 2017* (9 May 2017) pp. 99-111.

15 *Alzery v Sweden*, UN Human Rights Committee Communication No.1416/2005(20 November 2006) [11.8].

16 Only decisions of a delegate of the minister to cancel a person's visa under section 501 may be subject to merits review by the administrative appeals tribunal: see section 500(1)(b) of the Migration Act. Decisions for which merits review is not available include decisions of the minister personally exercising the visa refusal or cancellation power under section 501, and also decisions of the minister personally to set aside a decision by a delegate or the AAT not to exercise the power to refuse or cancel a person's visa and to substitute it with their own decision to refuse or to cancel the visa: section 501A of the Migration Act. Merits review is also unavailable where the minister exercises the power to set aside a decision of a delegate to refuse to cancel a person's visa and substitute it with their own refusal or cancellation under section 501B.

17 See, most recently, in relation to the Migration (Validation of Port Appointment) Bill 2018 in Parliamentary Joint Committee on Human Rights, *Report 11 of 2018* (16 October 2018) pp. 84-90. See also Parliamentary Joint Committee on Human Rights, *Thirty-sixth report of the 44th Parliament* (16 March 2016) pp. 196-202; *Report 12 of 2017* (28 November 2017) p. 92 and *Report 8 of 2018* (21 August 2018) pp. 25-28.

18 See, for example, Parliamentary Joint Committee on Human Rights, *Report 11 of 2018* (16 October 2018) pp. 84- 90. See also *Singh v Canada,* UN Committee against Torture Communication No.319/2007 (30 May 2011) [8.8]-[8.9].

original decision to determine whether the decision is the correct or preferable decision. This raises concerns that the proposed expansion of the visa refusal and cancellation powers may be incompatible with Australia's non-refoulement obligations.

Committee comment

1.18 The preceding analysis indicates that the proposed expansion of the minister's power to cancel or refuse a visa is likely to be incompatible with Australia's non-refoulement obligations and the right to an effective remedy.

1.19 The committee therefore seeks the advice of the minister as to:

- **whether decisions to remove a person once a visa has been refused or cancelled pursuant to the proposed expanded powers to cancel or refuse a visa is compatible with Australia's non-refoulement obligations in light of section 197C of the Migration Act; and**
- **whether decisions to remove a person once a visa has been refused or cancelled pursuant to the proposed expanded powers to cancel or refuse a visa is subject to sufficiently 'independent, effective and impartial review' so as to comply with Australia's non-refoulement obligations and the right to an effective remedy.**

Compatibility of the measures with the right to liberty

1.20 The right to liberty prohibits the arbitrary and unlawful deprivation of liberty.[19] The notion of 'arbitrariness' includes elements of inappropriateness, injustice and lack of predictability. Accordingly, any detention must not only be lawful, it must also be reasonable, necessary and proportionate in all of the circumstances. Detention that may initially be necessary and reasonable may become arbitrary over time if the circumstances no longer require detention. In this respect, regular review must be available to scrutinise whether the continued detention is lawful and non-arbitrary. The right to liberty applies to all forms of deprivations of liberty, including immigration detention.

1.21 Under the Migration Act, the cancellation of a person's visa on character grounds results in that person being classified as an unlawful non-citizen and subject to mandatory immigration detention prior to removal.[20] The detention of a non-citizen on cancellation of their visa pending deportation will not generally constitute arbitrary detention, as it is permissible to detain a person for a reasonable time pending their deportation. However, in the context of mandatory detention, in which individual circumstances are not taken into account, and where there is no right to periodic judicial review of the detention, there may be circumstances where the

19 ICCPR, article 9.

20 Migration Act, section 189.

detention could become arbitrary under international human rights law.[21] This is most likely to apply in cases where the person may be subject to indefinite or prolonged detention as the person cannot be returned to their home country because they may be subject to persecution there. On this basis, the expanded powers to cancel a person's visa where they have committed a 'designated offence', the consequence of which is that the person will be an unlawful non-citizen and subject to mandatory immigration detention, engages the prohibition against arbitrary detention.

1.22 The statement of compatibility states that:

> The amendments do not change the framework within which the character cancellation powers function. These new grounds do not enliven mandatory cancellation powers. The amendments only seek to provide additional, specified grounds to consider refusing or cancelling a visa. The decision to refuse or cancel a visa using these grounds will be discretionary.[22]

1.23 While the existing provisions relating to the detention of persons following cancellation of a visa are not amended by the bill, in order to consider the human rights compatibility of the expanded visa cancellation powers it is necessary to consider the proposed amendments in the context within which they will operate. Further, while the amendments in the bill apply only to the minister's discretionary cancellation power and not the mandatory cancellation power,[23] a consequence of the exercise of the discretionary cancellation power would be mandatory immigration detention. Therefore, to the extent the additional grounds to refuse or cancel a visa may provide additional circumstances in which a person may be detained, the existing provisions of the Migration Act are relevant.

1.24 Limitations on the right to liberty are permissible provided the limitation supports a legitimate objective, is rationally connected to that objective, and is a proportionate way to achieve that objective.

1.25 The statement of compatibility describes the objective of the bill as follows:

> The object of the Bill is to amend the character test to provide a specific and objective ground to consider cancellation or refusal of a visa where a non-citizen has been convicted of a serious crime. It aligns with community expectations that non-citizens who have committed serious offences should not be allowed to remain in the Australian community.[24]

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21 See, for example, *MGC v Australia,* UN Human Rights Committee Communication No. 1875/2009 (7 May 2015).

22 SOC, p.6.

23 The mandatory cancellation power is contained under section 501(3A) of the Migration Act.

24 SOC, p.11.

1.26 Tolerance and broadmindedness are the hallmarks of a democratic society, and so restrictions on rights of persons purely based on what might offend public opinion (or may not align with 'community expectations') is not generally considered a legitimate objective.[25] On this basis, the stated objective of aligning the character test with 'community expectations' does not appear to be a legitimate objective for the purposes of international human rights law.

1.27 The statement of compatibility also states that the measures are a 'reasonable response to achieving a legitimate purpose under the ICCPR – the safety of the Australian community and the integrity of the migration programme'.[26] Protecting the safety of the Australian community and the integrity of the migration programme may be capable of being legitimate objectives for the purposes of international human rights law. However, to be a legitimate objective, the objective must be one that is pressing and substantial and not one that simply seeks an outcome that is desirable or convenient. In this respect, the statement of compatibility also provides the following information as to the concern the measures seek to address:

> Currently the character provisions in the Act enable a visa to be refused or cancelled on the basis of offences where the non-citizen has received a sentence of 12 months or more or was convicted of sexual criminal offences involving a child. While there is also a provision that allows consideration of refusal or cancellation of a visa based on a person's past and present criminal or general conduct, the amendments in this Bill provide a clearer and more objective basis for refusing or cancelling the visa of a non-citizen whose offending has not attracted a sentence of 12 months or more, but who nonetheless poses an unacceptable risk to the safety of law-abiding citizens and non-citizens. For example, the breach of an Apprehended Violence Order (or similar). The amendments expand the framework beyond a primarily sentence-based approach and instead allow the Minister or delegate to look at the individual circumstances of the offending and the severity of the conduct.[27]

1.28 The statement of compatibility indicates that the current character test provisions in section 501 of the Act enable a visa to be refused or cancelled in circumstances that fall within the definition of 'designated offence'. In light of this, there are questions as to whether the measures address a pressing and substantial concern for the purposes of international human rights law. To the extent that the measures 'expand the framework beyond a primarily sentence-based approach',

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25 *Hirst v the United Kingdom (No. 2)*, European Court of Human Rights App No. 74025/01, (Grand Chamber, 6 October 2005) [69]-[71]; *Dickson v United Kingdom*, European Court of Human Rights App No. 44362/04 (Grand Chamber, 4 December 2007) [68] and [72].

26 SOC, p.11.

27 SOC, p.10.

there is limited information provided as to how the existing regime in section 501 is insufficient, and how moving away from a sentence-based approach addresses a pressing and substantial concern. Further information from the minister as to these matters would assist in determining whether the measures pursue a legitimate objective and are rationally connected to this objective.

1.29 As to proportionality, the statement of compatibility notes that the 'new powers will enable the Department to better target individuals with serious criminality or unacceptable behaviour and, in line with community expectations, it is appropriate that a person who engages in these activities should not be entitled to hold a visa'.[28] However, in circumstances where the minister may already cancel or refuse a person's visa where a person has committed an offence that would fall within the definition of 'designated offence', it is not clear why the measures are necessary.

1.30 The statement of compatibility also states:

> Legislative amendments that extend the grounds upon which a person's visa may be cancelled or refused, the result of which may be subsequent detention, add to a number of existing laws that are well-established, generally applicable and predictable. This will be the case also for these amendments. … Decision-makers exercising the discretion to refuse or cancel a person's visa are guided by comprehensive policy guidelines and Ministerial Directions, and take into account the individual's circumstances and relevant international obligations. This means the visa decision, and any consequent detention or refusal, is a proportionate response to the individual circumstances of each case.
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> The detention of a person under these circumstances is therefore considered neither unlawful nor arbitrary under international law. In addition, the Government has processes in place to mitigate any risk of a person's detention becoming indefinite or arbitrary through: internal administrative review processes; Commonwealth Ombudsman Own Motion enquiry processes, reporting and Parliamentary tabling; and, ultimately the use of the Minister's personal intervention powers to grant a visa or residence determination where it is considered in the public interest.[29]

1.31 However, the committee has previously considered that these administrative and discretionary processes identified in the statement of compatibility may not

28 SOC, p.11.

29 SOC, p.11.

meet the requirement for periodic and substantive judicial review of detention so as to be compatible with Article 9.[30]

1.32 Further, in *MGC v Australia,* the UN Human Rights Committee (HRC) considered a case in which visa cancellation under section 501 of the Migration Act was found to be incompatible with Article 9 of the ICCPR on the following basis:

> According to the information before the Committee, the author became an "unlawful non-citizen" as a result of the cancelling of his visa and, pursuant to the Migration Act 1958, was automatically placed in immigration detention until his removal, which eventually occurred three and a half years later. During that time, the authorities of the State party made no individual assessment of the need to maintain the author in immigration detention. The Committee considers that the State party has not demonstrated on an individual basis that the author's continuous and protracted detention was justified for such an extended period of time. The State party has also not demonstrated that other, less intrusive, measures could not have achieved the same end, of compliance with the State party's need to ensure that the author would be available for removal ... Furthermore, the author was deprived of the opportunity to challenge his indefinite detention in substantive terms. The Committee recalls its jurisprudence that judicial review of the lawfulness of detention is not limited to mere compliance of the detention with domestic law but must include the possibility to order release if the detention is incompatible with the requirements of the Covenant. For all those reasons, the Committee concludes that, in the present circumstances, the detention of the author violated his rights under article 9 (1) of the Covenant.[31]

1.33 The HRC further stated that detaining persons while their claims were being resolved would be arbitrary 'in the absence of particular reasons specific to the individual, such as individualised likelihood of absconding, a danger of crimes against others, or a risk of acts against national security'.[32]

1.34 Therefore, the mandatory nature of detention of persons who have had their visa cancelled in circumstances where there does not appear to be an individualised assessment of whether continuous or protracted detention is justified, and the

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30 Parliamentary Joint Committee on Human Rights, *Thirty-Sixth Report of the 44th Parliament* (16 March 2016) pp. 202–205. See also *Nineteenth Report of the 44th Parliament* (3 March 2015) p. 19.

31 *MGC v Australia,* UN Human Rights Committee Communication No.1875/2009 (7 May 2015) [11.6].

32 *MGC v Australia,* UN Human Rights Committee Communication No.1875/2009 (7 May 2015) [11.5]. See also *FKAG et al v Australia,* UN Human Rights Committee Communication No.2094/2011 (28 October 2013).

absence of any opportunity to challenge detention in substantive terms, raises questions as to compatibility of the measures with the right to liberty.

Committee comment

1.35 The preceding analysis raises questions as to compatibility of the expanded bases on which a person's visa may be cancelled, the consequence of which would be that the person is subject to immigration detention, with the right to liberty.

1.36 The committee therefore seeks the advice of the minister as to the compatibility of the measures with this right, including:

- **whether the measures pursue a legitimate objective for the purposes of international human rights law (including any reasoning or evidence that establishes the stated objectives address a substantial and pressing concern or are otherwise aimed at achieving a legitimate objective);**
- **whether the measures are rationally connected to (that is, effective to achieve) the objective;**
- **whether the measures are proportionate (including in light of the decision of the UN Human Rights Committee in *MGC v Australia,* UN Human Rights Committee Communication No.1875/2009, CCPR/C/113/D/1875/2009 (7 May 2015)).**

Compatibility of the measures with the prohibition on expulsion without due process

1.37 The right not to be expelled from a country without due process is protected by article 13 of the ICCPR. It provides:

> An alien lawfully in the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority.

1.38 The article incorporates notions of due process also reflected in article 14 of the ICCPR,[33] which protects the right to a fair hearing.[34] The Human Rights

33 UN Human Rights Committee, *General Comment No. 32: The right to equality before courts and tribunals and to a fair trial* (2007) [17], [62].

34 The UN Human Rights Committee has held that immigration and deportation proceedings are excluded from the ambit of article 14. See, for example, *Omo-Amenaghawon v Denmark,* UN Human Rights Committee Communication No. 2288/2013 (23 July 2015) [6.4]; *Chadzjian et al. v Netherlands,* UN Human Rights Committee Communication No.1494/2006 (22 July 2008) [8.4]; and *PK v Canada,* UN Human Rights Committee Communication No. 1234/2003 (20 March 2007) [7.4]-[7.5].

Committee has stated that the article requires that 'an alien […] be given full facilities for pursuing his remedy against expulsion so that this right will in all circumstances of his case be an effective one'.[35]

1.39 The statement of compatibility acknowledges that as the cancellation of a visa held by a non-citizen lawfully in Australia can lead to removal, the cancellation process as a whole can amount to expulsion as contemplated by article 13, and to this extent this right is engaged.[36] However, the statement of compatibility further states that the measures in the bill are compatible with this right because:

> Decisions to cancel a visa on character grounds are made in accordance with section 501 of the Migration Act and the relevant procedures and review mechanisms available are not being amended by this Bill. To the extent that a larger number of people may have their visa cancelled as a result of this amendment, possibly leading to their expulsion, the processes are in accordance with the procedural requirements of Article 13 and review of the decisions is available – merits review by the Administrative Appeals Tribunal and/or judicial review for decisions made by a delegate, and judicial review of decisions made by the Minister personally.[37]

1.40 The availability of judicial review of decisions by the minister (and more limited availability of merits review for decisions made by a delegate) to cancel a person's visa under the expanded powers is relevant in assessing whether the expanded powers are compatible with article 13.

1.41 However, some decisions by the minister to cancel a person's visa on character grounds can occur in circumstances where the rules of natural justice do not apply. While these existing provisions of the Migration Act and Migration Regulations are not amended by the bill, in order to consider the human rights compatibility of the expanded visa cancellation powers in the bill it is necessary to consider the proposed amendments in the context within which they will operate, including the human rights compatibility of these existing provisions.

1.42 Under section 501(3) of the Migration Act, the minister has a discretionary power to cancel a visa if the minister reasonably suspects that a person does not pass the character test (which would include, if the bill passes, where a person commits a 'designated offence') and the minister is satisfied that cancellation is in the 'national interest'. The rules of natural justice do not apply to section 501(3).[38] This means that, in contrast to other discretionary cancellation powers, the non-

35 UN Human Rights Committee, *General Comment No. 15: The position of aliens under the covenant* (1986) [10].

36 SOC, p.12.

37 SOC, p.12.

38 Migration Act, section 501(5).

citizen will not be notified of the intention to cancel and will not be given an opportunity to present any information to the minister as to why the minister should not exercise their discretion (such as, for example, representations that the exercise of the discretion would be unfair because of the person's long-term residence in Australia, or the impact of visa cancellation on the person's children). Instead, *after* a decision to cancel is made, the minister must give the person notice of the decision and particulars of any relevant information, and then invite a person to make representations about revoking the decision.[39]

1.43 It is not clear whether the opportunity to make submissions after a decision to cancel has been made would be sufficient to comply with the right to be heard and to submit reasons against expulsion under article 13. This is because the minister may only revoke the decision to cancel if the person makes representations that satisfy the minister that the person passes the character test.[40] This is in contrast to the mandatory cancellation power under the Migration Act where the person is also not afforded natural justice at the time of cancellation, but the minister may revoke the cancellation decision if satisfied the person passes the character test or alternatively on a broader discretionary basis of there being 'another reason why the original decision should be revoked'.[41] As a result, where the minister exercises their power under section 501(3), there is no opportunity for the person to be heard as to the minister's exercise of discretion to cancel their visa, except insofar as it relates to whether or not they pass the character test.[42] Nor is there an opportunity for the person to contest the minister's decision as to whether visa cancellation is in the national interest. This raises questions as to whether persons whose visa is cancelled pursuant to section 501(3) for failing the character test due to having committed a 'designated offence' would have a sufficient opportunity to present reasons against their expulsion for the purposes of article 13.[43] It is also noted that the decision to cancel a person's visa without natural justice under section 501(3) does not require the minister to be satisfied that 'compelling reasons of national security' exist, as is required to deprive a person of the opportunity to submit reasons against their

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39 Migration Act, section 501C(3).

40 Migration Act, section 501C(4)(b).

41 Migration Act, section 501CA(4)(b).

42 *Roach v Minister for Immigration and Border Protection* [2016] FCA 750 at [11], [91]-[93] ('The right to make representations in support of revocation pursuant to an invitation under s 501C(3) therefore ameliorates only in part the lack of procedural fairness afforded at the initial stage of the decision-making process set out in s 501(3). Representations made by the non-citizen at the revocation stage can bear only on the question of whether or not she or he passes the character test'). See also *Taulahi v Minister for Immigration and Border Protection* [2016] FCAFC 177 [50]-[51]; *Carrascalao v Minister for Immigration and Border Protection* [2017] FCAFC 107 [59].

43 *Hammel v Madagascar,* UN Human Rights Committee Communication No.155/83 (3 April 1987) [20].

expulsion under article 13. Instead, the minister may exercise their discretion to cancel a person's visa without natural justice on the broader basis that cancellation is in the 'national interest'.[44]

1.44 There is an additional concern in circumstances where the Migration Act and *Migration Regulations 1994* (Migration Regulations) appear to further limit the opportunity for some non-citizens to make representations after a decision to cancel has been made. In particular, section 2.52(7) of the Migration Regulations provides that a non-citizen whose visa was cancelled on character grounds is not entitled to make representations about revocation of a cancellation decision if the person is not a detainee.[45] It is not clear how many (if any) persons who may have their visa cancelled by the minister personally under section 501(3) for having committed a 'designated offence' would fall within the scope of section 2.52(7) of the Migration Regulations. However, to the extent that persons whose visas may be cancelled pursuant to the measures introduced by the bill may not be entitled to make representations as to revoking a cancellation decision, it would appear such persons would not have an opportunity to be heard prior to expulsion, as required by article 13. In circumstances where such persons may not have an opportunity to be heard, further information as to how the expanded cancellation power pursues a legitimate objective, is rationally connected to the objective and is proportionate would be of assistance in determining the human rights compatibility of the measure.

Committee comment

1.45 The preceding analysis raises questions as to the compatibility of the expanded visa cancellation powers with the prohibition on expulsion without due process.

1.46 The committee therefore seeks the advice of the minister as to the compatibility of the expanded visa cancellation powers with this right, in particular for persons who have their visa cancelled without natural justice under section 501(3) of the Migration Act for having committed a 'designated offence'. This includes further information as to:

- **whether expanding the visa cancellation power to cancel visas where a person commits a 'designated offence' pursues a legitimate objective;**
- **whether this measure is rationally connected to (that is, effective to achieve) the objective;**
- **whether the measure is proportionate (in particular, safeguards to ensure that non-citizens who have their visa cancelled pursuant to the proposed measures in the bill will have a sufficient opportunity to be heard prior to**

44 Migration Act, section 501(3)(d).

45 Migration Regulations 1994, regulation 2.52(7); Migration Act, section 501C(1).

expulsion, including an opportunity to be heard as to the minister's exercise of discretion and as to the minister's decision that visa cancellation is in the national interest).

Compatibility of the measures with the right to respect for the family and the obligation to consider the best interests of the child

1.47 The right to protection of the family includes ensuring that family members are not involuntarily and unreasonably separated from one another.[46] This right may be engaged where a person is expelled from a country and is thereby separated from their family. There is significant scope for states to enforce their immigration policies and to require departure of unlawfully present persons. However, where a family has been in the country for a significant duration of time, additional factors justifying the separation of families going beyond a simple enforcement of immigration law must be demonstrated, in order to avoid a characterisation of arbitrariness or unreasonableness.[47] The measure engages and limits the right to protection of the family as visa refusal or cancellation for committing a 'designated offence' could operate to separate family members.

1.48 Further, under the Convention on the Rights of the Child (CRC), Australia has an obligation to ensure that, in all actions concerning children, the best interests of the child are a primary consideration. It requires legislative, administrative and judicial bodies and institutions to systematically consider how children's rights and interests are or will be affected directly or indirectly by their decisions and actions. The UN Committee on the Rights of the Child has explained that:

> …the expression "primary consideration" means that the child's best interests may not be considered on the same level as all other considerations. This strong position is justified by the special situation of the child…[48]

1.49 As noted in the statement of compatibility, the measures in the bill do not differentiate between adults and children, and the provisions of section 501 can operate to cancel a child's visa.[49] The obligation to consider the best interests of the child is therefore engaged when determining whether to cancel or refuse a child's visa. It is also engaged when considering the cancellation or refusal of a parent's or

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46 See ICCPR, articles 17 and 23; ICESCR, article 10(1); and the Convention on the Rights of the Child, article 16(1).

47 *Winata v Australia,* UN Human Rights Committee Communication No.930/2000 (26 July 2001) [7.3].

48 UN Committee on the Rights of the Child, *General comment No. 14 on the right of the child to have his or her best interests taken as a primary consideration*, CRC/C/GC/14 (29 May 2013); see also *IAM v Denmark,* Committee on the Rights of the Child Communication No.3/2016 (8 March 2018) [11.8].

49 SOC, p.13.

close family member's visa, insofar as that cancellation or refusal of the family member's visa may not be in the best interests of their children.

1.50 The statement of compatibility acknowledges that these rights are engaged by the bill. However, it states that any limitation on these rights is permissible because:

> Where an individual's visa is cancelled or refused, they may be detained and/or removed from Australia under the provisions of the Migration Act, which may result in separation of the family unit. The rights relating to families and children — including the best interests of any children under 18 and the impact of separation from family members — will be taken into account as part of the consideration whether to refuse or cancel the visa. While rights relating to family and children generally weigh heavy against cancellation or refusal, there will be circumstances where they may be outweighed by the risk to the Australian community due to the seriousness of the person's criminal record or past behaviour or associations. The amendments in the Bill allow for a more considered deliberation of community expectations and threats posed by individuals by specifying certain offences that will enliven consideration of visa refusal or cancellation, which will then allow consideration of the surrounding circumstances.
>
> Any separation from family members in Australia caused by an unlawful non-citizen being detained or removed as a result of having their visa cancelled or refused pursuant to the new ground of the character test will not be inconsistent with Articles 17, 23 and 24 of the ICCPR and Article 3 of the CRC as the decision to refuse or cancel will appropriately weigh the impact of separation from family and the best interests of any children against the non-citizen's risk to the community.
>
> However, the best interests of the child are, and will remain to be, a primary consideration in any decision whether to refuse or cancel a child's visa on character grounds. As such, the refusal or cancellation of a child's visa on these grounds would only occur in exceptional circumstances.[50]

1.51 However as discussed above in relation to the right to liberty, there are questions as to whether the measures in the bill pursue a legitimate objective, are rationally connected to that objective and are proportionate. The potential separation of family members, including of parents from their children, where those persons may have resided in Australia for a very long time, indicates that the impact of these measures may be significant.

1.52 There are particular questions as to whether allowing the cancellation or refusal of a person's visa for having committed an ancillary offence that falls within the definition of 'designated offence' would be a proportionate limitation on the

50 SOC, p.13.

right to protection of the family and the obligation to consider the best interests of the child, particularly in circumstance where the decision is not based on the sentence or punishment the person may have received for committing that offence. For example, if a child is convicted of 'being in any way (directly or indirectly) knowingly concerned in, or a party to, the commission of an offence that is a designated offence', an offence which may punishable by imprisonment of more than two years but for which the child is only sentenced (for example) to a non-custodial sentence, they would be liable to have their visa cancelled or refused. While the minister states that a child's visa would only be cancelled in 'exceptional circumstances' as a matter of policy, it is possible based on the language of the bill for a child's visa to be cancelled or refused in that circumstance. It is unclear how it would be proportionate to separate a child from their parents, for example, through cancelling a child's visa and deporting them. Further information as to what constitutes 'exceptional circumstances' in which a child's visa would be cancelled, and how precisely considerations of the best interests of the child are considered as a primary consideration by the minister when making a decision, would be of assistance.

Committee comment

1.53 The preceding analysis raises questions as to the compatibility of the expanded visa cancellation powers with the right to protection of the family and the obligation to consider the best interests of the child as a primary consideration.

1.54 The committee therefore seeks the advice of the minister as to the compatibility of the measures with these rights, including:

- **whether the measure pursues a legitimate objective;**
- **whether there is a rational connection between the limitation of these rights and that objective;**
- **whether the limitation on the right to protection of the family and the obligation to consider the best interests of the child is proportionate (including safeguards to ensure that the best interests of the child are considered as a primary consideration, and any other information as to how the minister will consider protection of the family and the rights of children when making a decision).**

Compatibility of the measures with the right to freedom of movement

1.55 The right to freedom of movement is protected under article 12 of the ICCPR and includes a right to leave Australia as well as the right to enter, remain, or return to one's 'own country'.

1.56 The reference to a person's 'own country' is not restricted to countries with which the person has the formal status of citizenship. It includes a country to which a

person has very strong ties, such as the country in which they have resided for a substantial period of time and established their home.[51] In *Nystrom v Australia,* the HRC interpreted the right to freedom of movement under article 12 of the ICCPR as applying to non-citizens where they had sufficient ties to a country, and noted that 'close and enduring connections' with a country 'may be stronger than those of nationality'.[52] The HRC's views are highly authoritative interpretations of binding obligations under the ICCPR.

1.57 The committee has previously stated that expanded visa cancellation and refusal powers, in potentially widening the scope of people who may be considered for visa cancellation or refusal, may lead to more permanent residents having their visas refused or cancelled and potentially being deported from Australia, thereby engaging the right to remain in one's 'own country'.[53]

1.58 The statement of compatibility does not acknowledge that the right to freedom of movement may be engaged and limited by the bill, and therefore does not provide an assessment of whether any limitations on that right are permissible. Further information is therefore required in order to determine whether the measures are compatible with the right to freedom of movement.

Committee comment

1.59 The preceding analysis indicates that the expansion of visa refusal and cancellation powers may limit the right to freedom of movement and in particular the right of a person to remain in their 'own country'. The statement of compatibility does not acknowledge that this right is engaged by the bill.

1.60 The committee therefore seeks the advice of the minister as to the compatibility of the measures with this right, including:

- **whether the measure pursues a legitimate objective;**
- **whether there is a rational connection between the limitation on the right to freedom of movement and that objective;**
- **whether the limitation on the right to freedom of movement is proportionate (including by reference to the UN Human Rights Committee's decision in *Nystrom v Australia,* UN Human Rights Committee**

51 *Nystrom v Australia,* UN Human Rights Committee Communication No.1557/2007 (1 September 2011).

52 *Nystrom v Australia,* UN Human Rights Committee Communication No.1557/2007 (1 September 2011) [7.4].

53 Parliamentary Joint Committee on Human Rights, *Thirty-Sixth Report of the 44th Parliament* (16 March 2016) p. 206. See also *Nineteenth Report of the 44th Parliament* (3 March 2015) p. 20.

Communication No.1557/2007, CCPR/C/102/D/1557/2007 (1 September 2011), and any other reasons why the measures may be proportionate).

Powers to collect personal information based on 'character concern'

1.61 Under the Migration Act, there are a number of circumstances in which a non-citizen may be required to provide 'personal identifiers',[54] including for the purposes of enhancing the department's ability to identify non-citizens who are of 'character concern'.[55] It is an offence to disclose personal identifiers collected from a non-citizen, however there is an exemption on the prohibition on disclosing personal identifiers where that disclosure is for the purpose of data-matching in order to identify non-citizens of 'character concern'.[56]

1.62 The bill seeks to amend the definition of 'character concern' in section 5C of the bill to provide that non-citizens who have been convicted of a 'designated offence' will be classified as non-citizens of 'character concern'.[57] The effect of this is that it extends the circumstances in which the Department of Home Affairs can collect and disclose personal identifiers of a non-citizen to include where those persons have been convicted of a designated offence.

Compatibility of the measure with the right to privacy

1.63 The right to privacy includes respect for informational privacy, including the right to respect for private and confidential information, particularly the use and sharing of such information and the right to control the dissemination of information about one's private life.

1.64 Expanding the circumstances under which personal information about a non-citizen who has committed a designated offence may be collected and disclosed engages and limits the right to privacy. This right 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 rationally connected and proportionate to achieving that objective.

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54 'personal identifier' is defined in section 5A to mean any of the following (including any of the following in digital form): (a) fingerprints or handprints of a person (including those taken using paper and ink or digital live scanning technologies);(b) a measurement of a person's height and weight; (c) a photograph or other image of a person's face and shoulders; (d) an audio or a video recording of a person (other than a video recording under section 261AJ); (e) an iris scan; (f) a person's signature; (g) any other identifier prescribed by the regulations, other than an identifier the obtaining of which would involve the carrying out of an intimate forensic procedure within the meaning of section 23WA of the Crimes Act 1914.

55 Migration Act, sections 5A(3) and 257A.

56 Migration Act, section 336E.

57 Section 5C(1)(aa),(3)-[4] of the bill.

1.65 The statement of compatibility acknowledges the right is engaged but states that the limitation is permissible:

> The amendments are to achieve a legitimate purpose under the ICCPR — to protect the Australian community from non-citizens who pose an unacceptable risk. Permitting the collection and disclosure of identifying information, such as photographs, signatures and other personal identifiers as defined in section 5A of the Migration Act, for the purpose of identifying persons of character concern, is a reasonable and proportionate measure to achieve the intended operation of the character provisions for purpose of protecting the Australian community. Any interference with the privacy of a person who has been convicted of a designated offence, in order to help identify them, would therefore not be unlawful or arbitrary.[58]

1.66 The objective of protecting the Australian community is capable of being a legitimate objective for the purposes of international human rights law. However, as discussed earlier in relation to the right to liberty, further information is required as to how the measures address a pressing and substantial concern. In particular, further information as to how moving away from a sentence-based approach to determining whether a person is of 'character concern' addresses a pressing and substantial concern would be of assistance. Further information from the minister as to these matters would assist in determining whether the measures pursue a legitimate objective, and would also assist in determining whether the measures are rationally connected to that objective.

1.67 Further information would also assist in determining the proportionality of the measures. In order to be proportionate, limitations on the right to privacy must be accompanied by adequate safeguards to ensure that any limitation is only as extensive as is strictly necessary. The statement of compatibility does not provide any information as to the safeguards that would be available relating to the collection, use and disclosure of personal identifiers of non-citizens who are of 'character concern' because they have committed a 'designated offence'.

Committee comment

1.68 The preceding analysis indicates that expanding the definition of 'character concern' to include persons who have committed a 'designated offence' engages and limits the right to privacy.

1.69 The committee therefore seeks the advice of the minister as to compatibility of the measure with this right, including:

- **whether the measure pursues a legitimate objective;**

58 SOC, p.14.

- **whether there is a rational connection between the limitation of the right to privacy and that objective;**
- **whether the limitation on the right to privacy is proportionate.**

Further response required

The committee seeks a further response from the relevant minister or legislation proponent with respect to the following bills and instruments.

Social Security Legislation Amendment (Community Development Program) Bill 2018

Purpose	Seeks to extend the targeted compliance framework in the *Social Security Administration Act* to Community Development Programme regions
Portfolio	Indigenous Affairs
Introduced	Senate, 23 August 2018
Rights	Social security and an adequate standard of living; work; equality and non-discrimination
Previous report	Report 10 of 2018
Status	Seeking further additional information

Background

1.70 The committee first reported on the bill in its *Report No 10 of 2018* and requested a response from the Minister for Indigenous Affairs by 4 October 2018.[1]

1.71 The minister's response to the committee's inquiries was received on 10 October 2018. The response is discussed below and is available in full on the committee's website.[2]

1.72 The *Social Security Legislation Amendment (Welfare Reform) Act 2018* (Welfare Reform Act) amended the *Social Security (Administration) Act 1999* (Social Security Administration Act) to create a new compliance framework, the targeted compliance framework (TCF). The TCF applies to income support recipients subject to

1 Parliamentary Joint Committee on Human Rights, *Report 10 of 2018* (18 September 2018) pp. 4-19.

2 The minister's response is available in full on the committee's scrutiny reports page: https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Scrutiny_reports

participation requirements,[3] except for declared program participants.[4] Participants in the Community Development Programme (CDP) are not currently subject to the TCF,[5] as the CDP is a declared program.[6] CDP participants are currently subject to compliance arrangements under Division 3A of Part 3 of the Social Security Administration Act.[7]

1.73 The CDP is the Australian Government's employment and community development service for remote Australia. The CDP seeks to support job seekers in remote Australia to build skills, address barriers and contribute to their communities through a range of activities. It is 'designed around the unique social and labour market conditions in remote Australia' with the objective of 'increasing employment and breaking the cycle of welfare dependency'.[8] Under the current CDP, job seekers with activity requirements are expected to complete up to 25 hours per week of work-like activities that benefit their community.

1.74 The committee previously considered the TCF in its human rights assessment of the bill that became the Welfare Reform Act.[9] Under the TCF, a job seeker can have their payments suspended for non-compliance with a mutual obligation, such as failing to attend a job interview or appointment (mutual obligation failure),[10] or for refusing suitable employment (work refusal failure).[11] Payments may be cancelled

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3 Income support payments made to job seekers have 'participation' requirements or 'activity test' requirements, which require the job seeker to seek work or participate in some other labour force preparation activity as a condition of payment. Participation requirements include attending participation interviews, signing a participation plan with a compulsory work-focused activity, and undertaking the compulsory work-focused activity: see Department of Social Services, *Guide to Social Security* (2016) [1.1.P.75]. The CDP supports participants receiving a participation payment in meeting their activity test or participation requirements through Newstart Allowance, Youth Allowance (other), Parenting Payment (subject to participation requirements), Social Benefit (nominated visa holders) and the Disability Support Pension: see Explanatory Memorandum (EM) p. 3[3].

4 *Social Security (Administration) Act 1999* (Social Security Administration Act), section 42AB. 'Declared program participants' are persons who participate in employment services programs specified in a determination made under section 28C of the Social Security Administration Act: see Division 3A of Part 3 of that Act.

5 Social Security Administration Act, section 42AB.

6 *Social Security (Declared Program Participant) Determination 2018,* section 5.

7 Social Security Administration Act, section 42B.

8 Department of Prime Minister and Cabinet, *The Community Development Programme (CDP)* (2018) https://www.pmc.gov.au/indigenous-affairs/employment/community-development-programme-cdp.

9 Parliamentary Joint Committee on Human Rights, *Report 8 of 2017* (15 August 2017) pp. 46-77; *Report 11 of 2018* (17 October 2017) pp. 138-203.

10 Social Security Administration Act, sections 42AC, 42AF and 42AL.

11 Social Security Administration Act, sections 42AD, 42AG and 42AL.

if a job seeker commits persistent mutual obligation failures without reasonable excuse, or commits a work refusal failure without a reasonable excuse, or voluntarily leaves a job or is terminated for misconduct (unemployment failure).[12]

Penalties for work refusal failure without a reasonable excuse and unemployment failure and persistent mutual obligation failure

Work refusal failure and unemployment failure

1.75 The bill seeks to extend the targeted compliance framework (TCF) to community development programme (CDP) participants. Currently, a CDP participant is subject to a non-payment period of eight weeks for refusing or failing to accept suitable work without a reasonable excuse,[13] or for an unemployment failure resulting from a voluntary act or misconduct.[14] The secretary has discretion to waive this non-payment period if it would cause 'severe financial hardship'.[15] As a result of the TCF applying to CDP participants, the non-payment period is reduced to four weeks (six weeks if the person has received a relocation assistance to take up a job).[16] However, the measure would also remove the discretion for the secretary to waive the non-payment penalty on the basis of severe financial hardship.[17]

1.76 The bill also provides that a designated program participant (being a CDP participant) does not commit a work refusal failure if the person refuses or fails to accept an offer of subsidised employment,[18] nor does a person commit an unemployment failure for voluntarily leaving or being dismissed for misconduct from subsidised employment.[19] As these exceptions only apply in relation to subsidised jobs, these safeguards do not apply to persons who refuse or fail to accept an offer for unsubsidised employment or who voluntarily leave or are dismissed from unsubsidised jobs.

Persistent mutual obligation failure

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12 Social Security Administration Act, sections 42AH and 42AO.

13 Social Security Administration Act, sections 42N and 42P(2).

14 Social Security Administration Act, section 42S.

15 Social Security Administration Act, section 42NC.

16 Social Security Administration Act, section 42AP(5).

17 See section 27, which seeks to repeal Division 3A of Part 3 of the Social Security Administration Act 1999, which includes section 42NC that allows the Secretary to not impose a non-payment period if it would cause 'severe financial hardship'.

18 The bill seeks to insert a new section 42AEA to the Social Security Administration Act to define 'subsidised employment' to mean 'employment in respect of which a subsidy of a kind determined in an instrument [made by the secretary] is payable, or has been paid, by the Commonwealth': section 26.

19 See section 25 of the bill.

1.77 The application of the TCF to CDP participants means that income support recipients, other than holders of subsidised jobs,[20] will be subject to escalating reductions in their income support payments for persistent non-compliance with mutual obligations.[21]

1.78 The *Social Security (Administration) (Persistent Non-compliance) (Employment) Determination 2015 (No 1)* (persistent non-compliance determination) outlines the matters to be taken into account when determining if a person has committed persistent mutual obligation failures.[22] Relevantly, among the matters the secretary must take into account are the findings of the most recent comprehensive compliance assessment in respect of the person, and whether, during the assessment period (6 months) the person has committed three or more mutual obligation failures.[23] The secretary must not take into account failures outside the person's control, but only failures that occurred intentionally, recklessly or negligently.[24] The secretary also retains discretion to take into account other matters in determining whether a person failed to comply with his or her obligations.[25]

1.79 For the first failure constituting persistent non-compliance, the rate of participation payment for the instalment period in which the failure is committed or determined will be halved.[26] For a second failure, the job seeker will lose their entire participation payment and any add-on payments or supplements for that instalment period.[27] For a third failure, the job seeker's payment will be cancelled from the start of the instalment period and a four week non-payment period, starting from the date of cancellation, will apply if the job seeker reapplies for payment.[28] There will be no waivers for non-payment periods.

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20 Holders of subsidised jobs will not be required to comply with mutual obligation requirements: section 21 of the bill.

21 Non-compliance with a mutual obligation may include, for example, failure to attend a job interview or appointment.

22 Section 42M(4) of the Social Security Administration Act provides that the minister must, by legislative instrument, determine matters that the secretary must take into account in deciding whether a person persistently failed to comply with his or her obligations in relation to a participation payment.

23 *Social Security (Administration) (Persistent Non-compliance) (Employment) Determination 2015 (No 1)*, section 5(1).

24 Social Security Administration Act, section 42M(1).

25 Social Security Administration Act, section 42M(2).

26 Social Security Administration Act, section 42AN(3)(a).

27 Social Security Administration Act, section 42AN(3)(b).

28 Social Security Administration Act, section 42AP.

Compatibility of the measures with the right to social security and an adequate standard of living: initial analysis

1.80 The right to social security and the right to an adequate standard of living are protected by the International Covenant on Economic, Social and Cultural Rights (ICESCR). In its initial analysis the committee raised questions as to whether the measures constitute a permissible limitation on the rights to social security and an adequate standard of living. This is because the measures would operate to cancel a person's social security payments for up to four weeks without the ability to waive the non-payment period in circumstances of financial hardship. These measures would impact the person's right to an adequate standard of living in circumstances where a person could not afford basic necessities during that time.

1.81 The full initial human rights analysis is set out at *Report 10 of 2018* (18 September 2018) pp. 4-9.[29]

1.82 The committee therefore sought the advice of the minister as to the compatibility of the measures with the rights to social security and an adequate standard of living, in particular:

- whether the measures are aimed at achieving a legitimate objective for the purposes of international human rights law;
- how the measures are effective to achieve (that is, rationally connected to) that objective; and
- whether the limitation is a proportionate means of achieving the stated objective (including whether there are other, less rights restrictive, measures reasonably available, such as retaining the discretion of the secretary to waive a non-payment period on the grounds of severe financial hardship under section 42NC of the *Social Security (Administration) Act 1999*; and the extent to which, in practice, subsidised jobs represent the only jobs which may be offered to CDP participants in particular areas of remote Australia).

Minister's response and analysis

1.83 In relation to the bill generally, the minister notes in his response that:

> The Bill extends the targeted compliance framework (TCF) to CDP participants, with the exception of CDP participants undertaking subsidised employment. However, the Bill does not introduce the TCF. The TCF was introduced by the Social Security Legislation Amendment (Welfare Reform) Act 2018. Therefore, I have limited this response to the effect of the Bill rather than discussing the details of the TCF more generally.

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29 Parliamentary Joint Committee on Human Rights, *Report 10 of 2018* (18 September 2018) pp. 4-9 at: https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Scrutiny_reports/2018/Report_10_of_2018.

1.84 While the measures in the bill do not introduce the TCF, they expand its scope by applying the regime to CDP participants. Noting in particular that the statement of compatibility to the Welfare Reform Bill (now Act) stated that the TCF should not apply to CDP participants so as 'to reflect the unique labour market conditions that job seekers face in remote Australia',[30] the committee's expectation is that statements of compatibility, and responses from the minister, should identify the rights engaged by the instrument, and should provide a detailed and evidence-based assessment of the measures against the limitation criteria where applicable.

1.85 In relation to the compatibility of the measures with the rights to social security and an adequate standard of living, the minister provides the following general information:

> The Bill promotes the right to social security and the right to an adequate standard of living, particularly as it is specifically designed to counter the risks of long-term unemployment and welfare dependency in remote job markets.
>
> The proposed amendments are based on consultation and feedback received by the Department of the Prime Minister and Cabinet and will deliver a fairer and simpler arrangement for job seekers and CDP providers. Introduction of the TCF will remove penalties that CDP participants receive for one-off breaches of mutual obligation requirements. The new arrangements will also ensure that financial compliance penalties will focus on those who are persistently and wilfully non-compliant.

1.86 The minister's response largely replicates the information provided in the statement of compatibility. The statement of compatibility described the changes to the current compliance framework occasioned by the TCF and how the exemptions from the TCF in relation to subsidised jobs promote the rights to social security and an adequate standard of living, but did not substantively address whether applying the TCF to CDP participants was compatible with these rights. It is difficult to characterise measures which may lead to a social security recipient being without social security payments for a four week period as 'promoting' these rights. In this respect, the response does not expressly acknowledge that the right to social security and the right to an adequate standard of living is engaged and limited by these measures. As noted in the initial analysis, limitations on the right to social security and an adequate standard of living may be permissible where the limitation pursues a legitimate objective, and is rationally connected (that is, effective to achieve) and proportionate to that objective.

1.87 It was accepted in the committee's initial analysis that reducing the risks of long-term unemployment and welfare dependency in remote job markets is capable

30 Statement of compatibility (SOC), Social Security Legislation Amendment (Welfare Reform) Bill 2017, p. 162.

of constituting a legitimate objective for the purposes of international human rights law. However, the minister's response otherwise does not address the committee's inquiries as to whether the measures address a pressing and substantial concern in relation to this objective, and whether the measure is rationally connected and proportionate to that objective.

1.88 In particular, the minister's response does not identify any safeguards that may operate in relation to the non-payment of a person's social security payments, for example the discretion of the secretary to waive a non-payment period where it would cause severe financial hardship (as currently applies to CDP participants in current section 42NC of the Social Security Administration Act). It is relevant to the proportionality of the measures whether there is sufficient flexibility to treat different cases differently or whether the measures impose a blanket policy without regard to the merits of an individual case. Removing the ability for the secretary to waive the non-payment period on the grounds of financial hardship may, in effect, remove the ability to consider the merits of an individual case such as, for example, whether a person may be unable to afford basic necessities during the four week non-payment period.[31] This may be of particular concern in CDP regions noting the statement of compatibility states that participants in remote Australia face higher levels of dependency on welfare than in non-remote Australia.[32] While the four week period is a reduction from the eight week non-payment penalty that can be imposed under the current compliance framework, four weeks is still a considerable period of time for a person to be without welfare payments. It is unclear how a person will afford basic necessities during this period, and the minister's response does not elaborate as to this matter. The committee has previously concluded that, in circumstances where it is unclear how a person would afford basic necessities for four weeks, this type of measure is likely be incompatible with the right to social security.[33]

1.89 The minister's response also does not address the committee's inquiries as to whether subsidised jobs are likely to form most or all of the jobs available to CDP participants. Relevant to the proportionality of the measures is the extent of any interference with rights in practice. If the only jobs available to CDP participants in remote areas are subsidised jobs, then this measure may be less likely, in practice, to

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31 Parliamentary Joint Committee on Human Rights, *Report 11 of 2017* (17 October 2017) p. 189 [2.467].

32 SOC, pp. 21-23. Government statistics indicate the proportion of Indigenous people whose main source of income is welfare increases with remoteness: Australian Institute of Health and Welfare, 'Australia's Welfare – 7.5: Income and employment for Indigenous Australians' (2017) *Australian Government* https://www.aihw.gov.au/getmedia/2f327206-c315-43a7-b666-4fe24fefc12f/aihw-australias-welfare-2017-chapter7-5.pdf.aspx.

33 Parliamentary Joint Committee on Human Rights, *Report 11 of 2017* (17 October 2017) p. 189 [2.467].

interfere with the right to social security or an adequate standard of living, given the exception from penalty for failures in relation to subsidised jobs.[34] However, for CDP participants who do not undertake subsidised jobs, the impact may be more severe. Given that the bill applies the TCF to CDP participants except for those undertaking subsidised employment, information about the application of the subsidised job program is especially pertinent for the purposes of analysing the human rights compatibility of the measures.

1.90 In relation to persistent mutual obligation failures being subject to escalating penalties, culminating in payment cancellation, the minister's response reiterated the statement in the statement of compatibility that 'financial compliance penalties will focus on those who are persistently and wilfully non-compliant'. The minister's response did not otherwise provide any further information in relation to the committee's inquiries regarding the proportionality of this measure. As raised in the initial analysis, it is a relevant safeguard that the secretary must not take into account failures that are outside the person's control, and that only failures that occurred intentionally, recklessly or negligently are to be taken into account. It is also relevant that the secretary has latitude to take into account other matters when determining whether mutual obligation failures are 'persistent'. This provides some degree of safeguard for participants who were unable to comply with requirements for reasons outside their control. However, the initial analysis raised questions as to whether it is proportionate to impose a non-payment penalty for 'reckless' or 'negligent' behaviour in meeting mutual obligations (such as attending an appointment or a job interview) in circumstances where compliance with mutual obligations is made more difficult by the conditions of remote Australia, such as issues regarding transportation and communication, drug and alcohol dependency, and lower levels of literacy and numeracy.[35] Without further information from the minister it is not possible to conclude that the measures are compatible with the right to social security and the right to an adequate standard of living.

Committee response

1.91 The committee thanks the minister for his response.

1.92 The committee seeks the further advice of the minister in relation to the compatibility of the measures with the right to social security and an adequate standard of living. In particular, the committee seeks the minister's further advice as to:

- **whether the measures are aimed at achieving a legitimate objective for the purposes of international human rights law (in particular, the pressing and**

34 See for example, proposed sections 42AC(5), 42AD(2)-(3), 42AE(4) of the Social Security Administration Act.

35 See EM, p. 22.

substantial concern that the measure seeks to address, including why it is necessary to apply the TCF to CDP participants, which removes the ability of the secretary to waive the non-payment period on the basis of financial hardship);

- **how the measures are effective to achieve (that is, rationally connected to) that objective (including how removing the discretion of the secretary to waive the non-payment period on the grounds of severe financial hardship will be effective to achieve the objectives of the measures); and**
- **the proportionality of the measures, including:**
  - **whether the bill could be amended to retain the discretion of the secretary to waive a non-payment period on the grounds of severe financial hardship under current section 42NC of the *Social Security (Administration) Act 1999*;**
  - **the extent to which, in practice, subsidised jobs will represent the only or the majority of jobs which may be offered to CDP participants in remote Australia; and**
  - **in relation to penalties for mutual obligation failure, whether the factors which can be taken into account by the secretary to determine whether failures are outside the person's control operate as a sufficient safeguard for the purposes of international human rights law.**

Payment suspension for a mutual obligation failure

1.93 Applying the TCF to CDP participants means that CDP participants who are not engaged in subsidised employment are liable to payment suspension for a mutual obligation failure unless they have a reasonable excuse.[36] The suspension period may last up to four weeks but ends when the person complies with the reconnection requirement (such as reconnecting with an employment provider) unless the secretary determines an earlier day.[37] If the job seeker fails to comply with the reconnection requirement within four weeks, their social security participation payment will be cancelled (as noted above at [1.77]-[1.79]).[38]

36 Social Security Administration Act, sections 42AC and 42AL. Section 12 of the bill creates an exception from the requirement to comply with mutual obligations for subsidised employment holders.

37 Social Security Administration Act, section 42AL(3).

38 Social Security Administration Act, section 42AM(3)-(4).

Compatibility of the measure with the right to social security and an adequate standard of living: initial analysis

1.94 The initial analysis noted that the suspension of social security payments for mutual obligation failures may limit the right to social security and the right to an adequate standard of living.

1.95 The initial analysis raised questions as to whether the measures constitute a permissible limitation on the rights to social security and an adequate standard of living. This is because the measure would operate to suspend a person's social security payments.

1.96 The initial analysis also noted that the committee has previously concluded that such a measure may be compatible with human rights given the range of circumstances identified by the minister as constituting a 'reasonable excuse'. This was on the basis that the payment suspension would not apply where a person had a 'reasonable excuse' for a mutual obligation failure. However, that conclusion was made in relation to the TCF prior to its extension to CDP participants. The initial analysis therefore raised questions as to whether the matters which constituted a 'reasonable excuse' were sufficiently adapted to the conditions of remote Australia, noting large distances to be covered and limited transportation options.

1.97 The full initial human rights analysis is set out at *Report 10 of 2018* (18 September 2018) pp. 12-15.[39]

1.98 The committee therefore sought the advice of the minister as to the compatibility of the measure with the right to social security and an adequate standard of living, in particular:

- whether the measure is aimed at achieving a legitimate objective for the purposes of international human rights law;
- how the measure is rationally connected to (that is, effective to achieve) the stated objective of reducing welfare dependence and long-term unemployment in remote Australia; and
- whether the limitation is a reasonable and proportionate measure for the achievement of the stated objective (including how mutual obligation requirements will differ in remote Australia from non-remote Australia and whether appropriate safeguards exist in relation to what constitutes a reasonable excuse in the context of remote Australia).

39 Parliamentary Joint Committee on Human Rights, *Report 10 of 2018* (18 September 2018) pp. 12-15 at: https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Scrutiny_reports/2018/Report_10_of_2018.

Minister's response and analysis

1.99 The minister's response in relation to the bill's compatibility with the rights to social security and adequate standard of living is set out above at [1.84]. The minister's response does not otherwise substantively engage with the committee's inquiries in relation to this measure.

1.100 It is acknowledged, as reiterated in the minister's response, that 'the TCF will remove penalties that CDP participants receive for one-off breaches of mutual obligation requirements'. This is relevant to the human rights compatibility of the measure. However, the minister's response did not explain how the TCF will be effective to achieve the objective of reducing welfare dependence and long-term unemployment in remote Australia. Nor did it explain whether there are sufficient safeguards, including how mutual obligations will differ and whether reasonable excuse criteria will be adapted to the conditions of remote Australia, to ensure the proportionality of the measure. Without further information from the minister it is not possible to conclude that the measures are compatible with the right to social security and the right to an adequate standard of living.

Committee response

1.101 The committee thanks the minister for his response.

1.102 The committee seeks the further advice of the minister in relation to the compatibility of the measures with the right to social security and an adequate standard of living. In particular, the committee seeks the minister's further advice as to:

- **whether the measure is aimed at achieving a legitimate objective for the purposes of international human rights law;**
- **how the measure is rationally connected to (that is, effective to achieve) the stated objective of reducing welfare dependence and long-term unemployment in remote Australia; and**
- **relevant safeguards to ensure the measure does not limit the right to social security any more than necessary to achieve its objectives, including information on:**
    - **how mutual obligation requirements will differ in remote Australia from non-remote Australia; and**
    - **whether what constitutes reasonable excuse will be modified or interpreted to take into account the conditions of remote Australia.**

Compatibility of the measure with the right to equality and non-discrimination: initial analysis

1.103 In its initial analysis, the committee raised questions as to whether the measures are compatible with the right to equality and non-discrimination. 'Discrimination' encompasses a distinction based on a personal attribute (for

example, race, sex or disability), which has either the purpose (called 'direct' discrimination), or the effect (called 'indirect' discrimination), of adversely affecting human rights. The UN Human Rights Committee has explained indirect discrimination as 'a rule or measure that is neutral on its face or without intent to discriminate', which exclusively or disproportionately affects people with a particular protected attribute.[40] Where a measure impacts on a particular group disproportionately it establishes *prima facie* that there may be indirect discrimination.[41]

1.104 The initial analysis raised concerns that applying the TCF to CDP participants, 80% of whom are Aboriginal and Torres Strait Islander, and all of whom live in remote Australia, may result in indirect discrimination. That is, although the statement of compatibility states that the bill seeks to ensure that 'activity tested job seekers across Australia will be subject to the same compliance framework, no matter where they live', it did not appear to take into account what effect applying the same compliance framework to CDP participants, without adjustments to take into account the conditions of remote Australia, may have.

1.105 As also noted in the initial analysis, differential treatment (including the differential effect of a measure that is neutral on its face) will not constitute unlawful discrimination if the differential treatment is based on reasonable and objective criteria such that it serves a legitimate objective, is effective to achieve that legitimate objective and is a proportionate means of achieving that objective.[42] No evidence was provided in the statement of compatibility as to whether the existing compliance arrangements for CDP participants are ineffective to address the stated objective of the bill of reducing welfare dependence and long-term unemployment in remote Australia. This raised questions as to whether the differential treatment, being the disproportionate impact this measure may have on Aboriginal and Torres Strait Islander people and jobseekers living in remote Australia, is based on reasonable and objective criteria.

1.106 The full initial human rights analysis is set out at *Report 10 of 2018* (18 September 2018) pp. 15-17.[43]

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40 *Althammer v Austria*, Communication No 998/01, CCPR/C/78/D/998/2001 (2003) [10.2].

41 *D.H. and Others v the Czech Republic*, European Court of Human Rights Application no. 57325/00 (13 November 2007) [49]; *Hoogendijk v. the Netherlands*, European Court of Human Rights Application no. 58641/00 (6 January 2005).

42 See UN Human Rights Committee, *General Comment 18: Non-Discrimination* (1989) [13]; *Althammer v Austria*, Human Rights Committee, Communication No 998/01, CCPR/C/78/D/998/2001 (2003) [10.2].

43 Parliamentary Joint Committee on Human Rights, *Report 10 of 2018* (18 September 2018) pp. 15-17 at: https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Scrutiny_reports/2018/Report_10_of_2018.

1.107 The committee therefore sought the advice of the minister as to the compatibility of the measure with the right to equality and non-discrimination, in particular:

- whether the disproportionate impact the measure may have on Aboriginal and Torres Strait Islander people and jobseekers living in remote Australia constitutes differential treatment for the purposes of international human rights law;
- whether the differential treatment is aimed at achieving a legitimate objective for the purposes of international human rights law;
- how the differential treatment is effective to achieve (that is, rationally connected to) that objective; and
- whether the differential treatment is a proportionate means of achieving the stated objective.

Minister's response and analysis

1.108 The minister's full response to the committee's inquiries regarding the compatibility of the measure with the right to equality and non-discrimination was as follows:

> The Committee has suggested that the Bill may have a 'disproportionate impact on Aboriginal and Torres Strait Islander Australians and job seekers living in remote Australia' (paragraph 1.51, Committee Report 10 of 2018). This assertion is incorrect - CDP and the amendments proposed in the Bill apply equally to both Indigenous and non-Indigenous participants in remote Australia. Accordingly, both CDP and the Bill itself are consistent with the right to equality and non-discrimination.

1.109 As noted above, the initial analysis was concerned with the *effect* of the measures on particular groups (indirect discrimination) notwithstanding that the measures on their face apply equally to Indigenous and non-Indigenous participants. That is, the concept of indirect discrimination under international human rights law encompasses measures not intended to target particular groups, but which nevertheless have a disproportionate negative effect on these groups. In particular, the initial analysis was concerned with the effect of the measure on remote jobseekers, 80% of whom are Aboriginal and Torres Strait Islander people, compared with non-remote jobseekers. That is, although the same 'objective' compliance framework applies to all jobseekers, by virtue of the conditions of remote Australia, it may have a disproportionate negative impact on particular groups. For example, a mutual obligation failure, which could include missing a job appointment, results in suspension of social security payments unless the person has a 'reasonable excuse'. 'Reasonable excuse' as currently drafted in the bill does not appear to contemplate issues outside of a jobseeker's control associated with remoteness. This may mean that this measure applies more harshly to remote jobseekers, who may be required

to cover long distances to reach job appointments and may not have access to public transport, compared with urban jobseekers.

1.110 As noted above, a disproportionate effect may not constitute unlawful discrimination where it is based on reasonable and objective criteria such that it pursues a legitimate objective, is rationally connected to that objective and is a proportionate way of achieving that objective. The minister's response does not address such issues. Without additional information from the minister it will not be possible to conclude that the measure is compatible with the right to equality and non-discrimination.

Committee response

1.111 The committee thanks the minister for his response.

1.112 The committee seeks the further advice of the minister as to the compatibility of the measure with the right to equality and non-discrimination, in particular:

- **whether the measures disproportionately impact Aboriginal and Torres Strait Islander people and jobseekers living in remote Australia (as opposed to non-remote, non-Indigenous jobseekers);**
- **whether the disproportionate effect is aimed at achieving a legitimate objective for the purposes of international human rights law;**
- **how the disproportionate effect is effective to achieve (that is, rationally connected to) that objective; and**
- **whether the disproportionate effect is a proportionate means of achieving the stated objective (including any relevant safeguards, such as adaptation of reasonable excuse criteria to take into account the conditions of remote Australia).**

Inability to access subsidised jobs for six months

1.113 Section 25 of the bill provides that a CDP participant who voluntarily leaves subsidised employment or is dismissed for misconduct will not be subject to an unemployment failure for the purposes of the TCF. However, the explanatory memorandum states in relation to section 25 that where a participant voluntarily leaves a subsidised job or is dismissed due to misconduct, the job seeker will be prevented from taking up a place in subsidised employment for six months.[44] This is not reflected in section 25 or elsewhere in the text of the bill.

Compatibility of the measure with the right to work: initial analysis

1.114 The initial analysis raised questions as to the compatibility of the measure with the right to work. This is because if the labour market in CDP regions is

44 EM, pp. 5, 12.

comprised mostly or entirely of subsidised jobs, a CDP participant unable to access subsidised jobs for six months may be effectively excluded from the opportunity to work for that time.

1.115 The full initial human rights analysis is set out at *Report 10 of 2018* (18 September 2018) pp. 17-19.

1.116 Therefore, the committee sought the advice of the minister as to the compatibility of the measure with the right to work, in particular:

- whether the proposed exclusion of participants that have left or been dismissed from subsidised employment from accessing further subsidised employment for six months is prescribed by law;
- an evidence-based explanation of the legitimate objective being pursued (including how it addresses a pressing or substantial concern);
- how the measure is effective to achieve (that is, rationally connected to) that objective; and
- whether the limitation is a proportionate means of achieving the stated objective (including whether there are other, less rights restrictive, measures reasonably available and the existence of any safeguards).

Minister's response and analysis

1.117 The minister provides the following response in relation to the compatibility of the measure with the right to work:

> As discussed in the Explanatory Memorandum, the Bill promotes the right to work. Schedule l, Part 1, item 25 of the Bill inserts a new subsection 42AEA(4) in the Social Security (Administration) Act 1999 to provide that an individual does not commit an unemployment failure if they are a declared program participant and become unemployed from subsidised employment as a result of a voluntary act or misconduct.
>
> The Explanatory Memorandum also notes that the proposed subsidised jobs arrangement will include a requirement that where a participant voluntarily leaves a subsidised job or is dismissed due to misconduct, the participant will be prevented from taking up a place in subsidised employment for six months (paragraph 1.54, Committee Report 10 of 2018). This does not impact a CDP participant's access to income support payments or ability to immediately re-engage with CDP. Rather, it is designed to ensure CDP participants can access long term employment and do not cycle through subsidised job placements.
>
> To ensure there is flexible application of this arrangement that takes into consideration the individual circumstance of each CDP participant, it is not proposed that this requirement be enshrined in the CDP Bill. Rather, this would be outlined in policy guidance intended to support the interpretation and implementation of the subsidy. This policy guidance will include examples of when a six month preclusion period would not be

> appropriate - for example, where departure was related to workplace harassment of the employee.
>
> CDP providers are also required to discuss the appropriateness of any position with a CDP participant prior to placement in a subsidised job, giving CDP participants the best opportunities to succeed in their placements and move into long term employment.
>
> In the event a CDP participant leaves a subsidised job, CDP providers will still be expected to continue working with local employers to seek opportunities for unsubsidised employment for CDP participants in their region. If a CDP participant leaves a position voluntarily or due to misconduct, they will still have access to unsubsidised employment opportunities.

1.118 The minister's response identifies some safeguards that will apply before excluding a person from access to the subsidised job program for six months, including policy guidance to allow for flexibility in individual circumstances, and discussing the appropriateness of any position with a CDP participant prior to placement in a subsidised job. It also appears to contemplate 'opportunities for unsubsidised employment for CDP participants in [the] region' which suggests that subsidised jobs will not form the entire labour market in CDP regions. These safeguards may be capable, in practice, of ensuring that the measures constitute a proportionate limitation on the right to work. However, it is noted that from the perspective of international human rights law, policy guidance may not be a sufficient safeguard in comparison to protection by statutory processes. This is because such guidance can be removed, revoked or amended at any time and is not required as a matter of law. Therefore, the compatibility of this measure with the right to work will depend on how the safeguards operate in practice.

Committee response

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

1.120 Noting the existence of safeguards identified by the minister in his response, the measure may be capable, in practice, of being compatible with the right to work. However, depending on how the safeguards are applied, and the extent to which the only jobs available in a remote community are subsidised jobs, there is some degree of risk that the measure could operate so as to be incompatible with the right to work. This would be the case if the operation of the measure is not reasonable, necessary and proportionate in all the circumstances of the individual case. It is noted that much will depend on the adequacy of the applicable safeguards in practice.

Advice only

1.121 The committee draws the following bills and instruments to the attention of the relevant minister or legislation proponent on an advice only basis. The committee does not require a response to these comments.

Australian Broadcasting Corporation Amendment (Appointment of Directors) Bill 2018

Purpose	Seeks to amend the *Australian Broadcasting Corporation Act 1983* to require the publication of a list of candidates relating to the appointment of an Australian Broadcasting Corporation (ABC) Chairperson or other non-executive director and the reasons for the proposed appointment of a person that was not nominated by the nomination panel
Legislation Proponent	Senator Storer
Introduced	Senate, 17 October 2018
Right	Privacy
Status	Advice only

Online publication of shortlisted candidates

1.122 Schedule 1 of the bill seeks to amend the *Australian Broadcasting Corporation Act 1983* (ABC Act) to require the independent Nomination Panel (nomination panel)[1] to publish online a list of candidates in relation to the appointment of an ABC Chairperson or other non-executive director.[2]

Compatibility of the measure with the right to privacy

1.123 Article 17 of the International Covenant on Civil and Political Rights (ICCPR) prohibits arbitrary or unlawful interferences with an individual's privacy, family, correspondence or home. However, this right may be subject to permissible limitations which are provided by law and are not arbitrary. In order for limitations

1 The nomination panel is empowered by the ABC Act to conduct a selection process for each appointment of a director to the ABC board, to assess all applicants for the appointment against the selection criteria prescribed in the ABC Act, to assess all applicants for the appointment on the basis of merit, to give a written report to either the Prime Minister (for the ABC Chairperson) or the Minister (if not the Chairperson) on the outcome of the selection process that contains a list of three candidates who are nominated for appointment and a comparative assessment of the candidates, and to perform related functions: see section 24B.

2 The ABC Act requires the nomination panel to give a report which contains a list of 'at least' three candidates: see subsection 24B(d).

not to be arbitrary, they must seek to achieve a legitimate objective and be rationally connected and proportionate to achieving that objective.

1.124 The measure engages and limits the right to privacy as it requires the online publication of the names of persons shortlisted for appointment as the ABC Chairperson or as a non-executive director.

1.125 The statement of compatibility acknowledges that the right to privacy is engaged, but states that:

> ...to the extent that it limits rights such as the right to privacy, by providing for the publication of the names of candidates for ABC board positions, it does so in support of the legitimate objective of supporting the independence of the ABC.[3]

1.126 Supporting the independence of Australia's national broadcaster is likely to be a legitimate objective for the purposes of international human rights law. Transparency in relation to the selection process for its board, which is tasked with ensuring its functions are performed efficiently with maximum benefit to the people of Australia and with ensuring its independence and integrity,[4] appears rationally connected to (that is, effective to achieve) this objective. However, it is not entirely clear how the specific measure, being the disclosure of the names of short-listed candidates, some of whom will not ultimately be appointed to the board of the ABC, is necessarily effective to support the independence of the ABC.

1.127 Questions also arise as to the proportionality of the measure. Limitations on the right to privacy must only be as extensive as is strictly necessary to achieve its legitimate objective. However, the requirement of the disclosure of the names of shortlisted candidates does not appear to be the least rights restrictive approach to supporting the 'independence, autonomy, transparency and integrity' of the appointment process. In particular, there are other measures in the bill, including a requirement for the relevant minister to publish reasons for the appointment of a person where that person was not nominated by the nomination panel, which appear to be less rights restrictive and still achieve the objective of the bill. Neither the statement of compatibility, nor the explanatory memorandum, explain the specific purpose that disclosing the list of names of shortlisted candidates would serve that cannot be achieved through publication of reasons for not following a nomination panel recommendation. This raises questions as to whether this aspect of the bill is necessary and accordingly whether it constitutes a proportionate limitation for the purposes of international human rights law.

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3 Statement of compatibility (SOC), p. 3.

4 See ABC Act, section 8(1)(a)-(b).

Committee comment

1.128 The committee draws the human rights implications of the bill in respect of the right to privacy to the attention of the legislation proponent and the Parliament.

1.129 If the bill proceeds to further stages of debate, the committee may request further information from the legislation proponent as to the compatibility of the measure with the right to privacy.

Commonwealth Places and Services (Facial Recognition) Bill 2018

Purpose	Amends the *Criminal Code Act 1995*, *Social Security (Administration) Act 1999* and *Australian Citizenship Act 2007* to prohibit the wearing of full face coverings in Commonwealth places and territories in prescribed circumstances, including while attending a Centrelink office and while participating in a citizenship ceremony.
Legislation proponent	Senator Bernardi
Introduced	Senate, 11 September 2018
Rights	Freedom of religion; equality and non-discrimination; social security
Status	Advice only

Prohibition on wearing full face coverings in public places

1.130 The bill seeks to create a new Part 9.10 in the *Criminal Code Act 1995* (Criminal Code) to make unlawful the wearing of a full face covering in public places, and to make it an offence to compel a person under 18 years of age to wear a full face covering in public.

1.131 The committee has previously considered the human rights compatibility of prohibiting the wearing of full face coverings in public in relation to the Criminal Code Amendment (Prohibition of Full Face Coverings in Public Places) Bill 2017 (Prohibition of Full Face Coverings in Public Place bill), which sought to amend the Criminal Code in a substantively similar way.[1]

1.132 The bill also seeks to amend the *Social Security (Administration) Act 1999* to make it an offence to wear a full face covering (or compel another person to wear a full face covering) in any building owned or leased by the Commonwealth where the person wearing the full face covering engages in conduct in relation to an officer for the purpose of making a claim for a social security payment.[2]

1 See Parliamentary Joint Committee on Human Rights, *Report 4 of 2017* (9 May 2017) pp. 46-49. In the Criminal Code Amendment (Prohibition of Full Face Coverings in Public Places) Bill 2017, the prohibition on full face coverings in a public place only applied if the threat level under the National Terrorism Threat Advisory System was higher than 'possible', and there were higher penalties for wearing a full face covering or compelling another person to wear a full face covering in those circumstances.

2 See Schedule 2 of the bill.

1.133 Additionally, the bill seeks to amend the *Australian Citizenship Act 2007* (Citizenship Act) to state that a pledge may not be made while wearing a full face covering.[3]

Compatibility of the measure with the right to freedom of religion

1.134 The right to exercise one's religious or other belief or opinion includes the freedom to exercise religion or belief publicly or privately, alone or with others (including through wearing religious dress, which is also relevant to the right to freedom of expression). The right to exercise one's belief can only be limited where it can be demonstrated that the limitation is reasonable and proportionate and is necessary to pursue certain legitimate objectives, namely the protection of public safety, order, health or morals or the rights of others.

1.135 The committee has previously stated that a prohibition of full face coverings engages and may limit the right to freedom of religion.[4] This is because, by prohibiting the wearing of full face covering in public places, certain individuals may be prevented from wearing this form of dress as a religious practice, that is, in the exercise of religious belief.

1.136 While the statement of compatibility identifies that the bill engages the right to freedom of religion, it does not identify any legitimate objective the measure seeks to pursue, or how the measure is necessary to protect public safety, order, health or morals or the rights of others.

1.137 Further, it is unclear from the statement of compatibility whether the measure is rationally connected to (that is, effective to achieve) a particular objective. Concerns also arise as to whether the measure is a proportionate limit on freedom of religion. The statement of compatibility provides that 'the European Court of Human Rights (ECHR) has upheld the rights of Belgium and France to legislate in this manner'[5] and in particular that Belgium has 'the sovereign right to regulate':

> A practice it considered to be incompatible with Belgian society, with social communication and more generally the establishment of human relations, which were indispensable for life in society…. essential to ensure the functioning of democratic society.[6]

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3 See Schedule 3 of the bill.

4 See Parliamentary Joint Committee on Human Rights, *Report 4 of 2017* (9 May 2017) p. 47.

5 See SOC, p. 3.

6 Statement of compatibility (SOC), p. 3. The quote extracted in the statement of compatibility appears to be from the ECHR's judgments in *Belcacemi and Oussar v Belgium,* European Court of Human Rights Application No 37798/13 (11 July 2017)[53]; *Dakir v Belgium,* European Court of Human Rights Application No 4619/12 (11 July 2017)[56].

1.138 However, the statement of compatibility does not elaborate on the extent to which the measures introduced in those countries are analogous to those proposed by the bill. Nor does it comment on the circumstances, context and underlying legal framework giving rise to the ECHR's conclusions, and whether these are similar in the context of the bill. As noted in the committee's *Guidance Note 1,* international jurisprudence, such as that of the ECHR, may be relevant to the interpretation of the human rights obligations under the seven core human rights treaties to which Australia is a party.[7] However, more relevant is the interpretation of human rights obligations by the treaty monitoring bodies specified by those treaties, where this is available. Relevantly, the UN Human Rights Committee (the body responsible for interpreting the International Covenant on Civil and Political Rights (ICCPR)), has found that laws banning full face coverings in public infringe the freedom to express one's religion or belief.[8]

1.139 On the question of proportionality, as noted in the committee's report on the Prohibition of Full Face Coverings in Public Places Bill, to criminalise the wearing of religious dress in public is a serious limitation on the manifestation of religious belief.[9] This is particularly the case in light of the fact that, while there are a number of prescribed exemptions in the bill allowing persons to wear a full face covering in public in certain circumstances,[10] there is no exemption allowing the wearing of a full face covering for the purposes of genuine religious belief. In order to be a proportionate limitation on human rights a measure must be the least rights restrictive way of achieving a legitimate objective. It is not clear that this is the case with the prohibition on full face coverings in the bill.

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7 Parliamentary Joint Committee on Human Rights, *Guidance Note 1,* p. 3.

8 *Yaker v France,* Communication No.2747/2016, CCPR/C/123/D/2747/2016 (17 July 2018); *Hebbadj v France*, Communication No.2807/2016, CCPR/C/123/D/2807/2016 (17 July 2018); UN Human Rights Office of the High Commissioner, 'France: Banning the *niqab* violated two Muslim women's freedom of religion – UN experts' (23 October 2018). See also UN Human Rights Committee, *Concluding observations on the fifth periodic report of France* (2015) CCPR/C/FRA/CO/5 [22].

9 See Parliamentary Joint Committee on Human Rights, *Report 4 of 2017* (9 May 2017) p. 47.

10 The proposed offence provisions do not apply if the wearing of the full face covering is reasonably necessary, in all the circumstances, for any of the following purposes: the lawful pursuit of the wearer's occupation; the wearer's participation in lawful entertainment, recreation or sport; genuine artistic purpose; protection from physical harm, if the full face covering is safety equipment or a medical treatment; or such other purposes as are prescribed by the regulations: see proposed subsection 395.2(3) of the Criminal Code in Schedule 1 of the bill and proposed subsection 261A of the *Social Security (Administration) Act 1999* in Schedule 2 of the bill.

Compatibility of the measure with the right to equality and non-discrimination

1.140 The right to equality and non-discrimination is protected by articles 2 and 26 of the ICCPR. 'Discrimination' refers to a distinction based on a personal attribute (for example, race, sex, or religion) which has either the purpose (called 'direct' discrimination) or the effect (called 'indirect' discrimination) of adversely affecting human rights.[11] The UN Human Rights Committee has explained indirect discrimination as 'a rule or measure that is neutral on its face or without intent to discriminate', which exclusively or disproportionately affects people with a particular protected attribute.[12]

1.141 Where a measure impacts on particular groups disproportionately, it establishes *prima facie* that there may be indirect discrimination.[13] The committee has previously stated that a prohibition of full face coverings may engage the right to equality and non-discrimination.[14] This is because, as a large number of the persons affected by the proposed measures would be women from religious backgrounds, and Muslim backgrounds in particular, the measures would appear to disproportionately impact the enjoyment of rights by this group. This raises concerns regarding discrimination on the basis of sex and on the basis of religion. For example, the proposed amendment to the Citizenship Act would operate to prohibit a woman wearing a *niqab* or *burqa* from making a citizenship pledge, and therefore from acquiring citizenship. This may indirectly limit the right of women to enjoy equal rights to men to acquire nationality, and the right of women from Muslim backgrounds to enjoy equal rights to women from non-Muslim backgrounds.

1.142 The statement of compatibility does not acknowledge that the right to equality and non-discrimination is engaged and therefore does not provide an assessment of whether the measure is compatible with this right.

Compatibility of the measure with the right to social security and an adequate standard of living

1.143 The right to social security recognises the importance of adequate social benefits in reducing the effects of poverty and plays an important role in realising

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11 The prohibited grounds of discrimination or 'protected attributes' include race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Under 'other status' the following have been held to qualify as prohibited grounds: age, nationality, marital status, disability, place of residence within a country and sexual orientation: UN Human Rights Committee, *General Comment 18*, *Non-discrimination* (1989).

12 *Althammer v Austria*, Communication No. 998/2001, CCPR/C/78/D/998/2001 (2003) [10.2]. See above, for a list of 'personal attributes'.

13 *D.H. and Others v the Czech Republic* European Court of Human Rights, Application no. 57325/00 (13 November 2007) [49]; *Hoogendijk v. the Netherlands*, European Court of Human Rights, Application no. 58641/00 (6 January 2005).

14 See Parliamentary Joint Committee on Human Rights, *Report 4 of 2017* (9 May 2017) p. 48.

many other economic, social and cultural rights, particularly the right to an adequate standard of living and the right to health. The right to an adequate standard of living requires state parties to take steps to ensure the availability, adequacy and accessibility of food, clothing, water and housing for all people in Australia, and also imposes on Australia these obligations listed above in relation to the right to social security.

1.144 The measure engages and may limit the rights to social security and adequate standard of living as it prevents a person from making a claim for social security at any building owned or leased by the Commonwealth while wearing a full face covering (except in limited circumstances). This includes full face coverings worn for religious reasons. This may in turn impact a person's (and their family's) ability to enjoy an adequate standard of living. The statement of compatibility does not identify that the measure engages and may limit the right to social security, and therefore does not provide an assessment of whether the measure is compatible with this right.[15]

Committee comment

1.145 The committee draws the human rights implications of the bill in respect of the right to freedom of religion, the right to equality and non-discrimination and the rights to social security and an adequate standard of living to the attention of the legislation proponent and the Parliament.

1.146 If the bill proceeds to further stages of debate, the committee may request further information from the legislation proponent with respect to the rights engaged by the bill.

15 Guidance Note 1 requires that, where a limitation on a right is proposed, the statement of compatibility provide a reasoned and evidence-based assessment of how the measure pursues a legitimate objective, is rationally connected to that objective, and is proportionate.

National Consumer Credit Protection Amendment (Small Amount Credit Contract and Consumer Lease Reforms) Bill 2018

Purpose	This bill seeks to amend the *National Consumer Credit Protection Act 2009* and the National Credit Code in relation to small amount credit contracts and consumer leases
Legislation proponent	Ms Cathy McGowan AO MP
Introduced	House of Representatives, 22 October 2018
Rights	Fair trial; criminal process rights; presumption of innocence
Status	Advice only

Background

1.147 The committee previously examined an identical bill in its *Report 4 of 2018*.[1] That bill was subsequently discharged from the Senate Notice Paper on 16 October 2018.

1.148 The bill was reintroduced (as a private member's bill) in the House of Representatives on 22 October 2018. Accordingly, the committee's previous assessment is summarised briefly below.

Summary of civil penalty provisions

1.149 The bill seeks to introduce a series of civil penalty provisions of up to 2,000 penalty units for failure to comply with the provisions governing small amount credit contracts (SACCs) and consumer leases.

Compatibility of the measure with the criminal process rights

1.150 The previous human rights analysis raised concerns in relation to whether the new civil penalty provisions could be regarded as 'criminal' for the purposes of international human rights law and thereby engage the criminal process rights under articles 14 and 15 of the International Covenant on Civil and Political Rights (ICCPR).

1.151 These concerns were raised due to the substantial maximum civil penalty that may be imposed (2,000 penalty units or $420,000).

1.152 The committee's *Guidance Note 2* sets out the steps for determining whether civil penalty provisions may be considered 'criminal' for the purpose of

1 Parliamentary Joint Committee on Human Rights, *Report 4 of 2018* (8 May 2018) pp. 91-95 at: https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Scrutiny_reports/2018/Report_4_of_2018.

international human rights law. If the civil penalties are assessed to be 'criminal' for the purposes of international human rights law, it does not mean that they need to be turned into criminal offences or are illegitimate. Rather, it means that the civil penalty provisions in question must be shown to be consistent with the criminal process guarantees set out in articles 14 and 15 of the ICCPR.

1.153 In this case, there is particular concern as to whether the provisions are consistent with the criminal process guarantees set out in article 14 of the ICCPR, including the right not to be tried twice for the same offence (Article 14(7)) and the right to be presumed innocent until proven guilty according to law (Article 14(2)). For many of the proposed civil penalties there are corresponding criminal offences attached to the same conduct, and it is not clear in the bill whether a person could be subject to both criminal and civil penalties for the same conduct. Further, the standard of proof applicable in the civil penalty proceedings introduced by the bill is the civil standard of proof (requiring proof on the balance of probability) rather than the criminal standard of proof (requiring proof beyond reasonable doubt) and therefore there are questions as to whether the measure is compatible with the presumption of innocence. If the penalties are considered 'criminal' for the purposes of international human rights law, the statement of compatibility should explain how the civil penalties are compatible with these criminal process rights, including whether any limitations on these rights are permissible.

Summary of strict liability offences

1.154 The bill proposes to introduce a series of strict liability offences alongside several of the civil penalty provisions. The strict liability penalties range from 10 penalty units to 100 penalty units.

Compatibility of the measure with the presumption of innocence

1.155 Article 14(2) of the ICCPR provides that everyone charged with a criminal offence has the right to be presumed innocent until proven guilty. Generally, consistency with the presumption of innocence requires the prosecution to prove each element of a criminal offence beyond reasonable doubt. The effect of applying strict liability to an element of an offence is that no fault element needs to be proven by the prosecution (although the defence of mistake of fact is available to the defendant). The strict liability offences engage the presumption of innocence because they allow for the imposition of criminal liability without the need to prove fault.

1.156 The previous human rights analysis noted that strict liability offences will not necessarily be inconsistent with the presumption of innocence, provided such offences are rationally connected and proportionate to the objective being sought. However, the statement of compatibility does not specifically address this measure.

1.157 Some of the strict liability offences impose substantial criminal penalties of up to 100 penalty units and it is unclear why some of the strict liability offences attract more severe criminal penalties than others. While the objective of protecting

vulnerable consumers is likely to be a legitimate objective, and the strict liability offences appear to be rationally connected to this, further information from the legislation proponent is needed to determine the proportionality of the measures.

Committee comment

1.158 The committee refers to its previous consideration of an identical bill in its *Report 4 of 2018*.

1.159 Noting the human rights concerns raised in this previous analysis, the committee draws the human rights implications of the reintroduced measures to the attention of the legislation proponent and the Parliament.

1.160 If the bill proceeds to further stages of debate, the committee may seek further information from the legislation proponent with respect to the human rights implications of the bill.

Bills not raising human rights concerns

1.161 Of the bills introduced into the Parliament between 15 October and 15 November, the following did not raise human rights concerns (this may be because the bill does not engage or promotes human rights, and/or permissibly limits human rights):

- A Fair Go for Australians in Trade Bill 2018
- A Fair Go for Australians in Trade Bill 2018
- Agricultural and Veterinary Chemicals Legislation Amendment (Streamlining Regulation) Bill 2018
- Australian Research Council Amendment (Ensuring Research Independence) Bill 2018
- Copyright Amendment (Online Infringement) Bill 2018
- Defence (Honour General Sir John Monash) Amendment Bill 2018
- Fair Work Amendment (Restoring Penalty Rates) Bill 2018 [No. 2]
- High Speed Rail Planning Authority Bill 2018
- Migration Amendment (Kids Off Nauru) Bill 2018
- National Greenhouse and Energy Reporting Amendment (Timely Publication of Emissions) Bill 2018
- National Housing Finance and Investment Corporation Amendment Bill 2018
- Parliamentary Joint Committee on the Australia Fund Bill 2018
- Treasury Laws Amendment (Lower Taxes for Small and Medium Businesses) Bill 2018
- Treasury Laws Amendment (Making Sure Every State and Territory Gets Their Fair Share of GST) Bill 2018
- Treasury Laws Amendment (Strengthening Corporate and Financial Sector Penalties) Bill 2018