



# Parliamentary Joint Committee on Human Rights

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Human rights scrutiny report

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# Membership of the committee

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Mr Russell Broadbent MP	McMillan, Victoria, LP
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1 The human rights committee secretariat is staffed by parliamentary officers drawn from the Department of the Senate Legislative Scrutiny Unit (LSU), which usually includes two principal research officers with specialised expertise in international human rights law. LSU officers regularly work across multiple scrutiny committee secretariats.

## Committee information

Under the *Human Rights (Parliamentary Scrutiny) Act 2011* (the Act), the committee is required to examine bills, Acts and legislative instruments for compatibility with human rights, and report its findings to both Houses of the Parliament. The committee may also inquire into and report on any human rights matters referred to it by the Attorney-General.

The committee assesses legislation against the human rights contained in the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR); as well as five other treaties relating to particular groups and subject matter.<sup>2</sup> A description of the rights most commonly arising in legislation examined by the committee is available on the committee's website.<sup>3</sup>

The establishment of the committee builds on Parliament's established tradition of legislative scrutiny. The committee's scrutiny of legislation is undertaken as an assessment against Australia's international human rights obligations, to enhance understanding of and respect for human rights in Australia and ensure attention is given to human rights issues in legislative and policy development.

Some human rights obligations are absolute under international law. However, in relation to most human rights, prescribed limitations on the enjoyment of a right may be justified under international law if certain requirements are met. Accordingly, a focus of the committee's reports is to determine whether any limitation of a human right identified in proposed legislation is justifiable. A measure that limits a right must be **prescribed by law**; be in pursuit of a **legitimate objective**; be **rationaly connected** to its stated objective; and be a **proportionate** way to achieve that objective (the **limitation criteria**). These four criteria provide the analytical framework for the committee.

A **statement of compatibility** for a measure limiting a right must provide a **detailed and evidence-based assessment** of the measure against the limitation criteria.

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2 These are the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD); the Convention on the Elimination of Discrimination against Women (CEDAW); the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT); the Convention on the Rights of the Child (CRC); and the Convention on the Rights of Persons with Disabilities (CRPD).

3 See the committee's *Short Guide to Human Rights* and *Guide to Human Rights*, [https://www.aph.gov.au/Parliamentary\\_Business/Committees/Joint/Human\\_Rights/Guidance\\_Notes\\_and\\_Resources](https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Guidance_Notes_and_Resources)

Where legislation raises human rights concerns, the committee's usual approach is to seek a response from the legislation proponent, or else draw the matter to the attention of the proponent on an advice-only basis.

More information on the committee's analytical framework and approach to human rights scrutiny of legislation is contained in *Guidance Note 1*, a copy of which is available on the committee's website.<sup>4</sup>

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4 See *Guidance Note 1 – Drafting Statements of Compatibility*, [https://www.aph.gov.au/Parliamentary\\_Business/Committees/Joint/Human\\_Rights/Guidance\\_Notes\\_and\\_Resources](https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Guidance_Notes_and_Resources)

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# Chapter 1

## New and continuing matters

- 1.1 This chapter provides assessments of the human rights compatibility of:
- bills introduced into the Parliament between 15 October and 15 November (consideration of 1 bill from this period has been deferred);<sup>1</sup>
  - legislative instruments registered on the Federal Register of Legislation between 19 September and 18 October (consideration of 2 legislative instruments from this period has been deferred);<sup>2</sup> and
  - bills and legislative instruments previously deferred.
- 1.2 The chapter also includes reports on matters previously raised, in relation to which the committee seeks further information following consideration of a response from the legislation proponent.
- 1.3 The committee has concluded its consideration of four instruments that were previously deferred.<sup>3</sup>

### Instruments not raising human rights concerns

- 1.4 The committee has examined the legislative instruments registered in the period identified above, as listed on the Federal Register of Legislation. Instruments raising human rights concerns are identified in this chapter.
- 1.5 The committee has concluded that the remaining instruments do not raise human rights concerns, either because they do not engage human rights, they contain only justifiable (or marginal) limitations on human rights or because they promote human rights and do not require additional comment.

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

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

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

## Response required

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

### Migration Amendment (Strengthening the Character Test) Bill 2018

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

### Background

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

7 Migration Act, section 501(7).

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

soon as reasonably practicable.<sup>9</sup> Such persons are also prohibited from applying for most other visas.<sup>10</sup>

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

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

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

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9 Migration Act, section 198.

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

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

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

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

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

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

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

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

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

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

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

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

### **Committee comment**

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

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

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

### ***Compatibility of the measures with the right to liberty***

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

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

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19 ICCPR, article 9.

20 Migration Act, section 189.

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

1.22 The statement of compatibility states that:

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

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

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

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

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

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

22 SOC, p.6.

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

24 SOC, p.11.

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

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

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

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

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

26 SOC, p.11.

27 SOC, p.10.

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

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

1.30 The statement of compatibility also states:

Legislative amendments that extend the grounds upon which a person's visa may be cancelled or refused, the result of which may be subsequent detention, add to a number of existing laws that are well-established, generally applicable and predictable. This will be the case also for these amendments. ... Decision-makers exercising the discretion to refuse or cancel a person's visa are guided by comprehensive policy guidelines and Ministerial Directions, and take into account the individual's circumstances and relevant international obligations. This means the visa decision, and any consequent detention or refusal, is a proportionate response to the individual circumstances of each case.

The detention of a person under these circumstances is therefore considered neither unlawful nor arbitrary under international law. In addition, the Government has processes in place to mitigate any risk of a person's detention becoming indefinite or arbitrary through: internal administrative review processes; Commonwealth Ombudsman Own Motion enquiry processes, reporting and Parliamentary tabling; and, ultimately the use of the Minister's personal intervention powers to grant a visa or residence determination where it is considered in the public interest.<sup>29</sup>

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

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28 SOC, p.11.

29 SOC, p.11.

meet the requirement for periodic and substantive judicial review of detention so as to be compatible with Article 9.<sup>30</sup>

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

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

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

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

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

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

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

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

### **Committee comment**

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

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

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

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

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

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

**1.38** The article incorporates notions of due process also reflected in article 14 of the ICCPR,<sup>33</sup> which protects the right to a fair hearing.<sup>34</sup> The Human Rights

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

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

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

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

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

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

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

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

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

36 SOC, p.12.

37 SOC, p.12.

38 Migration Act, section 501(5).

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

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

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39 Migration Act, section 501C(3).

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

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

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

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

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

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

### **Committee comment**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

49 SOC, p.13.

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

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

Where an individual's visa is cancelled or refused, they may be detained and/or removed from Australia under the provisions of the Migration Act, which may result in separation of the family unit. The rights relating to families and children — including the best interests of any children under 18 and the impact of separation from family members — will be taken into account as part of the consideration whether to refuse or cancel the visa. While rights relating to family and children generally weigh heavy against cancellation or refusal, there will be circumstances where they may be outweighed by the risk to the Australian community due to the seriousness of the person's criminal record or past behaviour or associations. The amendments in the Bill allow for a more considered deliberation of community expectations and threats posed by individuals by specifying certain offences that will enliven consideration of visa refusal or cancellation, which will then allow consideration of the surrounding circumstances.

Any separation from family members in Australia caused by an unlawful non-citizen being detained or removed as a result of having their visa cancelled or refused pursuant to the new ground of the character test will not be inconsistent with Articles 17, 23 and 24 of the ICCPR and Article 3 of the CRC as the decision to refuse or cancel will appropriately weigh the impact of separation from family and the best interests of any children against the non-citizen's risk to the community.

However, the best interests of the child are, and will remain to be, a primary consideration in any decision whether to refuse or cancel a child's visa on character grounds. As such, the refusal or cancellation of a child's visa on these grounds would only occur in exceptional circumstances.<sup>50</sup>

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

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

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50 SOC, p.13.

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

### **Committee comment**

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

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

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

### ***Compatibility of the measures with the right to freedom of movement***

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

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

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

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

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

### **Committee comment**

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

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

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

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

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

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

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

**Powers to collect personal information based on 'character concern'**

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

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

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

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

1.64 Expanding the circumstances under which personal information about a non-citizen who has committed a designated offence may be collected and disclosed engages and limits the right to privacy. This right may be subject to permissible limitations which are provided by law and are not arbitrary. In order for limitations not to be arbitrary, they must seek to achieve a legitimate objective and be rationally connected and proportionate to achieving that objective.

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

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

56 Migration Act, section 336E.

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

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

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

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

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

### **Committee comment**

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

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

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

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58 SOC, p.14.

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

## Further response required

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

### Social Security Legislation Amendment (Community Development Program) Bill 2018

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

#### Background

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

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

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

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

2 The minister's response is available in full on the committee's scrutiny reports page: [https://www.aph.gov.au/Parliamentary\\_Business/Committees/Joint/Human\\_Rights/Scrutiny\\_reports](https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Scrutiny_reports)

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

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

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

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

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

5 Social Security Administration Act, section 42AB.

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

7 Social Security Administration Act, section 42B.

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

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

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

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

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

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

#### *Work refusal failure and unemployment failure*

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

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

#### *Persistent mutual obligation failure*

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

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

14 Social Security Administration Act, section 42S.

15 Social Security Administration Act, section 42NC.

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

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

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

19 See section 25 of the bill.

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

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

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

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

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

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

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

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

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

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

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

28 Social Security Administration Act, section 42AP.

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

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

1.81 The full initial human rights analysis is set out at [Report 10 of 2018 \(18 September 2018\) pp. 4-9](#).<sup>29</sup>

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

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

**Minister's response and analysis**

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

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

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29 Parliamentary Joint Committee on Human Rights, *Report 10 of 2018* (18 September 2018) pp. 4-9 at: [https://www.aph.gov.au/Parliamentary\\_Business/Committees/Joint/Human\\_Rights/Scrutiny\\_reports/2018/Report\\_10\\_of\\_2018](https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Scrutiny_reports/2018/Report_10_of_2018).

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

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

The Bill promotes the right to social security and the right to an adequate standard of living, particularly as it is specifically designed to counter the risks of long-term unemployment and welfare dependency in remote job markets.

The proposed amendments are based on consultation and feedback received by the Department of the Prime Minister and Cabinet and will deliver a fairer and simpler arrangement for job seekers and CDP providers. Introduction of the TCF will remove penalties that CDP participants receive for one-off breaches of mutual obligation requirements. The new arrangements will also ensure that financial compliance penalties will focus on those who are persistently and wilfully non-compliant.

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

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

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

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

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

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

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

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

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

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

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

### **Committee response**

**1.91 The committee thanks the minister for his response.**

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

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

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

35 See EM, p. 22.

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

### Payment suspension for a mutual obligation failure

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

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

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

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

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

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

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

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

1.97 The full initial human rights analysis is set out at [Report 10 of 2018 \(18 September 2018\) pp. 12-15](#).<sup>39</sup>

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

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

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39 Parliamentary Joint Committee on Human Rights, *Report 10 of 2018* (18 September 2018) pp. 12-15 at: [https://www.aph.gov.au/Parliamentary\\_Business/Committees/Joint/Human\\_Rights/Scrutiny\\_reports/2018/Report\\_10\\_of\\_2018](https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Scrutiny_reports/2018/Report_10_of_2018).

**Minister's response and analysis**

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

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

**Committee response**

**1.101 The committee thanks the minister for his response.**

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

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

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

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

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

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

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

1.106 The full initial human rights analysis is set out at [Report 10 of 2018 \(18 September 2018\) pp. 15-17](#).<sup>43</sup>

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

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

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

43 Parliamentary Joint Committee on Human Rights, *Report 10 of 2018* (18 September 2018) pp. 15-17 at: [https://www.aph.gov.au/Parliamentary\\_Business/Committees/Joint/Human\\_Rights/Scrutiny\\_reports/2018/Report\\_10\\_of\\_2018](https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Scrutiny_reports/2018/Report_10_of_2018).

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

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

### ***Minister's response and analysis***

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

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

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

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

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

### **Committee response**

**1.111 The committee thanks the minister for his response.**

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

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

### **Inability to access subsidised jobs for six months**

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

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

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

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44 EM, pp. 5, 12.

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

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

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

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

#### ***Minister's response and analysis***

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

As discussed in the Explanatory Memorandum, the Bill promotes the right to work. Schedule I, Part 1, item 25 of the Bill inserts a new subsection 42AEA(4) in the Social Security (Administration) Act 1999 to provide that an individual does not commit an unemployment failure if they are a declared program participant and become unemployed from subsidised employment as a result of a voluntary act or misconduct.

The Explanatory Memorandum also notes that the proposed subsidised jobs arrangement will include a requirement that where a participant voluntarily leaves a subsidised job or is dismissed due to misconduct, the participant will be prevented from taking up a place in subsidised employment for six months (paragraph 1.54, Committee Report 10 of 2018). This does not impact a CDP participant's access to income support payments or ability to immediately re-engage with CDP. Rather, it is designed to ensure CDP participants can access long term employment and do not cycle through subsidised job placements.

To ensure there is flexible application of this arrangement that takes into consideration the individual circumstance of each CDP participant, it is not proposed that this requirement be enshrined in the CDP Bill. Rather, this would be outlined in policy guidance intended to support the interpretation and implementation of the subsidy. This policy guidance will include examples of when a six month preclusion period would not be

appropriate - for example, where departure was related to workplace harassment of the employee.

CDP providers are also required to discuss the appropriateness of any position with a CDP participant prior to placement in a subsidised job, giving CDP participants the best opportunities to succeed in their placements and move into long term employment.

In the event a CDP participant leaves a subsidised job, CDP providers will still be expected to continue working with local employers to seek opportunities for unsubsidised employment for CDP participants in their region. If a CDP participant leaves a position voluntarily or due to misconduct, they will still have access to unsubsidised employment opportunities.

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

### **Committee response**

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

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

## Advice only

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

### Australian Broadcasting Corporation Amendment (Appointment of Directors) Bill 2018

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

#### Online publication of shortlisted candidates

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

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

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

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

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

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

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

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

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

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

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

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

### **Committee comment**

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

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

## Commonwealth Places and Services (Facial Recognition) Bill 2018

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

### Prohibition on wearing full face coverings in public places

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

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

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

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

2 See Schedule 2 of the bill.

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

***Compatibility of the measure with the right to freedom of religion***

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

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

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

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

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

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3 See Schedule 3 of the bill.

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

5 See SOC, p. 3.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

### **Committee comment**

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

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

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

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

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

### Background

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

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

### Summary of civil penalty provisions

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

### *Compatibility of the measure with the criminal process rights*

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

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

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

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1 Parliamentary Joint Committee on Human Rights, *Report 4 of 2018* (8 May 2018) pp. 91-95 at: [https://www.aph.gov.au/Parliamentary\\_Business/Committees/Joint/Human\\_Rights/Scrutiny\\_reports/2018/Report\\_4\\_of\\_2018](https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Scrutiny_reports/2018/Report_4_of_2018).

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

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

### **Summary of strict liability offences**

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

#### ***Compatibility of the measure with the presumption of innocence***

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

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

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

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

### **Committee comment**

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

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

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

## **Bills not raising human rights concerns**

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

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

## Chapter 2

### Concluded matters

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

2.2 Correspondence relating to these matters is available on the committee's website.<sup>1</sup>

#### Australian Federal Police Regulations 2018 [F2018L01121]

<b>Purpose</b>	Prescribes a number of matters relating to the operation of the Australian Federal Police (AFP), including relating to disposal of property
<b>Portfolio</b>	Home Affairs
<b>Authorising legislation</b>	<i>Australian Federal Police Act 1979</i>
<b>Last day to disallow</b>	15 sitting days after tabling (tabled House of Representatives and Senate 20 August 2018)
<b>Right</b>	Freedom of expression
<b>Previous report</b>	Report 10 of 2018
<b>Status</b>	Concluded examination

#### Background

2.3 The committee first reported on the instrument in its *Report 10 of 2018* and requested a response from the Minister for Home Affairs by 4 October 2018.<sup>2</sup>

2.4 The minister's response to the committee's inquiries was received on 8 October 2018. The response is discussed below and is available in full on the committee's website.<sup>3</sup>

1 See [https://www.apf.gov.au/Parliamentary\\_Business/Committees/Joint/Human\\_Rights/Scrutiny\\_reports](https://www.apf.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Scrutiny_reports)

2 Parliamentary Joint Committee on Human Rights, *Report 10 of 2018* (18 September 2018) pp. 2-3 at: [https://www.apf.gov.au/Parliamentary\\_Business/Committees/Joint/Human\\_Rights/Scrutiny\\_reports/2018/Report\\_10\\_of\\_2018](https://www.apf.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Scrutiny_reports/2018/Report_10_of_2018).

## **Immediate disposal of 'offensive' property**

2.5 Section 76(1)(b) of the regulations provides that the Australian Federal Police (AFP) Commissioner (commissioner) may direct immediate disposal (except by sale or gift) of property that the commissioner is reasonably satisfied is property that is 'offensive' in nature.

### ***Compatibility of the measure with the right to freedom of expression: initial analysis***

2.6 The right to freedom of expression is protected by the International Covenant on Civil and Political Rights (ICCPR), which requires the state not to arbitrarily interfere with freedom of expression, including through restrictions on political debate. In its initial analysis, the committee noted that allowing the commissioner to direct the disposal of property that the commissioner is satisfied is 'offensive' in nature may engage and limit the right to freedom of expression. The committee noted that the statement of compatibility does not acknowledge that the right to freedom of expression may be engaged and limited, and so does not provide an assessment as to whether any limitation is justifiable under international human rights law. Based on information provided in the explanatory memorandum, the initial analysis indicated that the measure was likely to pursue a legitimate objective and be rationally connected and proportionate to that objective. However, questions remained as to whether the measure was proportionate. The full initial human rights analysis is set out at [Report 10 of 2018 \(18 September 2018\) at pp. 2-3](#).<sup>4</sup>

2.7 The committee therefore requested the advice of the minister as to the compatibility of the measure with the right to freedom of expression. In particular, the committee sought the advice of the minister as to whether the measure is a proportionate limitation on that right (including information as to any relevant safeguards).

### ***Minister's response and analysis***

2.8 The minister's response recognises that the measure may engage the right to freedom of expression but states that any limitation on this right is permissible. As noted in the initial human rights analysis, 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. In order for a limitation to be permissible under international human rights law, limitations must

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3 The minister's response is available in full on the committee's scrutiny reports page: [https://www.aph.gov.au/Parliamentary\\_Business/Committees/Joint/Human\\_Rights/Scrutiny\\_reports](https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Scrutiny_reports).

4 Parliamentary Joint Committee on Human Rights, *Report 10 of 2018* (18 September 2018) pp. 2-3 at: [https://www.aph.gov.au/Parliamentary\\_Business/Committees/Joint/Human\\_Rights/Scrutiny\\_reports/2018/Report\\_10\\_of\\_2018](https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Scrutiny_reports/2018/Report_10_of_2018).

be prescribed by law, pursue a legitimate objective, be rationally connected to the achievement of that objective and be a proportionate means of achieving that objective. In relation to the objectives of the measure, the response states that:

The power to dispose of 'offensive' property under paragraph 76(1)(b) of the Regulations ensures that the Australian Federal Police (AFP) is not compelled to preserve property that is objectively contrary to the standards of morality, decency and propriety generally accepted by a reasonable person. If this power was not provided, the AFP would be compelled to retain possession of material that may be unacceptably racist, violent or sexual in nature.

This can include, for example, child pornography and child abuse material. Under Article 34 of the Convention on the Rights of the Child, this material impinges on the rights of children to be safe from sexual exploitation and abuse, including exploitative use in pornographic materials. Any limitation on freedom of expression engaged by the destruction of these materials is justified by the preservation of these rights.

2.9 As outlined in the committee's initial analysis, the protection of public morals is likely to be a legitimate objective for the purposes of international human rights law.<sup>5</sup> Protecting the rights of children to be safe from sexual exploitation and abuse is also likely to be a legitimate objective. As noted in the initial analysis the measure also appears to be rationally connected to those objectives.

2.10 The minister's response also argues that the measure is proportionate to achieving the objective of protecting public morals, as:

- the commissioner must make an assessment as to whether they are 'reasonably satisfied' (emphasis added) that the property is offensive in nature; and property will not be 'offensive' merely because the commissioner subjectively takes offence; and
- a person may claim the market value of the disposed property from the Commonwealth under section 77 of the Regulations if a State or Territory Court decides that the property was not 'offensive in nature'.

2.11 The fact that the test of whether property is 'offensive' is an objective one assists with the proportionality of the measure. However, it is noted that the term 'offensive' may nevertheless potentially capture a broad range of materials. In this respect, the response further notes that the minister has approved a supplementary explanatory statement, which includes a non-exhaustive list of factors to which the commissioner may have regard when assessing whether property is 'offensive'. The response states that these factors include:

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5 Parliamentary Joint Committee on Human Rights, *Report 10 of 2018* (18 September 2018) p. 2 at: [https://www.aph.gov.au/Parliamentary\\_Business/Committees/Joint/Human\\_Rights/Scrutiny\\_reports/2018/Report\\_10\\_of\\_2018](https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Scrutiny_reports/2018/Report_10_of_2018).

- the standards of morality, decency and propriety generally accepted by reasonable adults;
- the literary, artistic or educational merit (if any) of the property; and
- the general character of the property (including whether it is of a medical, legal or scientific character).

2.12 The guidance in the supplementary explanatory statement as to the factors the commissioner may consider when exercising the power to dispose of property, and the requirement that the commissioner must be reasonably satisfied (that is, objectively satisfied) that the property is offensive in nature before exercising that power, may be capable in practice of ensuring that the commissioner does not exercise the power to dispose of property in a way that would impermissibly limit the right to freedom of expression.

2.13 While noting that the term 'offensive' may be broad, in light of the information provided in the minister's response as to how it is intended the commissioner's powers would be exercised, on balance, the measures may be a proportionate limitation on the right to freedom of expression.

### **Committee response**

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

**2.15 Based on the information provided by the minister, the committee considers that the measures may be compatible with the right to freedom of expression. However, the committee notes that much will depend on how the commissioner's powers to dispose of 'offensive' property are exercised in practice.**

## Crimes Legislation Amendment (Police Powers at Airports) Bill 2018

<b>Purpose</b>	Seeks to amend the <i>Crimes Act 1914</i> to introduce new powers at major airports, including the power for constables and protective service officers to give directions to persons to provide identification, move-on, or stop.
<b>Portfolio</b>	Home Affairs
<b>Introduced</b>	House of Representatives, 12 September 2018
<b>Rights</b>	Privacy; freedom of movement; liberty; freedom of expression
<b>Previous report</b>	Report 11 of 2018
<b>Status</b>	Concluded examination

### Background

2.16 The committee first reported on the bill in its *Report 11 of 2018* and requested a response from the Minister for Home Affairs by 31 October.<sup>1</sup>

2.17 The minister's response to the committee's inquiries was received on 1 November 2018. The response is discussed below and is available in full on the committee's website.<sup>2</sup>

### Increased police powers at airports

2.18 The bill seeks to amend the *Crimes Act 1914* (Crimes Act) to expand the powers of police and protective service officers (PSO)<sup>3</sup> at the premises<sup>4</sup> of major airports.<sup>5</sup>

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1 Parliamentary Joint Committee on Human Rights, *Report 11 of 2018* (16 October 2018) pp. 9-23 at:  
[https://www.aph.gov.au/Parliamentary\\_Business/Committees/Joint/Human\\_Rights/Scrutiny\\_reports/2018/Report\\_11\\_of\\_2018](https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Scrutiny_reports/2018/Report_11_of_2018).

2 The minister's response is available in full on the committee's scrutiny reports page:  
[https://www.aph.gov.au/Parliamentary\\_Business/Committees/Joint/Human\\_Rights/Scrutiny\\_reports](https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Scrutiny_reports)

### **Directions to provide identity information at airports**

2.19 Currently, section 3UM of the Crimes Act provides that a constable may request a person provide evidence of their identity where the constable reasonably suspects the suspect has committed, is committing or intends to commit an offence against a law of the Commonwealth, or a law of a State or Territory, punishable by imprisonment for 12 months or more.

2.20 The bill seeks to introduce additional bases on which the powers can be exercised and additional persons who can exercise these powers. Proposed section 3UN provides that a constable or a PSO may direct a person to give the constable or PSO evidence of the person's identity (identification direction).<sup>6</sup> An identification direction may be issued if the constable or PSO:

- suspects on reasonable grounds that the person has committed, is committing, or intends to commit an offence against a law of the Commonwealth, or a law of a State having a federal aspect, punishable by imprisonment for 12 months or more; or

- 3 'protective service officer' means an Australian Federal Police (AFP) employee (other than a member) who has been declared by the Commissioner of the AFP to be a protective service officer of the AFP. The Commissioner may make such a declaration if the Commissioner is satisfied that the employee meets competency and qualification requirements specified in a determination: see sections 40EA and 40EB of the *Australian Federal Police Act 1979*. A 'member' of the Australian Federal Police means the Commissioner of Police, Deputy Commissioner of Police or an AFP employee in respect of whom a declaration under section 40B (which relates to employees other than protective service officers) is in force: see section 4 of the *Australian Federal Police Act 1979*.
- 4 'airport premises' is defined in section 239 of the *Airports Act 1996* to be a reference to (a) an airport site, if there is an airport lease for the airport; or (b) a building or other structure on such a site; and includes a part of any such premises.
- 5 'major airport' is defined in proposed section 3UL to mean (a) a Commonwealth aerodrome; (b) an airport in a Territory; or (c) an airport determined by the minister under proposed section 3UM. 'Commonwealth aerodrome' is defined in section 3 of the *Crimes (Aviation) Act 1991* to mean (a) an area of land or water in Australia that is owned by the Commonwealth and used, or intended for use, either wholly or partly, for, or in connection with, the arrival, departure or other movement of aircraft; or (b) a 'core regulated airport' as defined in section 7 of the *Airports Act 1996*; and includes any building, structure, installation or equipment in that area, or on the land that forms the core regulated airport, that is provided for use in connection with the operation of that area or land as an aerodrome or airport.
- 6 Evidence of a person's identity includes a government photographic identity document or, if the person does not produce such a document, another identity document or, if so directed, 2 different identity documents. If the person does not produce any of these identity documents the person may give the constable or officer the person's name, address and date of birth: see item 5 of Schedule 1 of the bill, proposed section 3UN(2).

- considers on reasonable grounds that it is necessary to give the direction to safeguard 'aviation security'.<sup>7</sup> 'Aviation security' is defined in the bill to include the 'good order and safe operation' of a major airport and its premises, and flights to and from a major airport.<sup>8</sup>

### **Move-on directions at airports**

2.21 Proposed section 3UO provides that a constable or PSO may give a direction to a person (a move-on direction) not to take a specified flight, or any flight, to or from that airport, or any specified major airport, for a specified period of no more than 24 hours after the direction is given.<sup>9</sup> A move-on direction may also direct a person to leave the airport premises as soon as practicable, and not enter those premises, or the premises of any specified major airport, for a specified period of no more than 24 hours after the direction is given.<sup>10</sup>

2.22 A move-on direction may be given where:

- the constable or PSO considers on reasonable grounds that the person has contravened an identification direction or a direction to stop or do anything else pursuant to section 3UQ (discussed further below), and the constable or PSO is not reasonably satisfied of the person's identity;
- the constable or PSO suspects on reasonable grounds that it is necessary to give the direction to prevent or disrupt relevant criminal activity<sup>11</sup> occurring on the premises of any major airport, or in relation to a flight to or from any major airport; or
- the constable or PSO considers on reasonable grounds that it is necessary to give the direction to safeguard aviation security.

2.23 A move-on direction covering a period of more than 12 hours must be given, or authorised, by a senior police officer.<sup>12</sup> There are restrictions on repeated directions within seven days of the first move-on direction, such that no more than one later direction (the second direction) can be given within that period. The second move-on direction can only be given if: another assessment is made that the

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7 See item 5 of Schedule 1 of the bill, proposed section 3UN(1).

8 See item 2 of Schedule 1 of the bill, proposed insertion into section 3UL.

9 See item 5 of Schedule 1 of the bill, proposed section 3UO(3).

10 See item 5 of Schedule 1 of the bill, proposed section 3UO(3).

11 'relevant criminal activity' is criminal activity involving the commission of an offence that is punishable by imprisonment for 12 months or more, against either the law of the Commonwealth or a law of the State having a federal aspect: see item 5 of Schedule 1 of the bill, proposed section 3UO(2).

12 A senior police officer is a constable having the rank of sergeant or an equivalent rank, or higher; or performing the duties of a constable having such a rank.

requirements to issue a move-on direction are satisfied; the second direction is given or authorised by a senior police officer; and the second period of exclusion from the airport premises would end no later than seven days after the first direction was given.<sup>13</sup>

### ***Stop and ancillary directions powers at airports***

2.24 Proposed section 3UQ provides that a constable or PSO may direct a person to stop or 'do anything else the constable considers on reasonable grounds to be necessary' to facilitate the direction to give identity information or the move-on direction.<sup>14</sup> A constable or PSO may give this direction if it is given on the premises of a major airport and the constable or PSO considers on reasonable grounds that it is necessary to give the direction to facilitate the exercise of the power to give a direction to give identity information or a move-on direction.<sup>15</sup>

### ***Compatibility of the measure with the right to privacy: initial analysis***

2.25 Article 17 of the International Covenant on Civil and Political Rights (ICCPR) prohibits arbitrary or unlawful interferences with an individual's privacy, family, correspondence or home. The initial human rights analysis stated that, as acknowledged in the statement of compatibility,<sup>16</sup> the bill engages the right to privacy as it requires a person to produce evidence of their identity to a constable or PSO if certain circumstances exist. The initial analysis stated that the right is also engaged by the stop and ancillary directions powers, as a person may be directed to do anything the constable considers on reasonable grounds to be necessary to facilitate the exercise of an identification direction.<sup>17</sup>

2.26 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 that objective.

2.27 The initial analysis stated that the objectives of enhancing safety and security in airports and of preserving national security, public order and the rights and freedoms of others, are likely legitimate objectives for the purposes of international human rights law.

2.28 Additionally, directing a person to provide identification where it is necessary to safeguard aviation security, or where a person is suspected on reasonable grounds to have committed, be committing or be intending to commit particular offences,

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13 See item 5 of Schedule 1 of the bill, proposed section 3UO(6).

14 See item 5 of Schedule 1 of the bill, proposed section 3UQ(2).

15 See item 5 of Schedule 1 of the bill, proposed section 3UQ(1).

16 Statement of compatibility (SOC) p. 22.

17 SOC, p. 22.

appears to be rationally connected to these objectives. However, it was not clear, based on the information provided, how the power to 'do anything else' necessary to facilitate the exercise of the identification directions power would necessarily be effective to achieve the objective, as the concept is extremely broad.<sup>18</sup>

2.29 The initial analysis further noted that in order to be a proportionate limitation on the right to privacy, a limitation must be sufficiently circumscribed to ensure that it is only as extensive as is strictly necessary to achieve the objective. In this respect, the initial analysis raised questions as to whether the ability of the constable or PSO to issue an identification direction where they consider on 'reasonable grounds' that it is 'necessary' to give the direction to 'safeguard aviation security' is sufficiently circumscribed.<sup>19</sup> Similarly, there were concerns as to the breadth of the ancillary directions power to direct a person 'to do anything else' considered on reasonable grounds to be necessary to facilitate the identification direction power.<sup>20</sup>

2.30 The full initial human rights analysis is set out at [Report 11 of 2018 \(16 October 2018\) pp. 12-15](#).<sup>21</sup>

2.31 The committee therefore sought the advice of the minister as to the compatibility of the measure with the right to privacy, including:

- whether the power in proposed section 3UQ(2)(b) of the bill to direct a person 'to do anything else' the constable or PSO considers on reasonable grounds to be necessary to facilitate the exercise of a power under proposed section 3UN is rationally connected to achieving the stated objective (including information as to what ancillary directions would be included in the scope of this power);
- whether the power to issue an identification direction under section 3UN(1)(b) is proportionate to the stated objective of the bill (including whether the power in proposed section 3UN(1)(b)(ii) to direct a person to provide identification where a constable or PSO considers on reasonable grounds it is necessary to give the direction to safeguard 'aviation security' is sufficiently circumscribed and accompanied by adequate safeguards); and
- whether the ancillary power in section 3UQ(2)(b) to direct a person to 'do anything else' the constable or PSO considers on reasonable grounds to be

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18 See, section 3UQ(2)(b) of the bill.

19 See, section 3UN(1)(b)(ii).

20 See, section 3UQ(2)(b) of the bill.

21 Parliamentary Joint Committee on Human Rights, *Report 11 of 2018* (16 October 2018) pp. 12-15 at: [https://www.aph.gov.au/Parliamentary\\_Business/Committees/Joint/Human\\_Rights/Scrutiny\\_reports/2018/Report\\_11\\_of\\_2018](https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Scrutiny_reports/2018/Report_11_of_2018).

necessary to facilitate the exercise of a power under proposed section 3UN is proportionate (including whether the measure is sufficiently circumscribed and accompanied by adequate safeguards).

### **Minister's response and analysis**

#### *Identification direction – requiring a person to produce an identity document*

2.32 The minister's response acknowledges that the power proposed in subsection 3UN(1)(b) (the power to give an identity direction) interferes with a person's privacy by requiring a person to produce identity documentation or, if this is not available, their name, address and date of birth (see subsection 3UN(2)). The response explains that no further conduct is compelled under this power.

2.33 In relation to whether the power to issue an identification direction under section 3UN(1)(b)(i) is proportionate to the stated objective, the minister's response explains that:

Under subparagraph 3UN(1)(b)(i), a direction can be issued where a constable or protective service officer (PSO) suspects on reasonable grounds that the person has committed, is committing or intends to commit an offence against the law of the Commonwealth, or a law of a State having a federal aspect, punishable by imprisonment for 12 months or more. In these circumstances, the person subject to an identity direction poses a possible risk to airport safety and security, and the direction is necessary to allow a constable or PSO to quantify this risk as early as possible. It should also be noted that this power is currently available to constables under the Act, and is being expanded to enable PSOs to exercise this power.

PSOs also have counter-terrorist first response capability at major airports, so it is necessary for PSOs to be able exercise the powers prescribed in the Bill.

2.34 Based on the information provided, the power under subsection 3UN(1)(b)(i), to issue an identity direction where a constable or PSO suspects on reasonable grounds that the person has committed, is committing or intends to commit an offence, would appear to be proportionate to the stated objective.

2.35 The minister's response further explains that an identity direction can also be issued under subsection 3UN(1)(b)(ii) where it is considered on reasonable grounds to be necessary to safeguard 'aviation security', which is defined as the 'good order and safe operation' of a major airport, its premises, and flights to and from a major airport. The initial human rights analysis raised concerns that as 'good order' is not defined in the bill, it was unclear whether the concept would capture a broader range of conduct than is strictly necessary to fulfil the legitimate objectives of the bill. That is, the concern was that the bill as drafted may not be sufficiently circumscribed with respect to the stated objective of the measure. In relation to

whether this power is necessary and the concept of 'aviation security' and 'good order' are sufficiently circumscribed, the minister's response states:

The inclusion of the term 'good order' is designed to be interpreted in accordance with its ordinary meaning, and captures a wide range of disruptive behaviour that poses a risk to others in the aviation environment (including, but not limited to, criminal conduct).

By including the term good order, the intention of the Bill is to empower constables and PSOs to issue a direction where it is reasonably necessary to address risks to the peace, safety and security of all persons within the airport premises – for example, to deter or manage a public order disturbance. The measures in the Bill are not intended to interfere with peaceful assembly unless this assembly reaches the threshold of impacting the safe operation of an airport. Where an assembly reaches this threshold, constables and PSOs may exercise the powers to ensure the safety of those present on the airport premises.

2.36 As such, the minister's response confirms that the scope of the term 'good order' captures a wide range of conduct. Based on the minister's response, it appears that peaceful protest in some circumstances could rise to the level of disrupting the 'good order' of the airport so as to enliven the power to give an identification direction. While the scope of the term 'good order' is broad, the minister's response explains that the power to issue an identity direction is restricted in other ways:

The use of the words 'reasonable grounds that it is necessary' at subparagraph 3UN(1)(b)(ii) also ensures that the least rights restrictive approach is taken in issuing these directions. For example, it may be reasonably necessary to issue an identity check direction to a person who constantly requests security information from airport officials, but a move-on direction will likely be not reasonably necessary based on this behaviour alone. If further information is obtained about a person, revealing that they may pose a threat to a person arriving at the airport in the next two hours, a move-on direction for a three hour period may be necessary on reasonable grounds to ensure the good order and safe operation of the airport.

2.37 The requirement that a constable or PSO must have 'reasonable grounds' to consider it 'necessary' to issue an identification direction to protect 'aviation security' including 'good order' is a relevant safeguard. However, the adequacy of the requirement as a safeguard also depends on the term 'good order' not being overly broad. In this respect, the minister's response did not fully address why it would not be possible to restrict the range of conduct that may be captured by the term 'good order'. As the term is not defined in the bill and is to be interpreted according to ordinary meaning, there may be a risk that 'good order' could capture a broader range of conduct than is strictly necessary to fulfil the legitimate objectives of the bill. That is, there is a risk that the scope of the power may not be the least rights

restrictive approach in all circumstances. Much may depend on how the power to issue an identification direction is used in practice.

#### *Ancillary powers related to identification directions*

2.38 In relation to whether the power in proposed section 3UQ(2)(b) of the bill to direct a person 'to do anything else' the constable or PSO considers on reasonable grounds to be necessary to facilitate the exercise of a power under proposed section 3UN is rationally connected and proportionate to achieving the stated objective, the minister's response provides a range of information. The minister's response explains that the ancillary power only enables the constable or PSO to require a person to stop or 'do anything else' that they consider on reasonable grounds to be necessary to facilitate the exercise of a power under section 3UN (identity check directions).

2.39 The initial analysis had raised concerns as to the breadth of the ancillary directions power. The initial analysis stated that it is not clear, for example, whether this could require a person to remove an item of clothing (such as a facial covering) for the constable or PSO to ascertain a person's identification. In relation to what is envisaged by the ancillary power to require a person to 'do anything else' considered necessary to facilitate the identification, the minister's response explains:

Since section 3UN(2) limits the ways in which a person can satisfy the identity direction, the ancillary powers at 3UQ(2)(b) can only be used to facilitate one of those means of evidencing identity. The ancillary power at 3UQ(2)(b) does not enable a constable or PSO to require a person to comply with visual identity checks. Identity can be substantiated by producing government- issued photographic identification, by producing up to two other forms of identification, or by providing name, address and date of birth.

These constraints ensure that the power is rationally connected to the identity check direction and the underlying objectives of this direction. It also ensures that this direction is proportionate, as a constable or PSO must choose the least intrusive means to ensure that an identity check is facilitated, as a more intrusive option is unlikely to be found to be necessary on reasonable grounds.

2.40 The minister's response usefully clarifies that the scope of the ancillary power is constrained by other provisions and does not enable a constable or PSO to require a person to comply with visual identity checks. This constraint assists to ensure the measure is rationally connected and proportionate to its stated objective. Further, in relation to the scope of the ancillary power, the minister's response states:

As outlined in the Explanatory Memorandum, these directions will not enable a constable or PSO to detain a person for the purposes of exercising their powers, or undertake any search and seizure of the person's property.

Ancillary powers that could fall within the limits of paragraph 3UQ(2)(b) include (but are not limited to) directing that a person: step to the side to ensure they are not disrupting an airport walkway during an identity check or remove an identity document from its opaque casing to ensure it can be properly examined.

2.41 Such information further indicates that, on balance, the ancillary powers appear to be rationally connected and proportionate to the stated objective underlying the identity check directions. However, as noted above, the power to issue an identity direction under subsection 3UN(1)(b)(ii) where it is considered on reasonable grounds to be necessary to safeguard 'aviation security' including 'good order' may be overly broad. Due to these concerns, there is a consequential risk that ancillary powers exercised in relation to an identity check direction under subsection 3UN(1)(b)(ii) may not represent the least rights restrictive approach. By contrast, exercise of the ancillary powers in relation to an identity check under subsection 3UN(1)(b)(i), where a constable or protective service officer suspects on reasonable grounds that the person has committed, is committing or intends to commit an offence punishable by imprisonment for 12 months or more, appears to be a proportionate limitation on the right to privacy.

### **Committee response**

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

**2.43 The power to issue an identity direction under subsection 3UN(1)(b)(i), where a constable or protective service officer suspects on reasonable grounds that the person has committed, is committing or intends to commit an offence punishable by imprisonment for 12 months or more, and the use of ancillary powers are likely to be compatible with the right to privacy.**

**2.44 However, in relation to the power to issue an identity direction under subsection 3UN(1)(b)(ii), where it is considered on reasonable grounds to be necessary to safeguard 'aviation security' including 'good order' and the use of ancillary powers in this context, there is a significant risk that the powers may operate in a way that may not be proportionate. This is because while there are some safeguards in relation to the power, there is a risk that 'good order' could capture a broader range of conduct than is strictly necessary to fulfil the legitimate objectives of the bill.**

### ***Compatibility of the measure with the right to freedom of movement and the right to liberty: initial analysis***

2.45 The right to freedom of movement includes the right to move freely within a country for those who are lawfully within the country, and also includes the right to leave a country. The right to leave a country encompasses both the legal right and practical ability to leave a country, and therefore it applies not just to departure for permanent emigration but also for the purpose of travelling abroad. A limitation on

the right to freedom of movement may be permissible, where it is rationally connected and proportionate to achieve the legitimate objectives of protecting the rights and freedoms of others, national security, public health or morals, and public order.

2.46 As set out in the initial human rights analysis and as acknowledged in the statement of compatibility, the right to freedom of movement is engaged by the bill in several respects. First, it is engaged by the move-on directions, which are capable of limiting the movement of a person in and out of major airports (including preventing them from leaving the country).<sup>22</sup> It is also engaged and limited by the ancillary directions powers to direct a person to stop or to do anything else the constable considers on reasonable grounds to be necessary to facilitate the move-on powers.<sup>23</sup> The initial analysis raised questions as to whether the measure constituted a permissible limitation on the right to freedom of movement.

2.47 Further, the initial analysis stated that the ability to direct a person to stop for an undefined period of time coupled with a power to direct a person to 'do anything else' raised additional questions as to whether the measure may also engage and limit the right to liberty. The right to liberty is not addressed in the statement of compatibility.

2.48 The full initial human rights analysis is set out at [Report 11 of 2018 \(16 October 2018\) pp. 15-19](#).<sup>24</sup>

2.49 The committee therefore sought the advice of the minister as to the compatibility of the measures with the right to freedom of movement, in particular:

- 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 (including how current laws are insufficient to address this objective);
- how the measures are effective to achieve (that is, rationally connected to) that objective; and
- whether the limitation is a proportionate limitation on the right to freedom of movement, including whether:
  - the power to issue a move-on and ancillary direction where a constable or PSO considers on reasonable grounds it is necessary to give the

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22 SOC, p. 19.

23 SOC, p. 19.

24 Parliamentary Joint Committee on Human Rights, *Report 11 of 2018* (16 October 2018) pp. 15-19 at: [https://www.aph.gov.au/Parliamentary\\_Business/Committees/Joint/Human\\_Rights/Scrutiny\\_reports/2018/Report\\_11\\_of\\_2018](https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Scrutiny_reports/2018/Report_11_of_2018).

direction to safeguard 'aviation security' is sufficiently circumscribed and accompanied by adequate safeguards; and

- the ancillary power to direct a person to stop or 'do anything else' the constable or PSO considers on reasonable grounds to be necessary to facilitate the exercise of the move-on or identification direction is sufficiently circumscribed and accompanied by adequate safeguards.

2.50 Noting the initial analysis also indicated the ancillary powers to require a person to stop or 'do anything else' to facilitate the exercise of the identification and move-on directions powers may engage and limit the right to liberty, the committee also sought the advice of the minister as to the compatibility of the measures with this right.

### ***Minister's response and analysis***

#### ***Right to freedom of movement***

2.51 The minister's response acknowledges that the powers in the bill may engage the right to freedom of movement. In relation 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), the minister's response states:

The National Terrorism Threat Level has remained at 'Probable' since September 2014, based on credible intelligence assessed by Australia's security agencies that individuals or groups continue to have the intent and capability to conduct a terrorist attack in Australia. Since this time, there have been six attacks and fourteen major counter-terrorism disruption operations in response to potential attack planning in Australia.

Within this threat environment, airports and the aviation sector are an attractive high-profile and high-impact target for criminals and terrorists. A number of attacks on airports and planes have occurred overseas and, in 2017, alleged plans to carry out a potentially catastrophic attack on a plane departing from Sydney International Airport were discovered. Airports are also key locations for gang-related activity, such as illicit drug trafficking, and provide pathways for serious and organised crime groups to expand their operations at a domestic and international level.

The proposed move-on and ancillary powers achieve the legitimate objective of protecting national security by preventing terrorist attacks and upholding public order by providing constables and PSOs with a mechanism to disrupt criminal activity and conduct that may pose a danger to others.

2.52 This indicates that the move-on and ancillary powers are likely to pursue a legitimate objective for the purposes of international human rights law. The minister's response further explains why the current law is insufficient to achieve this objective:

...there is currently only a limited power under the *Aviation Transport Security Act 2004* for police to direct a person to move on from the premises of certain airports if they reasonably suspect the person is committing or has committed an offence against the Act. This power may only be exercised for the purpose of safeguarding against unlawful interference with aviation as defined in that Act, and does not extend to the commission of other offences or disruptive behaviour more generally.

2.53 As noted in the initial analysis, directing a person to move-on by not taking a specified flight or leaving the airport premises would appear to be rationally connected to the stated objective.<sup>25</sup> However, the initial analysis raised concerns that it was unclear from the statement of compatibility how the ancillary power to 'do anything else' necessary to facilitate the exercise of the move-on or identification directions power would be effective to achieve the objective, as the concept is very broad. In this respect, the minister's response explains how the ancillary power is limited so as to be rationally connected to the stated objective:

Under section 3UQ, a constable or PSO may also direct a person to stop or do anything else that is reasonably necessary to facilitate the exercise of the identity checking or move-on power. As a police officer is required to have reasonable grounds to exercise this power, this threshold ensures that the officer must choose the least intrusive means to facilitate an identity check or move-on direction, as a more intrusive option is unlikely to be found to be necessary on reasonable grounds.

2.54 Such information indicates that, on balance, the ancillary powers appear to be rationally connected to the stated objective underlying the move-on power and identity check power.

2.55 As to the proportionality of the measures, the minister's response provides some relevant information. In relation to whether the power to issue move-on and ancillary directions where a constable or PSO considers on reasonable grounds it is necessary to give the direction to safeguard 'aviation security' is sufficiently circumscribed, the minister's response states:

The proposed move-on power has been formulated to ensure that a constable or PSO must tailor their direction so that it is most appropriate in the circumstances and proportionate to the threat situation identified.

Allowing a move-on direction to extend to specified airports or flights ensures that, should a threat only arise in relation to a particular flight or airport, the scope of the direction can be confined to the particular area where the threat may arise. Permitting a constable or PSO to issue the direction for up to 24 hours also allows the direction to be catered to only the necessary time period in which a threat may arise.

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25 See SOC, pp. 20-21.

2.56 It is acknowledged that the formulation of the power may act as a relevant safeguard and may be restricted in scope. However, as discussed in relation to the right to privacy above at [2.40] and in the initial analysis, the breadth of the definition of 'aviation security' (including 'good order and safe operation' of major airports) raises concerns that the power would apply to a broader range of conduct than is strictly necessary to fulfil the legitimate objectives of the bill. In this respect, the minister's response did not fully address whether the term 'aviation security' including 'good order' is sufficiently circumscribed. As the term 'good order' is not defined in the bill, there may be a risk that the scope of the power may not be the least rights restrictive approach in all circumstances. Much may depend on how the power to issue an identification direction is used in practice.

2.57 Further, as set out in the initial analysis, this concern arises in a context where a move-on direction, including a requirement not to take a flight for a period of time, could have significant consequences for an individual. For example, a person directed not to take their flight when traveling with their family could be separated from their family as a result of the move-on direction.<sup>26</sup>

2.58 In relation to whether the ancillary power to direct a person to stop or 'do anything else' the constable or PSO considers on reasonable grounds to be necessary to facilitate the exercise of the move-on or identification direction is proportionate, the minister's response states:

The proposed ancillary power does not permit a constable or PSO to detain a person for the purpose of exercising their power, or undertake any search and seizure of the person's property. The intention of an ancillary direction is purely to enable an officer to direct a person to undertake reasonable and necessary steps to facilitate the exercise of an identity check or move-on direction – for example, an officer could direct a person to step to the side of a public walkway while conducting an identity check to ensure they are not disrupting others' use of the airport.

2.59 Such information indicates that, on balance, the ancillary powers are likely to be proportionate to the stated objective underlying the move-on powers. However, as noted above, the power to issue a move-on direction where it is considered on reasonable grounds to be necessary to safeguard 'aviation security' including 'good order' may be overly broad. Due to these concerns, there is a consequential risk that ancillary powers exercised in relation to a move-on direction may not represent the least rights restrictive approach.

### *Right to liberty*

2.60 In relation to the power to direct a person to stop and the ancillary powers to direct a person to 'do anything else' related to giving an identity or move-on direction, the minister's response states that the powers do not limit the right to

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26 This may also engage and limit the rights of the child and the right to protection of the family.

liberty. The minister's response argues that this is because the powers do not authorise a constable or PSO to arbitrarily or unlawfully arrest or detain a person under an ancillary direction. In relation to the scope of the powers the minister's response explains:

The ancillary powers in the Bill can only be exercised by constables or PSOs where they consider on reasonable grounds that the exercise of these powers are necessary to facilitate an identity check direction or a move-on direction (see paragraphs 3UQ(1)(b) and (2)(b)).

This ensures that a constable or PSO must choose the least intrusive means to ensure that these directions are facilitated, as a more intrusive option is unlikely to be found to be necessary on reasonable grounds.

These directions are also designed to achieve a narrowly defined outcomes, and detention will not be considered to be necessary on reasonable grounds to achieve these outcomes.

Identity check directions, for example, only compel a person to produce identity documentation or their name, address and date of birth (subsection 3UN(2)), which would typically occur within seconds.

Move-on directions, on the other hand, require a person to not take a specified flight, or leave and not re-enter airport premises, for a specified period (see subsection 3OU(3)). These directions are focused on expelling a person from a particular area, and do not enable detention of a person, which would be excessive, unnecessary and often counterproductive.

In addition, detention of a person would not be permitted under the ancillary powers as it would not be reasonably necessary to ensure compliance with these directions. A person must be put on notice that contravening a direction will constitute an offence and, if this direction is breached, a constable or PSO will be able to arrest a person to prevent further breaches from occurring.<sup>27</sup>

2.61 Based on the information provided, the scope of the ancillary powers set out in the bill would not permit a deprivation of liberty through their use. Accordingly, the proposed powers would appear to be compatible with the right to liberty.

### **Committee response**

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

**2.63 In relation to the power to issue a move-on direction where it is considered on reasonable grounds to be necessary to safeguard 'aviation security' including 'good order', there is a significant risk that the powers may operate in a way that may not be a proportionate limitation on the right to freedom of movement. This is**

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27 *Crimes Act 1914*, section 3W (for constables) and *Australian Federal Police Act 1979*, section 14A (for PSOs).

because while there are some safeguards in relation to the power there is a risk that 'good order' could capture a broader range of conduct than is strictly necessary to fulfil the legitimate objectives of the bill. Due to these concerns, there is also a consequential risk that ancillary powers exercised in relation to a move-on direction may not represent the least rights restrictive approach.

**2.64** In relation to the power to direct a person to stop, and the ancillary powers to direct a person to 'do anything else' related to giving an identity or move-on direction, these powers appear to be compatible with the right to liberty.

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

2.65 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 the equal and non-discriminatory protection of the law.<sup>28</sup> Equality before the law provides that law must not be applied by law enforcement authorities or the judiciary in an arbitrary or discriminatory manner.

2.66 The statement of compatibility states that the proposed identity check, move-on and ancillary directions will apply equally to all persons within a major airport regardless of age, gender, ethnicity, religious background or other status.<sup>29</sup> However, the initial human rights analysis stated that there are questions as to whether the powers to issue directions where a constable or PSO considers on reasonable grounds that a person has committed, is committing, or intends to commit certain offences, or that it is necessary to safeguard aviation security, may engage the right to equality and non-discrimination. This is because, unless there are sufficient safeguards, the directions powers introduced by the bill have the potential, in practice, to be applied in a manner which may target, for example, persons with certain physical characteristics or of particular national or ethnic origins. Where this kind of targeting occurs, without objective or reasonable justification, it will be incompatible with the right to equality and non-discrimination.<sup>30</sup> That is, it may result in the law being applied in ways that are discriminatory, and may have a disproportionate or unintended negative impact on particular groups based on race or religion and therefore be potentially indirectly discriminatory. This form of targeting is often referred to as racial profiling.

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28 See Articles 2 and 26 of the International Covenant on Civil and Political Rights; Articles 2, 4, 5 and 7 of the International Convention on the Elimination on All Forms of Racial Discrimination.

29 SOC, p. 18.

30 *Williams Lecraft v Spain*, Communication No.1493/2006, A/64/40 (2009) [7.2]-[7.4]. See also United Nations Human Rights Council, *Report of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance*, A/HRC/29/46 (20 April 2015).

2.67 The full initial human rights analysis is set out at [Report 11 of 2018 \(16 October 2018\) pp. 19-22](#).<sup>31</sup>

2.68 The committee therefore sought the advice of the minister as to the compatibility of the measures with the right to equality and non-discrimination, including:

- whether the measures in the bill are sufficiently circumscribed and accompanied by adequate safeguards to ensure that the powers in the bill are exercised in a non-discriminatory manner; and
- a copy of the AFP Code of Conduct, further information relating to the Behaviour Assessment and Security Questioning, and any other relevant information as to the professional standards and training that applies to AFP members and protective services officers to ensure that the powers in the bill will be exercised in a non-discriminatory manner.

### ***Minister's response and analysis***

2.69 In relation to the right to equality and non-discrimination, the minister's response states that the measures do not limit this right, as the circumstances in which a constable or PSO may lawfully exercise the powers do not differ on the basis of a person's age, gender, ethnicity, religious background or any other status. However, while the powers are neutral on the face of the bill and there may be no intention to discriminate, there is a concern that without sufficient safeguards the powers may be exercised in such a way as to disproportionately impact on particular groups or those with particular attributes. It is to this extent that the right to equality and non-discrimination may be engaged and limited by the bill. In this respect, the minister's response indicates that the scope of the powers and existing anti-discrimination laws mean that the powers will be required to be exercised in a non-discriminatory way:

To issue an identity check or move-on direction, a constable or PSO must have reasonable grounds for doing so which are linked to criminal activity or aviation security. By requiring a constable or PSO to have 'reasonable grounds' to issue a direction, this ensures that the powers are only exercised on the basis of objectively substantiated observations or intelligence relevant to aviation security or criminal conduct. A direction cannot be issued in the absence of such grounds, ensuring that the powers prescribed in the Bill will only be exercised in accordance with a constable or PSO's perception of a security risk or to preclude the commission of a crime.

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31 Parliamentary Joint Committee on Human Rights, *Report 11 of 2018* (16 October 2018) pp. 19-22 at: [https://www.aph.gov.au/Parliamentary\\_Business/Committees/Joint/Human\\_Rights/Scrutiny\\_reports/2018/Report\\_11\\_of\\_2018](https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Scrutiny_reports/2018/Report_11_of_2018).

Constables and PSOs are also required to adhere to their obligations under Commonwealth, State and Territory anti-discrimination legislation, broadly prohibiting officers from engaging in behaviour that constitutes discrimination and providing that all persons are to be equal before the law. These obligations, in conjunction with the safeguards prescribed in the Bill and provided through the training for constables and PSOs, will ensure that a person's right to equality before the law and to non-discrimination are not limited in a manner that is either directly or indirectly discriminatory.

2.70 These mechanisms are likely to assist to ensure that the powers in the bill operate in a non-discriminatory way.

2.71 The minister's response also outlines training that will be made available to constables and PSOs to assist to ensure that they exercise their powers based on objective criteria:

The AFP's Behaviour Assessment and Security Questioning (BASQ) course was developed in 2011 from training material provided to the AFP by the Centre for Protection of National Infrastructure (CPNI) United Kingdom. It is based upon identifiable behaviours, which all have been extensively tested to be culturally neutral by CPNI, Portsmouth University and Essex Police Force.

Currently, the AFP runs one BASQ training course on an as-needed basis, including for new AFP Members and PSOs that are recruited to work in airports. The content of the BASQ course teaches officers to understand and consider the impacts of unconscious bias and stereotyping in carrying out their duties. The BASQ indicators are culturally-neutral and ensure that officers act on objective criteria based on non-demographic factors.

The initial level one BASQ training course includes three days of formal training in theory and practice. Ongoing practical on the job training is also delivered. The course itself is continually refined in accordance with identified best practice. A second course, which will operate as both refresher training and advanced training, is currently being developed.

2.72 Such training is likely to be an important mechanism for assisting to ensure that the exercise of the proposed powers by constables and PSOs is non-discriminatory. The minister's response also attaches the AFP Code of Conduct and explains that the professional standards regime, to which constables and PSOs are subject, acts as an additional mechanism to ensure that powers are exercised appropriately:

AFP Members and PSOs are subject to a comprehensive professional standards regime, including the AFP Code of Conduct (attached). The Code of Conduct requires all AFP appointees to act without discrimination or harassment in the course of AFP duties. Officers that use the powers in this Bill to target minority communities will be acting unlawfully and

subject to the AFP's professional standards regime, which may result in disciplinary action, including termination.

AFP Members and PSOs are also subject to reporting requirements and complaint mechanisms as well as extensive independent oversight from the Commonwealth Ombudsman, the Australian Commission for Law Enforcement Integrity, this Committee, the Parliamentary Joint Committee on Law Enforcement, the Senate Standing Committee on Legal and Constitutional Affairs. Use of powers is also tested whenever evidence derived from those powers is led in court.

2.73 These oversight mechanisms are relevant safeguards in relation to the operation of the powers. The minister's response further explains that a new training package will be provided to officers affected by the amendments, which covers the powers in the bill:

As part of that training package, AFP Members and PSOs will be given examples and scenarios that may be anticipated with a recommended course of action in response. The governance surrounding the application of the powers, recording and accountability mechanisms administering the legislation will form part of this package. The training will emphasise the legislative thresholds required to use the powers, which must be based on objective information. The AFP does not conduct a stand-alone course on anti-discrimination, as this training is provided in the context of the BASQ training.

The professional standards policies and training requirements applicable to State and Territory police officers are jurisdictionally specific, therefore it will be the responsibility of each State and Territory to determine the extent to which their officers receive guidance and training on exercising their powers in a non-discriminatory manner.

2.74 This training may also act as a relevant safeguard to assist to ensure that the powers are exercised in a non-discriminatory manner which is compatible with the right to equality and non-discrimination. Ultimately, much may depend on how the powers are exercised in practice by constables and PSOs.

### **Committee response**

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

**2.76 Noting the safeguards outlined in the minister's response, the committee considers that the powers are likely to be compatible with the right to equality and non-discrimination.**

**2.77 The committee recommends that the use of the powers be monitored by the government to ensure the exercise of the powers, in practice, is compatible with the right to equality and non-discrimination.**

***Compatibility of the measure with the right to freedom of expression and the right to freedom of assembly: initial analysis***

2.78 The right to freedom of expression requires the state not to arbitrarily interfere with freedom of expression, particularly restrictions on political debate. It protects all forms of expression and the means of their dissemination, including spoken, written and sign language and non-verbal expression. The right to peaceful assembly is the right of people to gather as a group for a specific purpose.

2.79 The initial analysis stated that due to the breadth of the definition of 'aviation security' (and in particular the words 'good order'), as discussed above, it was unclear whether a peaceful protest in a major airport would be conduct capable of disrupting the 'good order' of the airport so as to enliven the power to give an identification, move-on or ancillary powers direction because the constable or PSO considers on reasonable grounds it is necessary to 'safeguard aviation security'. The initial analysis explained that, if this were the case, the measures would engage and may limit the right to freedom of expression and the right to freedom of assembly. These rights may be subject to permissible limitations where the measure pursues a legitimate objective, and is rationally connected to, and proportionate to achieving, that objective. However, as set out in the initial analysis, the statement of compatibility does not acknowledge that this right is engaged and limited, so does not provide an assessment as to whether the limitation is justifiable under international human rights law.

2.80 The committee therefore sought the advice of the minister as to the compatibility of the measures with this right, 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;
- whether there is a rational connection between the limitation and that objective; and
- whether the limitation is a reasonable and proportionate measure for the achievement of that objective.

***Minister's response and analysis***

2.81 The minister's response states that to the extent that the powers limit the right to freedom of expression and the right to freedom of assembly, they do so in a way that is reasonable and proportionate to achieve the legitimate objectives of enhancing safety and security in airports, and preserving national security, public order and the rights and freedoms of others. In relation to how these measures address a pressing and substantial concern and are rationally connected to (that is, effective to achieve) the stated objectives, the minister's response states:

As outlined in the Explanatory Memorandum, there is a rational connection between these objectives and the amendments as constables

and PSOs do not currently have adequate powers to engage with persons at airports to assess a potential risk or threat at the earliest opportunity, and the proposed amendments to enable a constable or PSO to issue directions will effectively address this deficiency.<sup>32</sup>

For example, the current identity check directions under subsection 3UM(1) of the Crimes Act 1914 may not allow a constable or PSO to check the identity of a person who is taking photos and videos of airport security features for several hours as, while this behaviour is suspicious, the person's conduct cannot be linked to a specific criminal offence punishable by twelve months imprisonment or more.

In July 2017, plans to carry out a potentially catastrophic attack on a plane departing from Sydney International Airport were discovered. After the arrest of the suspects, AFP officers reviewed the CCTV footage of the suspects at the airport and identified a number of unusual behaviours. Had officers on the ground at the airport observed those behaviours at the time they would not have had legal basis under the existing laws to require the suspects to provide evidence of their identity. The alleged plot was ultimately uncovered through other intelligence. The alleged offenders are currently before the courts in relation to charges for terrorism offences.

Under the revised identity check directions a constable or PSO will be permitted to issue an identity check direction because it is necessary to safeguard aviation security. This identity information could then be checked against intelligence holding to determine whether the person is a known person of interest.

2.82 This information indicates that the measures address a pressing and substantial concern and are rationally connected to their stated objective.

2.83 The minister's response acknowledges the particular concern about whether issuing an identity direction or move-on direction is a limitation on the rights to freedom of expression and assembly that is reasonable and proportionate to achieve the above objectives. In relation to this issue, the minister's response states that the powers:

...only allow a direction to be issued where a constable or PSO considers on reasonable grounds that it is necessary to safeguard 'aviation security'. The Committee has pointed out that 'aviation security' includes 'the good order' of an airport, and have raised concerns that this could allow for the disruption of peaceful protests.

As outlined above, however, the term 'good order' will be interpreted in accordance with its ordinary meaning, and capture a wide range of disruptive behaviour that poses a risk to others in the aviation environment (including, but not limited to, criminal conduct).

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32 Explanatory Memorandum (EM) [4]-[15].

By including the term 'good order' in the definition of 'aviation security', the intention of the Bill is to empower constables and PSOs to issue a direction where it is reasonably necessary to address risks to the peace, safety and security of all persons within the airport premises – for example, to deter or manage a public order disturbance. The measures in the Bill are not intended to interfere with peaceful assembly unless this assembly reaches the threshold of impacting the safe operation of an airport. Where a protest reaches this threshold, constables and PSOs may exercise the powers to ensure the safety of those present on the airport premises.

2.84 As such, the minister's response confirms that protest including peaceful protest in some circumstances could rise to the level of disrupting the 'good order' of the airport so as to enliven the powers to give identity, move-on and ancillary directions. The minister's response argues that, while the scope of the term 'good order' is broad, the power to issue identity and move-on directions is restricted in other ways by the use of the words 'reasonable grounds that it is necessary'. The minister's response provides the following example as to how these requirements would apply in the context of a protest:

...it will not be reasonably necessary to issue an identity check direction or move-on direction to a person who is engaging in a peaceful protest on airport premises. If the protest severely impedes the movement of people in or out of the airport, and individuals involved in the protest pose a risk to people's safety, it may be reasonably necessary for a constable or PSO to issue a move-on direction that those individuals leave the airport premises for a one hour period.

During this period, the protesters will be able to continue to express their opinion and assemble, but not in a way that impedes the good order of the airport and the movement of others.

2.85 It is a welcome clarification from the minister that a person peacefully protesting on airport premises would not necessarily enliven the powers. However, as acknowledged in the minister's response, there are circumstances where a peaceful protest may enliven the powers. In this respect, the requirement that a constable or PSO must have 'reasonable grounds' to consider it 'necessary' to issue an identity or move on direction to protect 'aviation security' including 'good order' is a relevant safeguard. Yet, as acknowledged in the minister's response and noted above, the term 'good order' may capture a very broad range of conduct. Noting this, the adequacy of the requirement as a safeguard also depends on the term 'good order' not being overly broad.

2.86 The minister's response provides an example of where the powers would be enlivened against peaceful protesters in circumstances where they are impeding movement in and out of the airport. This example may raise human rights concerns noting that due to the breadth of the concept of 'good order' there appears to be no real threshold relating to the extent of disruption or risks to the safety, security or

rights of others. Further, while the constable or the PSO is required to consider whether moving on protesters is necessary on reasonable grounds to protect 'good order,' the rights of the protesters with respect to freedom of expression and assembly are not specifically considered. Given the breadth of the term 'good order,' there is a risk that directions could be given that are overly broad with respect to the stated objectives of the measure. Noting the breadth of this concept, at its worst there is a risk that it could permit directions to be issued in relation to protesters in circumstances where the protests were merely inconvenient, uncomfortable, noisy or large.

### **Committee response**

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

**2.88** The proposed powers to issue identity, move-on or ancillary directions may operate in a way that may not be a proportionate limitation on the right to freedom of expression and assembly. Given the breadth of the term 'good order,' there is a significant risk that directions could be given to those exercising their right to freedom of expression and assembly that are overly broad with respect to the stated objectives of the measures.

## Defence Amendment (Call Out of the Australian Defence Force) Bill 2018

<b>Purpose</b>	Seeks to make a range of amendments to the <i>Defence Act 1903</i> including to permit states and territories to request that the Commonwealth call out the Australian Defence Force (ADF) in a wider range of circumstances; enable call out orders to authorise the ADF to operate in multiple jurisdictions, as well as the offshore area; allow the ADF to be pre-authorised to respond to land and maritime threats, in addition to aviation threats; increase the requirements for the ADF to consult with state and territory police where it is operating in their jurisdictions; expand the power of the ADF to search and seize, and to control movement during an incident
<b>Portfolio</b>	Attorney-General
<b>Introduced</b>	House of Representatives, 28 June 2018
<b>Rights</b>	Life; liberty; freedom of movement; privacy; expression; assembly; association
<b>Previous report</b>	Report 8 of 2018
<b>Status</b>	Concluded examination

### Background

2.89 The committee first reported on the bill in its *Report 8 of 2018*, and requested a response from the Attorney-General by 5 September 2018.<sup>1</sup>

2.90 The Attorney-General's response to the committee's inquiries was received on 18 September 2018. The response is discussed below and is available in full on the committee's website.<sup>2</sup>

### Call outs of the Australian Defence Force domestically

2.91 Currently, there are a number of preconditions to the Australian Defence Force (ADF) being called out in response to 'domestic violence' in Australia including that the 'State or Territory is not, or is unlikely to be, able to protect Commonwealth interests against the domestic violence.'<sup>3</sup> The bill proposes to amend Part IIIAA of the

1 Parliamentary Joint Committee on Human Rights, *Report 8 of 2018* (21 August 2018) pp. 2-16.

2 The Attorney-General's response is available in full on the committee's scrutiny reports page: [https://www.apf.gov.au/Parliamentary\\_Business/Committees/Joint/Human\\_Rights/Scrutiny\\_reports](https://www.apf.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Scrutiny_reports).

3 *Defence Act 1903* (Defence Act), section 51A.

*Defence Act 1903* (Defence Act) to expand the circumstances in which the ADF may be called out in response to 'domestic violence'<sup>4</sup> in Australia under two types of orders:

### **Call out orders**

#### *Commonwealth interests call out order*

2.92 Under the bill, the Governor-General may make a Commonwealth interests call out order if the authorising ministers are satisfied that:

- 'domestic violence', that is likely to affect Commonwealth interests, is occurring or is likely to occur; and/or
- there is a threat in the Australian offshore area<sup>5</sup> to Commonwealth interests; and
- the powers of the ADF set out in one or more of divisions 3, 4 and/or 5 of the bill should apply (see below); and
- the ADF should be called out to protect Commonwealth interests against the domestic violence or threat or both.<sup>6</sup>

#### *State or territory call out order*

2.93 Under the bill the Governor-General may also make a state or territory call out order if:

- a state or territory government applies to the Commonwealth government to protect the state or territory against 'domestic violence' that is occurring or is likely to occur in the state or territory;
- the powers of the ADF set out in one or more of divisions 3, 4 and/or 5 of the bill should apply (see below); and
- the authorising ministers are satisfied that the ADF should be called out to protect the state or territory against domestic violence.<sup>7</sup>

2.94 In determining whether the ADF should be called out and whether either type of order should be made, the authorising ministers must consider the nature of the domestic violence, whether using the ADF would be likely to enhance the ability

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4 Section 31 of the bill defines 'domestic violence' as having the same meaning as in section 119 of the Constitution. Section 119 of the Constitution provides that 'the Commonwealth shall protect every State against invasion and, on the application of the Executive Government of the State, against domestic violence'. 'Domestic violence' is not defined.

5 Offshore area is defined in section 31 of the bill as Australian waters; or the exclusive economic zone adjacent to the coast of Australia; or the sea over the continental shelf of Australia; and includes the airspace over these areas.

6 Proposed section 33.

7 Proposed section 35.

of states and territories to protect Commonwealth interests or to protect the state or territory and any other matter considered relevant.<sup>8</sup> Under both types of order the ADF can be called out immediately or under a contingent call out order including for reasons of urgency.<sup>9</sup> Under a contingent call out order the ADF will be called out automatically if specified circumstances arise.<sup>10</sup>

### ***Powers of the ADF once called out***

#### *Divisions 3 and 4 - special powers and powers for specified areas*

2.95 Divisions 3 and 4<sup>11</sup> of the bill confer powers on members of the ADF if the ADF is being utilised under a call out order that specifies the divisions apply. This includes powers to:

- capture or recapture a location, prevent or put an end to violence;
- take measures including the use of force against an aircraft or vessel;
- control the movement of persons by means of transport;
- erect barriers, stop any person, direct any person not to enter or leave or move within a 'specified area';
- search persons, locations, premises, transport or things for items that may be seized;
- seize any item that the member believes on reasonable grounds is a thing that may be seized in relation to the call out order;
- detain any person that the member believes on reasonable grounds may be detained;<sup>12</sup>
- direct a person to answer a question or produce a document that is readily accessible to the person (including requiring the person to provide identification);
- direct a person to operate machinery or a facility;

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8 Proposed subsections 33(2) 35(2).

9 Proposed sections 34 and 36.

10 Proposed sections 34 and 36.

11 Division 3 of the bill confers powers on the ADF when authorised by an authorising minister or in sudden emergencies. Division 4 of the bill confers powers on the ADF within a 'specified area.' Section 51 of the bill provides that the authorising ministers may, in writing, declare an area to be a specified area in relation to a call out order.

12 Proposed section 31 defines 'person who may be detained' as a person: '(a) who is likely to pose a threat to any person's life, health or safety, or to public health or public safety; or (b) both: (i) who has committed an offence, against a law of the Commonwealth, a State or a Territory, that is related to the domestic violence or threat specified in the call out order; and (ii) whom it is necessary, as a matter of urgency, to detain'.

- actions incidental to such powers.<sup>13</sup>

2.96 It is an offence for a person to fail to comply with a direction, with a penalty of 60 penalty units.<sup>14</sup>

#### *Division 5 – powers to protect declared infrastructure*

2.97 Division 5 of the bill confers powers on members of the ADF if the ADF is being utilised under a call out order that specifies the division applies and the powers are to protect 'declared infrastructure'.<sup>15</sup> The member may take a number of actions to prevent, or put an end to, damage or disruption or exercise a range of powers including those outlined above at [2.95].<sup>16</sup>

#### *Division 6 - Use of force*

2.98 Division 6 provides that a member of the ADF being utilised under a call out order may use reasonable and necessary force, whether the member is exercising any other power under Part IIIAA of the Defence Act or not.<sup>17</sup>

2.99 Subsection 51N(3) provides that in using force against a person, a member of the ADF must not do anything that is likely to cause death or grievous bodily harm unless:

- the member believes on reasonable grounds that the use of force is:
  - necessary to protect the life of, or to prevent serious injury to, a person (including the member) (subsection 51N(3)(a)(i)); or
  - necessary to protect the declared infrastructure (subsection 51N(3)(a)(ii)); or
  - in relation to powers exercised to take authorised action under subsection 46(5)(d) or (e) (taking measures against an aircraft or vessel including destroying it), reasonable and necessary to give effect to the order under which, or under the authority of which, the member is acting (51N(3)(a)(iii)); and
- if a person against whom force is to be used is attempting to escape being detained by fleeing—the person has, if practicable, been called on to

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13 Division 3 and division 4 of the bill.

14 Proposed section 51R of the bill.

15 The authorising ministers may, in writing, declare that particular infrastructure, or a part of particular infrastructure, is declared infrastructure: section 51H of the bill.

16 Division 5, subdivision C of the bill.

17 Proposed subsection 51N(2) provides that the ADF member must not use force against persons or things in exercising a power to direct a person to answer a question or produce a document.

surrender and the member believes on reasonable grounds that the person cannot be apprehended in any other manner.

*Civil and criminal liability for ADF members*

2.100 Proposed section 51Z provides a defence of superior orders for criminal acts done by ADF members operating under call out orders in certain circumstances. Additionally proposed subsection 51S(2) provides that an ADF member will not be criminally and civilly liable for a purported exercise of powers if the order, declaration or authorisation was not validly made and, if the member made the authorisation, the powers were exercised or purportedly exercised in good faith.

***Compatibility of the measure with the right to life: initial analysis***

2.101 The right to life imposes an obligation on Australia to protect persons from being killed by identified risks and prohibits a person being arbitrarily killed by the state. The use of force by government authorities such as the police or military resulting in a person's death can only be justified if the use of force was necessary, reasonable and proportionate in the circumstances.

2.102 As the measure authorises the use of force including lethal force once the ADF is called out, the measure engages and may limit the right to life. The statement of compatibility acknowledges that the measure engages the right to life but argues that deprivation of life in accordance with proposed section 51N(3) is not 'arbitrary'.

2.103 A measure that limits the right to life may be justifiable if it is demonstrated that it addresses a legitimate objective, is rationally connected to that objective and is a proportionate means of achieving that objective.

2.104 In this respect, the statement of compatibility identified the legitimate objective of the measure as protecting the Australian populace from acts of significant violence. The initial human rights analysis stated that, in general terms, this would be capable of constituting a legitimate objective for the purposes of international human rights law. However, further information was required as to whether there are currently pressing and substantial concerns regarding the protection of the Australian populace from acts of significant violence, which give rise to the need for the specific measure. The previous analysis also raised questions in relation to whether the measure is rationally connected and proportionate to this stated objective.

2.105 The full initial human rights analysis in relation to the right to life is set out at [Report 8 of 2018 \(21 August 2018\) pp. 6-11](#).<sup>18</sup>

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18 Parliamentary Joint Committee on Human Rights, *Report 8 of 2018* (21 August 2018) pp. 6-11 at: [https://www.aph.gov.au/Parliamentary\\_Business/Committees/Joint/Human\\_Rights/Scrutiny\\_reports/2018/Report\\_8\\_of\\_2018](https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Scrutiny_reports/2018/Report_8_of_2018).

- 2.106 The committee therefore sought the advice of 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 (including how current laws are insufficient to address this objective);
  - how the measure is effective to achieve (that is, rationally connected to) that objective (in each of the circumstances where use of lethal force is permissible); and
  - whether the limitation is a reasonable and proportionate measure to achieve the stated objective (including whether the measure is sufficiently circumscribed and is the least rights restrictive approach; whether there are sufficient safeguards; whether what amounts to 'domestic violence' could be explicitly defined; where an aircraft or vessel is destroyed, resulting in the loss of life of large numbers of innocent people, whether the measure is proportionate).

### ***Attorney-General's response and analysis***

#### *Legitimate objective*

2.107 In relation to whether there is evidence that the measure addresses a substantial or pressing concern, the Attorney-General's response explains that the nature of the risks to national security has evolved since the call out order regime was last reviewed in 2005:

While more traditional bomb attacks, as seen in the Manchester bombing in May 2017, continue to pose a risk, recent events overseas offer an insight into the risks of violence with which this Bill is designed to deal. The Borough Market attacks in London in June 2017 and the events in Paris involving the Bataclan Theatre in November 2015 were both characterised by highly mobile attackers that moved quickly between locations and premises across large areas. The changes to powers in proposed Divisions 3 and 4 of the Bill are aimed at these kinds of events.

2.108 The Attorney-General's response also provides information as to how the existing law is insufficient to address these types of situations:

The amendments to the threshold for calling out the ADF will ensure that the Commonwealth can more easily respond to requests from states and territories for ADF assistance. The current threshold requires authorising Ministers to be satisfied that a state or territory is not, or is unlikely to be, able to protect themselves or Commonwealth interests against the domestic violence. This threshold means that the Commonwealth would not call out the ADF under Part IIIAAA where the Commonwealth assesses that a state or territory has both the capability and capacity to resolve the incident. In turn, this limits the ADF's ability to complement or augment a state or territory law enforcement response. For example, the ADF may be

called out to assist a state or territory to deal with an attack by a hijacked aircraft where the relevant state or territory has limited, or no, capability to respond to such an airborne attack and the ADF has this capability.

Under the proposed new threshold, authorising Ministers will instead need to take into account the nature of the violence and whether the ADF would be likely to enhance the state and territory response when deciding whether to call out the ADF. This amendment will allow greater flexibility for the ADF to provide the most rapid, effective and appropriate specialist support to the states and territories, upon request. Crucially, the new threshold will respect the states' and territories' position as first responders by requiring an assessment of the potential benefit of ADF assistance to the requesting state or territory.

...Under the amendments, states and territories will retain responsibility as first responders for domestic security incidents. State and territory police forces will be well-equipped to respond to many domestic terrorism incidents, and will continue to play this primary role alongside any deployment of ADF members.

2.109 In light of the information provided, the measure is likely to pursue a legitimate objective for the purposes of international human rights law.

*Rational connection*

2.110 In relation to how the measure is effective to achieve (that is, rationally connected to) that objective in each of the circumstances where use of lethal force is permitted under the bill, the Attorney-General's response states:

The amendments to Part IIIAAA retain the existing legislative framework in relation to use of force. The current powers authorising the use of force are sufficient to achieve the above objective. Proposed section 51N, which authorises ADF members to use force, and places limitations on the situations in which they can use lethal force, or force that may cause grievous bodily harm, largely replicates current section 51T.

Section 51N of the Bill authorises a member of the ADF who is being used under a call out order to use lethal force in three limited circumstances when exercising powers under proposed Divisions 3, 4 or 5.

2.111 In relation to the first circumstance where lethal force can be used (namely, where the member believes on reasonable grounds it is necessary to protect the life of, or prevent serious injury to, a person), the Attorney-General's response explains:

The taking of this measure is explicitly and rationally connected to protecting others' lives. It permits the use of lethal force for the purposes of self-defence or the defence of others, so long as it is reasonable and necessary in the circumstances.

2.112 Based on the information provided, it is likely that the scope of the power under section 51N(3)(a)(i) to use lethal force where the member believes on

reasonable grounds it is necessary to protect the life of, or prevent serious injury to, a person is rationally connected to the protection of others' lives.

2.113 In relation to the second circumstance where lethal force may be used (namely, where the member believes on reasonable grounds that using such force is necessary to protect declared infrastructure), the Attorney-General's response states:

Infrastructure can only be 'declared infrastructure' under proposed section 51H if there is a threat of damage to it or disruption of its operations, and that damage or disruption would directly or indirectly endanger the lives of, or cause serious injury to, other persons. The use of lethal force where there is a nexus between the threatened damage or disruption of the declared infrastructure and the risk of death or serious injury of others is rationally connected to protecting others' lives. Once the infrastructure is 'declared infrastructure', proposed subparagraph 51N(3)(a)(ii) makes clear that an ADF member can only use lethal force if the threat of, or incident of, domestic violence specified in the call out order arises and poses a threat to that infrastructure and therefore directly or indirectly endangers the lives of others.

2.114 The Attorney-General's response argues that the scope of the powers means that the nexus between declared infrastructure and risks to human life will be sufficiently close. It is acknowledged that in some cases the need to use lethal force to protect 'declared infrastructure' may coincide with the need to protect the lives of others, and to that extent the measure may be rationally connected to the legitimate objective of the protection of others' lives.

2.115 However, concerns remain as to whether the scope of the proposed power under section 51N(3)(a)(ii) is such that it would address this objective in all circumstances. As noted earlier, for infrastructure to be declared the threshold is that there is a 'threat of damage or disruption to the operation of infrastructure'<sup>19</sup> and the 'damage or disruption would directly or indirectly endanger the life of, or cause serious injury to any person'.<sup>20</sup> This is a concern as there is potentially a broad range of infrastructure<sup>21</sup> that may fall into this category, from power generation facilities to traffic lights (which would cause serious injury through their non-operation). It also appears that the scope of the declaration power is such that the minister is not required to take into account whether or not the risk to life is immediate or remote. That is, it remains unclear the extent to which the threshold

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19 In the case of a contingent call out order, the threshold is that if the circumstances specified in the order were to arise, there would be a threat of damage or disruption to the operation of the infrastructure or part of the infrastructure: see section 51H(2)(a)(ii).

20 See, for example, proposed section 51H.

21 Section 51 of the Defence Act provides that '**infrastructure** includes physical facilities, supply chains, information technologies and communication networks or systems.'

for declaring infrastructure requires that there be a specific level of risk of serious injury or to life through damage or disruption of that infrastructure. The initial analysis noted that, in circumstances where the risk to human life is more remote, use of lethal force to protect declared infrastructure may not be effective to achieve the stated objective of protecting the lives of others. In this respect, while the measure may be rationally connected in many circumstances, some concerns remain as to whether the measure will be rationally connected in each case where the risk to human life is more remote.

2.116 In relation to the third circumstance where lethal force may be used (that is, taking measures against an aircraft or vessel where it is reasonable and necessary to give effect to the order under which the member is acting), the Attorney-General's response states:

There will be some circumstances where the use of lethal force would require a decision to destroy an aircraft or vessel. The question of whether it is reasonable and necessary to use lethal force, or for the Minister to authorise the taking of measures involving the use of lethal force under proposed subsection 46(3), would need to take into account the potential consequences of not taking action and whether the aircraft or vessel posed a threat to the life or safety of others. The use of lethal force understood in this light is rationally connected to protecting others' lives.

2.117 The Attorney-General's response also explains that proposed subsection 46(6) adds further limitations on any measure (including use of force) taken against an aircraft or vessel.

2.118 The requirement that an authorisation to take measures (including the use of lethal force) against an aircraft or vessel cannot be made unless the measure is 'reasonable and necessary', coupled with the requirement that the member cannot use lethal force unless it is 'reasonable and necessary' to give effect to orders, may as a matter of practice be capable of ensuring the measure would be rationally connected to the objective of protecting others' lives. This is particularly the case if, as stated by the Attorney-General in his response, an assessment of whether it is 'reasonable and necessary' would need to take into account the potential consequences of not taking action and whether the aircraft or vessel posed a threat to the life or safety of others. However, it is noted that these considerations are not expressly stated in the bill to be required to be taken into account, and to that extent it remains unclear whether this aspect of the measure would be rationally connected to achieve the objective.

#### *Proportionality*

2.119 The test of proportionality that applies in relation to the deprivation of life is a strict one and also requires the use of precautionary measures by government

forces to reduce risk to life when planning operations.<sup>22</sup> As noted in the initial analysis, the use of force (including lethal force) by the ADF against people domestically is a serious and exceptional measure.

2.120 In relation to whether the measure authorising the use of force is proportionate, the Attorney-General's response states:

The use of force powers are only enlivened in extraordinary situations where there is, or is likely to be, domestic violence and the Governor-General has made a call out order. The same principles apply to the use of lethal force and the use of force more generally. The provisions permitting the use of force, including lethal force, are anchored by proposed section 51N which requires that the use of force be 'reasonable and necessary' to protect others from the domestic violence specified in the order. This provides the flexibility needed for the measure to be commensurate to the threat while providing procedural safeguards to ensure there is sufficient accountability at each level.

In addition to the safeguards stated above in proposed section 51N, force can only be used in relation to an action that has been approved by an authorising Minister. The actions include preventing, or putting an end to, acts of violence or threats to any person's life, health or safety, or to public health or public safety (proposed paragraph 46(5)(b)), and protecting any persons from acts of violence, threats to any person's life, health or safety, or to public health or public safety (proposed paragraph 46(5)(c)). The effect of these paragraphs is to confine the circumstances in which force may be used. These provisions operate both individually, and in conjunction with each other, to ensure that the eventual exercise of any power under a call out order is not arbitrary and is not disproportionate to the threat.

Furthermore, the use of force powers and the limitations that apply to individual ADF members must be understood against the limitations and safeguards that operate at a Ministerial and ADF command level. At the Ministerial level, for example, authorising Ministers may only decide to advise the Governor General to issue a call out order where they are satisfied of a range of matters, including that domestic violence is actually occurring or likely to occur, and after considering the nature of that violence and whether ADF assistance would enhance a state or territory's law enforcement response (under proposed subsections 33(2), 34(2), 35(2) and 36(2)). Authorising Ministers must also determine which specific types of powers are appropriate to make available to the ADF to respond to the violence (under proposed subparagraphs 33(1)(c), 34(1)(c), 35(1)(c) and 36(1)(c)).

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22 *McCann v United Kingdom*, European Court of Human Rights Application No. 18984/91 (1995) [147] – [149].

At the ADF command level, proposed subsection 39(2) requires the Chief of the Defence Force (CDF) to only utilise the ADF under a call out order in such manner as is reasonable and necessary for the purposes specified in the order.

2.121 The authorisation process for the conferral of powers may operate as a relevant safeguard. In this respect, the threshold for authorising the conferral of powers on the ADF including use of force is relevant to the proportionality of the measure. However, the initial analysis noted that while the stated objective of the measure is the 'protection of the Australian populace from acts of significant violence, such as terrorism incidents,' the proposed call out powers are not limited in this way and may be broader in scope. Specifically, while the ADF may be called out in response to 'domestic violence' which is occurring or is likely to occur, 'domestic violence' is not specifically defined.<sup>23</sup> The initial analysis expressed concern that by not specifically defining 'domestic violence' in the legislation there is a risk that 'domestic violence' could apply to a broader range of disturbances not necessarily involving great physical force (including, potentially, forms of civil disturbances, such as political protest and civil disobedience). If this were the case, the measure, as drafted, may be overly broad with respect to its stated objective. In relation to this issue, the Attorney-General's response explains:

Part IIIAAA provides the legislative framework authorising the ADF to be called out to use force to resolve 'domestic violence' occurring in Australia. Part IIIAAA uses the term 'domestic violence' as this is the term used in section 119 of the Constitution, which deals with state requests for assistance in responding to domestic violence.

The term is not defined in the Constitution. It refers to conduct that is marked by significant force and would include a terrorist attack, hostage situation, and widespread or significant violence. In other words, for a call out order to be made, there needs to be violence of such a magnitude that it endangers, or risks endangering, the lives of others. By contrast, peaceful industrial action, political protests or civil disobedience would not fall within the definition of 'domestic violence' that would enliven the use of the call out powers.

2.122 It is a welcome clarification from the Attorney-General that civil disturbances such as peaceful industrial action, political protests or civil disobedience are not intended to fall within the definition of 'domestic violence'. From a human rights law perspective this is relevant to assessing the overall proportionality of the measure. It is noted that the addendum to the explanatory memorandum now also contains a similar clarification about the meaning and scope of the definition of 'domestic violence'.<sup>24</sup> However, the term 'domestic violence' is not defined in legislation.

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23 Section 31 of the bill defines 'domestic violence' as having the same meaning as in section 119 of the Constitution. Section 119 of the Constitution does not define this concept.

24 See addendum to the Explanatory Memorandum, pp. 4-5.

Elsewhere in his response, the Attorney-General explains why a definition of 'domestic violence' has not been included in the legislation on the basis that 'domestic violence' 'could encompass a range of circumstances, which will be difficult to prescribe or predict in their entirety.'

2.123 It is acknowledged that a definition of 'domestic violence' would narrow the circumstances which constitute 'domestic violence' as a precondition to the use of the call out powers. However, from a human rights perspective, the concern is that the concept of 'domestic violence' left undefined may capture a broader range of conduct than that described by the Attorney-General. If this were the case the measures may be insufficiently circumscribed. Indeed, the fact that the explanation from the Attorney-General as to the scope of conduct captured by the term 'domestic violence' differs from the explanation which was included in the explanatory memorandum highlights concerns as to certainty. In this respect, while the Attorney-General's response states that 'domestic violence' would include conduct marked by 'significant force, including a terrorist attack, hostage situation, and widespread or significant violence', the initial explanatory memorandum states that 'domestic violence' refers to conduct marked by 'great physical force, including a terrorist attack or other mass casualty incident.'

2.124 It is noted that not only is 'domestic violence' not expressly positively defined in the bill (by reference to what it constitutes) but 'domestic violence' is also not negatively defined (by reference to conduct which is excluded). It would appear to be a less rights restrictive approach to include the clarification about the scope of domestic violence as a safeguard in the text of the bill. Ultimately, if the conferral of coercive powers on the ADF through the call out powers is not the least rights restrictive approach then the measure may not be a proportionate limitation on human rights.

#### *Proportionality and specific use of force provisions*

2.125 As set out in the initial human rights analysis, the use of lethal force where it is necessary to protect the life of others or in self-defence appears to accord with human rights standards relating to when it might be permissible to use lethal force. However, the initial analysis noted that it is less clear that the grounds relating to protecting declared infrastructure or taking measures against an aircraft or vessel under an authorisation accord with these standards.

2.126 In relation to the use of lethal force to protect declared infrastructure, the Attorney-General's response provides the following information as to safeguards in place:

Significantly, while a declaration may be made whether or not a call out order is in force, it has no effect until a call out order is in force. Call out can only be authorised where domestic violence is occurring or is likely to occur within Australia, or there is a threat in the offshore area, and the authorising Ministers are satisfied that the ADF should be called out

(proposed sections 33 to 36). Accordingly, an infrastructure declaration has no practical effect unless there is an incident of domestic violence.

2.127 It is acknowledged that the authorisation process and the precondition of 'domestic violence' occurring prior to a conferral of powers on the ADF may operate as a safeguard. However, for the reasons discussed earlier, as to the lack of definition of 'domestic violence', the effectiveness of this safeguard may be limited.

2.128 The Attorney-General's response also explains that the types of infrastructure intended to be declared as declared infrastructure include, for example, power stations, dams and water treatment plants. The response states that 'damage or disruption to the operation of such infrastructure could directly or indirectly cause widespread loss of life' and that 'there must always be a nexus between the damage or disruption to the infrastructure and the risk of death or serious injury to a person'. The response also states that the declaration would only remain in effect while authorising ministers are satisfied that the nexus between the declaration and the threats to the life or safety of others continues to exist.

2.129 However, it is not expressly provided in the bill that the loss of life must be 'widespread', but instead the test is whether the damage or disruption would directly or indirectly endanger the life of, or cause serious injury to, 'any person'.<sup>25</sup> In relation to the 'nexus' between the damage or disruption to the infrastructure and the risk of death or serious injury, and the availability of less rights restrictive measures, the Attorney-General's response also states:

An ADF member being utilised under a call out order, which includes protection of declared infrastructure, may or may not need to use force against a person in exercising powers to protect the infrastructure. An ADF member may be able to take a range of other steps to protect the infrastructure. Proposed subsection 51N(1) makes clear that an ADF member is only able to use force if it is reasonable and necessary in the circumstances. Proposed subparagraph 51N(3)(a)(ii) contains special requirements for an ADF member using force that is likely to cause the death of, or grievous bodily harm to, a person to protect declared infrastructure. Under paragraph 51(N)(3)(a)(ii), the ADF member must believe on reasonable grounds that the use of potentially lethal force is necessary to protect the declared infrastructure against the domestic violence or threat specified in the call out order.

Therefore, there is a connection between the power to use force under proposed section 51N and protection of life, because infrastructure may only be the subject of a declaration under proposed section 51H if damage or disruption would endanger life (proposed subsection 51H(2)).

Taken together, the matters that must be satisfied before an ADF member is required to act to protect declared infrastructure, and the limitations on

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25 See, proposed section 51H.

the use of force to what is reasonable and necessary in the circumstances, provide a proportionate limitation. There are no less rights restrictive alternatives that would address the extraordinary circumstances in which the ADF members would be exercising such powers in protecting declared infrastructure.

2.130 It is acknowledged that there are a range of other steps provided for in the bill that can be taken by an ADF member to protect infrastructure that would not involve the use of force, and that the requirement that the use of force be 'reasonable and necessary in the circumstances' is an important safeguard.<sup>26</sup> However, as discussed earlier and in the initial analysis, concerns remain insofar as it is unclear that the threshold for declaring infrastructure requires that there be a specific level of risk to human life (for example, an immediate risk) through damage or disruption of the declared infrastructure.<sup>27</sup> This is of concern in circumstances where there is potentially a wide range of infrastructure, damage or disruption of which would directly or indirectly endanger life or cause injury. Accordingly, concerns remain as to whether the level of risk to life associated with damage or disruption to such infrastructure would in every case necessarily be such as to warrant the potential use of lethal force. For example, under the bill it appears that a particular set of traffic lights could meet the threshold for being declared infrastructure on the basis that there is a threat of damage or disruption to them. This is because traffic lights play a key role in orderly and safe flow of traffic such that a disruption to them through, for example, non-operation would indirectly endanger the life of, or cause serious injury to, any person. The bill would permit a use of lethal force to protect such infrastructure even in circumstances where the level of risk to safety may be relatively small and may be mitigated. In this respect, it would be a stronger safeguard to have an express link in the bill between where it is permissible to use force and protection of human life. In relation to declared infrastructure a stronger safeguard, for example, would be a requirement that use of lethal force would only be permissible where the member believes on reasonable grounds that it is necessary to protect life or prevent serious injury likely to be caused by damage or disruption to declared infrastructure. As currently drafted, much would depend on how the powers in relation to declared infrastructure operate and are used in practice.

2.131 In relation to the use of lethal force when taking measures against an aircraft or vessel, the Attorney-General's response states a proportionality assessment is involved when taking such measures because of the requirement that the measure is 'reasonable and necessary'. The response states:

In recognition of the potentially significant loss of life that the use of force in such circumstances may occasion, there are several matters that must

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26 See, proposed section 51L, 51N(1) and 51N(3)(ii).

27 See, proposed subsection 51H(2)(b).

occur before an ADF member is in a position to consider the exercise of this power, and even then, there are multiple safeguards on the exercise of the power.

First, the Governor-General must have made a call out order in response to domestic violence that is occurring, or likely to occur. The discussion above notes the types of significant violent circumstances that would need to exist to engage call out. The authorising Ministers must also have decided that Division 3 powers, which include proposed paragraphs 46(5)(d) and (e), should be available for use by the ADF.

Second, an authorising Minister must have specifically authorised action against an aircraft or vessel, except where there is insufficient time to obtain the authorisation because a sudden and extraordinary emergency exists (dealt with separately below) (subsection 46(1)).

The question of whether it is reasonable and necessary to use lethal force, or for the Minister to authorise the taking of measures involving the use of lethal force under proposed subsection 46(3), would need to take into account the potential consequences of not taking action and whether the aircraft or vessel posed a threat to the life or safety of others. The significance of this decision-making process is reflected in the fact that the legislative framework requires this consideration at the Ministerial level.

...

Third, an ADF member can only take measures in relation to an aircraft or vessel if a number of conditions have been met (subsection 46(6)). These conditions ensure that an ADF member does not take action against an aircraft or vessel on the basis of a manifestly unlawful order, or where circumstances have changed in a way that is material to taking an action or giving an order. The conditions regarding change in circumstances are particularly important in the context of air and maritime threats, where the situation may change quickly.

They ensure that an ADF member does not take action on the basis of an order from someone who is not at the scene, who cannot accurately assess whether a threat still exists, or whether it is still reasonable and necessary to take the action ordered. This will also be reflected in operational documents such as Rules of Engagement.

2.132 As noted earlier, the authorisation process for the conferral of powers may operate as a relevant safeguard. However, for the reasons discussed earlier, as to the lack of definition of 'domestic violence', the effectiveness of this safeguard may be limited.

2.133 However, it is noted that in relation to taking particular measures against an aircraft or vessel, further restrictions exist. In relation to the use of such 'special

powers',<sup>28</sup> an authorising minister must authorise the taking of action only if satisfied it is 'reasonable and necessary' or would be 'reasonable and necessary'.<sup>29</sup> Alternatively, the ADF member must believe on reasonable grounds that there is insufficient time to obtain such authorisation.<sup>30</sup> These authorisation requirements are relevant to the proportionality of the limitation.<sup>31</sup> The further limitations on the exercise of the authorising minister's power in section 46(6) are also relevant safeguards. However, while the Attorney-General states that account would need to be taken of the potential consequences of not taking action and the threat posed to the life and safety of others, the bill does not expressly require these considerations to be taken into account.

2.134 The Attorney-General's response also states that the limitation on taking a measure against an aircraft or vessel needs to be viewed within the broader use of force obligations on ADF members:

Proposed subsection 51N(1) provides that a member of the ADF may only use such force against persons or things as is reasonable and necessary in the circumstances and, if using force against persons, must do so in accordance with the restrictions specified in subsection 51N(3). In relation to the exercise of powers under paragraphs 46(5)(d) or (e), the member, in using force against a person, must not do anything that is likely to cause the death of, or grievous bodily harm to, the person unless it is reasonable and necessary to give effect to the call out order under which, or under the authority of which, the member is acting (subparagraph 51N(3)(a)(iii)). As noted above, the requirement to consider whether it is reasonable and necessary to use such force in taking a measure against an aircraft or vessel would involve a proportionality assessment. In this regard, destroying an aircraft or vessel in a way that would involve the death of, or serious injury to, persons may only be reasonable and necessary if that aircraft or vessel posed a significant threat to other people (for example, by causing mass casualties).

This same assessment would be required in an emergency situation. Proposed paragraphs 46(5)(d) and (e) authorise an ADF member to take measures against an aircraft or vessel where they believe on reasonable grounds that there is insufficient time to obtain an authorisation because a sudden and extraordinary emergency exists. This recognises that there may be circumstances that evolve quickly and in an unforeseen way,

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28 See, schedule 1, subdivision B, section 46. Powers under this subdivision include capturing or recapturing a location, preventing or putting an end to violence, protecting any person from violence, taking measures including the use of force against an aircraft or vessel, up to and including destroying it.

29 Proposed section 46.

30 Proposed subsection 46(2).

31 See also proposed section 46(6) which contains additional restrictions.

particularly air and maritime threats. However, this power is also subject to a number of safeguards. The exercise of this power in emergency circumstances can only occur where there is already a call out order in place and it provides for the use of Division 3 powers. The ADF member must have a belief on reasonable grounds that there is insufficient time to obtain Ministerial authorisation. Crucially, the ADF member remains subject to the obligation under subsection 51N(1) to only use such force against persons or things as is reasonable and necessary in the circumstances.

This framework ensures that the use of force in relation to an aircraft or vessel is proportionate to any potential loss of life it may entail. It provides sufficient flexibility to deal with evolving threats but does not go further than is necessary to achieve the legitimate objective. It only authorises use of force where it is reasonable and necessary in the circumstances, meaning that the use of force will be graduated and only used as a last resort.

2.135 The Attorney-General's clarification that destroying an aircraft or vessel in a way that would involve the death of, or serious injury to, persons may only be 'reasonable and necessary' if that aircraft or vessel posed a significant threat to other people is important. However, as noted earlier, this is not how the bill is currently worded. In the absence of a requirement for an ADF member to consider whether the use of lethal force is absolutely necessary to protect the lives of others (as opposed to necessary to give effect to a superior's order),<sup>32</sup> there is no clear link in the language of the bill between the exercise of the power to destroy an aircraft or vessel and the protection of human life. Noting the fundamental nature of the right to life, concerns therefore remain that the measure may not be proportionate as a matter of international human rights law. It would be a stronger safeguard to have an express link in the bill between where it is permissible to take measures and protection of human life. A stronger safeguard, for example, would be a requirement that taking measures against an aircraft or vessel would only be permissible where the ADF member believes on reasonable grounds that such action is reasonable and necessary to protect life or prevent serious injury.

2.136 In relation to a use of lethal force against a fleeing suspect, the Attorney-General's response states:

The framework in the previous section also applies in relation to the use of force against a person who is attempting to escape being detained. Proposed paragraph 51N(3)(b) authorises the use of force against a person

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32 For example, the German Constitutional court considered that section 14 of the German *Air Safety Act* (Luftsicherheitsgesetz), which provided for direct action by the military against a hijacked civilian aircraft, was incompatible with the right to life in the German Constitution in a number of circumstances: Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] (30 June 2005) 2 BvR 1772/02; BVerfG (15 February 2006) 1 BvR 357/05.

who is attempting to escape being detained by fleeing where that person has, if practicable, been called on to surrender and the ADF member believes on reasonable grounds that the person cannot be apprehended in any other manner.

Additionally, a member of the ADF must not use force against the fleeing person unless the member believes on reasonable grounds that the use of force is necessary to protect life including the member's life (subparagraph 51N(3)(a)(i)), protect declared infrastructure (subparagraph 51N(3)(a)(ii)) which could only occur if there is an infrastructure declaration in place, or it is reasonable and necessary to give effect to an order in relation to aircraft or vessels (subparagraph 51N(3)(a)(iii)).

Further, any use of force remains subject to the obligation that such force against persons is only what is reasonable and necessary in the circumstances (subsection 51N(1)).

As discussed above, use of force needs to be viewed in the broader context. These circumstances would only arise in the context of a call out order, which requires the existence or likelihood of domestic violence. The use of force is always subject to what is reasonable and necessary in the circumstances. This entails a proportionality analysis, which requires the ADF member to consider other tactics or approaches to apprehend the fleeing person before resorting to this extreme measure. This ensures that the taking of the measure is proportionate and necessary to the threat the person poses, and requires a graduated approach in response to the threat.

2.137 The information provided by the Attorney-General clarifies the safeguards in place when exercising the power to use lethal force against a fleeing suspect. The requirement that the use of force against a fleeing suspect be 'reasonable and necessary in the circumstances' is an important safeguard. So too is the requirement that the member must 'believe on reasonable grounds that the person cannot be apprehended in any other manner' which suggests, as the Attorney-General's response states, that there would be a 'graduated approach' in response to a threat. In the case where such force is used against a fleeing person where the member believes on reasonable grounds that the use of force is necessary to protect life, this may be proportionate. However, it is less clear in relation to the use of lethal force against a fleeing person to protect declared infrastructure or to give effect to an order in relation to aircrafts or vessels, for the reasons stated earlier. To that extent, there remains a risk that the use of lethal force may occur in circumstances that are not a proportionate limitation on the right to life. Much will depend on how the powers are exercised in practice.

### **Committee response**

**2.138 The committee thanks the Attorney-General for his response and has concluded its examination of this issue.**

**2.139** The preceding analysis indicates that there is a risk that the proposed powers to use lethal force may be incompatible with the right to life. This is because of the potential breadth of the concept of 'domestic violence' as a precondition to the call out powers, in light of the fact that the concept is not defined in the bill. There are also concerns that the powers to use lethal force in relation to declared infrastructure (s 51N(3)(ii)) and to protect aircrafts or vessels (s 51N(3)(iii)) may be exercised in a manner that may not be proportionate.

**2.140** Should the bill pass, the committee recommends that the operation of the measures, if the call-out powers are utilised, be closely monitored to ensure that the exercise of the powers occurs in a manner that is compatible with the right to life.

***Compatibility of the measure with the right to liberty: initial analysis***

2.141 The right to liberty includes the right not to be subject to arbitrary detention, which requires that detention must be lawful, reasonable, necessary and proportionate in all the circumstances. As the measures allow for the detention of individuals in a number of circumstances,<sup>33</sup> the measures engage and limit the right to liberty. This limitation is acknowledged in the statement of compatibility which argues the limitation is permissible on the basis that it is 'reasonable, necessary and proportionate'.<sup>34</sup>

2.142 The statement of compatibility sets out the objective of the measure as 'responding to, and protecting the Australian populace from, acts of significant violence, including terrorism'.<sup>35</sup> The initial analysis noted that, while generally this may be capable of constituting a legitimate objective, further information was required as to its importance in the context of the specific measure and why current powers are insufficient to achieve the objective. The initial analysis stated that the detention of a person in circumstances where they pose a threat to any person's life, health or safety, or public health or safety, or where they have committed an offence related to the domestic violence, is likely to be rationally connected to the stated objective.<sup>36</sup> The initial analysis additionally raised questions in relation to whether the measure is proportionate to this stated objective.

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33 See, for example, sections 46(7)(f), 51D(2)(h)(ii), 51D (3)(d), 51D(5)(c), and 51L(3)(e) of the bill.

34 SOC p. 11.

35 SOC p. 11.

36 SOC p. 11.

2.143 The full initial human rights analysis in relation to the right to liberty is set out at [Report 8 of 2018 \(21 August 2018\) pp. 11-12](#).<sup>37</sup>

2.144 The committee therefore sought the advice of 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;
- whether the limitation is a reasonable and proportionate measure to achieve the stated objective (including what safeguards apply once a person is handed over to police; prior to a handover to police whether there are sufficient safeguards; and whether the measure is the least rights restrictive approach).

#### ***Attorney-General's response and analysis***

2.145 The Attorney-General's response provides the following information as to the legitimate objective of the measure:

The amendments authorising ADF members to detain persons for the purpose of placing the person in the custody of a member of a police force are necessary to achieve the legitimate objective of responding to, and protecting the Australian populace from, acts of significant violence, including terrorism.

...

In the extreme context of a domestic violence incident, these powers will be necessary to detain persons who are inciting or carrying out acts of domestic violence so that the lives of others can be protected. This is clearly a protective purpose. While law enforcement will have primary responsibility for managing an incident, there will be situations where the ADF may be operating away from law enforcement. This could occur, for example, where there are highly mobile attackers spread over a wide geographical area. These powers will enable the ADF to protect the life, health or safety of others, or public health or safety by detaining a person who poses a threat to others, and handing them over to the police as soon as practicable, to be dealt with in accordance with the due process of law.

The current powers are insufficient to enable ADF members to detain persons who pose a risk to the operation or integrity of declared infrastructure. Proposed subparagraph 51L(3)(e)(ii) will allow an ADF member to detain a person whom the member believes on reasonable grounds is likely to pose a risk to the operation or integrity of declared

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37 Parliamentary Joint Committee on Human Rights, *Report 8 of 2018* (21 August 2018) pp. 11-12 at: [https://www.aph.gov.au/Parliamentary\\_Business/Committees/Joint/Human\\_Rights/Scrutiny\\_reports/2018/Report\\_8\\_of\\_2018](https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Scrutiny_reports/2018/Report_8_of_2018).

infrastructure. This furthers the objective of protecting others by enabling the ADF to detain persons who may damage or disrupt declared infrastructure and, as a consequence, endanger the lives of others.

Furthermore, the Bill narrows the ability for ADF members to detain persons on the grounds of committing a Commonwealth, state or territory offence. The definition now requires that the offence be related to the threat or violence specified in the order. Narrowing this ability ensures that the ADF only detains persons for purposes directly connected to the commission or attempted commission of actions related to the domestic violence to which the call out order relates.

2.146 Based on the information provided by the Attorney-General, on balance the measures appear to pursue a legitimate objective for the purposes of international human rights law.

2.147 In relation to the proportionality of the measure, the Attorney-General's response clarifies that the bill provides a more limited approach to the right to detain as compared to existing legislation, for example by raising the threshold for detention in proposed section 51D from a 'suspicion' to a 'reasonable belief'. This is relevant to the assessment of proportionality; however it is not a complete answer to this question.

2.148 The Attorney-General's response emphasises that the detention powers in the bill are only enlivened where domestic violence of the kind specified in a call out order occurs, or is likely to occur. The response states:

In these circumstances, the rapid apprehension of persons who may be inciting or perpetrating domestic violence is critical to mitigate the risk for harm, and the magnitude of that harm. The detention powers in the Bill represent the least rights restrictive approach, in that they are focussed on allowing the ADF to detain persons who either present a threat, or who are engaging in criminal action connected to the domestic violence. In this sense, they are tailored at enabling the ADF to assist state and territory police in a practical sense. Once the ADF has detained a person, their detention is only permitted to protect others and to assist state and territory law enforcement in placing suspects in custody.

2.149 However, as noted above, in circumstances where the concept of 'domestic violence' is not defined and may be insufficiently circumscribed, this may not be determinative of the proportionality of the issue. This is because there is a risk that the detention powers may be enlivened or conferred in circumstances that are overly broad in respect of the legitimate objective of the measure.

2.150 Further, the initial analysis noted that a deprivation of liberty is a serious matter, and generally where such a deprivation occurs in a regular policing context it is accompanied by considerable safeguards. This may include timeframes for a person to be charged, released or brought before a bail authority or court. In this respect the Attorney-General's response identifies the following safeguards that

apply to a person prior to a handover to police and once a person is handed over to police:

Under proposed paragraph 46(7)(f), an ADF member may detain any person found in the search that the member believes on reasonable grounds is a person who may be detained in relation to the call out order for the purpose of placing the person in the custody of state or territory law enforcement at the earliest practicable time. Similar powers exist in proposed sections 51D and 51L. The deprivation of liberty in this situation is a necessary precursor to detention in a regular policing context.

An ADF member being utilised under a call out order may only detain a person for the purpose of placing the person in the custody of a member of a police force at the earliest practicable time. There are no powers in the Bill providing for extended detention without charge. Once the person is placed in the custody of state or territory police, it will be up to the police to arrest, question, charge or release the person, in accordance with the criminal law and the standard policing procedures of that state or territory.

In recognition of the fact that these provisions limit the right to liberty, the Bill provides a number of safeguards to ensure that the use of these powers is proportionate and is not arbitrary. First, the ADF may only detain a person where a member has reasonable grounds to believe that the person is a person who may be detained (see proposed subsection 46(7), sections 51D and 51L).

Further, proposed section 51P requires a member of the ADF to inform detained persons of the reasons for their detention at the time they are detained. In particular, this means that the ADF member must inform the person (as applicable):

- of the offence the person is reasonably believed to have committed (proposed paragraph 51(1)(a))
- that the person is believed to be likely to pose a threat to any person's life, health or safety, or to public health or safety, and the reasons for that belief (proposed subparagraphs 51P(1)(b)(i) and (ii)), or
- that the person is believed to be likely to pose a risk to the operation or integrity of declared infrastructure, and the reasons for that belief (proposed subparagraphs 51P(1)(c)(i) and (ii)).

This ensures that the person being detained is made aware of the grounds for their detention in accordance with procedural fairness and in a timely manner.

2.151 These are relevant safeguards in relation to the operation of detention powers. In particular, the requirement that a person detained by the ADF be placed in police custody at the earliest practicable time is an important safeguard. Detention without charge by the police in many jurisdictions in Australia is governed by time

limits as well as additional safeguards such as contacting a lawyer.<sup>38</sup> However, while the requirement to place the person in police custody as soon as practicable may be an adequate protection in most circumstances, it is noted that the measure lacks additional specific safeguards regarding timeframes for detention. In the absence of these kinds of additional safeguards, there is a risk that the operation of the measure in some circumstances may not be the least rights restrictive approach.

### **Committee response**

**2.152 The committee thanks the Attorney-General for his response and has concluded its examination of this issue.**

**2.153 The preceding analysis indicates that there is a risk that the measure may be incompatible with the right to liberty in some circumstances. This is because of the potential breadth of the concept of 'domestic violence' as a precondition to the call out powers, including the powers of detention, and questions as to whether additional safeguards are needed to ensure that detention is the least rights restrictive approach.**

**2.154 Should the bill pass, the committee recommends that the operation of the measures, if the call-out powers are utilised, be closely monitored to ensure that the exercise of the powers occurs in a manner that is compatible with the right to liberty.**

### ***Compatibility of the measure with the right to freedom of movement: initial analysis***

2.155 The right to freedom of movement includes the right of people to move freely within Australia and to access public places. By providing the ADF powers to erect barriers, to stop individuals and vehicles and to require people to move on from particular areas, the measures engage and limit the right to freedom of movement. The right to freedom of movement may be subject to permissible limitations where the measure pursues a legitimate objective and is rationally connected and proportionate to that objective. This right was not addressed in the statement of compatibility and so no assessment was provided as to whether the measures constitute a permissible limitation on this right.

2.156 The full initial human rights analysis in relation to the right to freedom of movement is set out at [Report 8 of 2018 \(21 August 2018\) pp. 12-13](#).<sup>39</sup>

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38 See, for example, *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW), sections 114-116; *Police Powers and Responsibilities Act 2000* (QLD), section 403; *Crimes Act 1914* (Cth), section 23C.

39 Parliamentary Joint Committee on Human Rights, *Report 8 of 2018* (21 August 2018) pp. 12-13 at: [https://www.aph.gov.au/Parliamentary\\_Business/Committees/Joint/Human\\_Rights/Scrutiny\\_reports/2018/Report\\_8\\_of\\_2018](https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Scrutiny_reports/2018/Report_8_of_2018).

- 2.157 The committee therefore sought the advice of the Attorney-General as to:
- whether the measure pursues a legitimate objective for the purposes of international human rights law (including how current laws are insufficient to address this objective);
  - 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.

***Attorney-General's response and analysis***

2.158 The Attorney General's response acknowledges that the powers in proposed subsections 46(7), 51D(2) and 51L(3) engage the right to freedom of movement and provides a detailed description of the scope of the powers. In relation to whether the measure pursues a legitimate objective for the purposes of international human rights law, the Attorney-General's response states:

The provisions restricting movement operate in accordance with procedures established by law. They are required to protect national security and public order and, in particular, ensure the safety of persons and the preservation of infrastructure that affects the lives and safety of persons in the vicinity of domestic violence in the extreme context of call out.

2.159 This is likely to constitute a legitimate objective for the purposes of international human rights law.

2.160 In relation to whether the measure is rationally connected to that objective, the Attorney General's response states:

When viewed in the context of a call out order, the exercise of these powers is reasonable in the contemporary threat environment. Where domestic violence is occurring, or is likely to occur, it is reasonable to restrict the movement of persons to ensure the safety of the Australian public and to ensure that individuals who pose a threat can be located and apprehended as appropriate.

As noted above, this environment is characterised by the threat of highly mobile attackers that move quickly between locations and premises across large areas, and the exact location of a threat may not be known or may change rapidly as a domestic violence situation develops.

In these circumstances, it is the ADF's role to assist state and territory police in responding to the domestic violence. As the ADF and state and territory police may not always be operating in close proximity, it is necessary for ADF members to have the power to control the movement of persons, including those who may pose a threat to the safety of others. This ensures that the ADF is able to assist in situations involving significant violence to protect the safety of the public and ensure that individuals who

pose a threat can be located. This could involve setting up a barrier, cordoning off an area or directing people to move to another location. These powers are reasonable and proportionate in ensuring public order and safety particularly where there is an ongoing threat or significant damage in a crowded place or the need to preserve evidence.

Accordingly, any limitation on the right to freedom of movement is rationally connected to achieving the legitimate objective of responding to, and protecting the Australian populace from, acts of significant violence, including terrorism. The powers can be exercised for protective purposes, to keep people away from threats and other actors carrying out acts of violence, or to control the movement of dangerous people.

2.161 Based on this information, the measures appear to be rationally connected to that objective.

2.162 As to the proportionality of the measure, the Attorney-General's response explains that the powers are necessary in the context of a call out as:

They have a protective function. For example, a perimeter could be set up around an incident to ensure that people are appropriately protected from violence occurring in the area. The powers can also be used in searching for suspects, allowing ADF members to manage movements in or out of a particular area while the location of a suspect is ascertained. It is important to note, however, that state or territory police forces would be the first responders in the circumstances contemplated by the Bill and they are well trained and equipped to respond to such situations.

2.163 The Attorney-General's response also points to several safeguards in relation to the operation of the powers:

Recognising that the exercise of these powers might restrict or interfere with a person's freedom of movement, there are a number of safeguards on the authorisation and exercise of these powers to ensure that they are used for a proper purpose, are proportionate to the threat, and are exercised in accordance with procedures established by law, without unduly limiting the operational flexibility the ADF needs to deal with a wide variety of potential situations of domestic violence.

A member of the ADF who is being utilised under a call out order may only exercise the power to restrict movement under proposed subsection 46(7) if an authorising Minister has authorised the taking of an action, or the member believes on reasonable grounds that there is insufficient time to obtain the authorisation because a sudden and extraordinary emergency exists (subsection 46(1)).

Relevantly, under proposed subsection 46(5) a member of the ADF may take an action to:

- capture or recapture a location or thing

- prevent, or put an end to, acts of violence or threats to life, health or safety, or to public health or public safety, or
- protect people from acts of violence or threats to life, health or safety, or to public health or public safety.

The ADF member may only restrict movement under proposed paragraphs 46(7)(b) or (c) in connection with these actions. This reinforces that the ADF member will usually exercise the power to restrict movement in connection with public safety and protection.

Further, an ADF member must not control the movement of persons for longer than is reasonable and necessary in the circumstances (subsection 46(8)). This limitation on the length of time that an ADF member is permitted to restrict the movement of persons invokes an assessment of proportionality and appropriately places a limit on the period during which the restriction on the freedom of movement might apply.

The power to restrict movement in proposed subsection 51D(2) relates to specified areas. In addition to requiring a call out order to be in effect, these powers cannot be exercised unless the authorising Ministers have declared an area to be a specified area (subsection 51(1)).

A specified area is a limited geographical area. If a specified area declaration is made, the authorising Ministers must arrange for the preparation of a statement that includes, among other matters, a description of the specified area and its boundaries (subsection 51(6)). The statement must generally be broadcast so as to be capable of being received within the specified area and must be forwarded to each House of Parliament within 24 hours of the declaration being made (subsection 51(7)). While there are exceptions where this will not be appropriate (subsection 51(8)) (for example, it may interfere with law enforcement efforts to apprehend a perpetrator), broadcast of the area notifies the public of the specified area in which ADF members might exercise their powers to restrict the movement of persons.

Subsection 51D(1) provides that the proposed powers in subsection 51D(2) apply if an ADF member who is being utilised under a call out order believes on reasonable grounds that there is in a specified area:

- a person who is likely to pose a threat to a person's life, health or safety, or public health or public safety
- a person who has in their possession a thing that is likely to pose a threat to a person's life, health or safety, or public health or public safety, or cause serious damage to property
- a person connected with the domestic violence or threat specified in the order
- a thing that is likely to pose a threat to a person's life, health or safety, or public health or public safety, or cause serious damage to property, or

- a thing connected with the domestic violence or threat specified in the order.

There must be a clear nexus between the exercise of the powers to restrict movement under proposed subsection 51D(2) in the context of a specified area, and the health and safety of people and the public.

The power to restrict movement in proposed subsection 51L(3) relates to the protection of declared infrastructure. Exercise of such powers to protect declared infrastructure is only relevant if the authorising Ministers have declared particular infrastructure, or a part of particular infrastructure (subsection 51H(1)) and the authorising Ministers remain satisfied there is:

- a threat to damage or destroy infrastructure
- damage, or disruption to, the infrastructure would kill or seriously injure people
- there is 'domestic violence' that is the subject of a call out order, and
- the call out order specifies that Division 5 powers to protect declared infrastructure apply.

In these circumstances a member of the ADF may take an action to:

- prevent or put an end to damage or disruption to the operation of the declared infrastructure
- prevent or put an end to acts of violence or threats to any person's life, health or safety or to public health or safety,
- protect any persons from acts of violence or threats to any person's life, health or safety or to public health or safety (subsection 51L(2)).

The ADF member may only exercise the powers to restrict movement in subsection 51L(3) in connection with taking one of these actions. Accordingly there is a clear link between the exercise of the powers to restrict movement in protecting declared infrastructure, and protection of people and the public.

Further, an ADF member must not control the movement of persons or of means of transport for longer than is reasonable and necessary in the circumstances (subsection 51L(4)). This limitation on the length of time that an ADF member is permitted to restrict the movement of persons invokes an assessment of proportionality and appropriately places a limit on the period during which the restriction on the freedom of movement might apply.

The powers to restrict movement are circumscribed by their purpose. They must be connected to an incident of domestic violence that is occurring or likely to occur. The powers in subsections 51D(2) and 51L(3) are further narrowed, as they must be connected with a specified area or the protection of declared infrastructure.

The powers to restrict movement are also temporary. The Bill does not allow call out powers to be exercised for longer than is strictly necessary. Further, call out orders restricting movement may only be validly extended in limited circumstances. The powers are only enlivened in the context of a call out order, which is subject to a time limit (see subsections 33(5), 34(5), 35(5), 36(5) and 37(2)) and must be revoked when, amongst other things, an authorising Minister ceases to be satisfied that there is domestic violence, or that the ADF should be called out (proposed subsection 37(3)). Accordingly, any restrictions on persons' freedom of movement will be short, and no longer than is reasonable and necessary in the circumstances.

The powers to restrict movement in the Bill are necessary to protect the public, including to keep them away from dangerous situations and to contain the perpetrators of domestic violence to a smaller area. They include appropriate safeguards to ensure that they are the least intrusive means of achieving the legitimate objective of the Bill.

2.164 These restrictions and safeguards on the use of the powers in the context of the call out assist with the proportionality of the measure. It is acknowledged that there may be circumstances of violence that warrant such powers on a temporary basis to protect the public. That is, the powers may be the least rights restrictive approach reasonably available in some circumstances. However, in this respect, a concern still arises as to the threshold for the call out powers. The Attorney-General's response emphasises that:

The power to restrict the movement of persons under proposed subsections 46(7), 51D(2) and 51L(3) may only be exercised in the extreme context of a call out order, where the Governor-General has authorised the ADF to respond to domestic violence that is actually occurring or likely to occur (proposed sections 33 to 36). Such incidents could include catastrophic terrorist incidents involving widespread or significant violence. The powers to restrict the movement of persons may only be exercised if the authorising Ministers specify that the Divisions in which these powers are located apply to the call out order.

2.165 The authorisation process and the precondition of 'domestic violence' may be capable of acting as relevant safeguard. However, 'domestic violence' is not defined. Accordingly, there is a risk that the powers may be enlivened or conferred in circumstances that are overly broad in respect of the legitimate objective of the measures.

### **Committee response**

**2.166 The committee thanks the Attorney-General for his response and has concluded its examination of this issue.**

**2.167 Noting the safeguards in place, the measure may be capable of operating in circumstances which are compatible with the right to freedom of movement. However, due to the potential breadth of the concept of 'domestic violence' as a**

precondition to the call out powers, there is a risk that there are circumstances where exercise of these powers may be incompatible with these human rights.

**2.168** Should the bill pass, the committee recommends that the operation of the measures, if the call-out powers are utilised, be closely monitored to ensure that the exercise of the powers occurs in a manner that is compatible with the right to freedom of movement.

***Compatibility of the measure with the right to privacy: initial analysis***

2.169 The right to privacy prohibits arbitrary or unlawful interferences with an individual's privacy, family, correspondence or home.<sup>40</sup> The initial analysis stated that a number of measures in the bill engage and limit the right to privacy including:

- powers to search locations, things, means of transport; and
- powers to direct a person to answer a question or produce a document which is reasonably accessible to the person (including identification).<sup>41</sup>

2.170 The statement of compatibility acknowledges that these measures engage and limit the right to privacy but argues that the limitation is permissible.<sup>42</sup> The initial analysis stated that 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.

2.171 As noted above, the statement of compatibility sets out the objective of the measure as responding to, and protecting the Australian populace from, acts of significant violence. The initial analysis noted that, while generally this may be capable of constituting a legitimate objective, further information was required as to its importance in the context of the specific measure and why current powers are insufficient to achieve the objective.

2.172 While the initial analysis acknowledged that the search powers may be effective to achieve this objective, it raised questions as to the proportionality of the measure.

2.173 The full initial human rights analysis in relation to the right to privacy is set out at [Report 8 of 2018 \(21 August 2018\) pp. 13-14](#).<sup>43</sup>

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40 ICCPR, article 17.

41 SOC, p. 13.

42 SOC, p. 13.

43 Parliamentary Joint Committee on Human Rights, *Report 8 of 2018* (21 August 2018) pp. 13-14 at:  
[https://www.aph.gov.au/Parliamentary\\_Business/Committees/Joint/Human\\_Rights/Scrutiny\\_reports/2018/Report\\_8\\_of\\_2018](https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Scrutiny_reports/2018/Report_8_of_2018).

- 2.174 The committee therefore sought the advice of 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 (including how current laws are insufficient to address this objective);
  - 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 necessary, whether it is the least rights restrictive approach and whether there are adequate and effective safeguards in place in relation to its operation).

### ***Attorney-General's response and analysis***

2.175 In relation to whether there is reasoning or evidence that establishes that the stated objective addresses a pressing or substantial concern including how current laws are insufficient to address this objective, the Attorney-General's response states:

The Bill improves the current search powers by addressing two issues in the existing legislation. The Bill creates a more streamlined authorisation process to enable ADF members to search premises within the specified area. The Bill also addresses a gap in the current powers, which do not allow ADF members to search premises for persons who are likely to pose a threat.

#### Authorisation process

The current process for authorising the search of premises is administratively burdensome and may restrict the ADF's ability to swiftly and effectively protect others from acts of significant violence. Under current subsection 51L(1), the CDF [chief of defence force] may only issue an authorisation to search premises in a specified area where he or she believes on reasonable grounds that there is a dangerous thing on the premises and that it is necessary as a matter of urgency to make the dangerous thing safe. The current legislation requires the CDF to identify and authorise search powers for individual premises (paragraph 51L(2)(b)), which may prove challenging in a time compressed, dynamic environment with a mobile threat. In particular, this provision does not enable an ADF member to search for a dangerous thing that they know is in the area without identifying the precise premises in which it is located. This overly inflexible process may undermine the ADF's ability to respond, because the authorisation is based on the premises, rather than the thing (or person) that poses the threat.

The Bill will provide the ADF with a more streamlined power to search premises within a specified area, which is better adapted to the current threat environment. It is crucial that ADF members have the powers to

conduct sweeps of areas in which the precise location of the threat within that area may be unknown or mobile. The new provision enables the search authorisation to authorise the entry and search of all premises within a specified area (proposed subparagraph 51A(2)(a)(i)), or specified premises within the specified area (subparagraph 51A(2)(a)(ii)), for the purposes of finding the person or thing that poses a threat, or determining that the person or thing is not there. This will enable ADF members to identify and neutralise threats, and confirm that premises within a specified area are safe.

#### Grounds for authorising a search of the premises

Under the existing legislative scheme, the CDF can only issue an authorisation to search premises in a specified area where he or she believes on reasonable grounds that there is a dangerous thing on the premises and that it is necessary as a matter of urgency to make the dangerous thing safe. This means that the ADF could be prevented from searching premises in order to find persons who pose a threat to others' lives, health or safety where the ADF does not know whether they possess a dangerous thing at that moment. In this regard, the current powers could inhibit the ADF achieving the objective of safeguarding the Australian populace from threats of domestic violence in the context of a call out order. Proposed subsection 51A(1) expands the grounds on which the CDF may issue a search authorisation to allow the ADF to also search for a person who is likely to pose a threat (proposed paragraph 51A(1)(a)) or is connected with the domestic violence or threat specified in the order (proposed paragraph 51A(1)(c)). For example, this could include a person who may be seeking to assist others in carrying out acts of domestic violence to which the call out order refers.

The two improvements ensure that the ADF has the necessary powers to search premises for persons or things that are likely to pose a threat to others' lives, health or safety, or to seriously damage property, or are connected with the domestic violence or threat specified in the call out order. While these powers temporarily limit the right to privacy in the context of a call out order, they do so in order to achieve the legitimate objective of protecting others from an act of significant violence. This is particularly so given that the powers are specifically targeted toward seizing and neutralising domestic violence-related threats to others' lives.

2.176 This information indicates that the measures are likely to pursue a legitimate objective for the purposes of international human rights law. In particular, the response articulates why the existing search power regime may be insufficient for addressing this objective.

2.177 The Attorney-General's response outlines a range of information as to how the search powers are effective to achieve (that is, are rationally connected to) the objective of protecting the Australian populace from acts of significant violence. In

this respect, the Attorney-General's response outlines the scope of each of the search powers. In relation to the incidental search powers, the response explains:

...powers clarify that an ADF member may enter any place or premises, or board an aircraft or vessel, in exercising these powers, in connection with the purpose of protecting others from domestic violence. For example, an ADF member can only exercise the incidental power to search premises in proposed subsection 46(9) in relation to the actions authorised in proposed subsection 46(5), which are connected to the purpose of the legislation to protect others' lives.

Here, the incidental powers would enable ADF members to follow or search for a person connected with domestic violence whether they are on public or private property. Proposed subsection 51L(5) operates in the same way. Without the incidental powers, proposed subsections 46(5), 46(7), 51L(5) and 51L(7) may be rendered redundant. For example, it would not be possible for ADF members to end or protect others from acts of domestic violence if the legislation allowed the ADF to only search publicly accessible locations. In this regard, the incidental powers are critical to ensuring that the ADF is able to perform the actions set out in proposed subsection 46(5), and protect the Australian community from acts of domestic violence.

2.178 Based on this information, it appears that the incidental search powers are likely to be effective to achieve (that is, rationally connected) to the stated objective. The Attorney-General's response also clarifies the scope of search powers in specified areas and provides information as to how these search powers are rationally connected to the stated objective:

The Bill does not enable a situation where everyone in a specified area may be subject to search, questioning and seizure powers and without the ADF member having a reasonable suspicion. Proposed subsection 51D(1) provides that an ADF member may search a person if the member *believes on reasonable grounds* that there is in a specified area:

- a person who is likely to pose a threat to any person's life, health or safety or to public health or public safety (proposed subparagraphs 51D(1)(a)(i) and (ii))
- a person who has in their possession a thing likely to pose a threat to any person's life, health or safety, or to public health or public safety, or to cause serious damage to property (proposed subparagraphs 51D(1)(b)(i) and (ii))
- a person connected with the domestic violence or threat specified in the order (proposed paragraph 51D(1)(c))
- a thing likely to pose a threat to any person's life, health or safety, to public health or public safety, or to cause serious damage to property (proposed subparagraphs 51D(1)(d)(i), (ii) and (iii)), or

- a thing connected with the domestic violence or threat specified in the order (proposed paragraph 51D(1)(e)).

Only once that condition is met, can an ADF member then exercise the powers in proposed subsection 51D(2) subject to further restrictions. For example, an ADF member is only permitted to use the search and seizure powers in a specified area with the person's consent (proposed paragraphs 51D(2)(f), (g) and (h)). In addition, proposed subsections 51D(3) and (5) provide search powers in relation to means of transport on which the ADF believes on reasonable grounds there is a dangerous person or thing (that is, as set out in proposed subsection 51D(1)), or suspects (within the meaning of proposed subsection 51D(1)).

The Bill does enable an ADF member being utilised under a call out order to stop a person in the specified area under proposed paragraph 51D(2)(b), and direct them in accordance with proposed subparagraphs 51D(2)(c)(i), (ii), (iii) and (iv). However, this limitation is rationally connected to the legitimate objective of protecting the lives of others in the context of a domestic violence incident. The contemporary threat environment is likely to involve highly mobile attackers, as well as attacks and threats related to the use of explosive devices. To enable the ADF to adequately assist state and territory law enforcement, they must be equipped with search powers, which may only be used subject to certain conditions being met. They are not powers that can be exercised freely in a specified area. The requirements of consent or reasonable belief ensure that the use of the power is connected with the overarching objective of protecting others' lives, whether directly from a threat of domestic violence or through assisting state and territory law enforcement.

2.179 Based on this information provided, it appears that the search powers in specified areas are likely to be rationally connected to the stated objective.

2.180 This information usefully also assists in determining whether the search powers are proportionate. In relation to proportionality, the initial analysis expressed concern that individuals in a specified area may be subject to stop, search, questioning and seizure powers. However, the Attorney-General's response explains that it is a precondition to the exercise of the powers to search individuals within specified areas that the ADF member be satisfied that inside the specified area there is a person or thing connected to 'domestic violence' or likely to pose a threat. This is likely to be a relevant safeguard in relation to the operation of the measures.

2.181 As set out in the Attorney-General's response there are also additional safeguards in relation to such searches including that the person consents. This may act as a safeguard in relation to the operation of the powers. However, it is noted that there are questions as to whether, in practice, a person is able to refuse to consent to a search in circumstances where an ADF member is empowered to direct that the transport this person is using is not to leave unless consent is granted to

search of the person or the transport. As such, this issue of consent does not fully address whether the search powers are proportionate.

2.182 Further in relation to the proportionality of the measures, the Attorney-General's response states:

It is a fundamental principle of call out that the civilian law enforcement powers remain paramount, and that the ADF is used only to support state and territory law enforcement agencies as primary responders. The Bill expressly recognises that state and territory law enforcement and the ADF play different roles under a call out order. The Bill does not grant ADF members law enforcement powers *in addition to* Part IIIAAA powers. Rather the Part IIIAAA powers are carefully calibrated to enable ADF members to assist state and territory law enforcement; they do not enable ADF members to perform a law enforcement role. In particular, the Bill does not provide the ADF with power to generally seize things that may constitute evidence of an offence. As detailed above, the Bill will enable the ADF to seize things:

- that are likely to pose a threat to any person's life, health or safety, or to public health or public safety, or that are likely to cause serious damage to property, or
- that are connected with the domestic violence or threat specified in the call out order, and that are necessary, as a matter of urgency, to seize.

2.183 This information indicates that the search powers are circumscribed in several respects. The Attorney-General's response provides some further information as to the context of the proposed ADF stop, search and seizure powers:

Under proposed section 51Q, the Bill requires that whenever an ADF member seizes a thing, and believes on reasonable grounds that the thing has been used or otherwise involved in the commission of an offence, they must give the thing to a member of a police force at the earliest practicable time (proposed subparagraph 51Q(3)(c)(ii)).

In this regard, the limitation on the right to privacy is reasonable and proportionate, because the limitations on that right are no more than is necessary to enable the ADF to assist state and territory law enforcement in responding to a domestic violence incident.

2.184 This information is relevant to the proportionality of the limitation. The Attorney-General's response further states that the call out orders will be subject to parliamentary oversight:

Under proposed paragraphs 51ZA(1)(b) and (c), the Minister must present to Parliament a copy of any specified area declarations that relate to a call out order that has been made, and any report on the utilisation of the ADF that occurred under that order, including the number of premises searched in specified areas. This ensures that Parliament can adequately

scrutinise the operation of the powers exercised under Division 4, including the extent to which the right to privacy is engaged in the context of a particular call out order.

2.185 While this oversight mechanism is relevant to the proportionality of the measures, it is noted that this will not prevent interference with an individual's right to privacy before it occurs. In this respect, it is noted that while the powers are circumscribed in several ways, they are also quite extensive and significant. In this respect, every person within a specified area may be stopped and required to provide identification, transport can be stopped until permission is granted for a search and searches of property can be conducted as authorised by the chief of the defence force without a court warrant. That is, the powers once conferred do not have some of the safeguards that routinely exist in relation to searches or questioning by the police. This raises questions as to whether the powers are the least rights restrictive approach.

2.186 However, it is acknowledged that there may be circumstances of violence that warrant such powers on a temporary basis to protect the public. That is, the powers may be the least rights restrictive approach reasonably available in some circumstances. However, in this respect, a concern arises as to the threshold for the call out powers. While it is noted that 'domestic violence' is a precondition to the conferral of powers, 'domestic violence' is not defined. Accordingly, there is a risk that the powers to search locations, things, means of transport; and direct a person to answer a question or produce a document which is reasonably accessible to the person (including identification) may be enlivened or conferred in circumstances that are overly broad in respect of the legitimate objective of the measures.

### **Committee response**

**2.187 The committee thanks the Attorney-General for his response and has concluded its examination of this issue.**

**2.188 The preceding analysis indicates that there is a risk that the measure may be incompatible with the right to privacy in some circumstances. This is because of the potential breadth of the concept of 'domestic violence' as a precondition to the call out powers as well as the sufficiency of safeguards in relation to the right to privacy.**

**2.189 Should the bill pass, the committee recommends that the operation of the measures, if the call-out powers are utilised, be closely monitored to ensure that the exercise of the powers occurs in a manner that is compatible with the right to privacy.**

### ***Compatibility of the measure with the rights to freedom of expression, association and assembly: initial analysis***

2.190 The rights to freedom of expression, association and assembly, including the right to strike, are protected by the International Covenant on Civil and Political

Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR).<sup>44</sup>

2.191 The initial analysis stated that these rights are potentially engaged in a number of ways by the measure. First, given the breadth of the powers of the ADF operating under a call out order, there are questions as to whether the powers could be used to, for example, move on protesters from a particular area. Secondly, as noted above, subject to some other conditions, a precondition for the call out powers being invoked is that they are in response to 'domestic violence.' It is unclear what the breadth of this definition is and whether it may capture a broader range of conduct than is necessary to achieve the stated objective of the legislation. As noted above, while the statement of compatibility explains that 'domestic violence' is marked by great physical force, the term is not so defined in the bill. In this respect, the analysis noted that proposed subsections 33(4), 34(4), 35(4) and 36(4) provide that 'the Reserves must not be called out or utilised in connection with an industrial dispute'. While this is a relevant safeguard, by implication it appeared that the permanent ADF could be called out in relation to industrial disputes. Further, the initial analysis explained that proposed subsection 39(3) provides that the chief of the ADF must not stop or restrict any protest, dissent or assembly or industrial action, except if there is a reasonable likelihood of the death or serious injury of persons or serious damage to property. While this also acts as a potential safeguard, also by implication, it is unclear the extent to which call out orders could be made in relation to strikes, protests or acts of civil disobedience.

2.192 As these rights were not addressed in the statement of compatibility, no assessment was provided as to whether the measures are compatible with the rights to freedom of assembly, expression and association including the right to strike.

2.193 The full initial human rights analysis in relation to the rights to freedom of expression, association and assembly is set out at [Report 8 of 2018 \(21 August 2018\) pp. 14-15](#).<sup>45</sup>

2.194 The committee therefore sought the advice of the Attorney-General as to:

- whether the measure pursues a legitimate objective for the purposes of international human rights law (including how current laws are insufficient to address this objective);
- how the measure is effective to achieve (that is, rationally connected to) that objective; and

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44 ICCPR, articles 19, 21, 22; ICESCR, article 8.

45 Parliamentary Joint Committee on Human Rights, *Report 8 of 2018* (21 August 2018) pp. 14-15 at: [https://www.aph.gov.au/Parliamentary\\_Business/Committees/Joint/Human\\_Rights/Scrutiny\\_reports/2018/Report\\_8\\_of\\_2018](https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Scrutiny_reports/2018/Report_8_of_2018).

- whether the limitation is a reasonable and proportionate measure to achieve the stated objective, including:
  - the extent to which 'domestic violence' could capture political protests or industrial action;
  - whether 'domestic violence' could be defined in the bill and appropriately circumscribed;
  - whether there are adequate and effective safeguards in place.

### ***Attorney-General's response and analysis***

2.195 The Attorney-General's response provides his view as to the scope of the rights to freedom of expression, association and assembly and how the amendments engage these rights. The response states that the circumstances where these rights may be engaged by the measure are 'extremely limited' because:

The powers in the Bill are premised on the occurrence or threat of domestic violence, or a threat in the offshore area (proposed subsections 33(1), 34(1), 35(1) and 36(1)). The rare type of situation in which this could arise, and interact with those human rights, is if there were a protest, industrial action or act of civil disobedience *and* there were a significant violent incident. In that situation, the Bill gives the ADF the power to protect those persons involved in the peaceful protest or dispute.

2.196 It is noted that ADF actions to protect those engaged in protest, industrial action or civil disobedience may still involve a limitation on the rights of those individuals to freedom of expression, association and assembly. This is acknowledged in the Attorney-General's response, which provides the following example of how this could occur:

There may be circumstances where a terrorist attacks a peaceful protest, or conducts an attack in the vicinity of a peaceful protest. ADF members may be exercising powers in the Bill, such as establishing a cordon or directing people away from a location of violence, which could incidentally impact on people engaged in peaceful protest. However, this would only be in a manner which is reasonable and necessary to protect the lives and safety of people from actors, such as terrorists, who are carrying out or are likely to carry out acts of violence. It is important to note that state and territory police would be the primary first responders to such incidents.

2.197 In this respect, the Attorney-General's response further explains there are also additional safeguards in relation to the rights to freedom of expression, association and assembly contained in the bill. In particular, section 39(3) requires that the Chief of Defence Force must not stop or restrict any protest, dissent, assembly or industrial action, except if there is a reasonable likelihood of the death of, or serious injury to, persons, or serious damage to property. This is a relevant safeguard with respect to the impact of the measures on human rights.

2.198 As to the scope of the measures, the Attorney-General's response indicates that once the ADF is called out there are a range of safeguards at various levels which restrict the impact of the measures on freedom of expression, association or assembly:

...call out of the ADF cannot occur outside of [the] limited context in which there is an incident of domestic violence occurring or likely to occur, and the ADF can only be utilised for the specific purpose set out in the call out order. Therefore, the powers in the Bill have no operation in relation to peaceful industrial action, political protests or civil disobedience as these would not constitute incidents of 'domestic violence'...

2.199 It is a welcome clarification that peaceful protest, industrial action or civil disobedience is not understood by the Attorney-General to constitute 'domestic violence.' It is acknowledged that the precondition of 'domestic violence' occurring prior to a conferral of powers on the ADF may operate as safeguard in relation to the rights to freedom of expression, association and assembly. However, as noted above, the term 'domestic violence' is not defined in legislation. The Attorney-General's response explains why a definition of 'domestic violence' has not been included in legislation on the basis that 'domestic violence' 'could encompass a range of circumstances, which will be difficult to prescribe or predict in their entirety.'

2.200 It is acknowledged that a definition of 'domestic violence' would narrow the circumstances which constitute 'domestic violence' as a precondition to the use of the call out powers. However, from a human rights perspective, the concern is that the concept of 'domestic violence' left undefined may capture a broader range of conduct than that described by the Attorney-General. If this were the case the measures may be insufficiently circumscribed. It is noted that not only is 'domestic violence' not expressly positively defined (by reference to what it constitutes) but 'domestic violence' is also not negatively defined (by reference to conduct which is excluded). In this respect, it would be a stronger safeguard to expressly exclude industrial action, political protests or civil disobedience from the definition of 'domestic violence'.

2.201 Where the rights to freedom of expression, association and assembly are limited by the measures, the Attorney-General's response provides information as to whether these limitations are permissible. As to the objective of the measures, the Attorney-General's response provides reasoning as to why 'protecting the Australian populace from, acts of significant violence, including terrorism' is likely to constitute a legitimate objective for the purposes of international human rights law in the context of the measures. This is likely to constitute a legitimate objective for the purposes of international human rights law. The response also emphasises that the circumstances in which the measures will impact upon the right to freedom of expression, association or assembly would be 'extreme circumstances'. The response further reiterates that 'there can be no call out of the ADF in relation to peaceful

industrial action, political protests or civil disobedience as these would not fall within the definition of 'domestic violence'.

2.202 The Attorney-General's response provides a range of information as to how the measures are rationally connected to their stated objective. In relation to the operation of the powers and their effectiveness, the response states that 'call out of the ADF...should only occur to assist civilian authorities. State or territory police forces would be the first responders to incidents of domestic violence and they are well trained and equipped to respond to such situations.' As noted above, based on the information provided it appears that the measures are likely to be rationally connected to their stated objective.

2.203 In relation to proportionality, the Attorney-General's response explains that where rights are limited, the framework for the call out powers, discussed above, assists to ensure that the measures are proportionate. Additionally, the safeguards pointed to which minimise the impact on the rights to freedom of expression, association and assembly, also assist to ensure that any limitations on these rights are proportionate. In particular, the response points to proposed subsection 39(3)(b) which requires that, in utilising the ADF, the CDF must not stop or restrict any protest, dissent, assembly or industrial action as constituting a relevant safeguard. While this safeguard is subject to exceptions where there is a reasonable likelihood of either the death of, or serious injury to, persons, or serious damage to property, on balance, it appears that any limitation on the rights to freedom of expression, association and assembly may be proportionate in these circumstances. However, as set out above, the concern about the scope of 'domestic violence' which triggers the call out powers being overly broad means there is a risk that there are circumstances where the measure would nevertheless not be a proportionate limitation on human rights.

### **Committee response**

**2.204 The committee thanks the Attorney-General for his response and has concluded its examination of this issue.**

**2.205 Noting the safeguards in place with respect to the rights to freedom of expression, association and assembly, the measure may be capable of operating in circumstances which are compatible with these rights. However, due the potential breadth of the concept of 'domestic violence' as a precondition to the call out powers, there is a risk that there are circumstances where exercise of these powers may be incompatible with these human rights.**

**2.206 Should the bill pass, the committee recommends that the operation of the measures, if the call-out powers are utilised, be closely monitored to ensure that the exercise of the powers occurs in a manner that is compatible with the rights to freedom of expression, association and assembly.**

***Compatibility of the measure with the right to an effective remedy: initial analysis***

2.207 The right to an effective remedy requires states parties to ensure access to an effective remedy for violations of human rights. This may take a variety of forms, such as prosecutions of suspected perpetrators or compensation to victims of abuse. Proposed section 51Z engages this right as it provides a defence of superior orders for criminal acts done by ADF members in certain circumstances.<sup>46</sup> If the conduct in question also constitutes a breach of human rights, this could potentially raise concerns about the availability of an effective remedy for victims in these circumstances. However, the right to an effective remedy was not addressed in the statement of compatibility. The committee therefore sought the advice of the Attorney-General as to the compatibility of the measure with the right to an effective remedy.

***Attorney-General's response and analysis***

2.208 The Attorney-General's response provides the following information in relation to the right to an effective remedy:

Nothing in the Bill prevents a person whose rights have been unreasonably or arbitrarily interfered with during a call out order from taking action (including judicial review of a decision) against the Commonwealth and seeking appropriate reparations, such as compensation.

In this light, the right to an effective remedy may be engaged by the operation of proposed subsection 51Z(2). This provision provides an ADF member a defence in criminal proceedings against them, in circumstances where they have engaged in conduct that constitutes criminal behaviour during a call out order but the narrow criteria for the defence in subsection 51Z(2) are met.

Under proposed subsection 51Z(1), the fact that an ADF member engaged in a criminal act during a call out under the orders of a superior will not automatically relieve the member of criminal responsibility. Subsection 51Z(2) provides a narrowly circumscribed defence for an ADF member, but only if the ADF member can demonstrate all of the following elements:

- the criminal act was done by the member under an order of a superior (proposed paragraph 51Z(2)(a))
- the member was under a legal obligation to obey the order (proposed paragraph 51Z(2)(b))
- the order was not manifestly unlawful (proposed paragraph 51Z(2)(c))

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46 See, also proposed subsection 51S(2).

- the member had no reason to believe that circumstances had changed in a material respect since the order was given (proposed paragraph 51Z(2)(d))
- the member had no reason to believe that the order was based on a mistake as to a material fact (proposed paragraph 51Z(2)(e)), and
- the action taken was reasonable and necessary to give effect to the order (proposed paragraph 51Z(2)(f)).

The defence of superior orders is necessary to achieve the legitimate objective of enabling ADF members to effectively respond to incidents of domestic violence and to protect the Australian public. The defence is only available in the context of a call out order to respond to an incident of domestic violence.

When viewed in the context of a call out order, the defence is rationally connected to the above objective. ADF members can only respond to domestic violence and protect the lives of others in the current threat environment if they have a level of operational certainty. It is a reasonable measure, given the nature of contemporary acts of violence, which require timely action to rapidly respond to moving or unknown threats.

This defence is also proportionate to its aims. It is a tightly defined defence, which is onerous to prove and therefore does not enable a person to automatically escape criminal liability purely on the basis of superior orders. It only operates in the extreme circumstances of a call out order, where the Governor-General has authorised the ADF to respond to domestic violence that is actually occurring or likely to occur.

The defence does not affect the criminal liability of a superior for giving the relevant order. Further, even if the ADF member in question is fully within the defence, it is not intended to otherwise affect the liability of the Commonwealth.

While the defence of superior orders engages the right to an effective remedy, it is compatible with that right. To the extent that proposed section 51Z limits the right, it does so in a way that is necessary, reasonable and proportionate.

2.209 On the basis of the information provided about the scope of the defence and noting the Commonwealth will retain liability, the measure is likely to be compatible with the right to an effective remedy.

### **Committee response**

**2.210 The committee thanks the Attorney-General for his response and has concluded its examination of this issue.**

**2.211 Based on the information provided, the measure is likely to be compatible with the right to an effective remedy.**

**Mr Ian Goodenough MP**

**Chair**

## **Appendix 1**

### **Deferred legislation**

3.1 The committee has deferred its consideration of the following legislation for the reporting period:

- Discrimination Free Schools Bill 2018
- National Health (Privacy) Rules 2018 [F2018L01427]
- Norfolk Island Legislation Amendment (Protecting Vulnerable People) Ordinance 2018 [F2018L01377]