# Chapter 1

## New and continuing matters

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

- bills introduced into the Parliament between 25 and 28 June 2018 (consideration of 2 bills from this period has been deferred);[1]
- legislative instruments registered on the Federal Register of Legislation between 24 May and 18 June 2018 (consideration of 2 legislative instruments from this period has been deferred);[2] and
- bills and legislative instruments previously deferred.

1.2 The committee has concluded its consideration of three legislative instruments that were previously deferred.[3]

### Instruments not raising human rights concerns

1.3 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.

1.4 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/. It is noted that the Australian Citizenship Amendment (Concessional Application Fees) Regulations 2018 [F2018L00734] was disallowed in the Senate on 25 June 2018. Accordingly, the committee makes no comment on the regulations at this time.

3 These are: Customs (Prohibited Exports) Amendment (Defence and Strategic Goods) Regulations 2018 [F2018L00503]; Export Control (Animals) Amendment (Information Sharing and Other Matters) Order 2018 [F2018L00580]; and Financial Framework (Supplementary Powers) Amendment (2018 Measures No. 1) Regulations 2018 [F2018L00456].

# Response required

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

## Family Assistance (Public Interest Certificate Guidelines) (Education) Determination 2018 [F2018L00464]

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| **Purpose** | Makes guidelines for the Secretary of the Department of Education and Training or their delegate in exercising their power under paragraph 168(1)(a) of the *A New Tax System (Family Assistance) (Administration) Act 1999* to disclose certain information if it is necessary in the public interest to do so |
| **Portfolio** | Education |
| **Authorising legislation** | *A New Tax System (Family Assistance) (Administration) Act 1999* |
| **Last day to disallow** | 15 sitting days after tabling (tabled House of Representatives 8 May 2018; tabled Senate 8 May 2018) |
| **Rights** | Privacy; rights of the child (see **Appendix 2**) |
| **Status** | Seeking additional information |

### Background

1.6 The Family Assistance (Public Interest Certificate Guidelines) (Education) Determination 2018 (2018 Determination) replaces the Family Assistance (Public Interest Certificate Guidelines) Determination 2015 (2015 Determination).

1.7 The committee considered the human rights compatibility of the 2015 Determination in its *Twenty-eighth Report of the 44th Parliament* and *Thirtieth Report of the 44th Parliament*.[1]

### Disclosure of personal information

1.8 The 2018 Determination sets out the circumstances in which the secretary may give a public interest certificate, which allows for the disclosure of information obtained by an officer in the course of their duties or in exercising their powers.[2] The

1 Parliamentary Joint Committee on Human Rights, *Twenty-eighth Report of the 44th Parliament* (17 September 2015), pp. 3-9; Parliamentary Joint Committee on Human Rights, *Thirtieth Report of the 44th Parliament* (10 November 2015), pp. 140-149.

2 Pursuant to section 168(1)(a) of the *A New Tax System (Family Assistance) (Administration) Act 1999* (Administration Act).

secretary may give a public interest certificate if the following conditions are satisfied:

- the information cannot reasonably be obtained from a source other than the department;
- the person to whom the information will be disclosed has sufficient interest in the information; and
- the secretary is satisfied that the disclosure is for at least one of a number of specified purposes, including:
    - to prevent, or lessen, a threat to the life, health or welfare of a person;
    - to make or support a proceeds of crime order;
    - to correct a mistake of fact in relation to the administration of a program of the department;
    - to brief a minister;
    - to assist with locating a missing person or in relation to a deceased person;
    - for research, statistical analysis and policy development;
    - to facilitate the progress or resolution of matters of relevance within the portfolio responsibilities of a department that is administering any part of the family assistance law or the social security law;
    - to contact a person in respect of their possible entitlement to recompense in a reparations process;
    - to enable a child protection agency of a state or territory to contact the parent or relative in relation to a child;
    - to facilitate the administration of public housing;
    - to ensure a child is enrolled in or attending school; or
    - to plan for, meet or monitor the infrastructure and resource needs in one or more schools.[3]

1.9 Section 6 of the 2018 Determination further provides that in giving a public interest certificate, other than to facilitate 'enforcement related activities', the secretary must have regard to:

- whether the person to whom the information relates is, or may be, subject to physical, psychological or emotional abuse; and

3 Family Assistance (Public Interest Certificate Guidelines) (Education) Determination 2018, section 7.

- whether the person in question may be unable to give notice of his or her circumstances because of age; disability; or social, cultural, family or other reasons.[4]

1.10 Section 7(3) of the 2018 Determination provides that public interest certificates to facilitate 'enforcement related activities'[5] can be given 'in any case where the Secretary considers doing so is in the public interest', without any other limitation.[6] In other words, when issuing a public interest certificate for the disclosure of information to facilitate enforcement related activities, the secretary is not required to have regard to the factors prescribed in section 6 set out in paragraph [1.9] above. This is a new ground of disclosure that was not included in the 2015 Determination.[7]

***Compatibility of the measure with the right to privacy***

1.11 The right to privacy encompasses respect for informational privacy, including the right to respect private and confidential information, particularly the use and sharing of such information and the right to control the dissemination of information.[8]

1.12 The disclosure of protected information (including personal information) pursuant to a public interest certificate engages and limits the right to privacy.

1.13 The statement of compatibility acknowledges that the 2018 Determination engages and may limit the right to privacy.[9] However, apart from stating generally that the determination 'ensure[s] that protected information may only be disclosed for specified grounds and purposes that are recognised as necessary in the public interest',[10] the statement of compatibility only provides an assessment of

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4 Family Assistance (Public Interest Certificate Guidelines) (Education) Determination 2018, section 6.

5 'Enforcement related activities' is defined in the *Privacy Act 1988* (Privacy Act) to mean: the prevention, detection, investigation, prosecution or punishment of criminal offences or breaches of a law imposing a penalty or sanction; the conduct of surveillance activities, intelligence gathering activities or monitoring activities; the conduct of protective or custodial activities; the enforcement of laws relating to the confiscation of the proceeds of crime; the protection of the public revenue; the prevention, detention, investigation or remedying of misconduct of a serious nature, or other conduct prescribed by the regulations; or the preparation for, or conduct of, proceedings before any court or tribunal, or the implementation of court/tribunal orders.

6 Family Assistance (Public Interest Certificate Guidelines) (Education) Determination 2018, subsection 7(3).

7 Explanatory statement (ES), p. 1.

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

9 Statement of compatibility (SOC), p. 11.

10 SOC, p. 11.

compatibility with the right to privacy in relation to the issuing of public interest certificates to disclose information to facilitate 'enforcement related activities'.[11] It does not assess whether disclosure of personal information for the other purposes set out at [1.8] above constitutes a justifiable limitation on the right to privacy.

1.14 The right to privacy may be subject to permissible limitations which are provided by law and are not arbitrary. In order for limitations not to be arbitrary, they must seek to achieve a legitimate objective and be rationally connected (that is, effective to achieve) and proportionate to that objective. The committee's usual expectation is that each limitation on human rights will be assessed on the basis of a reasoned and evidence-based explanation of how the measure supports a legitimate objective for the purposes of international human rights law.

1.15 The statement of compatibility explains that the objective of permitting information to be disclosed to facilitate 'enforcement related activities' is to 'allow for the monitoring or intelligence gathering activities before deciding to undertake an enforcement activity'.[12] It also notes that the provisions align the Family Assistance Law secrecy provisions with the 'enforcement body' exceptions that apply under the *Privacy Act 1988* in relation to personal information.[13] In relation to whether these objectives address a pressing or substantial concern, the explanatory statement states that:

> The narrow construct of the previous Guidelines has hampered the Department's ability to share information with other agencies and departments for enforcement related activities. This severely reduced the Department's capacity to effectively manage complex risks faced by the Department and other regulators, as well as the public.[14]

1.16 While this appears to be capable of constituting a legitimate objective for the purposes of human rights law, further information is required to determine why this

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11 The SOC also addresses the disclosure of personal information relating to homeless young people in the context of the rights of parents of children, which raises additional issues discussed further below.

12 SOC, p. 11.

13 SOC, p. 11. The Australian Privacy Principles (APPs) contain an exemption to the prohibition on the disclosure of personal information by an APP entity for a secondary purpose where the entity reasonably believes it is reasonably necessary for one or more 'enforcement related activities' conducted by, or on behalf of, an 'enforcement body': APP 6.2(e). An 'enforcement body' is defined in section 6(1) of the Privacy Act as a list of specific bodies. The list includes Commonwealth, State and Territory bodies that are responsible for policing, criminal investigations, and administering laws to protect the public revenue or to impose penalties or sanctions. Examples of enforcement bodies are the Australian Federal Police, a police force or service of a State or Territory, the Australian Crime Commission, the Australian Securities and Investments Commission and AUSTRAC: see ES, p. 3.

14 ES, pp. 1-2.

objective is important in the context of the particular measure. This would include, for example, information as to what the 'complex risks faced by the department and other regulators' entail, and how the broad power to disclose for enforcement related activities would facilitate management of these. To be capable of justifying a proposed limitation on human rights, a legitimate objective must address a pressing or substantial concern and not simply seek an outcome regarded as desirable or convenient.

1.17 Further, in order to be a proportionate limitation on the right to privacy, regimes that permit the collection and disclosure of personal information need to be sufficiently circumscribed and accompanied by sufficient safeguards.

1.18 The statement of compatibility explains that there are 'safeguards built into the legislative scheme to ensure that any protected information disclosed in the public interest is only used for the public interest purpose'.[15] It notes, for example, that the disclosure of information in accordance with the 2018 Determination does not give the person to whom the information is disclosed the authority to disclose that information to further parties, unless such disclosure is permitted by section 162(2)(e) of the Act,[16] or otherwise authorised by law.[17]

1.19 The statement of compatibility also explains that:

> While a public interest certificate will provide the authority under law for the purposes of use and disclosure, key requirements of the *Privacy Act 1988* will still apply to APP [Australian Privacy Principles] entities, such as requirements relating to collection notices.[18]

1.20 However, it remains unclear whether all recipients of the information disclosed for a purpose outlined in the 2018 Determination would be subject to the provisions of the Privacy Act. In particular, the expansion of the public interest disclosure powers to disclosure for 'enforcement related activities' would allow disclosure to state and territory enforcement bodies (such as state or territory police services), and it is unclear from the information provided the extent to which the safeguards in the Privacy Act would be applicable to them. This concern is also present for other purposes for which information may be disclosed. In particular, the determinations allow personal protected information to be shared with the 'agent or contracted service provider' of a state or territory department or authority.

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15 SOC, p. 11.

16 Section 162(2)(e) of the Administration Act provides that a person may make a record of protected information, disclose protected information to 'any person', or 'otherwise use such information' for the purpose for which the information was disclosed under sections 167 or 168 of the Act. Section 168(1)(a) permits disclosures that are 'necessary in the public interest', to which the 2018 Determination applies.

17 SOC, p. 11.

18 SOC, p. 9.

However, no information is given as to who such agents or contractors might be and whether they would be bound by the provisions of the Privacy Act (which does not apply to most state or territory government agencies).

1.21 Further, as the committee has noted previously,[19] the Australian Privacy Principles (APPs) in the Privacy Act are not a complete answer to concerns about interference with the right to privacy in this context, as those principles contain a number of exceptions to the prohibition on disclosure of personal information. This includes permitting use or disclosure for a secondary purpose where it is authorised under an Australian law or where reasonably necessary for one or more 'enforcement related activities'. These exemptions to the general prohibition on disclosure for a secondary purpose may be broader than the scope permitted under international human rights law.[20] Therefore, further information is required as to the operation of the specific safeguards in the Privacy Act so as to determine whether that Act provides effective safeguards for the right to privacy in these circumstances.

1.22 There are also questions as to whether the public interest disclosure power pursues the least rights restrictive approach. For example, it is not clear from the information provided why the power to disclose for 'enforcement related activities' is not limited by the requirement that the secretary have regard to any situation in which the person to whom the information relates is, or may be, subject to physical, psychological or emotional abuse, as is required for other public interest disclosures.[21] Further, and more broadly, it is unclear why it is necessary to enable the disclosure of protected personal information in a form that identifies individuals when the information is being disclosed for purposes such as research, statistical analysis, policy development, briefing the minister and meeting or monitoring infrastructure and resource needs. In such cases it would appear that the information could be disclosed in a de-identified form, which would be a less rights restrictive approach.

## Committee comment

**1.23 The preceding analysis raises questions as to whether the power to disclose personal information is compatible with the right to privacy.**

**1.24 The committee therefore seeks the advice of the minister as to:**

- **whether each of the proposed purposes for which information can be shared (as outlined in paragraph [1.8] to [1.10] above) is aimed at achieving a legitimate objective for the purposes of international human rights law;**

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19 See, for example, Parliamentary Joint Committee on Human Rights, *Report 1 of 2018* (6 February 2018), p. 87; Parliamentary Joint Committee on Human Rights, *Report 3 of 2018* (27 March 2018), p. 202.

20 APP 9; APP 6.2(b).

21 See section 6 of the 2018 Determination.

- **how the measure is effective to achieve (that is, rationally connected to) that objective;**
- **whether the limitation on the right to privacy is proportionate to the achievement of each objective (including whether the purposes for which information can be disclosed are sufficiently circumscribed, and what safeguards apply to the collection, storage and disclosure of personal and confidential information); and**
- **whether the Australian Privacy Commissioner has been consulted in relation to the 2018 Determination.**

## Disclosure of personal information relating to homeless young people

1.25 Part 3 of the 2018 Determination applies to the disclosure of information relating to homeless young people.[22] It provides that the secretary may issue a public interest certificate for the disclosure of such information if satisfied:

- the information cannot reasonably be obtained from a source other than the department;
- the disclosure will not result in harm to the homeless young person; and
- the disclosure is for one of the following purposes:
    - the information is about a homeless young person's family member and the secretary is satisfied the homeless young person or a family member has been subjected to abuse or violence (abuse or violence);[23]
    - the disclosure is necessary to verify qualifications for a payment under family assistance law or a social security payment on the grounds of being a homeless person (verification for payment);[24]
    - the disclosure will facilitate reconciliation between a homeless young person and his or her parent or parents (reconciliation);[25] and
    - the disclosure is necessary to inform the parent or parents whether the homeless young person has been in contact with the Department of Education and Training or Human Services Department (assurance).[26]

22 Subsection 25(2) of the 2018 Determination defines 'homeless young person' as a person under 18 years of age who has sought assistance on the ground of being homeless.

23 Family Assistance (Public Interest Certificate Guidelines) (Education) Determination 2018, section 27.

24 Family Assistance (Public Interest Certificate Guidelines) (Education) Determination 2018, section 28.

25 Family Assistance (Public Interest Certificate Guidelines) (Education) Determination 2018, section 29.

1.26 Section 6 of the 2018 Determination, discussed at paragraph [1.8], also applies to the disclosure of information relating to homeless young people.

***Compatibility of the measure with the right to privacy and the rights of the child***

1.27 Children have special rights under human rights law taking into account their particular vulnerabilities. Children's rights are protected under a number of treaties, particularly the Convention on the Rights of the Child (CRC). All children under the age of 18 years are guaranteed these rights.

1.28 Article 16 of the CRC provides that children have the right not to be subjected to arbitrary or unlawful interference with their privacy.[27] The right has the same content as the general right to privacy, discussed above.

1.29 Article 3 of the CRC requires states parties to ensure that, in all actions concerning children, the best interests of the child are a primary consideration.[28] The disclosure of personal information relating to homeless young people under the age of 18 years engages and limits these rights. The statement of compatibility acknowledges that the 2018 Determination engages article 3 of the CRC generally. However, it does not specifically address how disclosure of personal information relating to homeless young people is compatible with article 3. It also does not address the limitation the measure imposes on the child's right to privacy. As noted above, the committee's usual expectation where a measure may limit a human right is that the accompanying statement of compatibility provides a reasoned and evidence-based explanation of how the measure supports a legitimate objective for the purposes of international human rights law. Further information is therefore required to determine whether the power to disclose information relating to homeless young people pursues a legitimate objective and is rationally connected to this objective.

1.30 In relation to proportionality, it is noted that under the determination, the secretary can only issue a public interest certificate to disclose information relating to homeless young people if they are satisfied that the disclosure 'will not result in harm to the homeless young person'.[29] However, at international law, the right of a child to have his or her best interests taken as a primary consideration is broader than the right of a child not to be harmed. The child's best interests includes the enjoyment of the rights set out in the CRC, and, in the case of individual decisions, 'must be assessed and determined in light of the specific circumstances of the

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26 Family Assistance (Public Interest Certificate Guidelines) (Education) Determination 2018, section 30.

27 Convention on the Rights of the Child, article 16.

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

29 Family Assistance (Public Interest Certificate Guidelines) (Education) Determination 2018, paragraph 26(1)(a).

particular child'.[30] On this basis, this raises concerns that there may be a less rights restrictive approach to the sharing of a homeless young person's personal information, such as requiring the decision-maker to be satisfied that the disclosure would be in the best interests of the child, rather than that the disclosure will not result in harm to the child.

## Committee comment

**1.31 The preceding analysis indicates that the measure engages and limits the right of children to have their best interests taken as a primary consideration and the child's right to privacy. The committee therefore seeks the advice of the minister as to:**

- **whether the disclosure of personal information relating to homeless young people is aimed at achieving a legitimate objective for the purposes of international human rights law;**
- **how the measure is effective to achieve (that is, rationally connected to) that objective; and**
- **whether the limitation is a reasonable and proportionate measure for the achievement of that objective.**

30 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,* UN Doc CRC/C/GC/14 (29 May 2013), p. 3.

# Migration (IMMI 18/046: Determination of Designated Migration Law) Instrument 2018 [F2018L00446]

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| **Purpose** | Makes subdivision AF of Part 2, Division 3, of *the Migration Act 1958* part of the 'designated migration law' for the purposes of section 495A of that Act |
| **Portfolio** | Home Affairs |
| **Authorising legislation** | *Migration Act 1958* |
| **Last day to disallow** | Exempt from disallowance[1] |
| **Right** | Liberty (see **Appendix 2**) |
| **Status** | Seeking additional information |

## Use of computer to determine status as 'eligible non-citizen'

1.32 The Migration (IMMI 18/046: Determination of Designated Migration Law) Instrument 2018 (2018 instrument) makes subdivision AF of Part 2, Division 3 of the *Migration Act 1958* (Migration Act) part of the 'designated migration law'. The designation permits the minister to arrange for computer programs to be used to make a decision, exercise a power, comply with an obligation or do anything else related to these actions in subdivision AF of Part 2, Division 3 of the Migration Act.[2]

1.33 Subdivision AF of the Migration Act regulates bridging visas.[3] Section 73 of the Migration Act provides that the minister may grant a bridging visa to an 'eligible non-citizen' if certain criteria prescribed by the regulations are satisfied.[4] Under section 72 of the Migration Act, non-citizens are 'eligible non-citizens' if they have

1 Under section 5 of the *Human Rights (Parliamentary Scrutiny) Act 2011*, the instrument is not required to be accompanied by a statement of compatibility because it is exempt from disallowance. The committee nevertheless scrutinises exempt instruments because section 7 of the same Act requires it to examine all instruments for compatibility with human rights.

2 Migration Act, section 495A(1).

3 Bridging visas are temporary visas that allow 'eligible non-citizens' to lawfully stay in Australia or lawfully leave and return to Australia for a limited period while they make an application for a substantive visa, wait for their application for a substantive visa to be processed, or make arrangements to leave Australia, finalise their immigration matter or wait for an immigration decision.

4 Migration Act, section 73.

been 'immigration cleared',[5] belong to a particular class of persons,[6] or have been determined by the minister to be 'eligible non-citizens'.[7] The minister may make such a determination if certain criteria are satisfied, including that 'the minister thinks that the determination would be in the public interest'.[8] The power to make the determination may only be exercised by the minister personally.[9]

***Compatibility of the measure with the right to liberty***

*1.34* Article 9 of the International Covenant on Civil and Political Rights (ICCPR), prohibits the arbitrary and unlawful deprivation of liberty. This prohibition against arbitrary detention requires that detention must be lawful, reasonable, necessary and proportionate in all the circumstances and subject to regular review. The concept of 'arbitrariness' extends beyond the apparent 'lawfulness' of detention to include elements of injustice, lack of predictability and lack of due process.[10] The right to liberty applies to all forms of deprivations of liberty, including immigration detention, although what is considered arbitrary may vary depending on context.

*1.35* Bridging visas are generally only available to people who do not otherwise hold an effective visa.[11] Under the Migration Act, a non-citizen who does not hold a valid visa (such as a bridging visa) is classified as an unlawful non-citizen and is subject to mandatory detention prior to removal or deportation.[12] The detention of a non-citizen pending deportation will generally not constitute arbitrary detention, as it is permissible to detain a person for a reasonable period of time in these circumstances. However, detention may become arbitrary in the context of mandatory detention, where individual circumstances are not taken into account, and a person may be subject to a significant length of detention.

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5 Migration Act, section 72(1)(a). Section 172(1) of the Migration Act sets out the criteria for when a person will be 'immigration cleared'. The criteria vary depending on a range of factors, including how and where the person entered Australia, whether they complied with section 166 of the Migration Act, whether they were initially refused immigration clearance or bypassed immigration clearance and were then granted a substantive visa and whether they are in a prescribed class of persons.

6 Migration Act, section 72(1)(b). Section 2.20 of the *Migration Regulations 1994* prescribes the relevant classes of persons.

7 Migration Act, subsection 72(1)(c).

8 Migration Act, subsection 72(2)(e).

9 Migration Act, subsection 72(3).

10 Human Rights Committee, *General Comment 35: Liberty and security of person* (2014), [11]-[12].

11 With the exception of Bridging Visa B: see *Migration Regulations 1994*, section 1302.

12 Migration Act, sections 189; 198.

1.36 The use of a computer by the minister to exercise their personal power to determine whether a non-citizen is an 'eligible non-citizen' (and therefore eligible to apply for a bridging visa), including whether such a determination is 'in the public interest',[13] could engage and limit the right to liberty. This is because, in the absence of a bridging visa or other valid visa, a non-citizen will be classified as an 'unlawful non-citizen' and subject to immigration detention.

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

1.38 The explanatory statement does not provide sufficient information to assess whether the measure engages and may limit the right to liberty. In particular, the explanatory statement does not explain why there is a need to use computers to make a decision, exercise a power, comply with an obligation or do anything else related to these actions associated with eligibility to apply for and grant bridging visas.

1.39 The explanatory memorandum to the *Migration Legislation Amendment (Electronic Transactions and Methods of Notification) Act 2001* (2001 Act), which inserted section 495A of the Migration Act, under which the 2018 instrument is made, does provide some information as to the intended operation of computer programs:

> In the migration context, a computer program will only be making decisions on certain visa applications where the criteria for grant are simple and objective. There is no intention for complex decisions, requiring any assessment of discretionary criteria, to be made by computer programs. Those complex decisions will continue to be made by persons who are delegates of the Minister.[14]

1.40 However, it appears that under the 2018 instrument some matters which could be subject to decision by computer program may involve complex or discretionary considerations. Specifically, for the minister to determine whether a person is an 'eligible non-citizen' involves a decision as to whether the minister thinks such a determination would be in the 'public interest'.[15] By contrast, it is noted that, in relation to other provisions of the Migration Act that involve consideration of the 'public interest', the Migration Act has exempted such determinations from being

13 Migration Act, subsection 72(2)(e).

14 Explanatory memorandum, Migration Legislation Amendment (Electronic Transactions and Methods of Notification) Bill 2001, p. 3.

15 Migration Act 1958, subsection 72(2)(e).

'designated migration law' (that is, the decision cannot be made by computer).[16] It is unclear why subsection 72(2)(e) of the Migration Act is not similarly exempted from the 'designated migration law' or excluded from the 2018 instrument.

1.41 Noting that a potential consequence of a determination that a person is not an 'eligible non-citizen' is that the person may be subject to immigration detention, further information is required as to how the 2018 instrument will operate and be applied. This includes the extent to which a computer program will be used for determining a person's eligibility to apply for a bridging visa (including the assessment of whether it is in the 'public interest' to make such a determination). Further information is also required as to the safeguards in place to ensure a person is not deprived of liberty as a consequence of such a decision where it is not reasonable, necessary and proportionate.

## Committee comment

**1.42 The preceding analysis raises questions as to the compatibility with the right to liberty of the designation of subdivision AF of Part 2, Division 3 of the Migration Act as part of the 'designated migration law'.**

**1.43 The committee seeks further information from the minister as to the compatibility of the measure with the right to liberty, including:**

- **whether, and to what extent, a computer program will be used to exercise the minister's personal powers in subdivision AF of Part 2, Division 3 of the Migration Act; and**
- **whether 'public interest' considerations by the minister could be exempted from the 'designated migration law'.**

**1.44 If a computer program will be used to exercise the minister's personal power in subdivision AF of Part 2, Division 3 of the Migration Act, the committee seeks further information about the compatibility of this measure with the right to liberty, including:**

- **the existence of adequate and effective safeguards to ensure a person is not deprived of liberty where it is not reasonable, necessary and proportionate; and**
- **whether less rights restrictive alternatives are reasonably available.**

16 Migration Act sections 48B, 495A(3)(a); see, also, explanatory memorandum, Migration Legislation Amendment (Electronic Transactions and Methods of Notification) Bill 2001, p. 14.

# Migration (Validation of Port Appointment) Bill 2018

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|---|---|
| **Purpose** | Seeks to validate the appointment of a proclaimed port in the Territory of Ashmore and Cartier Islands |
| **Portfolio** | Home Affairs |
| **Introduced** | House of Representatives, 20 June 2018 |
| **Rights** | Non-refoulement; liberty; fair hearing; not to be expelled without due process; effective remedy (see **Appendix 2**) |
| **Status** | Seeking additional information |

## Validation of a 'proclaimed port'

1.45 Under subsection 5(5)(a) of the *Migration Act 1958* (the Migration Act) the minister may, by notice published in the Gazette, appoint ports in an external territory as 'proclaimed ports'.[1]

1.46 On 23 January 2002 a notice was published purporting to appoint an area of waters within the Territory of Ashmore and Cartier Islands as a 'proclaimed port' (2002 appointment).[2]

1.47 The effect of this 2002 appointment was to provide that people arriving by boat without a valid visa, who entered certain waters of the Territory of Ashmore and Cartier Islands, would be entering an 'excised offshore place' for the purposes of the Migration Act and would thereby become 'offshore entry persons', now 'unauthorised maritime arrivals' (UMAs) under the Migration Act.[3]

1.48 On 11 July 2018, the Federal Circuit Court held, in *DBC16 v Minister for Immigration & Anor,*[4] that the purported appointment as a proclaimed port, of an

1 Under section 5 of the Migration Act: a ***port*** is defined as a 'proclaimed port' or a 'proclaimed airport'. A ***proclaimed port*** is defined as including a port appointed by the minister under subsection 5(5). A person is defined as having ***entered Australia by sea*** including if the person entered the 'migration zone' except on an aircraft. The ***migration zone*** means 'the area consisting of the States, the Territories, Australian resource installations and Australian sea installations and, to avoid doubt, includes: (a) land that is part of a State or Territory at mean low water; and (b) sea within the limits of both a State or a Territory and a port; and (c) piers, or similar structures, any part of which is connected to such land or to ground under such sea; *but does not include sea within the limits of a State or Territory but not in a port*' (emphasis added).

2 Explanatory memorandum (EM) p. 2.

3 See, Statement of compatibility (SOC) p. 6; The Hon. Peter Dutton, Minister for Home Affairs, *Proof House of Representatives Hansard*, 20 June 2018, p. 8.

4 [2018] FCCA 1801.

area of waters within the Territory of Ashmore and Cartier Islands, was invalid. Accordingly, the applicant in that case was not an UMA.[5]

1.49 The bill would correct a number of errors in the 2002 appointment and retrospectively validate it including by:

- providing that there was a properly proclaimed port at Ashmore and Cartier Islands at all relevant times;
- correcting the geographical coordinates of the area of waters specified in the 2002 appointment noting that the 2002 appointment omitted some details relating to the geographical coordinates;
- validating things done under the Migration Act that would be invalid or ineffective directly or indirectly because of the terms of the 2002 appointment.[6]

1.50 Section 5 provides that the bill will not affect rights or liabilities arising between parties to proceedings where judgment has been delivered by a court prior to the commencement of the bill, if the validity of the appointment was at issue in the proceedings and the judgment set aside the appointment or declared it to be invalid.[7]

***Compatibility of the measure with the obligation of non-refoulement and the right to an effective remedy***

1.51 Australia has non-refoulement obligations under the Refugee Convention for refugees[8] and under both the International Covenant on Civil and Political Rights (ICCPR) and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) for all people, including people who are found not to be refugees.[9] 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,

5 [2018] FCCA 1801, p. 26 [111].

6 EM p. 2; bill sections 3-4.

7 The statement of compatibility states that this clause is included as there are ongoing proceedings in the Federal Circuit Court and Federal Court which are currently challenging the validity of the 2002 appointment: SOC, p. 5.

8 1951 Convention relating to the Status of Refugees and its 1967 Protocol (the Refugee Convention).

9 CAT, article 3(1); ICCPR, articles 6(1) and 7; and Second Optional Protocol to the International Covenant on Civil and Political Rights Aiming at the Abolition of the Death Penalty; Convention Relating to the Status of Refugees 1951 and its Protocol 1967 (Refugee Convention).

inhuman or degrading treatment or punishment.[10] Non-refoulement obligations are absolute and may not be subject to any limitations.

1.52 Independent, effective and impartial review by a court or tribunal of decisions to deport or remove a person, including merits review in the Australian context, is integral to complying with non-refoulement obligations.[11]

1.53 Given that the 2002 appointment has been found to have been invalidly made, this will have a range of consequences. Specifically, the effect of the 2002 appointment being invalid may be that persons who entered the area of waters within the Territory of Ashmore and Cartier Islands without a valid visa may not have been correctly classified as 'offshore entry persons' (now UMAs).

1.54 The classification of a person as an UMA significantly affects how their rights and obligations under the Migration Act are to be determined and how their applications for a visa may be processed. For example, persons who entered the area of waters within the Territory of Ashmore and Cartier Islands between 13 August 2012 and 1 June 2013 without a valid visa and were classified as UMAs became 'fast track applicants' under the Migration Act.[12] This would have resulted in the 'fast track' process applying to the assessment and review of their claims for refugee status and applications for protection visas.

1.55 However, the committee has previously considered that the 'fast track' assessment process raises serious human rights concerns.[13] In particular, the committee has found elements of the 'fast track' assessment process are likely to be incompatible with the obligation of non-refoulement and the right to an effective remedy.[14] This was on the basis that as the 'fast track' assessment process does not provide for full merits review it is likely to be incompatible with Australia's

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10 See Refugee Convention, article 33. The non-refoulement obligations under the CAT and ICCPR are known as 'complementary protection' as they are protection obligations available both to refugees and to people who are not covered by the Refugee Convention, and so are 'complementary' to the Refugee Convention.

11 ICCPR, article 2; *Agiza v Sweden*, Communication No. 233/2003, UN Doc CAT/C/34/D/233/2003 (2005) [13.7]; *Josu Arkauz Arana v. France*, CAT/C/23/D/63/1997, (CAT), 5 June 2000; *Mohammed Alzery v Sweden*, Communication No. 1416/2005, U.N. Doc. CCPR/C/88/D/1416/2005 (2006) [11.8]. See, also, Parliamentary Joint Committee on Human Rights, *Report 2 of 2017* (21 March 2017) pp 10-17; *Report 4 of 2017* (9 May 2017) pp. 99-111.

12 The Hon. Peter Dutton, Minister for Home Affairs, *Proof House of Representatives Hansard*, 20 June 2018, p. 7.

13 Parliamentary Joint Committee on Human Rights, *Fourteenth Report of the 44th Parliament* (28 October 2014) pp. 70-92; *Thirty-sixth report of the 44th Parliament* (16 March 2016) pp. 174-187; *Report 4 of 2017* (9 May 2017) pp. 99-106; *Report 2 of 2017* (21 March 2017) pp. 10-17; *Report 12 of 2017* (28 November 2017) pp. 89- 92.

14 Parliamentary Joint Committee on Human Rights, *Ninth report of the 44th Parliament* (15 July 2014) pp. 43-44; *Fourteenth report of the 44th Parliament* (28 October 2014) p. 88; *Report 2 of 2017* (21 March 2017) pp. 10-17.

obligations under the ICCPR and the CAT of ensuring independent, effective and impartial review, including merits review, of non-refoulement decisions.[15] While the statement of compatibility acknowledges that the measure engages the obligation of non-refoulement, it does not acknowledge the concerns outlined in the committee's previous reports.[16]

1.56 The statement of compatibility argues that the validation merely maintains the 'status quo'.[17] However, as noted above, in circumstances where the appointment was not validly made, this may fundamentally change how people should have been treated under the Migration Act. In this respect, the statement of compatibility provides no information as to how those individuals would have been treated if the appointment had never been made. It may be that a process that was capable of complying with Australia's obligations of non-refoulement may have applied to these individuals. It is unclear from the information provided how many people may be adversely affected by the validation. There are also questions as to the extent of the impact of the validation on Australia's non-refoulement obligations including how many persons who entered the waters of the Territory of Ashmore and Cartier Islands during the relevant period:

- are yet to have their claims for asylum or applications for protection visas determined;
- have had their applications refused under the 'fast track' process (and are present in Australia, offshore immigration detention or have been subject to removal or return).

## Committee comment

**1.57 The obligation of non-refoulement is absolute and may not be subject to any limitations.**

**1.58 Given the 2002 appointment has been found by the courts to be invalid, persons who entered waters of the Territory of Ashmore and Cartier Islands without a valid visa may not have been correctly classified as 'offshore entry persons' (now 'unauthorised maritime arrivals') and the 'fast track' assessment process may have been incorrectly applied to them.**

**1.59 The committee has previously considered that the 'fast track' assessment process is likely to be incompatible with Australia's obligations under the International Covenant on Civil and Political Rights and the Convention Against**

15 See the committee's comments on the human rights compatibility of the fast-track review process in, Parliamentary Joint Committee on Human Rights, *Thirty-sixth report of the 44th Parliament* (16 March 2016) pp. 174-187.

16 SOC, p. 6.

17 SOC, p. 5.

**Torture of ensuring independent, effective and impartial review, including merits review, of non-refoulement decisions.**

**1.60 Accordingly, by retrospectively validating the 2002 appointment, the measure engages the obligation of non-refoulement and the right to an effective remedy. The committee seeks the advice of the minister as to the extent of the impact of the validation on Australia's obligations, including:**

- **how individuals arriving at the area of waters within the Territory of Ashmore and Cartier Islands would have been treated if the 2002 appointment had not been made;**
- **the extent of any detriment to individuals if the 2002 appointment is validated;**
- **how many persons who entered the area of waters within the Territory of Ashmore and Cartier Islands without a valid visa during the relevant period:**
  - **are yet to have their claims for asylum or applications for protection visas determined (either in Australia or offshore immigration detention);**
  - **have had their applications refused under the 'fast track' process (including how many are present in Australia, are present in offshore immigration detention and how many have been subject to removal or return);**
- **any other information relevant to the compatibility of the measure with the obligation of non-refoulement.**

***Compatibility of the measure with the right to a fair hearing***

1.61 Validating the 2002 appointment may engage and limit the right to a fair hearing on a number of grounds.

1.62 First, given the 2002 appointment has been found to be invalid, the 'fast track' assessment process may have incorrectly been applied to individuals who arrived at the area of waters within the Territory of Ashmore and Cartier Islands. Previous human rights analysis of the 'fast track' assessment process noted that the 'fast track' assessment and review process is quite limited and there were concerns as to the independence and the impartiality of such a review. Accordingly, the committee previously concluded that the fast-track assessment process may be incompatible with the right to a fair hearing.[18]

1.63 Secondly, validating the 2002 appointment may adversely affect any person who seeks to challenge an act or decision under the Migration Act on the basis that

18 Parliamentary Joint Committee on Human Rights, *Thirty-sixth report of the 44th Parliament* (16 March 2016) pp. 174-187; *Report 12 of 2017* (28 November 2017) p. 92.

the impugned action or decision is invalid under the 2002 appointment. Accordingly, the validation may further limit the right to a fair hearing. The minister, in his second reading speech explains that the:

> …validity of the Appointment is now being challenged in the Federal Circuit Court and the Federal Court…A successful challenge to the Appointment could mean that affected persons did not enter Australia at an excised offshore place and are therefore not unauthorised maritime arrivals under the act. It could also mean that some affected persons are not fast-track applicants under the act.[19]

1.64 It is noted that the court in *DBC16 v Minister for Immigration & Anor*[20] reached precisely this finding in relation to the invalidity of the appointment and accordingly made a declaration that the applicant was not an UMA. No further information is provided in the statement of compatibility about the nature of any other challenges related to the 2002 appointment. Nevertheless section 5 of the bill provides that the bill will not affect rights or liabilities arising between parties to proceedings where judgment has been delivered by a court prior to the commencement of the bill, if the validity of the appointment was at issue in the proceedings and the judgment set aside the appointment or declared it to be invalid. While this may operate as a relevant safeguard, it does not address circumstances where a proceeding is on foot but judgment has not been issued. It also does not address the situation where proceedings have not yet been commenced by affected individuals. This raises questions as to whether the measure is the least rights restrictive approach.

1.65 More generally, the right to a fair hearing is not addressed in the statement of compatibility, and accordingly no assessment was provided as to whether any limitation is permissible.

## Committee comment

**1.66 The committee requests the advice of the minister as to the compatibility of the measure with the right to a fair hearing, including:**

- **whether the measure is aimed at achieving a legitimate objective for the purposes of human rights law;**
- **how the measure is effective to achieve (that is, rationally connected to) that objective; and**
- **whether the limitation is a reasonable and proportionate measure to achieve the stated objective (including whether it is the least rights restrictive approach and the scope of individuals likely to be affected),**

19 The Hon. Peter Dutton, Minister for Home Affairs, *Proof House of Representatives Hansard*, 20 June 2018, p. 7.

20 [2018] FCCA 1801.

**particularly in light of the fact that the 2002 appointment has been found to be invalid.**

***Compatibility of the measure with the right to an effective remedy for impermissible limitations on human rights***

1.67 Where measures impermissibly limit human rights, those affected have a right to an effective remedy. The right to an effective remedy is protected by article 2 of the ICCPR, and may include restitution, guarantees of non-repetition of the original violation, or satisfaction. The UN Human Rights Committee has stated that while limitations may be placed in particular circumstances on the nature of the remedy provided (judicial or otherwise), states parties must comply with the fundamental obligation to provide a remedy that is effective.[21]

1.68 As outlined above, classification as an UMA may have led to the imposition of measures which were likely to be incompatible with human rights including the obligation of non-refoulement. Those classified as an UMA will have been subject to mandatory immigration detention[22] and may also have been transferred to offshore immigration detention.[23] In some cases, it may have resulted in prolonged immigration detention (including offshore detention) or delays in processing claims.[24] The committee has previously raised human rights concerns about the impact of both onshore and offshore immigration detention including in relation to:

- the right to liberty and the prohibition on arbitrary detention;
- the right to humane treatment in detention;
- the right to health; and
- the rights of the child.[25]

1.69 Classification as an UMA may also have impacted upon whether an individual found to be a refugee was entitled to a permanent protection visa or temporary protection visa. The consequence of being granted a temporary rather than

21 UN Human Rights Committee, *General Comment No. 29: States of Emergency (Article 4)*(2001) [14].

22 See Migration Act, sections 189, 198.

23 See, Parliamentary Joint Committee on Human Rights, *Migration Legislation Amendment (Regional Processing and Other Measures) Act 2012 and related legislation: Ninth Report of 2013* (June 2013) p. 19.

24 See, Parliamentary Joint Committee on Human Rights, *Migration Legislation Amendment (Regional Processing and Other Measures) Act 2012 and related legislation: Ninth Report of 2013* (June 2013) p. 58.

25 See, Parliamentary Joint Committee on Human Rights, *Migration Legislation Amendment (Regional Processing and Other Measures) Act 2012 and related legislation: Ninth Report of 2013* (June 2013).

permanent visa may also have restricted access to family reunion and the right to the protection of the family.[26]

1.70 It appears that the validation could operate to close a potential avenue for individuals who entered certain waters of the Territory of Ashmore and Cartier Islands and were classified as UMAs to seek a remedy in relation to possible violations of such human rights. However, the statement of compatibility does not acknowledge that the right to an effective remedy is engaged by the measure and accordingly does not provide an assessment as to whether it is compatible with this right. As noted above, while there is a potential safeguard in the bill in relation to proceedings where judgment has been delivered, there is no such safeguard more generally in relation to ongoing proceedings or proceedings that have not yet been brought. Further, that safeguard would appear to only operate in relation to a person who is a party to the particular proceedings where judgment has been delivered, rather than all those who may be affected by the judgment.

## Committee comment

**1.71 The committee seeks the advice of the minister as to whether the measure is compatible with the right to an effective remedy (including how individuals who arrived at the area of waters within the Territory of Ashmore and Cartier Islands would have been treated if the 2002 appointment had not been made and the effect of the validation on the ability of individuals to seek remedies in relation to possible violations of human rights).**

26 See, Parliamentary Joint Committee on Human Rights, *Migration Legislation Amendment (Regional Processing and Other Measures) Act 2012 and related legislation: Ninth Report of 2013* (June 2013) p. 60.

# National Disability Insurance Scheme (Incident Management and Reportable Incidents) Rules 2018 [F2018L00633]

# National Disability Insurance Scheme (Complaints Management and Resolution) Rules 2018 [F2018L00634]

| | |
|---|---|
| **Purpose** | [F2018L00633]: prescribes the requirements for NDIS providers to implement and maintain incident management systems to record reportable incidents, and for inquiries by the NDIS Quality and Safeguards Commissioner in relation to reportable incidents.<br>[F2018L00634]: prescribes the requirements for the resolution of complaints relating to NDIS providers, complaints to and inquiries by the NDIS Quality and Safeguards Commissioner |
| **Portfolio** | Social Services |
| **Authorising legislation** | *National Disability Insurance Scheme Act 2013* |
| **Last day to disallow** | 15 sitting days after tabling (tabled Senate 18 June 2018) |
| **Rights** | Privacy; fair hearing; rights of persons with disabilities (see **Appendix 2**) |
| **Status** | Seeking additional information |

## Disclosure of information relating to complaints

1.72 The National Disability Insurance Scheme (Complaints Management and Resolution) Rules 2018 (the Complaints Management Rules) set out the rules governing the resolution of complaints about NDIS providers that have been made to the Commissioner.

1.73 Section 25 of the Complaints Management Rules provides that the Commissioner may give information, including about any action taken in relation to an issue raised in a complaint, to any person or body that the Commissioner considers has a sufficient interest in the matter.

### *Compatibility of the measure with the right to privacy*

1.74 Article 22 of the Convention on the Rights of Persons with Disabilities (CRPD) guarantees that no person with disabilities shall be subjected to arbitrary or unlawful interference with their privacy.[1] The right to privacy includes respect for private and

1 See also Article 17 of the International Covenant on Civil and Political Rights.

confidential information, particularly the storing, use and sharing of such information, and the right to control the dissemination of information about one's private life.

1.75 The statement of compatibility addresses the right to privacy in relation to a different aspect of the Complaints Management Rules,[2] but does not specifically address whether section 25 engages and limits the right to privacy. However, it would appear that the provision of 'information' could include personal information, including information about complainants or persons the subject of a complaint. If this is the case, then the provision would engage and limit the right to privacy.

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

1.77 The statement of compatibility describes the overall objective of the Complaints Management Rules as being to 'ensure providers are responsive to the needs of people with disability and focussed on the timely resolution of issues and that, when things go wrong, something is done about it'.[3] While this is capable of being a legitimate objective for the purposes of international human rights law, no information is provided as to the importance of this objective in the context of the particular measure. Further information as to the purpose of the particular measure (that is, the purpose of allowing the Commissioner to give information to 'any person or body that the Commissioner considers has a sufficient interest in the matter') would assist in determining whether the measure pursues a legitimate objective. Additional information in this respect would also assist in determining whether the measure is rationally connected to (that is, effective to achieve) the objective.

1.78 As to proportionality, the statement of compatibility explains that any personal information collected by the Commissioner in the performance of their functions is 'protected Commission information' under the *National Disability Insurance Scheme Act 2013* (the NDIS Act). It states that therefore:

> [protected Commission information] will be handled in accordance with the limitations placed on the use and disclosure of protected Commission information under the Act, the *National Disability Insurance Scheme (Protection and Disclosure of Information – Commissioner) Rules 2018,* the *Privacy Act 1988,* and any other applicable Commonwealth, State or Territory legislation. Information will only be dealt with where reasonably necessary for the fulfilment of the Commissioner's lawful and legitimate functions.[4]

2 See Statement of compatibility (SOC) to the Complaints Management Rules, pp. 33-34.

3 SOC, p. 32.

4 SOC, p. 34.

1.79 However, this general description of the safeguards does not assist in determining whether the measure is a proportionate limitation on the right to privacy. In order to be proportionate, limitations on the right to privacy must be no more extensive than what is strictly necessary to achieve the legitimate objective of the measure, and be accompanied by adequate safeguards to protect the right to privacy. Further information as to the specific safeguards in the NDIS Act, the National Disability Insurance Scheme (Protection and Disclosure of Information – Commissioner) Rules 2018 and the *Privacy Act 1988* that would protect personal and confidential information that may disclosed pursuant to section 25 of the Complaints Management Rules would assist in determining whether the measure is proportionate.

1.80 It is also not clear from the information provided what is meant by a person having a 'sufficient interest' in the information. The explanatory statement states that a person may have 'sufficient interest' in the matter 'if the Commissioner is satisfied that, in relation to the purpose of disclosure, the proposed recipient has a genuine and legitimate interest in the information'.[5] The explanatory statement further states:

> Other persons or bodies that may have a sufficient interest in the matter may include:
>
> - with the consent of the person with disability affected by an issue raised in a complaint, independent advocates or representatives;
> - with the consent of a person with disability affected by an issue raised in a complaint, their family members, carers or other significant people.
>
> In providing information, the Commissioner must comply with his or her obligations under the *Privacy Act 1988,* and should consider whether providing the information is appropriate or necessary for the proper handling of the complaint.[6]

1.81 However, beyond the reference to these safeguards in the explanatory statement, it is not clear from the information provided whether these safeguards and limitations on the meaning of 'sufficient interest' (such as the requirement to provide information with the consent of the person with disability, or the requirement that the Commissioner should consider whether providing information is appropriate or necessary for the proper handling of the complaint) are required as matters of law, or whether they are matters of discretion for the Commissioner.

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5 Explanatory Statement (ES) to the Complaints Management Rules, p. 25.

6 ES to the Complaints Management Rules, p. 25.

## Committee comment

**1.82 The preceding analysis indicates that the Commissioner's power to give information, including about any action taken in relation to an issue raised in a complaint, to any person or body that the Commissioner considers has a sufficient interest in the matter may engage and limit the right to privacy.**

**1.83 The committee seeks the advice of the minister as to:**

- **whether the measure is aimed at pursuing a legitimate objective for the purposes of international human rights law;**
- **how the measure is effective to achieve (that is, rationally connected to) its stated objective; and**
- **whether the limitation is a reasonable and proportionate measure to achieve the stated objective (including information as to the specific safeguards in the NDIS Act, the National Disability Insurance Scheme (Protection and Disclosure of Information – Commissioner) Rules 2018 and the *Privacy Act 1988* that protect personal and confidential information when the Commissioner exercises their power under section 25 of the rules).**

## Record keeping and incident and complaint management requirements

1.84 Section 10(2) of the Complaints Management Rules states that appropriate records of complaints received by the NDIS provider must be kept and include information about complaints, any action taken to resolve complaints, and the outcome of any action taken. Those records must be kept for 7 years from the day the record is made.[7] The complaints management system must also provide for the collection of statistical and other information relating to complaints made to the provider to review issues raised in complaints, identify and address systemic issues raised through the complaints management and resolution process, and report information relating to complaints to the Commissioner if requested to do so.[8]

1.85 Similarly, section 12 of the National Disability Insurance Scheme (Incident Management and Reportable Incidents) Rules 2018 (Reportable Incidents Rules) sets out the documentation, record keeping and statistics requirements in relation to the incident management systems. An NDIS provider must provide specified information in the record of each incident that occurs, including a description of the incident, the names and contact details of the persons involved in the incident, the names and contact details of any witnesses to the incident, the name and contact details of the person making the record of the incident, and the details and outcomes of any

7 Section 10(3) of the Complaints Management Rules.

8 Section 10(4) of the Complaints Management Rules.

investigations into the incident.[9] These records must also be kept for 7 years from the day the record is made and the incident management system must also provide for the collection of statistical and other information relating to incidents.[10]

***Compatibility of the measure with the right to privacy***

1.86 As the provisions in the Complaints Management Rules and Reportable Incidents Rules relate to the storing, use and sharing of information (including personal information), the provisions engage and limit the right to privacy.

1.87 The statement of compatibility to the Complaints Management Rules discusses the right to privacy in general terms (discussed above), but does not specifically address the record keeping requirements in those rules. The statement of compatibility to the Reportable Incidents Rules does not acknowledge that the rules may engage and limit the right to privacy.

1.88 The explanatory statement to the Reportable Incidents Rules states that it is 'crucial that the incident management system is documented so that compliance with the system can be monitored and enforced, including by quality auditors and the Commissioner'.[11] Similarly, the explanatory statement to the Complaints Management Rules states that the documentation and record keeping requirement 'is fundamental to the proper functioning of a complaints management and resolution system as it ensures that persons with disability and their families and carers are aware of their rights and can advocate for their needs and safety where appropriate'.[12] The explanatory statement to each of the instruments explains that the collection of statistics and other information is for the purpose of identifying any systemic issues that may exist.[13] Each of these objectives appear to be legitimate objectives for the purposes of international human rights law, and the measures appear to be rationally connected to this objective.

1.89 As to proportionality, as noted above, limitations on the right to privacy must be accompanied by adequate safeguards. There is limited information in the explanatory statement or statement of compatibility as to the safeguards that apply to the information stored pursuant to the record keeping requirements, such as requirements for keeping records secure and confidential, or penalties for unauthorised disclosure. Further information as to these matters would assist in determining whether the limitation on the right to privacy is proportionate.

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9 See section 12(2) and (3) of the Reportable Incidents Rules.

10 Section 12(4) and (5) of the Reportable Incidents Rules.

11 SOC to the Reportable Incident Rules, p. 10.

12 SOC to the Complaints Management Rules, p. 10.

13 SOC to the Complaints Management Rules, p. 11; SOC to the Reportable Incidents Rules, p. 12.

1.90 Further, in relation to the collection of statistical and 'other information', this appears to be very broad and, according to the explanatory statement to the Reportable Incidents Rules, would allow disclosure of 'who is involved in incidents (for example, whether particular workers and/or people with disability are involved in multiple incidents)'.[14] No information is provided in the explanatory statements or statements of compatibility as to the safeguards that would apply to protect the right to privacy of those persons whose information is disclosed pursuant to the statistical collection requirements.

## Committee comment

**1.91 The preceding analysis indicates that the record keeping requirements relating to incident management and complaints management may engage and limit the right to privacy.**

**1.92 The committee seeks the advice of the minister as to the proportionality of the limitation on the right to privacy. In particular, the committee seeks information as to the safeguards that would apply to protect the right to privacy.**

## Inquiry powers and procedural fairness requirements relating to complaints and incident management

1.93 Section 9 of the Complaints Management Rules provides that the complaints management and resolution system of a registered NDIS provider must ensure that people are afforded procedural fairness when a complaint is dealt with by a provider. Similarly, section 11 of the Reportable Incidents Rules provides that incident management systems of registered NDIS providers must require that people are afforded procedural fairness when an incident is dealt with by a provider. The Commissioner must have due regard to the rules of procedural fairness when taking action in relation to a reportable incident,[15] and must give due regard to procedural fairness when considering any complaints.[16] For each of these provisions, the Commissioner may make guidelines relating to procedural fairness.[17]

1.94 The Complaints Management Rules also give the Commissioner powers to authorise inquiries in relation to issues connected with complaints, a series of complaints or about support or services provided by NDIS providers.[18] The

14 ES to the Reportable Incidents Rules, p. 12.

15 Section 28 of the Reportable Incident Rules.

16 Section 30 of the Complaints Management Rules.

17 Section 9(2) of the Complaints Management Rules; Section 11(2) of the Reportable Incidents Rules; see also the note to section 28 of the Reportable Incidents Rules and section 30 of the Complaints Management Rules.

18 Section 29 of the Complaints Management Rules.

Reportable Incidents Rules allow for the Commissioner to authorise inquiries in relation to reportable incidents.[19]

***Compatibility of the measure with the right to a fair hearing***

1.95 Article 14(1) of the ICCPR requires that in the determination of a person's rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. Australia also has obligations to ensure effective access to justice for persons with disabilities on an equal basis with others.[20]

1.96 The concept of 'suit at law' encompasses judicial procedures aimed at determining rights and obligations, equivalent notions in the area of administrative law and also extends to other procedures assessed on a case-by-case basis in light of the nature of the right in question.[21]

1.97 It is not clear from the information provided the extent to which the processes in relation to incident and complaints management by NDIS providers and the Commissioner would involve the determination of rights and obligations of persons subject to the complaints (such as persons employed or engaged by NDIS providers) such as to constitute a 'suit at law'. However, it is noted that some of the outcomes of resolving incidents by NDIS providers appear to include corrective action,[22] the Commissioner may refer incidents to authorities with responsibility in relation to incidents (such as child protection authorities),[23] or 'take any other action that the Commissioner considers reasonable in the circumstances'.[24] In relation to complaints management, the Commissioner must undertake a resolution process in relation to complaints which appears to include the ability to make adverse findings against persons employed or engaged by NDIS providers.[25] Similarly in relation to inquiries the Commissioner may 'prepare and publish a report setting out his or her findings in relation to the inquiry'.[26]

1.98 To the extent that these processes may involve the determination of rights and obligations, fair hearing rights may apply. This matter was not addressed in the

19 Section 27 of the Reportable Incidents Rules; pursuant to section 73Z of the NDIS Act.

20 Article 13 of the CRPD.

21 See UN Human Rights Committee, *General Comment 32: Article 14, Right to Equality before Courts and Tribunals and to Fair Trial* (2007) [16].

22 Section 10(1)(g) of the Reportable Incidents Rules.

23 Section 26(1)(a) of the Reportable Incidents Rules.

24 Section 26(1)(f) of the Reportable Incidents Rules.

25 Section 16(3) and (5) of the Complaints Management Rules.

26 Section 24(6) of the Reportable Incidents Rules; section 29 of the Complaints Management Rules.

statement of compatibility. The instruments and the explanatory statement refer to the development of the National Disability Insurance Scheme (Procedural Fairness) Guidelines 2018. A copy of these guidelines would assist in determining whether the procedural fairness requirements afforded are consistent with fair hearing rights.

1.99 Another relevant factor in determining compatibility with fair hearing rights is the availability of independent review of decisions. The explanatory statement states that decisions of the Commissioner may be the subject of complaint to the Commonwealth Ombudsman.[27] This would be a relevant safeguard. However, further information, including information as to any external review of decisions of the Commissioner (such as merits review), would assist in determining whether these review options are sufficient for the purposes of the right to a fair hearing.

## Committee comment

**1.100 The preceding analysis raises questions as to the compatibility of the inquiry powers, incident management processes and complaints management processes with fair hearing rights under Article 14 of the ICCPR.**

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

- **a copy of the National Disability Insurance Scheme (Procedural Fairness) Guidelines 2018 (or if a copy is not available, a detailed overview of the guidelines having regard to the matters discussed above including any relevant safeguards); and**
- **safeguards to protect fair hearing rights (including information as to any external review of decisions).**

### *Compatibility of the measure with the right to privacy*

1.102 The relevant principles relating to the right to privacy are discussed above.

1.103 The ability of the Commissioner to prepare and publish reports setting out their findings in relation to an inquiry may engage and limit the right to privacy, insofar as those reports may contain personal and confidential information. The privacy implications of the inquiry process were not specifically addressed in the statements of compatibility to either the Reportable Incidents Rules or the Complaints Management Rules.

1.104 The explanatory statements to the Reportable Incidents Rules and the Complaints Management Rules explain that the inquiry function is 'intended to determine or define potential matters including any systemic issues which may be connected with support services provided under the NDIS'. This is likely to be a legitimate objective for the purposes of international human rights law, and the

27 SOC to the Complaints Management Rules, p. 27.

ability to publish reports on such matters appears to be rationally connected to this objective.

1.105 Further information from the minister, including the safeguards in place to protect personal and confidential information, would assist in determining the proportionality of the measure.

## Committee comment

**1.106 The preceding analysis indicates that the Commissioner's inquiry powers may engage and limit the right to privacy.**

**1.107 The committee seeks the advice of the minister as to the compatibility of the measure with the right to privacy and, in particular, information as to the safeguards in place to protect personal and confidential information.**

# National Disability Insurance Scheme (Protection and Disclosure of Information—Commissioner) Rules 2018 [F2018L00635]

| | |
|---|---|
| **Purpose** | Provides for the disclosure of information in certain circumstances by the NDIS Quality and Safeguards Commissioner |
| **Portfolio** | Social Services |
| **Authorising legislation** | *National Disability Insurance Scheme Act 2013* |
| **Last day to disallow** | 15 sitting days after tabling (tabled Senate 18 June 2018) |
| **Right** | Privacy (see **Appendix 2**) |
| **Status** | Seeking additional information |

**Background**

1.108 The National Disability Insurance Scheme (NDIS) Quality and Safeguards Commission and Commissioner (commissioner) were established by the *National Disability Insurance Scheme Amendment (Quality and Safeguards Commission and Other Measures) Act 2017* (the NDIS Amendment Act). The committee considered the human rights compatibility of the NDIS Amendment Act in *Report 7 of 2017.*[1] In that report, the committee noted that there were questions as to the compatibility of the Act with the right to privacy in light of the broad disclosure power of the commissioner in section 67E(1) of the *National Disability Insurance Scheme Act 2013* (NDIS Act).

1.109 The statement of compatibility for the NDIS Amendment Act explained that the proposed information gathering and disclosure powers were proportionate to achieving a legitimate objective because, amongst other factors, the commissioner would first need to satisfy the relevant NDIS rules,[2] which would 'enumerate specific bodies and purposes' for which the commissioner could disclose information in the public interest and 'include limitations on the further use and disclosure of such information'.[3] The committee noted that without a copy of these rules it was unclear whether the rules would sufficiently constrain the exercise of the commissioner's disclosure powers, such that the disclosure powers would constitute a permissible limitation on the right to privacy. Consequently, the committee advised that it would

1 Parliamentary Joint Committee on Human Rights, *Report 7 of 2017* (8 August 2017) pp. 27-30.

2 NDIS Amendment Bill, Addendum to the explanatory memorandum, p. 2.

3 NDIS Amendment Bill, statement of compatibility (SOC), p. 13.

revisit the matters raised in its assessment when reviewing the rules once they were made.[4]

## Information sharing – disclosure powers

1.110 Part 3 of the National Disability Insurance Scheme (Protection and Disclosure of Information—Commissioner) Rules 2018 (Disclosure Rules) prescribe the rules and guidance regarding the commissioner's disclosure powers in section 67E(1) of the NDIS Act.

1.111 Division 1 sets out the rules which the commissioner must follow in disclosing any 'NDIS information',[5] where:

- the commissioner is satisfied on reasonable grounds that it is in the public interest to do so;[6] or
- the NDIS information is being disclosed to:
  - the head of a Commonwealth, state or territory department or authority for the purposes of that department or authority;[7] or
  - a state or territory department or authority with responsibility for matters relating to people with disabilities.[8]

1.112 Subject to a number of exceptions,[9] in these circumstances the commissioner must:

- de-identify personal information included in NDIS information, where doing so would not adversely affect the purpose for which the information is disclosed;[10]
- notify and seek the consent of the affected individual about the proposed disclosure prior to disclosure, and provide them with a reasonable opportunity to comment;[11]

4 Parliamentary Joint Committee on Human Rights, *Report 7 of 2017* (8 August 2017) p. 30.

5 Section 8 of the Disclosure Rules defines 'NDIS information' as information acquired by a person in the performance of a person's functions or duties or in the exercise of the person's powers under the NDIS Act.

6 NDIS Act, section 67E(1)(a).

7 NDIS Act, section 67E(1)(b)(i), (iv).

8 NDIS Act, section 67E(1)(b)(iii).

9 See discussion at [1.126].

10 Disclosure Rules, section 10.

11 Disclosure Rules, section 11.

- notify the recipient of the NDIS information about the purpose of and limitations on the disclosure, and state that the information may only be used in accordance with the purpose of the disclosure;[12] and
- ensure a record of the disclosure is made, containing prescribed information.[13]

1.113 Division 2 of part 3 of the Disclosure Rules outlines matters to which the commissioner must have regard in determining whether there are reasonable grounds on which to disclose NDIS information in the public interest under section 67E(1) of the NDIS Act. Section 14 of the Disclosure Rules requires the commissioner to have regard to:

- whether the affected individual would be likely to be in a position to seek assistance themselves or notify the proposed recipient of the information of their circumstances;
- the purpose for which the information was collected, including any information provided to the affected individual at that time about how the information would or would not be used or disclosure;
- whether the affected individual would reasonably expect the commissioner to disclose the information for the proposed purpose and to the proposed recipient;
- whether the disclosure would be contrary to a request by a complainant under section 15(3) of the National Disability Insurance Scheme (Complaints Management and Resolution) Rules 2018;
- whether the proposed recipient has 'sufficient interest' in the information;[14]
- whether the proposed recipient could reasonably obtain the information from a source other than the commissioner; and
- whether sections 15 to 19 of the Disclosure Rules apply.

1.114 Sections 15 to 19 set out additional matters about which the commissioner must be satisfied if the proposed disclosure is for one of the following purposes:

- enforcement of laws and related circumstances;[15]
- briefing the minister;[16]

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12 Disclosure Rules, section 12.

13 Disclosure Rules, section 13.

14 Under section 14(2) of the Disclosure Rules, a person will have a 'sufficient interest' in the information if the Commissioner is satisfied that they have a 'genuine and legitimate interest' in the information or if they are a Commonwealth, State or Territory Minister.

15 Disclosure Rules, section 15.

- missing or deceased persons;[17]
- assisting child welfare agencies;[18] and
- assisting professional bodies;[19]

1.115 For example, where the proposed disclosure is to assist a 'professional body',[20] the commissioner must be satisfied that:

- the commissioner holds information about a person employed or otherwise engaged by an NDIS provider; and
- the disclosure is necessary to assist a professional body to consider whether the person's conduct meets the standards required to attain or maintain membership of the professional body.[21]

***Compatibility of the measure with the right to privacy***

1.116 The right to privacy includes respect for private and confidential information, particularly the storing, use and sharing of such information, and the right to control the dissemination of information about one's private life.[22]

1.117 Allowing for the disclosure of NDIS information (including personal information) under section 67E of the NDIS Act engages and limits the right to privacy. By setting out the factors that the commissioner must consider in determining whether to disclose NDIS information, the statement of compatibility acknowledges that the Disclosure Rules engage this right.[23]

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

1.119 In relation to whether the measure pursues a legitimate objective, the statement of compatibility explains that the objective of permitting the

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16 Disclosure Rules, section 16.

17 Disclosure Rules, section 17.

18 Disclosure Rules, section 18.

19 Disclosure Rules, section 19.

20 Section 19(2) of the Disclosure Rules defines 'professional body' as 'an organisation that is responsible, nationally or in one or more States or Territories, for registering members of a particular profession and monitoring their compliance with specified standards of behaviour'.

21 Disclosure Rules, section 19.

22 Article 17 of the International Covenant on Civil and Political Rights; Article 22 of the Convention on the Rights of Persons with Disabilities; article 16 of the Convention on the Rights of the Child (CRC)

23 Statement of compatibility (SOC), p. 13.

commissioner to disclose NDIS information is to enhance system-level oversight of serious incidents involving the abuse, neglect or exploitation of people with disabilities, by facilitating coordination with the family or carers of people with disabilities and relevant professional bodies and government departments and agencies.[24] Regarding the importance of this objective, the statement cites three inquiries in 2014-2015 into abuse in the disability sector, which emphasised the need for system-level oversight to adequately identify and address systemic issues in the sector.[25]

1.120 As acknowledged in the committee's assessment of the primary legislation, this is likely to constitute a legitimate objective for the purposes of international human rights law.[26]

1.121 The statement of compatibility provides further information about the individual measures in division 2 of part 3 (summarised at [1.113] above), which assists in determining how each disclosure power is effective to achieve (that is, rationally connected to) the stated objective. For example, the statement of compatibility notes that section 16, which permits disclosures to brief the minister, is designed 'to enable matters to be escalated and managed appropriately' by the relevant minister.[27] In light of the minister's oversight role, the escalation and management of issues by the minister is likely to be rationally connected to the legitimate objective of promoting effective system-level oversight of, and response to, the abuse of people with disabilities. For this reason, and having regard to the committee's previous conclusions in relation to the primary legislation, the measures appear to be rationally connected to this objective.

1.122 As noted by the committee in its analysis of the NDIS Amendment Act,[28] the extent to which the Disclosure Rules constrain the commissioner's exercise of the disclosure powers in section 67E(1) of the NDIS Act is key to determining whether the disclosure powers are a proportionate limitation on the right to privacy.

1.123 The statement of compatibility highlights a number of provisions in division 2 of the Disclosure Rules which are intended to 'limit the scope of the exercise of the [commissioner's] decision making power'.[29] For example, amongst other factors, the statement of compatibility notes that the commissioner must consider whether the proposed recipient of the information could reasonably obtain the information from

24 SOC, p. 15.

25 SOC, p. 15.

26 Parliamentary Joint Committee on Human Rights, *Report 7 of 2017* (8 August 2017) p. 28.

27 SOC, p. 16.

28 Parliamentary Joint Committee on Human Rights, *Report 7 of 2017* (8 August 2017), p. 29.

29 Disclosure Rules, SOC, p. 15.

another source,[30] and whether the person requesting the information has 'sufficient interest' in the information.[31] Section 14(2) of the Disclosure Rules imposes an additional limitation on this threshold by prescribing that a person has a 'sufficient interest' if they have a 'genuine and legitimate interest in the information', or are a Commonwealth, state or territory minister. Section 14 also requires the commissioner to consider whether a person about whom information would be disclosed is likely to be in a position to seek assistance themselves or give notice to the proposed recipient of the information, where the information concerns their life, health or safety.[32] The statement of compatibility explains that this provision is:

> …intended to insure that, as far as possible, the Commissioner takes into account the interests of the person concerned and…is a further protection against arbitrary interference with the privacy of a person…[33]

1.124 The statement of compatibility also identifies some specific further restrictions on the disclosure of information for the purposes defined in sections 15 to 19 of the Disclosure Rules, summarised above at [1.114]. For example, disclosure of information to brief the minister is limited to the prescribed purposes of enabling the minister to consider complaints, incidents or issues, and if necessary respond to the affected person; informing the minister about an error or delay on the part of the Commission; or alerting the minister to an anomalous or unusual operation of the Act, regulations or rules.[34] Such restrictions are relevant to the proportionality of the measure and assist to ensure that disclosure is sufficiently circumscribed.

1.125 However, sections 15, 17, 18 and 19 of the Disclosure Rules may permit the disclosure of personal information to bodies that are not constrained by the *Privacy Act 1988* (Privacy Act). While compliance with the Privacy Act is not a complete answer to concerns about the right to privacy, it may provide relevant safeguards that assist in determining whether a limitation on the right to privacy is proportionate. Noting this potential gap in coverage, the relevant sections do not require the commissioner to be satisfied of how bodies that are not subject to the Privacy Act will collect, store and disclose personal information that is disclosed to them. The statement of compatibility does not provide any additional information about this issue. The potential for information to be disclosed to bodies that are not constrained by the Privacy Act raises a question as to whether there are other, relevant safeguards in place to protect the right to privacy.

30 Disclosure Rules, section 14(1)(f).

31 Disclosure Rules, section 14(1)(e).

32 Disclosure Rules, section 14(1)(a).

33 Disclosure Rules, SOC, p. 16.

34 Disclosure Rules, section 16.

1.126 There are also a number of exceptions to the safeguards in division 1, which may restrict the effectiveness of the safeguards. For example, under section 10(3)(b), the commissioner is not required to de-identify personal information if they are satisfied that to do so would result in an unreasonable delay. A similar exception applies to the consent and consultation requirements in section 11.[35] Neither the Disclosure Rules nor the statement of compatibility explain what constitutes an 'unreasonable delay' or how this is determined. Further information as to how this threshold is determined would assist the committee to assess whether the limitation on the right to privacy is proportionate to the legitimate objective sought.

1.127 Finally, the Disclosure Rules do not appear to make decisions made by the commissioner under part 3 of the rules reviewable, nor does the NDIS Act make decisions under section 67E reviewable. This raises concerns about the sufficiency of the safeguards in place to protect the right to privacy. These matters were not fully addressed in the statement of compatibility for the Disclosure Rules.

1.128 Accordingly, while part 3 of the Disclosure Rules significantly constrains the commissioner's disclosure powers under section 67E(1) of the NDIS Act, some questions remain as to the proportionality of the measures, such as whether the exceptions to the safeguards in division 1 are the least rights restrictive approach to achieving the legitimate objective and whether the safeguards in division 2 for public interest disclosures are sufficient to constitute a proportionate limitation on the right to privacy.

## Committee comment

**1.129 The preceding analysis raises questions as to whether the Disclosure Rules are a proportionate limitation on the right to privacy.**

**1.130 The committee seeks the advice of the minister as to whether the Disclosure Rules ensure that the limitation on the right to privacy in section 67E(1) of the NDIS Act is proportionate to achieve the objective, in particular:**

- **whether information may be disclosed to organisations that are not covered by the Privacy Act and, if so, the sufficiency of other relevant safeguards to protect the right to privacy;**
- **whether the exceptions to the safeguards on the commissioner's disclosure powers in division 1 are the least rights restrictive approach to pursue the legitimate objective; and**
- **whether decisions made by the commissioner in part 3 of the Disclosure Rules are reviewable.**

35 Disclosure Rules, section 11(7)(b).

# National Disability Insurance Scheme (Restrictive Practice and Behaviour Support) Rules 2018 [F2018L00632]

| | |
|---|---|
| **Purpose** | Provides oversight relating to behaviour support, monitoring the use of restrictive practices within the National Disability Insurance Scheme (NDIS) |
| **Portfolio** | Social Services |
| **Authorising legislation** | *National Disability Insurance Scheme Act 2013* |
| **Last day to disallow** | 15 sitting days after tabling (tabled Senate 18 June 2018) |
| **Rights** | Torture, cruel, inhuman and degrading treatment or punishment; liberty; rights of persons with disabilities (see **Appendix 2**) |
| **Status** | Seeking additional information |

## Conditions relating to the use of regulated restrictive practices by NDIS providers

1.131 The National Disability Insurance Scheme (Restrictive Practice and Behaviour Support) Rules 2018 (rules) sets out the conditions of registration that apply to all registered National Disability Insurance Scheme (NDIS) providers who use 'regulated restrictive practices' in the course of delivering NDIS support. A 'regulated restrictive practice' involves any of the following:

(a) seclusion, which is the sole confinement of a person with disability in a room or a physical space at any hour of the day or night where voluntary exit is prevented, or not facilitated, or it is implied that voluntary exit is not permitted;

(b) chemical restraint, which is the use of medication or chemical substance for the primary purpose of influencing a person's behaviour. It does not include the use of medication prescribed by a medical practitioner for the treatment of, or to enable treatment of, a diagnosed mental disorder, a physical illness or a physical condition;

(c) mechanical restraint, which is the use of a device to prevent, restrict, or subdue a person's movement for the primary purpose of influencing a person's behaviour but does not include the use of devices for therapeutic or non-behavioural purposes;

(d) physical restraint, which is the use or action of physical force to prevent, restrict or subdue movement of a person's body, or part of their body, for the primary purpose of influencing their behaviour. Physical restraint does not include the use of a hands-on technique

in a reflexive way to guide or redirect a person away from potential harm/injury, consistent with what could reasonably be considered the exercise of care towards a person.

(e) environmental restraint, which restricts a person's free access to all parts of their environment, including items or activities.[1]

1.132 The rules prescribe different conditions of registration of NDIS providers depending on the regulation of restrictive practices in a state or territory. Broadly, for those states and territories that prohibit the use of a restrictive practice, it is a condition of registration of the NDIS provider that the provider must not use the restrictive practice in relation to a person with a disability.[2] However, where the practice is not prohibited but rather is regulated by an authorisation process,[3] registration is conditional upon the use of the regulated restrictive practice being authorised (other than a 'single emergency use'[4]), and the provider must lodge with the NDIS Quality and Safeguards Commissioner (Commissioner) evidence of that authorisation as soon as reasonably practicable after the use of the regulated restrictive practice.[5]

1.133 The rules also prescribe the conditions of registration where a 'behaviour support plan' is used in relation to a regulated restrictive practice. Behaviour support plans may only be developed by a NDIS behaviour support practitioner[6] and are subject to certain conditions, including the requirement that all reasonable steps be taken to reduce and eliminate the need for the use of regulated restrictive practices.[7] In particular, section 21 of the rules sets out the minimum content of behaviour support plans containing regulated restrictive practices, and provides that

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1 Section 6 of the National Disability Insurance Scheme (Restrictive Practice and Behaviour Support) Rules 2018 (rules).

2 Section 8 of the rules.

3 The rules note that an authorisation process may, for example, be a process under relevant State or Territory legislation or policy or involve obtaining informed consent from a person and/or their guardian, approval from a guardianship board or administrative tribunal or approval from an authorised state or territory officer.

4 'Single emergency use' is not defined in the instrument but is described in the explanatory statement (ES) as 'the use of a regulated restrictive practice in relation to a person with disability, in an emergency, where the use of a regulated restrictive practice has not previously been identified as being required in response to behaviour of that person with disability previously'. See, ES, p. 9.

5 Section 9 of the rules.

6 'Behaviour support practitioner' is defined in section 5 of the rules to mean a person the Commissioner considers is suitable to undertake behaviour support assessments (including functional behavioural assessments) and to develop behaviour support plans that may contain the use of restrictive practices.

7 See sections 18-20.

the registration of specialist behaviour support providers[8] is subject to the condition a regulated restrictive practice must:

- be clearly identified in the behaviour support plan;
- if the state or territory in which the regulated restrictive practice is to be used has an authorisation process – be authorised in accordance with that process;
- be used only as a last resort in response to risk of harm to the person with disability or others, and after the provider has explored and applied evidence-based, person-centred and proactive strategies; and
- be the least restrictive response possible in the circumstances to ensure the safety of the person and others; and
- reduce the risk of harm to the person with disability or others; and
- be in proportion to the potential negative consequence or risk of harm; and
- be used for the shortest possible time to ensure the safety of the person with disability or others.[9]

1.134 Where an NDIS provider provides support or services in accordance with a behaviour support plan that includes the use of a restrictive practice, registration as a provider is conditional on the regulated restrictive practice being used in accordance with the behaviour support plan.[10]

1.135 The rules also set out registration requirements where the use of a regulated restrictive practice may be unauthorised by state or territory law but be in accordance with a behaviour support plan, and vice versa. In particular:

- where the NDIS provider uses a regulated restrictive practice pursuant to an authorisation process but not in accordance with a behaviour support plan (described as the 'first use' in the rules), and the use of such practices will or is likely to continue, the NDIS provider must take all steps to develop an interim behaviour support plan within one month after the use of the regulated restrictive practice and a comprehensive behaviour support plan within six months;[11]
- where the NDIS provider uses a regulated restrictive practice that is not authorised pursuant to an authorisation *and* is not in accordance with a

8 A specialist behaviour support provider is defined in section 5 of the rules to mean a registered NDIS provider whose registration incudes the provision of specialist behaviour support services.

9 Section 21(3) of the rules.

10 Section 10 of the rules.

11 Section 11 of the rules.

behaviour support plan, and the use of such practices will or is likely to continue, the NDIS provider must (relevantly) obtain authorisation for the ongoing use of the regulated restrictive practice and take all reasonable steps to develop an interim behaviour support plan within one month and a comprehensive behaviour support plan within six months;[12] and

- where the NDIS provider uses a regulated restrictive practice that is not in accordance with a behaviour support plan but authorisation is not required in the state or territory, and the use will or is likely to continue, the NDIS provider must take all reasonable steps to develop an interim behaviour support plan within one month and a comprehensive behaviour support plan within six months that covers the use of the regulated restrictive practice.[13]

***Compatibility of the measure with the prohibition on torture, cruel, inhuman or degrading treatment or punishment***

1.136 Australia has an obligation not to subject any person to torture or to cruel, inhuman or degrading treatment or punishment.[14] The prohibition on torture, cruel, inhuman and degrading treatment or punishment is absolute and may never be subject to any limitations. The UN Committee on the Rights of Persons with Disabilities (UNCRPD) has stated that Australia's use of restrictive practices may raise concerns in relation to freedom from torture and cruel, inhuman or degrading treatment or punishment, and has recommended that Australia take immediate steps to end such practices.[15]

1.137 The statement of compatibility acknowledges that the rules engage the prohibition on torture, cruel, inhuman or degrading treatment or punishment,[16] and also acknowledges the concerns raised by the UNCRPD about the unregulated use of restrictive practices.[17]

1.138 The statement of compatibility emphasises the minimum requirements in behaviour support plans that include the use of regulated restrictive practices (summarised above at [1.133]) and also emphasises that behaviour support plans

12 Section 12 of the rules.

13 Section 13 of the rules.

14 Article 7 of the International Covenant on Civil and Political Rights; article 15 of the Convention on the Rights of Persons with Disabilities; articles 3-5 Convention against Torture and other Cruel, Inhuman, Degrading Treatment or Punishment; article 37 of the Convention on the Rights of the Child.

15 Committee on the Rights of Persons with Disabilities, *Concluding observations on the initial report of Australia, adopted by the committee at its tenth session,* CRPD/C/AUS/CO1(2013) [35]-[36].

16 Statement of compatibility (SOC) p. 29.

17 SOC, p. 28.

'must contain strategies that aim to reduce and eliminate the use of restrictive practices, both in the long-term and in the short-term'.[18] It also states that the oversight of behaviour support plans (including lodging the plans with the Commissioner and reviewing the plans every 12 months) and the obligations on behaviour support providers 'act as a safeguard against inhumane treatment'.[19] However, while the safeguards that ensure regulated restrictive practices are (for example) 'proportionate' or the 'least restrictive response' are important, they would not be of assistance where the practice amounted to torture, cruel, inhuman or degrading treatment or punishment. This is because, as noted earlier, Australia's obligations in relation to torture, cruel, inhuman or degrading treatment or punishment are absolute.

1.139 There are also particular questions in circumstances where the regulated restrictive practice may be used against a disabled person not in accordance with a behaviour support plan and/or without authorisation. It is possible that a disabled person could be subject to a regulated restrictive practice without authorisation or a behaviour support plan (and the accompanying safeguards), and the NDIS provider could still obtain registration as a provider so long as the provider is subsequently authorised and develops a behaviour support plan.[20] There is limited information provided in the statement of compatibility that specifically addresses how the NDIS provider registration scheme will ensure that the regulated restrictive practices used without authorisation or a behaviour support plan do not amount to torture, cruel, inhuman or degrading treatment or punishment. Further information as to the safeguards to prevent such practices in breach of Australia's obligations occurring in the first instance, rather than requirements imposed after the practice has occurred, would be of assistance in determining human rights compatibility.

1.140 Questions also arise in circumstances where an NDIS provider engages in a 'single emergency use' of the regulated restrictive practice without authorisation.[21] 'Single emergency use' is not defined in the rules. The explanatory statement indicates that 'single emergency use' refers to a practice 'that has not previously been identified as being required in response to behaviour of that person with a disability previously'.[22] The explanatory statement provides the following example:

> For example, if a person suddenly presents with behaviour that poses a risk of harm to themselves and immediate steps have to be taken to protect them from that harm, the emergency use of a restrictive practice may be required. An example would be where a person receives

18 SOC, p. 30.

19 SOC, pp. 30-31.

20 See section 12 of the rules.

21 Section 9 of the rules.

22 ES, p. 9.

> unexpected news causing them distress and in their distress they are about to run out onto a busy highway and the disability worker has to stand in front of him and physically restrain him by grabbing his wrists to prevent him from running onto the road.[23]

1.141 While the explanatory statement appears to indicate that a 'single emergency use' is restricted to certain circumstances (such as where immediate steps need to be taken to protect a person from harm), those restrictions and safeguards do not appear in the rules. It is not clear from the information provided what safeguards there are in place to prevent the 'single emergency use' occurring in circumstances where that practice may amount to torture, cruel, inhuman or degrading treatment or punishment.

## Committee comment

**1.142 The preceding analysis indicates that the use of regulated restrictive practices may engage Australia's absolute obligation not to subject persons to torture, cruel, inhuman or degrading treatment or punishment.**

**1.143 The committee seeks the advice of the minister as to the compatibility of the rules with this right, including:**

- **safeguards to prevent regulated restrictive practices (including 'first use' of a regulated restrictive practice and 'single emergency use' of a regulated restrictive practice) amounting to torture, cruel, inhuman or degrading treatment or punishment; and**
- **whether the rules could be amended to include safeguards to prevent regulated restrictive practices (in particular 'first use' regulated restrictive practices and 'single emergency use' regulated restrictive practices) amounting to torture, cruel, inhuman or degrading treatment or punishment.**

***Compatibility of the measure with multiple other rights relating to the protection of persons with disabilities***

1.144 The statement of compatibility also acknowledges that the use of regulated restrictive practices engages the following rights in the Convention on the Rights of Persons with Disabilities (see Appendix 2):

- the right to equal recognition before the law and to exercise legal capacity;[24]
- the right of persons with disabilities to physical and mental integrity on an equal basis with others;[25]

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23 ES, p. 9.

24 CRPD, Article 12.

25 CRPD, Article 17.

- the right to liberty and security of the person;[26]
- the right to freedom from exploitation, violence and abuse;[27] and
- the right to freedom of expression and access to information.[28]

1.145 Each of these rights may be subject to permissible limitations provided the limitation addresses a legitimate objective, is effective to achieve (that is, rationally connected to) that objective and is a proportionate means to achieve that objective.

1.146 The objective of the rules is stated to be to oversee behaviour support and 'the reduction and elimination of restrictive practices in the NDIS'.[29] While this is capable of being a legitimate objective for the purposes of international human rights law, the statement of compatibility provides limited information as to the importance of these objectives in the context of the particular measure. This is particularly significant given that the rules regulate the use of restrictive practices, that is, are directed toward oversight of their use rather than explicitly eliminating their use. Further information as to whether regulating the use of restrictive practices is a legitimate objective in circumstances where the ultimate objective is to eliminate such practices would therefore be of assistance. The same information would assist in determining whether the measures are rationally connected to the objective.

1.147 As to proportionality, the statement of compatibility identifies several safeguards, including the minimum requirements for the use of regulated restrictive practices in behaviour support plans, and reporting and monitoring requirements. All of these safeguards are relevant in determining the proportionality of the measure. The requirement that the use of any regulated restrictive practice pursuant to a behaviour support plan be the 'least restrictive', as a matter of last resort and proportionate are particularly relevant. However, it is not clear from the information provided who determines whether a measure is the 'least restrictive' and 'proportionate', the criteria that are relevant to making such a determination, and whether there is any oversight of such a determination.

1.148 There are also questions as to proportionality in circumstances where the use of the regulated restrictive practice occurs not in accordance with a behaviour support plan or without authorisation. In that circumstance, it is not clear what safeguards would be in place to ensure that use of the regulated restrictive practice occurs in a manner compatible with the human rights outlined above. This includes what safeguards would be in place to ensure that any use of the restrictive practice

26 CRPD, article 14; ICCPR, article 9; CRC, article 37.

27 CRPD, article 16.

28 CRPD, article 21.

29 ES, p. 1; SOC, p. 32.

(including but not limited to the 'first use' and a 'single emergency use') occurs in the least rights restrictive manner possible. It would appear that there would be other, less rights restrictive, approaches which could be taken by the rules, such as requiring *all* use (including 'first use' and 'single emergency use' practices) to be the subject of authorisation and behaviour support plans.

## Committee comment

**1.149 The preceding analysis indicates that the use of regulated restrictive practices engages the right to equal recognition before the law and to exercise legal capacity, the right of persons with disabilities to physical and mental integrity on an equal basis with others, the right to liberty and security of the person, the right to freedom from exploitation, violence and abuse, and the right to freedom of expression and access to information.**

**1.150 The committee seeks the advice of the minister as to the compatibility of the use of regulated restricted practices with these rights, including:**

- **whether the measure is aimed at achieving a legitimate objective for the purposes of human rights law;**
- **how the measure is effective to achieve (that is, rationally connected to) that objective;**
- **whether the limitation is a reasonable and proportionate measure to achieve the stated objective;**
- **information as to safeguards to ensure that the 'first use' of a regulated restrictive practice and any 'single emergency use' occurs in a manner that is compatible with human rights;**
- **whether the rules could be amended to include safeguards to ensure regulated restrictive practices (in particular 'first use' regulated restrictive practices and 'single emergency use' regulated restrictive practices) occur in a manner that is compatible with the human rights discussed in the preceding analysis.**

## Record keeping requirements

1.151 The rules also prescribe record keeping requirements in relation to the use of regulated restrictive practices, including a requirement to record the details of the names and contact details of the persons involved in the use of the regulated restrictive practice and of any witnesses.

### *Compatibility of the measure with the right to privacy*

1.152 Article 22 of the CRPD guarantees that no person with disabilities shall be subjected to arbitrary or unlawful interference with their privacy.[30] The right to

30 See also article 17 of the International Covenant on Civil and Political Rights.

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

1.153 As the record keeping requirements relate to the storing and use of information (including personal information) the measures engage and limit the right to privacy. The right to privacy is not addressed in the statement of compatibility.

1.154 The statement of compatibility explains that the reporting and record keeping requirements 'allow appropriate action to be taken in response to any issues raised and to inform future policy development, education and guidance to providers, participants and their support networks'.[31] The record keeping requirements appear to be rationally connected to this objective.

1.155 As to proportionality, limitations on the right to privacy must be accompanied by adequate safeguards. There is limited information in the explanatory statement or statement of compatibility as to the safeguards that apply to the information stored pursuant to the record keeping requirements, such as requirements to keep records secure and confidential, or penalties for unauthorised disclosure. Further information as to these matters would assist in determining whether the limitation on the right to privacy is proportionate.

## Committee comment

**1.156 The preceding analysis indicates that the record keeping requirements relating to the use of regulated restrictive practices may engage and limit the right to privacy.**

**1.157 The committee seeks the advice of the minister as to the proportionality of the limitation on the right to privacy. In particular, the committee seeks information as to the safeguards that would apply to protect the right to privacy.**

31 SOC, p. 28.

# Office of National Intelligence Bill 2018

# Office of National Intelligence (Consequential and Transitional Provisions) Bill 2018

| | |
|---|---|
| **Purpose** | Seeks to establish the Office of National Intelligence as an independent statutory agency within the prime minister's portfolio, subsuming the role, functions and staff of the Office of National Assessments.<br>Seeks to repeal the *Office of National Assessments Act 1977*, make consequential amendments to a range of Acts and provide for transitional arrangements |
| **Portfolio** | Prime Minister |
| **Introduced** | House of Representatives, 28 June 2018 |
| **Rights** | Freedom of expression; presumption of innocence; privacy; equality and non-discrimination; life; torture, cruel, inhuman and degrading treatment or punishment (see **Appendix 2**) |
| **Status** | Seeking additional information |

## Offences for unauthorised use or disclosure of information

1.158 The Office of National Intelligence Bill 2018 (the bill) seeks to create a number of offences related to the unauthorised communication, use or recording of information or matters acquired or prepared by or on behalf of the Office of National Intelligence (ONI) in connection with its functions or that relates to the performance by ONI of its functions (ONI information).

1.159 Proposed section 42 would create an offence for persons to communicate ONI information or matters in circumstances where the person is or was a staff member of ONI, is otherwise engaged by ONI, or is an employee or agent of a person engaged by ONI (in other words, an ONI 'insider').[1] The offence carries a maximum penalty of 10 years' imprisonment.

1.160 Proposed section 43 would create an offence for the subsequent disclosure of ONI information or matters which come to the knowledge or into the possession

1 See subsection 42(1)(b).

of a person other than due to their employment or association with ONI[2] (in other words, an ONI 'outsider'), in circumstances where the person intends that the communication cause harm to national security or endanger the health or safety of another person, or where the person knows that the communication will or is likely to cause harm to national security or endanger the health or safety of another person. The offence carries a maximum penalty of 5 years' imprisonment.

1.161 Proposed section 44 would create offences for the unauthorised 'dealing with'[3] or making records of ONI information where the person is an ONI 'insider'. The offences carry a maximum penalty of 3 years' imprisonment.

*Defences and exceptions*

1.162 There are specific exemptions to the offences in proposed sections 42 and 44 where the communication is made:

- to the Director-General[4] or a staff member by the person in the course of their duties as a staff member or in accordance with a contract, agreement or arrangement; or
- within the limits of authority conferred on the person by the Director-General or with the approval of the Director-General or a staff member having the authority of the Director-General to give such an approval.

1.163 The bill also provides for a number of defences to each of the offences in proposed sections 42, 43, and 44, including where:

- the information or matter is already publicly available with the authority of the Commonwealth;[5]
- the information is communicated to an Inspector-General of Intelligence and Security (IGIS) official for the purpose of the official exercising a power or performing a function or duty as an IGIS official;[6]

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2 Under proposed subsection 43(1)(a) these associations include 'that the person is or was a staff member of ONI, that the person has entered into any contract, agreement or arrangement with ONI or that the person has been an employee or agent of a person who has entered into a contract, agreement or arrangement with ONI'. See explanatory memorandum (EM), p. 38.

3 Under proposed subsection 44(1)(a) 'dealing with' information includes copying a record, transcribing a record, retaining a record, removing a record, or dealing with a record in any other manner.

4 Under the bill, Director-General means the Director-General of National Intelligence, whose functions include overseeing and managing ONI. See division 1 of part 3 of the bill.

5 See proposed subsections 42(2), 43(2) and 44(3).

6 See proposed subsections 42(3) and 43(3).

- the person deals with, or makes, a record for the purpose of an IGIS official exercising a power or performing a function or duty as an IGIS official;[7] and
- the subsequent communication is in accordance with any requirement imposed by law or for the purposes of relevant legal proceedings or any report of such proceedings.[8]

1.164 The defendant bears an evidential burden in relation to these matters.

***Compatibility of the measures with the right to freedom of expression***

1.165 The right to freedom of expression requires the state not to arbitrarily interfere with freedom of expression, particularly restrictions on political debate. By criminalising the disclosure of certain information, as well as particular forms of use of such information, the proposed secrecy provisions engage and limit the right to freedom of expression.

1.166 The committee has previously raised concerns in relation to limitations on the right to freedom of expression relating to secrecy offences introduced or amended by the National Security Legislation Amendment (Espionage and Foreign Interference) Bill 2018; the Australian Border Force Amendment (Protected Information) Bill 2017; the Counter-Terrorism Legislation Amendment Bill (No. 1) 2016; and the National Security Legislation Amendment Bill (No. 1) 2014 (all now Acts).[9] The secrecy offences examined in this report raise similar concerns.

1.167 Measures limiting the right to freedom of expression may be permissible where the measures pursue a legitimate objective, are rationally connected to that objective, and are a proportionate way to achieve that objective.[10]

1.168 The statement of compatibility for the bill acknowledges that the secrecy offences engage and limit the right to freedom of expression but argues that the measures are reasonable, necessary and proportionate to achieve the objectives of protecting national security; protecting the right to privacy of individuals whose personal information may be provided to ONI; and enabling ONI to perform its functions, including promoting a well-integrated intelligence community.[11] While

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7 See proposed subsection 44(4).

8 See proposed subsection 43(3).

9 See, respectively, Parliamentary Joint Committee on Human Rights, *Report 3 of 2018* (27 March 2018) pp. 213-279; *Report 11 of 2017* (17 October 2017) pp. 72-83; *Report 7 of 2016* (11 October 2016) pp. 64-83; and *Sixteenth Report of the 44th Parliament* (25 November 2014) pp. 33-60.

10 See, generally, Human Rights Committee*, General comment No 34 (Article 19: Freedoms of opinion and expression)*, CCPR/C/GC/34, [21]-[36] (2011). The right to freedom of expression may be subject to limitations that are necessary to protect the rights or reputations of others, national security, public order, or public health or morals.

11 EM, Statement of compatibility (SOC), p. 13.

generally these matters are likely to constitute legitimate objectives for the purposes of international human rights law, it would have been useful if the statement of compatibility provided further information as to the importance of these objectives in the specific context of the secrecy measures.

1.169 As to whether the measures are rationally connected to the stated objective, the statement of compatibility explains that:

> By providing a deterrent against the disclosure or handling of information without authorisation, the risk of national security being prejudiced through that disclosure or inappropriate handling is minimised, the risk of a person's privacy being breached is lowered, and agencies will be more willing to provide information to ONI in the knowledge that there are strict penalties for unauthorised disclosure of that information.[12]

1.170 It is acknowledged that, to the extent that the type of information or matters prohibited from unauthorised use or disclosure under the bill may prejudice national security or contain an individual's personal information, the measures may be capable of being rationally connected to the objectives stated above. However, the breadth of information or matters that the proposed offences may apply to raises questions as to whether the measures would in all circumstances be rationally connected to the stated objectives.

1.171 Similar questions arise in relation to the proportionality of the measures as drafted.

*Breadth of information*

1.172 As set out at [1.158], the proposed offences apply to information or matters acquired or prepared by or on behalf of ONI in connection with its functions or that relate to the performance by ONI of its functions. ONI's functions are extensive and include leading and evaluating the activities of the 'national intelligence community' (NIC);[13] collecting information and preparing assessments on matters of political, strategic or economic significance to Australia, including of a domestic or international nature; and providing advice to the Prime Minister on national intelligence priorities, requirements and capabilities and other matters relating to the NIC. Under the bill, ONI may receive information on matters of political, strategic or economic significance to Australia from a Commonwealth authority, an

12 EM, SOC, p. 13.

13 This includes the Australian Security Intelligence Organisation (ASIO), Australian Secret Intelligence Service (ASIS), Defence Intelligence Organisation (DIO), Australian Signals Directorate (ASD) and the Australian Geospatial-Intelligence Organisation (AGO), the Australian Criminal Intelligence Commission (ACIC); and the intelligence functions of the Department of Home Affairs, the Australian Federal Police (AFP), the Australian Transaction Reports and Analysis Centre (AUSTRAC) and the Department of Defence.

intelligence agency or agency with an intelligence role, and may request such information subject to certain restrictions.[14]

1.173 In relation to the type of information prohibited from unauthorised use or disclosure under the bill, the statement of compatibility explains that:

> Such information is likely to be sensitive, and unauthorised disclosure or handling could threaten Australia's national security. The provisions also provide for NIC agencies to give ONI documents or things that relate to ONI's functions. This information is likely to relate to highly sensitive information that could prejudice national security if disclosed – for example, information relating to intelligence workforce information, intelligence capabilities or national intelligence priorities.[15]

1.174 While it is acknowledged that the disclosure of some types of ONI information may potentially harm national security, as noted above, proposed section 42 of the bill prohibits the unauthorised disclosure of ONI information or matters generally, regardless of the material's security classification or whether it concerns national security or is otherwise deemed to be potentially harmful. It therefore appears that the 'insider' offence set out in proposed section 42 would criminalise the unauthorised communication of information that is not necessarily harmful to national security, to Australia's interests or to a particular individual, and is not intended to cause harm. This raises concerns that the measures may not be the least rights restrictive way of achieving the stated objectives and may be overly broad.

*Breadth of application and definition of 'national security'*

1.175 In this context, the breadth of the proposed 'insider' offence in section 44, which prohibits the unauthorised 'dealing with'[16] or recording of ONI information or matters, is also a concern. It appears that a person does not have to publicly communicate the information or matter, or intend to do so, in order to commit an offence. It is unclear whether criminalising unauthorised 'dealing with' all information or matters classified as ONI information, including where the information is not otherwise harmful or sensitive and is not communicated publicly, is rationally connected or proportionate to achieve the legitimate objectives.

1.176 The proposed 'outsider' offence in section 43 relating to the subsequent communication of information or matters by persons other than, for example, ONI employees or contractors, applies to the same broad range of information. However, the offence only applies where the person intends that the communication cause

14 See division 1 of part 4 of the bill.

15 EM, SOC, p. 13.

16 As stated above, under proposed subsection 44(1)(a) 'dealing with' information includes copying a record, transcribing a record, retaining a record, removing a record, or dealing with a record in any other manner.

harm to national security or endanger the health or safety of another person, or knows that it will or is likely to. While this may potentially assist with the proportionality of the limitation on the right to freedom of expression, concerns remain that the offence is overly broad with respect to the stated objectives.

1.177 In particular, the scope of information or matters that may be considered as causing harm to Australia's national security if publicly disclosed is potentially broad. Under the bill, national security has the same meaning as in the *National Security Information (Criminal and Civil Proceedings) Act 2004* (NSI Act), which provides that 'national security means Australia's defence, security, international relations or law enforcement interests'.[17] International relations is in turn defined in the NSI Act as the 'political, military and economic relations with foreign governments and international organisations'.[18] In light of these definitions, it appears that the proposed offence in section 43 would apply to a journalist who publishes an article containing ONI information that they know will likely cause harm to Australia's political relations with an international organisation, notwithstanding that the communication may be in the course of reporting on an issue considered to be in the public interest. It would also appear possible that the public disclosure of certain information may endanger the health or safety of another person — for example, a person held in immigration detention — and therefore constitute an offence despite the information being in the public interest, including in circumstances where the affected person consents to the information being made public. It is therefore not clear whether the measure, as drafted, is sufficiently circumscribed in order to be a proportionate limitation on the right to freedom of expression.

1.178 Further, it may not be clear to a person as to whether information or matters that they come to know or possess constitutes ONI information and is therefore protected from subsequent disclosure subject to the exceptions set out above. As noted at [1.172], ONI information may potentially include a very broad range of documents or other matters that may initially have been produced by a range of Commonwealth agencies, including non-intelligence agencies. It is possible that a person may receive information that was originally produced by, for example, the Department of Home Affairs, but may be unaware that the information has also become ONI information by reason of it having been acquired by ONI. Under proposed section 43, the prosecution is only required to prove that the defendant was reckless as to whether information or a matter is ONI information.[19]

*Safeguards and penalties*

17 See section 8 of division 2 of part 2 of the *National Security Information (Criminal and Civil Proceedings) Act 2004*.

18 See section 10 of division 2 of the *National Security Information (Criminal and Civil Proceedings) Act 2004*.

19 See EM, SOC, p. 38.

1.179 There are also questions about whether the defences (set out at [1.163]) act as adequate safeguards in respect of the right to freedom of expression. For example, the defences may not sufficiently protect the disclosure of information that is in the public interest or in aid of government accountability and oversight. There is no general defence related to public reporting in the public interest or general protections for whistleblowers, other than for the communication of information to the IGIS. This raises further questions about the proportionality of the limitation on the right to freedom of expression.

1.180 Further, the severity of the penalties is also relevant to whether the limitation on the right to freedom of expression is proportionate. In this case, it is noted that the proposed penalties are serious and range from 3 to 10 years' imprisonment.

## Committee comment

**1.181 The measures engage and limit the right to freedom of expression.**

**1.182 The preceding analysis raises questions about whether the measures are compatible with this right.**

**1.183 The committee therefore seeks the advice of the Prime Minister and the Attorney-General as to:**

- **how the measures are effective to achieve (that is, rationally connected to) the stated objectives of the bill; and**
- **whether the limitations are reasonable and proportionate to achieve the stated objectives (including in relation to the breadth of information subject to secrecy provisions; the range of information or matters that may be considered as causing harm to Australia's national security or the health and safety of another person; the adequacy of safeguards; and the severity of the criminal penalties).**

**1.184 In relation to the proportionality of the measures, in light of the information requested above, advice is also sought as to whether it would be feasible to amend the secrecy offences to:**

- **appropriately circumscribe the scope of information subject to the prohibition on unauthorised disclosure or use under proposed sections 42 and 44 (by, for example, introducing a harm element or otherwise restricting the offences to defined categories of information);**
- **appropriately circumscribe the definition of what causes harm to national security for the purposes of proposed section 43;**
- **expand the scope of safeguards and defences (including, for example, a general 'public interest' defence); and**
- **reduce the severity of the penalties which apply.**

***Compatibility of the measures with the right to be presumed innocent***

1.185 Article 14(2) of the International Covenant on Civil and Political Rights (ICCPR) protects the right to be presumed innocent until proven guilty according to law. The right to be presumed innocent usually requires that the prosecution prove each element of an offence beyond reasonable doubt.

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

1.187 Reverse burden offences will not necessarily be inconsistent with the presumption of innocence provided that they are within reasonable limits which take into account the importance of the objective being sought and maintain the defendant's right to a defence. In other words, such provisions must pursue a legitimate objective, be rationally connected to that objective and be a proportionate means of achieving that objective.

1.188 As set out at [1.163] above, proposed sections 42, 43 and 44 include offence-specific defences to the various secrecy offences in the bill. In doing so, the provisions reverse the evidential burden of proof as subsection 13.3(3) of the Criminal Code provides that a defendant who wishes to rely on any exception, exemption, excuse, qualification or justification bears an evidential burden in relation to that matter.

1.189 While the objectives of the secrecy provisions are stated generally as being to protect national security and individual privacy, the statement of compatibility does not expressly explain how reversing the evidential burden in the offences pursues a legitimate objective or is rationally connected to this objective.

1.190 The statement of compatibility acknowledges that the offence-specific defences engage and limit the presumption of innocence but argues that the measures are reasonable, necessary and proportionate.[20] The justification provided in the explanatory memorandum and statement of compatibility is, generally, that the relevant evidence 'should be readily available to the accused'[21] or that it is 'far more reasonable' to require a defendant to point to the relevant evidence than to

20 EM, SOC, p. 12.

21 EM, SOC, p. 12.

require the prosecution to demonstrate that such evidence does not exist.[22] However, this does not appear to be a sufficient basis to constitute a proportionate limitation on human rights.

1.191 It is unclear that reversing the evidential burden, as opposed to including additional elements within the offence provisions themselves, is necessary. For example, it is a defence for a person to provide ONI information to an IGIS official for the purpose of the official exercising a power or performing a function or duty as an IGIS official. This would appear to leave individuals who provide information to the IGIS open to a criminal charge and then place the evidential burden of proof on them to raise evidence to demonstrate that they were in fact acting appropriately. In this context, the approach of including the fact that the information was not provided to an IGIS official as described above as an element of the offence provisions themselves, would seem to be a less rights restrictive alternative. This raises questions as to whether the current construction of the offences is a proportionate limitation on the right to be presumed innocent.

## Committee comment

**1.192 The preceding analysis raises questions as to the compatibility of the reverse burden offences with the right to be presumed innocent. The committee therefore requests the advice of the Prime Minister and the Attorney-General as to:**

- **whether the reverse burden offences are aimed at achieving a legitimate objective for the purposes of international human rights law;**
- **how the reverse burden offences are rationally connected to (that is, effective to achieve) this objective;**
- **whether the limitation is a reasonable and proportionate measure to achieve the stated objective; and**
- **whether it would be feasible to amend the measures so that the relevant matters (currently in defences) are included as elements of the offences or, alternatively, to provide that despite section 13.3 of the Criminal Code, a defendant does not bear an evidential (or legal) burden of proof in relying on the offence-specific defences.**

## Information gathering powers

1.193 The bill would provide ONI with a number of information gathering powers. Under proposed section 7 ONI will have broad statutory functions, including to:

22 EM, p. 37.

- assemble, correlate and analyse information related to international and other matters that are of political, strategic or economic significance to Australia and prepare assessments and reports (section 7(1)(c)-(d)); and
- collect, interpret and disseminate information relating to matters of political, strategic or economic significance to Australia that is accessible to any section of the public (section 7(1)(g)).

1.194 Under proposed section 37, for the purpose of ONI performing its function under section 7(1)(c), the Director-General of ONI may make a written request that a Commonwealth authority provide information, documents or things in its possession that relate to international matters of political, strategic or economic significance to Australia; or domestic aspects relating to such international matters.

1.195 Proposed section 38 provides that a Commonwealth authority may provide to ONI information, documents or things that the head of the authority considers relate to matters of political, strategic or economic significance to Australia.

1.196 Proposed section 39 provides that an intelligence agency or agency with an intelligence role or function may provide to ONI information, documents or things that relate to any of ONI's functions.

***Compatibility of the measures with the right to privacy***

1.197 The right to privacy includes respect for private and confidential information, particularly the collection, storing, use and sharing of such information, and the right to control the dissemination of information about one's private life.[23] The statement of compatibility acknowledges that the above measures, by enabling ONI to obtain, and in some cases compel, information, including personal information, engage and limit the right to privacy.[24]

1.198 The right to privacy may be subject to permissible limitations which are provided by law and are not arbitrary. In order for limitations not to be arbitrary, they must seek to achieve a legitimate objective and be rationally connected (that is, effective to achieve) and proportionate to that objective. In this respect, the statement of compatibility states that the measures constitute a permissible limitation on the right to privacy and are aimed at two legitimate objectives:

> …firstly, to ensure national security, by collecting, interpreting and disseminating open source intelligence on matters of significance to Australia, and by promoting the collective performance of the NIC agencies through its leadership and enterprise management functions; and secondly, to promote well-informed and rigorous policy making by the

23 Article 17 of the International Covenant on Civil and Political Rights.

24 SOC, p. 8.

> Australian government through preparing and communicating assessments on matters of significance.[25]

1.199 These are likely to constitute a legitimate objective for the purposes of international human rights law. Collecting relevant information is likely to be rationally connected to (that is, effective to achieve) these stated objectives.

1.200 In order to be a proportionate limitation on the right to privacy, a measure must be no more extensive than is strictly necessary to achieve its stated objective and must be accompanied by adequate and effective safeguards. In this respect, in relation to the proportionality of the limitation, the statement of compatibility provides relevant information. It acknowledges that proposed sections 37 and 38 provide a requirement or authorisation under Australian law for the purposes of the *Privacy Act 1988* (Privacy Act). As such, this requirement or authorisation operates as an exception to the prohibition on the disclosure of personal information by a Commonwealth entity for a secondary purpose and allows information to be disclosed to ONI. This means the Privacy Act will not act as a safeguard in the context of the measures. However, the statement of compatibility argues that the measures are nevertheless sufficiently circumscribed. In relation to the compulsory evidence gathering power in proposed section 37, it states:

> …section 37 is broad, but it is not unconstrained. It can only be exercised for the purposes of ONI's international assessments function under paragraph 7(1)(c). The Director-General is also obliged to consider any privacy concerns raised by the relevant Commonwealth authority before making the request to compel information. This ensures that requests will not be made unless the Director-General considers that the importance of obtaining the information outweighs the importance of preserving the right to privacy.[26]

1.201 The statement of compatibility further explains that section 37 does not override any existing secrecy provisions and ONI will have express obligations in relation to the use and protection of such information.[27] While these matters are relevant to the proportionality of the limitation, it is noted that the breadth of the power remains broad.

1.202 In relation to proposed section 38, the statement of compatibility acknowledges that the provision provides a permissive authority for Commonwealth authorities to disclose information to ONI even if doing so would not otherwise fall within the scope of the authority's statutory functions. However, the statement of compatibility explains that these disclosure powers are also limited to material

25 SOC, p. 8.

26 SOC, p. 8.

27 SOC, p. 9.

related to ONI's assessment functions.[28] While this may be the case, it is noted that the assessment functions are broad and so may permit disclosure of a very extensive range of information to ONI.

1.203 In relation to proposed section 39, the statement of compatibility explains that while this provides a broad power of voluntary disclosure from NIC agencies, the broader power is reasonable as NIC agencies will hold far greater information that is relevant to ONI's functions than Commonwealth agencies more generally. The statement of compatibility further outlines some relevant safeguards in relation to the handling of disclosed information.[29] While there are relevant safeguards, it is unclear from the information provided that the scope of the power is sufficiently circumscribed. This is because while NIC agencies may hold information relevant to ONI's functions, it is unclear whether the disclosure of information from NIC agencies would be proportionate in each case.

1.204 In relation to ONI's proposed power to collect 'identifiable information'[30] under ONI's open source function, the statement of compatibility explains that the Prime Minister will be required to make privacy rules governing ONI's collection, communication, handling and retention of such information.[31] Such rules may operate as a safeguard in relation to the right to privacy. However, the likely content of these rules is not described in the statement of compatibility and it is therefore difficult to assess whether the rules will be sufficient to ensure that the limitation on the right to privacy is proportionate.

1.205 Further, in relation to the scope of the rules as a potential safeguard, it is noted that the requirement to make rules regarding 'identifiable information' will only apply in respect of Australian citizens and permanent residents rather than all persons in Australia or subject to Australian jurisdiction. This is of concern as Australia owes human rights obligations to all persons within Australia.

1.206 In explaining the scope of the requirement to make privacy rules, the statement of compatibility nevertheless states that:

> …the provision does not limit the matters in relation to which the Prime Minister may make rules. It remains open to the Prime Minister to extend these rules, or to make additional rules, to protect the personal information of others, including foreign nationals.[32]

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28 SOC, p. 9.

29 SOC, p. 9.

30 'Identifiable information' means information about an Australian citizen or permanent resident, who is identified or reasonably identifiable: section 4.

31 SOC, p. 9. See, section 53 of the bill.

32 SOC, p. 9.

1.207 While it is possible that the Prime Minister may decide to make rules to protect the privacy of people who are not Australian citizens or permanent residents, there is no requirement to make such rules. Accordingly, it is unclear what other safeguards are in place to protect the right to privacy of non-nationals or whether the measure is the least rights restrictive approach. In this respect, there may also be concerns about the compatibility of the measure with the right to equality and non-discrimination.

## Committee comment

**1.208 The preceding analysis raises questions as to whether the information gathering powers are a proportionate limitation on the right to privacy.**

**1.209 The committee seeks the advice of the Prime Minister and the Attorney-General as to whether the measures are reasonable and proportionate to achieve the stated objectives, including:**

- **whether each of the information gathering powers are sufficiently circumscribed and accompanied by adequate and effective safeguards;**
- **how the measures constitute the least rights restrictive approach;**
- **in relation to the power to collect open source information, whether a copy of the proposed rules could be provided; and**
- **what safeguards will be in place in relation to the power to collect open source information from people who are not Australian citizens or permanent residents.**

***Compatibility of the measures with the right to equality and non-discrimination***

1.210 The right to equality and non-discrimination provides that everyone is entitled to enjoy their rights without discrimination of any kind, and that all people are equal before the law and entitled without discrimination to equal and non-discriminatory protection of the law.

1.211 'Discrimination' under articles 2 and 26 of the ICCPR includes both measures that have a discriminatory intent (direct discrimination) and measures that have a discriminatory effect on the enjoyment of rights (indirect discrimination).[33] The UN Human Rights Committee has explained indirect discrimination as 'a rule or measure that is neutral at face value or without intent to discriminate', but which exclusively

33 The prohibited grounds of discrimination are race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Under 'other status' the following have been held to qualify as prohibited grounds: age, nationality, marital status, disability, place of residence within a country and sexual orientation. The prohibited grounds of discrimination are often described as 'personal attributes'.

or disproportionately affects people with a particular personal attribute (for example, nationality or national origin).[34]

1.212 In this respect, while Australia maintains some discretion under international law with respect to its treatment of non-nationals, Australia has obligations not to discriminate on the grounds of nationality or national origin.[35] As acknowledged in the statement of compatibility, by providing that the proposed privacy rules (see above, [1.204]) are only required to apply to Australian citizens and permanent residents, the measure engages the right to equality and non-discrimination on the basis of nationality. That is, the measure allows for Australian citizens and permanent residents to be treated differently to people who do not fall into these categories.

1.213 Differential treatment (including the differential effect of a measure that is neutral on its face) will not constitute unlawful discrimination if the differential treatment is based on reasonable and objective criteria such that it serves a legitimate objective, is rationally connected to that legitimate objective and is a proportionate means of achieving that objective.

1.214 In relation to the objective of the differential treatment, the statement of compatibility states it:

> …is to provide protections for Australians while facilitating the performance of ONI's functions in the interests of national security and for Australia's economic, strategic and political benefit.[36]

1.215 However, the statement of compatibility does not explain the importance of this objective in the context of the measure nor how the measure is rationally connected to that objective. The statement of compatibility instead states that 'special protection for Australians is a long-standing, core principle of accountability for intelligence agencies'.[37] While privacy protections for Australians may assist to ensure the accountability of intelligence agencies, it is unclear from the information provided why there needs to be differential treatment in the form of less protection of the right to privacy for those who are within Australia but are not Australian citizens or permanent residents.

1.216 In relation to proportionality, the statement of compatibility provides some information as to how the information collection powers of intelligence agencies are circumscribed. While this is relevant to the question of proportionality, it is unclear

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34 *Althammer v Austria*, Human Rights Committee Communication no. 998/01 (8 August 2003) [10.2].

35 UN Committee on the Elimination of Racial Discrimination, *General Recommendation 30: Discrimination against non-citizens* (2004).

36 SOC, p. 6.

37 SOC, p. 6.

from the information provided whether excluding non-nationals from additional privacy protections is based on reasonable and objective criteria or represents the least rights restrictive approach. Accordingly, this raises questions as to whether the measure is compatible with the right to equality and non-discrimination.

## Committee comment

**1.217 The preceding analysis raises questions as to whether the differential treatment is compatible with the right to equality and non-discrimination.**

**1.218 Accordingly, the committee requests the advice of the Prime Minister and the Attorney-General as to:**

- **whether there is reasoning or evidence that establishes that the stated objective addresses a pressing or substantial concern or whether the proposed changes are otherwise aimed at achieving a legitimate objective;**
- **how the measures are effective to achieve (that is, rationally connected to) that objective; and**
- **whether the measures are reasonable and proportionate to achieving the stated objective of the bill (including how the measures are based on reasonable and objective criteria, whether the measures are the least rights-restrictive way of achieving the stated objective and the existence of any safeguards).**

## Cooperation with entities in connection with ONI's performance of functions

1.219 Proposed section 13 provides that, subject to relevant approvals, ONI may cooperate with an authority of another country approved by an instrument, or any other person or entity, within or outside Australia.

### *Compatibility of the measure with the right to privacy*

1.220 As set out above, 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. By providing that the ONI may cooperate with an authority or person outside Australia, this measure appears to allow for the sharing of personal or confidential information. As such, the measure may engage and limit the right to privacy. While the right to privacy may be subject to permissible limitations in certain circumstances, this issue is not addressed in the statement of compatibility.

## Committee comment

**1.221 The preceding analysis raises questions as to whether the measure is compatible with the right to privacy.**

**1.222 The committee requests the advice of the Prime Minister and the Attorney-General as to:**

- **whether the measure is aimed at achieving a legitimate objective for the purposes of international human rights law;**
- **how the measure is effective to achieve (that is, rationally connected to) that objective; and**
- **whether the limitation is a reasonable and proportionate measure to achieve the stated objective (including whether the measure is sufficiently circumscribed and whether there are adequate and effective safeguards in relation to the operation of the measure).**

***Compatibility of the measure with the right to life and the prohibition on torture, cruel, inhuman, or degrading treatment or punishment***

1.223 Under international human rights law every human being has the inherent right to life, which should be protected by law. The right to life imposes an obligation on state parties to protect people from being killed by others or from identified risks. While the ICCPR does not completely prohibit the imposition of the death penalty, international law prohibits states which have abolished the death penalty (such as Australia) from exposing a person to the death penalty in another nation state.

1.224 The United Nations (UN) Human Rights Committee has made clear that international law prohibits the provision of information to other countries that may be used to investigate and convict someone of an offence to which the death penalty applies. In this context, the UN Human Rights Committee stated in 2009 its concern that Australia lacks 'a comprehensive prohibition on the providing of international police assistance for the investigation of crimes that may lead to the imposition of the death penalty in another state', and concluded that Australia should take steps to ensure it 'does not provide assistance in the investigation of crimes that may result in the imposition of the death penalty in another State'.[38]

1.225 By providing that the ONI may cooperate with an authority or person outside Australia, this measure appears to allow for the sharing of personal or confidential information overseas. Such sharing of information internationally could accordingly engage the right to life. This issue was not addressed in the statement of compatibility.

1.226 A related issue raised by the measure is the possibility that sharing of information may result in torture, or cruel, inhuman or degrading treatment or punishment. Under international law the prohibition on torture is absolute and can

38 Human Rights Committee, *Concluding observations on the fifth periodic report of Australia*, CCPR/C/AUS/CO/5, 7 May 2009, [20].

never be subject to permissible limitations.[39] This issue was also not addressed in the statement of compatibility.

## Committee comment

**1.227 The preceding analysis raises questions as to whether the measure is compatible with the right to life and the prohibition on torture, or cruel, inhuman and degrading treatment or punishment.**

**1.228 In relation to the right to life, the committee seeks the advice of the Prime Minister and the Attorney-General on the compatibility of the measure with this right (including the existence of relevant safeguards or guidelines).**

**1.229 In relation to the prohibition on torture, or cruel, inhuman or degrading treatment or punishment, the committee seeks the advice of the Prime Minister and the Attorney-General in relation to the compatibility of the measure with this right (including any relevant safeguards or guidelines).**

39 Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment 1984, 4(2); UN Human Rights Committee, *General Comment 20: Article 7* (1992) UN Doc HRI/GEN/1, [3].

# Unexplained Wealth Legislation Amendment Bill 2018

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| **Purpose** | Seeks to: extend the scope of commonwealth unexplained wealth restraining orders and unexplained wealth orders under the *Proceeds of Crime Act 2002* (POC Act) to state and territory offences; allow participating state and territory agencies to access commonwealth information gathering powers under the POC Act for the investigation or litigation of unexplained wealth matters under state or territory unexplained wealth legislation; amend the way in which recovered proceeds are shared between the Commonwealth, states and territories and foreign law enforcement entities; also seeks to amend the *Telecommunications (Interception and Access) Act 1979* to facilitate information-sharing on unexplained wealth between commonwealth, participating state and territory agencies |
| **Portfolio** | Home Affairs |
| **Introduced** | House of Representatives, 20 June 2018 |
| **Rights** | Fair trial; fair hearing; privacy (see **Appendix 2**) |
| **Status** | Seeking additional information |

## Background – unexplained wealth orders

1.230 Part 2-6 of the *Proceeds of Crime Act 2002* (POC Act) enables certain orders to be made relating to 'unexplained wealth':[1]

- unexplained wealth restraining orders, which are interim orders that restrict a person's ability to dispose of, or otherwise deal with, property;[2]
- preliminary unexplained wealth orders, which require a person to appear before a court to enable the court to determine whether or not to make an unexplained wealth order against the person;[3] and
- unexplained wealth orders, which require a person to pay an amount to the commonwealth where the court is not satisfied that the whole or any part of the person's wealth was not derived or realised, directly or indirectly, from an offence against the law of the commonwealth, a foreign indictable offence or a state offence that has a federal aspect. The amount to be paid

1 'Unexplained wealth' refers to an amount that is the difference between a person's total wealth and the wealth shown to have been derived lawfully: see section 179E(2) of the POC Act.

2 Section 20A of the POC Act.

3 Section 179B of the POC Act.

(the unexplained wealth) is the difference between a person's total wealth and the wealth shown to have been derived lawfully.[4]

***Compatibility of unexplained wealth orders with human rights***

1.231 The committee has previously commented on the human rights compatibility of the unexplained wealth regime. In those reports, the committee raised concerns that the unexplained wealth provisions may involve the determination of a criminal charge for the purposes of international human rights law.[5] Similar concerns have been discussed in the context of the broader underlying regime established by the POC Act for the freezing, restraint or forfeiture of property.[6]

1.232 The committee has previously noted that the POC Act was introduced prior to the establishment of the committee and therefore before the requirement for bills to contain a statement of compatibility with human rights.[7] The committee has therefore previously recommended that the minister undertake a detailed assessment of the POC Act to determine its compatibility with the right to a fair trial and right to a fair hearing.

## Expansion of the unexplained wealth orders regime – Schedules 2 and 3

1.233 The bill extends the scope of the commonwealth unexplained wealth restraining orders and unexplained wealth orders (defined in the bill as the 'main unexplained wealth provisions'[8]) under the POC Act to territory offences as well as 'relevant offences'[9] of 'participating states'.[10] Currently, existing provisions of the

4 Section 179E of the POC Act.

5 See, Parliamentary Joint Committee on Human Rights, *Report 1 of 2018* (6 February 2018) p. 121; *Report 12 of 2017* (28 November 2017); *Ninth Report of the 44th Parliament* (July 2014) p. 133; *Fourth Report of the 44th Parliament* (March 2014) p. 1; *Sixth Report of 2013* (May 2013) pp. 189-191; *Third Report of 2013* (March 2013) p. 120; *First Report of 2013* (February 2013) p. 27.

6 See, Parliamentary Joint Committee on Human Rights, *Report 1 of 2018* (6 February 2018) p. 121; *Report 12 of 2017* (28 November 2017); *Report 4 of 2017* (9 May 2017) pp. 92-93; *Report 2 of 2017* (21 March 2017); *Report 1 of 2017* (16 February 2017); *Thirty-First Report of the 44th Parliament* (24 November 2015) pp. 43-44; *Twenty-Sixth Report of the 44th Parliament* (18 August 2015).

7 Parliamentary Joint Committee on Human Rights, *Thirty-First Report of the 44th Parliament* (24 November 2015) pp. 43-44.

8 See proposed section 14B(3) of Schedule 1 of the bill.

9 A 'relevant offence' of a participating state is defined to mean an offence of a kind that is specified in the referral Act or adoption Act of the state: see proposed amendment to section 338 in item 2, Schedule 2 of the bill.

10 A 'participating state' is one which refers powers to the commonwealth parliament (for the purposes of paragraph 51(xxxvii) of the Constitution) so as to participate in the national unexplained wealth scheme: see proposed section 14C in Schedule 1 of the bill.

POC Act allow unexplained wealth restraining orders and unexplained wealth orders to be made in relation to commonwealth offences, foreign indictable offences and state offences that have a federal aspect. The effect of these amendments is to expand the scope of the unexplained wealth regime to provide that:

- unexplained wealth restraining orders must be made by a court if, relevantly, there are reasonable grounds to suspect that a person has committed a territory offence or a relevant offence of a participating state, or where there are reasonable grounds to suspect that the whole or any part of a person's wealth was derived from a territory offence or relevant offence of a participating state;[11] and
- unexplained wealth orders must be made by a court if, relevantly, the court is not satisfied that the whole or any part of the person's wealth was not derived from a territory offence or relevant offence of a participating state.[12]

***Compatibility of the measure with the right to a fair trial and fair hearing***

1.234 The right to a fair trial and fair hearing is protected by articles 14 and 15 of the International Covenant on Civil and Political Rights (ICCPR). These rights are concerned with procedural fairness, and encompass notions of equality in proceedings, the right to a public hearing and the requirement that hearings be conducted by an independent and impartial body. Specific guarantees of the right to a fair trial in relation to a criminal charge include the presumption of innocence,[13] the right not to incriminate oneself,[14] and the guarantee against retrospective criminal laws.[15]

*Minimum guarantees in criminal proceedings*

1.235 As noted earlier, the committee has previously raised concerns that the unexplained wealth provisions may be considered 'criminal' for the purposes of international human rights law. The committee considered that if the provisions were considered to be 'criminal' for the purposes of international human rights law, there would be concerns as to the compatibility of the measures with the right to a fair trial and the right to a fair hearing, in particular the right to be presumed innocent until proven guilty.[16] By broadening the circumstances in which unexplained

11 See items 1 and 2 of Schedule 2 and 3, proposed amendments to sections 20A(1)(g)(i) and 20A(1)(g)(ii) of the bill.

12 See item 5 of Schedule 2 and 3, proposed amendment to section 179E(1)(b)(ii) of the bill.

13 Article 14(2) of the ICCPR.

14 Article 14(3)(g) of the ICCPR.

15 Article 15(1) of the ICCPR.

16 Parliamentary Joint Committee on Human Rights, *Report 1 of 2018* (6 February 2018) p. 121.

wealth restraining orders and unexplained wealth orders can be made, those matters raised in previous analyses are of equal relevance to this bill.

1.236 As set out in the committee's *Guidance Note 2,* the term 'criminal' has an autonomous meaning in international human rights law, such that even if a penalty is classified as civil in character domestically it may nevertheless be considered 'criminal' for the purposes of international human rights law.

1.237 The statement of compatibility acknowledges that the minimum guarantees in criminal proceedings in Articles 14(2)-(7) and 15 of the ICCPR may extend to acts regarded as penal or criminal regardless of their qualification under domestic law.[17] However, the statement of compatibility explains that the unexplained wealth proceedings and other proceedings under the POC Act should not be characterised as criminal for the following reasons:

> Unexplained wealth proceedings and other proceedings under the POC Act are brought by a public authority for the purpose of determining and punishing breaches of Commonwealth law. However, these proceedings are civil proceedings only and are not criminal in nature – unexplained wealth orders imposed via unexplained wealth proceedings cannot create criminal liability, do not result in any finding of criminal guilt and do not expose people to any criminal sanctions. Proceedings on an application for a restraining order or an unexplained wealth order are also explicitly characterised as civil in section 315 of the POC Act and the rules of statutory construction and evidence applicable only in relation to criminal law do not apply in proceedings under the Act.[18]

1.238 In addition to the domestic classification of the offence, the committee's *Guidance Note 2* explains that there are two other relevant tests in determining whether provisions may be characterised as 'criminal' in character. These concern the nature and purpose of the measure and the severity of the penalty. The statement of compatibility states that the purpose of the bill is to enable closer coordination between Commonwealth, states and territories to target criminal assets and use 'unexplained wealth laws to undermine criminal gangs and prevent them reinvesting their profits to support further criminal activity'.[19] This would indicate that the unexplained wealth provisions may have a preventative purpose. Preventative measures have not generally been characterised as 'criminal charges' or 'penalties' in international human rights law.[20] However, the characterisation will

17 SOC, [61].

18 SOC, [62].

19 SOC, [51].

20 See *Gogitdze & Ors v Georgia,* European Court of Human Rights App No.36862/05 (2015) [126]; *Butler v United Kingdom,* European Court of Human Rights App No.41661/98 (2002).

ultimately depend on the particular facts of a case in question,[21] including whether the degree of culpability of the offender impacts the amount of the order,[22] and whether proceedings are initiated after the relevant criminal proceedings have ended with an outcome other than conviction (such as acquittal or discontinuation of criminal proceedings as being statute-barred).[23] It is also noted that the broader purpose of the POC Act (including unexplained wealth provisions) is outlined in section 5 of the Act and includes to punish and deter persons from breaching laws. Proceeds of crime measures which have a deterrent purpose are more likely to be considered 'criminal'.[24] The committee has previously noted that these purposes raise concerns that the proceeds of crime proceedings (including unexplained wealth proceedings) may be characterised as a form of punishment.[25] The unexplained wealth provisions also appear to apply to the public in general. This is relevant in determining whether the measures are 'criminal' in nature, as measures are more likely to be criminal if they apply to the public in general.

1.239 As to severity, the unexplained wealth restraining orders and unexplained wealth orders can involve significant sums of money, which raises concerns that the cumulative effect of the purpose and severity of the measures would lead to the provisions being characterised as criminal.

1.240 If the provisions were characterised as 'criminal' for the purposes of human rights law, this means that the provisions in question must be shown to be consistent with criminal process guarantees set out in Articles 14 and 15 of the ICCPR, including any justifications for any limitations on these rights where applicable.

1.241 As noted earlier, the committee has previously raised particular concerns in relation to the compatibility of the unexplained wealth provisions with the presumption of innocence, if the measures are characterised as 'criminal'. This is because, where the court is considering whether to make an unexplained wealth order, the burden of proving that a person's wealth is not derived, directly or indirectly, from one or more of the relevant offences would lie on the person against which an order is being sought.[26] The committee has previously raised concerns that

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21 See, for example, *Welch v United Kingdom,* European Court of Human Rights App No.17440/90 (1995).

22 *Dassa Foundation v Lichtenstein,* European Court of Human Rights Application No.696/05 (2007); *Butler v United Kingdom,* European Court of Human Rights App No.41661/98 (2002).

23 *Gogitdze & Ors v Georgia,* European Court of Human Rights App No.36862/05 (2015) [125]; *Allen v United Kingdom,* European Court of Human Rights (Grand Chamber) App No. 25424/09 (2013) [103]-[104].

24 *Welch v United Kingdom,* European Court of Human Rights App No.17440/90 (1995) [28].

25 See, Parliamentary Joint Committee on Human Rights, *Report 1 of 2018* (6 February 2018) p. 115.

26 Section 179E of the POC Act.

this reverse burden placed on a respondent effectively gives rise to a presumption of unlawful conduct.[27]

*Fair hearing*

1.242 The committee has also previously raised concerns insofar as a preliminary unexplained wealth order or unexplained wealth restraining order may be made against a person who does not appear at the hearing, and so may not have an opportunity to be heard.[28] The POC Act also provides that a court may make an unexplained wealth order even when the person failed to appear as required by the preliminary unexplained wealth order.[29] As the amendments to the bill expand the operation of the unexplained wealth regime, these concerns apply equally to the amendments introduced by the bill.

1.243 The statement of compatibility acknowledges that the ability to make orders without notice being given to the person who is the subject of the application may engage the right to a fair hearing.[30] However, it further states that the laws 'serve the justifiable and reasonable purpose of preventing a person from dispersing his or her assets during the time between an order being sought and an order being made' and prevent persons 'from frustrating unexplained wealth proceedings by simply failing to appear when ordered to do so'.[31] These would appear to be legitimate objectives and the measures would appear to be rationally connected to this objective.

1.244 However, there are questions as to the proportionality of the limitation on the right to a fair hearing. The statement of compatibility states that where such orders are made without notice, the POC Act provides mechanisms which allow a person to contest these orders.[32] However, it is not clear whether such safeguards would be sufficient for the purposes of international human rights law. For example, once an unexplained wealth restraining order has been made, if a person was notified of the application for the restraining order but did not appear at the hearing of that application, a person cannot apply for an order excluding property from a restraining order unless the court gives leave.[33] A court may give leave if satisfied that the person had a good reason for not appearing,[34] but this is discretionary. This raises concerns that the safeguards would not be sufficient from a human rights law

27 Parliamentary Joint Committee on Human Rights, *Report 1 of 2018* (6 February 2018) p. 121.

28 Parliamentary Joint Committee on Human Rights, *Fourth Report of the 44th Parliament* (March 2014) p. 6.

29 Section 179E(4) of the POC Act.

30 SOC, [55]-[60].

31 SOC, [57]-[58].

32 SOC, [59]; sections 29, 31 and 179C of the POC Act.

33 Section 31(2)(a) of the POC Act.

34 Section 31(3)(a) of the POC Act.

perspective and that there may be other, less rights restrictive means of achieving the legitimate objective.

## Committee comment

**1.245 The preceding analysis of the proposed amendments to the unexplained wealth provisions in schedules 2 and 3 of the bill raise questions as to whether expanding the application of the POC Act is compatible with the right to a fair trial and the right to a fair hearing.**

**1.246 The committee seeks the advice of the minister as to whether these amendments to the POC Act are compatible with these rights, including:**

- **whether the unexplained wealth provisions (as expanded by the bill) may be characterised as 'criminal' for the purposes of international human rights law, having regard in particular to the nature, purpose and severity of the measures;**
- **the extent to which the provisions are compatible with the criminal process guarantees in articles 14 and 15 of the ICCPR, including any justification for any limitations on these rights where applicable; and**
- **the extent to which the provisions are compatible with the right to a fair hearing (including whether there are other, less rights restrictive, means of achieving the objectives of the bill).**

**1.247 As the POC Act was introduced prior to the establishment of the committee, the committee recommends that the minister undertake a detailed assessment of the POC Act to determine its compatibility with the right to a fair trial and right to a fair hearing. This would inform the committee's consideration of the compatibility of the amendments in the context of the legislative scheme as a whole.**

### *Compatibility of the measure with the right to privacy*

1.248 The right to privacy includes the right not to be subject to arbitrary or unlawful interference with one's privacy, family, home or correspondence. As acknowledged in the statement of compatibility, the bill engages and limits the right not to be subject to arbitrary or unlawful interference with a person's home, as unexplained wealth restraining orders can be used to restrain real property, and the amount a person has to repay pursuant to an unexplained wealth order is determined in part by reference to property (including real property) owned by a person, and that property may be ordered to be available to authorities to satisfy the unexplained wealth order.[35]

35 See the definition of 'property' in section 338 of the POC Act; see also SOC, [80]; see also section 179S of the POS Act.

1.249 A limitation on the right to privacy will be permissible under international human rights law where it addresses a legitimate objective, is rationally connected to that objective and is a proportionate means of achieving that objective.

1.250 The statement of compatibility states that the amendments in schedules 2 and 3 support 'the important objective of ensuring that criminals are not able to profit from their crimes and are deterred from further criminal activity'.[36] This would appear to be a legitimate objective for the purposes of international human rights law. However, insofar as unexplained wealth restraining orders and unexplained wealth orders may apply in circumstances where a person has not been convicted of any crime, it is not clear whether the measures are rationally connected to this objective.

1.251 As to proportionality, the statement of compatibility identifies the following safeguards:

- courts may refuse to make an unexplained wealth restraining order, a preliminary unexplained wealth order or an unexplained wealth order if there are not reasonable grounds to suspect that a person's total wealth exceeds by $100,000 or more the value of their wealth that was 'lawfully acquired;[37]
- a court may refuse to make an unexplained wealth restraining order or unexplained wealth order if the court is satisfied that it is not in the public interest to make the order;[38]
- courts may also exclude property from the scope of some of these orders or revoke these orders in a range of situations, including where it is in the public interest or the interests of justice to do so;[39] and
- courts may also make orders relieving dependents from hardship caused by unexplained wealth orders[40] and allow for reasonable expenses to be paid out of funds restrained under unexplained wealth restraining orders.[41]

36 SOC, [80].

37 Sections 20A(4); 179B(4) and 179E(6) of the POC Act.

38 Sections 20A(4) and 179E(6) of the POC Act.

39 Sections 24A, 29A, 42 and 179C of POC Act.

40 Section 179L of the POC Act.

41 Section 24 of the POC Act.

1.252 The statement of compatibility also emphasises that proceeds of crime authorities are bound by an obligation to act as model litigants, which requires the authorities to act honestly and fairly in handling litigation under the POC Act.[42]

1.253 Notwithstanding these safeguards, questions remain as to the proportionality of the measure in circumstances where a person has not been convicted of a criminal offence. It is also noted that some of the safeguards identified in the statement of compatibility, such as the ability to allow reasonable expenses to be paid out of funds restrained pursuant to unexplained wealth restraining orders, and the ability to refuse to make orders if the court is satisfied it is not in the public interest to do so, are discretionary.[43] This raises questions as to whether there may be other, less rights restrictive, means of achieving the objective. For example, a mandatory rather than discretionary requirement for a court to refuse to make an unexplained wealth order when particular circumstances apply would appear to be a less rights restrictive approach.

## Committee comment

**1.254 The preceding analysis indicates that the measures in schedules 2 and 3 of the bill may engage and limit the right to privacy.**

**1.255 The committee seeks the advice of the minister as to:**

- **whether the measures in schedules 2 and 3 are rationally connected (that is, effective to achieve) the legitimate objective of the measures; and**
- **the proportionality of the limitation on the right to privacy (including whether the safeguards in the POC Act referred to in the statement of compatibility are the least rights restrictive means of achieving the objective).**

## Information gathering powers under the national cooperative scheme on unexplained wealth – Schedule 4

1.256 Schedule 4 of the bill allows specified officers in territories and participating states to apply for production orders, which would require a person to produce or make available documents relevant to identifying, locating or quantifying property of a person for the purposes of unexplained wealth proceedings that have commenced or deciding whether to institute such proceedings.[44] Such orders can only require

42 SOC, [82].

43 Section 24(1) of the POC Act. In contrast, the court *must* relieve certain dependants from hardship caused by unexplained wealth orders if certain criteria are satisfied: section 179L(1).

44 See Schedule 4, section 1 of proposed Part 1 of Schedule 1 of the POC Act. Documents relevant to identifying or locating any document necessary for the transfer of property and documents that would assist in the reading or interpretation of documents referred to in section 1(6)(a) and (b) would also be subject to production orders: section 1(6)(c).

production of documents that are in the possession, or under the control, of a corporation or are used, or intended to be used, in the carrying on of a business.[45]

1.257 A person is not excused from producing or making available a document made under such an order on the ground that producing the document would tend to incriminate the person or expose the person to a penalty.[46] In this respect, a 'use immunity' is provided, such that any document produced or made available is not admissible in evidence in a criminal proceeding against the person except for the offences of giving false or misleading information or documents under the *Criminal Code*.[47] However, no derivative use immunity is provided.[48]

1.258 A person who obtains information as a direct result of the exercise of the production order power or function may disclose the information to a number of specified authorities for a number of specified purposes, if the person believes on reasonable grounds that the disclosure will serve that purpose and a court has not made an order prohibiting disclosure.[49] This includes disclosure to authorities of a state or territory for the purposes of engaging in proceedings under the state or territory law; disclosure to an 'authority of the Commonwealth with one or more functions under [the POC] Act' for the purpose of 'facilitating the authority's performance of its functions under this Act'; disclosure to authorities of the commonwealth, state or territory to assist in the prevention, investigation or prosecution of an offence against that law that is punishable on conviction by imprisonment for at least three years; and disclosure to the Australian Taxation Office for the purpose of protecting public revenue.[50]

***Compatibility of the measures with the right not to incriminate oneself***

1.259 As noted earlier, specific guarantees of the right to a fair trial in the determination of a criminal charge guaranteed by article 14 of the ICCPR include the right not to incriminate oneself.[51]

1.260 The statement of compatibility does not acknowledge that the proposed production orders powers engage and limit the right not to incriminate oneself. Instead, the statement of compatibility states in general terms that the proceeds are

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45 See Schedule 4, section 1(3)(b)-(c) of proposed Part 1 of Schedule 1 of the POC Act.

46 See Schedule 4, section 5(1)(a) of proposed Part 1 of Schedule 1 of the POC Act.

47 See Schedule 4, section 5(2) of proposed Part 1 of Schedule 1 of the POC Act; see also proposed section 18(3) and (4) of Part 3 of Schedule 1 of the POC Act.

48 See Schedule 4, section 18(3) and (4) of proposed Part 3 of Schedule 1 of the POC Act. A derivative use immunity would prevent information or evidence indirectly obtained from being used in criminal proceedings against the person.

49 See Schedule 4, section 18 of proposed Part 3 of Schedule 1 of the POC Act.

50 See Schedule 4, section 18(2) of proposed Part 3 of Schedule 1 of the POC Act.

51 International Covenant on Civil and Political Rights, Article 14(3)(g).

civil proceedings only and are not criminal in nature, with the result that the bill does not engage the specific guarantees relating to the determination of criminal charges in the ICCPR.[52] However, by requiring a person to produce or make available documents notwithstanding that to do so might tend to incriminate that person, schedule 4 engages and limits the right not to incriminate oneself.

1.261 The right not to incriminate oneself may be subject to permissible limitations where the limitation pursues a legitimate objective, is rationally connected to that objective and is a proportionate way of achieving that objective.

1.262 The explanatory memorandum explains that overriding the privilege against self-incrimination is appropriate because 'criminals regularly seek to hide their ill-gotten gains behind a web of complex legal, contractual and business arrangements'.[53] The measure therefore appears to address a substantial and pressing concern and is likely to be a legitimate objective for the purposes of international human rights law. The explanatory memorandum also states that requiring the production of documents is 'necessary to enable law enforcement to effectively trace, restrain and confiscate unexplained wealth amounts'. This suggests the measure is also rationally connected to this objective.

1.263 The availability of use and derivative use immunities can be one important factor in determining whether the limitation on the right not to incriminate oneself is proportionate. While a 'use' immunity is provided in the bill, no 'derivative use' immunity is provided (which would prevent information or evidence indirectly obtained from being used in criminal proceedings against the person). The lack of a 'derivative use' immunity raises questions about whether the measure is the least rights restrictive way of achieving its objective.

1.264 The explanatory memorandum emphasises that the production orders can only require the production of documents that are in the possession, or under the control, of a corporation, or are used, or intended to be used, in the carrying on of a business. That is, they do not require production of documents in the custody of an individual which relate to the affairs of an individual.[54] The explanatory memorandum explains that the bill does not compel production of documents in the custody of an individual which relate to the affairs of the individual because no derivative use immunity has been conferred.[55] While this information provided in the explanatory memorandum is useful and may constitute a relevant safeguard in relation to the scope of the powers, it is not sufficient as it does not provide an assessment of whether the limitation on human rights is permissible. As set out in

52 SOC, [62].

53 Explanatory memorandum (EM), [205]-[206].

54 EM, [190]-[191].

55 EM, [191].

the committee's *Guidance Note 1,* the committee's expectation is that statements of compatibility read as stand-alone documents, as the committee relies on the statement as the primary document that sets out the legislation proponent's analysis of the compatibility of the bill with Australia's international human rights obligations.

## Committee comment

**1.265 The preceding analysis raises questions as to the compatibility of the abrogation of the privilege against self-incrimination with the right not to incriminate oneself in Article 14(3)(g) of the ICCPR.**

**1.266 The committee seeks the advice of the minister as to whether the measures are a proportionate means of achieving the stated objective. This includes information as to whether a 'derivative use' immunity is reasonably available as a less rights restrictive alternative.**

**1.267 The committee reiterates its position set out in *Guidance Note 1* that a statement of compatibility should read as a stand-alone document and that all issues relating to compatibility with human rights should be addressed in the statement of compatibility.**

***Compatibility of the measure with the right to privacy***

1.268 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.

1.269 As noted above, the documents that can be subject to the production orders are limited to those documents in possession of a corporation that are used in the carrying on of a business. However, it appears possible that such documents may involve the disclosure of personal information about a person in relation to, for example, the carrying on of a business. If the disclosure to authorities of documents that are produced as a result of compulsory production orders involves the disclosure of personal information, this would engage and limit the right to privacy.

1.270 The statement of compatibility acknowledges that the power to compel persons to produce documents and power to disclose those documents to specified authorities engages the right to privacy.[56] Limitations on the right to privacy will be permissible where they are not arbitrary such that they pursue a legitimate objective, are rationally connected to that objective and are a proportionate means of achieving that objective.

1.271 The statement of compatibility explains that the limitation on the right to privacy 'is aimed at disrupting and combating serious and organised crime'.[57] This is

56 SOC, [67].

57 SOC, [68].

likely to be a legitimate objective for the purposes of international human rights law. The statement of compatibility also explains that the measure would facilitate information sharing programs between commonwealth, state and territory agencies whose functions relate to unexplained wealth, which would appear to be rationally connected to this objective.

1.272 As to proportionality, the statement of compatibility explains that information obtained from the orders is protected by a use (but not derivative use) immunity, such that evidence obtained from a production order against a person will not be admissible in criminal proceedings against a person. This is a relevant but limited safeguard in relation to the right to privacy. The statement of compatibility further notes that information obtained from production orders can only be disclosed to specific authorities where a person believes on reasonable grounds that the disclosure will serve a specified purpose, and will be overseen by the Parliamentary Joint Committee on Law Enforcement.[58]

1.273 However, in order to constitute a proportionate limitation on the right to privacy, a limitation must only be as extensive as is strictly necessary. Notwithstanding the safeguards described in the previous paragraph, questions remain as to the breadth of the purposes for which information may be disclosed by a person to authorities. For example, information may be disclosed to an 'authority of the commonwealth with one or more functions under [the POC] Act' for the broad purpose of 'facilitating the authority's performance of its functions under this Act'.[59] It is not clear from the information provided what this may entail, and whether it is strictly necessary to include such a broad purpose of disclosure. It is also unclear what safeguards are in place with respect to the use, storage and retention of information obtained pursuant to production orders.

## Committee comment

**1.274 The preceding analysis raises questions as to the compatibility of the information gathering powers with the right to privacy.**

**1.275 The committee seeks the advice of the minister as to the proportionality of the limitation on the right to privacy (including whether the measure is sufficiently circumscribed and whether there are safeguards in place with respect to the use, disclosure, storage and retention of information obtained pursuant to production orders).**

## Information sharing provisions – amendments to TIA Act – Schedule 6

1.276 Currently, lawfully intercepted information and interception warrant information may be used in unexplained wealth proceedings only where the

58 SOC, [69-[71].

59 See Schedule 4, section 18(2) of proposed Part 3 of Schedule 1 of the POC Act.

proceedings are 'in connection with the commission of a prescribed offence'.[60] Similarly, agencies may only 'deal' in interception information for certain prescribed purposes and proceedings, which does not currently include unexplained wealth provisions or proceedings.[61] Schedule 6 of the bill would allow officers in Commonwealth, territory and participating state agencies to use, record or communicate lawfully intercepted information or interception warrant information under the *Telecommunications (Interception and Access) Act 1979* (TIA Act) for purposes connected with unexplained wealth proceedings, without having to show a link to a prescribed offence. This amendment would override the general prohibition in the TIA Act on using, disclosing, recording and giving in evidence lawfully intercepted information.[62]

1.277 It would also amend section 68 of the TIA Act to allow the chief officer of an agency to communicate lawfully intercepted information to the relevant Commissioner of Police if it relates to the unexplained wealth provisions of that jurisdiction.[63]

***Compatibility of the measure with the right to privacy***

1.278 As the TIA Act was legislated prior to the establishment of the committee, the scheme has never been required to be subject to a foundational human rights compatibility assessment in accordance with the terms of the *Human Rights (Parliamentary Scrutiny) Act 2011.* A full human rights assessment of proposed measures which extend or amend existing legislation requires an assessment of how such measures interact with the existing legislation. The committee is therefore faced with the difficult task of assessing the human rights compatibility of an amendment to the TIA Act without the benefit of a foundational human rights assessment of the Act.

1.279 As noted earlier, the right to privacy includes the right to respect for private and confidential information, particularly the storing, use and sharing of such information. It also includes the right to control the dissemination of information about one's private life. As acknowledged in the statement of compatibility, schedule 6 of the bill engages and limits the right to privacy by allowing officers in Commonwealth, territory and participating state agencies to use, record or communicate lawfully intercepted information or interception warrant information

60 See section 5B(1)(b) of the *Telecommunications (Interception and Access) Act 1979*.

61 'Dealing' for permitted purposes in relation to an agency allows an officer or staff member of an agency, for a permitted purpose, or permitted purposes, in relation to the agency and for no other purpose, to communicate to another person, make use of, or make a record of specified information: see section 67 of the TIA Act.

62 See item 2 of Schedule 6, proposed sections 5B(1)(be) and (bf) of the bill.

63 See item 7 and 8 of Schedule 6, proposed section 68(c)(ia) of the bill.

for a purpose connected with unexplained wealth proceedings.[64] This may include private communications, including potentially the content of private telephone conversations and emails.

1.280 The statement of compatibility explains that the legitimate objective of the amendments is to ensure 'law enforcement authorities are in a position to effectively combat serious and organised crime' in circumstances where covert movement of funds often occurs across state and territory borders.[65] While this may be capable of constituting a legitimate objective for the purposes of international human rights law, further information is required as to how it addresses a pressing and substantial concern in the context of the proposed measure. In this respect, the statement of compatibility does not fully address whether there is a gap in existing abilities to combat serious or organised crime or why the expanded powers are needed. It is also unclear from the information provided how the expanded information-sharing arrangements between law enforcement agencies will be effective to achieve (that is, rationally connected) to the stated objective.

1.281 As to proportionality, the statement of compatibility identifies safeguards in the TIA Act relating to disclosure and other protections under that Act. The statement of compatibility identifies the following safeguards:

- restrictions that prevent Australian law enforcement, anti-corruption, and national security agencies from accessing communications[66] and telecommunications data[67] except for proper purposes under a warrant or authorisation;
- prohibitions on a range of people associated with the telecommunications industry, such as employees of carriers and emergency call service people, from disclosing any information or document relating to a communication, which includes telecommunications data; and
- requirements that an authorised officer must consider the privacy of a person before authorising disclosure of particular information, or that

64 SOC, [72]-[75].

65 SOC, [73].

66 'Communication' is defined in section 5 of the TIA Act as 'conversation and a message, and any part of a conversation or message, whether: (a) in the form of: (i) speech, music or other sounds; (ii) data; (iii) text; (iv) visual images, whether or not animated; or (v) signals; or (b) in any other form or in any combination of forms.' See also, TIA Act section 46.

67 'Telecommunications data' refers to metadata rather than information that is the content or substance of a communication: see section 172 of the TIA Act

persons who issue warrants must consider the privacy of persons affected by those warrants.[68]

1.282 The statement of compatibility also states that the TIA Act already allows for the communication of lawfully intercepted information or interception warrant information relevant to certain forfeiture matters, and that the amendments in the bill 'merely extend the existing disclosure laws to ensure that they cover information relevant to unexplained wealth proceedings'.[69]

1.283 However, there are questions as to whether the safeguards identified in the statement of compatibility are sufficient for the purposes of international human rights law. The safeguards identified in the statement of compatibility relating to warranted access to information are found in Chapters 2 and 3 of the TIA Act. The committee has not previously considered chapters 2 and 3 of the TIA Act in detail. The committee has previously noted, however, that while the warrant regime may assist to ensure that access to private communications is sufficiently circumscribed, the use of warrants does not provide a complete answer as to whether chapters 2 and 3 of the TIA Act constitute a proportionate limit on the right to privacy, as questions arise as to the proportionality of the broad access that may be granted in relation to 'services' or 'devices' under these chapters of the TIA Act.[70] This would be of particular relevance in the context of the present amendments as there would be no requirement to show a link to a prescribed offence before using the information.

1.284 Accordingly, further information from the minister in relation to the human rights compatibility of the TIA Act would assist a human rights assessment of the proposed measures in the context of the TIA Act.

1.285 Further, as noted above, in order for a limitation on the right to privacy to be proportionate, it must be no more extensive than is strictly necessary. In this respect, the statement of compatibility does not fully address why the expanded information sharing powers are necessary or why the current law is insufficient to address the stated object of the measure. This raises concerns that the measure may not be sufficiently circumscribed such as to constitute a proportionate limitation on the right to privacy.

## Committee comment

**1.286 The committee notes that the *Telecommunications (Interception and Access) Act 1979* (TIA Act) was legislated prior to the establishment of the committee and has not been the subject of a foundational human rights analysis.**

68 SOC, [76].

69 SOC, [77].

70 See Parliamentary Joint Committee on Human Rights, *Report 9 of 2016* (22 November 2016) p. 5; *Report 1 of 2017* (16 February 2017) pp. 35-44.

**1.287 In light of the human rights concerns regarding the scope of powers under the TIA Act, the preceding analysis raises questions as to whether the amendments to the TIA Act introduced by the bill are compatible with the right to privacy.**

**1.288 The committee therefore seeks the advice of the minister as to the compatibility with the right to privacy of allowing officers in Commonwealth, territory and participating state agencies to use, record or communicate lawfully intercepted information or interception warrant information under the TIA Act in an unexplained wealth proceeding without having to show a link to a prescribed offence, including:**

- **whether there is reasoning or evidence that establishes that the stated objective addresses a pressing or substantial concern or whether the proposed changes are otherwise aimed at achieving a legitimate objective;**
- **how the measure is effective to achieve (that is, rationally connected to) that objective;**
- **whether the limitation is a reasonable and proportionate measure for the achievement of that objective (including whether the measure is necessary and sufficiently circumscribed and whether it is accompanied by adequate and effective safeguards); and**
- **whether an assessment of the TIA Act could be undertaken to determine its compatibility with the right to privacy (including in respect of matters previously raised by the committee).**

# Advice only

1.289 The committee draws the following bills 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.

## Banking System Reform (Separation of Banks) Bill 2018

| | |
|---|---|
| **Purpose** | Seeks to make a range of reforms to the banking sector, including to limit the activities of banks and to establish a joint parliamentary committee to oversee the Australian Prudential Regulation Authority |
| **Legislation proponent** | The Hon Bob Katter MP |
| **Introduced** | House of Representatives, 25 June 2018 |
| **Rights** | Privacy; liberty; quality of law (see **Appendix 2**) |
| **Status** | Advice only |

### Offence provisions

1.290 A number of provisions in the bill seek to introduce offences that each carry a maximum penalty of five years' imprisonment or 1,190 penalty units ($249,900), or both.[1] These offences may apply to individuals.

#### *Compatibility of the measure with human rights*

1.291 Article 9 of the International Covenant on Civil and Political Rights (ICCPR) protects the right to liberty, including the right not to be arbitrarily detained. The prohibition on arbitrary detention requires that the state should not deprive a person of their liberty except in accordance with law. The notion of 'arbitrariness' includes elements of inappropriateness, injustice and lack of predictability. The UN Human Rights Committee has noted that any substantive grounds for detention 'must be prescribed by law and should be defined with sufficient precision to avoid overly broad or arbitrary interpretation or application'.[2]

1.292 As the offence provisions in the bill provide for a term of imprisonment, they engage and limit the right to liberty. Under international human rights law, limitations on the right to liberty may be permissible where they are reasonable, necessary and proportionate in the individual case. In these circumstances, deprivation of liberty will not generally constitute arbitrary detention.

1 See proposed subsections 10(2); 12(2); 14(14) and 14(16).

2 United Nations Human Rights Committee, *General Comment No. 35: Article 9 (Liberty and Security of persons)*, (16 December 2014) [22].

1.293 However, human rights standards require that interferences with rights must have a clear basis in law. This principle includes the requirement that laws must satisfy the 'quality of law' test, which means that any measures which interfere with human rights must be sufficiently certain and accessible, such that people are able to understand when an interference with their rights will be justified.

1.294 As drafted, the offence provisions in the bill, which carry potential terms of imprisonment, may lack sufficient certainty. It is unclear from the proposed offences the scope of conduct that may be captured by the offence provisions.[3]

1.295 However, the statement of compatibility does not identify that the proposed offences engage and limit the right to liberty and instead states that the bill 'does not engage any of the applicable rights or freedoms'.[4] The statement therefore does not provide an assessment as to whether the measure is compatible with the right to liberty in accordance with the committee's *Guidance Note 1.*

## Requirement for APRA to provide documents

1.296 Subsection 14(15) of the bill provides that the Australian Prudential Regulation Authority (APRA) shall provide to the Australian Federal Police, state police and law enforcement bodies any documents, information or data requested by such bodies regarding any bank under APRA's regulatory supervision or which may come to the attention of APRA and which may evidence a breach of Australian law. A person commits an offence if they evade or attempt to evade subsection 14(15) or the person is an officer, employee or agent of APRA and knowingly participates in such a violation.[5]

### *Compatibility of the measure with the right to privacy*

1.297 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. To the extent that the requirement to provide documents extends to APRA providing information or documents, which may include personal or confidential information, the proposed measure engages and may limit the right to privacy.

1.298 The right to privacy may be subject to permissible limitations which are provided by law and are not arbitrary. In order for limitations not to be arbitrary, they must seek to achieve a legitimate objective and be rationally connected (that is, effective to achieve) and proportionate to that objective. As noted above, the statement of compatibility does not acknowledge that any human rights are engaged

3 See, for example, proposed subsection 10(2) and subsection 12(2).

4 Explanatory memorandum, statement of compatibility, p. [10].

5 See subsection 14(16) of the bill.

by the bill and accordingly does not provide an assessment as to the compatibility of the measure with the right to privacy.

## Committee comment

**1.299 The committee draws the human rights implications of the bill in respect of the right to liberty, the right to privacy and the quality of law test to the attention of the legislation proponent and the parliament.**

**1.300 If the bill proceeds to further stages of debate, the committee may request information from the legislation proponent as to the compatibility of the bill with human rights.**

# Freedom of Speech Legislation Amendment (Censorship) Bill 2018

# Freedom of Speech Legislation Amendment (Insult and Offend) Bill 2018

# Freedom of Speech Legislation Amendment (Security) Bill 2018

| | |
|---|---|
| **Purpose** | Repeal and amend certain restrictions on communication in Commonwealth laws in relation to broadcasting and online services; the classification of films, publications and computer games; offensive or insulting conduct; and the disclosure of information |
| **Legislation Proponent** | Senator Leyonhjelm |
| **Introduced** | Senate, 25 June 2018 |
| **Rights** | Freedom of expression; equality and non-discrimination; rights of the child; privacy (see **Appendix 2**) |
| **Status** | Advice only |

## Amending and removing certain restrictions on communication

1.301 The Freedom of Speech Legislation Amendment (Censorship) Bill 2018 (censorship bill), Freedom of Speech Legislation Amendment (Insult and Offend) Bill 2018 (insult and offend bill) and the Freedom of Speech Legislation Amendment (Security) Bill 2018 (security bill) (the bills) are part of a suite of four bills which seek to repeal or amend various provisions in Commonwealth laws which restrict communication.[1] The proposed amendments include:

1 The committee previously addressed the human rights compatibility of the fourth bill, namely, the Racial Discrimination Law Amendment (Free Speech) Bill 2016, in its *Report 2 of 2017*, by reference to its comments in its inquiry into freedom of speech in Australia: Parliamentary Joint Committee on Human Rights, *Report 2 of 2017* (21 March 2017) p. 1; Parliamentary Joint Committee on Human Rights, *Freedom of speech in Australia: Inquiry into the operation of Part IIA of the* Racial Discrimination Act 1975 *(Cth) and related procedures under the* Australian Human Rights Commission Act 1986 *(Cth)* (28 February 2017). For more information on this inquiry, see the inquiry website at: http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights_inquiries/FreedomspeechAustralia.

- removing provisions in 23 Commonwealth Acts which prohibit 'offensive or insulting' language and conduct;[2]
- restricting the scope and operation of the disclosure offences in the *Australian Security Intelligence Organisation Act 1979*, *Crimes Act 1914* and *Criminal Code Act 1995*;[3]
- excluding from the 'Refused Classification' (RC) [4] category publications, films or computer games which advocate terrorism;[5]
- restricting the RC classification to publications, films and computer games which:
  - depict or describe, in a way that is likely to cause offence to a reasonable adult, a person who is, or appears to be, a minor engaged in sexual activity; or
  - promote crime, or incite or instruct in matters of crime;[6]
- repealing the prohibition on the possession, control and supply of certain materials in certain areas of the Northern Territory in part 10 of the Classification (Publications, Films and Computer Games) Act 1995 (Classification Act);[7]

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2 Insult and Offend Bill.

3 Security Bill.

4 Under the National Classification Code, publications, films and computer games that are classified as RC depict, express or otherwise deal with matters of sex, drug misuse or addiction, crime, cruelty, violence or revolting or abhorrent phenomena in such a way that they offend against the standards of morality, decency and propriety generally accepted by reasonable adults to the extent that they should not be classified; or describe or depict in a way that is likely to cause offence to a reasonable adult, a person who is, or appears to be, a child under 18 (whether the person is engaged in sexual activity or not); or promote, incite or instruct in matters of crime or violence: National Classification Code, section 2, item 1; section 3, item 1; section 4, item 1. In addition, section 9A of the Classification Act requires publications, films or computer games that advocate terrorism to be classified as RC. Materials that are classified as RC cannot be sold, hired, advertised or legally imported in Australia. See Department of Communications and the Arts, *Refused Classification (RC)* at http://www.classification.gov.au/Guidelines/Pages/RC.aspx.

5 Censorship Bill, schedule 1, item 4.

6 Censorship Bill, schedule 1, item 2.

7 Censorship Bill, schedule 1, clause 7.

- permitting subscription television broadcasting licensees and online content services to facilitate access to content classified as Restricted (X 18+),[8] and, in relation to online services, 'Category 1 Restricted'[9] and 'Category 2 Restricted' material,[10] provided access is subject to a restricted access system;[11] and
- removing the ban on broadcasting electoral advertising immediately prior to elections.[12]

***Compatibility of the measures with human rights***

1.302 The right to freedom of expression protects the communication of information or ideas through any medium, including written and oral communications, the media, public protest, broadcasting, artistic works and commercial advertising.[13] As acknowledged by the statements of compatibility, the measures in all three bills engage the right to freedom of expression.[14]

1.303 The committee has previously examined the compatibility of particular disclosure offences and particular provisions prohibiting offensive or insulting conduct with human rights, and has considered that such provisions engage and limit

8 National Classification Code, section 3, item 2. Under the code, films that are classified as X 18+ are unsuitable for minors to see and contain real depictions of actual sexual activity between consenting adults in which there is no violence, sexual violence, sexualised violence, coercion, sexually assaultive language, or fetishes or depictions which purposefully demean anyone involved in that activity for the enjoyment of viewers, in a way that is likely to cause offence to a reasonable adult. X 18+ films are currently only available for sale or hire in the ACT and Northern Territory: Department of Communications and the Arts, *Restricted (X 18+)* at http://www.classification.gov.au/Guidelines/Pages/X18+.aspx.

9 National Classification Code, section 2, item 3. Under the code, Category 1 Restricted publications explicitly depict nudity, or describe or impliedly depict sexual or sexually related activity between consenting adults, in a way that is likely to cause offence to a reasonable adult, or describe or express in detail violence or sexual activity between consenting adults that is likely to cause offence to a reasonable adult, or are unsuitable for a minor to see or read.

10 National Classification Code, section 2, item 2. Under the code, Category 2 Restricted publications explicitly depict sexual or sexually related activity between consenting adults in a way that is likely to cause offence to a reasonable adult, or depict, describe or express revolting or abhorrent phenomena in a way that is likely to cause offence to a reasonable adult and are unsuitable for a minor to see or read.

11 Censorship Bill, schedule 2, clause 2.

12 Censorship Bill, schedule 3.

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

14 Censorship Bill, statement of compatibility (SOC), p. 13; Insult and Offend Bill, SOC, p. 14; Security Bill, SOC, p. 23.

the right to freedom of expression.[15] While the right to freedom of expression may be subject to permissible limitations providing particular criteria are met, measures which remove or limit provisions which restrict communication, such as those contained in these bills, engage and may promote the right to freedom of expression.

1.304 However, the statements of compatibility do not address other rights potentially engaged by the bills, including the rights of children, the right to privacy and the right to equality and non-discrimination, and accordingly do not provide an assessment as to whether the measures in each bill are compatible with these rights. For example, in relation to the Censorship Bill:

- the proposed repeal of part 10 of the Classification Act engages a number of human rights, including the right to equality and non-discrimination to the extent that the current measures disproportionately affect Aboriginal and Torres Strait Islander people;[16] and
- the proposed narrowing of the RC classification for films, publications and computer games may engage the rights of children and the obligation on states to take all appropriate legislative measures to protect children from all forms of physical or mental violence, injury or abuse,[17] to the extent that the

15 Regarding disclosure offences see, for example, Parliamentary Joint Committee on Human Rights, National Security Legislation (Amendment (Espionage and Foreign Interference) Bill 2017, *Report 2 of 2018* (13 February 2018) pp. 2-11; and *Report 3 of 2018* (27 March 2018) pp. 213-236; Australian Border Force Amendment (Protected Information Bill) 2017, *Report 9 of 2017* (5 September 2017) pp. 6-12; and *Report 11 of 2017* (17 October 2017) pp. 72-83; Australian Border Force Bill 2015, *Twenty-second Report of the 44th Parliament* (13 May 2015) pp. 18-23; and *Thirty-seventh Report of the 44th Parliament* (19 April 2016) pp. 34-35; National Security Legislation Amendment Bill (No 1) 2014, *Thirteenth Report of the 44th Parliament*, pp. 6-13; and *Sixteenth Report of the 44th Parliament* (November 2014) pp. 55-57. In relation to provisions prohibiting offensive or insulting conduct see, for example, Parliamentary Joint Committee on Human Rights, National Integrity Commission Bill 2017, *Report 12 of 2017* (28 November 2017) pp. 94-95, National Integrity Commission Bill 2013, *First Report of the 44th Parliament* (10 December 2013) pp. 44-45 and *Report 8 of 2016* (9 November 2016), pp. 45-46; Veterans' Affairs Legislation Amendment (Mental Health and Other Measures) Bill 2014, *Sixth Report of the 44th Parliament* (May 2014) pp. 33-36; *Ninth Report of the 44th Parliament* (July 2014) pp. 110-112; and *Eleventh Report of 44th Parliament* (September 2014), pp. 38-39.

16 In the committee's examinations of the Stronger Futures in the Northern Territory Act 2012 in 2013 and 2016, it considered that the legislation could not properly be characterised as 'special measures' under the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), because the measures criminalised the conduct of some members of the group to be benefitted: Parliamentary Joint Committee on Human Rights, *Eleventh Report of 2013* (June 2013) pp. 21-28; *2016 Review of Stronger Futures Measures* (16 March 2016) pp. 3, 22.

17 Convention on the Rights of the Child (CRC), article 19(1).

current RC classification deters the production and distribution of material involving the abuse of children.[18]

## Committee comment

**1.305 The committee draws the human rights implications of the bills to the attention of the legislation proponent and the parliament.**

**1.306 If the bills proceed to further stages of debate, the committee may request information from the legislation proponent with respect to the compatibility of each bill with human rights.**

18 Censorship Bill, schedule 1, item 2.

# Bills not raising human rights concerns

1.307 Of the bills introduced into the Parliament between 25 and 28 June, 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):

- Commonwealth Inscribed Stock Amendment (Restoring the Debt Ceiling) Bill 2018;
- Customs Tariff Amendment (Incorporation of Proposals) Bill 2018;
- Export Control Amendment (Equine Live Export for Slaughter Prohibition) Bill 2018;
- Fair Work Amendment (A Living Wage) Bill 2018;
- Fair Work Amendment (Restoring Penalty Rates) Bill 2018;
- Family Law Amendment (Family Violence and Cross-examination of Parties) Bill 2018;
- Legislation Amendment (Sunsetting Review and Other Measures) Bill 2018;
- Regional, Rural and Remote Education Commissioner Bill 2018;
- Telecommunications Amendment (Giving the Community Rights on Phone Towers) Bill 2018;
- Telecommunications Legislation Amendment Bill 2018;
- Therapeutic Goods Amendment (2018 Measures No. 1) Bill 2018; and
- Treasury Laws Amendment (Financial Sector Regulation) Bill 2018.