Parliamentary Joint Committee on Human Rights

Human rights scrutiny report

Report 4 of 2018

8 May 2018

ISSN 2204-6356 (Print)

ISSN 2204-6364 (Online)

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

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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.[2] **Appendix 2** contains brief descriptions of the rights most commonly arising in legislation examined by the committee.

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 **rationally 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.

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 (see **Appendix 4**).

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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).

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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 26 and 28 March 2018;[1]
- legislative instruments registered on the Federal Register of Legislation between 15 February and 14 March 2018;[2] and
- bills and legislative instruments previously deferred.

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

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

Instruments not raising human rights concerns

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

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

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

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

3 These are: Consular Privileges and Immunities (Indirect Tax Concession Scheme) Amendment (United Arab Emirates) Determination 2018 [F2018L00074]; Family Law Amendment (Parenting Management Hearings) Bill 2017; Marine Safety (Domestic Commercial Vessel) Levy (Consequential Amendments) Bill 2018; and Narcotic Drugs Amendment (Cannabis) Regulations 2018 [F2018L00106].

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.

Australian Institute of Health and Welfare Amendment Bill 2018

Purpose	Amends the *Australian Institute of Health and Welfare Act 1987* to replace the representative-based structure of the Australian Institute of Health and Welfare; and removes the requirement for the Institute to seek agreement from the Australian Bureau of Statistics for the collection of health and welfare-related information and statistics
Portfolio	Health
Introduced	House of Representatives, 28 March 2018
Rights	Privacy (see **Appendix 2**)
Status	Seeking additional information

Collection of health and welfare-related information and statistics

1.7 Items 13 and 14 of the bill remove the requirement in the *Australian Institute of Health and Welfare Act 1987* (AIHW Act) that the Australian Institute of Health and Welfare (the Institute) seeks the agreement of the Australian Bureau of Statistics (ABS) to collect health and welfare-related information and statistics. Instead, the bill would allow the Institute to collect health-related and welfare-related information and statistics, in consultation with the ABS if necessary, whether by the Institute itself or in association with other bodies or persons.

Compatibility of the measure with the right to privacy

1.8 Article 17 of the International Covenant on Civil and Political Rights (ICCPR) prohibits arbitrary or unlawful interferences with an individual's privacy. The right to privacy includes respect for informational privacy, including the right to respect for private and confidential information, particularly the collection, storing, use and sharing of such information.

1.9 It is unclear from the statement of compatibility whether the collection of health-related and welfare-related information and statistics would include personal information. The definition of 'health-related information and statistics' and 'welfare-related information and statistics' are defined in the AIHW Act to mean 'information and statistics collected and produced from' data relevant to health or health services and from data relevant to the provision of welfare services respectively. This appears to be broad enough to include personal information. The privacy policy of the

Australian Institute of Health and Welfare also indicates that personal information may be collected as part of its statistics and information collecting mandate.[1] Therefore, the collection (and subsequent use) of health-related information and welfare-related information by the Institute or the Institute in association with other bodies or persons would appear to engage and limit the right to privacy.

1.10 Limitations on the right to privacy will be permissible where they are prescribed by law and are not arbitrary, they pursue a legitimate objective, are rationally connected to (that is, effective to achieve) that objective and are a proportionate means of achieving that objective. In order to be proportionate, the limitation needs to be sufficiently circumscribed to ensure that it is only as extensive as is strictly necessary to achieve its objective. This includes having adequate and effective safeguards to ensure the limitation is no more extensive than is strictly necessary to achieve its objective. However, the statement of compatibility does not acknowledge the limitation on the right to privacy and merely states that the bill 'does not engage any of the applicable rights or freedoms'. Accordingly, no assessment is provided as to whether the limitation on the right to privacy is permissible. The statement of compatibility therefore does not meet the standards outlined in the committee's *Guidance Note 1*.

Committee comment

1.11 The preceding analysis raises questions about the compatibility of the measure with the right to privacy.

1.12 The statement of compatibility has not identified or addressed the right to privacy. The committee therefore seeks the advice of the minister as to:

- **the extent to which 'health-related information and statistics' and 'welfare-related information and statistics' includes personal information;**
- **whether the measure is aimed at achieving a legitimate objective for the purposes of human rights law;**
- **how the measure is effective to achieve (that is, rationally connected to) that objective; and**
- **whether the limitation is proportionate to the stated objective (including the extent of interference with the right to privacy, whether there are adequate and effective safeguards, who can collect information and who can access information).**

1 See Australian Institute of Health and Welfare, *Privacy Policy* (2018) https://www.aihw.gov.au/privacy-policy.

Home Affairs Legislation Amendment (Miscellaneous Measures) Bill 2018

Purpose	Makes a range of amendments including to the *Migration Act 1958* (the Migration Act) to provide that when an unlawful non-citizen is in the process of being removed to another country under section 198 and the removal is aborted then the person will be taken to have been continuously in the migration zone for the purposes of the Migration Act
Portfolio	Home Affairs
Introduced	House of Representatives, 28 March 2018
Rights	Liberty; non-refoulement; effective remedy (see **Appendix 2**)
Status	Seeking additional information

Expansion of visa bar

1.13 Currently, section 48A of the Migration Act applies to bar a person who is a non-citizen from applying for particular visas where they have been removed or deported from Australia under section 198 to another country but have been refused entry by that country and so are returned to Australia.

1.14 The proposed amendments to sections 42(2A) and 48A in the bill would expand the circumstances in which this visa bar applies so that it will apply where:

- an attempt to remove the person was made under section 198 but not completed; or
- the person is removed under section 198 but does not enter the destination country.

Compatibility of the measure with the right to liberty

1.15 The right to liberty includes the right not to be unlawfully or arbitrarily detained.[1] The effect of this measure is that a broader class of person will be barred from applying for visas and will therefore be subject to mandatory immigration detention prior to removal or deportation.[2] The detention of a non-citizen pending deportation will generally not constitute arbitrary detention, as it is permissible to detain a person for a reasonable period of time in these circumstances. However, detention may become arbitrary in the context of mandatory detention and the

1 UN Human Rights Committee, *General Comment 35: Liberty and security of person* (2014), [18].

2 See Migration Act sections 189, 198.

expanded visa bar, where individual circumstances are not taken into account, and a person may be subject to a significant length of detention.[3] There appears to be a risk in relation to the current measure that if a person is barred from applying, for example, for a new protection visa, then they could be subject to immigration detention for an extended period given that an attempt to deport the person has already failed.

1.16 The statement of compatibility acknowledges that the measure engages the right to be free from arbitrary detention but argues that the detention is neither unlawful nor arbitrary as it is for 'a legitimate purpose'.[4] In other words, the limitation on the right to liberty is permissible as it supports a legitimate objective, is rationally connected to that objective, and is a proportionate way to achieve that objective. The statement of compatibility explains the context of the measure and states that:

> While the proposed amendments will limit an unlawful non-citizen's opportunity to apply for a visa (through continuous application of statutory bars in ss48 and 48A), their re-detention will continue to be for the legitimate purpose of completing their removal from Australia under section 198 of the Migration Act as soon as it becomes reasonably practicable to do so. The removal of unlawful non-citizens under section 198 is mandated by the law and is an integral part of maintaining the integrity of Australia's migration system.[5]

1.17 In relation to circumstances where a person may be subject to prolonged immigration detention, the statement of compatibility points to departmental policies and procedures as a relevant safeguard:

> Where removal cannot be accomplished within reasonable timeframes, in line with established detention policy and procedures, the Department will review the detention decision and consider less restrictive forms of detention such as residence determination or grant of a Bridging visa E, as appropriate in circumstances of the case. [6]

1.18 It is significant that the department has policies and procedures in place to review detention and grant visas in appropriate circumstances so as to minimise the risk of arbitrary detention. However, it is noted that discretionary or administrative

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3 See *F.K.A.G v. Australia* (2094/2011), UN Human Rights Committee, 20 August 2013, [9.5]; *M.M.M et al v Australia* (2136/2012), UN Human Rights Committee, 25 July 2013, [10.4] ['the authors are kept in detention in circumstances where they are not informed of the specific risk attributed to each of them… They are also deprived of legal safeguards allowing them to challenge their indefinite detention'].

4 Statement of compatibility (SOC), p. 26.

5 SOC, p. 26.

6 SOC, p. 26.

safeguards alone may be insufficient for the purpose of international human rights law. This is because administrative and discretionary safeguards are less stringent than the protection of statutory processes and can be amended or removed at any time. Indeed, as a matter of Australian law, there are no safeguards to protect a person from being subject to prolonged or even indefinite detention due to an inability to deport the person. In this respect, the United Nations Human Rights Committee (UNHRC) has made clear that '[t]he inability of a state to carry out the expulsion of an individual because of statelessness or other obstacles does not justify indefinite detention'.[7]

1.19 The risk of arbitrariness may be exacerbated in circumstances where there may be limited effective means to challenge such detention. There is a consequential risk that the immigration detention is not reasonable, necessary and proportionate in the individual case as required in order to be a permissible limitation on the right to liberty.

1.20 As noted above, the detention of a non-citizen for a reasonable period of time pending deportation is likely to pursue a legitimate objective and be rationally connected to this objective. However, beyond stating that the expansion of the visa bar will 'correct the unintended operation of the law that leads to unlawful non-citizens…being treated differently'[8] it is unclear from the information provided in the statement of compatibility why the visa bar is necessary. In this respect, it is noted that current sections 48 and 48A themselves raise concerns in relation to human rights such that issues of consistency do not address or overcome such underlying concerns.[9] That is, given the context of mandatory immigration detention, there is a question as to whether the application of the visa bar is the least rights restrictive approach.

Committee comment

1.21 The committee requests the advice of the minister as to the compatibility of the measure with the right to liberty, including:

- **why it is necessary to apply a visa bar to those non-citizens which the government has attempted to remove from Australia under section 198 of the Migration Act;**
- **whether there are less rights restrictive approaches than the application of the visa bar; and**

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7 Human Rights Committee, *General Comment 35: Liberty and security of person* (2014), [18].

8 SOC, p. 23.

9 See, Parliamentary Joint Committee on Human Rights, *Seventh Report of the 44th Parliament* p. 30 (18 June 2014); *Tenth Report of the 44th Parliament* (26 August 2014) p. 78; *Fourteenth Report of the 44th Parliament* (28 October 2014) p. 114.

- **whether there are adequate and effective safeguards in place to ensure that a person is not subject to arbitrary detention (including the availability of periodic review of whether detention is reasonable, necessary and proportionate in the individual case, and the circumstances in which a person may apply for particular classes of visas or the visa bar may be lifted).**

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

1.22 Australia has non-refoulement obligations under the Refugee Convention for refugees, and under both the International Covenant on Civil and Political Rights (ICCPR) and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) for people who are found not to be refugees.[10] 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.[11] Non-refoulement obligations are absolute and may not be subject to any limitations.

1.23 Independent, effective and impartial review by a court or tribunal of decisions to deport or remove a person, including merits review in the Australian context, is integral to complying with non-refoulement obligations.[12]

1.24 The effect of expanding the visa bar may be that a person is unable to apply for a new protection visa and accordingly the person may be subject to removal from Australia.[13] The statement of compatibility acknowledges that the obligation of non-refoulement is absolute and may be engaged by the measure. However, it argues that the measure will not breach Australia's non-refoulement obligations as:

> …the obligations - if applicable - will have been assessed prior to the non-citizen's removal from Australia. A pre-removal clearance check is undertaken for all involuntary removals of unlawful non-citizens to ensure

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

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

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

13 Migration Act section 198.

> the proposed removal would not breach Australia's non-refoulement obligations. Where this check identifies outstanding protection claims, removal will not proceed until these claims have been fully assessed. An individual will not be removed from Australia in breach of non-refoulement obligations.[14]

1.25 However, as stated in the committee's previous human rights assessments, administrative and discretionary safeguards are less stringent than the protection of statutory processes, and are insufficient in and of themselves to satisfy the standards of 'independent, effective and impartial' review required to comply with Australia's non-refoulement obligations.

1.26 Under section 198 of the Migration Act an immigration officer is required to remove an unlawful non-citizen in a number of circumstances as soon as reasonably practicable. Section 197C of the Migration Act also provides that, for the purposes of exercising removal powers under section 198, it is irrelevant whether Australia has non-refoulement obligations in respect of an unlawful non-citizen. There is no statutory protection ensuring that an unlawful non-citizen to whom Australia owes protection obligations will not be removed from Australia, nor is there any statutory provision granting access to independent, effective and impartial review of the decision as to whether removal is consistent with Australia's non-refoulement obligations.[15] Accordingly, there may be a risk that a person who is unable to apply for a new protection visa may be deported notwithstanding that Australia owes them protection obligations. In this respect, it is also unclear from the statement of compatibility as to whether there are circumstances in which the visa bar will be lifted, including where new information has come to light which supports the person's claim for protection.

Committee comment

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

1.28 The expansion of the visa bar occurs in a context where there is only a discretionary barrier to refoulement and no provision of access to independent, impartial and effective review of whether a removal is consistent with Australia's non-refoulement obligations.

1.29 As such, the visa bar is likely to be incompatible with Australia's obligations under the ICCPR and the Convention Against Torture, which require independent, effective and impartial review of non-refoulement decisions.

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14 SOC, p. 27.

15 See for example, Parliamentary Joint Committee on Human Rights, *Fourteenth Report of the 44th Parliament* (28 October 2014) pp. 77-78.

1.30 The committee seeks the further advice of the minister as to the compatibility of the expansion of the visa bar with the obligation of non-refoulement (including whether there are mechanisms in place to lift the visa bar where new information has come to light which supports a person's claim for protection).

Obligation to consider the best interests of the child

1.31 Under the Convention on the Rights of the Child (CRC), state parties are required to ensure that, in all actions concerning children, the best interests of the child are a primary consideration.[16] The statement of compatibility acknowledges that the expansion of the visa bar engages the rights of children as it would also apply to them.[17] The statement of compatibility, however, argues that the measure is compatible with the obligation to consider the best interests of the child as:

> Under policy, all actions taken by the Department which involve children involve an assessment of the child's best interests as a primary consideration. However, although the best interests of the child is a primary consideration, such considerations may be outweighed by other factors, such as the need to maintain the integrity of Australia's migration system and the fact that those subject to removal have no entitlement to remain lawfully in Australia. Consequently, it may not be in a child's best interests to be removed from Australia, but in certain circumstances, this will need to be balanced against other primary considerations.
>
> …Where the best interest of the child overwhelmingly outweighs all other relevant considerations in relation to a removal, the case may be referred to the Minister for consideration to exercise his non-compellable powers to grant a visa.[18]

1.32 However, while the department and the minister may consider the best interests of the child as a matter of policy and discretion, the proposed expanded visa bar will still generally apply to children. This may be the case regardless of whether department or the minister has, in fact, substantively considered the best interests of the child in the context of the operation of the visa bar. Indeed, the statement of compatibility states that the best interests of the child is to be 'balanced against other primary considerations'. Further, it appears from the information provided that the matter may only be referred to the minister for intervention where the best interests of the child 'overwhelmingly outweighs' all other considerations. If this were the case, it would raise particular concerns. It is noted in this respect that the UN Committee on the Rights of the Child has explained that:

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16 CRC article 3(1).

17 SOC, p. 28.

18 SOC, p. 28.

> …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…'[19]

1.33 It follows that it would be inconsistent with Australia's obligations to treat other considerations as of equal weight to the obligation to consider the best interests of the child. In this context, as a matter of international human rights law, it does not appear that the importance of 'maintain[ing] the integrity of Australia's migration system' should be given equal or greater weight than the obligation to consider the best interests of the child. Other than current departmental policies and the potential exercise of discretion by the minister (which may not be sufficient for human rights purposes) the statement of compatibility does not provide any further information as to any procedural safeguards to ensure that the best interests of the child are given due consideration.

1.34 As such, the expansion of the visa bar, including its impact on the right to liberty and non-refoulement obligations, engages and may limit the obligation to consider the best interests of the child. Limitations on human rights may be permissible where they pursue a legitimate objective, are rationally connected to that objective and are a proportionate means of achieving that objective. The statement of compatibility does not expressly address these criteria in relation to this obligation. Accordingly, without further information it is not possible to conclude that the measure is compatible with the obligation to consider the best interests of the child.

Committee comment

1.35 The committee seeks the advice of the minister as to:

- **the relative weight which will be given to the obligation to consider the best interests of the child in departmental policies and procedures in the context of the proposed measure;**
- **what is the threshold for intervention on the basis that the measure would not be in the child's best interests;**
- **whether there are any procedural safeguards in place to ensure that the obligation to consider the best interests of the child is given due consideration;**
- **whether the measure is aimed at achieving a legitimate objective for the purposes of human rights law;**
- **how the measure is effective to achieve (that is, rationally connected to) that objective; and**

19 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).

- **whether the limitation is a reasonable and proportionate measure to achieve the stated objective.**

National Consumer Credit Protection Amendment (Mandatory Comprehensive Credit Reporting) Bill 2018

Purpose	Amends the *National Consumer Credit Protection Act 2009* to introduce a mandatory comprehensive credit reporting regime; expands ASIC's powers to monitor compliance with the mandatory regime; imposes additional obligations as to where data held by a credit reporting body must be stored
Portfolio	Treasury
Introduced	House of Representatives, 28 March 2018
Rights	Privacy (see **Appendix 2**)
Status	Seeking additional information

Background

1.36 The *Privacy Amendment (Enhancing Privacy Protection) Act 2012* (the 2012 Act) amended the *Privacy Act 1988* (Privacy Act) to establish a framework under which credit providers and credit reporting bodies could collect, use and disclose comprehensive credit information. This framework came into effect in March 2014.[1] The 2012 Act was introduced to parliament shortly prior to the establishment of the committee, which means it was not subject to a human rights compatibility assessment in accordance with the terms of the *Human Rights (Parliamentary Scrutiny) Act 2011.*[2]

1.37 Prior to the framework established by the 2012 Act, the credit reporting system limited the information that could be collected, used and disclosed by credit providers and credit reporting bodies to 'negative information' about an individual. 'Negative information' includes identification information (such as a person's name and address), default history and any bankruptcy information about that person.[3]

1.38 The 2012 Act expanded the kind of information that was permitted in the credit reporting system. The expanded information (referred to as 'comprehensive credit information') that was able to be collected, used and disclosed included

1 See the commencement information for Schedule 2 in section 2 of the *Privacy Amendment (Enhancing Privacy Protection) Act 2012*.

2 The 2012 Act was introduced to parliament on 23 May 2012, whereas the committee's *First Report of 2012* considered bills introduced between 18 June-29 June 2012: see Parliamentary Joint Committee on Human Rights, *First Report of 2012* (August 2012) p.3.

3 Explanatory Memorandum to the National Consumer Credit Protection Amendment (Mandatory Comprehensive Credit Reporting) Bill 2018, [1.26].

repayment performance history of a person, the type of credit a person has, and the maximum amount of credit available to a person.

1.39 The 2012 Act permitted credit providers to disclose this information to credit reporting bodies on a voluntary basis.

Establishment of a mandatory comprehensive credit reporting scheme

1.40 The current bill seeks to amend the Privacy Act and the *National Consumer Credit Protection Act 2009* (the NCCP Act) to make it mandatory for large Authorised Deposit-taking Institutions (ADI) that are credit providers[4] to supply comprehensive credit information to eligible credit reporting bodies about all of the open credit accounts held with the licensee or with other members of the licensee's corporate group. The licensees must also supply updated information to credit reporting bodies on an ongoing basis.

1.41 The bill further provides that the regulations may set out the circumstances when a credit reporting body must share with credit providers credit information received under the mandatory comprehensive credit regime.[5]

Compatibility of the measure with the right to privacy

1.42 Article 17 of the International Covenant on Civil and Political Rights (ICCPR) prohibits arbitrary or unlawful interferences with an individual's privacy. The right to privacy includes respect for informational privacy, including the right to respect for private and confidential information, particularly the collection, storing, use and sharing of such information.

1.43 The introduction of a mandatory comprehensive credit reporting scheme engages the right to privacy by requiring large ADIs to supply comprehensive credit information to certain credit reporting bodies. This credit information includes significant personal and financial information about individual bank customers, and thus the measure limits the right to privacy. The statement of compatibility acknowledges that the right to privacy is engaged by the bill.[6]

1.44 The statement of compatibility emphasises that the mandatory comprehensive credit regime does not, of itself, allow for the collection, use and disclosure of an individual's credit information. This is because the framework for such collection, use and disclosure was established by the 2012 Act. However, it is noted that, by making the scheme mandatory for large ADIs instead of the current

4 See the definition of 'eligible licensee' in proposed section 133CN. An ADI is considered large when its total resident assets are greater than $100 billion: see the EM to the bill, [1.14]. Other credit providers will be subject to the regime if they are prescribed in regulations: see proposed section 133CN(1)(a).

5 See Division 3 of Schedule 1 of the bill.

6 Statement of Compatibility (SOC), [2.12].

voluntary scheme, in practical terms the bill expands the operation of the framework established by the 2012 Act. It is therefore necessary to assess the human rights compatibility of the mandatory comprehensive credit regime, which also requires considering the underlying human rights compatibility of the 2012 Act.

1.45 Limitations on the right to privacy will be permissible where they are prescribed by law and are not arbitrary, they pursue a legitimate objective, are rationally connected to (that is, effective to achieve) that objective and are a proportionate means of achieving that objective.

1.46 The statement of compatibility identifies the objective of the bill by reference to the objective of the 2012 Act, namely, 'improving the management of personal and credit reporting information'.[7] The statement of compatibility further states:

> A more comprehensive credit reporting regime allows credit providers to better establish a consumer's credit worthiness and lead to a more competitive and efficient credit market. A more comprehensive regime benefits consumers by enabling more reliable individuals to seek more competitive rates when purchasing credit and enabling those with a historically poor credit rating to demonstrate their credit worthiness through future consistency and reliability.[8]

1.47 As set out in the committee's *Guidance Note 1*, in order to be capable of justifying a proposed limitation on human rights, a legitimate objective must address a pressing or substantial concern, and not simply seek an outcome regarded as desirable or convenient. While the objectives identified in the statement of compatibility may be capable of being legitimate objectives for the purposes of international human rights law, further information is required to determine whether (and if so, how) this specific measure of mandatory credit reporting addresses a pressing or substantial concern. It is noted in this respect that a legitimate objective must be supported by a reasoned and evidence-based explanation. Further information as to the legitimate objective of the measure would also assist in determining whether the measure is rationally connected to this objective.

1.48 As to the proportionality of the measure, the statement of compatibility notes that the bill does not alter the existing protections set out in the Privacy Act governing the use and disclosure of credit information, and that 'the requirement to supply credit information only applies to the extent that the disclosure is permitted under the Privacy Act'.[9] It is in this respect that the amendments to the Privacy Act

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7 See SOC, [2.20] citing the explanatory memorandum to the Privacy Amendment (Enhancing Privacy Protection) Bill 2012.

8 SOC, [2.15].

9 SOC, [2.21].

introduced by the 2012 Act are particularly relevant. The statement of compatibility therefore sets out the safeguards that were in place to protect individuals' credit information in the 2012 Act, namely:

> Greater responsibility was placed on credit reporting bodies and credit providers to assist individuals to access, correct and resolve complaints about their personal information. Those amendments included specific rules to deal with pre-screening of credit offers and the freezing of access to an individual's personal information in cases of suspected fraud or identity theft.
>
> 2.18 The amendments [in the 2012 Act] also restricted access to repayment history information to those credit providers who hold an Australian Credit Licence and are therefore subject to responsible lending obligations.
>
> 2.19 Any effect on privacy rights was considered proportionate and limited by the introduction of specific safeguards, including:
>
> - only de-identified information can be used for the purpose of research, and the research must be reasonably connected to the credit reporting system, and
> - the use of credit reporting information for the purposes of pre-screening is expressly limited to the purpose of excluding adverse credit risks from marketing lists.[10]

1.49 These safeguards are important in determining the proportionality of the measure. However, further information in the statement of compatibility would have been of assistance to determine the sufficiency of the safeguards in light of the amendments proposed in the bill, in particular: details regarding information security between credit providers and credit reporting bodies, details of how long credit information is retained, and further detail as to access to review for persons who have complaints relating to the use of their personal information.

1.50 Further, in order to be a proportionate limitation on the right to privacy, the limitation needs to be sufficiently circumscribed to ensure that it is only as extensive as is strictly necessary to achieve its objective. The information that may be disclosed through comprehensive credit reporting is potentially extensive, including a person's repayment history information and credit limits. This information would appear to include positive repayment performance history rather than merely any history of default.[11] It is not clear from the statement of compatibility whether such extensive information is necessary for determining a consumer's credit worthiness. Given the effect of the measure would be to make the disclosure of such information mandatory for ADIs (such that the limitation on privacy would affect a large number

10 SOC, [2.17]-[2.19]

11 See the definition of 'repayment history information' in section 6V of the *Privacy Act 1988*.

of individuals), this raises questions as to whether the limitations on the right to privacy are sufficiently circumscribed.

1.51 It is also noted that the power to set out by regulation the circumstances when a credit reporting body must share credit information also appears to be very broad. Without adequate safeguards, it is possible that leaving significant matters to be determined by regulation may result in the regulation-making power being exercised in such a way as to be incompatible with the right to privacy. In this respect, the statement of compatibility states that 'these circumstances will be limited and not extend beyond those circumstances in the Privacy Act'.[12] However, it is not clear whether the Privacy Act would constitute an effective safeguard for the purposes of the right to privacy in the context of this particular measure. For example, while the Privacy Act contains a range of general safeguards it is not a complete answer to this issue because the Privacy Act and the Australian Privacy Principles (APPs) contain a number of exceptions to the prohibition on disclosure of personal information. This includes permitting use or disclosure where the use or disclosure is authorised under an Australian law, which may be broader than the scope permitted under international human rights law.[13] Therefore, further information is required as to the operation of the specific safeguards in the Privacy Act so as to determine whether that Act provides effective safeguards of the right to privacy in these circumstances.

Committee comment

1.52 The preceding analysis raises questions as to the compatibility of the mandatory comprehensive credit reporting scheme with the right to privacy.

1.53 The committee therefore seeks further information from the minister as to:

- **whether there is reasoning or evidence that establishes that the stated objective addresses a pressing or substantial concern or whether the proposed changes are otherwise aimed at achieving a legitimate objective;**
- **how the measure is effective to achieve (that is, rationally connected to) that objective; and**
- **whether the limitation is a proportionate limitation on the right to privacy (including whether the requirement to provide comprehensive credit information is sufficiently circumscribed, and information as to the adequacy and effectiveness of safeguards).**

12 SOC, [2.22].

13 APP 9; APP 6.2(b).

Offshore Petroleum and Greenhouse Gas Storage Amendment (Miscellaneous Amendments) Bill 2018

Purpose	To transfer oversight for offshore greenhouse gas storage environmental management from the minister to the National Offshore Petroleum Safety and Environmental Management Authority (NOPSEMA)
Portfolio	Industry, Innovation and Science
Introduced	House of Representatives, 28 March 2018
Rights	Presumption of innocence (see **Appendix 2**)
Status	Seeking additional information

Reverse legal burden offences

1.54 The bill contains a number of offence provisions which contain offence-specific defences:

- it is a defence to the offence of breaching a direction given by NOPSEMA, if the defendant proves that they took all reasonable steps to comply with the direction;[1] and
- it is a defence to the offence of refusing or failing to do anything required by a 'well integrity law' if the defendant proves that it was not practicable to do that thing because of an emergency prevailing at the relevant time.[2]

1.55 In respect of each of these defences, the defendant bears a *legal* burden of proof.[3] This means that the defendant rather than the prosecution must prove the existence of the matters relevant to the defence on the balance of probabilities.[4]

1 See, proposed sections 579A, 591B, 594A; and Item 40 of the bill, proposed amendment to section 584; Explanatory Memorandum (EM) p. 11.

2 See, proposed Schedule 2B, section 23; EM pp. 12-13.

3 Under section 13.5 of the Criminal Code a legal burden of proof on the defendant must be discharged on the balance of probabilities.

4 See, *Criminal Code Act 1995* (Criminal Code) schedule 1, subsection 13.1(3)-(5). By contrast, evidential burden, in relation to a matter, means the burden of adducing or pointing to evidence that suggests a reasonable possibility that the matter exists or does not exist: Criminal Code section 13.3(6).

Compatibility of the measures with the right to be presumed innocent

1.56 The right to be presumed innocent until proven guilty according to law usually requires that the prosecution prove each element of the offence (including fault elements and physical elements).[5]

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

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

1.59 The statement of compatibility acknowledges that the offence-specific defences (which require the defendant to carry a reverse legal burden) engage and limit the right to be presumed innocent, but argues that this reverse burden is permissible. The statement of compatibility explains that in each case 'the burden is reversed because the matter is likely to be exclusively within the knowledge of the defendant, particularly given the remote nature of offshore operations'.[6] However, it is unclear from the information provided why the offence provision reverses the legal rather than merely the evidential burden of proof. This raises concerns that the reverse burden offences may not be the least rights restrictive approach to achieving the objective of the proposed legislative regime. Further, the statement of compatibility does not expressly explain how the reverse burden offences pursue a legitimate objective or are rationally connected to this objective.

Committee comment

1.60 The committee requests the advice of the minister as to:

- **whether the measure is aimed at achieving a legitimate objective for the purposes of human rights law;**

5 See, Article 14(2) of the International Covenant on Civil and Political Rights (ICCPR).

6 EM, Statement of Compatibility (SOC) pp. 11, 13; EM p. 33.

- **how the measure is effective to achieve (that is, rationally connected to) that objective;**
- **whether the limitation is a reasonable and proportionate measure to achieve the stated objective (including whether it is the least rights restrictive approach and whether reversing the legal burden of proof rather than the evidential burden of proof is necessary); and**
- **whether consideration could be given to amending the measures to provide for a reverse evidential burden rather than a reverse legal burden.**

Road Vehicle Standards Bill 2018

Purpose	Seeks to provide a new regulatory framework for the importation and provision of road vehicles into Australia
Portfolio	Infrastructure, Regional Development and Cities
Introduced	7 February 2018, House of Representatives
Rights	Privacy, not to incriminate oneself, presumption of innocence (see **Appendix 2**)
Status	Seeking additional information

Reverse burden offences

1.61 A number of provisions in the bill seek to introduce offences which include offence-specific defences.[1]

Compatibility of the measures with the right to be presumed innocent

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

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

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

1.65 Proposed subsections 16(3), 24(3)-(4), 32(2) and 43(2) provide offence-specific defences or exceptions to particular proposed offences in the bill. In doing

1 See proposed sections 16, 24, 32, 43.

so, the provisions reverse the evidential burden of proof as subsection 13.3(3) of the *Criminal Code* provides that a defendant who wishes to rely on any exception, exemption, excuse, qualification or justification bears an evidential burden in relation to that matter.

1.66 The statement of compatibility does not identify that the reverse burden offences in the bill engage and limit the presumption of innocence. However, the explanatory memorandum includes some information about the reverse evidential burdens including their regulatory context.[2] In this respect, the justification for reversing the burden of proof is, generally, that the relevant evidence will be peculiarly within the knowledge of the defendant[3] and that the defendant would be in a 'significantly better position than the Commonwealth'[4] to be able to present this evidence. The explanatory memorandum explains in relation to subsection 16(3) that it:

> …provides a defence for entering a non-compliant vehicle onto the RAV if the person who entered it can provide evidence that it was only non-compliant because of an approved component that they used. This evidence would be easily available to the defendant and it would be relatively inexpensive for them to present this evidence.[5]

1.67 However, more generally, without additional information it is unclear that these matters are a sufficient basis for permissibly limiting the right to be presumed innocent.

1.68 Further, it is unclear that reversing the evidential burden is necessary as opposed to including additional elements within the offence provisions themselves. This raises questions as to whether the measure is the least rights restrictive approach.

Committee comment

1.69 The committee draws to the attention of the minister its *Guidance Note 1* and *Guidance Note 2* which set out information specific to reverse burden offences.

1.70 The committee requests the advice of the minister as to:

- **whether the reverse burden offences are aimed at achieving a legitimate objective for the purposes of international human rights law;**
- **how the reverse burden offences are effective to achieve (that is, rationally connected to) their objective;**

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2 See, for example, Explanatory Memorandum (EM) p. 13.

3 See, for example, EM, p. 33, p. 38.

4 EM, p. 28.

5 EM, p. 13.

- **whether the limitation is a reasonable and proportionate measure to achieve the stated objective; and**
- **whether it would be feasible to amend the measures so that the relevant matters (currently in defences) are included as elements of the offence or alternatively, to provide that despite section 13.3 of the Criminal Code, a defendant does not bear an evidential (or legal) burden of proof in relying on the offence-specific defences.**

Coercive evidence gathering powers

1.71 Section 41 of the bill provides that the minister, secretary or a Senior Executive Service employee may issue a disclosure notice to persons who supply road vehicles or road vehicle components if the person giving the notice reasonably believes that: vehicles or components of that kind will or may cause injury; vehicles or components of that kind do not, or likely do not, comply with applicable national standards; and the person receiving the notice is capable of giving or producing applicable information, documents or evidence.

1.72 Section 42 sets out that a person is not excused from giving information or evidence or producing a document on the grounds that to do so might tend to incriminate the person or expose them to a penalty. Section 42(2) provides that the information, evidence or documents provided in response to a disclosure notice are not admissible in evidence against the individual in civil or criminal proceedings subject to limited exceptions.[6] Failure or refusal to comply with a disclosure notice is an offence with a sanction of up to 40 penalty units ($8,400) for an individual.[7]

Compatibility of the measure with the right not to incriminate oneself

1.73 Specific guarantees of the right to a fair trial in the determination of a criminal charge guaranteed by article 14 of the ICCPR include the right not to incriminate oneself (article 14(3)(g)).

1.74 Section 42 of the bill engages and limits this right by requiring that a person give information or evidence, or produce a document, notwithstanding that to do so might tend to incriminate that person. The right not to incriminate oneself may be subject to permissible limitations where the limitation pursues a legitimate objective, is rationally connected to that objective and is a proportionate way of achieving that objective.

1.75 The statement of compatibility acknowledges that the measure engages and limits this right. In relation to the proposed disclosure notices, it argues that it is

6 These exceptions are proceedings relating to a refusal or failure to comply with a disclosure notice, knowingly providing false or misleading information in response to a disclosure notice, or knowingly giving false or misleading information to a Commonwealth entity.

7 Section 43 of part 3, division 4.

appropriate to override the right not to incriminate oneself 'as failure to comply could seriously undermine the effectiveness of the regulatory scheme'.[8] The explanatory memorandum sets out further information as to why the abrogation of the right not to incriminate oneself is needed in the particular regulatory context:

> Disclosure notices may be issued where a Minister or inspector believes that road vehicle or approved road vehicle components pose a danger to any person. For this reason timely gathering of information about the extent and nature of any risks is critical. While it may be technically feasible for the Department to obtain information by other means that do not impinge on the right against self-incrimination, these actions may take a longer amount of time. The first priority in recalls of road vehicles or approved components is the rectification or remediation of the safety or non-compliance issue. Prosecution and resulting penalties for those involved in the supply of road vehicles or approved components is generally a secondary consideration.
>
> The Department may not always have specific information about the activities of particular suppliers – the Department may receive information about vehicle safety recalls, such as reports of faulty components in overseas markets, which will form the basis of its market surveillance activities. The receipt of such information may place the Department in the position where it needs to seek information from suppliers of similar vehicles or approved components in order to ascertain whether the same problem exists in Australia.[9]

1.76 The broad objective of gathering timely information on road vehicles or road vehicle components that may pose a danger to the public is likely to be a legitimate objective for the purposes of international human rights law. Requiring that suppliers produce information or documents on such matters also appears to be rationally connected to this objective. It is noted that it would have been useful had this information been also included in the statement of compatibility as well as the explanatory memorandum.

1.77 Questions arise, however, as to the proportionality of the measure. The availability of 'use' and 'derivative use' immunities can be an important factor in determining whether the abrogation of the privilege against self-incrimination is proportionate. That is, they may act as a relevant safeguard. In this case, a 'use' immunity would be available in relation to this measure. This means that, where a person has been required to give incriminating evidence, that evidence cannot be used against the person in any civil or criminal proceeding, subject to exceptions, but may be used to obtain further evidence against the person.

8 EM, SOC, p. 20.

9 EM, p. 44.

1.78 However, no 'derivative use' immunity is provided in the bill. This means that information or evidence indirectly obtained as a result of the person's incriminating evidence may be used in criminal proceedings against the person. It is acknowledged that a 'derivative use' immunity will not be appropriate in all cases (for example, because it would undermine the purpose of the measure or be unworkable).

1.79 Further, it is noted that the availability or lack of availability of a 'derivative use' immunity needs to be considered in the regulatory context of the proposed powers. The extent of interference with the privilege against self-incrimination that may be permissible as a matter of international human rights law may be, for example, greater in contexts where there are difficulties regulating specific conduct, persons subject to the powers are not particularly vulnerable or powers are otherwise circumscribed with respect to the scope of information which may be sought. That is, there is a range of matters which influence whether the limitation is proportionate.

1.80 In this case, the statement of compatibility does not substantively address why a 'derivative use' immunity would not be reasonably available. This raises the question as to whether the measure is the least rights restrictive way of achieving the stated objective as required in order for the limitation to be proportionate.

Committee comment

1.81 The committee seeks the advice of the minister as to:

- **whether the limitation is a reasonable and proportionate measure to achieve the stated objective;**
- **whether the persons and the scope of information that may be subject to compulsory disclosure is sufficiently circumscribed with respect to the stated objective of the measure; and**
- **whether a 'derivative use' immunity is reasonably available as a less rights restrictive alternative in section 42 to ensure information or evidence indirectly obtained from a person compelled to answer questions or provide information or documents cannot be used in evidence against that person.**

Compatibility of the measure with the right to privacy

1.82 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.

1.83 By requiring that a person give information or evidence or produce a document, including in circumstances where to do so might tend to incriminate that person, the proposed measure may also engage and limit the right to privacy.

1.84 The statement of compatibility does not acknowledge that the proposed coercive evidence gathering powers in section 41 may engage the right to privacy and therefore does not provide an assessment of whether the measure engages and limits this right.[10] It is unclear from the information provided as to the extent to which a person may be required to disclose personal or confidential information. As noted above, the measure appears to pursue a legitimate objective and be rationally connected to that objective. However, questions remain as to whether the measure is a proportionate means of achieving the objective in the context of limitations on the right to privacy.

1.85 In particular, to be proportionate, a limitation on the right to privacy should only be as extensive as is strictly necessary to achieve its legitimate objective and must be accompanied by appropriate safeguards. Information and evidence as to whether the measure is the least rights-restrictive way of achieving the stated objective of the measure, and of any safeguards in place to protect a person's informational privacy when providing information pursuant to the coercive information gathering powers in the bill, would be of assistance in determining the proportionality of the measure.

Committee comment

1.86 The committee seeks the advice of the minister as to whether any limitation on the right to privacy is reasonable and proportionate to achieve the stated objective including:

- **what types of information may be subject to a disclosure notice and whether this could include personal or confidential information;**
- **whether there are less rights restrictive ways of achieving the objective;**
- **whether the persons who may be subject to compulsory disclosure is sufficiently circumscribed with respect to the stated objective of the measure; and**
- **whether there are adequate and effective safeguards in relation to the measure.**

10 It is noted that the statement of compatibility does acknowledge that the right to privacy is engaged by other measures in the bill, including in relation to the powers of inspectors, drawn from the *Regulatory Powers (Standards Provisions) Act 2014*, to enter premises and inspect documents or things on the premises. See, EM, SOC, pp. 18-19.

Treasury Laws Amendment (Enhancing ASIC's Capabilities) Bill 2018

Purpose	Seeks to amend the *Australian Securities and Investments Commission Act 2001* to require ASIC to consider competition in the financial system when performing its functions and exercising its powers and to remove the requirement for ASIC staff to be engaged under the *Public Service Act 1999*. Also seeks to make consequential amendments to several Acts
Portfolio	Treasury
Introduced	House of Representatives, 28 March 2018
Right	Just and favourable conditions of work (see **Appendix 2**)
Status	Seeking additional information

Removal of requirement for ASIC staff to be engaged under the Public Service Act

1.87 The bill seeks to amend the *Australian Securities and Investments Commission Act 2001* (ASIC Act) to provide that the chairperson of ASIC may employ such employees as the chairperson considers necessary for ASIC and may determine the terms and conditions of employment, including remuneration.[1] The chairperson would also determine in writing the ASIC Code of Conduct and the ASIC Values which apply to ASIC members and staff members.[2]

1.88 The effect of these amendments would be to remove the requirement for ASIC staff to be engaged under the *Public Service Act 1999* (PS Act), and consequently remove the requirement that ASIC staff members employed under the PS Act be subject to the Australian Public Service (APS) Code of Conduct and APS Values.

Compatibility of the measures with the right to just and favourable conditions of work

1.89 The right to work and rights in work are protected by articles 6(1), 7 and 8(1)(a) of the International Covenant on Economic, Social and Cultural Rights (ICESCR).

1.90 The right to just and favourable conditions of work includes the right to decent work providing an income that allows the worker to support themselves and their family, and which provides safe and healthy conditions of work.

1 Item 7, proposed section 120.

2 Item 11, proposed sections 126B and 126C.

1.91 The PS Act contains a range of provisions in relation to the terms and conditions of employment of public servants. By removing the requirement that ASIC employ staff under the PS Act and providing that the ASIC chairperson may engage staff directly and set the terms and conditions of employment, the measures engage and may limit the right to just and favourable conditions of work.

1.92 This right may be permissibly limited where the limitation pursues a legitimate objective, is rationally connected to that objective and is a proportionate means of achieving that objective. The statement of compatibility does not acknowledge that any rights are engaged or limited by the measures and therefore does not provide an analysis against these criteria.

1.93 The explanatory memorandum states that the proposed amendments will 'support ASIC to more effectively recruit and retain staff in positions requiring specialist skills'.[3] This may be capable of being a legitimate objective for the purposes of international human rights law. However, limited information is provided in the explanatory materials to the bill as to how this objective addresses a pressing and substantial concern, as is required in order to constitute a legitimate objective for the purposes of international human rights law.

1.94 It is unclear from the explanatory materials, for example, how the PS Act operates as a barrier to the recruitment and retention of appropriate staff. The explanatory memorandum states that the amendments implement a recommendation made by the government commissioned report, *Fit for the Future: A Capability Review of ASIC*, published in December 2015. The report recommended that the government 'remove ASIC from the [PS Act] as a matter of priority, to support more effective recruitment and retention strategies'.[4] While not discussed in the explanatory materials for the bill, the report noted several ways in which the PS Act 'negatively impacts' ASIC, including that it impedes ASIC's ability to attract and retain staff who may pursue better remuneration elsewhere, including at peer regulators such as the Australian Prudential Regulation Authority; and that it slows down the ability for internal promotions, particularly at senior levels.[5] In accordance with *Guidance Note 1*, the committee's expectation is that information such as this would be included in the statement of compatibility as part of an assessment of whether the measures address a pressing and substantial concern for the purposes of international human rights law.

1.95 There are also questions about the proportionality of the measures and, in particular, whether the measures are the least rights restrictive approach. It is unclear, for example, why barriers to recruitment and retention of staff could not be

3 Explanatory memorandum, p. 9.

4 *Fit for the Future: A Capability Review of ASIC* (December 2015) p. 21.

5 *Fit for the Future: A Capability Review of ASIC* (December 2015) p. 108.

addressed through the negotiation of entitlements through the usual enterprise process or the current provisions for Individual Flexibility Arrangements (IFAs).[6] Further, the ASIC Act currently allows for the chairperson to employ persons outside the PS Act, under terms and conditions such as the chairperson determines.[7] Questions arise as to whether arrangements such as these may be pursued as less rights restrictive alternatives to the removal of the requirement that ASIC staff be engaged under the PS Act.

1.96 At present, APS employees are generally employed under relevant enterprise agreements which set out terms and conditions of employment. Section 311 of the bill provides that ASIC staff who are APS employees immediately prior to the date the proposed measures take effect will continue to be employed from this date of commencement on the same terms, conditions and with the same accrued entitlements under a written agreement under the ASIC Act.[8] This would appear to indicate that no ASIC staff member currently engaged under the PS Act will be worse off when the measures in the bill take effect. However, given the potential breadth of powers of the ASIC chairperson to employ and set out terms and conditions for ASIC staff, it is not clear from the information provided what safeguards are in place to ensure ASIC employees whose work conditions are governed currently under the PS Act are not worse off in future. Having regard to the breadth of the chairperson's powers and the obligation on state parties under ICESCR not to unjustifiably take any backwards steps (retrogressive measures) that might affect the right to just and favourable conditions of work,[9] concerns arise as to whether the measure as proposed contains adequate safeguards to protect just and favourable conditions of work.

Committee comment

1.97 The preceding analysis raises questions as to whether the measure is compatible with the right to just and favourable conditions of work.

1.98 The committee therefore seeks the advice of the Minister for Revenue and Financial Services 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;**

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6 The ASIC Capability Review noted that the use of IFAs was relatively uncommon at ASIC at the time the review was conducted and, further, that such arrangements 'affect efficiency given the additional complexity of managing these arrangements'. See, *Fit for the Future: A Capability Review of ASIC* (December2015) pp. 107-108.

7 Part 6, sections 120(3) and 120(4) of the ASIC Act.

8 See also EM, p. 13.

9 See Article 2(1) of ICESCR.

- **how the measure is effective to achieve (that is, rationally connected to) that objective;**
- **whether the limitation is a reasonable and proportionate measure to achieve the stated objective, including whether less rights restrictive measures may be reasonably available and the sufficiency of any relevant safeguards; and**
- **whether the measure is compatible with Australia's obligations not to take any backwards steps (retrogressive measures) in relation to the right to just and favourable conditions of work.**

Treasury Laws Amendment (2018 Measures No. 4) Bill 2018

Purpose	Range of amendments concerning compliance with the Superannuation Guarantee
Portfolio	Treasury
Introduced	House of Representatives, 28 March 2018
Rights	Presumption of innocence (see **Appendix 2**)
Status	Seeking additional information

Strict liability and absolute liability offences

1.99 Schedule 1 of the bill seeks to amend the *Taxation Administration Act 1953* (TAA) to introduce a strict liability offence for employers who fail to comply with a direction from the Commissioner to pay a superannuation guarantee charge.[1] A person will not commit an offence if they took all reasonable steps within the required period to both comply with the direction and to ensure that the original liability was discharged before the direction was given.[2]

1.100 Schedule 1 also would allow the Commissioner to direct an employer to attend an approved education course where that employer has failed to comply with their superannuation guarantee obligations. Failure to comply with the education direction would be an absolute liability offence.[3]

1.101 Schedule 5 of the bill seeks to amend the TAA to introduce a strict liability offence for failing to provide security where ordered to do so by the Federal Court.[4] A person will not commit an offence to the extent that they are not capable of complying with the order.[5]

Compatibility of the measure with the presumption of innocence

1.102 Article 14(2) of the International Covenant on Civil and Political Rights (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 means that no fault element needs to be proven by the prosecution,

1 See Part 1 of Schedule 1 of the bill, proposed section 265-95(2).

2 See Part 1 of Schedule 1 of the bill, proposed section 265-95(3).

3 See Part 2 of Schedule 1 of the bill, proposed section 8C(1)(fa).

4 See Part 3 of Schedule 5 of the bill, proposed section 255-120(2).

5 See Part 3 of Schedule 5 of the bill, proposed section 255-120(3).

although the defence of mistake of fact is available to the defendant. Applying absolute liability to an element of an offence also means that no fault element needs to be proved by the prosecution, however the defence of mistake of fact is not available to the defendant. The strict liability and absolute liability offences engage the presumption of innocence because they allow for the imposition of criminal liability without the need to prove fault.

1.103 Strict liability and absolute liability offences will not necessarily be inconsistent with the presumption of innocence provided that they are within reasonable limits, taking into account the importance of the objective being sought, and maintain the defendant's right to a defence. In other words, such offences must pursue a legitimate objective and be rationally connected and proportionate to that objective.

1.104 While the statement of compatibility provides a general description of the nature and effect of each of the proposed offences,[6] it does not acknowledge that the presumption of innocence is engaged or limited by the strict liability and absolute liability offences in Schedule 1 and Schedule 5. Instead, the statement of compatibility states that both Schedule 1 and Schedule 5 do not engage any applicable rights or freedoms.[7]

1.105 It is noted that the explanatory memorandum to the bill also provides some information as to the rationale for and effect of the strict liability and absolute liability offences.[8] However, the information provided in the explanatory memorandum is not sufficient as it does not provide an assessment of whether the limitation on the presumption of innocence is permissible. As set out in the committee's *Guidance Note 1,* the committee's expectation is that statements of compatibility read as stand-alone documents, as the committee relies on the statement as the primary document that sets out the legislation proponent's analysis of the compatibility of the bill with Australia's international human rights obligations.

Committee comment

1.106 The strict liability and absolute liability offences introduced by Schedules 1 and 5 of the bill engage and limit the presumption of innocence.

1.107 The committee refers to its *Guidance Note 1* and seeks further information from the minister as to:

- **whether the strict liability and absolute liability offences introduced by the bill pursue a legitimate objective for the purposes of international human rights law;**

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6 See, Statement of Compatibility (SOC), 119-120, 122-123.

7 SOC, [10.11] and [10.31].

8 Explanatory Memorandum, 12-14, 25-26, 82-84.

- **whether the offences are rationally connected to (that is, effective to achieve) that objective; and**
- **whether the limitation on the presumption of innocence introduced by the strict liability and absolute liability offences is proportionate to that objective.**

Underwater Cultural Heritage Bill 2018

Purpose	Introduces a series of measures to provide for the protection and conservation of Australia's underwater cultural heritage
Portfolio	Environment and Energy
Introduced	House of Representatives, 28 March 2018
Rights	Fair Trial; criminal process rights (see **Appendix 2**)
Status	Seeking additional information

Civil penalties for breaches of protected underwater cultural heritage regime

1.108 The bill seeks to introduce a number of civil penalties for breaches of the proposed new regime for the protection and conservation of Australia's underwater cultural heritage. Some of these penalties are substantial, including penalties of up to 300 penalty units (currently, $63,500) for engaging in prohibited conduct within a protected zone without a permit,[9] possessing protected underwater cultural heritage without a permit,[10] and exporting underwater cultural heritage without a permit.[11] There is also a civil penalty of up to 800 penalty units (currently, $168,000) for engaging in conduct with an adverse impact on protected underwater cultural heritage without a permit.[12] There are corresponding criminal offences and strict liability offences, punishable by either imprisonment or civil penalties, which are discussed further below.

Compatibility of the measure with criminal process rights

1.109 Under Australian law, civil penalty provisions are dealt with in accordance with the rules and procedures that apply in relation to civil matters (for example, the

9 Proposed section 29(6).

10 Proposed section 31(6).

11 Proposed section 35(5).

12 Proposed section 30(6). There are also a number of civil penalties for which the proposed penalty is 120 penalty units ($25,000), however the committee considers such penalties in context would be unlikely to be considered criminal for the purposes of international human rights law: see proposed section 27 (failing to notify Minister of transfer of permit); section 28 (breach of permit condition); section 32 (supplying and offering to supply protected underwater cultural heritage without a permit); section 33 (advertising to sell underwater cultural heritage without a permit); section 34 (importing protected underwater cultural heritage without a permit); section 36 (importing underwater cultural heritage of a foreign country without a permit); section 37 (failing to produce a permit); section 38 (failing to respond to notice from Minister); section 39 (failing to comply with Ministerial direction); and section 40 (failing to advise Minister of discovery of underwater cultural heritage).

burden of proof is on the balance of probabilities). However, if the new civil penalty provisions are regarded as 'criminal' for the purposes of international human rights law, they will engage the criminal process rights under articles 14 and 15 of the International Covenant on Civil and Political Rights (ICCPR). The statement of compatibility acknowledges that the civil penalty provisions may engage criminal process rights if they are considered 'criminal' for the purposes of international human rights law.

1.110 As noted in the statement of compatibility, the committee's *Guidance Note 2* (see Appendix 4) sets out the relevant steps for determining whether civil penalty provisions may be considered 'criminal' for the purpose of international human rights law:

- first, the domestic classification of the penalty as civil or criminal (although the classification of a penalty as 'civil' is not determinative as the term 'criminal' has an autonomous meaning in human rights law);
- second, the nature and purpose of the penalty: a civil penalty is more likely to be considered 'criminal' in nature if it applies to the public in general rather than a specific regulatory or disciplinary context, *and* where there is an intention to punish or deter, irrespective of the severity of the penalty; and
- third, the severity of the penalty.

1.111 Here, the second and third steps of the test are particularly relevant as the penalties are classified as 'civil' under domestic law meaning they will not automatically be considered 'criminal' for the purposes of international human rights law. Under step two, the statement of compatibility indicates that the civil penalties are directed at a particular regulatory context, namely the regulation of underwater cultural heritage. Further, the statement of compatibility notes that the purpose of the penalties is to deter the 'deliberate destruction, looting or illegal salvage of protected underwater cultural heritage that is a national, non-renewable and unique historical asset'.[13] While the purpose of deterrence is often an indication that a penalty may be 'criminal' in nature, the narrow application of the penalties would indicate the penalty is unlikely to be considered 'criminal' under the second part of the test.

1.112 Even if step two of the test is not established, a penalty may still be 'criminal' for the purposes of international human rights law under step three where the penalty is a substantial pecuniary sanction. In determining whether a civil penalty is sufficiently severe to amount to a 'criminal' penalty under step three, the nature of the industry or sector being regulated and the relative size of the penalties in that regulatory context is relevant. It is noted that the conduct regulated by the bill that

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

gives rise to the relevant civil penalties (such as damage and destruction to sites of underwater cultural heritage) may be substantial and irreversible, and that the penalties have been drafted having regard to those potential consequences. However, the civil penalties that may be imposed are substantial (300 penalty units for breaches of sections 29(6), 31(6) and 35(5) and 800 penalty units for breaching section 30(6). This raises concerns as to whether the overall severity of the penalty would mean that the penalties may be classified as 'criminal' for the purposes of international human rights law. Further information as to the relative size of the pecuniary penalties in the particular context that is being regulated would be of assistance in determining the human rights compatibility of the legislation.

1.113 If the civil penalties were assessed to be 'criminal' for the purposes of human rights law, this does not mean that the relevant conduct must be turned into a criminal offence in domestic law nor does it mean that the civil penalty is illegitimate. Instead, 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, 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)).[14]

1.114 The statement of compatibility usefully explains that the civil penalty provisions are compatible with Article 14(7), as while there are corresponding criminal offences attaching to the same conduct, a person cannot be subject to the civil penalty provision if they have been convicted of the criminal offence (for which there are different pecuniary penalties applicable, and potential imprisonment), and any proceedings for a civil penalty provision are automatically stayed if criminal proceedings are commenced.[15] This would ensure that a person could not be punished twice for the same conduct, consistent with Article 14(7).

1.115 However, the presumption of innocence in Article 14(2) requires that the case against a person be demonstrated on the criminal standard of proof, that is, it must be proven beyond reasonable doubt. By contrast, 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 probabilities. Therefore, if the penalties were classified as 'criminal' for the purposes of international human rights law, it would be necessary to explain how the application of the civil standard of proof for such proceedings is compatible with Article 14(2) of the ICCPR. This would include an analysis of whether the limitation on the presumption of innocence pursues a

14 Other guarantees include the guarantee against retrospective criminal laws (Article 15(1)) and the right not to incriminate oneself (article 14(3)(g)). These guarantees are not engaged by the proposed civil penalties, as the law does not appear to apply retrospectively and the conduct giving rise to the offence does not appear to engage the right not to incriminate oneself.

15 SOC, p. 12.

legitimate objective, is rationally connected to this objective, and is proportionate to that objective.

Committee comment

1.116 The committee seeks the advice of the minister as to whether the civil penalty provisions in proposed sections 29(6), 30(6), 31(6), and 35(5) of the bill may be considered 'criminal' in nature for the purposes of international human rights law, addressing in particular whether the severity of the civil penalties that may be imposed on individuals is such that the penalties may be considered 'criminal' (including information as to the nature of the sector being regulated and the relative size of the pecuniary penalties in that regulatory context).

1.117 The committee also seeks the advice of the minister as to whether, assuming the penalties are considered 'criminal' for the purposes of international human rights law, the application of the civil standard of proof to the civil penalty provisions in sections 29(6), 30(6), 31(6), and 35(5) is compatible with the presumption of innocence in Article 14(2) of the ICCPR. This includes advice as to whether the limitation on the presumption of innocence pursues a legitimate objective, is rationally connected to this objective, and is proportionate to that objective, and whether the civil penalty provisions could be amended to apply the criminal standard of proof.

Strict liability offences

1.118 The bill also seeks to introduce a number of strict liability offences for breaches of the underwater cultural heritage protection regime, which are punishable by a pecuniary penalty of 60 penalty units.[16]

Compatibility of the measure with the presumption of innocence

1.119 As noted earlier, 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).

1.120 Strict liability offences engage the presumption of innocence because they allow for the imposition of criminal liability without the need to prove fault. The statement of compatibility acknowledges the strict liability offences engage and limit the presumption of innocence, but states that:

16 See proposed sections 27(6), 28(3), 29(5), 30(5), 31(5), 32(5), 33(4), 34(4), 35(4), 36(4), 37(5), 38(6), and 39(7).

> Application of strict liability has been set with consideration given to the guidelines regarding the circumstances in which strict liability is appropriate set out in *A Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers*. The penalties for the strict liability offences in the Bill do not include imprisonment, and do not exceed 60 penalty units for an individual.[17]

1.121 However, further information is required in order to determine whether the limitation on the presumption of innocence is permissible. In this respect, strict liability offences will not necessarily be inconsistent with the presumption of innocence provided that they are within reasonable limits, taking into account the importance of the objective being sought, and maintain the defendant's right to a defence. In other words, limits on the presumption of innocence must be reasonable, necessary and proportionate to the objective being sought.

Committee comment

1.122 The committee seeks the advice of the minister as to the compatibility of the strict liability offences with the presumption of innocence, in particular:

- **whether the strict liability offences are aimed at achieving a legitimate objective for the purposes of international human rights law;**
- **how the strict liability offences are effective to achieve (that is, rationally connected to) that objective; and**
- **whether the limitation on the presumption of innocence is proportionate to the legitimate objective of the measure.**

17 SOC, p.13.

Further response required

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

Crimes Amendment (National Disability Insurance Scheme – Worker Screening) Bill 2018

Purpose	Seeks to amend the *Crimes Act 1914* to create exceptions to provisions that would prevent the disclosure of spent, quashed and pardoned convictions for persons who work or seek to work with people with disability in the NDIS
Portfolio	Social Services
Introduced	House of Representatives, 15 February 2018
Rights	Privacy; work; equality and non-discrimination (see **Appendix 2**)
Previous report	3 of 2018
Status	Seeking further additional information

Background

1.124 The committee first reported on the bill in its *Report 3 of 2018*, and requested a response from the Minister for Social Services by 11 April 2018.[1]

1.125 The minister's response to the committee's inquiries was received on 19 April 2018. The response is discussed below and is reproduced in full at **Appendix 3**.

Permitting disclosure of spent, quashed and pardoned convictions in certain circumstances

1.126 The measures in the bill seek to create exceptions to Part VIIC of the *Crimes Act 1914* (Crimes Act) with respect to persons who work, or seek to work, with persons with disability in the National Disability Insurance Scheme (NDIS). The effect of these exceptions would be that the spent, quashed and pardoned convictions of persons working or seeking to work with persons with disability under the NDIS may be disclosed to and by, and taken into account by, Commonwealth, State and Territory agencies for the purposes of assessing the person's suitability as a disability worker.

1 Parliamentary Joint Committee on Human Rights, *Report 3 of 2018* (27 March 2018) pp. 6-11.

Compatibility of the measure with the right to privacy and the right to work

1.127 The initial human rights analysis stated that the measures engage the right to privacy and the right to work.[2] The right to privacy is engaged and limited by enabling the disclosure, and the taking into account, of information relating to a person's spent convictions, quashed convictions and convictions for which the person has been pardoned. The measure may also engage and limit the right to work insofar as individuals may be excluded from employment with the NDIS on the basis of their criminal record.

1.128 The statement of compatibility acknowledged that the measure engages and limits the right to privacy and the right to work. However, the statement also argues that these limitations are permissible as they are reasonable to protect people with disability.[3]

1.129 The initial analysis stated that the stated objective of the bill, namely to protect people with a disability from experiencing harm arising from unsafe support or services under the NDIS, was likely to be a legitimate objective for the purposes of international human rights law. Insofar as including information regarding spent, quashed and pardoned convictions may enable worker screening units to accurately assess a person's suitability as a disability support worker, the initial analysis also stated that the measure appears to be rationally connected to this objective.

1.130 However, the initial analysis also noted that questions arose as to whether the measures in the bill constituted a proportionate limitation on the right to privacy and right to work. In relation to the proportionality of the measure, the statement of compatibility states:

> The Bill provides access to a worker's detailed criminal history information to state-based worker screening units to enable a thorough risk-based worker screening assessment proportionate to determining the potential risk of harm to people with a disability receiving services under the NDIS. Further, the permission to access such information will be obtained from a worker applying for a worker screening access check as a part of the application process.[4]

1.131 While it was acknowledged that there may be circumstances where it would be appropriate to permit disclosure, or taking into account of, a person's criminal history to properly assess whether a person poses an unacceptable risk of harm, the initial analysis noted that questions arose as to whether the breadth of the measure

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2 For further information as to the content of these rights, see Appendix 2. These rights may be subject to permissible limitations which are provided by law and are not arbitrary. In order for a limitation not to be arbitrary, it must pursue a legitimate objective and be rationally connected and proportionate to achieving that objective.

3 Statement of compatibility (SOC), pp. 11-12.

4 SOC, p. 12

in this bill is greater than necessary to achieve the stated objectives. This is because the measure appears to permit the disclosure, and the taking into account, of a person's entire criminal record, including minor convictions (for example, shoplifting), regardless of whether those criminal convictions bear any relevance to the person's capacity to perform the job or indicate that the person poses an unacceptable risk. This also raised questions as to whether there would be other, less rights restrictive, alternatives available, such as only requiring disclosure of serious offences or offences that are relevant to a person's suitability as a disability worker.

1.132 Additionally, based on the information provided, it was unclear why it is necessary to permit the disclosure and the taking into account of spent and quashed convictions, and wrongful convictions for which the person has been pardoned. In the case of a wrongful conviction, for example, the person may be factually and legally innocent of the offence with which they were charged.

1.133 The initial analysis also noted that it was unclear whether there are sufficient safeguards to ensure that the measure is a proportionate limitation on human rights. In this respect, the statement of compatibility recognises that 'it is critical that NDIS worker screening does not unreasonably exclude offenders from working in the disability sector'.[5] The statement of compatibility further states:

> The State and Territory-operated worker screening units will be required to have appropriately skilled staff to assess risks to people with disability, to comply with the principles of natural justice, and to comply with a nationally consistent risk assessment and decision-making framework, including considerations of the circumstances surrounding any offence. The Bill provides the means to gain the necessary information to assess such circumstances.
>
> In this way, the Bill…supports a proportionate approach to safeguards that does not unduly prevent a person from choosing to work in the NDIS market, but ensures the risk of harm to people with disability is minimised, by excluding workers whose behavioural history indicates they pose a risk from certain services and supports.[6]

1.134 It was acknowledged in the initial analysis that the bill provides some safeguards in relation to the persons who may disclose criminal history information and take that information into account, and the persons to whom that information may be disclosed. However, the safeguards in the bill do not appear to limit the scope of the criminal history information that may be disclosed or taken into account.

1.135 Accordingly, the committee requested the advice of the minister as to whether the measures were proportionate to achieving the stated objectives of the

5 SOC, p. 11.

6 SOC, p. 12.

bill (including whether the measures are the least rights restrictive way of achieving the objective and the existence of any safeguards).

Minister's response

1.136 The minister's response explains the importance of taking into account a person's entire criminal record when undertaking the NDIS worker screening, noting that it is important 'to ensure that the state and territory worker screening units tasked with making an informed assessment of an individual's suitability to work with people with disability can access and consider a complete picture of that person's criminal history'. In this respect, the minister explains the particular vulnerabilities of disabled persons that necessitate a more extensive criminal history check of potential NDIS workers:

> People with disability are some of the most vulnerable within the Australian community. It is not only sexual or violent offences that the worker screening regime seeks to mitigate against. Individuals employed within the NDIS are in a position of trust and in many cases will have access to the person with disability's personal belongings, finances and medication. Minor offences may be relevant to a person's integrity and general trustworthiness. On that basis, it is appropriate to have awareness of the circumstances […] surrounding even minor offences.

1.137 The minister's response further explains why a less rights restrictive approach, such as limiting the types of offences that could be disclosed, was not reasonably available:

> Limiting the categories of offences that can be disclosed to worker screening units would create a risk that relevant information is not available to inform a decision by a worker screening unit and could undermine the value of an NDIS worker screening outcome as a source of information for people with disability and for employers. Inaccurate risk assessments may also be unfair to workers themselves.
>
> …
>
> While, as the Committee points out, a person whose conviction is quashed may be factually and legally innocent, there are a range of reasons that a conviction may be quashed or pardoned that might not be so black and white. This will not be known until the specific circumstances surrounding the pardoned or quashed conviction are considered by the worker screening unit, which is why they need access to such information as proposed in the Bill.

1.138 It is acknowledged that undertaking an accurate risk assessment is important and, as noted in the initial analysis, a detailed criminal history check of individuals would assist in ascertaining whether a person poses a risk. However, it is noted that international human rights jurisprudence has raised concerns that indiscriminate and

open-ended disclosure of criminal record data may be incompatible with human rights where there are not adequate safeguards in place.[7] In this respect, the minister's response sets out the safeguards that would be in place in order to ensure that the assessment of risk is undertaken in a proportionate manner:

> Safeguards will be in place through a nationally consistent, risk-based approach that will provide state and territory worker screening units with a framework for considering a person's criminal history and patterns of behaviour over a lifetime that would indicate potential future risk to people with disability...
>
> State and territory worker screening units will be required to undertake a rigorous process to determine the relevance of a particular event to whether an applicant for an NDIS Worker Screening Check poses a risk to people with disability. In particular, worker screening units are required to consider:
>
> - the nature, gravity and circumstances of the event and how it […] contributes to a pattern of behaviour that may be relevant to disability-related work;
> - the length of time that has passed since the event occurred;
> - the vulnerability of the victim at the time of the event and the person's relationship to the victim or position of authority over the victim at the time of the event;
> - the person's criminal, misconduct and disciplinary, or other relevant history, including whether there is a pattern of concerning behaviour;
> - the person's conduct since the event; and
> - all other relevant circumstances in respect of their offending, misconduct or other relevant history, including attitudes towards offence or misconduct, and the impact on their eligibility to be engaged in disability-related work.

1.139 The minister further emphasises that a person's criminal history 'forms only one part of the analysis and risk assessment undertaken by a state or territory worker screening unit' and that a conviction for a minor offence, spent or quashed conviction would not necessarily prohibit that person from gaining employment with a provider within the NDIS.

1.140 These safeguards are important in determining whether the limitation on the right to privacy and right to work is proportionate. Notwithstanding the fact that the exception to the Crimes Act introduced by the bill creates a broad power to disclose,

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7 See, for example, *MM v United Kingdom,* App. No 24029/12, European Court of Human Rights (2012); *R (on the application of T and another) v Secretary of State for the Home Department and another* [2014] UKSC 35. See also the decision of Bell J in the Victorian Supreme Court in *ZZ v Secretary, Department of Justice* [2013] VSC 267 (22 May 2013).

the safeguards in the worker screening process described in the further information provided by the minister appear to be capable of ensuring that persons with spent, pardoned or quashed criminal convictions that bear no relevance to their suitability as an NDIS worker would not be unduly prevented from being employed by the NDIS.

1.141 However, it is not clear from the information provided by the minister whether the safeguards outlined are matters of departmental policy or matters to be set out in legislation or in delegated legislation in the future. Departmental policies and procedures are less compelling than legislation, as policies can be removed, revoked or amended at any time, and are not subject to the same levels of scrutiny or accountability as when the policies are enshrined in legislation.

1.142 The bill additionally provides that, before regulations can prescribe the persons to whom the criminal convictions may be disclosed, the minister must be satisfied, relevantly, that the person or body complies with applicable laws relating to privacy, human rights and records management, complies with principles of natural justice, and has risk assessment frameworks and appropriately skilled staff to assess risks to the safety of a person with a disability.[8] However, further information from the minister would assist in determining whether the safeguards set out in the minister's response are sufficient for the purposes of international human rights law, including whether the safeguards will be prescribed by legislation or legislative instrument.

1.143 Another relevant factor in determining whether safeguards are sufficient includes whether there is a possibility of monitoring and access to review.[9] It is noted, for example, that Working with Children Check decisions are able to be reviewed by applicants through state and territory administrative appeals tribunals.[10] Further information from the minister as to whether (and, if so, by what mechanism) a decision relating to a person's suitability for employment following worker screening will be able to be reviewed would therefore be of assistance to determine whether the limitation on the right to privacy and right to work is proportionate.

Committee response

1.144 The committee thanks the minister for his response.

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8 Section 85ZZGL of the bill.

9 See Parliamentary Joint Committee on Human Rights, *Guidance Note 1* (2014) p.2.

10 See Victorian Government Department of Justice and Regulation, *Working with Children Check: Failing the Check*, available at http://www.workingwithchildren.vic.gov.au/home/applications/application+assessment/failing+the+check/; NSW Civil and Administrative Tribunal, *Working with Children Checks,* available at http://www.ncat.nsw.gov.au/Pages/administrative_equal_opp/aed_your_matter/aeod_working-with-children/aeod_working-with-children.aspx .

1.145 The committee seeks further information from the minister as to the proposed safeguards in relation to the criminal history checks undertaken as part of the proposed NDIS Worker Screening Check, including:

- **whether the risk assessment framework outlined in the minister's response will be set out in legislation or a legislative instrument; and**
- **whether a decision relating to a person's suitability for employment following worker screening is able to be reviewed.**

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

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

1.147 'Discrimination' encompasses both measures that have a discriminatory intent (direct discrimination) and measures which have a discriminatory effect on the enjoyment of rights (indirect discrimination).[11] The UN Human Rights Committee has described indirect discrimination as 'a rule or measure that is neutral at face value or without intent to discriminate', which exclusively or disproportionately affects people with a particular personal attribute.[12]

1.148 The United Nations Human Rights Committee has not considered whether having a criminal record is a relevant personal attribute for the purposes of the prohibition on discrimination. However, relevantly, the European Court of Human Rights has interpreted non-discrimination on the grounds of 'other status' to include an obligation not to discriminate on the basis of a criminal record.[13] While this jurisprudence is not binding on Australia, the case law from the Court is useful in considering Australia's obligations under similar provisions in the International Covenant on Civil and Political Rights (ICCPR).[14] Providing that certain persons may disclose, and may take into account, information in relation to a person's criminal history information for the purposes of worker screening for the NDIS is likely to

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

12 See e.g. *Althammer v Austria,* Human Rights Committee, 8 August 2003, [10.2].

13 See *Thlimmenos v Greece*, ECHR Application No. 34369/97 (6 April 2000).

14 See also the *Australian Human Rights Commission Act 1986* (Cth) which considers discrimination in employment on the basis of a criminal record as part of Australia's obligations under International Labour Organisation Convention 111, the Discrimination (Employment and Occupation) Convention 1958*,* which prohibits discrimination in employment. See Australian Human Rights Commission*, 'On the Record: Discrimination in Employment on the basis of Criminal Record under the AHRC Act'* (2012).

engage the right to equality and non-discrimination. This is because persons may be excluded from employment with the NDIS on the basis of their criminal record.

1.149 Under international human rights law, differential treatment (including the differential effect of a measure that is neutral on its face) will not constitute unlawful discrimination if the differential treatment is based on reasonable and objective criteria such that it serves a legitimate objective, is rationally connected to that legitimate objective and is a proportionate means of achieving that objective.[15]

1.150 The statement of compatibility did not recognise that the right to equality and non-discrimination is engaged by the measure, and so did not provide a substantive assessment of whether the measure constitutes a permissible limitation on that right. Accordingly, the committee requested the advice of the minister as to the compatibility of the measure with this right.

Minister's response

1.151 In relation to whether the differential treatment is rationally connected and proportionate to the legitimate objective of the measure, the minister's response explains:

> The more comprehensive data collected as part of the NDIS Worker Screening Check reflects that there is a higher degree of risk an individual may pose to person[s] with disability in the course of delivering supports and services. Differential treatment of individuals as a result of considering criminal history as a part of a risk-based worker screening would not constitute unlawful discrimination as there is sufficient research and objective evidence that supports the consideration of this information as a basis for determining risk.
>
> A complete criminal history, leads to a more accurate and reliable risk-based worker screening assessment which benefits both people with disability and the worker being screened. A comprehensive assessment is likely to be fairer to workers and reduce the chance of unjustified discrimination.
>
> It should be noted that employers do not get access to any criminal history information under the proposed approach to NDIS Worker Screening. Employers will only have access to worker screening outcomes, once the approved Worker Screening Unit has made a determination.
>
> Finally, I note that Working with Children Checks already operate in all jurisdictions with access to, and assessment of, full criminal history. People with disability deserve the same level of protection.

1.152 From the information provided, it appears that the differential treatment is based on reasonable and objective criteria. However, for the same reasons discussed

15 *Althammer v Austria* HRC 998/01, [10.2].

above in relation to the right to privacy and right to work, further information relating to the adequacy of the safeguards is required in order for the committee to complete its analysis as to whether the measure is compatible with the right to equality and non-discrimination.

Committee response

1.153 The committee thanks the minister for his response.

1.154 The committee seeks further information from the minister as to the proposed safeguards in relation to the criminal history checks undertaken as part of the proposed NDIS Worker Screening Check, including:

- **whether the risk assessment framework outlined in the minister's response will be set out in legislation or legislative instrument; and**
- **whether a decision relating to a person's suitability for employment following worker screening is able to be reviewed.**

Intelligence Services Amendment (Establishment of the Australian Signals Directorate) Bill 2018

Purpose	Amends the *Intelligence Services Act 2001* to establish the Australian Signals Directorate (ASD) as an independent statutory agency within the Defence portfolio reporting directly to the Minister for Defence; amend ASD's functions to include providing material, advice and other assistance to prescribed persons or bodies, and preventing and disrupting cybercrime; and give the Director-General powers to employ persons as employees of ASD. Also makes a range of consequential amendments to other Acts, including to the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* to provide that the Director-General of ASD may communicate AUSTRAC information to a foreign intelligence agency if satisfied of certain matters
Portfolio	Defence
Introduced	House of representatives, 15 February 2018
Rights	Privacy; life; freedom from torture, cruel, inhuman or degrading treatment or punishment; just and favourable conditions at work (see **Appendix 2**)
Previous report	3 of 2018
Status	Seeking further additional information

Background

1.155 The committee first reported on the bill in its *Report 3 of 2018*, and requested a response from the Minister for Defence by 11 April 2018.[1]

1.156 The bill passed both Houses of Parliament on 28 March 2018 and received Royal Assent on 11 April 2018.

1.157 The minister's response to the committee's inquiries was received on 20 April 2018. The response is discussed below and is reproduced in full at **Appendix 3**.

Communicating AUSTRAC information to foreign intelligence agencies

1.158 Proposed section 133BA of the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (AMLCT Act) provides that the Director-General of the Australian Signals Directorate (ASD) may communicate Australian Transaction

1 Parliamentary Joint Committee on Human Rights, *Report 3 of 2018* (27 March 2018) pp. 52-56.

Reports and Analysis Centre (AUSTRAC) information[2] to a foreign intelligence agency if satisfied of certain matters and may authorise an ASD official to communicate such information on their behalf. The matters in respect of which the Director-General is to be satisfied before communicating AUSTRAC information are:

> (a) the foreign intelligence agency has given appropriate undertakings for:
>
> (i) protecting the confidentiality of the information; and
>
> (ii) controlling the use that will be made of it; and
>
> (iii) ensuring that the information will be used only for the purpose for which it is communicated to the foreign country; and
>
> (b) it is appropriate, in all the circumstances of the case, to do so.[3]

Compatibility of the measure with the right to privacy

1.159 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. The initial human rights analysis stated that, as AUSTRAC information may include a range of personal and financial information, the disclosure of this information to foreign intelligence agencies engages and limits the right to privacy.

1.160 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. However, the statement of compatibility for the bill did not acknowledge this limitation on the right to privacy and therefore did not provide information on these matters. Accordingly, the committee requested the advice of the minister as to:

- whether the measure is aimed at achieving a legitimate objective for the purposes of international human rights law;
- how the measure is effective to achieve (that is, rationally connected to) that objective; and
- whether the limitation is a reasonable and proportionate measure to achieve the stated objective (including whether the measure is sufficiently

2 'AUSTRAC information' is defined in section 5 of the AMLCT ACT as meaning eligible collected information (or a compilation or analysis of such information) and 'eligible collected information' is defined as information obtained by the AUSTRAC CEO under that Act or any other Commonwealth, State or Territory law or information obtained from a government body or certain authorised officers, and includes financial transaction report information as obtained under the *Financial Transaction Reports Act 1988*.

3 Section 133BA(1) of the bill.

circumscribed and whether there are adequate and effective safeguards in relation to the operation of the measure).

Minister's response

1.161 In response to the committee's inquires, the minister's response provides some general information as to the purpose of the amendment and existing safeguards, but the response does not expressly address whether the limitation on the right to privacy is permissible. The minister's response states that the amendment 'is critical to ASD's work to combat terrorism, online espionage, transnational crime, cybercrime and cyber-enabled crime', and further states:

> As an independent statutory agency, this amendment now ensures that information is able to be appropriately shared, consistent with how other Australian domestic intelligence and security agencies manage this type of information. This work across the intelligence and security community is central to defending Australia and its national interests.

1.162 As noted in the initial human rights analysis, the right to privacy may be subject to permissible limitations and thus the purpose of the measure is relevant in determining whether the limitation on these rights is permissible.[4] The purposes of combating terrorism, online espionage, transnational crime, cybercrime and cyber-related crime is likely to be a legitimate objective for the purpose of international human rights law, and the information sharing for this purpose appears to be rationally connected to this objective.

1.163 Relevant to the proportionality of the measure, the minister's response provides the following general information about safeguards:

> As the committee would be aware, the Australian Transaction Reports and Analysis Centre (AUSTRAC) has made successive statements and provided advice to the parliament in relation to the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006*, including specifically regarding the sharing of information with foreign partners, and provided assurances that while the Act does engage a range of human rights, to the extent that it limits some rights, those limitations are reasonable, necessary and proportionate in achieving a legitimate objective.
>
> …
>
> This amendment to the Act does not extend or alter the current arrangement ASD receives by being part of the Department of Defence. Similarly, it is consistent with arrangements provided for all other intelligence and security agencies that require this function. This amendment is not, in effect, creating a new arrangement for ASD. These provisions reflect longstanding arrangements for agencies in the

4 See Parliamentary Joint Committee on Human Rights, *Guidance Note 1: Drafting Statements of Compatibility* (December 2014) p.2.

> intelligence and security community, and there are strong safeguards in place to ensure the function is appropriately exercised.
>
> In this context, there already exists strong compliance safeguards and ASD is subject to some of the most rigorous oversight arrangements in the country. This includes being subject [to] the oversight of the Inspector-General of Intelligence and Security, who has the powers of a standing royal commission and can compel officers to give evidence and hand over materials. The Inspector-General regularly reviews activities to ensure ASD's rules to protect the privacy of Australians are appropriately applied.

1.164 While the minister's response indicates that AUSTRAC has previously reported to parliament on the human rights compatibility of the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006,* that does not address the committee's specific inquiries in relation to the implications of the measures in this bill and their compatibility with the right to privacy.

1.165 It is acknowledged that the amendment is not creating a new arrangement for ASD, and that the amendments reflect current arrangements for agencies in the intelligence and security community. However, scrutiny committees consistently note that the fact that provisions replicate existing arrangements does not, of itself, address the committee's human rights concerns. Further information is therefore required from the minister as to what safeguards are in place to ensure the function is appropriately exercised. This includes information as to what constitutes an "appropriate undertaking" for the purpose of section 133BA of the bill (described at [1.158] above), including what is considered appropriate protection of confidential information by the foreign intelligence agency (section 133BA(1)(a)(i)). It is unclear from the information provided that the measure is a proportionate limitation on the right to privacy.

Committee response

1.166 The committee thanks the minister for her response.

1.167 The committee seeks further information from the minister as to the compatibility of the measure with the right to privacy including:

- **information as to the existing safeguards to protect the right to privacy (such as the *Privacy Act 1988*);**
- **the scope of information that may be subject to information sharing;**
- **what constitutes an "appropriate undertaking" in relation to the protection of confidential information by the foreign intelligence agency for the purposes of section 133BA(1)(a)(i) of the bill; and**
- **any other relevant safeguards that ensure the sharing of information between the ASD and foreign intelligence agencies is compatible with the right to privacy.**

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

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

1.169 The United Nations (UN) Human Rights Committee has made clear that international law prohibits the provision of information to other countries that may be used to investigate and convict someone of an offence to which the death penalty applies. In this context, the UN Human Rights Committee stated in 2009 its concern that Australia lacks 'a comprehensive prohibition on the providing of international police assistance for the investigation of crimes that may lead to the imposition of the death penalty in another state', and concluded that Australia should take steps to ensure it 'does not provide assistance in the investigation of crimes that may result in the imposition of the death penalty in another State'.[5]

1.170 The initial analysis stated that the sharing of information internationally with foreign intelligence agencies could accordingly engage the right to life. This issue was not addressed in the statement of compatibility.

1.171 In relation to the right to life, the committee sought the advice of the minister about the compatibility of the measure with this right (including the existence of relevant safeguards).

1.172 A related issue raised by the measure is the possibility that sharing of information may result in torture, or cruel, inhuman or degrading treatment or punishment. Under international law the prohibition on torture is absolute and can never be subject to permissible limitations.[6] This issue was also not addressed in the statement of compatibility.

1.173 In relation to the prohibition on torture, or cruel, inhuman or degrading treatment or punishment, the committee sought the advice of the minister in relation to the compatibility of the measure with this right (including any relevant safeguards).

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

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

Minister's response

1.174 The minister's response did not substantively respond to the committee's inquiries as to the compatibility of the measures with the right to life and the prohibition on torture or cruel, inhuman, degrading treatment or punishment. In order to be compatible with these rights, information sharing powers must be accompanied by adequate and effective safeguards.

1.175 However, in this respect, the minister's response provides no information as to whether there is a prohibition on sharing information with foreign intelligence agencies where that information could lead to torture or cruel, inhuman, degrading treatment or punishment. Similarly, no information has been provided as to whether there is a prohibition on sharing information which could result in the prosecution of a person for an offence involving the death penalty. It is unclear whether or not there are any legal or policy requirements that mandate the consideration of such matters prior to the disclosure of information to a foreign intelligence organisation. By contrast, the Minister for Justice has previously provided the committee copies of the Australian Federal Police (AFP) National Guideline on international police-to-police assistance in death penalty situations and the AFP National Guideline on offshore situations involving potential torture or cruel, inhuman or degrading treatment or punishment. This allowed the committee to assess whether information sharing powers were compatible with human rights in the context of these guidelines.[7]

1.176 In relation to the minister's response in this instance, the fact that such information sharing powers are pre-existing and that there has been reporting to parliament does not address such human rights concerns. Indeed, as the prohibition on torture is absolute and cannot be subject to limitations, the minister's reference in the response to previous assessments of proportionality does not assist. While proportionality is relevant to an assessment of the compatibility of the measure with the right to life, in the context of the information sharing powers it is essential that there are effective safeguards in place. In relation to whether there are adequate safeguards in place, information as to what constitutes an "appropriate undertaking" for the purpose of section 133BA of the bill (described at [1.158] above) is relevant. This includes advice as to what is considered appropriate protection of confidential information by the foreign intelligence agency (section 133BA(1)(a)(i)), and whether it would include an undertaking that information shared with the foreign intelligence agencies would not result in persons being subject to the death penalty, torture or ill-treatment. Any further information, such as any policies about information sharing from the Director-General to a foreign intelligence agency, and what matters are

7 Parliamentary Joint Committee on Human Rights, *Report 8 of 2017* (15 August 2017) pp. 83-91.

taken into account when considering such communications, would also be of assistance.

1.177 In relation to the information provided by the minister relating to oversight of the ASD by the Inspector-General of Intelligence and Security, this information may be relevant to determining compatibility of the measure with human rights. In particular, the right to life and the prohibition against torture or cruel, inhuman or degrading treatment or punishment require an official and effective investigation to be undertaken when there are credible allegations against public officials concerning violations of these rights. However, further information is required as to the extent to which this oversight mechanism takes account of whether the ASD's rules are compatible with Australia's international human rights obligations.

Committee response

1.178 The committee thanks the minister for her response.

1.179 The committee seeks further information from the minister as to the compatibility of the measure with the right to life and the prohibition on torture or cruel, inhuman and degrading treatment or punishment.

1.180 In relation to the right to life, specific information as to any safeguards in place to protect the right to life, including information as to:

- **whether there is a prohibition on sharing information where that information may be used in investigations that may result in the imposition of the death penalty;**
- **whether there are any guidelines about information sharing in death penalty situations and whether the committee could be provided with a copy of any such guidelines; and**
- **whether the requirement that the Director-General receive "appropriate undertakings" from the foreign intelligence agency in order to share information pursuant to section 133BA(1) includes undertakings in relation to this matter and, if so, what constitutes an "appropriate undertaking". If such matters are set out in departmental policies or guidelines, a copy of those guidelines would be of assistance.**

1.181 In relation to the prohibition on torture, or cruel, inhuman or degrading treatment or punishment, specific information as to any safeguards in place to ensure compatibility with this right, including information as to:

- **whether there is a prohibition on sharing information where that information may result in a person being subject to torture, or cruel, inhuman or degrading treatment or punishment;**
- **whether there are any guidelines about information sharing in situations involving potential torture or cruel, inhuman or degrading treatment or**

punishment and whether the committee could be provided with a copy of any such guidelines; and

- **whether the requirement that the Director-General receive "appropriate undertakings" from the foreign intelligence agency in order to share information pursuant to section 133BA(1) includes undertakings in relation to this matter and, if so, what constitutes an "appropriate undertaking".**

1.182 In relation to each of these rights:

- **whether the oversight of the ASD by the Inspector-General of Intelligence and Security, referred to in the minister's response, includes oversight of whether the ASD's rules are compatible with Australia's international human rights obligations; and**
- **any other relevant safeguards that ensure the sharing of information between the ASD and foreign intelligence agencies is compatible with the right to life and the prohibition on torture, cruel, inhuman and degrading treatment or punishment.**

Operation outside the Public Service Act

1.183 The bill proposes that ASD will operate outside the *Public Service Act 1999* (PS Act) in relation to the employment of staff. Proposed section 38A of the *Intelligence Services Act 2001* provides that the Director-General of ASD may employ such employees of ASD as the Director-General thinks necessary and may determine the terms and conditions on which employees are to be employed.[8] Further, the Director-General may, at any time, by written notice, terminate the employment of such a person.[9]

Compatibility of the measure with just and favourable conditions at work

1.184 The right to work and rights in work are protected by articles 6(1), 7 and 8(1)(a) of the International Covenant on Economic, Social and Cultural Rights (ICESCR).[10]

1.185 The UN Committee on Economic, Social and Cultural Rights has stated that the obligations of State parties to the ICESCR in relation to the right to work include the obligation to ensure individuals their right to freely chosen or accepted work, including the right not to be deprived of work unfairly, allowing them to live in

8 Item 29, proposed section 38A.

9 Item 29, proposed section 38A(4).

10 Related provisions relating to such rights for specific groups are also contained in article 5(i) of the International Convention on the Elimination of All Forms of Racial Discrimination (CERD), articles 11 and 14(2)(e) of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), article 32 of the Convention on the Rights of the Child (CRC) and article 27 of the Convention on the Rights of Persons with Disabilities (CRPD).

dignity. The right to work is understood as the right to decent work providing an income that allows the worker to support themselves and their family, and which provides safe and healthy conditions of work.[11]

1.186 The PS Act contains a range of provisions in relation to the terms and conditions of employment of public servants. As noted in the initial analysis, by providing that the PS Act does not apply and that the Director-General may engage staff, set their conditions of employment through determinations and terminate their employment, the measure engages and may limit the right to just and favourable conditions at work.

1.187 The statement of compatibility acknowledges that the measure engages this right and argues that it pursues the objective of providing 'ASD with greater flexibility to recruit, retain, develop and remunerate its specialist staff'.[12] While the statement of compatibility points to some information as to why this objective may address a pressing and substantial concern, the initial analysis stated that further information would have been useful. It was unclear, for example, how the PS Act operates as a barrier to the recruitment and retention of appropriate staff. It was also unclear why this could not be addressed through the negotiation of entitlements through the usual enterprise agreement process.

1.188 Further, there was no specific information provided as to how the measure is rationally connected to (that is, effective to achieve) this stated objective.

1.189 Additionally, the initial analysis stated that there are a number of questions about the proportionality of the measure. In this respect, the measure as proposed does not provide for minimum levels of entitlements or working conditions.

1.190 Currently, Australian Public Service (APS) employees are generally employed under relevant enterprise agreements which set out terms and conditions of employment. In this respect, it was unclear whether current APS employees who become employees of the ASD could be worse off under the measure. While the statement of compatibility points to the availability of some potential safeguards, it was unclear whether they are sufficient given the potential breadth of the Director-General's powers.

1.191 The committee therefore sought the advice of the minister as to the compatibility of the measure with the right to just and favourable conditions of work.

Minister's response

1.192 The minister's response provides useful information as to the purpose of removing the ASD from the framework of the PS Act. In particular, the minister's

11 See, UN Committee on Economic, Social and Cultural Rights, *General Comment No. 23: on the right to just and favourable conditions of work (article 7 of the International Covenant on Economic, Social and Cultural Rights)* (26 April 2016) pp. 3 and 7.

12 Statement of compatibility (SOC) p. 7.

response states that the amendment 'pursues the legitimate objective of providing ASD with greater flexibility to recruit, retain, train, develop and remunerate its specialist staff, in accordance with the recommendations of the 2017 Independent Intelligence Review'. As to whether this measure addresses a pressing and substantial concern and is effective to achieve the objective, the minister's response states:

> This will provide ASD with greater flexibility to recognise the skills of its specialised workforce. This structure reflects the need to retain those individuals with highly sought after skills, such as those with science, technology, engineering and maths qualifications. Mobility across the public sector is also recognised as an important tool to bring in critical talent into ASD, but to also enable the further development of skills in different environments. To support this, the amendments made to the Intelligence Services Act include the specific provision that will allow for the transfer of employment from ASD to the Australian Public Service. As part of these arrangements, the prior service and accrued leave balances of staff within the Australian Public Service and ASD will continue to be recognised and ASD staff will continue to be able to access public sector superannuation schemes.
>
> […]
>
> Operating outside the Australian Public Service also provides the flexibility to design over time new employment categories and career pathways that are in addition to the standard public service structures. This will enable ASD to more directly market itself to the types of trades and skills it needs to attract, and highlight the skill development and career progression that can occur within these streams of work in the agency.
>
> It is recognised that ASD operates within a highly competitive employment market, even within the Australian security and intelligence community. There are several other agencies that also offer rewarding careers to people with many of the skills and attributes ASD seeks to engage. Overall, in recognition of the environment ASD seeks to recruit from, the amendments to the Intelligence Services Act effectively give the same flexibility to the Director-General of ASD for the recruitment and retention, and establishing workplace agreements, as the Australian Security Intelligence Organisation and the Australian Secret Intelligence Service.

1.193 Based on the information provided, it is likely that the measure pursues a legitimate objective for the purposes of international human rights law and that the measure is rationally connected to this objective.

1.194 In relation to the proportionality of the measure, the minister provides the following information as to why a less rights restrictive approach (such as staying within the framework of the PS Act) is not appropriate:

> As recognised by the Review, for ASD the option of continuing to operate within the Public Service Act employment framework, even with

> exemptions, is not the most effective way forward to ensure ASD can continue to deliver the outcomes required. It would increase the risk of further losing the critical skills needed to successfully perform this task and not address the need to improve ASD's position in the employment market to attract the highest quality candidates.

1.195 Further, the minister provides information as to the safeguards that are in place to protect just and favourable conditions of work. This includes new subsection 38F to the *Intelligence Services Act 2001*, which requires the Director-General of ASD to adopt the principles of the PS Act in relation to employees of ASD to the extent to which the Director-General considers they are consistent with the effective performance of the functions of ASD. The minister also points to the safeguards for workers under the *Fair Work Act 2009*, which the amendments introduced by the bill do not extinguish. The minister also provides the following information as to the oversight of the Inspector-General of Intelligence and Security of employment-related grievances in the ASD:

> In addition to the continuation of the protections afforded to staff by the Fair Work Act, the Inspector-General of Intelligence and Security (IGIS) provides additional safeguards not normally afforded to workers outside of the intelligence community. Through the amendments made to the Intelligence Services Act the IGIS will be given powers to investigate complaints regarding employment-related grievances from ASD employees. Previously the IGIS was not able to investigate these complaints, and ASD employees sought redress through the Public Service Commissioner or the Merit Protection Commissioner. From 1 July 2018, ASD employees can bring their grievances to the IGIS in the same way as for employees of the Australian Security Intelligence Organisation and the Australian Secret Intelligence Service.

1.196 Based on the information provided by the minister, there appear to be sufficient safeguards in place to conclude that, on balance, it is likely that the measure would be a proportionate limitation on the right to just and favourable conditions of work.

Committee response

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

1.198 Based on the further information provided by the minister, the committee considers that the measure is likely to be compatible with the right to just and favourable conditions at work.

Migration (IMMI 18/003: Specified courses and exams for registration as a migration agent) Instrument 2018 [F2017L01708]

Purpose	Prescribes tertiary courses that must be completed, and exams that must be passed, in order to register as a migration agent. Prescribes the English language tests that certain persons must take in order to register as a migration agent, and the minimum scores that a person must achieve
Portfolio	Home Affairs
Authorising legislation	Migration Agents Regulations 1998
Last day to disallow	15 sitting days after tabling (tabled Senate and House of Representatives on 5 February 2018)
Rights	Equality and non-discrimination (see **Appendix 2**)
Previous report	3 of 2018
Status	Seeking further additional information

Background

1.199 The committee first reported on the instrument in its *Report 3 of 2018*, and requested a response from the Minister for Home Affairs by 11 April 2018.[1]

1.200 The minister's response to the committee's inquiries was received on 30 April 2018. The response is discussed below and is reproduced in full at **Appendix 3**.

Requirement for certain persons to complete additional English language exams to register as a migration agent

1.201 Relevantly, section 7(2) of the Migration (IMMI 18/003: Specified courses and exams for registration as a migration agent) Instrument 2018 [F2017L01708] (the instrument) introduces new language proficiency exams for persons seeking to register as a migration agent unless specified residency and study requirements are met. Persons are exempt from language proficiency exams if they have successfully met specified requirements in Australia, New Zealand, the United Kingdom, the Republic of Ireland, the United States of America, the Republic of South Africa or Canada as follows:

1 Parliamentary Joint Committee on Human Rights, *Report 3 of 2018* (27 March 2018) pp. 65-69.

- secondary school studies to the equivalent of Australian Year 12 level with minimum 4 years secondary school or equivalent study, and have successfully completed a Bachelor degree or higher; or
- they have successfully completed the equivalent of secondary school studies to at least Australian Year 10 with at least 10 years of primary or secondary schooling, or their secondary school studies and degree; and
- while completing their primary or secondary schooling, or their secondary school studies and degree, they were resident in one of those countries.

1.202 If these requirements are not met, then section 8 of the instrument provides that persons who are required to complete the English-language proficiency test must achieve:

- in the International English Language Testing System (IELTS), an overall score of at least 7, with a minimum score of 6.5 in each component of the test (speaking, listening, reading and writing); or
- in the Test of English as a Foreign Language internet-based test (TOEFL iBT), an overall score of at least 94, with minimum scores of 20 in speaking and listening, 19 in reading, and 24 in writing.

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

1.203 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 are entitled without discrimination to the equal and non-discriminatory protection of the law.

1.204 'Discrimination' encompasses both measures that have a discriminatory intent (direct discrimination) and measures which have a discriminatory effect on the enjoyment of rights (indirect discrimination).[2] The UN Human Rights Committee has described indirect discrimination as 'a rule or measure that is neutral at face value or without intent to discriminate', which exclusively or disproportionately affects people with a particular personal attribute (for example, national origin or language).[3]

1.205 The initial human rights analysis stated that requiring certain persons to complete an English language proficiency test to be eligible for registration as a migration agent engages the right to equality and non-discrimination on the basis of language competency or 'other status'. It may also indirectly discriminate on the

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

3 See, e.g., *Althammer v Austria*, Human Rights Committee, 8 August 2003, [10.2].

basis of national origin as it may disproportionately impact individuals from countries where English is not a national language or widely spoken.

1.206 Further, by providing that persons who completed their education and were resident in specified countries are not required to undertake a language proficiency test, the measure may also further indirectly discriminate on the basis of national origin. This is because it will have a disproportionate negative effect on individuals from countries that are not excused from the English language proficiency test requirement. Where a measure impacts on particular groups disproportionately, it establishes *prima facie* that there may be indirect discrimination.[4]

1.207 The statement of compatibility states that the instrument does not engage any of the applicable rights or freedoms,[5] and so does not provide an assessment of whether the right to equality and non-discrimination is engaged by the measure.

1.208 Under international human rights law, differential treatment (including the differential effect of a measure that is neutral on its face) will not constitute unlawful discrimination if the differential treatment is based on reasonable and objective criteria such that it serves a legitimate objective, is rationally connected to that legitimate objective and is a proportionate means of achieving that objective.[6]

1.209 The statement of compatibility states that the objective of the instrument is to 'strengthen the educational qualifications of migration agents…to ensure that their clients receive high standards of service'.[7] The initial analysis stated that these are likely to be legitimate objectives for the purposes of human rights law, particularly given the complexities of the Australian migration system and the potentially serious effect that poor advice can have on individuals.[8]

1.210 Notwithstanding the legitimate objectives of the measure, it was unclear whether the measure is effective to achieve (that is, rationally connected to) and proportionate to that objective. In this respect, it was acknowledged that a level of proficiency in English may be needed to practise effectively as a migration agent in Australia. Requiring a person either to complete all or part of their education in English, or to complete an English-language proficiency test, may therefore be an effective means of ensuring the necessary level of proficiency.

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4 See, *D.H. and Others v the Czech Republic* ECHR Application no. 57325/00 (13 November 2007) 49; *Hoogendijk v the Netherlands ECHR*, Application no. 58641/00 (6 January 2005).

5 Statement of compatibility (SOC), p. 8.

6 *Althammer v Austria* HRC 998/01, [10.2].

7 SOC, p. 8.

8 C N Kendall, *2014 Independent Review of the Office of the Migration Agents Registration Authority: Final Report* (September 2014), p. 142.

1.211 However, the initial analysis noted that the IELTS and the TOEFL iBT may exceed those requirements necessary to enter tertiary study.[9] It was unclear from the information provided that merely completing 10 years of primary and secondary education, to the equivalent of Australian Year 10 level, would ensure a person possesses a level of English proficiency equivalent to that of a person who achieves the required IELTS or TOEFL iBT scores. Consequently, it appears possible that persons who are not educated in Australia, or in another prescribed country, may be required to meet a potentially higher standard of English language proficiency than their Australian (or prescribed country) counterparts in order to be eligible for registration as a migration agent. This raised concerns as to whether the differential requirements would be effective to achieve the stated objectives, and whether the differential requirements are based on reasonable and objective criteria.

1.212 Similarly, it was unclear from the information provided that the exemption for a person who completed their school education at an institution in one of the prescribed countries where they were resident is rationally connected to the stated objective. This is because it was unclear that this would necessarily ensure the person's proficiency in English at the required level.

1.213 In relation to the proportionality of the measure, the statement of compatibility states:

> Strengthening educational requirements for the migration agent industry does not exclude applicants from the profession, provided they meet the applicable standards, which are reasonable and transparent.[10]

1.214 However, there are questions as to whether the application of these standards is sufficiently circumscribed with respect to the stated objective of the measure. For example, the instrument would require a person to complete an English proficiency test irrespective of whether their education was primarily in English, if the person did not complete their education in a prescribed country. For example, English may be the primary language used in an institution (for example, an international school) in a country that is not a prescribed country. Further, a number of universities consider that secondary and tertiary studies completed in English from countries that are not listed in the instrument satisfy the English proficiency requirements necessary for entry into the migration law program.[11] This raised

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9 See, for example, Flinders University, English language requirements, http://www.flinders.edu.au/international-students/study-at-flinders/entry--and-english-requirements/english-language-requirements.cfm; Australian National University, English language admission requirements for students, https://policies.anu.edu.au/ppl/document/ANUP_000408.

10 SOC, p. 8.

11 See, for example, Australian National University, English language admission requirements for students, https://policies.anu.edu.au/ppl/document/ANUP_000408.

questions as to whether requiring a person who was educated primarily in English to also sit a proficiency test is the least rights-restrictive means of achieving the stated objectives of the measure.

1.215 Accordingly, the committee requested the advice of the minister as to:

- how the measures are effective to achieve (that is, rationally connected to) the stated objectives; and
- whether the measures are reasonable and proportionate to achieving the stated objectives of the instrument (including how the measures are based on reasonable and objective criteria, whether the measures are the least rights-restrictive way of achieving the stated objective and the existence of any safeguards).

Minister's response

1.216 In relation to the right to equality and non-discrimination engaged by the instrument and discussed in the previous analysis, the minister provides the following general information:

> Guided by the 2014 Kendall Review, the Government is committed to protecting vulnerable visa applicants by ensuring that new and re-registering migration agents be required to prove that they have English language proficiency. The amendments made to the English language tests in *IMMI 18/003: Specified courses and exams for registration as a migration agent instrument* were a correction to the previous instrument *IMMI 12/097 Prescribed courses and exams for applicants for registration as a Migration Agent (Regulation 5)*. The Test of English as a Foreign Language (TOEFL) scores set out in the previous instrument 12/097 (with the exception of the writing subtest) were incorrect and did not align with the benchmarked International English Language Testing System (IELTS-TOEFL) equivalent scores.
>
> With IMMI 12/097 being repealed and replaced to reflect the new educational requirements for migration agents, it was an opportune time to revise the TOEFL scores. The TOEFL scores in IMMI 18/003 align with the benchmarks for all departmentally accepted English language tests.
>
> The broad application of these accepted English language proficiency levels for registered migration agents (which aligns with benchmarks required for certain visa applicants) is non-discriminatory. The measures are also reasonable and proportionate to ensure the quality and standards of advice to protect clients of migration agents.

1.217 As set out in the committee's initial report, it is acknowledged that the measure appears to pursue a legitimate objective for the purposes of international human rights law. However, as set out in detail above at [1.203]-[1.214] there are questions as to whether the measure as formulated is rationally connected and proportionate to that objective. In this respect while the minister's response merely states that the measure is non-discriminatory, no further information is provided in

support of this statement. The information provided by the minister otherwise does not substantively engage with the committee's inquiries and does not provide sufficient information for the committee to consider whether the instrument is compatible with human rights.

1.218 The *Human Rights (Parliamentary Scrutiny) Act 2011* requires a statement of compatibility to include an *assessment* of whether the legislative instrument is compatible with human rights,[12] and this has not occurred in relation to the statement of compatibility accompanying the instrument that is the subject of this analysis. As noted in the Committee's *Guidance Note 1,* the committee considers that statements of compatibility are essential to the examination of human rights in the legislative process, 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. In the absence of such information in the statement of compatibility, the committee may seek additional information from the proponent of the instrument and it is the committee's usual expectation that the minister's response would substantively address the committee's inquiries. In other words, the committee requires a more detailed assessment of the human rights engaged by the instruments beyond the minister's statement that the measure is non-discriminatory.

Committee response

1.219 The committee thanks the minister for his response.

1.220 The committee notes that the minister's response does not substantively address the committee's inquiries in relation to the compatibility of the instrument with the right to equality and non-discrimination.

1.221 The committee therefore restates its request for the advice of the minister in relation to the compatibility of the measure with the right to equality and non-discrimination, including:

- **how the measures are effective to achieve (that is, rationally connected to) the stated objectives; and**
- **whether the measures are reasonable and proportionate to achieving the stated objectives of the instrument (including how the measures are based on reasonable and objective criteria, whether the measures are the least rights-restrictive way of achieving the stated objective and the existence of any safeguards).**

12 Section 9(2) of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Various Instruments made under the Autonomous Sanctions Act 2011[1]

Purpose	Amends the Autonomous Sanctions Regulations 2011
Portfolio	Foreign Affairs
Authorising legislation	*Autonomous Sanctions Act 2011*
Last day to disallow	[F2018L00049]: 15 sitting days after tabling (tabled Senate 5 February 2018, notice of motion to disallow must be given by 8 May 2018) [F2017L01063] and [F2017L01080]: 15 sitting days after tabling (tabled Senate 4 September 2017) [F2017L01592]: 15 sitting days after tabling (tabled Senate 8 February 2018, notice of motion to disallow must be given by 8 May 2018) [F2018L00102] and [F2018L00108]: 15 sitting days after tabling (tabled Senate 15 February 2018, notice of motion to disallow must be given by 25 June 2018) [F2018L00099], [F2018L00101] and [F2018L00100]: 15 sitting days after tabling (tabled Senate 14 February 2018, notice of motion to disallow must be given by 21 June 2018)
Rights	Multiple rights (see **Appendix 2**)
Previous report	3 of 2018
Status	Seeking further additional information

1 Autonomous Sanctions (Designated Persons and Entities – Democratic People's Republic of Korea) Amendment List 2017 (No. 2) [F2017L01063]; Autonomous Sanctions (Designated Persons and Entities – Democratic People's Republic of Korea) Amendment List 2017 (No.3) [F2017L01592]; Autonomous Sanctions (Designated Persons and Entities and Declared Persons – Syria) List 2017 [F2017L01080]; Autonomous Sanctions (Designated Persons and Entities – Democratic People's Republic of Korea) Continuing Effect Declaration 2018 [F2018L00049]; Autonomous Sanctions (Designated Persons and Entities and Declared Persons – Zimbabwe) Continuing Effect Declaration 2018 [F2018L00108]; Autonomous Sanctions (Designated Persons and Entities and Declared Persons – Iran) Continuing Effect Declaration 2018 [F2018L00102]; Autonomous Sanctions (Designated Persons and Entities and Declared Persons – Libya) Continuing Effect Declaration and Revocation Instrument 2018 [F2018L00101]; Autonomous Sanctions (Designated and Declared Persons – Former Federal Republic of Yugoslavia) Continuing Effect Declaration and Revocation Instrument 2018 [F2018L00099]; Autonomous Sanctions (Designated Persons and Entities and Declared Persons – Syria) Continuing Effect Declaration and Revocation Instrument 2018 [F2018L00100].

Background

1.222 The committee first reported on the instruments in its *Report 3 of 2018*, and requested a response from the Minister for Foreign Affairs by 11 April 2018.[2]

1.223 The minister's response to the committee's inquiries was received on 27 April 2018. The response is discussed below and is reproduced in full at **Appendix 3**.

1.224 The instruments on which the committee sought the minister's advice were a number of new instruments under the *Autonomous Sanctions Act 2011* (the Act).[3] This Act, in conjunction with the Autonomous Sanctions Regulations 2011 (the 2011 regulations) and various instruments made under those 2011 regulations, provide the power for the government to impose broad sanctions to facilitate the conduct of Australia's external affairs (the autonomous sanctions regime).

1.225 Initial human rights analysis of various autonomous sanctions instruments was undertaken in 2013, and further detailed analysis (of autonomous sanctions and of the UN Charter sanctions regime) was made in 2015 and 2016.[4] This analysis stated that, as the instruments under consideration expanded or applied the operation of the sanctions regime by designating or declaring that a person is subject to the sanctions regime, or by amending the regime itself, it was necessary to assess the human rights compatibility of the autonomous sanctions regime and aspects of the UN Charter sanctions regime as a whole when considering these instruments. A further response was therefore sought from the minister, which was considered in the committee's *Report 9 of 2016*.[5] The committee concluded its examination of various instruments and made a number of recommendations to assist the compatibility of the sanctions regime with human rights.[6]

'Freezing' of designated person's assets and prohibitions on travel

1.226 Each of the new instruments designates and declares persons for the purpose of the 2011 regulations. Persons are designated and declared where the Minister for Foreign Affairs is satisfied that doing so will facilitate the conduct of Australia's relations with other countries or with entities or persons outside of

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2 Parliamentary Joint Committee on Human Rights, *Report 3 of 2018* (27 March 2018) pp. 82-96.

3 See footnote 1.

4 See, Parliamentary Joint Committee on Human Rights, *Sixth report of 2013* (15 May 2013) pp. 135-137; and *Tenth report of 2013* (26 June 2013) pp. 13-19; *Twenty-eighth report of the 44th Parliament* (17 September 2015) pp. 15-38; and *Thirty-third report of the 44th Parliament* (2 February 2016) pp. 17-25.

5 Parliamentary Joint Committee on Human Rights, *Report 9 of 2016* (22 November 2016) pp. 41-55.

6 Parliamentary Joint Committee on Human Rights, *Report 9 of 2016* (22 November 2016) p. 53; see also *Report 10 of 2017* (12 September 2017) pp. 27-31.

Australia, or will otherwise deal with matters, things or relationships outside Australia.[7] The 2011 regulations set out the countries and activities for which a person or entity can be designated or declared.[8] For example, the Autonomous Sanctions (Designated Persons and Entities – Democratic People's Republic of Korea) Amendment List 2017 (No. 2) [F2017L01063] designates and declares certain persons or entities for the purposes of the 2011 regulations on the basis that the Minister for Foreign Affairs is satisfied that the person or entity is assisting in the violation or evasion by the Democratic People's Republic of Korea (DPRK) of specified United Nations (UN) Security Council Resolutions.

1.227 The effect of the designations and declarations in each of the instruments is that the listed persons:

- are subject to financial sanctions such that it is an offence for a person to make an asset directly or indirectly available to, or for the benefit of, a designated person.[9] A person's assets are therefore effectively 'frozen' as a result of being designated; and
- are subject to a travel ban to prevent the persons travelling to, entering or remaining in Australia.

1.228 The autonomous sanctions regime provides that the minister may grant a permit authorising the making available of certain assets to a designated person.[10] An application for a permit can only be made for basic expenses, to satisfy a legal judgment or where a payment is contractually required.[11] A basic expense includes foodstuffs; rent or mortgage; medicines or medical treatment; public utility charges; insurance; taxes; legal fees and reasonable professional fees.[12]

Compatibility of the designations and declarations with multiple human rights

1.229 The statement of compatibility for each of the instruments states that the instruments are compatible with human rights and freedoms. However, the statements of compatibility provide only a broad description of the operation and effect of each instrument, and none provide any substantive analysis of the rights and freedoms that are engaged and limited by the instruments. This is the case notwithstanding that committee reports have previously raised significant human rights concerns in relation to such instruments on a number of previous occasions. As set out in the committee's *Guidance Note 1,* the committee's usual expectation is

7 Section 10(2) of the Autonomous Sanctions Act 2011.

8 Section 6 of the Autonomous Sanctions Regulations 2011.

9 Section 14 of the Autonomous Sanctions Regulations 2011.

10 See section 18 of the Autonomous Sanctions Regulations 2011.

11 See section 20 of the Autonomous Sanctions Regulations 2011.

12 See subsection 20(3)(b) of the Autonomous Sanctions Regulations 2011.

that the statement of compatibility provides a detailed and evidence-based assessment of the rights engaged and limited by the measure, including whether any limitations on such rights are permissible (that is, whether they are prescribed by law, pursue a legitimate objective, are rationally connected to that objective, and are proportionate).

1.230 The initial human rights analysis noted that aspects of the sanctions regimes may operate variously to both limit and promote human rights. However, consistent with committee practice to comment by exception, the current and previous examination of Australia's sanctions regimes has been, and is, focused solely on measures that impose restrictions on individuals.

1.231 The committee has previously noted that the autonomous sanctions regime engages and may limit multiple human rights, including:

- the right to privacy;
- the right to a fair hearing;
- the right to protection of the family;
- the right to an adequate standard of living;
- the right to freedom of movement;
- the prohibition against non-refoulement; and
- the right to equality and non-discrimination.

1.232 Further analysis of the rights engaged by the current instruments is set out below.

1.233 The committee further noted that the analysis is undertaken in relation to the human rights obligations owed to individuals located in Australia. The committee is unaware whether any of the designations or declarations made under the autonomous or UN Charter sanctions regime has affected individuals living in Australia (although as at 21 February 2018 the consolidated list of individuals subject to sanctions currently includes two Australian citizens who have been delegated pursuant to the UN Charter sanctions regime).[13] The analysis below therefore provides an assessment of whether the amendments to the autonomous sanctions regime introduced by the instruments could breach the human rights of persons to whom Australia owes such obligations, irrespective of whether there have already been instances of individuals in Australia affected by these measures.

13 See the Department of Foreign Affairs and Trade, 'Consolidated List', available at: http://dfat.gov.au/international-relations/security/sanctions/pages/consolidated-list.aspx.

Right to privacy, right to a fair hearing, right to protection of the family, right to an adequate standard of living and the right to freedom of movement

Right to privacy

1.234 Article 17 of the International Covenant on Civil and Political Rights (ICCPR) prohibits arbitrary or unlawful interference with an individual's privacy, family, correspondence or home. The designation and declaration of a person under the autonomous sanctions regimes is a significant incursion into a person's right to personal autonomy in one's private life (within the right to privacy). In particular, the freezing of a person's assets and the requirement for a designated person to seek the permission of the minister to access their funds for basic expenses imposes a limit on that person's right to a private life, free from interference by the state.

1.235 Further, the designation process under the autonomous sanctions regimes limits the right to privacy of close family members of a designated person. As noted above, once a person is designated under either sanctions regime, the effect of designation is that it is an offence for a person to directly or indirectly make any asset available to, or for the benefit of, a designated person (unless it is authorised under a permit to do so). This could mean that close family members who live with a designated person will not be able to access their own funds without needing to account for all expenditure, on the basis that any of their funds may indirectly benefit a designated person (for example, if a spouse's funds are used to buy food or public utilities for the household that the designated person lives in).

Right to a fair hearing

1.236 The right to a fair hearing is protected by article 14 of the ICCPR. The right applies both to criminal and civil proceedings, to cases before both courts and tribunals and to military disciplinary hearings. The right applies where rights and obligations, such as personal property and other private rights, are to be determined. In order to constitute a fair hearing, the hearing must be conducted by an independent and impartial court or tribunal, before which all parties are equal, and have a reasonable opportunity to present their case. Ordinarily, the hearing must be public, but in certain circumstances, a fair hearing may be conducted in private. The committee's previous human rights analysis of the autonomous sanctions regimes therefore noted that the designation and declaration process under the sanctions regimes limits the right to a fair hearing because it does not provide for merits review of the minister's designation or declaration under the autonomous sanctions regime before a court or tribunal.[14]

14 See further below and Parliamentary Joint Committee on Human Rights, *Report 9 of 2016* (22 November 2016) p. 45.

Right to protection of the family

1.237 The right to respect for the family is protected by articles 17 and 23 of the ICCPR and article 10 of the International Covenant on Economic, Social and Cultural Rights (ICESCR). An important element of protection of the family is to ensure family members are not involuntarily separated from one another. Laws and measures which prevent family members from being together, impose long periods of separation or forcibly remove children from their parents, will therefore engage this right. A person who is declared under the autonomous sanctions regime for the purpose of preventing the person from travelling to, entering or remaining in Australia will have their visa cancelled pursuant to the Migration Regulations 1994.[15] This makes the person liable to deportation which may result in that person being separated from their family, which therefore engages and limits the right to protection of the family.

Right to an adequate standard of living

1.238 The right to an adequate standard of living is guaranteed by article 11 of the ICESCR and requires state parties to take steps to ensure the availability, adequacy and accessibility of food, clothing, water and housing for all people in Australia. The imposition of economic sanctions on a person engages and limits this right, as persons subject to such sanctions will have their assets effectively frozen and may therefore have difficulty paying for basic expenses.[16]

Right to freedom of movement

1.239 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'. 'Own country' is a concept which encompasses not only a country where a person has citizenship but also one where a person has strong ties, such as long standing residence, close personal and family ties and intention to remain, as well as the absence of such ties elsewhere.[17] As noted in the initial analysis, the power to cancel a person's visa that is enlivened by designating or declaring a person under the autonomous sanctions regime may engage and limit

15 See Migration Regulations 1994, section 2.43(1)(aa) and section 116(1)(g) of the Migration Act 1958.

16 The minister may grant a permit for the payment of such expenses (including foodstuffs, rent or mortgage, medicines or medical treatment, public utility charges, insurance, taxes, legal fees and reasonable professional fees): Section 18 and 20 of the Autonomous Sanctions Regulations 2011. However, the minister must not grant a permit unless the minister is satisfied that it would be in the national interest to grant the permit and is satisfied about any circumstance or matter required by the regulations to be considered for a particular kind of permit: section 18(3) of the Autonomous Sanctions Regulations 2011.

17 UN Human Rights Committee, *General Comment No.27: Article 12 (Freedom of Movement)* (1999). See also *Nystrom v Australia* (1557/2007), UN Human Rights Committee, 1 September 2011.

the freedom of movement. This is because a person's visa may be cancelled (with the result that the person may be deported) in circumstances where that person has strong ties to Australia such that Australia may be considered their 'own country' for the purposes of international human rights law, despite that person not holding formal citizenship.

Limitations on human rights

1.240 Each of these rights may be subject to permissible limitations under international human rights law. In order to be permissible, the measure must seek to achieve a legitimate objective and be reasonable, necessary and proportionate to achieving that objective. In the case of executive powers which seriously disrupt the lives of individuals subjected to them, the existence of safeguards is important to prevent arbitrariness and error, and ensure that the powers are exercised only in the appropriate circumstances.

1.241 The committee has previously accepted that the use of international sanctions regimes to apply pressure to governments and individuals in order to end the repression of human rights may be regarded as a legitimate objective for the purposes of international human rights law.[18] However, it has expressed concerns that the sanctions regimes may not be regarded as proportionate to their stated objective, in particular because of a lack of effective safeguards to ensure that the regimes, given their serious effects on those subject to them, are not applied in error or in a manner which is overly broad in the individual circumstances.

1.242 For example, the previous human rights analysis raised concerns that the designation or declaration under the autonomous sanctions regime can be solely on the basis that the minister is 'satisfied' of a number of broadly defined matters,[19] and that there is no provision for merits review before a court or tribunal of the minister's decision. In response to previous questions from the committee in relation to these issues, the minister noted that the decisions were subject to judicial review under the *Administrative Decisions (Judicial Review) Act 1977* (ADJR Act) and under common law.[20] This appears to be one safeguard available under general law insofar as it does secure the minimum requirement that the minister act in accordance with the legislation.

1.243 However, as previously noted by the committee, the effectiveness of judicial review as a safeguard within the sanctions regimes relies, in significant part, on the clarity and specificity with which legislation specifies powers conferred on the

18 Parliamentary Joint Committee on Human Rights, *Report 9 of 2016* (22 November 2016) p. 44.

19 See the examples in the committee's previous analysis at paragraph [1.114] of the *Twenty-Eighth report of the 44th Parliament* and section 6 of the Autonomous Sanctions Regulations 2011

20 Parliamentary Joint Committee on Human Rights, *Report 9 of 2016* (22 November 2016) p. 46.

executive. The scope of the power to designate or declare someone is based on the minister's satisfaction in relation to certain matters which are stated in broad terms. It was noted that this formulation limits the scope to challenge such a decision on the basis of there being an error of law (as opposed to an error on the merits) under the ADJR Act or at common law. As the committee has previously explained, judicial review will generally be insufficient, in and of itself, to operate as a sufficient safeguard for human rights purposes in this context.[21]

1.244 The previous human rights analysis has also raised concerns that the minister can make the designation or declaration without hearing from the affected person before the decision is made. In response to previous questions from the committee, the minister indicated that the designation or declaration without hearing from the affected person was necessary to ensure the effectiveness of the regime, as prior notice would effectively 'tip off' the person and could lead to assets being moved off-shore. However, the previous human rights analysis noted that there may be less rights-restrictive measures available, such as freezing assets on an interim basis until complete information is available including from the affected person.[22]

1.245 There is also no requirement to report to Parliament setting out the basis on which persons have been declared or designated and what assets, or the amount of assets that have been frozen. In response to previous questions from the committee, the minister stated that public disclosure of assets frozen could risk undermining the administration of the sanctions regimes. However, the previous human rights analysis noted that it was difficult to accept the minister's justification as information identifying declared or designated persons is already publicly available on the Consolidated List of individuals subject to sanctions, which is available on the Department of Foreign Affairs and Trade website.[23]

1.246 Previous human rights analysis has also noted that once the decision is made to designate or declare a person, the designation or declaration remains in force for three years and may be continued after that time (such as occurs through these instruments). There is no requirement that if circumstances change or new evidence comes to light the designation or declaration will be reviewed before the three year period ends. In response to previous questions from the committee on this issue, the minister noted that designations and declarations may be reviewed at any time and persons may request revocation if circumstances change or new evidence comes to light. While this is true, without an automatic requirement of reconsideration if

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21 Parliamentary Joint Committee on Human Rights, *Report 9 of 2016* (22 November 2016) pp. 46-47; and *Twenty-eighth Report of the 44th Parliament* (17 September 2015) [1.116] to [1.123].

22 Parliamentary Joint Committee on Human Rights, *Report 9 of 2016* (22 November 2016) p. 47.

23 See, http://dfat.gov.au/international-relations/security/sanctions/pages/consolidated-list.aspx; Parliamentary Joint Committee on Human Rights, *Report 9 of 2016* (22 November 2016) pp. 48-49.

circumstances change or new evidence comes to light, a person may remain subject to sanctions notwithstanding that the designation or declaration may no longer be required.[24] This is of particular relevance in the context of the Autonomous Sanctions (Designated and Declared Persons – Former Federal Republic of Yugoslavia) Continuing Effect Declaration and Revocation Instrument 2018 [F2018L00099], which renews the designation and declarations, against many persons for a further three years on the basis of (among other things) their indictment before the International Criminal Tribunal for the former Yugoslavia (ICTY). However, the ICTY closed on 31 December 2017 with remaining appeals being determined by the UN Mechanism for International Criminal Tribunals (MICT), which raised questions as to whether the continued application of sanctions against those persons because of their status as (former) ICTY indictees is proportionate.

1.247 Similarly, a designated or declared person will only have their application for revocation considered once a year. If an application for review has been made within the year, the minister is not required to consider it. The minister has previously stated that this requirement is intended to ensure the minister is not required to consider repeated, vexatious revocation requests.[25] However, the previous human rights analysis noted that the provision gives the minister a discretion that is broader than merely preventing vexatious applications and the current requirement may affect meritorious applications for revocation.[26]

1.248 There is also no requirement to consider whether applying the ordinary criminal law to a person would be more appropriate than freezing the person's assets on the decision of the minister. The minister has previously stated that the imposition of targeted financial sanctions is considered, internationally, to be a preventive measure that operates in parallel to complement the criminal law.[27] The previous human rights analysis accepted that such measures may be preventive, but also noted that without further guidance from the minister (such as when and in what circumstances complementary targeted action would be needed) that there appeared to be a risk that such action may not be the least restrictive of human rights in every case.[28]

1.249 The previous human rights analysis also raised concerns relating to the minister's unrestricted power to impose conditions on a permit to allow access to funds to meet basic expenses. While the minister has previously stated that such discretion is appropriate, the previous human rights analysis expressed concern as

24 Parliamentary Joint Committee on Human Rights, *Report 9 of 2016* (22 November 2016) p. 49.

25 Parliamentary Joint Committee on Human Rights, *Report 9 of 2016* (22 November 2016) p. 49.

26 Parliamentary Joint Committee on Human Rights, *Report 9 of 2016* (22 November 2016) p. 49.

27 Parliamentary Joint Committee on Human Rights, *Report 9 of 2016* (22 November 2016) p. 50.

28 Parliamentary Joint Committee on Human Rights, *Report 9 of 2016* (22 November 2016) p. 50.

the broad discretion to impose conditions on access to money for basic expenses does not appear to be the least rights-restrictive way of achieving the legitimate objective.[29]

1.250 The previous human rights analysis also raised concerns that there is no requirement that in making a designation or declaration the minister must take into account whether doing so would be proportionate with the anticipated effect on an individual's private and family life. The committee has previously noted that this absence of safeguards in relation to family members raises concerns as to the proportionality of the measure.[30]

1.251 Further, limited guidance is available under the Act or 2011 regulations or any other publicly available document setting out the basis on which the minister decides to designate or declare a person.[31] The previous human rights analysis noted that this lack of clarity raised concerns as to whether the regime represents the least rights-restrictive way of achieving its objective, as the scope of the law is not made evident to those who may fall within the criteria for listing and who may seek in good faith to comply with the law.[32]

1.252 The European Court of Human Rights decision in *Al-Dulimi and Montana Management Inc. v Switzerland* provides further useful guidance on the interaction between UN Security Council sanctions and international human rights law.[33] This case confirmed the presumption that UN Security Council Resolutions are to be interpreted on the basis that they are compatible with human rights. The European Court of Human Rights found that domestic courts should have the ability to exercise scrutiny so that arbitrariness can be avoided. This case also indicated that, even in circumstances where an individual is specifically listed by the UN Security Council Committee, individuals should be afforded a genuine opportunity to submit evidence to a domestic court to seek to show that their inclusion on the UN Security Council list was arbitrary. That is, the state is still required to afford fair hearing rights in these circumstances. In light of this case and the concerns discussed above, the initial human rights analysis stated that there are concerns that the current Australian model of autonomous sanctions regimes may be incompatible with the right to a fair hearing.

1.253 The committee has also previously noted that, in terms of comparative models, the United Kingdom (UK) has implemented its obligations in a manner that

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29 Parliamentary Joint Committee on Human Rights, *Report 9 of 2016* (22 November 2016) p. 50.

30 Parliamentary Joint Committee on Human Rights, *Report 9 of 2016* (22 November 2016) p. 51.

31 See further below.

32 Parliamentary Joint Committee on Human Rights, *Report 9 of 2016* (22 November 2016) p. 48.

33 *Al-Dulimi and Montana Management Inc. v Switzerland,* ECHR (Application no. 5809/08) (21 June 2016).

incorporates a number of safeguards not present in the Australian autonomous sanctions regime, including:

- challenges to designations made by the executive can be made by way of full merits appeal rather than solely by way of judicial review;[34]
- quarterly reports must be made by the executive on the operation of the regime;[35]
- an Independent Reviewer of Terrorism Legislation reviews each designation and has unrestricted access to relevant documents, government personnel, the police and intelligence agencies;[36]
- the executive provides a 'Designation Policy Statement' to Parliament setting out the factors used when deciding whether to designate a person;
- an Asset-Freezing Review sub-group annually reviews all existing designations, or earlier if new evidence comes to light or there is a significant change in circumstances, and the executive invites each designated person to respond to whether they should remain designated;[37]
- the prohibition on making funds available does not apply to social security benefits paid to family members of a designated person (even if the payment is made in respect of a designated person);[38] and
- when the executive is considering designating a person, operational partners are consulted, including the police, to determine whether there are options available other than designation—for example, prosecution or forfeiture of assets—to ensure that there is not a less rights restrictive alternative to achieve the objective.[39]

1.254 These kinds of safeguards in the UK asset-freezing regime are highly relevant indicia that there are more proportionate methods of achieving the legitimate

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34 See section 26 of *Terrorist Asset-Freezing etc. Act 2010* (UK) (TAFA 2010).

35 See section 30 of TAFA 2010.

36 See David Anderson QC, Independent Reviewer of Terrorism Legislation, *Third Report on the Operation of the Terrorist Asset-Freezing etc. Act 2010 (Review Period: Year to 16 September 2013)* (December 2013) para 1.3.

37 See section 4 of TAFA 2010; David Anderson QC, Independent Reviewer of Terrorism Legislation, *First Report on the Operation of the Terrorist Asset-Freezing etc. Act 2010 (Review Period: December 2010 to September 2011)* (December 2011) [6.5]; *and Third Report on the Operation of the Terrorist Asset-Freezing etc. Act 2010 (Review Period: Year to 16 September 2013)* (December 2013) [3.4].

38 See subs 16(3) of TAFA 2010.

39 David Anderson QC, Independent Reviewer of Terrorism Legislation, *Third Report on the Operation of the Terrorist Asset-Freezing etc. Act 2010 (Review Period: Year to 16 September 2013)* (December 2013) [3.2].

objective of the Australian autonomous sanctions regimes. That is, it would appear that a less rights-restrictive approach is reasonably available.

The prohibition on non-refoulement, and the right to an effective remedy

1.255 Australia has non-refoulement obligations under the Refugee Convention, the ICCPR and the Convention Against Torture (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.[40] Non-refoulement obligations are absolute and may not be subject to any limitations.

1.256 Independent, effective and impartial review by a court or tribunal of decisions to deport or remove a person, including merits review in the Australian context, is integral to giving effect to non-refoulement obligations.

1.257 As noted earlier, an Australian visa holder who is declared under the autonomous sanctions regime for the purpose of preventing the person from travelling to, entering or remaining in Australia will have their visa cancelled pursuant to the Migration Regulations 1994.[41] It was not clear whether this provision would apply to visa holders who have been found to engage Australia's non-refoulement obligations.

1.258 Section 198 of the Migration Act requires an immigration officer to remove an unlawful non-citizen (which includes persons whose visas have been cancelled) in a number of circumstances as soon as reasonably practicable. Section 197C of the Migration Act also provides that, for the purposes of exercising removal powers under section 198, it is irrelevant whether Australia has non-refoulement obligations in respect of an unlawful non-citizen. There is thus no statutory protection ensuring that an unlawful non-citizen to whom Australia owes protection obligations will not be removed from Australia, nor is there any statutory provision granting access to effective and impartial review of the decision as to whether removal is consistent with Australia's non-refoulement obligations. As stated in previous human rights assessments, ministerial discretion not to remove a person is not a sufficient safeguard under international law.[42]

1.259 This therefore raised concerns that the declaration of a person who is an Australian visa holder under the autonomous sanctions regime, which may trigger

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

41 See, Migration Regulations 1994, section 2.43(1)(aa) and section 116(1)(g) of the Migration Act 1958.

42 See, for example, Parliamentary Joint Committee on Human Rights, *Fourteenth Report of the 44th Parliament* (October 2014) pp. 76-77; *Report 11 of 2017* (17 October 2017) pp. 108-111.

the cancellation of a person's visa, in the absence of any statutory protections to prevent the removal of persons to whom Australia owes non-refoulement obligations, may be incompatible with the obligation of non-refoulement in conjunction with the right to an effective remedy.

Initial information sought from the minister

1.260 In light of the human rights issues raised by the various sanctions instruments, the committee sought the advice of the minister as to the compatibility of the sanctions instruments with these rights.

1.261 In particular, the committee sought the advice of the minister as to the compatibility of this measure with the prohibition on non-refoulement in conjunction with the right to an effective remedy. This includes any safeguards in place to ensure that persons to whom Australia owes protection obligations will not be subject to refoulement as a consequence of being declared under the autonomous sanctions regime.

1.262 The committee also sought the advice of the minister as to the compatibility of the measures with the right to privacy, right to a fair hearing, right to protection of the family, right to an adequate standard of living and the right to freedom of movement. In particular, the committee sought the advice of the minister as to how the designation and declaration of persons pursuant to the autonomous sanctions regime is a proportionate limit on these rights, having regard to the matters set out in [1.234] to [1.254] above.

1.263 The committee also drew the minister's attention to the committee's recommendations in *Report 9 of 2016* that consideration be given to the following measures, several of which have been implemented in relation to the comparable regime in the United Kingdom, to ensure compatibility with human rights:

- the provision of publicly available guidance in legislation setting out in detail the basis on which the minister decides to designate or declare a person;
- regular reports to parliament in relation to the regimes including the basis on which persons have been declared or designated and what assets, or the amount of assets, that have been frozen;
- provision for merits review before a court or tribunal of the minister's decision to designate or declare a person;
- provision for merits review before a court or tribunal of an automatic designation where an individual is specifically listed by the UN Security Council Committee;
- regular periodic reviews of designations and declarations;
- automatic reconsideration of a designation or declaration if new evidence or information comes to light;

- limits on the power of the minister to impose conditions on a permit for access to funds to meet basic expenses;
- review of individual designations and declarations by the Independent National Security Legislation Monitor;
- provision that any prohibition on making funds available does not apply to social security payments to family members of a designated person (to protect those family members); and
- consultation with operational partners such as the police regarding other alternatives to the imposition of sanctions.

1.264 The committee also sought the advice of the minister as to whether a substantive assessment of the human rights engaged and limited by the autonomous sanctions regime will be included in future statements of compatibility to assist the committee fully to assess the compatibility of the measure with human rights in future.[43]

Designations or declarations in relation to specified countries

1.265 The autonomous sanctions regime allows the minister to make a designation or declaration in relation to persons involved in some way with (currently) eight specified countries.

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

1.266 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. Unlawful discrimination may be direct (that is, having the purpose of discriminating on a prohibited ground), or indirect (that is, having the effect of discriminating on a prohibited ground, even if this is not the intent of the measure). One of the prohibited grounds of discrimination under international human rights law is discrimination on the grounds of national origin and nationality.

1.267 The previous human rights analysis of the sanctions regime considered that the designation of persons in relation to specified countries may limit the right to equality and non-discrimination.[44] This is because nationals of listed countries may be more likely to be considered to be 'associated with' or work for a specified government or regime than those from other nationalities. Where a measure impacts on particular groups disproportionately it establishes *prima facie* that there may be indirect discrimination.

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43 See further section 8(3) of the *Human Rights (Parliamentary Scrutiny) Act 2011.*

44 Parliamentary Joint Committee on Human Rights, *Report 9 of 2016* (22 November 2016) pp. 53-54.

1.268 A disproportionate effect on a particular group may be justifiable such that the measure does not constitute unlawful indirect discrimination if the differential treatment is based on reasonable and objective criteria such that it serves a legitimate objective, is rationally connected to that legitimate objective and is a proportionate means of achieving that objective. Information to justify the rationale for differential treatment will be relevant to this proportionality analysis.

1.269 The committee therefore sought the advice of the minister as to the compatibility of the measures with the right to equality and non-discrimination.

Minister's response

Compatibility of the measure with the prohibition on non-refoulement and the right to an effective remedy

1.270 In relation to the compatibility of the measures with the obligation of non-refoulement, the minister's response states:

> Under the *Autonomous Sanctions Regulations 2011*, I may declare a person who meets the criteria specified in regulation 6 for the purpose of preventing the person from travelling to, entering or remaining in Australia. A 'declared person' holding an Australian visa may therefore have their visa cancelled by the Minister for Home Affairs under the *Migration Regulations 1994*, regulation 2.43.
>
> However, under regulation 2.43(1)(aa) of the *Migration Regulations 1994*, the Minister for Home Affairs cannot cancel a visa that is classified as a 'relevant visa'. Regulation 2.43(3) of the *Migration Regulations 1994* provides that a 'relevant visa' includes, among others, a protection, refugee, or humanitarian visa. I note that under the *Autonomous Sanctions Regulations 2011*, I may also waive the operation of a declaration that was made for the purpose of preventing the person from travelling to, entering or remaining in Australia, on the grounds that it would be in the national interest, or on humanitarian grounds. This decision is subject to natural justice requirements, and may be judicially reviewed.
>
> I also note the Committee's comments in relation to section 197C of the *Migration Act 1958*. As outlined in the Explanatory Memorandum to this section at the time of its introduction, Australia will continue to meet its non-refoulement obligations through mechanisms other than the removal powers in section 198 of the *Migration Act 1958*, including through the protection visa application process, and through the use of the Minister's personal powers in the *Migration Act 1958*. These mechanisms ensure that non-refoulement obligations are addressed before a person becomes ready for removal under section 198.

1.271 The minister's response helpfully provides information as to the operation of the Migration Regulations in relation to persons who are declared under section 6(1)(b) or 2(b) of the 2011 regulations. In particular, the minister's response clarifies that persons on protection, refugee or humanitarian visas could not have their visa

cancelled under section 2.43(1)(aa) of the Migration Regulations.[45] This indicates that, in practical terms, there is less risk of persons to whom Australia owes protection obligations having their visa cancelled as a consequence of the minister's exercise of power to declare persons under the 2011 regulations. However, the classes of 'relevant visas' that cannot be cancelled under section 2.43(1)(aa) do not include all types of visas that are granted to persons to whom Australia owes protection obligations. For example, Safe Haven Enterprise visas (subclass 790), which apply to persons who arrived in Australia illegally, engage Australia's protection obligations and intend to work and/or study in regional Australia,[46] are not included within the definition of 'relevant visa' in section 2.43(3). Similarly, there may be persons on other types of visas for whom deportation to their country of origin upon cancellation of their visa would mean the person faces a real risk that they would face persecution, torture or other serious forms of harm.

1.272 For persons who may have their visa cancelled under section 2.43 of the Migration Regulations, the response identifies the minister's power to waive the operation of the declaration and the use of the immigration minister's personal powers in the *Migration Act 1958* as a form of safeguard. The minister also points to the human rights compatibility assessment in the explanatory memorandum to the bill which introduced section 197C of the Migration Act.[47] However, it is noted that the mechanisms referred to are entirely at the discretion of the relevant minister. While the minister identifies that decisions by the minister to waive the operation of a declaration may be judicially reviewed, effective and impartial review by a court or tribunal of decisions, including *merits* review in the Australian context, is integral in giving effect to non-refoulement obligations.[48]

1.273 Further, the committee has previously concluded that section 197C of the Migration Act is incompatible with Australia's non-refoulement obligations, and specifically noted the deficiency of mere administrative (rather than statutory) safeguards:

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45 'Relevant visas' are defined in regulation 2.43(3) and means a visa of the following subclasses: Subclass 050 (Bridging Visa E); Subclass 070 (Bridging (Removal Pending) Visa); Subclass 200 (Refugee Visa); Subclass 201 (In-country Special Humanitarian Visa); Subclass 202 (Global Special Humanitarian Visa); Subclass 203 (Emergency Rescue Visa); Subclass 204 (Women at Risk Visa); Subclass 449 (Humanitarian Stay (Temporary) Visa); Subclass 785 (Temporary Protection Visa); Subclass 786 (Temporary Humanitarian Concern Visa); Subclass 866 (Permanent Protection Visa).

46 See Department of Home Affairs, *Safe Haven Enterprise Visa (Subclass 790)* at https://www.homeaffairs.gov.au/trav/visa-1/790-

47 Section 197C was introduced by Schedule 5 to the *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014*.

48 ICCPR, article 2. See Parliamentary Joint Committee on Human Rights, *Report 4 of 2017* (9 May 2017) 102.

> This statement suggests that visa processes and the minister's discretionary and non-compellable powers to grant a visa are sufficient to enable Australia to comply with its non-refoulement obligations. However, the committee considers that, while the form of administrative arrangements is a matter for the Australian government to determine, non-reviewable, discretionary and non-compellable powers in relation to visa protection claims do not meet the requirement of independent, effective and impartial review of non-refoulement decisions, and are in breach of Australia's non-refoulement obligations under the ICCPR and the CAT.[49]

1.274 Therefore, while the risk of persons to whom Australia owes protection obligations being returned contrary to the prohibition on non-refoulement is low, to the extent that there is a risk, the administrative safeguards identified by the minister are not sufficient safeguards to enable Australia to comply with its non-refoulement obligations. This is because these arrangements do not meet the requirements of independent, effective and impartial review of non-refoulement decisions.

Committee response

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

1.276 The committee notes the information from the minister that persons on 'relevant visas' (including protection, refugee or humanitarian visas) cannot have their visa cancelled under section 2.43(1)(aa) of the Migration Regulations following the exercise of the minister's power to declare persons under the 2011 regulations.

1.277 To the extent that there remains a risk that persons to whom Australia owes protection obligations who are not on 'relevant visas' may have their visa cancelled if they are declared persons under the 2011 regulations, the committee reiterates its previous view that the safeguards to prevent non-refoulement of persons to whom Australia owes protection obligations are incompatible with Australia's obligations under the ICCPR and CAT because they do not meet the requirements of independent, effective and impartial review of non-refoulement decisions.

Compatibility of the measure with multiple rights

1.278 In relation to the remaining human rights engaged by the instruments and discussed in the previous analysis, the minister does not substantively address the committee's inquiries but instead provides the following general information:

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49 See Parliamentary Joint Committee on Human Rights, *Fourteenth Report of the 44th Parliament* (October 2014) p.77-78. See also *Thirty-sixth report of the 44th Parliament* (16 March 2016) pp. 149-194.

> The Government is committed to ensuring the human rights compatibility of Australia's sanctions regime. I have previously addressed in some detail the issues raised in the Report in my responses to the Committee in 2015 and 2016. Without repeating the detail of those responses, it remains the Government's view that sanctions measures are proportionate and appropriate in targeting those responsible for repressing human rights and democratic freedoms or to end regionally or internationally destabilising actions.
>
> Modern sanctions regimes impose highly targeted measures designed to limit the adverse consequences of a situation of international concern, to seek to influence those responsible for it to modify their behaviour, and to penalise those responsible. Australia does not impose sanction measures on individuals lightly.
>
> I continue to be satisfied that Australia's implementation of autonomous sanctions is proportionate to the objectives of each regime. I note that the Department of Foreign Affairs and Trade (DFAT) keeps the operation of Australia's sanction regimes under regular review.

1.279 While the minister has referred to previous responses provided to the committee in 2015 and 2016, those responses related to different sanctions instruments. The *Human Rights (Parliamentary Scrutiny) Act 2011* requires a statement of compatibility to include an *assessment* of whether the legislative instrument is compatible with human rights,[50] and this has not occurred in relation to the statements of compatibility accompanying the various instruments that are the subject of this analysis. As noted in the Committee's *Guidance Note 1,* the committee considers that statements of compatibility are essential to the examination of human rights in the legislative process, and should identify the rights engaged by the legislation, and should provide a detailed and evidence-based assessment of the measures against the limitation criteria where applicable. In the absence of such information in the statement of compatibility, the committee may seek additional information from the proponent of the instrument and it is the committee's usual expectation that the minister's response would substantively address the committee's inquiries. In other words, the committee requires a more detailed assessment of the human rights engaged by the instruments beyond the minister's statement of satisfaction with human rights compatibility.

1.280 Finally, in relation to the statements of compatibility for the instruments, the minister's response states:

> I note the Committee's concerns that the statement of compatibility with human rights (SCHR) in the Instruments does not engage in any substantive analysis of the rights and freedoms that are engaged and limited by the Instruments.

50 Section 9(2) of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

As I have indicated above, I consider that the Instruments and the broader sanctions framework is proportionate and compatible with human rights. I have asked DFAT to consider whether additional detail can be included in future statements.

Committee response

1.281 The committee thanks the minister for her response.

1.282 The committee notes that the minister's response does not substantively address the committee's inquiries in relation to the compatibility of the instruments with multiple rights.

1.283 The committee refers to its analysis above and seeks the further advice of the minister as to the compatibility of the designations and declarations of persons under the 2011 regulations with the right to privacy, right to a fair hearing, right to protection of the family, right to an adequate standard of living and the right to freedom of movement. In particular, the committee restates its request for the advice of the minister as to how the designation and declaration of persons pursuant to the autonomous sanctions regime is a proportionate limitation on these rights, having regard to the matters set out at [1.234] to [1.254] above.

1.284 The committee reiterates the analysis above that the designations or declarations in relation to specified countries appear to have a disproportionate impact on persons on the basis of national origin or nationality. The committee therefore restates its request for the advice of the minister as to the compatibility of these measures with the right to equality and non-discrimination.

1.285 The committee draws the minister's attention to the committee's recommendations in *Report 9 of 2016* and seeks the minister's advice as to whether consideration could be given to the following measures, several of which have been implemented in relation to the comparable regime in the United Kingdom, to ensure compatibility with human rights:

- **the provision of publicly available guidance in legislation setting out in detail the basis on which the minister decides to designate or declare a person;**
- **regular reports to parliament in relation to the regimes including the basis on which persons have been declared or designated and what assets, or the amount of assets, that have been frozen;**
- **provision for merits review before a court or tribunal of the minister's decision to designate or declare a person;**
- **provision for merits review before a court or tribunal of an automatic designation where an individual is specifically listed by the UN Security Council Committee;**
- **regular periodic reviews of designations and declarations;**

- **automatic reconsideration of a designation or declaration if new evidence or information comes to light;**
- **limits on the power of the minister to impose conditions on a permit for access to funds to meet basic expenses;**
- **review of individual designations and declarations by the Independent National Security Legislation Monitor;**
- **provision that any prohibition on making funds available does not apply to social security payments to family members of a designated person (to protect those family members); and**
- **consultation with operational partners such as the police regarding other alternatives to the imposition of sanctions.**

1.286 The committee notes the minister has requested the Department of Foreign Affairs and Trade to include additional detail in future statements of compatibility, and draws the minister and department's attention to the committee's *Guidance Note 1*.

Advice only

1.287 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 Human Rights Commission Repeal (Duplication Removal) Bill 2018

Purpose	Seeks to repeal the *Australian Human Rights Commission Act 1986*
Legislation Proponent	Senator Cory Bernardi
Introduced	Senate, 15 February 2018
Rights	Effective Remedy (see **Appendix 2**)
Status	Advice only

Repeal of the *Australian Human Rights Commission Act 1986*

1.288 The bill seeks to repeal the whole of the *Australian Human Rights Commission Act 1986* (the AHRC Act).

1.289 The AHRC Act establishes the Australian Human Rights Commission (the AHRC) and gives the AHRC functions in relation to several international human rights treaties and instruments. The AHRC Act also regulates the processes for making and resolving complaints under four federal anti-discrimination acts: the *Racial Discrimination Act 1975,* the *Sex Discrimination Act 1984*, the *Disability Discrimination Act 1992* and the *Age Discrimination Act 2004*.

1.290 As stated in the statement of compatibility, the effect of the bill would be to abolish the AHRC and to repeal the mechanisms by which the AHRC Act provides redress for unlawful discrimination.[1]

Compatibility of the measure with the right to an effective remedy

1.291 Article 2 of the International Covenant on Civil and Political Rights (ICCPR) requires state parties to ensure access to an effective remedy for violations of human rights.[2] Relevantly, the right to an effective remedy requires state parties to establish appropriate judicial and administrative mechanisms for addressing claims

1 Statement of Compatibility (SOC), p.3.

2 See also International Convention on the Elimination of All Forms of Racial Discrimination, Article 6; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Article 14; Convention on the Elimination of All Forms of Discrimination against Women, Article 2.

of human rights violations under domestic law. The United Nations Human Rights Committee has noted the particular importance of national human rights institutions in giving effect to state parties' obligations to ensure access to effective remedies, in particular the role such institutions play in investigating allegations of human rights violations.[3]

1.292 By repealing the AHRC Act, and consequently the mechanisms through which victims of human rights violations may seek redress, the bill engages the right to an effective remedy. The statement of compatibility does not acknowledge that this right may be engaged by the bill. Rather, the statement of compatibility states that the bill touches on a 'number of human rights topics' but 'leaves untouched commonwealth legislation relating to human rights' (namely, the four federal anti-discrimination acts as well as elements of the *Fair Work Act 2009*).[4]

1.293 The statement of compatibility states that the purpose of the bill is to 'end commonwealth duplication of human rights advocacy performed by state-equivalent commissions' and that repealing the AHRC Act would 'encourage aggrieved plaintiffs to use relevant State and Territory anti-discrimination legislation'.[5] The statement of compatibility further states:

> The functionality of the Commission can be replicated if a government so wishes by other means. The offences under those Commonwealth Acts could be prosecuted by the Commonwealth. Alternatively, the government could propose consequential amendments to provide for applications by aggrieved plaintiffs to be lodged directly in the Federal Court. It is also observed that the bill does not touch the significant number of bodies at state levels tasked with upholding specific human rights...[6]

1.294 While there is overlap between the federal anti-discrimination laws and the state and territory discrimination laws, the schemes are not identical, and different matters and protected attributes are covered to differing degrees between the jurisdictions.[7] For example, Part IIA of the *Racial Discrimination Act* provides federal protection against racial vilification, and complaints of racial vilification are investigated and conciliated by the AHRC.[8] However, as the committee has previously noted, while all other states and territories have some form of anti-

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3 United Nations Human Rights Committee, *General Comment No.31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant* (2004) [15].

4 SOC, p.2.

5 SOC, p.2.

6 SOC, pp.2-3.

7 See generally, Australian Human Rights Commission, *A Quick Guide to Australian Discrimination Laws* (2014); Neil Rees, Simon Rice and Dominique Allen, *Australian anti-discrimination and equal opportunity law* (3rd edition, 2018) Chapter 10.

8 See AHRC Act, section 46P.

vilification laws, the Northern Territory (NT) presently does not and therefore any complaints of racial vilification in the NT must be brought under the *Racial Discrimination Act* to the AHRC.[9] State and territory jurisdictions would also not necessarily cover discriminatory conduct by the Commonwealth or Commonwealth officers.[10]

1.295 Further, in addition to the mechanisms under the four federal anti-discrimination acts, the AHRC Act also gives the AHRC specific functions in relation to equal opportunity in employment in order to give effect to Australia's obligations under the International Labour Organisation Convention (No 111) concerning Discrimination in respect of Employment and Occupation (ILO 111).[11] The AHRC Act defines 'discrimination' in that context as including distinction on the basis of religion, political opinion, or social origin that has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation.[12] These protected attributes of political opinion, religion or social origin are not covered in some state jurisdictions.[13] The repeal of the AHRC Act would therefore raise concerns that there would not be appropriate judicial and administrative mechanisms for addressing human rights violations, contrary to the right to an effective remedy.

1.296 In relation to the ability of the Commonwealth to prosecute offences under the federal discrimination laws, it is noted that unlawful discrimination is generally a civil matter in Australian law and there are only a small number of offences in federal

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9 See Parliamentary Joint Committee on Human Rights, *Freedom of Speech in Australia: Inquiry into the operation of Part IIA of the* Racial Discrimination Act 1975 (Cth) *and related procedures under the* Australian Human Rights Commission Act 1986 (Cth) (28 February 2017) [2.37]. It is noted that in September 2017 the Northern Territory government released a discussion paper on modernising the Northern Territory *Anti-Discrimination Act* to include provisions relating to anti-vilification: Northern Territory Department of Attorney-General and Justice, *Discussion Paper: Modernisation of the Anti-Discrimination Act* (September 2017) p.11.

10 Parliamentary Joint Committee on Human Rights, *Freedom of Speech in Australia: Inquiry into the operation of Part IIA of the* Racial Discrimination Act 1975 (Cth) *and related procedures under the* Australian Human Rights Commission Act 1986 (Cth) (28 February 2017) [2.37]; see also Legal Aid New South Wales, *Discrimination Law Complaints: Should I go to the ADB or AHRC?* (2018) https://www.legalaid.nsw.gov.au/publications/factsheets-and-resources/discrimination-toolkit/what-you-can-do-about-discrimination/discrimination-law-complaints.

11 See Part II, Division 4 of the *Australian Human Rights Commission Act 1986* (the AHRC Act).

12 See AHRC Act, section 3.

13 See for example, the South Australian *Equal Opportunity Act 1984* (SA); see also South Australia Equal Opportunity Commission, *Where do I complain – state or federal?* (2018) http://www.eoc.sa.gov.au/eo-you/discrimination-laws/where-do-i-complain-state-or-federal.

discrimination laws[14] and in the AHRC Act.[15] This raises concerns that relying on the criminal offence provisions under the federal discrimination laws would not provide a sufficiently effective mechanism for investigating and redressing human rights violations that would be compatible with the right to an effective remedy.

Committee comment

1.297 The committee draws the human rights implications of the bill in respect of the right to an effective remedy to the attention of the legislation proponent and the Parliament.

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

14 For example, Part IV of the *Racial Discrimination Act 1975;* Division 4 of the *Disability Discrimination Act 1992*; Part 5 of the *Age Discrimination Act 2004*; Part IV of the *Sex Discrimination Act 1984*.

15 For example section 26 of the AHRC Act.

Criminal Code (Foreign Incursions and Recruitment—Declared Areas) Declaration 2018—Mosul District, Ninewa Province, Iraq [F2018L00176]

Purpose	Makes it an offence under section 119.2 of the *Criminal Code Act 1995* (the Criminal Code) to enter, or remain in, Mosul District, Ninewa Province, Iraq
Portfolio	Foreign Affairs and Trade
Authorising legislation	*Criminal Code Act 1995*
Last day to disallow	15 sitting days after tabling (tabled House of Representatives 26 March 2018, Senate 19 March 2018)
Rights	Fair trial; presumption of innocence; prohibition against arbitrary detention; freedom of movement; equality and non-discrimination (see **Appendix 2**)
Status	Advice only

Background

1.299 Section 119.2 of the Criminal Code makes it an offence for a person to intentionally enter, or remain in, a declared area in a foreign country where the person is reckless as to whether the area is a declared area. Under section 119.3 of the Criminal Code, the Minister for Foreign Affairs (the minister) may declare an area in a foreign country for the purposes of section 119.2 if the minister is satisfied that a listed terrorist organisation is engaging in a hostile activity in that area.

1.300 The committee previously considered these provisions as part of its assessment of the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014 (the bill) in its *Fourteenth Report of the 44th Parliament*.[1] The bill passed both Houses of Parliament and received Royal Assent on 2 November 2014.

1.301 The committee considered that the declared area offence provisions introduced by the bill were likely to be incompatible with the right to a fair trial and the presumption of innocence, the prohibition against arbitrary detention, the right to freedom of movement and the right to equality and non-discrimination.

1.302 Subsequent to the committee's analysis of the bill, the bill was amended to remove the ability of the minister to declare whole countries or neighbouring countries as declared areas (see section 119.3(2A) of the Criminal Code).

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1 Parliamentary Joint Committee on Human Rights, *Fourteenth Report of the 44th Parliament* (28 October 2014) pp. 34-44.

1.303 The committee has also previously considered specific declarations of an area in a foreign country for the purposes of section 119.2 of the Criminal Code.[2]

Declaration of Mosul District as a declared area

1.304 As a result of the Declaration, it is a criminal offence under section 119.2 of the Criminal Code for a person to enter, or remain in the Mosul District.

1.305 In order to prove the offence the prosecution is only required to prove that a person intentionally entered into (or remained in) the Mosul District and was reckless as to whether or not it had been declared by the minister. The prosecution is not required to prove that the person had any intention to undertake a terrorist or other criminal act. A person accused of entering or remaining in Mosul District province bears an evidential burden—that is, to establish a defence they must provide evidence that they were in the declared area solely for a legitimate purpose as defined by the Criminal Code.

Compatibility of the measure with multiple human rights

1.306 As stated above, the committee has previously concluded that the declared area offence provisions of the Criminal Code are likely to be incompatible with:

- the right to a fair trial and the presumption of innocence;
- the prohibition against arbitrary detention;
- the right to freedom of movement; and
- the right to equality and non-discrimination.

1.307 In light of the committee's previous conclusion that the declared area offence provisions in the Criminal Code are incompatible with human rights, it follows that the declaration of Mosul District, Ninewa Province, Iraq for the purposes of the declared area offence provision is also likely to be incompatible with human rights. This analysis is consistent with the committee's previous analysis and conclusions about earlier declarations made for the purposes of section 119.2.

1.308 The statement of compatibility for the Declaration argues that the 'Declaration is compatible with these human rights because it is a lawful, necessary and proportionate response to protect Australia's national security'.[3] It is acknowledged that the protection of national security from identified risks may be capable of constituting a legitimate objective for the purposes of international human rights law.

1.309 In this respect, the statement of compatibility provides a general explanation for the measure and states that:

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2 See, Parliamentary Joint Committee on Human Rights, *Eighteenth Report of the 44th Parliament* (10 February 2015) pp. 71-73.

3 Statement of Compatibility (SOC), p. 1.

> …The Islamic State (also known as the Islamic State of Iraq and the Levant or ISIL) is a listed terrorist organisation under the Criminal Code. ISIL's activities, including in the district of Mosul, and calls by ISIL's leadership, have attracted thousands of foreign fighters, including Australians, who have travelled to Iraq to join ISIL and engage in hostile activity…
>
> The declaration promotes the safety of Australians, including those who might be seeking to travel to Mosul district, Ninewa province, Iraq and those who may be at risk of harm posed by persons returning from Mosul district, Ninewa province, Iraq.[4]

1.310 However, the statement of compatibility does not provide more specific analysis of the specific threat to Australia's national security or how any such threat is addressed by declaring the district of Mosul. Further, the statement does not explain why it is not possible to rely on measures that are less restrictive of human rights, such as the existing provisions of the Criminal Code which prohibit engaging in hostile activities in foreign countries. The statement of compatibility does not acknowledge or address human rights concerns raised in the committee's previous reports.

Committee comment

1.311 Noting the concerns raised in the previous human rights assessment of the declared area offence and the above analysis, the committee draws the human rights implications of the Declaration to the attention of parliament.

4 SOC, p. 1.

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

Purpose	This bill seeks to amend the *National Consumer Credit Protection Act 2009* and the National Credit Code in relation to small amount credit contracts and consumer leases
Legislation proponent	Mr Tim Hammond MP
Introduced	House of Representatives, 26 February 2018
Rights	Fair trial; criminal process rights; presumption of innocence (see **Appendix 2**)
Status	Advice only

Civil penalty provisions

1.312 The bill seeks to introduce a series of civil penalty provisions for failure to comply with the provisions governing small amount credit contracts (SACCs)[1] and consumer leases.[2] In relation to SACCs, civil penalties of 2,000 penalty units (currently, $420,000) may be imposed in circumstances including: where a licensee[3] fails to record assessments of a consumer's suitability for a SACC,[4] makes certain representations in relation to SACCs but without providing prescribed information,[5] makes unsolicited SACC invitations,[6] or enters into a SACC with a consumer where the repayments under the contract are not equal or would not meet prescribed requirements.[7] Civil penalties of 2,000 penalty units are also imposed in relation to

1 SACCs are defined in section 5 of the *National Consumer Credit Protection Act 2009* and are loans of up to $2,000 where the term of the contract is between 16 days and 12 months.

2 Consumer leases are contracts for goods (hired wholly or predominately for personal, domestic or household purposes) for longer than four months where: the consumer does not have the right or obligation to purchase the goods; and the total amount payable exceeds the cash price: see Exposure Draft Explanatory Memorandum to the Bill at [3.6] https://static.treasury.gov.au/uploads/sites/1/2017/10/c2017-t229374-Explanatory-Memorandum-1.pdf

3 A licensee means a person who holds a licence: section 5 of the *National Consumer Credit Protection Act 2009*.

4 Items 4 and 12, proposed sections 116A(1) and 129A of the bill.

5 Items 8 and 18, proposed sections 124B(1) and 133CB(1) of the bill.

6 Items 10 and 22, proposed sections 124C and 133CF of the bill.

7 Items 19 and 21, proposed sections 133CE(1) and 133CC(1) of the bill.

similar conduct relating to consumer leases,[8] the prohibited use of account statements,[9] avoidance schemes relating to SACCs and consumer leases,[10] charging prohibited monthly fees,[11] exceeding caps on fees and charges for consumer leases,[12] and canvassing of consumer leases at home.[13]

Compatibility of the measure with criminal process rights

1.313 Under Australian law, civil penalty provisions are dealt with in accordance with the rules and procedures that apply in relation to civil matters (for example, the burden of proof is on the balance of probabilities). However, if the new civil penalty provisions are regarded as 'criminal' for the purposes of international human rights law, they will engage the criminal process rights under articles 14 and 15 of the International Covenant on Civil and Political Rights (ICCPR). The statement of compatibility does not acknowledge that the civil penalty provisions may engage the criminal process rights in the ICCPR.

1.314 The committee's *Guidance Note 2* (see Appendix 4) sets out the three relevant steps for determining whether civil penalty provisions may be considered 'criminal' for the purpose of international human rights law. In this bill, the penalties are classified as 'civil' under domestic law meaning they will not automatically be considered 'criminal' for the purposes of international human rights law under the first part of the test.

1.315 Under step two, a civil penalty is more likely to be considered 'criminal' in nature if it applies to the public in general rather than a specific regulatory or disciplinary context, and where there is an intention to punish or deter, irrespective of the severity of the penalty. While there is no information in the statement of compatibility as to the purpose of the penalties, it is clear that the penalties apply in a particular regulatory context of consumer protection, and apply to licensees of SACCs and consumer leases rather than the public in general. This would suggest that the penalty is unlikely to be considered 'criminal' under the second part of the test.

1.316 Even if the penalty is not considered 'criminal' under step two, a penalty may still be 'criminal' for the purposes of international human rights law under step three if the penalty carries a substantial pecuniary sanction. In determining whether a civil penalty is sufficiently severe to amount to a 'criminal' penalty under step three, the nature of the industry or sector being regulated and the relative size of the penalties

8 Items 25,28,31,and 34, proposed sections 139A(1), 147A(1), 152A(1), 156A(1), 156C(1).

9 Item 36, proposed sections 160H(1)

10 See item 38, proposed sections 323A(1)and 323C(1),

11 See item 42, proposed section 31C(1).

12 See item 58, proposed section 175AA.

13 See item 62, proposed section 179VA.

in that regulatory context is relevant. No information is provided in the statement of compatibility as to the amount of the penalty in context, however it is noted that the maximum civil penalty that may be imposed (2,000 penalty units, or $420,000) is substantial. This raises concerns that the penalties may be classified as 'criminal' for the purposes of international human rights law, due to the substantial pecuniary sanction.

1.317 If the civil penalties were assessed to be 'criminal' for the purposes of human rights law, this does not mean that the relevant conduct must be turned into a criminal offence in domestic law nor does it mean that the civil penalty is illegitimate. Instead, it means that the civil penalty provisions in question must be shown to be 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)).[14]

1.318 Here, there are concerns as to whether the bill would be compatible with these criminal process guarantees. For example, for many of the proposed civil penalties there are corresponding criminal offences attaching to the same conduct, and it is not clear 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 probabilities) rather than the criminal standard of proof (requiring proof beyond reasonable doubt), raising concerns as to whether the measure is compatible with the presumption of innocence.

1.319 Therefore, if the penalties were classified as 'criminal' for the purposes of international human rights law, the committee's usual expectation is that the statement of compatibility would explain how the civil penalties are compatible with these criminal process rights, in particular whether any limitations on those rights are permissible.

Strict liability offences

1.320 The bill also introduces a series of strict liability offences alongside several of the civil penalty provisions discussed above in relation to SACCs and consumer leases.[15] The strict liability penalties range from 10 penalty units to 100 penalty units.

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14 Other guarantees include the guarantee against retrospective criminal laws (Article 15(1)) and the right not to incriminate oneself (article 14(3)(g)). These guarantees are not engaged by the proposed civil penalties, as the law does not appear to apply retrospectively and the conduct giving rise to the civil penalties do not appear to engage the right not to incriminate oneself.

15 See item 4, section 116A(3)-(4); item 10, section 124C(3)-(4); item 12, section 129A(3)-(4); item 21, section 133CE(6)-(7); item 22, section 133CF(3)-(4); item 25, section 139A(3)-(4); item 31, section 152A(3)-(4); item 36, section 160H(3)-(4); item 42, section 31C(3)-(4); item 62, section 179VA(3)-(4).

Compatibility of the measure with the presumption of innocence

1.321 As noted earlier, 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.

1.322 Strict liability offences will not necessarily be inconsistent with the presumption of innocence provided that they are within reasonable limits, taking into account the importance of the objective being sought, and maintain the defendant's right to a defence. In other words, such offences must be rationally connected and proportionate to the objective being sought.

1.323 The statement of compatibility generally acknowledges that there are human rights implications of the strict liability offences when it states:

> Consistent with the Government's draft legislation, this bill imposes strict liability offences on SACC providers and consumer lease providers for some breaches of the new requirements.
>
> The imposition of strict liability for these offences is appropriate because of the potentially serious financial impact a contravention may have on an affected consumer. Requiring fault to be demonstrated as part of the offence would undermine deterrence and increase the likelihood of contraventions that could impact negatively on vulnerable consumers.
>
> Furthermore, by addressing rip-offs and predatory behaviour by SACC lenders and consumer lease providers, and improving financial inclusion, the bill would enhance the protection of human rights recognised under the International Covenant on Economic, Social and Cultural Rights.[16]

1.324 However, there is no specific engagement in the statement of compatibility with the right to presumption of innocence. Further, 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 would have been useful in the statement of compatibility as to the proportionality of the measures. For instance, as noted earlier, some of the strict liability offences impose substantial criminal penalties of up to 100 penalty units.[17] It is not clear from the information provided why some of the strict liability offences attract more severe

16 Statement of compatibility, pp.10-11.

17 See item 21, section 133CE(6)-(7); item 42, section 31C(3)-(4).

criminal penalties than others, particularly in circumstances where the accompanying civil penalty is 2000 penalty units for all of the strict liability offences.

Committee comment

1.325 The committee draws the human rights implications of the bill to the attention of the legislation proponent and the Parliament.

1.326 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

1.327 Of the bills introduced into the Parliament between 26 and 28 March 2018, 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):

- Aboriginal and Torres Strait Islander Amendment (Indigenous Land Corporation) Bill 2018;
- Aboriginal and Torres Strait Islander Land and Sea Future Fund Bill 2018;
- Aboriginal and Torres Strait Islander Land and Sea Future Fund (Consequential Amendments) Bill 2018;
- Air Services Amendment Bill 2018;
- A New Tax System (Medicare Levy Surcharge—Fringe Benefits) Amendment (Excess Levels for Private Health Insurance Policies) Bill 2018;
- Australian Astronomical Observatory (Transition) Bill 2018;
- Biosecurity Legislation Amendment (Miscellaneous Measures) Bill 2018;
- Commerce (Trade Descriptions) Amendment Bill 2018;
- Corporations Amendment (Asia Region Funds Passport) Bill 2018;
- Customs Amendment (Illicit Tobacco Offences) Bill 2018;
- Education and Other Legislation Amendment (VET Student Loan Debt Separation) Bill 2018;
- Fair Work Amendment (Better Work/Life Balance) Bill 2018;
- Fair Work Amendment (Tackling Job Insecurity) Bill 2018;
- Higher Education Support Amendment (National Regional Higher Education Strategy) Bill 2018;
- Intellectual Property Laws Amendment (Productivity Commission Response Part 1 and Other Measures) Bill 2018;
- Interactive Gambling Amendment (Lottery Betting) Bill 2018;
- Medicare Levy Amendment (Excess Levels for Private Health Insurance Policies) Bill 2018;
- Offshore Petroleum and Greenhouse Gas Storage (Regulatory Levies) Amendment Bill 2018;
- Primary Industries Levies and Charges Collection Amendment Bill 2018;
- Private Health Insurance Legislation Amendment Bill 2018;
- Public Sector Superannuation Legislation Amendment Bill 2018;
- Social Services Legislation Amendment (Payments for Carers) Bill 2018;

- Statute Update (Autumn 2018) Bill 2018;
- Student Loans (Overseas Debtors Repayment Levy) Amendment Bill 2018;
- Treasury Laws Amendment (ASIC Governance) Bill 2018;
- Treasury Laws Amendment (Australian Consumer Law Review) Bill 2018;
- Treasury Laws Amendment (OECD Multilateral Instrument) Bill 2018;
- Treasury Laws Amendment (Tax Integrity and Other Measures) Bill 2018; and
- Underwater Cultural Heritage (Consequential and Transitional Provisions) 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 included at **Appendix 3**.

Export Control Bill 2017

Purpose	Amends the framework for regulating the export of goods, including agricultural products and food, from Australian territory
Portfolio	Agriculture and Water Resources
Introduced	Senate, 7 December 2017
Rights	Privacy; freedom of association; work (see **Appendix 2**)
Previous report	3 of 2018
Status	Concluded examination

Background

2.3 The committee first reported on the bill in its *Report 3 of 2018*, and requested a response from the Minister for Agriculture and Water Resources by 11 April 2018.[1]

2.4 The minister's response to the committee's inquiries was received on 30 April 2018. The response is discussed below and is reproduced in full at **Appendix 3**.

Requirement to be a 'fit and proper person'

2.5 The bill would impose conditions on the export of some types of goods, including requiring that: a person holds an export licence; an establishment or premises is registered for export operations; and the export is in accordance with an approved export arrangement. Under the bill, the secretary[2] may refuse or suspend a licence, registration or an arrangement if the applicant or a person who participates

1 Parliamentary Joint Committee on Human Rights, *Report 3 of 2018* (27 March 2018) pp. 12-15.

2 The 'secretary' is the Secretary of the Department of the minister who will administer the Export Control Act 2017 if the bill passes the parliament and receives Royal Assent: Explanatory memorandum (EM) p. 6.

or would participate in managing or controlling the export business is not a 'fit and proper person'.[3] Subsection 372(2) of the bill provides that in determining whether the person is a 'fit and proper person' the secretary must have regard to a range of matters including whether the person or an associate of that person:

- has been convicted of an offence or ordered to pay a pecuniary penalty under particular legislation;[4]
- has provided false, misleading or incomplete information in an application and/or to the secretary; or
- had an application, registration or licence revoked, suspended or refused.[5]

2.6 In determining whether the person is a 'fit and proper person' the secretary may also have regard to:

- whether the person has been convicted or ordered to pay a penalty under any other Australian law;
- the interests of the industry or business that relate to the person's export business; or
- any other relevant matter.[6]

2.7 Section 373 further provides that the rules may prescribe kinds of persons who are required to be 'fit and proper persons' for the purposes of the bill.

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3 See, for example, sections (a) sections 112, 117, 123, 127 and 138 (decisions in relation to registered establishments); (b) sections 151, 156, 165, 171 and 179 (decisions in relation to 8 approved arrangements); (c) sections 191, 196, 201, 205 and 212 (decisions in relation to export licences).

4 The legislation is the bill; the *Biosecurity Act 2015*; another Act prescribed by the rules; the *Criminal Code* or the *Crimes Act 1914* to the extend it relates to the *Biosecurity Act 2015* or another Act prescribed by the rules: see section 372(2) of the rules.

5 'Associate' is defined in section 13 of the bill as including (a) a person who is or was a consultant, adviser, partner, representative on retainer, employer or employee of: (i) the first person; or (ii) any corporation of which the first person is an officer or employee or in which the first person holds shares; (b) a spouse, de facto partner, child, parent, grandparent, grandchild, sibling, aunt, uncle, niece, nephew or cousin of the first person; (c) a child, parent, grandparent, grandchild, sibling, aunt, uncle, niece, nephew or cousin of a spouse or de facto partner of the first person; (d) any other person not mentioned in paragraph (a), (b) or (c) who is or was: directly or indirectly concerned in; or in a position to control or influence the conduct of; a business or undertaking of: the first person; or a corporation of which the first person is an officer or employee, or in which the first person holds shares; (e) a corporation: of which the first person, or any of the other persons mentioned in paragraphs (a), (b), (c) and (d), is an officer or employee; or in which the first person, or any of those other persons, holds shares; (f) if the first person is a body corporate—another body corporate that is a related body corporate (within the meaning of the *Corporations Act 2001*) of the first person.

6 Subsection 373(3).

Compatibility of the measure with the right to work, the right to freedom of association and the right to equality and non-discrimination

2.8 The right to work provides that everyone must be able to freely accept or choose their work, and includes a right not to be unfairly deprived of work. The right to work also requires that state parties provide a system of protection guaranteeing access to employment. This right must be made available in a non-discriminatory manner.[7] The right to freedom of association protects the right of all persons to group together voluntarily for a common goal and to form and join an association.[8]

2.9 The initial human rights analysis stated that by providing that in order to engage in certain export related activities a person must be 'fit and proper', the measure may engage and limit the right to work, the right to equality and non-discrimination and the right to freedom of association. This is because a person may be unable to engage in export related business due to, for example, their conduct or the conduct of an associate. It was noted that the 'fit and proper person' test may encompass a broad range of conduct which also extends to the conduct of the person's associates. In this respect, the 'fit and proper person' test may also penalise a person for associating with certain individuals. The right to work, the right to equality and non-discrimination and the right to freedom of association may be subject to permissible limitations provided that such measures pursue a legitimate objective, are rationally connected to that objective and are a proportionate means of achieving that objective.

2.10 In relation to the application of the 'fit and proper person' test, the statement of compatibility states that the measure pursues 'the legitimate objective of ensuring that persons who have been approved to export goods from Australian territory are persons who are trustworthy… [as] the government needs to be certain that the persons responsible for export operations will not abuse the trust placed in them'.[9] Given the particular regulatory context, the initial analysis stated that this is likely to be a legitimate objective for the purposes of international human rights law.

2.11 The measure would also appear to be rationally connected to this objective. The statement of compatibility explains that the reason why the measure extends to a person's business associates is that:

> Business associates and others may have influence over the primary person such that they may be able to compel them to undertake illegal activities on their behalf, through inducement or other means. Putting a fit and proper person test in place will notify the Department of any associates of the primary person who may pose a risk and allow them to

7 Pursuant to article 2(1) of the International Covenant on Economic, Social and Cultural Rights.

8 Article 22 of the International Covenant on Civil and Political Rights.

9 Statement of compatibility (SOC), p. 451.

take action to ensure Australia's agricultural exports are not compromised.[10]

2.12 In relation to the measure's application, the statement of compatibility notes that the requirements will only extend to persons who are voluntarily seeking to benefit from the export of goods from Australian territory. This is a relevant factor in respect of whether the measure is a proportionate limitation on human rights.

2.13 Further in relation to the proportionality of the limitation, the statement of compatibility notes that section 372 provides an exhaustive list of factors to be taken into account by the secretary in determining whether the person is a 'fit and proper' person, that associates are limited to those defined in section 13 of the bill and that the secretary's decision is reviewable.[11] While these factors are relevant, it was noted that the secretary's discretion to determine that a person is not a fit and proper person is still potentially very broad and may allow the secretary to take account of, for example, types of criminal conviction that may be less serious and 'any other matter' which the secretary considers relevant. It was unclear from the information provided why each such category of factor needs to be taken into account to achieve the legitimate objective of the measure. Further, while 'associates' are restricted to those set out in section 13, this list is still substantial and includes family members, advisers, employees and business contacts. This raises a concern that the limitation may not be the least rights restrictive approach.

2.14 Finally, who is required to be a 'fit and proper person' will be able to be set out in delegated legislation. This raises a related concern as to whether the classes of person subject to the requirement are sufficiently circumscribed.

2.15 The committee therefore sought the advice of the minister as to whether:

- the limitation is a reasonable and proportionate measure for the achievement of its stated objective (including whether the measure is sufficiently circumscribed, the breadth of the secretary's discretion and the availability of relevant safeguards); and
- consideration could be given to: amending section 372 to restrict the range of factors that the secretary may consider as adversely affecting whether a person is a 'fit and proper person'; restricting the list of 'associates' in section 13; and setting out who is required to be a fit and proper person in primary legislation rather than in delegated legislation.

Minister's response

2.16 The minister's response provides some further information in relation to the importance of the measure and the role of the fit and proper person test:

10 SOC, p. 451.

11 SOC, pp. 454-455.

> A fit and proper person test can be used to consider a person or company's history of compliance with Commonwealth legislation and then deny them approval to register an establishment, or to suspend, revoke or alter the conditions on an existing approved arrangement. This ensures that persons or companies seeking these approvals are suitable entities to be responsible for the appropriate management of relevant risks. For example, an approved arrangement may set out the ways in which an exporter will meet legislative and importing country requirements in relation to a kind of prescribed goods. It is important that such persons are considered fit and proper to be able to conduct these activities and that there is no reason to believe that the person will not operate within the scope of their approval or adhere to any conditions or requirements that are placed on it.

2.17 In relation to the proportionality of the limitation, the minister's response provides the following information:

> Clause 372 of the Bill will provide the Secretary with the ability to apply a fit and proper person test in circumstances provided for by the Bill or prescribed by the Rules. Persons will be required to notify the Secretary if they have been convicted of certain specified offences, or ordered to pay a pecuniary penalty in relation to certain specified contraventions (clause 374 of the Bill). When determining whether a person is a fit and proper person, the Secretary may consider the nature of the offences resulting in the conviction or pecuniary penalty, the interest of the industry, or industries, relating to the person's export business and any other relevant matter. Whilst these factors, along with a person's associates, will be taken into account by the Secretary when applying the fit and proper persons test, these matters do not, in and of themselves, automatically give rise to a negative finding. Rather, it will be up to the Secretary to consider whether a person is fit and proper as a result of these matters.
>
> The consideration as to whether a person is a fit and proper person forms part of the decision in relation to an application under the Bill (e.g. to register an establishment), and is a reviewable decision under the Bill. This is reflective of administrative law principles.

2.18 The nature of the assessment and the availability of review are relevant to the proportionality of the measure. In relation to the breadth of the factors that the secretary may consider as adversely affecting whether a person is a 'fit and proper person', the minister's response states:

> Enabling the Secretary to take into account a broad range of matters is important when considering whether a person is a fit and proper person because such a person might be involved in the export of a wide range of goods, with varying degrees of risk. The matters provided for in the Bill seek to reflect the broad range of matters in the current framework that can be taken into account by the Secretary to ensure that he or she may have regard to any relevant matter. This ensures that the integrity of the regulatory framework is not compromised by limiting conduct that can be

> considered in this context. As the agricultural export sector is regularly changing and evolving, this is reasonable and proportionate and ensures that the current level of market access can be maintained and possibly even increased in future.

2.19 In relation to the breadth of the definition of 'associates', the minister's response explains that:

> The associates' test is designed to ensure that an applicant for a regulatory control under the Bill (e.g. a registered establishment) is a suitable person to be responsible for managing relevant risks, in light of the potential consequences of non-compliance. It is appropriate for associates to be included in the consideration so as to ensure that the conduct of all types of entities may be taken into account where the Secretary considers it appropriate to do so.

2.20 The minister's response explains why it is appropriate to define who constitutes a 'fit and proper person':

> It is appropriate for the rules to be able to provide who can be a fit and proper person. The Bill and the rules will allow the Australian Government to respond in an appropriate and timely manner to any changes to importing country requirements or to implement any necessary policy or regulatory reforms in the future. The rules will be able to prohibit the export of certain kinds of goods (called prescribed goods) unless they meet the conditions set out in the Rules. The requirements for prescribed goods must be appropriately tailored to ensure that only the necessary level of regulatory burden is imposed on exporters and this includes the imposition of the fit and proper person test which should only be imposed where it is required (e.g. as a result of an importing country requirement). The rules are a legislative instrument and therefore will be subject to Parliamentary scrutiny through the disallowance process, and sunsetting in accordance with the *Legislation Act 2003*.

2.21 On balance, in light of the information provided, the measure may be capable of constituting a proportionate limitation on human rights. It is noted, however, that much may depend on the content of the rules and how the measure is applied in practice. In this respect, from the point of view of effective parliamentary scrutiny, it is problematic that the detail of the delegated legislation is not publicly available when parliament is considering the bill. Specifically, the rules will need to ensure that the 'fit and proper person test' is applied in a manner compatible with human rights. Should the bill be passed, the committee will assess the rules for compatibility with human rights.

Committee response

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

2.23 Subject to the content of the rules, the committee considers that the measure may be compatible with human rights. If the bill is passed, the committee will consider the human rights implications of the rules once they are received. The committee also notes that it is preferable for details of proposed rules to be available for consideration in conjunction with the related bill prior to its passage.

Higher Education Support Legislation Amendment (Student Loan Sustainability) Bill 2018

Purpose	Amends the *Higher Education Support Act 2003* including to: provide a new minimum repayment income of $44,999 for the compulsory repayment of Higher Education Loan Program (HELP) debts; replace the current repayment thresholds and introduce additional repayment thresholds; index HELP repayment thresholds to the consumer price index instead of average weekly earnings; and introduce, from 1 January 2019, a combined lifetime limit on the amount a student can borrow under HELP of $150,000 for students studying medicine, dentistry and veterinary science courses, and $104,440 for other students
Portfolio	Education and Training
Introduced	House of representatives, 14 February 2018
Rights	Education; equality and non-discrimination (see **Appendix 2**)
Previous report	3 of 2018
Status	Concluded examination

Background

2.24 The committee first reported on the Higher Education Support Legislation Amendment (Student Loan Sustainability) Bill 2018 (the bill) in its *Report 3 of 2018*, and requested a response from the Minister for Education and Training by 11 April 2018.[1]

2.25 The minister's response to the committee's inquiries was received on 16 April 2018. The response is discussed below and is reproduced in full at **Appendix 3**.

2.26 The committee has commented on proposed reforms to the funding of higher education and reforms to the Higher Education Loan Program (HELP) on a number of occasions.[2]

1 Parliamentary Joint Committee on Human Rights, *Report 3 of 2018* (27 March 2018) pp. 30-40.

2 Parliamentary Joint Committee on Human Rights, *Twelfth Report of the 44th Parliament* (24 September 2014) pp. 8-13; *Eighteenth Report of the 44th Parliament* (10 February 2015) pp. 43-64; *Twenty-second Report of the 44th Parliament* (13 May 2015) pp. 163-174; *Report 5 of 2017* (14 June 2017) pp. 22-30 and *Report 7 of 2017* (8 August 2017) pp. 41-60.

2.27 Most recently, the committee considered the Higher Education Support Legislation Amendment (A More Sustainable, Responsive and Transparent Higher Education System) Bill 2017 (2017 bill) in its *Report 5 of 2017* and *Report 7 of 2017*.[3] The current 'Student Loan Sustainability' bill[4] (2018 bill) reintroduces a number of the measures contained in the 2017 bill.

Lowering repayment threshold for HELP debts and changes to indexation

2.28 Schedule 1 of the 2018 bill lowers the current minimum repayment income for HELP loans to $44,999 per annum (currently, the repayment threshold is $55,874).[5] It also introduces additional repayment thresholds and rates (1 percent at $45,000 and increasing to 10 percent on salaries over $131,989 per annum).[6] The equivalent measure contained in the 2017 bill sought to lower the repayment threshold to $41,999 per annum.[7]

2.29 From 1 July 2019 repayment thresholds including the minimum repayment amount will be indexed using the Consumer Price Index (CPI) rather than Average Weekly Earnings (AWE).[8] This is a reintroduced measure which is contained in the 2017 bill.

Compatibility of the measures with the right to education

2.30 Article 13 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) protects the right to education. It specifically requires, with a view to achieving the full realisation of the right to education, that:

> Higher education shall be made equally accessible to all, on the basis of capacity, by every appropriate means, and in particular by the progressive introduction of free education.

2.31 Australia has obligations to progressively introduce free higher education by every appropriate means and also has a corresponding duty to refrain from taking retrogressive measures, or backwards steps, in relation to the realisation of the right to education.[9] Retrogressive measures, a type of limitation, may be permissible under international human rights law providing that they address a legitimate

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3 Parliamentary Joint Committee on Human Rights, *Report 5 of 2017* (14 June 2017) pp. 22-30 and *Report 7 of 2017* (8 August 2017) pp. 41-60.

4 Higher Education Support Legislation Amendment (Student Loan Sustainability) Bill 2018.

5 Statement of compatibility (SOC) p. 4; Schedule 1, item 2.

6 Schedule 1, item 2.

7 See schedule 3 of the 2017 bill.

8 Explanatory Memorandum (EM) p. 1.

9 See, UN Committee on Economic, Social and Cultural Rights, *General Comment 13: the Right to education* (8 December 1999) [44]-[45].

objective, are rationally connected to that objective and are a proportionate way to achieve that objective.[10]

2.32 The Australian system of higher education allows students to defer the costs of their education under a HELP loan until they start earning a salary above a certain threshold. The initial human rights analysis stated that the proposed lowering of the repayment threshold engages and may limit the right to education as it imposes payment obligations on those who earn lower incomes. This appears to be contrary to the requirement under article 13 of the ICESCR to ensure that higher education is equally accessible and progressively free. Similarly, a change to indexation also engages and may limit the right to education to the extent it increases the amount to be paid, relative to earnings. In this respect, the United Nations (UN) Committee on Economic, Social and Cultural Rights has raised serious concerns about access to education in the context of the operation of student loan schemes internationally.[11]

2.33 The committee previously corresponded with the minister about the compatibility of the measures in the 2017 bill which sought to lower the repayment threshold with the right to education. The repayment threshold in the 2018 bill is slightly higher than the amount in the 2017 bill, but the measures raise substantively identical issues in relation to the right to education. While the statement of compatibility to the 2018 bill identifies that these measures engage the right to education, it does not include the level of detail previously provided by the minister in his response to the 2017 bill.

2.34 In the context of this measure, the committee has previously concluded that lowering the repayment threshold may be compatible with the right to education. This was based on the information that was previously provided by the minister in response to the committee's request for information. However, in the absence of any detail from the minister in the statement of compatibility to the 2018 bill, further information was required in order for the committee to conclude its assessment of the reintroduced measure.

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10 See, for example, UN Committee on Economic, Social and Cultural Rights, *General Comment 13: the Right to education* (8 December 1999) [44]-[45].

11 For example, the UN Committee on Economic, Social and Cultural Rights raised concerns about access to education in relation to the operation of the student loans scheme in the United Kingdom which shares similar elements to the Australian HELP scheme: UN Committee on Economic, Social and Cultural Rights , Concluding observations on the United Kingdom of Great Britain and Northern Ireland, E/C.12/1/Add.79 (5 June 2002) [22]; UN Committee on Economic, Social and Cultural Rights, Concluding observations on the United Kingdom of Great Britain and Northern Ireland, E/C.12/GBR/CO/5 (12 July 2009) [44]; UNESCR, Concluding observations on the United Kingdom of Great Britain and Northern Ireland, E/C.12/GBR/CO/6 (14 July 2016) [65]-[66].

2.35 Nevertheless, the statement of compatibility argues that the measures are compatible with the right to education as they do not increase the overall cost to students or prevent access to higher education:

> Access to higher education will be maintained through the continued availability of HELP loans. As individuals will commence repayment sooner, it may create the belief that costs are increasing for students, thereby reducing access to higher education. By lowering the repayment threshold, and altering the indexation of the threshold to grow in line with CPI, this measure makes the overall scheme more affordable for Government in the long-term, and does not result in an overall increase in costs for students.[12]

2.36 However, the initial analysis stated that this does not fully address whether the changes to indexation and the repayment threshold may act as a disincentive for access to education or, more generally, how such measures impact upon Australia's obligations of progressive realisation.

2.37 Additionally, there may be a category of low income earners who, due to earning below the repayment threshold, may never have had to repay the entire amount of their HELP-debt. If such low income earners now have to repay HELP-loans due to a change in thresholds, there are questions as to whether this could be an indirect reduction in freely accessible higher education for these classes of individuals.

2.38 Should the measure constitute a limitation on the right to education, it was unclear from the information provided whether this limitation is permissible as a matter of international human rights law. The statement of compatibility identifies the objective of the measure as 'ensuring the long term viability of the HELP scheme'.[13] However, it does not provide an evidence-based explanation of how this constitutes a legitimate objective for the purposes of international human rights law. In this respect, a legitimate objective must address a pressing or substantial concern and not simply seek an outcome regarded as desirable or convenient. Additionally, as set out above, a limitation must be rationally connected to, and a proportionate way to achieve, its stated objective in order to be permissible under international human rights law.

2.39 Accordingly, the committee requested the further advice of the minister as to:

- whether the proposed change in indexing from AWE to CPI means that students would pay more or less for their university degrees (including for their degree overall and as a proportion of their wages);

12 SOC, p. 5.

13 SOC, p. 4.

- whether requiring some classes of low income earners to repay HELP-debts could constitute an indirect reduction in the amount of government funding of higher education;
- whether the proposed changes to the repayment threshold and indexation could have an adverse impact on access to education;
- whether there is reasoning or evidence that establishes that the stated objective addresses a pressing or substantial concern or whether the proposed changes are otherwise aimed at achieving a legitimate objective;
- how the measure is effective to achieve (that is, rationally connected to) that objective; and
- whether the limitation is a reasonable and proportionate measure to achieve the stated objective.

Minister's response

2.40 The minister's response argues that the proposed lowering of the repayment threshold to $45,000 and changes to indexation engage but do not limit the right to education.

2.41 In relation to whether the proposed changes to the repayment threshold and indexation could have an adverse impact on access to education, the minister's response states that there should be no effect on access to higher education and eligible students will remain able to defer their student contribution amounts or tuition fees via a HELP loan. The minister's response additionally provides the following information as to why the measures will not have an adverse impact:

> The new HELP repayment threshold arrangements do not restrict accessibility and affordability of higher education. The Higher Education Loan Program (HELP) will continue to ensure that eligible Australian students are able to fully defer the cost of their higher education through income-contingent loans. The HELP scheme has, and will continue to be, critical for ensuring high-quality university education is accessible to all Australians, enabling admission on the basis of merit as opposed to wealth.
>
> International evidence suggests that the availability of a strong student loan scheme reduces or eliminates any effects of price increases on accessibility. A 2014 report prepared for the European Commission (the Usher report) explored the impacts of changes to cost-sharing arrangements on higher education students and institutions across nine countries. The Usher report found that there was no trend of declining enrolments after a fee increase, and that in cases where students were able to access financial support, in the form of loans or scholarships, the impact of a fee increase on university applications was negligible.
>
> In addition, Professor Bruce Chapman from the Australian National University has argued that "the evidence is now overwhelming that

> changes to the level of the charge, or other aspects of HECS-HELP, such as the first threshold of repayment, have no discernible effects on student behaviour or choices."
>
> While the minimum HELP repayment threshold will be reduced, the one per cent repayment rate at this minimum threshold will ensure the scheme remains affordable for those who incur a HELP debt, and that there are no adverse impacts on access to higher education.

2.42 Accordingly, this information indicates that the measure is consistent with maintaining access to higher education. In relation to whether the proposed change in indexing from AWE to CPI means that students would pay more or less for their university degrees, the minister's response explains that the proposed change:

> …does not affect university fees or HELP debts incurred by students - it only affects the repayment thresholds themselves.
>
> ...this change may lead to students paying slightly less in nominal terms for their degree over their lifetime compared with what they would pay under the current arrangements. This is due to the reduced indexation of debt. If the HELP repayment thresholds are indexed by CPI, some debtors are likely to make higher per year repayments. In such cases debts are being paid down more quickly, there is less debt to index at a given time and therefore total indexation is lower. The lower amount of indexation on debts would lead to the individual repaying a slightly lower amount of total debt over their lifetime, all else being equal.

2.43 This information indicates that this aspect of the measure does not amount to a backward step in the progressive realisation of the right to education. As to whether requiring some classes of low income earners to repay HELP-debts could constitute an indirect reduction in the amount of government funding of higher education, the response acknowledges that:

> …the new minimum threshold of $45,000 in 2018-19 will result in more debtors falling within a repayment scope, which means some people, who would not repay any of their debt under current arrangements, may pay part or all of their debt under the proposed arrangements.

2.44 However, in relation to whether this constitutes a backward step in the progressive introduction of free education, the minister's response explains that there are some relevant safeguards in place:

> …relevant to the rights-based integrity of the measure, under the *Higher Education Support Act 2003*, where a person's financial and family circumstances result in them either being exempt or receiving a reduction in their Medicare Levy, they are not required to make compulsory HELP repayments for that income year. For example, in 2016-17 a single person with one dependent child with an income below $49,871 was exempt from HELP repayments in that income year. The income level rises with each additional dependent.

2.45 The response further argues that overall government university funding has increased 15 per cent between 2010 and 2015. Accordingly, while the measure may adversely affect some groups of low income earners, the measure may not constitute a backward step in progressively realising free higher education given the information provided that the funding of higher education has increased and about the existence of some safeguards.

2.46 If the measure was to constitute a backward step or limitation on progressively free higher education, the minister's response also provides some information as to whether this would be permissible in the circumstances. The minister's response explains how the objective of 'ensuring the long term viability of the HELP scheme' addresses a substantial concern and how the measure is effective to achieve that objective:

> The existing HELP thresholds have been in place for a number of years and do not take into account the changes in access to HELP that have occurred in recent years. HELP lending has grown rapidly with the expansion of the demand driven system, and the amount of HECS-HELP loans accessed has increased from over $2.2 billion in 2009 to over $4.3 billion in 2016. In addition, the expansion of HELP to the Vocational Education and Training (VET) sector in 2008 led to increases in VET FEE-HELP loans from over $25 million in 2009 to over $1.4 billion in 2016.
>
> HELP expenses, which consist mainly of debt not expected to be repaid and the deferral subsidy resulting from the concessional interest rate applied to the loans compared with costs of borrowing by the Commonwealth for on-lending, are estimated at $1.8 billion in 2017-18. The fair value of the HELP debts was estimated to be $35.9 billion as at 30 June 2017.
>
> In this context, there is a strong need for the Government to improve the sustainability of the HELP scheme. The changes to HELP repayment thresholds and indexation contained in the Bill will result in approximately 124,000 additional HELP debtors making repayments in 2018-19. The changes also involve higher repayment rates for those on higher incomes. As a result, the measure is expected to deliver savings of $345.7 million in fiscal balance terms and $245.2 million in underlying cash balance terms over the forward estimates (2017-18 to 2020-21). Therefore, the new HELP repayment threshold arrangements contribute strongly to the sustainability of the scheme, ensuring that future generations of students also benefit from access to both HELP and higher education more broadly.

2.47 While not specifically articulated in this way, the minister's response appears to indicate that unless spending is curbed then there is a risk that the HELP loan system may collapse or will have to be restricted in other ways. That is, there is a concern that, given a limited pool of government resources, mounting costs could affect the availability of the HELP loans and therefore access to education for future students. To the extent that this is the case, this would appear to constitute a

legitimate objective for the purposes of international human rights law. The measure appears to be rationally connected to that objective. As to whether the limitation is a reasonable and proportionate measure to achieve the stated objective, the response states:

> The new minimum repayment threshold is around 25 per cent above the full time minimum wage (currently around $36,100 for a full-time worker from 1 July 2017, according to Fair Work Australia). At a repayment rate of just one per cent, a person with a HELP debt will pay back less than $9 per week. Therefore, the Government considers that any limitations on the right to education constitute a reasonable, proportionate and properly tailored measure to achieve long-term improvements in sustainability of the HELP scheme.

2.48 In view of this information and the extent of any limitation on the right to education (set out above), the measure may be a proportionate limitation on this right. In this respect, whether other alternatives to the measure have been fully considered is also relevant. However, as set out above, the measure in context may not constitute a backward step in progressively realising free higher education and questions of proportionality do not therefore arise.

Committee response

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

2.50 The committee considers that the measure may be compatible with the right to education. However, it is noted that Australia has an ongoing obligation under international law to progressively introduce free higher education.

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

2.51 The right to equality and non-discrimination is protected by articles 2 and 26 of the International Covenant on Civil and Political Rights (ICCPR). Article 2(2) of the ICESCR also prohibits discrimination specifically in relation to the human rights contained in the ICESCR such as the right to education. In addition to these general non-discrimination provisions, articles 1, 2, 3, 4 and 15 of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) further describe the content of these obligations, including the specific elements that state parties are required to take into account to ensure the rights to equality for women.[14]

14 Article 1 of CEDAW defines 'discrimination against women' as 'any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field'.

2.52 'Discrimination' encompasses a distinction based on a personal attribute (for example, race, sex or on the basis of disability),[15] which has either the purpose (called 'direct' discrimination), or the effect (called 'indirect' discrimination), of adversely affecting human rights.[16] 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.[17]

2.53 The initial analysis stated that reducing the minimum repayment income threshold for HELP debts to $44,999 may have a disproportionate impact on women and other vulnerable groups.[18] In relation to women, this is because, on average, women are more likely to earn less than men, and therefore more are likely to be affected by the reduction in the repayment threshold to cover those earning between $44,999 and $55,000.

2.54 The change in indexation may also have a disproportionate effect on women and other vulnerable groups. As women, on average, earn less over a lifetime of employment, are more likely to take time out of the workforce to care for children and are more likely to be engaged in part-time employment, they may take longer to

15 The prohibited grounds are race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status: ICCPR articles 2 and 26; ICESCR article 2(2); UN Human Rights Committee, *General Comment 18*, *Non-discrimination* (10 November 1989) [1]. 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: See, for example, *Schmitz-de-Jon v Netherlands*, UN Human Rights Committee 855/99 (2001); *Gueye v France* UN Human Rights Committee 196/85 (1989); *Danning v Netherlands,* UN Human Rights Committee 180/84 (1990); *Lindgren et al v Sweden* UN Human Rights Committee 298-9/88 (1990); *Young v Australia*, UN Human Rights Committee 941/00 (2003); UN Human Rights Committee, Concluding observations on Ireland, A/55/40 (2000) [422]-[451]. See, also, UN Committee on Economic, Social and Cultural Rights, *General Comment 20, Non-discrimination in economic, social and cultural rights*, E/C.12/GC/20 (2 July 2009) [28]-[35].

16 UN Human Rights Committee, *General Comment 18*, Non-discrimination (1989) [7].

17 *Althammer v Austria* HRC 998/01, [10.2]. See above, for a list of 'personal attributes'.

18 See, for example, the UN Committee on Economic, Social and Cultural Rights, General Comment 20, Non-discrimination in economic, social and cultural rights, E/C.12/GC/20 (2 July 2009) [28]-[35].

pay off their HELP debt than their male counterparts.[19] Where a person takes longer to repay a HELP debt, any changes in indexation under the HELP scheme relative to their earnings may have a more significant effect on them. This is because they may be subject to the indexation changes and repayment obligations for a longer period of time.

2.55 Where a measure impacts on particular groups disproportionately, it establishes *prima facie* that there may be indirect discrimination.[20] Differential treatment (including the differential effect of a measure that is neutral on its face)[21] 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.

2.56 The statement of compatibility acknowledges that the measures engage the right to equality and non-discrimination due to their disproportionate impacts on women:

> …the introduction of new HELP repayment thresholds, may be seen as limiting the right to non-discrimination due to disproportionate impacts on women and other low income groups.
>
> The Government currently carries a higher deferral subsidy from demographic groups that tend to have lower incomes. This includes women, individuals in part-time work, or individuals in low paid professions. As a result, some of these individuals, including women, may be making repayments for the first time as a result of the introduction of a lower minimum repayment threshold. Addressing this income inequality, however, is not the role of the higher education loans system.[22]

2.57 This statement is identical to the information provided in the statement of compatibility for the 2017 bill.[23] As with the 2017 bill, the statement of compatibility

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19 See, Australian Bureau of Statistics (ABS), Employee Earnings and Hours (May 2016) http://www.abs.gov.au/ausstats/abs@.nsf/0/27641437D6780D1FCA2568A9001393DF?Opendocument; ABS, Gender indicators, Australia (August 2016) http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/by%20Subject/4125.0~August%202016~Main%20Features~Economic%20Security~6151; Workplace Gender Equality Agency, Gender pay gap statistics (March 2016) https://www.wgea.gov.au/sites/default/files/Gender_Pay_Gap_Factsheet.pdf (last accessed 24 May 2017); See, for example, Senate Standing Committee on Education and Employment, The Future of HECS (28 October 2014) p. 52.

20 See, *D.H. and Others v the Czech Republic* ECHR Application no. 57325/00 (13 November 2007) 49; *Hoogendijk v. the Netherlands* ECHR, Application no. 58641/00 (6 January 2005).

21 See, for example, *Althammer v Austria* HRC 998/01 [10.2].

22 SOC, p. 6.

23 See, SOC to the 2017 bill, p. 10.

to the 2018 bill does not provide a substantive assessment of whether the measure amounts to indirect discrimination nor does it address the concerns expressed by the committee in its consideration of the measures in the 2017 bill.

2.58 The initial analysis further noted that the argument in the statement of compatibility that a negative impact on women results from income inequality is not an adequate justification of the measure for the purposes of human rights law in circumstances where the measure has the potential to exacerbate inequality. Rather, as set out above, where there is evidence that a measure may have a disproportionate negative effect on women it shows *prima facie* that the measure itself may be discriminatory. In these circumstances, the measure may still be compatible with the right to equality and non-discrimination where the measure serves a legitimate objective, is effective to achieve that objective and is a proportionate means of achieving that objective. However, the statement of compatibility does not address whether this is the case with respect to these measures. Further, international human rights law recognises that it is fundamentally the role of government to address existing inequalities and ensure that these are not exacerbated through particular measures. In this respect, the UN Committee on Economic, Social and Cultural Rights, in its concluding observations on Australia in July 2017, recommended that Australia 'intensify its efforts to address the remaining obstacles to achieving substantive equality between men and women'.[24] As the minister's response to the 2017 bill did not fully address such issues, the committee previously advised that it was not possible to conclude that the measure was compatible with the right to equality and non-discrimination.[25]

2.59 Accordingly, the committee requested the further advice of the minister as to:

- whether the measure pursues a legitimate objective for the purposes of international human rights law and whether there is reasoning or evidence that establishes that this objective addresses a pressing or substantial concern;
- how the measure is effective to achieve (that is, rationally connected to) the stated objective; and
- whether the limitation is a reasonable and proportionate measure to achieve the stated objective.

Minister's response

2.60 The minister's response acknowledges the potential limitation that the measure imposes on the right to equality and non-discrimination. However, the

24 UN Committee on Economic, Social and Cultural Rights, Concluding observations on the fifth periodic report of Australia, E/C.12/AUS/CO/5 (11 July 2017) [22].

25 Parliamentary Joint Committee on Human Rights, *Report 7 of 2017* (8 August 2017) pp. 41-60.

response merely reiterates the minister's view that the disproportionate effect on women and other vulnerable groups is caused by 'broader and complex social and economic factors that influence participation in higher education, and subsequent labour market experience' and it is not 'within the scope of a student loan scheme to address or mitigate' such factors. As explained above at [2.58] this position misunderstands the scope of Australia's obligations under international human rights law which requires Australia to proactively address such inequalities. Further, where a measure may have a disproportionate negative effect on women or other vulnerable groups (including where it may exacerbate existing inequalities), this disproportionate negative effect needs to be justified as a matter of international human rights law.

2.61 In this respect, it is noted that much of the minister's response focuses on the level of participation by women in higher education and concludes that therefore the measure will necessarily have a disproportionate impact on them. However, as outlined in the initial analysis, the particular concern is that because women earn on average less than their male counterparts (including other university graduates), lowering the repayment threshold and the changes to indexation will have a disproportionate negative effect on them. In other words, the measure may exacerbate the existing disadvantage experienced by women (along with other vulnerable groups). This concern is not substantively addressed solely by reference to participation rates in higher education.

2.62 While the minister's response does not fully engage with the nature of Australia's obligations in relation to the right to equality and non-discrimination, it nevertheless provides some information as to whether the measure is compatible with the right. As set out above, the measures appear to pursue the legitimate objective of improving the sustainability of the HELP scheme and be rationally connected to that objective.

2.63 However, serious questions remain about whether the measures are proportionate with respect to their impact on women and other vulnerable groups. In this respect, the minister's engagement with questions of proportionality does not focus on the measure's disproportionate effect on women in terms of exacerbating the existing disadvantage they experience, due to the fact that they earn less on average than their male counterparts. The response instead focuses on the participation rates of women in higher education and argues that the measures represent 'a purely income-based change and do not target particular groups such as women'. Yet, the concept of indirect discrimination encompasses measures not intended to target particular groups, but which nevertheless have a disproportionate negative effect on these groups. The extent of impact on the particular group and whether the measure is the least rights restrictive approach are of relevance to whether the impact is proportionate. Yet, the minister's response does not fully address such issues. As a result, given the potential of the measures to exacerbate existing inequalities, it is not possible to conclude from the information provided in

the minister's response that the measures are compatible with the right to equality and non-discrimination.

Committee response

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

2.65 Consistent with the committee's previous conclusions and the preceding analysis, it is not possible to conclude that the measure is compatible with the right to equality and non-discrimination (indirect discrimination).

Restriction on how much students can borrow under HELP to cover tuition fees

2.66 Schedule 3 of the 2018 bill introduces a new combined limit on how much students can borrow under HELP to cover their tuition fees from 1 January 2019. Currently, the limit applies only to debts incurred through FEE-HELP,[26] VET FEE-HELP[27] and VET Student Loans.[28] Under the proposal, debts incurred by Commonwealth supported students under HECS-HELP[29] will also be included in the lending limit. This means that all eligible domestic students will be subject to a single combined lending limit for their tuition fees. The lifetime limit will be $150,000 for students studying medicine, dentistry and veterinary science courses and $104,440 for other students. Loan limits will be indexed according to CPI.[30] The loan limit will not be retrospective with respect to HECS-HELP.[31]

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26 FEE−HELP is a loan scheme that assists eligible fee paying students to pay all or part of their tuition fees. It is for domestic undergraduate and postgraduate students who do not have a Commonwealth supported place.

27 VET Student Loans commenced on 1 January 2017, replacing the VET FEE-HELP scheme, which ceased for new students on 31 December 2016.

28 The VET Student Loans program is an income contingent loan offered by the Australian Government that helps eligible students pay for some vocational education and training (VET) diploma level or above courses.

29 A commonwealth supported student place is part subsidised by the Australian government through the government paying part of the fees for the place directly to the university. Students are also required to contribute towards the study and pay the remainder of the fee called the 'student contribution amount' for each unit they are enrolled in at the higher education institution. HECS−HELP is a loan scheme for eligible students enrolled in Commonwealth supported places to pay their student contribution amounts.

30 Explanatory memorandum (EM), p. 22.

31 SOC, p. 6.

Compatibility of the measure with the right to education

2.67 As set out above, article 13 of the ICESCR protects the right to education including ensuring that higher education is equally accessible, on the basis of capacity and through the progressive introduction of free higher education.

2.68 The initial analysis stated that a combined lifetime loan limit on all HELP-lending may restrict access to tertiary or further education for individuals who have reached the loan limit and who are unable to afford to pay their tuition fees upfront. Accordingly, the measure appears to be a backward step, or limitation, on the level of attainment of the right to higher education.[32] As noted above, such limitations or retrogressive measures may be permissible under international human rights law provided that they address a legitimate objective, are rationally connected to that objective and are a proportionate way to achieve that objective. In this context, the UN Committee on Economic, Social and Cultural Rights has noted that:

> There is a strong presumption of impermissibility of any retrogressive measures taken in relation to the right to education, as well as other rights enunciated in the Covenant. If any deliberately retrogressive measures are taken, the State party has the burden of proving that they have been introduced after the most careful consideration of all alternatives and that they are fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the State party's maximum available resources.[33]

2.69 The statement of compatibility acknowledges that the measure engages the right to education and argues that any limitation on the right is permissible. It identifies the objective of the measure as 'ensuring access to tertiary education for those who cannot afford to pay their tuition upfront'.[34] While ensuring access to tertiary education may be capable of constituting a legitimate objective for the purposes of international human rights law, limited information is provided in the statement of compatibility as to how this constitutes a pressing or substantial concern in the specific circumstances of the measure.

2.70 Further, it was unclear from the information provided how this measure is rationally connected to (that is, effective to achieve) this objective. This is because rather than ensuring access to higher education for those who cannot afford to pay fees upfront, the measure would appear instead to restrict access to higher education for those unable to pay if they have already reached the HELP limit.

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32 See, UN Committee on Economic, Social and Cultural Rights, General Comment 13: the Right to education (8 December 1999).

33 See, UN Committee on Economic, Social and Cultural Rights, General Comment 13: the Right to education (8 December 1999) [45].

34 SOC, p. 6.

2.71 In relation to the proportionality of the limitation, the statement of compatibility states that as the loan limit is:

> …firstly, sufficient to support almost nine years of full time study as a Commonwealth supported student and, secondly, can reasonably be repaid within a borrower's lifetime, this measure is consistent with fair and shared access to education.[35]

2.72 However, this may not fully take into account all potential impacts on access to education for students, particularly in the context of lifelong learning or retraining. Additionally, while the loan amount may be sufficient to support nine years of full time study as a Commonwealth supported student, this does not appear to fully acknowledge the context of current higher education funding arrangements. Currently, in many graduate and postgraduate programs there are few commonwealth supported student places.[36] If a commonwealth supported place is unavailable, this means that students will usually have to pay higher fees in respect of such graduate and postgraduate programs. While students may be able to borrow the cost of their tuition under FEE-HELP, they will reach the lifetime loan limit sooner due to the higher costs of tuition. However, the effect of the measure will be to count both the FEE-HELP debt and any HECS-HELP debt (that students have already incurred, for example, during their undergraduate degree) for the purposes of the lifetime limit. This means that it is possible an Australian student who completes, for example, an undergraduate bachelor degree as a commonwealth supported student followed by a full-fee paying graduate degree may reach the lifetime loan limit. Accordingly, this raised a particular concern that the measure could have a significant impact on access to higher education for some students.[37] Further, no information was provided in the statement of compatibility about the consideration of alternatives, in the context of Australia's use of its maximum available resources. Based on the information provided, it was not clear that the measure was proportionate.

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

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35 SOC, p. 6.

36 See, Study Assist, Commonwealth Supported places, http://studyassist.gov.au/sites/studyassist/helppayingmyfees/csps/pages/commonwealth-supported-places.

37 A student who completed a four year undergraduate Bachelor of Arts degree with honours as a Commonwealth supported student at, for example, Macquarie University might graduate with a HECS-HELP debt of approximately $43,016. If the student decided to undertake a graduate law degree such as a Juris Doctor as a full-fee paying student at, for example, the University of Melbourne the cost of this three year program would be approximately $124,385. These two programs of study would push the student over the proposed total lifetime HELP-loan limit: see, Melbourne University JD, Fees and Scholarships, http://law.unimelb.edu.au/study/jd#fees-and-scholarships; Macquarie University, Courses, Bachelor of Arts, https://courses.mq.edu.au/2018/domestic/undergraduate/bachelor-of-arts.

- whether there is reasoning or evidence that establishes that the stated objective addresses a pressing or substantial concern or whether the proposed changes are otherwise aimed at achieving a legitimate objective;
- how the measure is effective to achieve (that is, rationally connected to) that objective;
- whether the limitation is a reasonable and proportionate measure to achieve the stated objective (including in the context of lifelong learning or a future need for retraining);
- whether alternatives to the measure have been fully considered; and
- how the measure complies with Australia's obligation to use the maximum of its available resources to ensure higher education is accessible to all, on the basis of capacity, by every appropriate means, and by the progressive introduction of free education.

Minister's response

2.74 The minister's response states that the objective of the measure is 'to improve the sustainability of the HELP scheme while retaining sufficient flexibility for students in furtherance of the core value of promoting the enjoyment of the right to education'. It provides some general information as to the costs of the loans.

2.75 While not articulated in this way, the minister's response appears to indicate that, given a limited pool of government resources, mounting costs could affect the availability of the HELP loans and therefore access to education for future students. To the extent that this is the case, as noted above, this would appear to constitute a legitimate objective for the purposes of international human rights law. It would also appear to be rationally connected to that objective.

2.76 The minister's response provides some information which goes to the proportionality of the limitation. The minister's response states that the loan limit will impact on a small number of students (as at 30 June 2017, only around 0.5 per cent of all HELP debtors had a debt greater than $100,000). Additionally, the government has moved amendments to the bill to provide that the HELP-loan limit will not operate as a lifetime limit where the student has made voluntary or compulsory repayments. Under the amendments a student will have a FEE-HELP balance, equal to the current FEE-HELP limit, and will become ineligible for further FEE-HELP where their balance is zero. This balance may be increased by the student making repayments of their HELP debts.[38] In relation to this amendment, the minister's response states that:

> …mak[ing] the lifetime limit a renewable loan limit enables interested students to pursue lifelong learning. It provides scope for individuals

38 Revised Explanatory Memorandum (EM) p. 25.

> whose HELP debt repayments for an income year have replenished their HELP loan balance to re-borrow those funds.
>
> This will enable them to pursue further study in order to retrain, change careers, or further specialise in their current profession - giving them lifelong access to education.

2.77 Accordingly, the amendment addresses a number of the concerns raised in the initial analysis about the proportionality of the measure in the context of lifelong learning. The renewable loan limit clearly provides much more scope for lifelong learning than was previously the case.

2.78 However, while noting the minister's advice that there are relatively few HECS-debtors who have reached the limit, there is still a concern about access to educational opportunities for some students under the revised measure. For example, an Australian student who completes, for example, an undergraduate bachelor degree as a commonwealth supported student and immediately commences a full-fee paying graduate degree without working full time may reach the loan limit.[39] If such a student is unable to afford to pay the fees upfront, they may need to defer their course of study until they have paid down their HECS-loan (which could take many years). There is accordingly a risk that the measure may restrict access to education for some individuals in circumstances where it is not proportionate to do so in the context of Australia's obligations under this right. In this respect, it is noted that the minister's response has not explained whether alternatives to the measure have been fully considered.

2.79 In relation to how the measure complies with Australia's obligation to use the maximum of its available resources to ensure higher education is accessible to all, and by the progressive introduction of free education, the minister's response states:

> The Government believes that [the measure] is fair and justifiable by reference to the totality of rights provided for in the ICESCR and in the context of the full use of the government's maximum available resources, that those who benefit from access to higher education contribute towards the cost of the scheme, but also recognises that those who repay their debts should be able to access the loan scheme in the future.

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39 For example, a student who completed a four year undergraduate degree with a bachelor of planning as a Commonwealth supported student at, for example, Macquarie University might graduate with a HECS-HELP debt of approximately $36,740. If the student decided to undertake a graduate law degree such as a Juris Doctor as a full-fee paying student at, for example, the Australian National University the cost of this three year program would be approximately $101,664. These two programs of study would push the student over the proposed total HELP-loan limit: see, Australian National University Juris Doctor https://programsandcourses.anu.edu.au/program/MJD; Macquarie University, Courses, Bachelor of Arts, http://www.courses.mq.edu.au/2018/domestic/undergraduate/bachelor-of-economics.

> Providing for a renewable loan limit substantially addresses the concern of numerous stakeholders that the loan limit changes could result in inequities in access to higher education.

2.80 This provides some useful context in relation to the minister's view of the measure in the context of Australia's maximum available resources including the role of student contributions. It is clear that this measure does not further Australia's obligation to progressively introduce free higher education.

Committee response

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

2.82 The amendment made to the measure addresses some concerns in relation to access to education. In the context of this amendment, the preceding analysis indicates that the measure may be compatible with the right to education in a range of circumstances. However, there is a risk in its operation that it could potentially restrict access to higher education for some individuals in circumstances where it may not be proportionate to do so. It is further noted that Australia has an ongoing obligation under international law to progressively introduce free higher education.

Legislation (Deferral of Sunsetting—Australian Crime Commission Regulations) Certificate 2017 [F2017L01709]

Purpose	Defers the date of automatic repeal ('sunsetting') of the Australian Crime Commission Regulations 2002 by 12 months, from 1 April 2018 to 1 April 2019
Portfolio	Attorney-General
Authorising legislation	*Legislation Act 2003*
Last day to disallow	Exempt from disallowance[1]
Rights	Privacy; liberty; effective remedy; fair trial and fair hearing; prohibition against torture, cruel, inhuman or degrading treatment or punishment (see **Appendix 2**)
Previous report	3 of 2018
Status	Concluded examination

Background

2.83 The committee first reported on this instrument in its *Report 3 of 2018*, and requested a response from the Attorney-General by 11 April 2018.[2]

2.84 A response from the Minister for Law Enforcement and Cyber Security was received on 27 April 2018. The response is discussed below and is reproduced in full at **Appendix 3**.

2.85 The Australian Crime Commission Regulations 2002 (ACC regulations) were scheduled to sunset, that is, be automatically repealed, on 1 April 2018. This certificate defers the sunsetting date for 12 months, to 1 April 2019.[3]

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

2 Parliamentary Joint Committee on Human Rights, *Report 3 of 2018* (27 March 2018) pp. 57-64.

3 Under section 50 of the *Legislation Act 2003* (Legislation Act), all legislative instruments registered on the Federal Register of Legislation after 1 January 2005 are repealed on the first 1 April or 1 October that falls on or after their tenth anniversary of registration. Instruments made before 1 January 2005 (when the sunsetting regime was introduced) sunset on a staggered basis, in accordance with the schedule in subsection 50(2). Section 51 of the Legislation Act provides that the Attorney-General may defer the sunsetting of a legislative instrument by up to 12 months, subject to certain conditions.

2.86 While the certificate of deferral does not amend the current ACC regulations, the certificate has the effect of continuing their operation for a further 12 months. Accordingly, the committee is obliged to provide an assessment as to the compatibility of the certificate with human rights. This includes an assessment of the potential impact of the extension of the operation of the ACC regulations.

2.87 While the Attorney-General is not required to provide a statement of compatibility for this instrument,[4] where a legislative instrument engages human rights, including by continuing the effect of measures that engage rights, it is good practice for an assessment to be provided as to human rights compatibility.

Conferral of powers under state laws

2.88 Section 55A of the *Australian Crime Commission Act 2002* (ACC Act) provides Commonwealth legislative authority for the conferral by the states[5] of certain duties, functions or powers on the Australian Criminal Intelligence Commission (ACIC),[6] members of its board or staff, or a judge of the Federal Court or Federal Circuit Court. These may include duties, functions or powers of a kind specified in relevant regulations.

2.89 Section 8A and schedules 3, 4 and 5 of the ACC regulations prescribe provisions of state and territory laws for the purpose of section 55A. These include:

- under subsection 8A(1), duties, functions or powers provided in 19 provisions of state and territory Acts and regulations, specified in schedule 4, which may be conferred on the Commission; and
- under subsection 8A(2), duties, functions or powers provided in 305 provisions of state and territory Acts and regulations, specified in schedule 3, which may be conferred on the Commission's CEO, a member of its staff, the Chair or a member of its Board.

2.90 In each instance, the relevant duties, powers or functions may be conferred on the ACIC, members of its board or staff or federal judges for the purposes of, or in relation to, the investigation of a matter or the undertaking of an intelligence

4 See footnote 1 above.

5 'State' is defined in section 4 of the ACC Act to include the Australian Capital Territory and the Northern Territory.

6 In 2016 the Australian Crime Commission and CrimTrac were merged to form the Australian Criminal Intelligence Commission (ACIC). Pursuant to subsection 7(1A) of the ACC Act and section 3A of the Regulations, the ACIC is the body which now exercises the powers and functions of the ACC under the ACC Act and Regulations.

operation relating to a relevant criminal activity,[7] in so far as the relevant crime is, or includes, an offence or offences against a state law, whether or not that offence or those offences have a federal aspect.

Compatibility of the measure with multiple human rights

2.91 The right to privacy prohibits arbitrary or unlawful interferences with an individual's privacy, family, correspondence or home. This includes informational privacy, the right to personal authority and physical and psychological integrity, and prohibitions on unlawful and arbitrary state surveillance or interference with a person's home or workplace.

2.92 The right to liberty of the person is a procedural guarantee not to be arbitrarily and unlawfully deprived of liberty.

2.93 The right to a fair trial and a fair hearing encompasses notions of the fair administration of justice and prohibits investigatory techniques that incite individuals to commit a criminal offence.[8]

2.94 Australia is also required to ensure that those whose human rights are violated have access to an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity.

2.95 The initial human rights analysis stated that it appears that some of the provisions set out in schedules 3 and 4 to the ACC regulations, allowing the conferral of powers under state laws on the Commission, its board or staff, engage the right to privacy, the right to liberty, the right to a fair trial and a fair hearing, or the right to an effective remedy, and may engage other human rights. These include provisions relating to criminal intelligence operations, use of assumed identities by law enforcement personnel, use of surveillance devices, witness protection, and spent convictions.

2.96 For example, schedule 3 allows the conferral of powers on the CEO or staff of the ACIC under a number of provisions of the New South Wales *Law Enforcement (Controlled Operations) Act 1997* (NSW Act). This includes the power under section 13 of the NSW Act to engage in 'controlled activities' when part of an

7 Under section 4 of the ACC Act, 'relevant criminal activity' is defined as 'any circumstances implying, or any allegations, that a relevant crime may have been, may be being, or may in future be, committed against a law of the Commonwealth, of a State or of a Territory'. 'Relevant crime' means serious and organised crime, or indigenous violence or child abuse.

8 See, *Ramanauskas v Lithuania*, European Court of Human Rights (ECHR) Application No. 74420/01, 5 February 2008, [55]. The ECHR has consistently held that entrapment violates article 6 of the European Convention on Human Rights, which is equivalent to article 14 of the ICCPR.

authorised 'controlled operation',[9] which may be conferred on any member of staff of the ACIC. Controlled activities are activities which, but for section 16 of the NSW Act, would be unlawful. Section 16 provides that any activity engaged in by a participant in an authorised operation, and in accordance with the authority for the operation, is not unlawful and does not constitute an offence or corrupt conduct despite any other Act or law.

2.97 As such, where that power is conferred, it would allow any member of the ACIC's staff, given the authority, to commit an otherwise unlawful act. Schedule 3 also permits the conferral on the CEO of the ACIC of the power, under subsection 14(1) of the NSW Act, to grant (or refuse) retrospective authority for controlled activities.

2.98 The initial analysis noted that while there appear to be some safeguards in relation to the controlled operations,[10] by allowing a broad range of activities that would otherwise be unlawful, these provisions could have a significant impact on various rights, including (but not restricted to) the right to liberty, the right to a fair trial and a fair hearing, the right to privacy and the right not to be subject to torture, cruel, inhuman or degrading treatment or punishment. The provisions may also prevent a person from seeking an effective remedy where his or her rights have been violated, insofar as a participant in a controlled operation is granted protection from criminal liability.

2.99 Another example is the prescription of powers under South Australia's *Listening and Surveillance Devices Act 1972* (SA Act).[11] Schedule 3 of the ACC regulations enables the conferral of powers on a staff or board member of the ACIC under section 7 of the SA Act to use listening devices to overhear, record, monitor or listen to private conversations without the consent of the parties, and in certain circumstances to disclose the information derived from their use. Powers are also able to be conferred under section 9 of the SA Act including, in subsection 9(2), powers to break into, enter and search any premises; stop, detain and search a vehicle; and detain and search any person; where an officer suspects on reasonable

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9 Section 4 of the NSW Act defines a 'controlled operation' as an operation conducted for the purpose of obtaining evidence of criminal activity or corrupt conduct, arresting any person involved in criminal activity or corrupt conduct, frustrating criminal activity or corrupt conduct, or carrying out an activity reasonably necessary to facilitate one of the above purposes; and involving a controlled activity.

10 Section 7 of the NSW Act provides that controlled operations must not be authorised where they would involve inducing or encouraging a person to engage in criminal activity or corrupt conduct that they would not otherwise be expected to engage in; engaging in conduct likely to seriously endanger the health or safety of any person or result in serious loss or damage to property; or the commission of a sexual offence.

11 Schedule 3 also prescribes powers relating to surveillance devices under the *Surveillance Devices Act 1999* (Victoria), *Surveillance Devices Act 1998* (Western Australia) and *Surveillance Devices Act [2007]* (Northern Territory).

grounds that an unauthorised listening device is being held. Use of these powers would engage and limit the right to privacy of individuals subject to searches or surveillance, including respect for the privacy of a person's home, workplace and correspondence. The provision for the detention of persons also engages and limits the right to liberty.

2.100 It was noted that some of the powers prescribed in schedule 3 of the ACC regulations appear to be accompanied by certain duties which may act as safeguards on the use and scope of the power. However, there is no obligation in the ACC regulations requiring that where powers are conferred, the corresponding duties must be conferred along with them. It is unclear whether very broad powers could be conferred on the ACIC or its staff, without the safeguards contained in the original state or territory legislation.

2.101 In schedule 4, several powers are prescribed relating to the receipt or disclosure of information, which may include personal information. These include powers to receive information under subsection 11(1) of the First Home Owner Grants Regulation 2000 (WA), subsection 37(d) of the *Gambling and Racing Control Act 1999* (ACT), and subsection 97(d) of the *Taxation Administration Act 1999* (ACT); and the power to disclose information about spent convictions under subsection 17(3) of the *Spent Convictions Act 2000* (ACT). Once again, these powers engage and limit the right to informational privacy.

2.102 Limitations on human rights may be permissible where the measure pursues a legitimate objective, is effective to achieve (that is, rationally connected to) that objective, and is a proportionate means of achieving that objective.

2.103 However, no information is provided in the explanatory statement to the certificate about the human rights engaged by (the continued operation of) subsections 8A(1) and (2) and schedules 3 and 4 of the ACC regulations. As stated above, while a statement of compatibility is not required for this instrument, where a legislative instrument engages human rights, including by continuing the effect of measures that appear to engage rights, it is good practice for an assessment to be provided as to their human rights compatibility. In the absence of further information, it is not possible to conclude that the instrument is compatible with human rights.

2.104 The committee therefore sought the advice of the Attorney-General as to:

- the human rights engaged by subsections 8A(1) and (2) and schedules 3 and 4 of the ACC regulations;
- where these measures engage and limit human rights:
    - whether the measure is aimed at achieving a legitimate objective for the purposes of human rights law;
    - how the measures are effective to achieve (that is, rationally connected to) a legitimate objective; and

- whether the limitations are reasonable and proportionate to achieve that objective; and

- whether it would be feasible to amend the ACC regulations, when remade, to require that any state powers conferred on the ACIC or its personnel which limit human rights will only be exercisable where accompanied by the conferral of the corresponding duties and safeguards in the relevant state law.

Minister's response

2.105 In relation to the committee's inquiries, the minister's response states:

> I note the Committee's comments on the Legislation (Deferral of Sunsetting — Australian Crime Commission Regulations) Certificate 2017.
>
> In re-making the Australian Crime Commission Regulations prior to the sunsetting date of 1 April 2019, I will develop a statement of human rights compatibility, which canvasses whether the identified measures engage and limit human rights, and whether these measures represent a reasonable and proportionate means of achieving a legitimate objective for the purposes of human rights law. As part of the re-making process, I will consider any necessary amendments to ensure the ACC Regulations remain fit-for-purpose and contain appropriate safeguards to protect human rights.

2.106 The committee welcomes the minister's commitment to considering the human rights issues raised by the ACC regulations when re-making the regulations, and will consider the human rights implications of the re-made regulations when they are received.

Committee response

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

2.108 The committee welcomes the minister's commitment to ensure that the re-made ACC regulations will contain appropriate safeguards to protect human rights, and recommends the minister consider the preceding analysis when preparing the statement of compatibility for the new ACC regulations.

2.109 The committee will consider the human rights implications of the re-made ACC regulations when they are received.

Collection and use of 'national policing information'

2.110 Subsection 4(1) of the ACC Act defines 'national policing information' as information that is collected by the Australian Federal Police, a state police force, or a body prescribed by the regulations, and is of a kind prescribed by the regulations.

2.111 Section 2A of the ACC regulations prescribes eight bodies (listed in schedule 1A) that collect 'national policing information', and prescribes the kind of national

policing information collected as information held under, or relating to the administration of, 24 specified databases or electronic systems.

2.112 Section 9A of the ACC regulations prescribes six organisations to which national policing information may be disclosed by the CEO of the ACIC, without requiring the approval of the board, in addition to those specified in the ACC Act.[12]

Compatibility of the measure with the right to privacy

2.113 As set out above, the right to privacy includes respect for informational privacy, including the right to respect for private and confidential information, particularly the storing, use and sharing of such information; and the right to control the dissemination of information about one's private life.

2.114 As national policing information is likely to include private, confidential and personal information, its collection, use and disclosure by the ACIC engages and limits the right to privacy.

2.115 The committee previously examined the human rights implications of this measure in relation to the right to privacy in its *Report 7 of 2016* and *Report 8 of 2016*.[13] The committee sought advice as to whether the limitation was a reasonable and proportionate measure for the achievement of its stated objective, and in particular, whether there were sufficient safeguards in place to protect the right to privacy, noting in particular that the ACIC is not subject to the *Privacy Act 1988* (Privacy Act).

2.116 In response, the then Minister for Justice agreed that the collection and disclosure of national policing information engages and limits the right to privacy, but stated that the limitation was reasonable and proportionate to achieving the objective of enabling the ACIC to fulfil its functions. The minister advised that the ACC Act provided sufficient safeguards to protect the right to privacy, and that the ACIC also had technical and administrative mechanisms in place to ensure that national policing information is collected, used and stored securely.

2.117 The minister noted that while the ACIC is not subject to the Privacy Act, the ACIC is experienced in the appropriate handling of sensitive information, and has safeguards and accessibility mechanisms specifically designed for the sensitive

12 Section 59AA of the ACC Act provides for the disclosure of information in the ACIC's possession by its CEO. Subsection 59AA(1B) provides that where that information is national policing information, the CEO must obtain the approval of the board before disclosing it, except to specified bodies, including bodies prescribed by the regulations.

13 Parliamentary Joint Committee on Human Rights, *Report 7 of 2016* (11 October 2016) pp. 30-32; *Report 8 of 2016* (9 November 2016) pp. 72-74. The Australian Crime Commission Amendment (National Policing Information) Regulation 2016 [F2016L00712], and the Australian Crime Commission Amendment (National Policing Information) Regulation 2016 which were examined in those reports introduced the provisions relating to national policing information into the ACC regulations.

nature of its operations. The minister advised that the ACIC was in the process of preparing an information handling protocol addressing the way it would treat personal information.

2.118 On this basis, the previous human rights analysis in the committee's report stated that the legislative and administrative safeguards outlined in the minister's response were likely to improve the proportionality of the limitation on the right to privacy resulting from the collection, use and disclosure of national policing information, and may ensure that the measure would only impose proportionate limitations on this right. Nonetheless, the committee considered it difficult to reach a conclusion that the measure was compatible with human rights without the detail of the information handling protocol being available. The committee requested that a copy of the information handling protocol be provided to the committee once it was finalised.

2.119 However, the committee has not to date received a copy of that document, and it does not appear to be publicly available. No information is provided in the explanatory statement to this certificate of deferral about the engagement of the right to privacy by the (continued operation of) this measure.

2.120 The committee therefore requested an update from the Attorney-General regarding the preparation of an information handling protocol by the ACIC, and reiterated its request that a copy of this document be provided to the committee.

Minister's response

2.121 The minister's response reiterates that he will prepare a statement of compatibility for the re-made ACC regulations which identify how the measures engage and limit the right to privacy. In relation to the delay in providing the information handling protocol by the ACIC, the minister's response provides the following information:

> …the Attorney-General's Department, the Australian Crime Commission (ACC) and CrimTrac provided a joint submission to the Senate Legal and Constitutional Affairs Legislation Committee's *Inquiry into the Australian Crime Commission Amendment (National Policing Information) Bill 2015 and the Australian Crime Commission (National Policing Information Charges) Bill 2015* in February 2016. On 10 March 2016, the [Legal and Constitutional Affairs] Committee published its final report which recommended that the Bills be passed and noted that:
>
> > *the department and relevant agencies intend to develop and publish an information handling protocol in consultation with the OAIC to address in more detail the information handling procedures and protections that would apply, and the assurance provided that the principles in this document would be consistent with the Australian Privacy Principles.*
>
> The Australian Criminal Intelligence Commission (ACIC) has advised that the development of an information handling protocol is well advanced and

> consultation will occur with the Office of the Australian Information Commissioner shortly.
>
> The finalisation of this protocol has been delayed due to the need to address the implications of two major changes in administrative arrangements affecting the ACIC. First, as a merged agency, the ACIC has faced significant legal issues in seeking to amalgamate and consolidate the functions and services formerly provided by the ACC and CrimTrac. These issues particularly concern the handling of information. Secondly, the establishment of the Home Affairs portfolio has raised additional legal and policy issues that need to be taken into account in developing the protocol.

Committee response

2.122 The committee thanks the minister for his response.

2.123 The committee notes the information from the minister as to the reason for the delay in finalising the information handling protocol.

2.124 The committee reiterates its request that, once finalised, a copy of the information handling protocol by ACIC be provided to the committee in order for the committee to conclude its analysis on the compatibility of the ACC regulations with the right to privacy.

Disclosure of 'ACC information'

2.125 Sections 9 and 10 and schedules 6 and 7 of the ACC regulations prescribe 5 international organisations, 98 Australian bodies corporate and 38 classes of body corporate to whom ACC information (defined by section 4 of the Act as information that is in the ACIC's possession) may be disclosed, in accordance with sections 59AA and 59AB of the Act.

Compatibility of the measure with the right to privacy

2.126 As noted above, the right to privacy includes respect for informational privacy. As ACC information is likely to include private, confidential and personal information, its disclosure by the ACIC engages and limits the right to privacy.

2.127 Limitations on the right to privacy may be permissible where the measure pursues a legitimate objective, is effective to achieve (that is, rationally connected to) that objective, and is a proportionate means of achieving that objective.

2.128 However, no information is provided in the explanatory statement to the certificate of deferral about the engagement of the right to privacy by the (continued operation of) this measure. As stated above, while a statement of compatibility is not required for this instrument, where a legislative instrument engages human rights, including by continuing the effect of measures that appear to engage rights, it is good practice for an assessment to be provided as to their human rights compatibility. In the absence of further information, it was not possible to conclude that the limitations on the right to privacy are justifiable.

2.129 The committee therefore requested advice as to:

- whether the measure is aimed at achieving a legitimate objective for the purposes of human rights law;
- how the measure is effective to achieve (that is, rationally connected to) a legitimate objective; and
- whether the limitations are reasonable and proportionate to achieve that objective.

Minister's response

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

> In re-making the Australian Crime Commission Regulations prior to the sunsetting date of 1 April 2019, I will develop a statement of human rights compatibility, which canvasses how the identified measures engage and limit the right to privacy, and whether these measures represent a reasonable and proportionate means of achieving a legitimate objective for the purposes of human rights law.

2.131 The committee welcomes the minister's commitment to considering the privacy issues raised by this aspect of the ACC regulations when re-making the regulations, and will consider the human rights implications of the re-made regulations when they are received.

Committee response

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

2.133 The committee welcomes the minister's commitment to ensure that the re-made ACC regulations will contain appropriate safeguards to protect human rights, and recommends the minister consider the preceding analysis when preparing the statement of compatibility for the new ACC regulations.

2.134 The committee will consider the human rights implications of the re-made ACC regulations when they are received.

My Health Records (National Application) Rules 2017 [F2017L01558]

Purpose	Provides for the nationwide implementation of the My Health Record system on an opt-out basis
Portfolio	Health
Authorising legislation	*My Health Records Act 2012*
Last day to disallow	Tabled in the House of Representatives on 4 December 2017; tabled in the Senate on 5 December 2017. Last day to disallow: 26 March 2018 (Senate)
Right	Privacy (see **Appendix 2**)
Previous report	1 of 2018
Status	Concluded examination

Background

2.135 The committee first reported on this instrument in its *Report 1 of 2018*, and requested a response from the Minister for Health by 21 February 2018.[1]

2.136 The minister's response to the committee's inquiries was received on 26 February 2018. The response is discussed below and is reproduced in full at **Appendix 3**.

2.137 The My Health Record system, previously referred to as the personally controlled electronic health record (PCEHR), is an electronic summary of an individual's health records. The system currently operates on an opt-in basis, meaning that persons register to obtain a My Health Record.

2.138 The *Health Legislation Amendment (eHealth) Act 2015* (the Act) enables trials to be undertaken in defined locations on an opt-out basis, with an individual's health records automatically uploaded onto the My Health Record system unless that individual takes steps to request that their information not be uploaded. The Act also allows the opt-out process to be applied nationwide following the trial. The committee previously assessed this legislation in its *Twenty-ninth Report of the 44th Parliament* and *Thirty-second report of the 44th Parliament*.[2]

1 Parliamentary Joint Committee on Human Rights, *Report 1 of 2018* (6 February 2018) pp. 45-49.

2 Parliamentary Joint Committee on Human Rights, *Twenty-ninth Report of the 44th Parliament* (13 October 2015) pp. 9-24 and *Thirty-second report of the 44th Parliament* (1 December 2015) pp. 64-86.

Automatic inclusion of health information on the My Health Record system

2.139 The instrument provides for the implementation of the My Health Record system nationwide on an opt-out basis. Under the scheme, a My Health Record will automatically be created for all healthcare recipients,[3] unless they choose to opt-out.

2.140 Under the instrument, all people with an Individual Healthcare Identifier (IHI), which includes all people enrolled in Medicare or with a Department of Veterans' Affairs file number, will be provided the opportunity to opt-out during a three-month 'opt-out period' before their record is automatically created.[4] Healthcare recipients can also choose to cancel or suspend their registration at any time after their My Health Record is created.[5]

Compatibility of the measure with the right to privacy

2.141 The right to privacy includes respect for informational privacy, including the right to respect for private and confidential information, particularly the use and sharing of such information and the right to control the dissemination of information about one's private life. By enabling the uploading of the personal health records of all healthcare recipients onto the My Health Record system, the instrument engages and limits the right to privacy. In this respect, My Health Records may contain extensive health information such as records of 'medical consultations, blood tests and x-ray reports and prescriptions filled'.[6]

2.142 The statement of compatibility acknowledges that the instrument engages and limits the right to privacy but concludes that any limitation is necessary, reasonable and proportionate to achieving the objective of improving healthcare for

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3 Under the *My Health Records Act 2012*, 'healthcare recipient' is defined as 'an individual who has received, receives, or may receive, healthcare'.

4 The three-month period will begin on a date to be specified by the minister. See, explanatory statement (ES) pp. 4-5.

5 ES, p. 5.

6 According to the Department of Health Website, the information stored on My Health Record can include: 'Clinical documents about your health – added by healthcare providers including: Shared Health Summary; Hospital discharge summaries; Pathology and diagnostic imaging reports; Prescribed and dispensed medication; Specialist and referral documents; Medicare and PBS information stored by the Department of Human Services, Medicare and RPBS information stored by the Department of Veterans' Affairs; Organ Donor decisions; Immunisations that are included in the Australian Immunisation Register. This may include childhood immunisations and other immunisations given to you by a healthcare provider; Personal health notes written by you or an authorised representative including: Contact numbers and emergency contact details; Current medications; Allergy information and any previous adverse reactions; Indigenous status; Veteran or ADF status; living will or advance care planning documents". Department of Health, My Health Record, https://myhealthrecord.gov.au/internet/mhr/publishing.nsf/Content/find-out-more?OpenDocument&cat=Managing%20your%20My%20Health%20Record.

Australians. The statement of compatibility also states that the measure promotes the right to health by 'improving the sharing of health information between treating healthcare providers, leading to quicker and safer treatment decisions and reducing repetition of information for patients and duplication of tests'.[7] The initial human rights analysis stated that the broad objective of improving healthcare for all Australians is likely to be considered a legitimate objective for the purposes of international human rights law. It may also be accepted that the sharing of health information between health practitioners through the My Health Record system may help enable more efficient and informed treatment of patients, therefore contributing to improved healthcare. The measure would therefore appear to be rationally connected to the objective.

2.143 In order to be a proportionate limitation on the right to privacy, a limitation should only be as extensive as is strictly necessary to achieve its objective. In this respect, there were concerns as to whether the measure is the least rights restrictive way to achieve the stated objective for the purposes of international human rights law. In particular, the blanket application of the system nationwide on an opt-out basis may be overly broad. It was noted that opt-in arrangements, where an individual expressly consents to having their health information uploaded to the online register, appear to constitute a less rights restrictive alternative. The statement of compatibility explains that the current arrangements are not effective to encourage broader participation, 'creating a barrier to achieving the full benefits of the system for individuals'.[8]

2.144 While increasing the number of people using the My Health Record system may potentially assist to achieve the objective of improving health outcomes, it was not clear whether a less rights restrictive approach to increasing the number of people using the system may be reasonably available. This may include, for example, measures promoting public awareness of and participation in the system in its current opt-in form or encouraging individuals with complex or serious health needs to opt-in. Further, the initial analysis stated that information as to why, and the extent to which, the current opt-in system has not succeeded and is not a reasonably available alternative on an ongoing basis would assist in assessing whether the limitation on the right to privacy is proportionate. It is also possible that some people may not have opted-in to the My Heath Record system on the basis of reasonable concerns about their privacy. Further, it was unclear that automatically uploading key aspects of the medical records of all health care recipients is necessary to improve health outcomes for each individual. For example, it was unclear whether individuals who do not have ongoing or complex health needs will benefit from the proposed system.

7 ES, statement of compatibility (SOC), p. 8.

8 ES, SOC, p. 8.

2.145 Another relevant consideration in determining the proportionality of the measure is whether there are adequate safeguards in place to ensure that the limitation on the right to privacy is no more extensive than is strictly necessary. The statement of compatibility sets out a range of measures aimed at safeguarding informational privacy, including that individuals can: restrict access to certain information, including Medicare information; effectively remove certain documents from the system; request their healthcare provider not upload certain information; monitor login activity in relation to their My Health Record; and cancel their registration at any time.[9] These points appear to provide individuals some measure of control over their electronic record. However, based on the information provided, it was unclear as to the process for individuals to opt-out or control what is accessible through the My Health Record.

2.146 The initial analysis stated that other aspects of the system may not be sufficiently circumscribed, including in relation to the retention of data. The explanatory memorandum for the Health Legislation Amendment (eHealth) Bill 2015 explains that, when an individual cancels their existing My Health Record, information compiled on the individual up to that point will be retained, but cannot be accessed by any entity.[10] This apparently open-ended practice of retention raises further questions as to whether the limitation on the right to privacy is the least rights restrictive alternative to meet its objective.

2.147 The statement of compatibility also explains that healthcare recipients will have a 'reasonable period of time' to opt-out of the system, which is a three month window beginning from a future date to be specified by the minister.[11] The explanatory statement explains that:

> [i]n order to opt-out, a person must give notice to the System Operator in a particular manner. In practice, a person will be able to give this notice in a number of ways and at a time or period specified by the Minister, depending on their circumstances.

2.148 However, no specific information is set out in the explanatory materials as to how a person opts-out in practice. Of particular concern is how the process would cater for people with communication difficulties or those without internet access.

2.149 A related question concerned how individuals will be made aware of the national opt-out arrangements and other relevant information about the My Health Record system. The importance of this aspect of the proposed rollout was noted in the final evaluation report of participation trials in the My Health Record system, commissioned by the Department of Health and conducted by Siggins Miller

9 ES, SOC, p. 10.

10 Health Legislation Amendment (eHealth) Bill 2015, explanatory memorandum, p. 95.

11 ES, SOC, p. 9.

Consultants in 2016, which emphasised 'the need for any future national change and adoption strategy to include a much bigger emphasis on awareness and education'.[12] The statement of compatibility states that:

> [c]omprehensive information and communication activities are being planned to ensure all affected individuals, including parents, guardians and carers, are aware of the opt-out arrangements, what they need to do to participate, how to adjust privacy controls associated with their My Health Record, or opt-out if they choose.[13]

2.150 However, no further information is provided as to what these communication initiatives will entail and how they will be effective to ensure all individuals are made aware of the My Health Record system including their ability to opt-out or control disclosure of information via the system. It was further noted that, as health recipients subject to the scheme will include a range of individuals with specific needs, including children[14] and persons with disabilities, any information and communication activities about the system would likely need to be appropriately tailored.

2.151 The committee therefore sought the advice of the minister as to whether the measure is reasonable and proportionate to achieve the stated objective and, in particular:

- whether the measure is the least rights restrictive way of achieving its stated objective (including why current opt-in arrangements could not be pursued on an ongoing basis, why it is necessary to automatically include the health record of all Australians and healthcare recipients on the My Health Record (rather than, for example, only those with complex or ongoing health conditions), and whether the retention of data after cancellation of a My Health Record account is adequately circumscribed); and
- whether there are sufficient processes and safeguards in place to ensure awareness and information in relation to the system, including the ability to opt-out or control information disclosure, will be adequately conveyed to the public, including in relation to children and persons with a disability.

Minister's response

2.152 The minister's response restates the objectives and potential benefits of the My Health Record system. As noted above, the previous human rights analysis

12 Siggins Miller Consultants, *Evaluation of the Participation Trials for the My Health Record: Final Report* (November 2016) p. vii.

13 ES, SOC, pp. 9-10.

14 The explanatory statement states that individuals aged 14 years or older will be able to opt themselves out. Persons with parental or legal authority for another person may also opt out that other person. See ES, p. 5.

assessed that the broad objective of improving healthcare for all Australians is likely to be considered a legitimate objective for the purposes of international law.

2.153 In relation to the proportionality of the measure, the minister's response provides further information as to the breadth of health information that will be automatically uploaded to a My Health Record:

> In an opt-out setting, health information will not automatically be uploaded to a My Health Record. When a My Health Record is created, the only information that may be included is information held by Medicare, specifically two years' of Medicare and Pharmaceutical Benefits claiming information, Australian Organ Donation Register information and Australian Immunisation Register information. A consumer can choose not to include this information.
>
> Health care providers are likely to only include information in the consumer's My Health Record when the consumer has an interaction with the health system. As such, consumers who are healthy and rarely interact with the health system will have little, if any, health information in their My Health Record.

2.154 The minister's response appears to suggest that the extent of information that would be included is not extensive. However, information such as that held by Medicare and Pharmaceutical Benefits claims may reveal significant personal information about a person and, when included on the same centralised database, would appear to allow for linking and matching of that information to draw conclusions about a person's health. Notwithstanding the legitimate public health objective pursued by the measure, from the standpoint of the right to privacy the information that is to be included on the My Health Record appears to be extensive. For the reasons discussed further below, it is not clear that an individual's choice not to include this information would constitute a sufficient safeguard.

2.155 In relation to why it is considered necessary to implement an opt-out system, under which an electronic record will automatically be created for all healthcare recipients, in place of current opt-in arrangements, the minister's response provides the following information:

> In November 2013, the then Minister for Health commissioned a review of the system which confirmed some key issues that needed to be resolved so consumers and health care providers would be more likely to use the system. Among other things, the number of people with a My Health Record (then known as a personally controlled electronic health record) was too small to warrant health care providers learning how to use it or checking it for updated information. Feedback from health care providers was that they would be more inclined to use it if all of their patients had one, and feedback from the Consumers Health Forum was that the system would be more successful if it were opt-out. The review subsequently recommended the system transition to opt-out participation arrangements.

> In 2016, the Australian Government chose to undertake trials of My Health Record participation arrangements — an opt-out model was trialled in Northern Queensland and Nepean Blue Mountains, and innovative opt-in models were trialled in the Ballarat Hospital, Victoria, and several private general practices in Perth, Western Australia.
>
> The independent evaluation of these trials found 'overwhelming and almost unanimous support' by both consumers and health care providers for opt-out arrangements. For consumers, opt-out affords them the benefits of having a My Health Record without taking any action, while for health care providers, opt-out ensures the majority of their patients have a My Health Record without the administrative burden of explaining it and assisting patients to register. The opt-out trial sites recorded a significant increase in health information being uploaded and viewed by health care providers, well above that experienced in the rest of Australia, proving health care providers actively engaged with the system where the majority of their patients have a My Health Record. The trials evaluation recommended the opt-out model be implemented nationally.
>
> While the growth rate of My Health Records and their content has continued to increase, the proportion of consumers with a My Health Record still provides little incentive to health care providers to use the system.
>
> In 2017, the Government agreed to implement opt-out because it allows the My Health Record system to deliver health benefits to all Australians at least nine years sooner [than] opt-in options. In considering participation models, opt-in models offered limited benefits realisation, higher cost in some cases (as a result of consumer engagement), and the models did not effectively engage health care providers other than GPs or effectively leverage Government investment.

2.156 As stated above, while increasing the number of people using the My Health Record system may potentially assist to achieve the objective of improving health outcomes, it remains unclear whether a less rights restrictive approach to achieving this objective may be reasonably available. The minister's response indicates that opt-in arrangements would take a longer period of time to deliver benefits and would be more costly. However, while these potential challenges are acknowledged, it is noted that administrative difficulties, in and of themselves, are unlikely to be a sufficient reason not to pursue a measure that may be a less rights restrictive alternative.

2.157 Further, the response argues that it is necessary for a large volume of health records to be accessible through My Health Records in order for it to be effective. The minister's response also explains that opt-in arrangements have not effectively engaged healthcare providers who may be more inclined to use the system if all of their patients had an account. However, it is not clear whether other approaches specifically targeted at incentivising healthcare providers to use the system could be adopted or have been considered, rather than the blanket application of the system

nationwide on an opt-out basis. As acknowledged in the minister's response, the number of people registering for a My Health Record account is continuing to grow. According to statistics published on the Australian Digital Health Agency website, the number of individual registrations as at 1 April 2018 was over 5.6 million, with over 18,000 new records created each week.[15] This growth rate under current opt-in arrangements would appear to go some way to alleviating the apparent concern of healthcare providers that only a small number of individuals were using the system. Further, it is unclear why encouraging medical professionals to use the My Health Records for those patients who do have a record is not a reasonably available approach. In these circumstances, there would not appear to be any less benefit to these patients with a My Health Record than if more people had My Health Records. As such, educating medical professions about use of My Health Records would appear to be a less rights restrictive approach to achieving the legitimate objective of the measure.

2.158 In relation to whether there are sufficient processes and safeguards in place to ensure awareness of the opt-out system, the minister's response outlines that $27.75 million has been committed 'to ensure all Australians are aware of the My Health Record and their right to opt-out during the three month opt-out period, and $52.38 million to supporting education and training'. The response states that the opt-out trials of 2016 have informed the planning of a comprehensive communications strategy which will include partnerships with various organisations, the utilisation of a range of communication channels, face to face briefings around the country and the provision of information at the point of care and other community sites.

2.159 While these awareness-raising initiatives may potentially assist the scheme to operate in a proportionate manner, concerns remain that an approach that better safeguards the right to privacy, such as a similar communications strategy to support current opt-in arrangements, would be reasonably available. As stated above, opt-in arrangements under which health recipients expressly consent to creating a My Health Record would appear to constitute a less rights restrictive means of achieving the legitimate objective of the measure. It is further noted that while lack of awareness about the system may be a principal reason that more healthcare recipients have not signed on to the system, it is also possible that some people may not have opted in to the My Heath Record system on the basis of reasonable concerns about their privacy.

2.160 The minister's response also states that the communications strategy 'ensures hard-to-reach audiences have been considered, such as people with communication difficulties, and will receive enhanced support should they choose to

15 Australian Digital Health Agency, *My Health Record Statistics – at 1 April 2018,* https://myhealthrecord.gov.au/internet/mhr/publishing.nsf/Content/news-002.

opt-out'. However, no further detail is provided as to how communication activities will specifically cater for certain individuals with specific needs, such as children or persons with a disability. Concerns therefore remain as to whether awareness and information about the system will be adequately conveyed to members of the public with specific needs. This is of particular concern in the context of an opt-out system which will automatically generate electronic health records for all healthcare recipients that do not register their intention to opt-out within the three-month window.

2.161 The response refers to the various ways, as explained in the statement of compatibility, that individuals may 'exercise their rights to control how their information is collected, used and disclosed' through the My Health Record system. As set out at [2.145] above, measures available to individuals include: restricting access to certain information; effectively removing certain documents from the system; requesting their healthcare provider not upload certain information; monitoring login activity in relation to their My Health Record; and cancelling their registration at any time. As stated above, these measures appear to provide individuals with some degree of control over their electronic record. However, it is noted that the burden is placed on each individual to manage their electronic record and the effectiveness of these controls in safeguarding informational privacy may therefore be dependent on the adequacy of information and awareness initiatives in explaining these access controls to My Health Record users. For some individuals, such as those with low computer literacy or those without ready access to facilities (such as computers) that would enable them to manage their record, this may be a particularly substantial and potentially onerous burden.

2.162 In relation to the retention of data when a person cancels their My Health Record, the minister's response states:

> If a consumer decides to cancel their My Health Record, the System Operator (i.e. the Australian Digital Health Agency), is required by law to store certain information until 30 years after the consumer dies; however, the information is not generally available to any entity other than in specific circumstances, such as to lessen or prevent a serious threat to public safety. The requirement to retain information was implemented to:
>
> - ensure there is capacity to store a minimum critical set of health information about consumers, thus providing long-term efficacy for the purposes of health care delivery- this is critical since the system operates on the basis of distributed public and private repositories that are subject to differing jurisdictional laws;
> - provide that, if a consumer changes their mind and decides to get a My Health Record, the information that existed before they cancelled it will be available to them;
> - provide a source of information that, in a de-identified form, can be used to inform and improve health services;

- provide for medico-legal needs, such as if a clinical decision is made on the basis of My Health Record information and the decision is being legally challenged; and
- reflect Commonwealth record-keeping requirements.

2.163 The long-term retention of individuals' medical information in electronic form, particularly in instances where a person has cancelled their My Health Record, raises further concerns in relation to the right to privacy. It would appear to mean that a person who does not opt-out of the My Health Record system within the prescribed three-month period but then decides to cancel their registration would have their personal information retained on the system for the remainder of their life, notwithstanding they no longer consent to being part of that system. For example, it would appear that people who are currently children and are not opted-out during the three month period would have their medical records created and retained for the rest of their life even if they later choose to cancel. This long-term retention of personal information in circumstances where a person has sought to cancel their registration limits a person's ability to control how their personal information is used and disclosed, which raises serious concerns as to the adequacy of the safeguards in place to protect the right to privacy.

2.164 Ultimately the compatibility of this aspect of the measure with the right to privacy may depend on how data retention practices and safeguards in relation to protecting information work in practice, as well as whether individuals are provided with sufficient information about the management and retention of their medical information. Such information should include what data is stored on an ongoing basis, what entities may have access to such data, and under what circumstances and for what purpose such data may be accessed. Effective measures should also be in place to ensure that unauthorised persons or entities are not able to access the medical data of individuals.

Committee response

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

2.166 Notwithstanding the legitimate objective of the My Health Record scheme, the preceding analysis indicates that, based on the further information provided, the scheme in its opt-out form is likely to be incompatible with the right to privacy. This is because:

- **the implementation of the scheme on an opt-out basis may not be a proportionate means of achieving the legitimate objective of the measure. Specifically, opt-in participation arrangements and education of health care professionals would appear to be a reasonably available less rights-restrictive alternative; and**
- **questions remain as to the adequacy of relevant safeguards, including in relation to ensuring awareness and information about the scheme, as well**

as the long-term retention of data, including in cases where individuals cancel their My Health Record account.

Social Services Legislation Amendment (Encouraging Self-sufficiency for Newly Arrived Migrants) Bill 2018

Purpose	Amends the *Social Security Act 1991* to increase the newly arrived resident's waiting period from 104 weeks to 156 weeks for certain social security payments and concession cards; introduce a newly arrived resident's waiting period of 156 weeks for bereavement allowance, widow allowance, parenting payment and carer allowance; and make a technical amendment; amends the *Farm Household Support Act 2014* to increase the newly arrived resident's waiting period from 104 weeks to 156 weeks; amends the *A New Tax System (Family Assistance) Act 1999* and *Social Security Act 1991* to introduce a newly arrived resident's waiting period of 156 weeks for family tax benefit; and amends the *Paid Parental Leave Act 2010* to introduce a newly arrived resident's waiting period of 156 weeks for parental leave pay and dad and partner pay
Portfolio	Social Services
Introduced	House of representatives, 15 February 2018
Rights	Social security; adequate standard of living; women's rights (see **Appendix 2**)
Previous report	3 of 2018
Status	Concluded examination

Background

2.167 The committee first reported on the bill in its *Report 3 of 2018*, and requested a response from the Minister for Social Services by 11 April 2018.[1]

2.168 The minister's response to the committee's inquiries was received on 19 April 2018. The response is discussed below and is reproduced in full at **Appendix 3**.

2.169 The committee has considered the human rights implications of a waiting period for classes of newly arrived residents to access social security payments on a number of occasions.[2]

1 Parliamentary Joint Committee on Human Rights, *Report 3 of 2018* (27 March 2018) pp. 70-78.

2 Parliamentary Joint Committee on Human Rights, *Report 7 of 2016* (11 October 2016) pp. 2-11; *Report 8 of 2016* (9 November 2016) pp. 57-61; *Report 2 of 2017* (21 March 2017) pp. 41-43; *Report 4 of 2017* (9 May 2017) pp. 149-154.

Newly arrived resident's waiting period for social security payments

2.170 The Social Services Legislation Amendment (Encouraging Self-sufficiency for Newly Arrived Migrants) Bill 2018 (the bill) would increase the waiting period for newly arrived residents to access a range of social security payments including bereavement allowance, widow allowance, parenting payment, carer allowance, farm household allowance, family tax benefit, parental leave pay and dad and partner pay from 104 weeks (2 years) to 156 weeks (3 years).[3] It will also extend the waiting period to access the low income Health Care Card (HCC) and Commonwealth Seniors Card from 104 weeks (2 years) to 156 weeks (3 years).

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

2.171 The right to social security recognises the importance of adequate social benefits in reducing the effects of poverty and plays an important role in realising many other economic, social and cultural rights, particularly the right to an adequate standard of living and the right to health.[4] 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 the obligations listed above in relation to the right to social security.[5]

2.172 Australia has obligations to progressively realise these rights and also has a corresponding duty to refrain from taking retrogressive measures, or backwards steps.[6] Retrogressive measures, a type of limitation, may be permissible under international human rights law providing that they address a legitimate objective, are rationally connected to that objective and are a proportionate way to achieve that objective.

2.173 The initial human rights analysis stated that extending the waiting period to three years (from the current two years) further restricts access to social security (including health care cards) for newly arrived residents. Accordingly, the measure constitutes a retrogressive measure, a type of limitation, in the realisation of the right to social security, the right to an adequate standard of living and the right to health.

2.174 The statement of compatibility acknowledges that the measure engages the right to social security and states that:

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3 Explanatory memorandum (EM), p. 1.

4 See, International Covenant on Economic, Social and Cultural Rights (ICESCR) article 9; United Nations Committee on Economic, Social and Cultural Rights, General Comment 19: the right to social security, E/C.12/GC/19 (4 February 2008).

5 See, ICESCR, article 11.

6 See, ICESCR, article 2.

> Given the current fiscal environment…three years is a reasonable period to expect new permanent migrants to support themselves and their families when they first settle in Australia. This will reduce the burden placed on Australia's welfare payments system and improve its long-term sustainability.[7]

2.175 In general terms, budgetary constraints and financial sustainability have been recognised as a legitimate objective for the purpose of justifying reductions in government support that impact on the progressive realisation of economic, social and cultural rights. However, the United Nations Committee on Economic, Social and Cultural Rights has explained that any retrogressive measures:

> …require the most careful consideration and would need to be fully justified by reference to the totality of the rights provided for in the Covenant [ICESCR] and in the context of the full use of the maximum available resources.[8]

2.176 In this respect, the initial analysis noted that limited information has been provided in the statement of compatibility to support the characterisation of financial sustainability or budgetary constraints as a pressing or substantial concern in these specific circumstances. If this were a legitimate objective for the purposes of international human rights law, reducing government spending through this measure may be capable of being rationally connected to this stated objective.

2.177 In relation to the proportionality of the limitation, the statement of compatibility explains that there will be a range of exemptions from the waiting period. These include exemptions for humanitarian migrants, New Zealand citizens on a Special Category visa, and holders of certain temporary visas, including temporary protection visas and Safe Haven Enterprise Visas, to be able to immediately access family tax benefit payments, parental leave pay and dad and partner pay.[9] It is relevant to the proportionality of the limitation that certain classes of visa holders will be able to access a number of social security payments.

2.178 The statement of compatibility explains that there will also be a provision for migrants who become lone parents after becoming an Australian resident, to access social security payments:

> Migrants who become a lone parent after becoming an Australian resident will continue to be exempt from the waiting period for parenting payment, newstart allowance and youth allowance. Those who receive an exemption from the waiting period for one of these payments will also be exempt from the waiting period for FTB [family tax benefit]. Those who

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7 Statement of compatibility (SOC), p. 29.

8 UN Committee on Economic, Social and Cultural Rights, General Comment 3: the nature of state party obligations, E/1991/23 (14 December 1990) [9].

9 SOC, p. 30.

> subsequently have a new child will also be able to transfer to PLP [parental leave pay] or DaPP [dad and partner pay] if they are otherwise qualified. This ensures that parents who lose the support – financial and otherwise – of a partner have access to support for themselves and their children.[10]

2.179 The statement of compatibility further explains that the availability of Special Benefit social security payments is an additional safeguard in relation to the measure:

> …migrants who experience a substantial change in circumstances after the start of their waiting period, and are in financial hardship, will continue to be exempt from the waiting period for special benefit. Special benefit is a payment of last resort that provides a safety net for people in hardship who are not otherwise eligible for other payments. Those who receive this exemption and have dependent children will also be exempt from the waiting period for FTB. Consistent with established policy (contained in the Guide to Social Security Law) this may include migrants:
>
> - who are the victim of domestic or family violence;
> - who experience a prolonged injury or illness and are unable to work, or whose partner or sponsor does;
> - whose dependent child develops a severe medical condition, disability or injury; or
> - whose sponsor or partner dies, becomes a missing person or is imprisoned leaving the migrant with no other means of support.
>
> These exemptions ensure that there continues to be a safety net available for potentially vulnerable individuals and families who are unable to support themselves despite their best plans.

2.180 As noted in the initial analysis, the Special Benefit appears to provide an important safeguard such that these individuals could afford the basic necessities to maintain an adequate standard of living in circumstances of financial hardship. This is of considerable importance in relation to the proportionality of the limitation.

2.181 However, increasing the waiting period to access social security for newly arrived residents generally from two years to three years is still a considerable reduction in the availability of social security. In this respect, the initial analysis stated that it would be useful for further information to be provided about any consideration of alternatives to reducing access to social security, in the context of Australia's use of its maximum available resources.

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

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10 SOC, p. 30.

- whether there is reasoning or evidence that establishes that the stated objective addresses a pressing or substantial concern in the specific circumstances of the proposed legislation;
- how the measure is effective to achieve (that is, rationally connected to) that objective;
- whether the limitation is a reasonable and proportionate measure to achieve its stated objective (including the extent of the reduction in access to social security payments; what level of support Special Benefit payments provide; and whether the measure is the least rights restrictive approach); and
- whether alternatives to reducing access to social security, in the context of Australia's use of its maximum available resources, have been fully considered.

Minister's response

2.183 The minister's response provides a range of information as to whether the measure constitutes a permissible limitation on the right to social security. In relation to whether there is reasoning or evidence that establishes that the stated objective addresses a pressing or substantial concern, the minister's response states:

> It is important that Australia's welfare payments systems remains sustainable into the future and continues to provide the best possible encouragement for people to support themselves where they are able. This includes migrants settling permanently in this country.
>
> Returning the Budget to balance by living within our means remains a key element of the Government's economic plan. To achieve the Government's fiscal strategy, including a return to surplus in 2020-21, fiscally responsible decisions are required to keep spending under control.
>
> In 2016-17, Australia's expenditure on welfare payments to individuals (including social security payments, family assistance payments and paid parental leave payments) was $109.5 billion, representing around a quarter of the overall Commonwealth Budget.
>
> Given the substantial expenditure associated with the welfare payments system, maintaining the ongoing sustainability of the system is critical to the Government's fiscal strategy. The *Encouraging Self Sufficiency for Newly Arrived Migrants* measure announced in the 2017-18 Mid-Year Economic and Fiscal Outlook (MYEFO) contributes to achieving this fiscal outcome.
>
> The measure is estimated to improve the Budget bottom line by around $1.3 billion over the four years from 2017-18. There will continue to be savings beyond the forward estimates period, contributing to the ongoing sustainability of the welfare payments system.

2.184 While not put expressly in these terms, the minister appears to be arguing that unless the 'substantial expenditure' on social security is curbed then there is a

risk that the welfare system may collapse or will have to be restricted in other ways. That is, there is a concern that, given a limited pool of government resources, mounting costs could affect the availability of social security for those who require it. To the extent this is the case ensuring the sustainability of the welfare system in the context of budgetary constraints is likely to constitute a legitimate objective for the purposes of international human rights law. By improving the 'budget bottom line', the information provided also shows that the measure is likely to be rationally connected to that objective.

2.185 The minister's response provides a range of information as to the proportionality of the limitation.

2.186 In terms of the scope of the application of the measure, it explains that the waiting period will apply primarily to new migrants settling in Australia under the permanent skilled and family streams of the migration program. The response states that the eligibility criteria for grant of permanent visas through these streams reflects the Government's expectation that applicants will either support themselves or be supported by family members during their initial period in Australia. In this respect, the minister's response explains that the new waiting period will only apply to people granted a permanent visa after 1 July 2018 and states that '[t]his is designed to provide individuals and families seeking to migrate to Australia time to be aware of the new rules so that they can make an informed decision when applying for or accepting a permanent visa and make plans to support themselves during the waiting period'. The new waiting period will not apply to migrants granted permanent residency before 1 July 2018 or to those who have already served the existing waiting period. It is noted that the prospective application of the measure assists with the proportionality of the measure.

2.187 In relation to the extent of the reduction in access to social security payments, the minister's response indicates that of the non-humanitarian permanent migrants who come to Australia each year the majority did not require welfare support either during or after their waiting period. The response further states that:

> The impact of this measure will only be felt by those migrants who would have otherwise sought and received certain payments during this period. It is estimated that when the measure is fully implemented in 2020-21 around 50,000 families will be serving a waiting period for Family Tax Benefit Part A and around 30,000 will be serving a waiting period for other payments. These figures may encompass the same individuals as these payments are not mutually exclusive. The overall financial impact on affected individuals and families will depend on their circumstances and the payments they would otherwise have received.

2.188 In relation to the proportionality of the limitation, the minister's response reiterates that there is a range of exemptions to the waiting period. This includes exemptions for humanitarian migrants and their family members due to their particular vulnerabilities. More broadly, the minister's response also outlines that

there will still be a 'safety net' in place in relation to those who find themselves in need or whose circumstances change:

> People who become a lone parent after becoming an Australian resident are exempt from the [waiting period] for Parenting Payment, Newstart Allowance, Youth Allowance and Farm Household Allowance. This exemption ensures that parents, often mothers, who no longer have the support of a partner can still access financial support for themselves and their children.
>
> Migrants who experience a substantial change of circumstances and are in financial hardship will be exempt from the [waiting period] for Special Benefit which is delivered through the Department of Human Services. Special Benefit is a payment of last resort that provides support for people in financial hardship who are unable to obtain or earn a sufficient livelihood for themselves and any dependants and who are not eligible for any other income support payment.
>
> Special Benefit provides a basic level of support, usually equal to Newstart Allowance (or Youth Allowance if the person is aged under 22 years). Supplementary payments such as Rent Assistance, may also be paid in addition to these basic rates. Recipients of Special Benefit are also entitled to an automatic Health Care Card or Pensioner Concession Card, depending on their circumstances.
>
> The exemption from the [waiting period] for Special Benefit provides a safety net for those who find themselves in hardship with no other means of support for reasons beyond their control. Situations which constitute a substantial change of circumstances for the purposes of this exemption include:
>
> - experiencing domestic violence
> - losing a job organised prior to coming to Australia
> - suffering a prolonged injury or illness and being unable to work
> - having to care for a dependent child who develops a severe medical condition, disability or injury, or
> - being left with no other means of support after their sponsor or partner dies, becomes a missing person or is imprisoned.
>
> This exemption recognises that migrants who have made plans to support themselves when they arrive in Australia may experience a change of circumstances that prevents them from realising those plans.
>
> There are a number of new exemptions being introduced through this Bill in relation to the new payments that will be subject to a [waiting period] for the first time. This includes exemptions designed to ensure the new [waiting period] operates coherently with the existing exemptions outlined above:

- People with a Family Tax Benefit eligible child will be exempt from the [waiting period] for the Low-Income Health Care Card. These families would previously have qualified for a Health Care Card as part of their Family Tax Benefit. The exemption ensures that they can still receive a concession card where eligible and access associated health concessions, including discounted items under the Pharmaceutical Benefits Scheme.
- People who are receiving a social security pension or benefit or Farm Household Allowance (for example, because they are exempt from the [waiting period] for that payment) will also be exempt from the [waiting period] for family payments and Carer Allowance. This will ensure that exemptions operate consistently across welfare payments and those exempt can access both primary income support payments and supplementary assistance for dependent children and/or caring responsibilities where eligible.

Finally, New Zealand citizens on a Special Category Visa will be exempt from the [waiting period] for Family Tax Benefit, Parental Leave Pay and Dad and Partner Pay. This exemption only applies for certain payments as Special Category Visa holders are generally not eligible for other payments. This exemption ensures that New Zealand citizens in Australia will continue to access the same benefits in recognition of the particular Trans-Tasman arrangements between Australia and New Zealand. Special Category Visa holders who later move to a permanent visa will continue to be eligible for this exemption, ensuring they can continue to receive these payments while serving the [waiting period] for other payments.

The above exemptions ensure that this measure strikes a balance between promoting self-reliance for migrants and providing appropriate safeguards for those in vulnerable circumstances.

2.189 These exemptions, including the availability of the Special Benefit, are likely to act as important safeguards to ensure that those in situations of financial hardship or whose circumstances change can afford the basic necessities to maintain an adequate standard of living. These exemptions, in combination with the scope of the measure, support an assessment that it is likely to be a proportionate limitation on the right to social security and the right to an adequate standard of living. In this respect, the minister's response also argues that the measure is the least rights restrictive approach to achieve its objective to balance the budget and notes that permanent migrants will still have access to broader government funded services including health care and education.

Committee response

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

2.191 In light of the additional information provided and the availability of safeguards, the committee notes that the measure appears likely to be compatible with the right to social security.

Compatibility of the measure with the right to maternity leave

2.192 The right to maternity leave is protected by article 10(2) of the International Covenant on Economic, Social and Cultural Rights (ICESCR) and article 11(2)(b) of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)[11] and includes an entitlement for parental leave with pay or comparable social security benefits for a reasonable period before and after childbirth.

2.193 The UN Committee on Economic, Social and Cultural Rights has further explained that the obligations of state parties to the ICESCR in relation to the right to maternity leave include the obligation to guarantee 'adequate maternity leave for women, paternity leave for men, and parental leave for both men and women'.[12] The initial analysis stated that by extending the waiting period for access to parental leave pay and dad and partner pay, the measure engages and limits this right.

2.194 In restricting the paid maternity leave support available to newly arrived migrants for a further year (bringing the total waiting period to three years), the measure is a retrogressive measure, a type of limitation, for the purposes of international human rights law.

2.195 As noted above, limitations on human rights may be permissible under international human rights law providing that they address a legitimate objective, are rationally connected to that objective and are a proportionate way to achieve that objective.

2.196 The statement of compatibility acknowledges that the measure engages the right to paid maternity leave but appears to argue that this limitation is permissible. However, limited information or reasoning was provided as to whether the objectives of ensuring financial sustainability or budgetary constraints address a pressing or substantial concern in these specific circumstances. As noted above,

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11 The Australian government on ratification of CEDAW in 1983 made a statement and reservation that: 'The Government of Australia advises that it is not at present in a position to take the measures required by Article 11(2)(b) to introduce maternity leave with pay or with comparable social benefits throughout Australia.' This statement and reservation has not been withdrawn. However, after the Commonwealth introduced the Paid Parental Leave scheme in 2011, the Australian Government committed to establishing a systematic process for the regular review of Australia's reservations to international human rights treaties: See, Attorney-General's Department, Right to Maternity Leave https://www.ag.gov.au/RightsAndProtections/HumanRights/Human-rights-scrutiny/PublicSectorGuidanceSheets/Pages/Righttomaternityleave.aspx.

12 UN Committee on Economic, Social and Cultural Rights, *General Comment 16, The equal right of men and women to the enjoyment of all economic, social and cultural rights* (2005). See also, article 3 of ICESCR.

reducing government spending through this measure would appear to be rationally connected to this stated objective.

2.197 In relation to the proportionality of the limitation, the statement of compatibility states:

> While it is acknowledged that the upbringing of children requires a sharing of responsibility between men and women and society as a whole, it is reasonable to expect that migrants who make the decision to have a child during their initial settlement period should also allow for the costs of supporting themselves and their children during the waiting period.
>
> The Australian welfare system is targeted so that those who most need help receive it. In order to sustain this, those who can support their children are expected to do so.[13]

2.198 However, this does not fully take into account that the timing of having children and a consequential need for paid maternity leave may not necessarily be something that is fully in the hands of potential parents. Noting that the measure applies to a range of visas, it also does not explain why newly arrived residents would necessarily be in a better position to adequately support the costs of having children than other individuals.

2.199 The statement of compatibility further explains in relation to the proportionality of the measure that there is a transitional period so that migrants who may have a baby born between 1 July 2018 and 1 January 2019 will still be able to access paid parental leave. While having a transitional period may be an important safeguard ensuring expectant parents who had planned care arrangements around the existing parental leave provisions would not be affected by the changes, it does not address broader concerns.

2.200 It was noted that increasing the waiting period to access paid parental leave from two years to three years is a considerable reduction in the availability of parental leave pay and dad and partner pay. It may have particularly significant consequences for those who have no access to other paid parental leave arrangements through their employer. In this respect, it would be useful for further information to be provided about any consideration of alternatives to reducing access to social security, in the context of Australia's use of its maximum available resources.

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

- whether there is reasoning or evidence that establishes that the stated objective addresses a pressing or substantial concern in the specific circumstances of the proposed legislation;

13 SOC, p. 31.

- how the measure is effective to achieve (that is, rationally connected to) that objective;
- whether the limitation is a reasonable and proportionate measure to achieve its stated objective (including the extent of the reduction in access to parental leave payments; the existence of relevant safeguards; and whether the measure is the least rights restrictive approach); and
- whether alternatives to reducing access to paid parental leave, in the context of Australia's use of its maximum available resources, have been fully considered.

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

2.202 The right to equality and non-discrimination is protected by articles 2 and 26 of the ICCPR. In addition to these general non-discrimination provisions, articles 1, 2, 3, 4 and 15 of the CEDAW further describe the content of these obligations, including the specific elements that state parties are required to take into account to ensure the rights to equality for women.[14]

2.203 'Discrimination' encompasses a distinction based on a personal attribute (for example, race, sex or on the basis of disability),[15] which has either the purpose (called 'direct' discrimination), or the effect (called 'indirect' discrimination), of adversely affecting human rights.[16] 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.[17]

2.204 As women are the primary recipients of paid parental leave, increasing the waiting period for access may have a disproportionate negative effect on women who are newly arrived residents. Where a measure impacts on particular groups disproportionately, it establishes *prima facie* that there may be indirect

14 Article 1 of CEDAW defines 'discrimination against women' as 'any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field'.

15 The prohibited grounds are race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status: ICCPR articles 2 and 26; ICESCR article 2(2); UN Human Rights Committee, *General Comment 18*, *Non-discrimination* (10 November1989) [1]. 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.

16 UN Human Rights Committee, *General Comment 18*, Non-discrimination (1989) [7].

17 *Althammer v Austria* HRC 998/01, [10.2]. See above, for a list of 'personal attributes'.

discrimination.[18] Differential treatment (including the differential effect of a measure that is neutral on its face)[19] 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.

2.205 The statement of compatibility acknowledges that the right to equality and non-discrimination is engaged. It states that the measure pursues the objective of 'ensuring newly arrived migrants meet their own living costs…in order to keep the system sustainable into the future'.[20] As noted above, limited information or reasoning has been provided as to whether the objectives of ensuring financial sustainability or budgetary constraints address a pressing or substantial concern in these specific circumstances. Further, while the statement of compatibility points to the existence of particular exemptions which may operate as safeguards, no information is provided as to whether the measure is the least rights restrictive approach.

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

- whether there is reasoning or evidence that establishes that the stated objective addresses a pressing or substantial concern in the specific circumstances of the proposed legislation;
- how the measure is effective to achieve (that is, rationally connected to) that objective;
- whether the limitation is a reasonable and proportionate measure to achieve its stated objective (including whether it is based on reasonable and objective criteria; the extent of the reduction in access to parental leave payments; the existence of relevant safeguards; and whether the measure is the least rights restrictive approach); and
- whether alternatives to reducing access to paid parental leave, in the context of Australia's use of its maximum available resources, have been fully considered.

Minister's response in relation to the right to maternity leave and the right to equality and non-discrimination

2.207 The minister's response provides a range of information as to the compatibility of the measure with the right to paid maternity leave and the right to equality and non-discrimination. The minister's response explains that the *Paid*

18 See, *D.H. and Others v the Czech Republic* ECHR Application no. 57325/00 (13 November 2007) 49; *Hoogendijk v. the Netherlands* ECHR, Application no. 58641/00 (6 January 2005).

19 See, for example, *Althammer v Austria* HRC 998/01 [10.2].

20 SOC, p. 36.

Parental Leave Act 2010 provides for the Paid Parental Leave scheme, which complements the entitlement to unpaid leave under the National Employment Standards in the *Fair Work Act 2009*. The minister's response states that under the *Fair Work Act 2009* parents to whom the waiting period applies will still have access to 12 months of unpaid parental leave without loss of employment or seniority within the workplace. However, while there will be continued access to unpaid parental leave, the effect of the measure is that those who are not entitled to employer funded benefits will not have access to paid parental leave during the waiting period.

2.208 As noted above, given that women are the primary recipients of paid parental leave, the measure will have a disproportionate negative effect on women who are newly arrived residents. In this respect, it is noted that the very purpose of the right to paid maternity leave is not targeted purely at meeting necessities but providing financial support to women (and men) following the birth of a child in order to prevent discrimination against women on the grounds of maternity.[21] Indeed, such purposes appear to be reflected in Australian domestic law as unlike other social security benefits, paid maternity leave is not subject to the same level of means testing in Australia.[22]

2.209 As set out above, the measure is likely to pursue the legitimate objective of ensuring the financial sustainability of the welfare system and be rationally connected to that objective. In relation to the proportionality of the measure, the minister's response states:

> The majority of newly arrived migrants in scope for this measure are expected to be able to provide for themselves and their family members during the [waiting period], as they are settling in Australia through the skilled and family streams of the migration program. These migrants are well placed to support themselves through work, existing resources or family support. Most are also expected to be able to make informed decisions about growing their families within the settlement period.

2.210 In relation to the groups of migrants to which the measure will apply, the minister's response explains that the government will ensure that these migrants have access to information about the scope of the measure 'to ensure they are aware of the changes and can make informed decisions about whether to apply for or accept a permanent visa'. The response also further explains that transitional arrangements are being provided so that those who may already be pregnant and have planned leave arrangements are not disadvantaged:

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21 See, *Elisabeth de Blok et al v the Netherlands*, Communication No 36/2012, UN Committee on the Elimination of All Forms of Discrimination Against Women (24 March 2014).

22 Paid parental leave is generally available under Australian law for those earning under $150,000.

> Under these arrangements, people granted a permanent or eligible temporary visa on or after 1 July 2018 will still be able to access Parental Leave Pay and Dad and Partner Pay if they have a newborn or adopt a child between 1 July 2018 and 31 December 2018 (inclusive) and they are otherwise qualified for the payment (including meeting the work test and income test).

2.211 Providing that the measures will not apply to currently expectant parents, who may have made plans on the basis of current arrangements, is relevant to the proportionality of the measure. The response further notes that the measure will not affect humanitarian migrants and their family members, acknowledging these people are often particularly vulnerable and may have less capacity to plan for their own support prior to coming to Australia.

2.212 The response also points to a specific exemption to the waiting period for Parental Leave Pay and Dad and Partner Pay 'for families with children who experience a change of circumstances and are unable to support themselves as originally planned, including those who become a lone parent after arrival and no longer have the support of their partner, and those in financial hardship'. The minister's response further explains, in relation to the impact of the measure on women that:

> …while the range of exemptions from the [waiting period] are not specifically targeted to women, some circumstances that attract an exemption for income support payments – for example, becoming a single parent or experiencing a change in circumstances such as domestic violence – are most likely to be experienced by women.
>
> These exemptions ensure that migrants in these circumstances, particularly migrant women, can still access financial support through payments, such as Parenting Payment or Special Benefit, where eligible. Those who [are] granted one of these payments under an exemption will also be exempt from the [waiting period] for the Paid Parental Leave Scheme, Family Tax Benefit and Carer Allowance. This ensures that migrants in these circumstances who have dependent children or caring responsibilities for a person with [a] disability can also access additional support where eligible. For example, a woman granted Special Benefit because she is in hardship due to a change in circumstances would also be able to receive Family Tax Benefit for any eligible children and would also be able to transfer to Parental Leave Pay if she has a new baby and meets all the requirements.
>
> The comprehensive range of exemptions and safeguards ensure migrants, particularly migrant women, retain access to payments, including Paid Parental Leave payments, where they find themselves in hardship. Given these exemptions, this measure is the least restrictive way of applying consistent rules and expectations for new migrants in order to improve the sustainability of the welfare payments system, both in the short and longer term.

2.213 The availability of such payments is relevant to the proportionality of the measure. In particular there appears to be a safety net in place in relation to basic necessities. As set out above, this addresses concerns regarding access to social security.

2.214 However, while the exemptions provide for access to paid parental leave in some circumstances, they do not fully address the concerns as to the right to paid maternity leave and the consequential impact on the right to equality and non-discrimination. In relation to the measure, the minister's response states:

> Targeting expenditure remains an essential part of balancing the distribution of available resources with the most effective measures for addressing barriers and creating opportunity. Residency waiting periods already play a fundamental role in targeting immediate access to social security payments. This measure will strengthen the existing waiting periods by applying consistent rules across welfare payments types, including social security and family payments, ensuring that migrants support themselves and their families for a reasonable period before becoming eligible for taxpayer-funded parental leave or other payments.

2.215 However, the application of these rules in the context of paid parental leave has a range of consequences that raise concerns from a human rights perspective. It means that a woman, subject to the waiting period, who earns a low income, will generally not have access to the paid parental leave scheme while a woman who earns considerably more (up to $150,000) would have access to the scheme. That is, to the extent that part of the justification for the measure is the targeting of limited resources, the measure does not appear to necessarily target those most in need. In this context, the extent of the disproportionate impact on women subject to the waiting period could be considerable, and the measure could exacerbate the disadvantage experienced by those who are already vulnerable. The purpose of the right to paid maternity leave is to prevent discrimination against women on the grounds of maternity. By restricting access to paid maternity leave the measure may ultimately exacerbate inequalities experienced by women subject to the waiting period. It is unclear that the measure represents the least rights restrictive approach. Accordingly, the measure does not appear to be a proportionate limit on the right to paid maternity leave and may also constitute unlawful discrimination against women.

Committee response

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

2.217 The preceding analysis indicates that the measure may be incompatible with the right to paid maternity leave and the right to equality and non-discrimination.

Treasury Laws Amendment (Black Economy Taskforce Measures No. 1) Bill 2018

Purpose	Introduces offences prohibiting the production, distribution and possession of sales suppression tools in relation to entities that have Australian tax obligations. Also requires entities providing courier or cleaning services that have an ABN to report to the Australian Taxation Office information about transactions that involve engaging other entities to undertake those courier or cleaning services for them
Portfolio	Treasury
Introduced	House of Representatives, 7 February 2018
Rights	Presumption of innocence, privacy (see **Appendix 2**)
Previous report	3 of 2018
Status	Concluded examination

Background

2.218 The committee first reported on the Treasury Laws Amendment (Black Economy Taskforce Measures No. 1) Bill 2018 (the bill) in its *Report 3 of 2018*, and requested a response from the Treasurer by 11 April 2018.[1]

2.219 The Minister for Revenue and Financial Services responded to the committee's inquiries on 13 April 2018. The response is discussed below and is reproduced in full at **Appendix 3**.

Strict liability offences relating to the production, distribution and possession of sales suppression tools

2.220 Schedule 1 of the bill seeks to introduce offence provisions relating to the production or supply of electronic sales suppression tools[2] and the acquisition, possession or control of such tools where the person is required to keep or make

1 Parliamentary Joint Committee on Human Rights, *Report 3 of 2018* (27 March 2018) pp. 79-81.

2 'Electronic sales suppression tools' are defined in proposed section 8WAB of the bill to mean a device, software, program or other thing, a part of any such thing, or a combination of any such things or parts, that meets the following conditions: (a) it is capable of falsifying, manipulating, hiding, obfuscating, destroying, or preventing the creation of, a record that: (i) an entity is required by a taxation law to keep or make; and (ii) is, or would be, created by a system that is or includes an electronic point of sale system; (b) a reasonable person would conclude that one of its principal functions is to falsify, manipulate, hide, obfuscate, destroy, or prevent the creation of, such records.

records under an Australian taxation law.[3] A person will also commit an offence where they have incorrectly kept records using electronic sales suppression tools.[4] Each of these offences are offences of strict liability.[5]

Compatibility of the measure with the right to the presumption of innocence

2.221 The initial analysis explained that the proposed strict liability offences engage and limit the right to presumption of innocence[6] because they allow for the imposition of criminal liability without the need to prove fault. The statement of compatibility for the bill stated that the bill did not engage 'any of the applicable rights or freedoms',[7] but stated that 'applying strict liability to these offences covered by these amendments is appropriate because it substantially improves the effectiveness of the prohibition on electronic sales suppression tools'.[8]

2.222 The initial analysis drew the minister's attention to the committee's *Guidance Note 2* and restated the committee's usual expectation that the statement of compatibility provides an assessment of whether such limitations on the presumption of innocence are permissible such that they pursue a legitimate objective, are rationally connected to that objective, and are a proportionate means to achieving that objective.

2.223 The committee therefore sought advice as to:

- whether the strict liability offences are aimed at achieving a legitimate objective for the purposes of human rights law;
- how this measure is effective to achieve (that is, rationally connected to) that objective; and
- whether the limitation on the right to be presumed innocent is proportionate to achieve the stated objective.

Minister's response

2.224 As to whether the presumption of innocence is engaged or limited by the bill, the minister's response states:

> I believe that Schedule 1 to the Bill does not engage or limit the right to the presumption of innocence. A strict liability offence removes the

3 See sections 8WAC and 8WAD of the bill.

4 Section 8WAE of the bill.

5 See sections 8WAC(4), 8WAD(3), 8WAE(2) of the bill.

6 The right to the presumption of innocence requires that everyone charged with a criminal offence has the right to be presumed innocent until proven guilty according to law (see Appendix 2).

7 Statement of Compatibility (SOC), [1.109].

8 SOC, [1.104].

> requirement for a fault element to be proven before a person can be found guilty of an offence. However the prosecution must still prove all of the physical elements to the offence before a court will impose any criminal liability.

2.225 However, while it is the case that the physical elements must still be proved by the prosecution, strict liability offences do engage and limit the presumption of innocence because they allow for the imposition of criminal liability without the need to prove fault (*mens rea*).[9] Further, as noted in the initial analysis, strict liability offences will not necessarily be inconsistent with the presumption of innocence provided that they are within reasonable limits, taking into account the importance of the objective being sought, and maintain the defendant's right to a defence. In other words, they must meet the 'limitation criteria': they must pursue a legitimate objective and be rationally connected and proportionate to that objective.

2.226 While not acknowledging the limitation on the right to be presumed innocent imposed by the offences, the minister nevertheless provides information addressing these criteria. In relation to whether the measures are aimed at achieving a legitimate objective for the purposes of human rights law, the minister's response states:

> The object of Schedule 1 to the Bill is to deter the production, use and distribution of tools to manipulate or falsify electronic point of sale records to facilitate tax evasion.
>
> This is a legitimate objective for the purposes of human rights law because electronic sales suppression tools serve no legitimate function. They are specifically designed to understate income and assist in avoiding tax obligations. Such behaviour undermines the integrity of the tax system.

2.227 Ensuring the integrity of the tax system may be a legitimate objective for the purposes of international human rights law. In light of the information contained in the explanatory memorandum concerning the significant problem of the black economy and its impact on the integrity of the tax system,[10] it seems likely that addressing this problem will constitute a legitimate objective for the purposes of international human rights law.

2.228 As to how the measures are effective to achieve the stated objective, the minister's response explains that strict liability offences substantially improve the effectiveness of the prohibition on electronic sales suppression tools. In particular, the minister's response states that the strict liability offences would 'act as a significant and real deterrent to those entities who seek to profit by facilitating tax evasion and fraud through the tools' production and supply' and explains that the

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9 The committee's *Guidance Note 2* sets out some of the key human rights compatibility issues in relation to provisions that create strict liability offences.

10 See Explanatory Memorandum, pp.5-6.

'ability to prosecute people who facilitate the fraud earlier in the supply chain will significantly reduce the instances of fraud at the user level'. Based on the information provided, it is likely that the measure is rationally connected to the legitimate objective.

2.229 As to the proportionality of the measure, the minister explains that the strict liability offences are 'appropriate and proportionate' because an electronic sales suppression tool's principal function is to facilitate tax evasion and fraud, and there are no reasons for an entity to produce or supply such a tool beyond those covered by the applicable defences. The minister's response also notes that, in addition to the defence of honest and reasonable mistake, there are offence-specific defences which will operate as safeguards 'to ensure that entities who undertake certain conduct in relation to an electronic sales suppression tool are protected from committing an offence where their conduct is undertaken to prevent or deter tax evasion, or to enforce a taxation law'. Based on the information provided and the regulatory context, on balance, the strict liability offences are likely to be considered a proportionate limitation on the presumption of innocence.

Committee response

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

2.231 Based on the information provided and the above analysis, the committee considers the strict liability offences are likely to be compatible with the presumption of innocence.

Mr Ian Goodenough MP

Chair

Appendix 1

Deferred legislation

3.1 There are no bills or legislative instruments that have been deferred for this reporting period.

Appendix 2

Short guide to human rights

4.1 The following guide contains short descriptions of human rights regularly considered by the committee. State parties to the seven principal human rights treaties are under a binding obligation to respect, protect and promote each of these rights. For more detailed descriptions please refer to the committee's *Guide to human rights*.[1]

4.2 Some human rights obligations are absolute under international law, that is, a state cannot lawfully limit the enjoyment of an absolute right in any circumstances. The prohibition on slavery is an example. However, in relation to most human rights, a necessary and proportionate limitation on the enjoyment of a right may be justified under international law. For further information regarding when limitations on rights are permissible, please refer to the committee's *Guidance Note 1* (see Appendix 4).[2]

Right to life

*Article 6 of the International Covenant on Civil and Political Rights (**ICCPR**); and article 1 of the Second Optional Protocol to the ICCPR*

4.3 The right to life has three core elements:

- it prohibits the state from arbitrarily killing a person;
- it imposes an obligation on the state to protect people from being killed by others or identified risks; and
- it imposes on the state a duty to undertake an effective and proper investigation into all deaths where the state is involved (discussed below, [4.5]).

4.4 Australia is also prohibited from imposing the death penalty.

Duty to investigate

Articles 2 and 6 of the ICCPR

4.5 The right to life requires there to be an effective official investigation into deaths resulting from state use of force and where the state has failed to protect life. Such an investigation must:

- be brought by the state in good faith and on its own initiative;
- be carried out promptly;

1 Parliamentary Joint Committee on Human Rights, Guide to Human Rights (June 2015).

2 Parliamentary Joint Committee on Human Rights, Guidance Note 1 (December 2014).

- be independent and impartial; and
- involve the family of the deceased, and allow the family access to all information relevant to the investigation.

Prohibition against torture, cruel, inhuman or degrading treatment

*Article 7 of the ICCPR; and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (**CAT**)*

4.6 The prohibition against torture, cruel, inhuman or degrading treatment or punishment is absolute. This means that torture or cruel, inhuman or degrading treatment or punishment is not permissible under any circumstances.

4.7 The prohibition contains a number of elements:

- it prohibits the state from subjecting a person to torture or cruel, inhuman or degrading practices, particularly in places of detention;
- it precludes the use of evidence obtained through torture;
- it prevents the deportation or extradition of a person to a place where there is a substantial risk they will be tortured or treated inhumanely (see also non-refoulement obligations, [4.9] to [4.11]); and
- it requires an effective investigation into any allegations of such treatment and steps to prevent such treatment occurring.

4.8 The aim of the prohibition against torture, cruel, inhuman or degrading treatment is to protect the dignity of the person and relates not only to acts causing physical pain but also acts causing mental suffering. The prohibition is also an aspect of the right to humane treatment in detention (see below, [4.18]).

Non-refoulement obligations

Article 3 of the CAT; articles 2, 6(1) and 7 of the ICCPR; and Second Optional Protocol to the ICCPR

4.9 Non-refoulement obligations are absolute and may not be subject to any limitations.

4.10 Australia has non-refoulement obligations under both the ICCPR and the CAT, as well as under the Convention Relating to the Status of Refugees and its Protocol (**Refugee Convention**). This means that Australia must not under any circumstances return a person (including a person who is not a refugee) 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.

4.11 Effective and impartial review by a court or tribunal of decisions to deport or remove a person, including merits review in the Australian context, is integral to complying with non-refoulement obligations.

Prohibition against slavery and forced labour

Article 8 of the ICCPR

4.12 The prohibition against slavery, servitude and forced labour is a fundamental and absolute human right. This means that slavery and forced labour are not permissible under any circumstances.

4.13 The prohibition on slavery and servitude is a prohibition on 'owning' another person or exploiting or dominating another person and subjecting them to 'slavery-like' conditions.

4.14 The right to be free from forced or compulsory labour prohibits requiring a person to undertake work that they have not voluntarily consented to, but which they do because of either physical or psychological threats. The prohibition does not include lawful work required of prisoners or those in the military; work required during an emergency; or work or service that is a part of normal civic obligations (for example, jury service).

4.15 The state must not subject anyone to slavery or forced labour, and ensure adequate laws and measures are in place to prevent individuals or companies from subjecting people to such treatment (for example, laws and measures to prevent trafficking).

Right to liberty and security of the person

Article 9 of the ICCPR

Right to liberty

4.16 The right to liberty of the person is a procedural guarantee not to be arbitrarily and unlawfully deprived of liberty. It applies to all forms of deprivation of liberty, including detention in criminal cases, immigration detention, forced detention in hospital, detention for military discipline and detention to control the spread of contagious diseases. Core elements of this right are:

- the prohibition against arbitrary detention, which requires that detention must be lawful, reasonable, necessary and proportionate in all the circumstances, and be subject to regular review;
- the right to reasons for arrest or other deprivation of liberty, and to be informed of criminal charge;
- the rights of people detained on a criminal charge, including being promptly brought before a judicial officer to decide if they should continue to be detained, and being tried within a reasonable time or otherwise released (these rights are linked to criminal process rights, discussed below);
- the right to challenge the lawfulness of any form of detention in a court that has the power to order the release of the person, including a right to have

access to legal representation, and to be informed of that right in order to effectively challenge the detention; and

- the right to compensation for unlawful arrest or detention.

Right to security of the person

4.17 The right to security of the person requires the state to take steps to protect people from others interfering with their personal integrity. This includes protecting people who may be subject to violence, death threats, assassination attempts, harassment and intimidation (for example, protecting people from domestic violence).

Right to humane treatment in detention

Article 10 of the ICCPR

4.18 The right to humane treatment in detention provides that all people deprived of their liberty, in any form of state detention, must be treated with humanity and dignity. The right complements the prohibition on torture and cruel, inhuman or degrading treatment or punishment (see above, [4.6] to [4.8]). The obligations on the state include:

- a prohibition on subjecting a person in detention to inhumane treatment (for example, lengthy solitary confinement or unreasonable restrictions on contact with family and friends);
- monitoring and supervision of places of detention to ensure detainees are treated appropriately;
- instruction and training for officers with authority over people deprived of their liberty;
- complaint and review mechanisms for people deprived of their liberty; and
- adequate medical facilities and health care for people deprived of their liberty, particularly people with disability and pregnant women.

Freedom of movement

Article 12 of the ICCPR

4.19 The right to freedom of movement provides that:

- people lawfully within any country have the right to move freely within that country;
- people have the right to leave any country, including the right to obtain travel documents without unreasonable delay; and
- no one can be arbitrarily denied the right to enter or remain in his or her own country.

Right to a fair trial and fair hearing

Articles 14(1) (fair trial and fair hearing), 14(2) (presumption of innocence) and 14(3)-(7) (minimum guarantees) of the ICCPR

4.20 The right to a fair hearing is a fundamental part of the rule of law, procedural fairness and the proper administration of justice. The right provides that all persons are:

- equal before courts and tribunals; and
- entitled to a fair and public hearing before an independent and impartial court or tribunal established by law.

4.21 The right to a fair hearing applies in both criminal and civil proceedings, including whenever rights and obligations are to be determined.

Presumption of innocence

Article 14(2) of the ICCPR

4.22 This specific guarantee protects the right to be presumed innocent until proven guilty of a criminal offence according to law. Generally, consistency with the presumption of innocence requires the prosecution to prove each element of a criminal offence beyond reasonable doubt (the committee's *Guidance Note* 2 provides further information on offence provisions (see Appendix 4)).

Minimum guarantees in criminal proceedings

Article 14(2)-(7) of the ICCPR

4.23 These specific guarantees apply when a person has been charged with a criminal offence or are otherwise subject to a penalty which may be considered criminal, and include:

- the presumption of innocence (see above, [4.22]);
- the right not to incriminate oneself (the ill-treatment of a person to obtain a confession may also breach the prohibition on torture, cruel, inhuman or degrading treatment (see above, [4.6] to [4.8]);
- the right not to be tried or punished twice (double jeopardy);
- the right to appeal a conviction or sentence and the right to compensation for wrongful conviction; and
- other specific guarantees, including the right to be promptly informed of any charge, to have adequate time and facilities to prepare a defence, to be tried in person without undue delay, to examine witnesses, to choose and meet with a lawyer and to have access to effective legal aid.

Prohibition against retrospective criminal laws

Article 15 of the ICCPR

4.24 The prohibition against retrospective criminal laws provides that:

- no-one can be found guilty of a crime that was not a crime under the law at the time the act was committed;
- anyone found guilty of a criminal offence cannot be given a heavier penalty than one that applied at the time the offence was committed; and
- if, after an offence is committed, a lighter penalty is introduced into the law, the lighter penalty should apply to the offender. This includes a right to benefit from the retrospective decriminalisation of an offence (if the person is yet to be penalised).

4.25 The prohibition against retrospective criminal laws does not apply to conduct which, at the time it was committed, was recognised under international law as being criminal even if it was not a crime under Australian law (for example, genocide, war crimes and crimes against humanity).

Right to privacy

Article 17 of the ICCPR

4.26 The right to privacy prohibits unlawful or arbitrary interference with a person's private, family, home life or correspondence. It requires the state:

- not to arbitrarily or unlawfully invade a person's privacy; and
- to adopt legislative and other measures to protect people from arbitrary interference with their privacy by others (including corporations).

4.27 The right to privacy contains the following elements:

- respect for private life, including information privacy (for example, respect for private and confidential information and the right to control the storing, use and sharing of personal information);
- the right to personal autonomy and physical and psychological integrity, including respect for reproductive autonomy and autonomy over one's own body (for example, in relation to medical testing);
- the right to respect for individual sexuality (prohibiting regulation of private consensual adult sexual activity);
- the prohibition on unlawful and arbitrary state surveillance;
- respect for the home (prohibiting arbitrary interference with a person's home and workplace including by unlawful surveillance, unlawful entry or arbitrary evictions);

- respect for family life (prohibiting interference with personal family relationships);
- respect for correspondence (prohibiting arbitrary interception or censoring of a person's mail, email and web access), including respect for professional duties of confidentiality; and
- the right to reputation.

Right to protection of the family

*Articles 17 and 23 of the ICCPR; and article 10 of the International Covenant on Economic, Social and Cultural Rights (**ICESCR**)*

4.28 Under human rights law the family is recognised as the natural and fundamental group unit of society and is therefore entitled to protection. The right requires the state:

- not to arbitrarily or unlawfully interfere in family life; and
- to adopt measures to protect the family, including by funding or supporting bodies that protect the family.

4.29 The right also encompasses:

- the right to marry (with full and free consent) and found a family;
- the right to equality in marriage (for example, laws protecting spouses equally) and protection of any children on divorce;
- protection for new mothers, including maternity leave; and
- family unification.

Right to freedom of thought and religion

Article 18 of the ICCPR

4.30 The right to hold a religious or other belief or opinion is absolute and may not be subject to any limitations.

4.31 However, the right to exercise one's belief may be subject to limitations given its potential impact on others.

4.32 The right to freedom of thought, conscience and religion includes:

- the freedom to choose and change religion or belief;
- the freedom to exercise religion or belief publicly or privately, alone or with others (including through wearing religious dress);
- the freedom to exercise religion or belief in worship, teaching, practice and observance; and
- the right to have no religion and to have non-religious beliefs protected (for example, philosophical beliefs such as pacifism or veganism).

4.33 The right to freedom of thought and religion also includes the right of a person not to be coerced in any way that might impair their ability to have or adopt a religion or belief of their own choice. The right to freedom of religion prohibits the state from impairing, through legislative or other measures, a person's freedom of religion; and requires it to take steps to prevent others from coercing persons into following a particular religion or changing their religion.

Right to freedom of opinion and expression

*Articles 19 and 20 of the ICCPR; and article 21 of the Convention on the Rights of Persons with Disabilities (**CRPD**)*

4.34 The right to freedom of opinion is the right to hold opinions without interference. This right is absolute and may not be subject to any limitations.

4.35 The right to freedom of expression relates to the communication of information or ideas through any medium, including written and oral communications, the media, public protest, broadcasting, artistic works and commercial advertising. It may be subject to permissible limitations.

Right to freedom of assembly

Article 21 of the ICCPR

4.36 The right to peaceful assembly is the right of people to gather as a group for a specific purpose. The right prevents the state from imposing unreasonable and disproportionate restrictions on assemblies, including:

- unreasonable requirements for advance notification of a peaceful demonstration (although reasonable prior notification requirements are likely to be permissible);
- preventing a peaceful demonstration from going ahead or preventing people from joining a peaceful demonstration;
- stopping or disrupting a peaceful demonstration;
- punishing people for their involvement in a peaceful demonstration or storing personal information on a person simply because of their involvement in a peaceful demonstration; and
- failing to protect participants in a peaceful demonstration from disruption by others.

Right to freedom of association

Article 22 of the ICCPR; and article 8 of the ICESCR

4.37 The right to freedom of association with others is the right to join with others in a group to pursue common interests. This includes the right to join political parties, trade unions, professional and sporting clubs and non-governmental organisations.

4.38 The right prevents the state from imposing unreasonable and disproportionate restrictions on the right to form associations and trade unions, including:

- preventing people from forming or joining an association;
- imposing procedures for the formal recognition of associations that effectively prevent or discourage people from forming an association;
- punishing people for their membership of a group; and
- protecting the right to strike and collectively bargain.

4.39 Limitations on the right are not permissible if they are inconsistent with the guarantees of freedom of association and the right to organise as contained in the International Labour Organisation Convention of 1948 concerning Freedom of Association and Protection of the Right to Organize (ILO Convention No. 87).

Right to take part in public affairs

Article 25 of the ICCPR

4.40 The right to take part in public affairs includes guarantees of the right of Australian citizens to stand for public office, to vote in elections and to have access to positions in public service. Given the importance of free speech and protest to the conduct of public affairs in a free and open democracy, the realisation of the right to take part in public affairs depends on the protection of other key rights, such as freedom of expression, association and assembly.

4.41 The right to take part in public affairs is an essential part of democratic government that is accountable to the people. It applies to all levels of government, including local government.

Right to equality and non-discrimination

*Articles 2, 3 and 26 of the ICCPR; articles 2 and 3 of the ICESCR; International Convention on the Elimination of All Forms of Racial Discrimination (**CERD**); Convention on the Elimination of all Forms of Discrimination Against Women (**CEDAW**); CRPD; and article 2 of the Convention on the Rights of the Child (**CRC**)*

4.42 The right to equality and non-discrimination is a fundamental human right that is essential to the protection and respect of all human rights. The human rights treaties provide that everyone is entitled to enjoy their rights without discrimination of any kind, and that all people are equal before the law and entitled to the equal and non-discriminatory protection of the law.

4.43 'Discrimination' under the ICCPR encompasses both measures that have a discriminatory intent (direct discrimination) and measures which have a

discriminatory effect on the enjoyment of rights (indirect discrimination).[3] 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 personal attribute.[4]

4.44 The right to equality and non-discrimination requires that the state:

- ensure all laws are non-discriminatory and are enforced in a non-discriminatory way;
- ensure all laws are applied in a non-discriminatory and non-arbitrary manner (equality before the law);
- have laws and measures in place to ensure that people are not subjected to discrimination by others (for example, in areas such as employment, education and the provision of goods and services); and
- take non-legal measures to tackle discrimination, including through education.

Rights of the child

CRC

4.45 Children have special rights under human rights law taking into account their particular vulnerabilities. Children's rights are protected under a number of treaties, particularly the CRC. All children under the age of 18 years are guaranteed these rights, which include:

- the right to develop to the fullest;
- the right to protection from harmful influences, abuse and exploitation;
- family rights; and
- the right to access health care, education and services that meet their needs.

Obligation to consider the best interests of the child

Articles 3 and 10 of the CRC

4.46 Under the CRC, states are required to ensure that, in all actions concerning children, the best interests of the child are a primary consideration. This requires active measures to protect children's rights and promote their survival, growth and wellbeing, as well as measures to support and assist parents and others who have

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

4 Althammer v Austria HRC 998/01, [10.2]. See above, for a list of 'personal attributes'.

day-to-day responsibility for ensuring recognition of children's rights. 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.

4.47 Australia is required to treat applications by minors for family reunification in a positive, humane and expeditious manner. This obligation is consistent with articles 17 and 23 of the ICCPR, which prohibit interference with the family and require family unity to be protected by society and the state (see above, [4.29]).

Right of the child to be heard in judicial and administrative proceedings

Article 12 of the CRC

4.48 The right of the child to be heard in judicial and administrative proceedings provides that states assure to a child capable of forming his or her own views the right to express those views freely in all matters affecting them. The views of the child must be given due weight in accordance with their age and maturity.

4.49 In particular, this right requires that the child is provided the opportunity to be heard in any judicial and administrative proceedings affecting them, either directly or through a representative or an appropriate body.

Right to nationality

Articles 7 and 8 of the CRC; and article 24(3) of the ICCPR

4.50 The right to nationality provides that every child has the right to acquire a nationality. Accordingly, Australia is required to adopt measures, both internally and in cooperation with other countries, to ensure that every child has a nationality when born. The CRC also provides that children have the right to preserve their identity, including their nationality, without unlawful interference.

4.51 This is consistent with Australia's obligations under the Convention on the Reduction of Statelessness 1961, which requires Australia to grant its nationality to a person born in its territory who would otherwise be stateless, and not to deprive a person of their nationality if it would render the person stateless.

Right to self-determination

Article 1 of the ICESCR; and article 1 of the ICCPR

4.52 The right to self-determination includes the entitlement of peoples to have control over their destiny and to be treated respectfully. The right is generally understood as accruing to 'peoples', and includes peoples being free to pursue their economic, social and cultural development. There are two aspects of the meaning of self-determination under international law:

- that the people of a country have the right not to be subjected to external domination and exploitation and have the right to determine their own political status (most commonly seen in relation to colonised states); and

- that groups within a country, such as those with a common racial or cultural identity, particularly Indigenous people, have the right to a level of internal self-determination.

4.53 Accordingly, it is important that individuals and groups, particularly Aboriginal and Torres Strait Islander peoples, should be consulted about decisions likely to affect them. This includes ensuring that they have the opportunity to participate in the making of such decisions through the processes of democratic government, and are able to exercise meaningful control over their affairs.

Rights to and at work

Articles 6(1), 7 and 8 of the ICESCR

Right to work

4.54 The right to work is the right of all people to have the opportunity to gain their living through decent work they freely choose, allowing them to live in dignity. It provides:

- that everyone must be able to freely accept or choose their work, including that a person must not be forced in any way to engage in employment;
- a right not to be unfairly deprived of work, including minimum due process rights if employment is to be terminated; and
- that there is a system of protection guaranteeing access to employment.

Right to just and favourable conditions of work

4.55 The right to just and favourable conditions of work provides that all workers have the right to just and favourable conditions of work, particularly adequate and fair remuneration, safe working conditions, and the right to join trade unions.

Right to social security

Article 9 of the ICESCR

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

4.57 Access to social security is required when a person lacks access to other income and is left with insufficient means to access health care and support themselves and their dependents. Enjoyment of the right requires that sustainable social support schemes are:

- available to people in need;
- adequate to support an adequate standard of living and health care;

- accessible (providing universal coverage without discrimination; and qualifying and withdrawal conditions that are lawful, reasonable, proportionate and transparent); and
- affordable (where contributions are required).

Right to an adequate standard of living

Article 11 of the ICESCR

4.58 The right to an adequate standard of living requires that the state take steps to ensure the availability, adequacy and accessibility of food, clothing, water and housing for all people in its jurisdiction.

Right to health

Article 12 of the ICESCR

4.59 The right to health is the right to enjoy the highest attainable standard of physical and mental health. It is a right to have access to adequate health care (including reproductive and sexual healthcare) as well as to live in conditions that promote a healthy life (such as access to safe drinking water, housing, food and a healthy environment).

Right to education

Articles 13 and 14 of the ICESCR; and article 28 of the CRC

4.60 This right recognises the right of everyone to education. It recognises that education must be directed to the full development of the human personality and sense of dignity, and to strengthening respect for human rights and fundamental freedoms. It requires that primary education shall be compulsorily and freely available to all; and the progressive introduction of free secondary and higher education.

Right to culture

Article 15 of the ICESCR; and article 27 of the ICCPR

4.61 The right to culture provides that all people have the right to benefit from and take part in cultural life. The right also includes the right of everyone to benefit from scientific progress; and protection of the moral and material interests of the authors of scientific, literary or artistic productions.

4.62 Individuals belonging to minority groups have additional protections to enjoy their own culture, religion and language. The right applies to people who belong to minority groups in a state sharing a common culture, religion and/or language.

Right to an effective remedy

Article 2 of the ICCPR

4.63 The right to an effective remedy requires states to ensure access to an effective remedy for violations of human rights. States are required to establish

appropriate judicial and administrative mechanisms for addressing claims of human rights violations under domestic law. Where public officials have committed violations of rights, states may not relieve perpetrators from personal responsibility through amnesties or legal immunities and indemnities.

4.64 States are required to make reparation to individuals whose rights have been violated. Reparation can involve restitution, rehabilitation and measures of satisfaction—such as public apologies, public memorials, guarantees of non-repetition and changes in relevant laws and practices—as well as bringing to justice the perpetrators of human rights violations. Effective remedies should be appropriately adapted to take account of the special vulnerability of certain categories of persons including, and particularly, children.

Appendix 3

Correspondence

The Hon Dan Tehan MP
Minister for Social Services

Parliament House
CANBERRA ACT 2600

Telephone: 02 6277 7560

MC18-002446

19 APR 2018

Mr Ian Goodenough MP
Chair
Parliamentary Joint Committee on Human Rights
PO Box 6100
Parliament House
CANBERRA ACT 2600

Dear Mr Goodenough Ian,

Thank you for your letter of 28 March 2018 regarding the Parliamentary Joint Committee on Human Rights' consideration of the Crimes Amendment (National Disability Insurance Scheme – Worker Screening) Bill 2018 (the Bill) in its *Report 3 of 2018*.

I appreciate the Committee's consideration of the Bill and am pleased to have the opportunity to address the issues raised by the Committee in relation to permitting disclosure of spent, quashed and wrongful convictions of persons seeking to work with persons with disability under the National Disability and Insurance Scheme (NDIS).

I welcome the opportunity to respond to the Committee's comments and provide the following advice.

Compatibility with the right to privacy and the right to work

The Committee has acknowledged that in some circumstances, it may be appropriate to permit the disclosure, or the taking into account, of a person's criminal history information to enable proper assessment of whether the person poses an unacceptable risk of harm, including when the person works with vulnerable people.

While the Committee has raised the question of the taking into account of a person's entire criminal record, disclosure of a person's entire criminal record is important to ensure that the state and territory worker screening units tasked with making an informed assessment of an individual's suitability to work with people with disability can access and consider a complete picture of that person's criminal history.

Safeguards will be in place through a nationally consistent, risk-based approach that will provide state and territory worker screening units with a framework for considering a person's criminal history and patterns of behaviour over a lifetime that would indicate

potential future risk to people with disability. The more complete the information about patterns of behaviour, the more accurate the assessment of risk. Even offences that are minor, not violent or sexual in nature, are not directly related to disability employment or happened some time ago, contribute to an assessment of risk.

State and territory worker screening units will be required to undertake a rigorous process to determine the relevance of a particular event to whether an applicant for an NDIS Worker Screening Check poses a risk to people with disability. In particular, worker screening units are required to consider:

- the nature, gravity and circumstances of the event and how it is contributes to a pattern of behaviour that may be relevant to disability-related work;
- the length of time that has passed since the event occurred;
- the vulnerability of the victim at the time of the event and the person's relationship to the victim or position of authority over the victim at the time of the event;
- the person's criminal, misconduct and disciplinary, or other relevant history, including whether there is a pattern of concerning behaviour;
- the person's conduct since the event; and
- all other relevant circumstances in respect of their offending, misconduct or other relevant history, including attitudes towards offence or misconduct, and the impact on their eligibility to be engaged in disability-related work.

People with disability are some of the most vulnerable within the Australian community. It is not only sexual or violent offences that the worker screening regime seeks to mitigate against. Individuals employed within the NDIS are in a position of trust and in many cases will have access to the person with disability's personal belongings, finances and medication. Minor offences may be relevant to a person's integrity and general trustworthiness. On that basis, it is appropriate to have awareness of the circumstances of surrounding even minor offences.

It should be recognised that the fact that an individual may have a criminal conviction for a minor offence which occurred a long time ago forms only one part of the analysis and risk assessment undertaken by a state or territory worker screening unit. It will not necessarily prohibit that person from gaining employment with a provider within the NDIS.

Limiting the categories of offences that can be disclosed to worker screening units would create a risk that relevant information is not available to inform a decision by a worker screening unit and could undermine the value of an NDIS worker screening outcome as a source of information for people with disability and for employers. Inaccurate risk assessments may also be unfair to workers themselves.

The Committee also raises the issue of access to information on spent, quashed and pardoned convictions. Research supports criminal history, including spent, quashed or pardoned convictions, as a key indicator of past patterns of behaviour.

While, as the Committee points out, a person whose conviction is quashed may be factually and legally innocent, there are a range of reasons that a conviction may be quashed or pardoned that might not be so black and white. This will not be known until the specific circumstances surrounding the pardoned or quashed conviction are considered by the

worker screening unit, which is why they need access to such information as proposed in the Bill.

This is why the Working with Children Check currently undertakes a review of spent, quashed and pardoned convictions.

Compatibility with the right to equality and non-discrimination

With regards the issues of proportionality and rational connection between the differential treatment of workers based on criminal history, criminal history checks are conducted as a matter of routine for a range of occupations, to allow employers to make recruitment decisions which support a safe and secure workplace for workers and participants alike.

The more comprehensive data collected as part of the NDIS Worker Screening Check reflects that there is a higher degree of risk an individual may pose to person with disability in the course of delivering supports and services. Differential treatment of individuals as a result of considering criminal history as a part of a risk-based worker screening would not constitute unlawful discrimination as there is sufficient research and objective evidence that supports the consideration of this information as a basis for determining risk.

A complete criminal history, leads to a more accurate and reliable risk-based worker screening assessment which benefits both people with disability and the worker being screened. A comprehensive assessment is likely to be fairer to workers and reduce the chance of unjustified discrimination.

It should be noted that employers do not get access to any criminal history information under the proposed approach to NDIS Worker Screening. Employers will only have access to worker screening outcomes, once the approved Worker Screening Unit has made a determination.

Finally, I note that Working with Children Checks already operate in all jurisdictions with access to, and assessment of, full criminal history. People with disability deserve the same level of protection.

Thank you again for bringing these matters to my attention. I trust this information is of assistance to the Committee and look forward to the Committee's final report.

Yours sincerely

DAN TEHAN

COPY

Senator the Hon Marise Payne
Minister for Defence

MC18-000774

Mr Ian Goodenough
Chair
Parliamentary Joint Committee on Human Rights
Parliament House
CANBERRA ACT 2600

Dear Mr Goodenough Ian

Thank you for your letter of 28 March 2018 regarding the interest of the Parliamentary Joint Committee on Human Rights in the Intelligence Services Amendment (Establishment of the Australian Signals Directorate) Bill 2018.

As you would be aware, the Bill received bi-partisan support and was passed without amendment by the parliament on 28 March 2018.

Notwithstanding the Bill's passage through the parliament, I am pleased to provide the enclosed advice regarding your committee's specific questions regarding the operation of particular provisions of the legislation.

I trust this information is of assistance.

Yours sincerely

MARISE PAYNE
Encl

13 APR 2018

Senator the Hon Marise Payne, Minister for Defence
Parliament House, CANBERRA ACT, Telephone: 02 6277 7800
Commonwealth Parliamentary Offices, SYDNEY NSW, Telephone: 02 8289 9580

COPY

Advice to the Parliamentary Joint Committee on Human Rights in response to questions regarding the Intelligence Services Amendment (Establishment of the Australian Signals Directorate) Bill 2018

Question:

Communicating AUSTRAC information to foreign intelligence agencies and the compatibility with the right to privacy.

The preceding analysis [contained in the committee's Report 3 of 2018] raises questions as to whether the measure is compatible with the right to privacy.

The committee therefore requests the advice of the minister as to:

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

Question:

In relation to the right to life, the committee seeks the advice of the minister about the compatibility of the measure with this right (including the existence of relevant safeguards).

In relation to the prohibition on torture, or cruel, inhuman or degrading treatment or punishment, the committee seeks the advice of the minister in relation to the compatibility of the measure with this right (including any relevant safeguards).

Combined Answer:

As the committee would be aware, the Australian Transaction Reports and Analysis Centre (AUSTRAC) has made successive statements and provided advice to the parliament in relation to the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006*, including specifically regarding the sharing of information with foreign partners, and provided assurances that while the Act does engage a range of human rights, to the extent that it limits some rights, those limitations are reasonable, necessary and proportionate in achieving a legitimate objective.

The new section 133BA for the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* includes a very important consequential amendment as a result of the Australian Signals Directorate (ASD) becoming an independent statutory agency.

At present ASD is part of the Department of Defence and is covered by the Department's own provision within *the Anti-Money Laundering and Counter-Terrorism Financing Act 2006*. As ASD will be becoming its own entity on 1 July 2018 it now requires its own listing under this Act.

This amendment to the Act does not extend or alter the current arrangement ASD receives by being part of the Department of Defence. Similarly, it is consistent with arrangements provided for all other intelligence and security agencies that require this function. This amendment is not, in effect, creating a new arrangement for ASD. These provisions reflect longstanding arrangements for agencies in the intelligence and security community, and there are strong safeguards in place to ensure the function is appropriately exercised.

In this context, there already exists strong compliance safeguards and ASD is subject to some of the most rigorous oversight arrangements in the country. This includes being subject the oversight of the Inspector-General of Intelligence and Security, who has the powers of a standing royal commission and can compel officers to give evidence and hand-over materials. The Inspector-General regularly reviews activities to ensure ASD's rules to protect the privacy of Australians are appropriately applied.

This amendment made to the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* is critical to ASD's work to combat terrorism, online espionage, transnational crime, cybercrime and cyber-enabled crime.

As an independent statutory agency, this amendment now ensures that information is able to be appropriately shared, consistent with how other Australian domestic intelligence and security agencies manage this type of information. This work across the intelligence and security community is central to defending Australia and its national interests.

Question:

Operation outside the Public Service Act and compatibility with the right to just and favourable conditions at work.

The preceding analysis [contained in the committee's Report 3 of 2018] raises questions as to whether the measure is compatible with the right to just and favourable conditions at work. The committee therefore seeks the advice of the minister as to:

- ***whether there is reasoning or evidence that establishes that the stated objective addresses a pressing or substantial concern or whether the proposed changes are otherwise aimed at achieving a legitimate objective;***
- ***how the measure is effective to achieve (that is, rationally connected to) that objective; and***
- ***whether the limitation is a reasonable and proportionate measure to achieve the stated objective.***

Answer:

The Government is committed to ensuring that all workers have the right to just and favourable conditions of work, particularly adequate and fair remuneration, safe working conditions, and the right to access employee representatives.

The amendments to the *Intelligence Services Act 2001* (Intelligence Services Act) that establish ASD as an independent statutory agency do not have the effect of intruding into the right to work on an unwarranted or unreasonable basis.

In relation to the employment of staff, ASD will now operate outside of the *Public Service Act 1999* (Public Service Act) framework. This will provide ASD with greater flexibility to recognise the skills of its specialised workforce. This structure reflects the need to retain those individuals with highly sought after skills, such as those with science, technology, engineering and maths qualifications. Mobility across the public sector is also recognised as an important tool to bring in critical talent into ASD, but to also enable the further development of skills in different environments. To support this, the amendments made to the Intelligence Services Act include the specific provision that will allow for the transfer of employment from ASD to the Australian Public Service. As part of these arrangements, the prior service and accrued leave balances of staff within the Australian Public Service and ASD will continue to be recognised and ASD staff will continue to be able to access public sector superannuation schemes. This amendment pursues the legitimate objective of providing ASD with greater flexibility to recruit, retain, train, develop and remunerate its specialist staff, in accordance with the recommendations of the 2017 Independent Intelligence Review.

As recognised by the Review, for ASD the option of continuing to operate within the Public Service Act employment framework, even with exemptions, is not the most effective way forward to ensure ASD can continue to deliver the outcomes required. It would increase the risk of further losing the critical skills needed to successfully perform this task and not address the need to improve ASD's position in the employment market to attract the highest quality candidates.

In seeking to achieve this for ASD the Government also recognises that ASD, while stepping outside of the Australian Public Service, will still be operating in close proximity to many public service agencies, and the Public Service Act provides several important protections for staff. In this context, an important safeguard has been included in the Bill to ensure that the new ASD employment framework would not be arbitrary. Under section 38F, the Director-General of ASD must adopt the principles of the Public Service Act in relation to employees of ASD to the extent to which the Director-General considers they are consistent with the effective performance of the functions of ASD. This has the effect of protecting ASD employees, similar to the protection received by public servants employed under the Public Service Act.

There are also additional measures to safeguard workers.

First, the *Fair Work Act 2009* (Fair Work Act) will continue to apply to ASD employees and provide them with an avenue for redress for their employment-related grievances. The Fair Work Act provides protections of employee rights, including:

a. workplace rights as currently defined by the Fair Work Act;
b. the right to engage in industrial activities;
c. the right to be free from unlawful discrimination; and
d. the right to be free from undue influence or pressure in negotiating individual arrangements.

The amendments to the Intelligence Services Act do not extinguish these rights for the staff of ASD. Additionally, the right of employees to be members of industrial associations and the ability to engage in industrial activities will continue, as well as have their workplace interests represented by industrial or employee advocates.

In addition to the continuation of the protections afforded to staff by the Fair Work Act, the Inspector-General of Intelligence and Security (IGIS) provides additional safeguards not normally afforded to workers outside of the intelligence community. Through the amendments made to the Intelligence Services Act the IGIS will be given powers to investigate complaints regarding employment-related grievances from ASD employees. Previously the IGIS was not able to investigate these complaints, and ASD employees sought redress through the Public Service Commissioner or the Merit Protection Commissioner. From 1 July 2018, ASD employees can bring their grievances to the IGIS in the same way as for employees of the Australian Security Intelligence Organisation and the Australian Secret Intelligence Service.

Operating outside the Australian Public Service also provides the flexibility to design over time new employment categories and career pathways that are in addition to the standard public service structures. This will enable ASD to more directly market itself to the types of trades and skills it needs to attract, and highlight the skill development and career progression that can occur within these streams of work in the agency.

It is recognised that ASD operates within a highly competitive employment market, even within the Australian security and intelligence community. There are several other agencies that also offer rewarding careers to people with many of the skills and attributes ASD seeks to engage. Overall, in recognition of the environment ASD seeks to recruit from, the amendments to the Intelligence Services Act effectively give the same flexibility to the Director-General of ASD for the recruitment and retention, and establishing workplace agreements, as the Australian Security Intelligence Organisation and the Australian Secret Intelligence Service.

THE HON PETER DUTTON MP
MINISTER FOR HOME AFFAIRS
MINISTER FOR IMMIGRATION AND BORDER PROTECTION

Ref No: MS18-001251

Mr Ian Goodenough MP
Chair
Parliamentary Joint Committee on Human Rights
S1.111
Parliament House
CANBERRA ACT 2600

Dear Ian, Mr Goodenough

Thank you for your letters of 28 March 2018 in which further information was requested on the *Identity-matching Services Bill 2018* (Cth) and *Migration (IMMI 18/003: Specified courses and exams for registration as a migration agent) Instrument 2018*.

I have attached my response to the *Parliamentary Joint Committee on Human Rights' Report 3 of 2018* as requested in your letters. The response to the *Identity-matching Services Bill 2018* (Cth) should be considered in conjunction with my letter dated 04 April 2018, which outlined our response to the Chair of the Senate Standing Committee on the Scrutiny of Bills.

I trust the information provided is helpful.

Yours sincerely

PETER DUTTON 26/04/18

IMMI 18/003: Specified courses and exams for registration as a migration agent Instrument 2018

Committee's Questions:

The Committee requests advice of the Minister as to how the measures are effective to achieve (that is, rationally connected to) the stated objectives; and

Whether the measures are reasonable and proportionate to achieving the stated objectives of the instrument (including how the measures are based on reasonable and objective criteria, whether the measures are the least rights-restrictive way of achieving the stated objective and the existence of any safeguards).

Guided by the 2014 Kendall Review, the Government is committed to protecting vulnerable visa applicants by ensuring that new and re-registering migration agents be required to prove that they have English language proficiency. The amendments made to the English language tests *in IMMI 18/003: Specified courses and exams for registration as a migration agent instrument* were a correction to the previous instrument *IMMI 12/097 Prescribed courses and exams for applicants for registration as a Migration Agent (Regulation 5).* The Test of English as a Foreign Language (TOEFL) scores set out in the previous instrument 12/097 (with the exception of the writing subtest) were incorrect and did not align with the benchmarked International English Language Testing System (IELTS-TOEFL) equivalent scores.

With IMMI 12/097 being repealed and replaced to reflect the new educational requirements for migration agents, it was an opportune time to revise the TOEFL scores. The TOEFL scores in IMMI 18/003 align with the benchmarks for all departmentally accepted English language tests.

The broad application of these accepted English language proficiency levels for registered migration agents (which aligns with benchmarks required for certain visa applicants) is non-discriminatory. The measures are also reasonable and proportionate to ensure the quality and standards of advice to protect clients of migration agents.

THE HON JULIE BISHOP MP

Minister for Foreign Affairs

Mr Ian Goodenough MP
Chair
Parliamentary Joint Committee on Human Rights
Parliament House
CANBERRA ACT 2600

Dear Mr Goodenough

Thank you for your letter of 28 March 2018 regarding the human rights compatibility of various instruments (together, the Instruments) made under the *Autonomous Sanctions Act 2011* (the Act).

As noted by the Committee in its *Report 3 of 2018* ('the Report'), the effect of the Instruments is to subject designated and declared persons to targeted financial sanctions and travel bans.

The Government is committed to ensuring the human rights compatibility of Australia's sanctions regime. I have previously addressed in some detail the issues raised in the Report in my responses to the Committee in 2015 and 2016. Without repeating the detail of those responses, it remains the Government's view that sanctions measures are proportionate and appropriate in targeting those responsible for repressing human rights and democratic freedoms or to end regionally or internationally destabilising actions.

Modern sanctions regimes impose highly targeted measures designed to limit the adverse consequences of a situation of international concern, to seek to influence those responsible for it to modify their behaviour, and to penalise those responsible. Australia does not impose sanction measures on individuals lightly.

I continue to be satisfied that Australia's implementation of autonomous sanctions is proportionate to the objectives of each regime. I note that the Department of Foreign Affairs and Trade (DFAT) keeps the operation of Australia's sanction regimes under regular review.

Non-refoulement

The Committee's Report raises concerns at the potential for designated or declared individuals to be removed from Australia contrary to Australia's non-refoulement obligations.

+61 2 6277 7500 Parliament House, Canberra ACT 2600, Australia foreign.minister@dfat.gov.au

Under the *Autonomous Sanctions Regulations 2011*, I may declare a person who meets the criteria specified in regulation 6 for the purpose of preventing the person from travelling to, entering or remaining in Australia. A 'declared person' holding an Australian visa may therefore have their visa cancelled by the Minister for Home Affairs under the *Migration Regulations 1994*, regulation 2.43.

However, under regulation 2.43(1)(aa) of the *Migration Regulations 1994*, the Minister for Home Affairs cannot cancel a visa that is classified as a 'relevant visa'. Regulation 2.43(3) of the *Migration Regulations 1994* provides that a 'relevant visa' includes, among others, a protection, refugee, or humanitarian visa. I note that under the *Autonomous Sanctions Regulations 2011*, I may also waive the operation of a declaration that was made for the purpose of preventing the person from travelling to, entering or remaining in Australia, on the grounds that it would be in the national interest, or on humanitarian grounds. This decision is subject to natural justice requirements, and may be judicially reviewed.

I also note the Committee's comments in relation to section 197C of the *Migration Act 1958*. As outlined in the Explanatory Memorandum to this section at the time of its introduction, Australia will continue to meet its non-refoulement obligations through mechanisms other than the removal powers in section 198 of the *Migration Act 1958*, including through the protection visa application process, and through the use of the Minister's personal powers in the *Migration Act 1958*. These mechanisms ensure that non-refoulement obligations are addressed before a person becomes ready for removal under section 198.

Statements of compatibility with human rights

I note the Committee's concerns that the statement of compatibility with human rights (SCHR) in the Instruments does not engage in any substantive analysis of the rights and freedoms that are engaged and limited by the Instruments.

As I have indicated above, I consider that the Instruments and the broader sanctions framework is proportionate and compatible with human rights. I have asked DFAT to consider whether additional detail can be included in future statements.

I trust this information will assist you in concluding your consideration of the Instruments.

Yours sincerely

Julie Bishop

The Hon. David Littleproud MP

Minister for Agriculture and Water Resources
Federal Member for Maranoa

Ref: MS18-000543

Mr Ian Goodenough MP
Chair
Parliamentary Joint Committee on Human Rights
Parliament House
CANBERRA ACT 2600

30 APR 2018

Dear Mr Goodenough

The Parliamentary Joint Committee on Human Rights (the Committee) has requested further information about measures in the Export Control Bill 2017 (the Bill). The enclosure sets out my detailed response to the questions raised by the Committee.

I thank the Committee for their consideration of this Bill to better regulate Australia's agricultural exports into the future.

Yours sincerely

DAVID LITTLEPROUD MP

Enc.

Parliament House, Canberra ACT 2600 Telephone: 02 6277 7630 Email: minister@agriculture.gov.au

Response to a request from the Parliamentary Joint Committee on Human Rights for information in relation to the Export Control Bill 2017.

Request at paragraph 1.53-1.54 – Fit and proper person test

1.53 The preceding analysis indicates that there are questions as to the proportionality of the limitation on the right to work, the right to freedom of association and engagement of the right to equality and non-discrimination.

1.54 The committee therefore seeks the advice of the minister as to whether:

the limitation is a reasonable and proportionate measure for the achievement of its stated objective (including whether the measure is sufficiently circumscribed, the breadth of the secretary's discretion and the availability of relevant safeguards); and

consideration could be given to: amending section 372 to restrict the range of factors that the secretary may consider as adversely affecting whether a person is a 'fit and proper person'; restricting the list of 'associates' in section 13; and setting out who is required to be a fit and proper person in primary legislation rather than in delegated legislation.

Australia's access to markets and the ability to export agricultural goods depends on its trading reputation and the confidence of its trading partners. The fit and proper person test is necessary, reasonable and proportionate for the legitimate objective of ensuring that persons who are approved to export goods from Australian territory are persons that are trustworthy and demonstrate the required integrity necessary to uphold Australian law and protect our trading reputation.

Clause 372 of the Bill will provide the Secretary with the ability to apply a fit and proper person test in circumstances provided for by the Bill or prescribed by the Rules. Persons will be required to notify the Secretary if they have been convicted of certain specified offences, or ordered to pay a pecuniary penalty in relation to certain specified contraventions (clause 374 of the Bill). When determining whether a person is a fit and proper person, the Secretary may consider the nature of the offences resulting in the conviction or pecuniary penalty, the interest of the industry, or industries, relating to the person's export business and any other relevant matter. Whilst these factors, along with a person's associates, will be taken into account by the Secretary when applying the fit and proper persons test, these matters do not, in and of themselves, automatically give rise to a negative finding. Rather, it will be up to the Secretary to consider whether a person is fit and proper as a result of these matters.

The consideration as to whether a person is a fit and proper person forms part of the decision in relation to an application under the Bill (e.g. to register an establishment), and is a reviewable decision under the Bill. This is reflective of administrative law principles.

The integrity of Australia's agricultural export framework is underpinned by appropriate regulatory controls, including who is permitted to perform certain roles within it and who should be granted with certain privileges. A fit and proper person test is necessary for the legitimate objective of ensuring that persons who are approved to export goods from Australia

are persons who are trustworthy and have demonstrated the required attributes necessary to uphold Australia's trading reputation.

A fit and proper person test can be used to consider a person or company's history of compliance with Commonwealth legislation and then deny them approval to register an establishment, or to suspend, revoke or alter the conditions on an existing approved arrangement. This ensures that persons or companies seeking these approvals are suitable entities to be responsible for the appropriate management of relevant risks. For example, an approved arrangement may set out the ways in which an exporter will meet legislative and importing country requirements in relation to a kind of prescribed goods. It is important that such persons are considered fit and proper to be able to conduct these activities and that there is no reason to believe that the person will not operate within the scope of their approval or adhere to any conditions or requirements that are placed on it.

The test streamlines and consolidates the character tests in the current framework. This includes the fit and proper person test in the *Export Control (Prescribed Goods—General) Order 2005* and the requirement of an export licence holder to be a person of integrity under the *Australian Meat and Live-stock Industry Act 1997*.

Enabling the Secretary to take into account a broad range of matters is important when considering whether a person is a fit and proper person because such a person might be involved in the export of a wide range of goods, with varying degrees of risk. The matters provided for in the Bill seek to reflect the broad range of matters in the current framework that can be taken into account by the Secretary to ensure that he or she may have regard to any relevant matter. This ensures that the integrity of the regulatory framework is not compromised by limiting conduct that can be considered in this context. As the agricultural export sector is regularly changing and evolving, this is reasonable and proportionate and ensures that the current level of market access can be maintained and possibly even increased in future.

The associates' test is designed to ensure that an applicant for a regulatory control under the Bill (e.g. a registered establishment) is a suitable person to be responsible for managing relevant risks, in light of the potential consequences of non-compliance. It is appropriate for associates to be included in the consideration so as to ensure that the conduct of all types of entities may be taken into account where the Secretary considers it appropriate to do so.

It is appropriate for the rules to be able to provide who can be a fit and proper person. The Bill and the rules will allow the Australian Government to respond in an appropriate and timely manner to any changes to importing country requirements or to implement any necessary policy or regulatory reforms in the future. The rules will be able to prohibit the export of certain kinds of goods (called prescribed goods) unless they meet the conditions set out in the Rules. The requirements for prescribed goods must be appropriately tailored to ensure that only the necessary level of regulatory burden is imposed on exporters and this includes the imposition of the fit and proper person test which should only be imposed where it is required (e.g. as a result of an importing country requirement). The rules are a legislative instrument and therefore will be subject to Parliamentary scrutiny through the disallowance process, and sunsetting in accordance with the *Legislation Act 2003*.

Senator the Hon Simon Birmingham

Minister for Education and Training
Manager of Government Business in the Senate
Senator for South Australia

Our Ref MC18-001774

16 APR 2018

Mr Ian Goodenough MP
Chair
Parliamentary Joint Committee on Human Rights
S1.111
Parliament House
CANBERRA ACT 2600

Dear Mr Goodenough Ian

Thank you for your letter of 28 March 2018 and for the opportunity to respond to the Committee's assessment relating to the Higher Education Support Legislation Amendment (Student Loan Sustainability) Bill 2018 (the SLS Bill) in its *Report 3 of 2018*. I note the Committee's concerns about two measures in the SLS Bill: changes to the repayment rates and indexation; and the Higher Education Loan Program (HELP) loan limits. The additional information requested by the Committee is attached.

The lower repayment rates included in the SLS Bill maintain the principle that graduates should only repay their debts if and when they can afford to do so, and it ensures that any impact is minimal – being one per cent of their annual taxable income which equates to less than $9 per week. The measure also involves higher repayment rates for those at the higher end of the income scale, ensuring that high income earners also contribute to improving the sustainability of HELP.

This legislation introduces a combined HELP maximum loan limit that is, firstly, sufficient to support almost nine years of full time study as a Commonwealth supported student and, secondly, can reasonably be repaid within a borrower's lifetime. I consider that this measure is consistent with fair and shared access to education.

Making the lifetime limit a renewable loan limit, through Government amendments, enables interested students to pursue lifelong learning. It provides scope for individuals whose HELP debt repayments for an income year have replenished their HELP loan balance to re-borrow those funds. I would note that these amendments were moved and passed by the House of Representatives on 27 March 2018, which was after the Committee's consideration of the SLS Bill in their report. It is likely that the amendments substantially address the concerns raised.

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The Australian Government does not consider that these measures will limit the right to education or the right to equality and non-discrimination. The SLS Bill will ensure access to, and affordability of, higher education by continuing to allow students to borrow the costs of their study without having to pay upfront fees. This position was supported by Professor Bruce Chapman, the architect of HECS, in his evidence at the hearing of the Senate Standing Committee on Education and Employment on 5 March 2018.

I thank the Committee for its consideration of the SLS Bill.

Yours sincerely

Simon Birmingham

Encl.

THE HIGHER EDUCATION LEGISLATION AMENDMENT (STUDENT LOAN SUSTAINABILITY) BILL 2018

Detailed response to the Joint Parliamentary Committee on Human Rights

The Parliamentary Joint Committee on Human Rights (the Committee) requested further information in relation to various measures in the Higher Education Support Legislation Amendment (Student Loan Sustainability) Bill 2017 (the Bill), which was introduced on 14 February 2018. The Bill:

- sets new repayment thresholds for the Higher Education Loan Program (HELP) from 1 July 2018, starting with a lower minimum repayment threshold of $45,000 with a one per cent repayment rate, with a further 17 thresholds and repayment rates, up to a top threshold of $131,989 at which ten per cent of income is repayable
- aligns the indexation of the HELP repayment thresholds to the Consumer Price Index (CPI) instead of Average Weekly Earnings (AWE)
- brings repayment thresholds for SFSS managed by the Social Services portfolio in line with the HELP repayment thresholds from 2019–20, and beneficially changes to the order of repayment of student loan debts with consequential implications for Student Start-up Loans and Trade Support Loan debt repayment
- retains the current three-tier repayment threshold for SFSS, with the existing indexation, for 2018–19
- sets FEE-HELP loan limits for 2019 for FEE-HELP loans, VET FEE-HELP loans and VET Student Loans
- introduces the combined HELP loan limits for HECS-HELP loans, FEE-HELP loans, VET FEE-HELP loans and VET Student Loans from 1 January 2020 (rather than 2019)
- allows for renewable HELP balances, beginning with HELP debt repayments made during and after the financial year 2019-20 re-crediting HELP balances from 2020.

The last three measures were part of a Government amendment that was introduced into the House of Representatives and agreed to on 27 March 2018. The revised Bill entered the Senate on 28 March 2018 and remains to be debated. The Bill will be addressed in its current amended form in this response.

The Bill engages the right to an adequate standard of living – Article 11 of the *International Covenant on Economic, Social and Cultural Rights* (ICESCR), the right to education – Article 13 of the ICESCR, and the right to equality and non-discrimination – Article 26 of the *International Covenant on Civil and Political Rights* (ICCPR).

The response to specific human rights-based issues raised by the Committee, and an analysis of the human rights implications of the Bill, is set out below. Any limitations on human rights resulting from these measures are reasonable, necessary, and proportionate to the broader policy objectives of ensuring the ongoing financial sustainability for higher education.

Schedule 1 - Changes to the repayment thresholds

Schedule 1 of the Bill establishes a new minimum repayment threshold for HELP loans of $45,000. In the 2017–18 income year, taxpayers are not required to start paying back their HELP loans until their annual incomes reach $55,874. In the 2018–19 income year, the new threshold at which people will start repaying debts will be $45,000. If the Bill does not pass, a new minimum repayment threshold of $51,957 will apply from 1 July 2018 under the *Budget Savings (Omnibus) Act 2016*.

Under HESA, where a person's financial and family circumstances result in them either being exempt or receiving a reduction in their Medicare levy, they are not required to make compulsory HELP repayments for that income year.

In addition to a change in the minimum repayment amount, Schedule 1 of the Bill establishes a new maximum threshold of $131,989 with a repayment rate of 10 per cent compared with a maximum threshold of $107,214 with a repayment rate of 8 per cent. This will ensure that HELP debtors at the higher end of the income scale repay their debt faster.

The legal obligations of States parties concerning the right to education is to demonstrate that, in aggregate, the measures being taken are sufficient to release the right to education for every individual by every appropriate means. It is therefore incumbent on government to formulate policy and allocate resources to ensure maximal enjoyment of the right to education for all students. Although progressive realisation means that States parties have a specific and continuing obligation to 'move as expeditiously and effectively as possible towards the full realisation of article 13', ICESCR acknowledges constraints due to the limits of available resources. The sustainability of HELP is crucial to ensure continued access to higher education to the broadest spectrum of students. HELP ensures that students do not face upfront costs for their higher education and are able to further their study on the basis of capacity to learn rather than capacity to pay. Moreover, measured adjustments to the repayment threshold could be seen to support and augment the right of access to education by establishing a robust and functional loan access scheme. Further, the measure does not alter the general availability of loan support for higher education (and therefore does not hinder or displace the core right of access to education or interfere with the broader enjoyment of the right to education). This maintains the principles of concessional rates and income contingency.

Right to education

The measures in Schedule 1 engage but do not limit the right to education. The changes to the payment thresholds do not undermine or impede access to higher education, by every appropriate means, nor could they be regarded as regressive to the broader imperative of the progressive introduction or realisation of free higher education contained in Article 13(2)(c) of the ICESCR. Notably, Article 2 of the ICESCR recognises that economic, social and cultural rights require resources in order to implement them, and imposes a general obligation of progressive achievement. Further, the concept of accessibility necessitates fair distribution of resources.

In terms of access to education, there should be no effect on access to higher education based on the new repayment threshold. Eligible students will remain able to defer their student contribution

amounts or tuition fees via a HELP loan. This includes individuals who earn more than the minimum repayment threshold.

The proposed minimum repayment threshold is still above the minimum wage (currently around $36,100 for a full-time worker from 1 July 2017, according to Fair Work Australia). Additionally, the lower repayment rate ensures that any impact is minimal - one per cent of their annual taxable income equates to less than $9 per week.

Schedule 1 - Changes to indexation

Schedule 1 of the Bill will also change the way in which HELP thresholds are currently indexed. From 1 July 2019 onwards, all HELP thresholds will be indexed at the CPI instead of AWE.

Indexing the HELP repayment thresholds at CPI will ensure the value of the thresholds is maintained in real terms, as the thresholds will increase in line with consumer prices rather than average wages. With AWE being typically higher than CPI, indexation by CPI will slow growth in repayment thresholds, bringing more individuals into the repayment scope over time.

Access to higher education will be maintained through the continued availability of HELP loans. As thresholds are lowered, it is likely that a greater number of individuals will commence repayment sooner and repayments will increase for some others. However, by lowering the repayment threshold, and altering the indexation of the threshold to grow in line with CPI, this measure makes the overall scheme more affordable in the long-term, and is a reasonable and proportionate response to improve both the equity and efficiency of the higher education sector, make public funding more sustainable through economic fluctuation and downturn, and bolster the overall fiscal viability of the sector to ensure it remains available for current and future students. The Government provides considerable direct funding to the higher education sector, as well as substantial financial support to almost all domestic students through direct subsidies, caps on tuition fees or subsidised income-contingent loans.

Since earnings and inflation growth are currently similar, the practical effect of CPI indexation is likely to be minimal in the short term; however, in the medium to longer term, the new indexation arrangements will ensure repayments keep their real value. It is also notable that thresholds for many other government benefits are generally indexed to CPI and there is arguably a rights-based discrepancy at play if students who obtain substantial private benefits (both monetary and non-monetary) from the sector are conferred a more generous indexation policy than other Australians, including vulnerable Australians, who are recipients of other government programs that are indexed to CPI.

Right to education

Changes to the indexation of the repayment thresholds similarly do not limit the right to access higher education and are not retrogressive in terms of the introduction of free education, because properly characterised, the change to indexation is not a measure that reduces the extent to which an economic, social and cultural right is guaranteed.

Article 4 of the ICESCR provides that countries may subject economic social and cultural rights only to such limitations 'as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society'. The UN Committee has stated that such limitations must be proportionate and the least restrictive alternative where several types of limitations are available. The Minister considers that the change to the indexation of the repayment thresholds is a measure which is democratically aligned to the broader welfare and support of the student populace. Further, to the extent that the measure represents a reasonable adjustment to enable student debt to be aligned with, and re-paid based on CPI indexation, this change is legitimately directed to the continuing fiscal viability of the sector and, by extension, a higher education sector which is economically sustainable and capable of supporting Australia's future growth and productivity as well as ensuring that government can invest in its human capital to improve their skills and capabilities, promote knowledge through higher levels of educational attainment and support general social cohesion.

According to the Grattan Institute, the AWE figure is distorted by several factors including increasingly larger incomes due to a rise in professional occupations over low-skilled occupations, and an ageing population staying longer in the workforce with high salaries. As growth in CPI is slower than growth in AWE, this results in people commencing repayments towards their HELP debt sooner. This does not equate to people paying more for their education. As individuals may begin repaying their debts more quickly as their incomes grow in real terms, it may reduce the amount they repay over the life of their HELP debt, as faster repayments mean that there is less debt to index each year.

Further, it should be noted that the growth in HELP repayments has not kept pace with the growth in HELP lending. The rate of spending on the HELP scheme increases pressure on the Commonwealth's finances and needs to be addressed. The amount of HECS-HELP loans accessed annually has increased from over $2.2 billion in 2009[1] to over $4.3 billion in 2016[2]. Additionally, the expansion of HELP to the vocational education and training sector has led to VET FEE-HELP loans increasing from over $25 million in 2009[3] to over $1.4 billion in 2016[4]. From 2010-11 to 2016-17, the level of debt not expected to be repaid on new debt has increased from 16 per cent[5] to 25 per cent[6].

The savings arising from this measure will help reduce this growth in the HELP scheme, and ensure that it remains available for future generations of students. Any perceived limitation on the right to education, including the progressive introduction of free higher education, is reasonable, necessary and proportionate to the legitimate policy objective of ensuring that the higher education loan scheme remains sustainable.

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[1] 2011-2013 Higher Education Report
2 Department of Education and Training Higher Education Statistics – 2016 Liability Status Categories
3 2015 VET FEE-HELP Statistical Report
4 2016 VET FEE-HELP Statistical Report
[5] 2011-12 Department of Industry, Innovation, Science, Research and Tertiary Education Annual Report
[6] 2016-17 Department of Education and Training Annual Report

Right to equality and non-discrimination

As acknowledged in the original statement of compatibility with human rights in the Explanatory Memorandum, there may be a disproportionate effect on women as a result of the measures contained in this Schedule. Women, and other low-earning demographic groups, may represent a disproportionately larger number of those students required to make HELP repayments for the first time as a result of the introduction of the new, lower threshold. This may present an indirect limitation on the right to non-discrimination.

Due to the income-contingent nature of the HELP scheme, those who earned less than the minimum repayment threshold have not previously been required to meet any repayment obligations and, in addition, income-contingent loan schemes offset any general tendency for higher fees to deter low socio-economic students. Any disproportionate impact on women as a result of this measure is the result of broader and complex social and economic factors that influence participation in higher education, and subsequent labour market experience, which are not within the scope of a student loan scheme to address or mitigate.

It should be noted however, that women make up the majority of higher education students, graduates and HELP debtors. Women made up 58 per cent of domestic students in 2016[7], and between 2007 and 2015 had a completion rate of 75.2 per cent, compared with 71.3 per cent for men over the same period for commencing bachelor level study at a Table A or Table B university[8]. Given that women make up a larger proportion of HELP debtors due to their proportionally greater enrolments and success in higher education, any measure that affected repayment would therefore proportionally affect women more. This is invariably the case by virtue of the demographic make-up of the student group as majority women (and the allied variables of institutional disadvantage and structural inequities attaching to this group) as opposed to as a result of the rights-based integrity or otherwise of the measure.

The repayment thresholds remain progressive with lower repayment rates for lower incomes.

As outlined above, this measure is properly tailored to the legitimate policy objective of directly improving the sustainability of HELP and ensuring it remains a viable option for students in the future. HELP expenses, which consist mainly of debt not expected to be repaid and the deferral subsidy from the concessional interest applied to HELP loans, are estimated to be $2.2 billion in 2017-18[9].

This measure is expected to bring approximately 124,000 new individuals into the repayment stream, and is expected to increase HELP repayments and reduce the amount of outstanding debt not expected to be repaid.

Any limitation on the right to non-discrimination as a result of the measures contained in Schedule 1 is reasonable, and proportionate to the policy objective of creating a sustainable higher education

[7] Department of Education and Training data
[8] Completion Rates of Higher Education Students – Cohort Analysis, 2005-2015
[9] 2017-18 Education Portfolio Budget Statement

system, and to ensure that higher education remains accessible, noting that maximising opportunities for broad student participation, is beneficial for the development of society including to business, industry and community participation, making it a collective economic asset and social and cultural good.

Committee comment

1.108 The preceding analysis raises questions as to whether the measures are compatible with the right to education.

1.109 Accordingly, the committee requests the further advice of the minister as to:

- **whether the proposed change in indexing from AWE to CPI means that students would pay more or less for their university degrees (including for their degree overall and as a proportion of their wages);**

The proposed change to index the HELP repayment thresholds from AWE to CPI does not affect university fees or HELP debts incurred by students – it only affects the repayment thresholds themselves.

With AWE being typically higher than CPI, indexation by CPI is likely to slow growth in repayment thresholds. The Grattan Institute reported in 2016 that indexation based on AWE had led to an increase in the minimum threshold by 17 per cent higher in real terms from 2004–05 to 2015–16 than would have been the case under indexation at CPI. Had the minimum threshold been linked to CPI instead of AWE, the 2015-16 minimum threshold of $54,126 would instead have been $46,457; that is, similar to the proposed new lowest threshold.

It is also notable that this change may lead to students paying slightly less in nominal terms for their degree over their lifetime compared with what they would pay under the current arrangements. This is due to the reduced indexation of debt. If the HELP repayment thresholds are indexed by CPI, some debtors are likely to make higher per year repayments. In such cases debts are being paid down more quickly, there is less debt to index at a given time and therefore total indexation is lower. The lower amount of indexation on debts would lead to the individual repaying a slightly lower amount of total debt over their lifetime, all else being equal.

- **whether requiring some classes of low income earners to repay HELP-debts could constitute an indirect reduction in the amount of government funding of higher education;**

The new minimum threshold of $45,000 in 2018-19 will result in more debtors falling within a repayment scope, which means some people, who would not repay any of their debt under current arrangements, may pay part or all of their debt under the proposed arrangements.

However, the low repayment rate of one per cent for these people will maintain the principle that graduates should only repay their debts when they start receiving a financial benefit from their study. This proposal is fair, measured and modest in its scope and effect.

In addition, and relevant to the rights-based integrity of the measure, under the *Higher Education Support Act 2003*, where a person's financial and family circumstances result in them either being exempt or receiving a reduction in their Medicare Levy, they are not required to make compulsory HELP repayments for that income year. For example, in 2016-17 a single person with one dependent child with an income below $49,871 was exempt from HELP repayments in that income year. The income level rises with each additional dependent.

Universities will continue to benefit from an estimated $17.6 billion of funding in 2018. This follows average funding for universities per student having increased by 15 per cent between 2010 and 2015.

- **whether the proposed changes to the repayment threshold and indexation could have an adverse impact on access to education;**

The new HELP repayment threshold arrangements do not restrict accessibility and affordability of higher education. The Higher Education Loan Program (HELP) will continue to ensure that eligible Australian students are able to fully defer the cost of their higher education through income-contingent loans. The HELP scheme has, and will continue to be, critical for ensuring high-quality university education is accessible to all Australians, enabling admission on the basis of merit as opposed to wealth.

International evidence suggests that the availability of a strong student loan scheme reduces or eliminates any effects of price increases on accessibility. A 2014 report prepared for the European Commission (the Usher report [10]) explored the impacts of changes to cost-sharing arrangements on higher education students and institutions across nine countries. The Usher report found that there was no trend of declining enrolments after a fee increase, and that in cases where students were able to access financial support, in the form of loans or scholarships, the impact of a fee increase on university applications was negligible.

In addition, Professor Bruce Chapman from the Australian National University has argued that "the evidence is now overwhelming that changes to the level of the charge, or other aspects of HECS-HELP, such as the first threshold of repayment, have no discernible effects on student behaviour or choices."[11][12]

While the minimum HELP repayment threshold will be reduced, the one per cent repayment rate at this minimum threshold will ensure the scheme remains affordable for those who incur a HELP debt, and that there are no adverse impacts on access to higher education.

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[10] Usher, Orr and Wespel, 'Do changes in cost-sharing have an impact on the behaviour of students and higher education institutions?', Report for European Union, United Kingdom, May 2014.

[11] Chapman, B CBE Blogisphere *2016/17 Budget: Changes to HECS-HELP and University Funding* (15 May 2017) accessible at https://blog.cbe.anu.edu.au/2017/05/15/201617-budget-changes-hecs-help-university-funding/

- **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; and**
- **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.**

The existing HELP thresholds have been in place for a number of years and do not take into account the changes in access to HELP that have occurred in recent years. HELP lending has grown rapidly with the expansion of the demand driven system, and the amount of HECS-HELP loans accessed has increased from over $2.2 billion in 2009[13] to over $4.3 billion in 2016[14]. In addition, the expansion of HELP to the Vocational Education and Training (VET) sector in 2008 led to increases in VET FEE-HELP loans from over $25 million in 2009[15] to over $1.4 billion in 2016.[16]

HELP expenses, which consist mainly of debt not expected to be repaid and the deferral subsidy resulting from the concessional interest rate applied to the loans compared with costs of borrowing by the Commonwealth for on-lending, are estimated at $1.8 billion in 2017–18.[17] The fair value of the HELP debts was estimated to be $35.9 billion as at 30 June 2017.[18]

In this context, there is a strong need for the Government to improve the sustainability of the HELP scheme. The changes to HELP repayment thresholds and indexation contained in the Bill will result in approximately 124,000 additional HELP debtors making repayments in 2018–19. The changes also involve higher repayment rates for those on higher incomes. As a result, the measure is expected to deliver savings of $345.7 million in fiscal balance terms and $245.2 million in underlying cash balance terms over the forward estimates (2017–18 to 2020–21). Therefore, the new HELP repayment threshold arrangements contribute strongly to the sustainability of the scheme, ensuring that future generations of students also benefit from access to both HELP and higher education more broadly.

The new minimum repayment threshold is around 25 per cent above the full time minimum wage (currently around $36,100 for a full-time worker from 1 July 2017, according to Fair Work Australia). At a repayment rate of just one per cent, a person with a HELP debt will pay back less than $9 per week. Therefore, the Government considers that any limitations on the right to education constitute a reasonable, proportionate and properly tailored measure to achieve long-term improvements in sustainability of the HELP scheme.

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[13] 2011-2013 Higher Education Report
[14] Department of Education and Training Higher Education Statistics – 2016 Liability Status Categories
[15] 2015 VET FEE-HELP Statistical Report
[16] 2016 VET FEE-HELP Statistical Report
[17] 2017–18 Education Portfolio Additional Estimates Statement
[18] 2016-17 Department of Education and Training Annual Report

Committee comment

1.118 The measure engages the right to equality and non-discrimination.

1.119 The preceding analysis raises questions as to whether the disproportionate

negative effect on women (which indicates prima facie indirect discrimination) amounts to unlawful discrimination.

1.120 Accordingly, the committee requests the further advice of the minister as to:

- **whether the measure pursues a legitimate objective for the purposes of international human right law and whether there is reasoning or evidence that establishes that this objective addresses a pressing or substantial concern; and**
- **how the measure is effective to achieve (that is, rationally connected to) the stated objective; and**
- **whether the limitation is a reasonable and proportionate measure to achieve the stated objective.**

As stated above, the objective of this change is to improve the sustainability of the HELP scheme and enable the Government to manage ongoing financial support to tertiary students. The Government believes that is fair that those who benefit from access to higher education contribute towards the cost of the scheme. The substantial private benefits conferred by higher education justify contributions by students who are earning above a certain threshold (at a manageable level to balance minimising repayment hardships and the risks of non-repayment) as a means to help defray higher education sectoral costs and sustain economic growth. Given the substantial savings delivered by this change, the new arrangements contribute strongly to the sustainability of the scheme and are the least restrictive means to achieve this core policy objective.

Due to the demographics of those impacted by the change, more women than men will be required to make HELP repayments for the first time. This is because statistically women make up the majority of higher education students, graduates and HELP debtors. In 2016, women made up 58 per cent of domestic students. Between 2007 and 2015 women had a completion rate of 75.2 per cent, compared with 71.3 per cent for men over the same period for commencing bachelor level study at a Table A or Table B university[19].

However, the new thresholds represent a purely income-based change and do not target particular groups such as women. Given that women make up a larger proportion of HELP debtors due to their proportionally greater enrolments, any measure that affected repayment would therefore proportionally affect women more. It would not be appropriate to adopt HELP repayment arrangements that differed according to demographic characteristics of debtors.

The change affects anyone earning between $45,000 and $51,956 (the minimum repayment income that would otherwise commence on 1 July 2018). While the minimum threshold is being reduced,

[19] Completion Rates of Higher Education Students – Cohort Analysis, 2005-2015

the one per cent repayment rate at this minimum threshold will ensure the scheme remains fair and affordable. In this context, the Government considers that any limitations on the right to equality and non-discrimination constitute a reasonable and proportionate measure to achieve critical and future-proofing improvements in sustainability of the HELP scheme.

Schedule 3 - HELP loan limits

Schedule 3 of the Bill introduces a new, combined, and renewable limit on how much students can borrow under HELP to cover their tuition fees from 1 January 2020. The combined limit will be an indexed amount of the 2019 FEE-HELP limit set in **Schedule 2A** of the Bill.

By limiting borrowing to a maximum amount that is, firstly, sufficient to support almost nine years of full time study as a Commonwealth supported student and, secondly, can reasonably be repaid within a borrower's lifetime, this measure is consistent with fair and shared access to education.

The loan limit is indexed annually according to CPI, so that it keeps pace with inflation.

The combined loan limit is not retrospective for HECS-HELP loans. From 1 January 2019, all new HECS-HELP borrowing will count towards a student's loan limit. However, no previously incurred HECS-HELP debt will be taken into account. This means that these students' right to education will not be compromised by amounts they have previously borrowed through HECS-HELP while they were Commonwealth supported students.

As FEE-HELP, VET FEE-HELP or VET Student Loans debt were already subject to a limit, any debt already accrued by students under the existing FEE-HELP limit will be transferred onto the new HELP tuition limit for that student. Any new FEE-HELP, VET FEE-HELP or VET Student Loans borrowing will continue to count towards students' combined loan limit.

Right to education

The introduction of an amendment to make the lifetime limit a renewable loan limit enables interested students to pursue lifelong learning. It provides scope for individuals whose HELP debt repayments for an income year have replenished their HELP loan balance to re-borrow those funds.

This will enable them to pursue further study in order to retrain, change careers, or further specialise in their current profession – giving them lifelong access to education.

To the extent that this measure may limit the right to education, these measures are reasonable, necessary, and proportionate to the policy objective of ensuring access to tertiary education for those who cannot afford to pay their tuition upfront. Moreover, the measure could be seen to support and augment the right of access to education by establishing a fiscally responsible student loan scheme. It does not alter the general availability of tuition loan support for higher education and is justified in the context of available resources and the spirit of maximising educational access and inclusion.

Committee comment

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

- **whether there is reasoning or evidence that establishes that the stated objective addresses a pressing or substantial concern or whether the proposed changes are otherwise aimed at achieving a legitimate objective; and**
- **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 in the context of lifelong learning or a future need for retraining); and**
- **whether alternatives to the measure have been fully considered; and**
- **how the measure complies with Australia's obligation to use the maximum of its available resources to ensure higher education is accessible to all, on the basis of capacity, by every appropriate means, and by the progressive introduction of free education.**

The Government introduced a range of measures as part of the December 2017 Mid Year Economic and Fiscal Outlook to ensure the long term viability of Australia's higher education sector so that future students would be able to benefit from the generous loan scheme.

On 15 February 2018, the Senate referred the Bill to the Senate Education and Employment Legislation Committee for inquiry and report by 16 March 2018. In its majority report, the Senate Committee recommended that the Bill be passed. In doing so, the Committee further recommended that the Government consider amending Schedule 3 of the Bill to introduce a renewable limit on outstanding HELP debts, rather than a lifetime limit.

Under current legislation, Commonwealth supported places and HECS-HELP loans are not limited. In the interest of sustainability, a limit on borrowing will prevent these students from undertaking multiple courses over their lifetime at taxpayer expense with little likelihood of ever repaying their debt. Although a loan cap is unlikely to affect the majority of students, as at 30 June 2017, only around 0.5 per cent of all HELP debtors had a debt greater than $100,000, so the loan cap acts as a ceiling that will prevent individuals from exploiting the generosity of the HELP scheme by encouraging them to select their courses carefully.

Nevertheless, the Government adopted the recommendation of the Senate Committee and introduced an amendment to change the lifetime limit to a renewable loan limit. This measure will enable interested students to pursue lifelong learning. It will provide scope for individuals, whose HELP debt repayments for an income year have replenished their HELP loan balance, to re-borrow those funds. This will enable them to pursue further study in order to retrain, change careers, or further specialise in their current profession.

The objective of the proposed measures is to improve the sustainability of the HELP scheme while retaining sufficient flexibility for students in furtherance of the core value of promoting the enjoyment of the right to education. The Government believes that it is fair and justifiable by reference to the totality of rights provided for in the ICESCR and in the context of the full use of the government's maximum available resources, that those who benefit from access to higher education contribute towards the cost of the scheme, but also recognises that those who repay their debts should be able to access the loan scheme in the future. Providing for a renewable loan limit substantially addresses the concern of numerous stakeholders that the loan limit changes could result in inequities in access to higher education.

There is a strong need for the Government to improve the sustainability of the HELP scheme. The changes to the HELP loan scheme contained in the Bill in Schedules 2A and 3 will result in a cost of $0.9 million, in fiscal balance terms, over the forward estimates (2017-18 to 2020-2021). In underlying cash balance terms, the measures come at a cost of around $14.2 million over the forward estimates.[20]

The new HELP combined and renewable loan limits will contribute meaningfully to the sustainability of the HELP loan scheme, ensuring that future generations of students also benefit from access to both HELP and higher education more broadly. While the overall amount that students may borrow may have a new combined limit, students will continue to benefit from not having to pay upfront fees. The addition of renewability to the loan scheme also provides students with the lifelong capacity to study and defer tuition fees through loans as long as they have a viable HELP balance, which works both to prevent exploitation of the HELP scheme while permitting flexibility for students.

[20] Financial Impact Statement in the Revised Explanatory Memorandum of the Higher Education Support Legislation Amendment (Student Loan Sustainability) Bill 2018, 28 March 2018.

THE HON ANGUS TAYLOR MP
MINISTER FOR LAW ENFORCEMENT AND CYBER SECURITY

MS18-001465

Mr Ian Goodenough MP
Chair
Parliamentary Joint Committee on Human Rights
Parliament House
CANBERRA ACT 2600

Dear Mr ~~Goodenough~~ Ian

Thank you for your correspondence of 28 March 2018 in which further information was requested on the *Anti-Money Laundering and Counter- Terrorism Financing Amendment Instrument 2017 (No. 4)* and *Legislation (Deferral of Sunsetting- Australian Crime Commission Regulations) Certificate 2017.*

I have attached the response to the *Parliamentary Joint Committee on Human Rights' Report 3 of 2018* as requested in your letters.

Thank you for raising this matter.

Yours sincerely

ANGUS TAYLOR

Response to the Parliamentary Joint Committee on Human Rights – Legislation (Deferral of Sunsetting – Australian Crime Commission Regulations) Certificate 2017

Following the establishment of the Home Affairs portfolio, the Minister for Law Enforcement and Cyber Security, the Hon Angus Taylor MP, has policy and administrative responsibility for the *Australian Crime Commission Act 2002* and the Australian Crime Commission Regulations 2002.

Committee comment

1.201 The measure appears to engage and limit a range of human rights. The preceding analysis raises questions as to whether the measure is compatible with human rights.

1.202 The committee therefore seeks the advice of the Attorney-General as to:

- *the human rights engaged by subsections 8A(1) and (2) and schedules 3 and 4 of the ACC regulations;*
- *where these measures engage and limit human rights:*
    - *whether the measure is aimed at achieving a legitimate objective for the purposes of human rights law;*
    - *how the measures are effective to achieve (that is, rationally connected to) a legitimate objective; and*
    - *whether the limitations are reasonable and proportionate to achieve that objective; and*
- *whether it would be feasible to amend the ACC regulations, when remade, to require that any state powers conferred on the ACIC or its personnel which limit human rights will only be exercisable where accompanied by the conferral of the corresponding duties and safeguards in the relevant state law.*

I note the Committee's comments on the Legislation (Deferral of Sunsetting – Australian Crime Commission Regulations) Certificate 2017.

In re-making the Australian Crime Commission Regulations prior to the sunsetting date of 1 April 2019, I will develop a statement of human rights compatibility, which canvasses whether the identified measures engage and limit human rights, and whether these measures represent a reasonable and proportionate means of achieving a legitimate objective for the purposes of human rights law. As part of the re-making process, I will consider any necessary amendments to ensure the ACC Regulations remain fit-for-purpose and contain appropriate safeguards to protect human rights.

Committee comment

1.213 The measure engages and limits the right to privacy. The committee previously concluded, based on information provided by the then Minister for Justice, that there appear to be relevant safeguards in place that may assist to ensure that it is a proportionate limit on the right to privacy.

1.214 The committee requests an update from the Attorney-General regarding the preparation of an information handling protocol by the ACIC, and reiterates its request that a copy of this document be provided to the committee.

I note the Committee's comments on the Legislation (Deferral of Sunsetting – Australian Crime Commission Regulations) Certificate 2017.

In re-making the Australian Crime Commission Regulations prior to the sunsetting date of 1 April 2019, I will develop a statement of human rights compatibility, which canvasses how the identified measures engage and limit the right to privacy, and whether these measures represent a reasonable and proportionate means of achieving a legitimate objective for the purposes of human rights law.

As the Committee notes, the Attorney-General's Department, the Australian Crime Commission (ACC) and CrimTrac provided a joint submission to the Senate Legal and Constitutional Affairs Legislation Committee's *Inquiry into the Australian Crime Commission Amendment (National*

Policing Information) Bill 2015 and the Australian Crime Commission (National Policing Information Charges) Bill 2015 in February 2016. On 10 March 2016, the Committee published its final report which recommended that the Bills be passed and noted that:

> *the department and relevant agencies intend to develop and publish an information handling protocol in consultation with the OAIC to address in more detail the information handling procedures and protections that would apply, and the assurance provided that the principles in this document would be consistent with the Australian Privacy Principles.*

The Australian Criminal Intelligence Commission (ACIC) has advised that the development of an information handling protocol is well advanced and consultation will occur with the Office of the Australian Information Commissioner shortly.

The finalisation of this protocol has been delayed due to the need to address the implications of two major changes in administrative arrangements affecting the ACIC. First, as a merged agency, the ACIC has faced significant legal issues in seeking to amalgamate and consolidate the functions and services formerly provided by the ACC and CrimTrac. These issues particularly concern the handling of information. Secondly, the establishment of the Home Affairs portfolio has raised additional legal and policy issues that need to be taken into account in developing the protocol.

Committee comment

1.219 The measure engages and limits the right to privacy. The preceding analysis raises questions as to whether the measure is compatible with that right.

1.220 The committee requests the Attorney-General's advice as to:

- *whether the measure is aimed at achieving a legitimate objective for the purposes of human rights law;*
- *how the measure is effective to achieve (that is, rationally connected to) a legitimate objective; and*
- *whether the limitations are reasonable and proportionate to achieve that objective.*

I note the Committee's comments on the Legislation (Deferral of Sunsetting – Australian Crime Commission Regulations) Certificate 2017.

In re-making the Australian Crime Commission Regulations prior to the sunsetting date of 1 April 2019, I will develop a statement of human rights compatibility, which canvasses how the identified measures engage and limit the right to privacy, and whether these measures represent a reasonable and proportionate means of achieving a legitimate objective for the purposes of human rights law.

The Hon Greg Hunt MP
Minister for Health

Ref No: MC18-002695

26 FEB 2018

Mr Ian Goodenough MP
Chair
Parliamentary Joint Committee on Human Rights
Parliament House
CANBERRA ACT 2600

Dear Chair Ian

I refer to your letter of 7 February 2018 in which you sought my advice in relation to the *My Health Records (National Application) Rules 2017* (the Rules).

In Report 1 of 2018, the Committee questioned whether the opt-out arrangements for the My Health Record system, implemented by the Rules, are a permissible limitation on the right to privacy. In particular, the Committee questioned the automatic inclusion of health information, and the retention of information regarding cancelled My Health Records, and sought advice regarding the nature of communications with the public and their adequacy in respect of children and persons with a disability.

The My Health Record system is an electronic summary of a consumer's key health information which consumers can share with their health care providers. It will deliver health benefits to consumers by improving the quality of health care they receive, and deliver direct economic benefits to the health system, making the health system more sustainable.

Having a My Health Record is likely to improve health outcomes, making getting the right treatment faster, safer, easier and more cost-effective:

- faster – because doctors and nurses and other health care providers will not have to spend time searching for past treatment information;
- safer – because authorised health care providers can view an individual's important health care information, including any allergies and vaccinations and the treatment the individual has received;
- easier – because consumers will not have to remember the results of tests they have had, or all the medications they have been prescribed; and
- more cost-effective – because health care providers won't have to order duplicate tests – for example, when an individual visits a different GP whilst on holidays. The time necessary to provide treatment may also be reduced as an individual's health information will be available in one place. As a result, the cost of treatment may be reduced, freeing up funds for improving health outcomes in other areas.

Everyone can benefit from having a My Health Record, not just people with chronic or complex conditions. For example, if a person becomes sick while on holiday, the GP that treats them will be able to look at their My Health Record to see if there is any information relevant to their condition, such as previous medications they have been prescribed or the results of a recent blood test. Another example is if a person has an accident and arrives at hospital unconscious, their emergency doctor can check their My Health Record to find out if they have any allergies or conditions that should inform treatment.

In November 2013, the then Minister for Health commissioned a review of the system[1] which confirmed some key issues that needed to be resolved so consumers and health care providers would be more likely to use the system. Among other things, the number of people with a My Health Record (then known as a personally controlled electronic health record) was too small to warrant health care providers learning how to use it or checking it for updated information. Feedback from health care providers was that they would be more inclined to use it if all of their patients had one, and feedback from the Consumers Health Forum was that the system would be more successful if it were opt-out. The review subsequently recommended the system transition to opt-out participation arrangements.

In 2016, the Australian Government chose to undertake trials of My Health Record participation arrangements – an opt-out model was trialled in Northern Queensland and Nepean Blue Mountains, and innovative opt-in models were trialled in the Ballarat Hospital, Victoria, and several private general practices in Perth, Western Australia.

The independent evaluation of these trials found 'overwhelming and almost unanimous support' by both consumers and health care providers for opt-out arrangements. For consumers, opt-out affords them the benefits of having a My Health Record without taking any action, while for health care providers, opt-out ensures the majority of their patients have a My Health Record without the administrative burden of explaining it and assisting patients to register. The opt-out trial sites recorded a significant increase in health information being uploaded and viewed by health care providers, well above that experienced in the rest of Australia, proving health care providers actively engaged with the system where the majority of their patients have a My Health Record. The trials evaluation recommended the opt-out model be implemented nationally.

While the growth rate of My Health Records and their content has continued to increase[2], the proportion of consumers with a My Health Record still provides little incentive to health care providers to use the system.

In 2017, the Government agreed to implement opt-out because it allows the My Health Record system to deliver health benefits to all Australians at least nine years sooner that opt-in options. In considering participation models, opt-in models offered limited benefits realisation, higher cost in some cases (as a result of consumer engagement), and the models did not effectively engage health care providers other than GPs or effectively leverage Government investment.

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[1] *Review of the Personally Controlled Electronic Health Record*, December 2013

[2] As of 28 January 2018, 5,513,545 consumers have a My Health Record and 20,670,631 clinical and pharmaceutical records are available.

The Government has committed $27.75 million to ensure all Australians are aware of the My Health Record and their right to opt-out during the three month opt-out period, and $52.38 million to supporting education and training.

Lessons learned from the opt-out trials of 2016 have informed the planning of communications, and the comprehensive communications strategy that has been developed for the implementation of opt-out will see information in every general practice in Australia.

It will also reach out to consumers through other health and non-health channels. It will include national and local partnerships with Medicare, Primary Health Networks, corporate, peak and consumer organisations, as well as through direct Australian Digital Health Agency activities. In partnership with these organisations, we will reach Australians through a range of channels including, traditional and social media, public relations, and events.

The comprehensive strategy ensures hard-to-reach audiences have been considered, such as people with communication difficulties, and will receive enhanced support should they choose to opt-out. This will ensure all Australians are informed about the opt-out process and specifically how to access the opt-out portal.

Communication activities over the opt-out period will include thousands of face-to-face briefings at community events around the country, distribution of collateral through consumer peak organisations, and the provision of information at the point of care and other community places such as doctors' surgeries, hospitals, libraries and post offices.

A consumer will be able to opt-out by going online to the opt-out portal, or by calling the helpline on 1800 723 471 (free call). These channels will become available when the opt-out period commences.[3] A consumer will simply need to identify themselves and, if applicable, their children or dependents in order to opt-out.

If a consumer chooses not to opt-out, a My Health Record will be created for them and they will be able to exercise their rights to control how their information is collected, used and disclosed. They will be able to:

- set access controls restricting access to their My Health Record entirely or restricting access to certain information in their My Health Record – for example, they can set an access code so that a health care provider organisation can only access the My Health Record if they have been given this code;
- request that their health care provider not upload certain information or documents to their My Health Record, in which case the health care provider will be required not to upload that information or those documents;
- request that their Medicare data not be included in their My Health Record, in which case the Chief Executive Medicare will be required to not make the data available to the System Operator;
- monitor activity in relation to their My Health Record using the audit log or via electronic messages alerting them that someone has accessed their My Health Record;
- effectively remove documents from their My Health Record;
- make a complaint if they consider there has been a breach of privacy; and
- cancel their My Health Record.

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[3]This date will be specified by the Minister through a notifiable instrument that will be published on the Federal Register of Legislation.

Consumers can set these access controls online or over the telephone.

If a consumer decides that they no longer want a My Health Record, they can choose to cancel their record at any time. This can be done online via the consumer portal, by calling the helpline on 1800 723 471(free call), or by visiting a Department of Human Services Medicare service centre.

The My Health Record system provides special arrangements to support children and vulnerable people to participate in the system by allowing authorised representatives to act on their behalf and protect their rights. Authorised representatives can control access to the consumer's My Health Record and, in an opt-out setting, opt them out. The consumer can also nominate other people, such as family members or friends, to be their nominated representative to help the consumer manage their My Health Record.

In an opt-out setting, health information will not automatically be uploaded to a My Health Record. When a My Health Record is created, the only information that may be included is information held by Medicare, specifically two years' of Medicare and Pharmaceutical Benefits claiming information, Australian Organ Donation Register information and Australian Immunisation Register information. A consumer can choose not to include this information.

Health care providers are likely to only include information in the consumer's My Health Record when the consumer has an interaction with the health system. As such, consumers who are healthy and rarely interact with the health system will have little, if any, health information in their My Health Record.

If a consumer decides to cancel their My Health Record, the System Operator (i.e. the Australian Digital Health Agency), is required by law to store certain information until 30 years after the consumer dies; however, the information is not generally available to any entity other than in specific circumstances, such as to lessen or prevent a serious threat to public safety. The requirement to retain information was implemented to:

- ensure there is capacity to store a minimum critical set of health information about consumers, thus providing long-term efficacy for the purposes of health care delivery – this is critical since the system operates on the basis of distributed public and private repositories that are subject to differing jurisdictional laws;
- provide that, if a consumer changes their mind and decides to get a My Health Record, the information that existed before they cancelled it will be available to them;
- provide a source of information that, in a de-identified form, can be used to inform and improve health services;
- provide for medico-legal needs, such as if a clinical decision is made on the basis of My Health Record information and the decision is being legally challenged; and
- reflect Commonwealth record-keeping requirements.

I trust that this additional information will be sufficient to address the Committee's comments.

Yours sincerely

Greg Hunt

The Hon Dan Tehan MP
Minister for Social Services

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MC18-002445

19 APR 2018

Mr Ian Goodenough MP
Chair
Parliamentary Joint Committee on Human Rights
PO BOX 6100
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Dear Mr Goodenough

Thank you for your letter of 28 March 2018 regarding the Committee's Human Rights Scrutiny Report No. 3 of 2018, which requested information in relation to the Social Services Legislation Amendment (Encouraging Self-sufficiency for Newly Arrived Migrants) Bill 2018.

Please find enclosed a response to the Committee in relation to each of the issues identified.

Thank you for raising these matters and allowing us to provide additional information.

Yours sincerely

DAN TEHAN
Encl.

Response to the Parliamentary Joint Committee on Human Rights

Human rights scrutiny report – Report 3 of 2018

Social Services Legislation Amendment (Encouraging Self-sufficiency for Newly Arrived Migrants) Bill 2018

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

Committee comment

1.249 The preceding analysis raises questions as to the compatibility of the measure with the right to social security and the right to an adequate standard of living.

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

- **whether there is reasoning or evidence that establishes that the stated objective addresses a pressing or substantial concern in the specific circumstances of the proposed legislation;**
- **how the measure is effective to achieve (that is, rationally connected to) that objective;**
- **whether the limitation is a reasonable and proportionate measure to achieve its stated objective (including the extent of the reduction in access to social security payments; what level of support Special Benefit payments provide; and whether the measure is the least rights restrictive approach); and**
- **whether alternatives to reducing access to social security, in the context of Australia's use of its maximum available resources, have been fully considered.**

Response

The primary purpose of Australia's welfare payments system is to provide financial support for individuals and families who are unable to fully support themselves. The welfare payments system is targeted to ensure that payments are directed to those most in need and that those who are able to support themselves are encouraged to do so.

The Newly Arrived Resident's Waiting Period (NARWP) is a longstanding part of Australia's welfare payments system. It is designed to ensure that new migrants seeking to settle permanently in Australia make plans for their own support during their initial settlement period.

The NARWP applies primarily to new migrants settling in Australia under the skilled and family streams of Australia's migration program – those who are well placed to support themselves and their families, through existing resources, work or support from family already in Australia.

This is reflected in the eligibility criteria for permanent residency through the skilled and family visa streams of the migration program:

- The skilled visa stream provides a pathway for skilled overseas workers with skills needed in Australia to settle permanently in Australia with the expectation that they will support themselves and their families through work.
- The family visa stream provides a pathway for existing Australian citizens and permanent residents to bring family members to Australia with the expectation that they will support those family members.

It is important that Australia's welfare payments systems remains sustainable into the future and continues to provide the best possible encouragement for people to support themselves where they are able. This includes migrants settling permanently in this country.

Returning the Budget to balance by living within our means remains a key element of the Government's economic plan.[1] To achieve the Government's fiscal strategy, including a return to surplus in 2020-21, fiscally responsible decisions are required to keep spending under control.

In 2016-17, Australia's expenditure on welfare payments to individuals (including social security payments, family assistance payments and paid parental leave payments) was $109.5 billion,[2] representing around a quarter of the overall Commonwealth Budget.

Given the substantial expenditure associated with the welfare payments system, maintaining the ongoing sustainability of the system is critical to the Government's fiscal strategy. The *Encouraging Self Sufficiency for Newly Arrived Migrants* measure announced in the 2017-18 Mid-Year Economic and Fiscal Outlook (MYEFO) contributes to achieving this fiscal outcome.

The measure is estimated to improve the Budget bottom line by around $1.3 billion over the four years from 2017-18. There will continue to be savings beyond the forward estimates period, contributing to the ongoing sustainability of the welfare payments system.

The measure will increase the existing NARWP from two to three years and will apply the waiting period more consistently across the welfare payments system. The measure will apply primarily to migrants granted a permanent skilled or family visa – migrants who are more likely to be in a position to support themselves and their families during this initial period.

In addition, the measure will apply to people granted a relevant visa on or after commencement, intended to be 1 July 2018. This is designed to provide individuals and families seeking to migrate to Australia time to be aware of the new rules so that they can make an informed decision when applying for or accepting a permanent visa and make plans to support themselves during the waiting period. Migrants already granted permanent residency before 1 July 2018 will not be affected by this measure. This means that no one who is already serving a NARWP will have their NARWP extended. Similarly, those who have previously served any applicable NARWP and are already eligible for or receiving payments will not have a further NARWP applied or lose any entitlements they are already receiving.

Australia accepts around 183,000 permanent migrants each year under the skilled and family visa streams. The majority of these are able to support themselves and their families and do not seek to access welfare payment during their first three years in Australia.

A 2016 Productivity Commission report[3] noted that permanent non humanitarian migrants who arrived between 2000 and 2011 and would have been subject to a two year waiting period (unless exempt) had lower take-up rates of income support in 2011 than the general population. In particular, only three per cent of permanent skilled migrants and 13 per cent of family migrants who arrived between 2000 and 2011 were receiving any form of income support in 2011, compared to 17 per cent for the general population. This research indicates that most new migrants who have come under the skilled and family migration program since the introduction of the two year waiting period have been able to support themselves without needing to rely on income support, both during and following their waiting period. This is consistent with the intention of the waiting period to encourage self-sufficiency for migrants coming to Australia.

The impact of this measure will only be felt by those migrants who would have otherwise sought and received certain payments during this period. It is estimated that when the measure is fully implemented in 2020-21 around 50,000 families will be serving a waiting period for Family Tax Benefit Part A and around 30,000 will be serving a waiting period for other payments. These figures

[1] MYEFO 2017-18, pg. 8: budget.gov.au/2017-18/content/myefo/html/.
[2] DSS Annual Report 2016-17, pg. 110: www.dss.gov.au/publications-articles/corporate-publications/annual-reports/dss-annual-report-2016-17.
[3] Productivity Commission, *Migrant Intake Report*, 2016: www.pc.gov.au/inquiries/completed/migrant-intake/report

may encompass the same individuals as these payments are not mutually exclusive. The overall financial impact on affected individuals and families will depend on their circumstances and the payments they would otherwise have received.

Importantly, there is a comprehensive range of exemptions which ensure that a safety net continues to be available to those who find themselves in need. Some exemptions apply to all payments, while others apply to specific payments based on the nature of the payment.

Permanent humanitarian migrants and their family members will continue to be exempt from the NARWP for all payments, including social security payments, family assistance payments and parental leave payments. Temporary humanitarian-type visa holders will be exempt from the NARWP for Special Benefit, the Low Income Health Care Card, Family Tax Benefit, Parental Leave Payment and Dad and Partner Pay.[4]

These exemptions recognise that refugees and their family members are often particularly vulnerable and are not usually in a position to make plans for their own support prior to applying for a humanitarian visa.

People who become a lone parent after becoming an Australian resident are exempt from the NARWP for Parenting Payment, Newstart Allowance, Youth Allowance and Farm Household Allowance. This exemption ensures that parents, often mothers, who no longer have the support of a partner can still access financial support for themselves and their children.

Migrants who experience a substantial change of circumstances and are in financial hardship will be exempt from the NARWP for Special Benefit which is delivered through the Department of Human Services. Special Benefit is a payment of last resort that provides support for people in financial hardship who are unable to obtain or earn a sufficient livelihood for themselves and any dependants and who are not eligible for any other income support payment.

Special Benefit provides a basic level of support, usually equal to Newstart Allowance (or Youth Allowance if the person is aged under 22 years).[5] Supplementary payments such as Rent Assistance, may also be paid in addition to these basic rates. Recipients of Special Benefit are also entitled to an automatic Health Care Card or Pensioner Concession Card, depending on their circumstances.

The exemption from the NARWP for Special Benefit provides a safety net for those who find themselves in hardship with no other means of support for reasons beyond their control. Situations which constitute a substantial change of circumstances for the purposes of this exemption include:

- experiencing domestic violence
- losing a job organised prior to coming to Australia
- suffering a prolonged injury or illness and being unable to work
- having to care for a dependent child who develops a severe medical condition, disability or injury, or
- being left with no other means of support after their sponsor or partner dies, becomes a missing person or is imprisoned.

This exemption recognises that migrants who have made plans to support themselves when they arrive in Australia may experience a change of circumstances that prevents them from realising those plans.

[4] These temporary visa holders only have access to these payments and concession cards.

[5] The current rates of Newstart Allowance are $545.80 per fortnight for a single person without children, $590.40 per fortnight for a single person with children and $492.80 per fortnight for a partnered person.

There are a number of new exemptions being introduced through this Bill in relation to the new payments that will be subject to a NARWP for the first time. This includes exemptions designed to ensure the new NARWP operates coherently with the existing exemptions outlined above:

- People with a Family Tax Benefit eligible child will be exempt from the NARWP for the Low-Income Health Care Card. These families would previously have qualified for a Health Care Card as part of their Family Tax Benefit. The exemption ensures that they can still receive a concession card where eligible and access associated health concessions, including discounted items under the Pharmaceutical Benefits Scheme.
- People who are receiving a social security pension or benefit or Farm Household Allowance (for example, because they are exempt from the NARWP for that payment) will also be exempt from the NARWP for family payments and Carer Allowance. This will ensure that exemptions operate consistently across welfare payments and those exempt can access both primary income support payments and supplementary assistance for dependent children and/or caring responsibilities where eligible.

Finally, New Zealand citizens on a Special Category Visa will be exempt from the NARWP for Family Tax Benefit, Parental Leave Pay and Dad and Partner Pay. This exemption only applies for certain payments as Special Category Visa holders are generally not eligible for other payments. This exemption ensures that New Zealand citizens in Australia will continue to access the same benefits in recognition of the particular Trans-Tasman arrangements between Australia and New Zealand. Special Category Visa holders who later move to a permanent visa will continue to be eligible for this exemption, ensuring they can continue to receive these payments while serving the NARWP for other payments.

The above exemptions ensure that this measure strikes a balance between promoting self-reliance for migrants and providing appropriate safeguards for those in vulnerable circumstances.

This measure is designed to achieve the dual objectives of:

- encouraging new migrants to make plans to support themselves and their families during their initial settlement period, and
- reducing the burden placed on Australia's welfare payments system and improving the long-term sustainability of the system.

This measure is the least restrictive approach to achieving both these objectives. Residency waiting periods are an existing and longstanding element of the welfare payments system. This measure does not introduce new principles or settings to the welfare payments system, rather it applies the existing principles and settings consistently across payment types. It also ensures the current comprehensive range of exemptions and safeguards are maintained and extended.

As noted above, these objectives reflect the Government's ongoing fiscal strategy to balance the Budget and ensure continued economic growth. The Government considers a range of options for achieving its fiscal strategy in the policy development process.

To the extent that this measure places any limitation on the rights to social security and an adequate standard of living, this limitation is reasonable and proportionate in the context of achieving these fiscal objectives that benefit the nation, while ensuring a safety net is available for the most vulnerable.

In addition, permanent migrants will still have access to broader Government-funded services to support their integration and wellbeing, including health care and education services. Access to child care services will also be available for those who work or study and have children.

Compatibility of the measure with the right to maternity leave

Committee comment

1.260 The preceding analysis raises questions as to the compatibility of the measure with the right to paid parental leave.

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

- **whether there is reasoning or evidence that establishes that the stated objective addresses a pressing or substantial concern in the specific circumstances of the proposed legislation;**
- **how the measure is effective to achieve (that is, rationally connected to) that objective;**
- **whether the limitation is a reasonable and proportionate measure to achieve its stated objective (including the extent of the reduction in access to parental leave payments; the existence of relevant safeguards; and whether the measure is the least rights restrictive approach); and**
- **whether alternatives to reducing access to paid parental leave, in the context of Australia's use of its maximum available resources, have been fully considered.**

Response

The *Paid Parental Leave Act 2010* provides for the Paid Parental Leave scheme, comprised of Parental Leave Pay and Dad and Partner Pay, which complements the entitlement to unpaid leave under the National Employment Standards in the *Fair Work Act 2009*.

The Government remains committed to assisting parents to balance their work and family responsibilities through a range of programs and payments. However, this must be balanced with the responsibility to ensure family assistance and social security payments are well targeted and sustainable into the future.

Waiting periods for new migrants already exist for a number of welfare payments, including Parenting Payment. These waiting periods reflect the expectation that new permanent residents should be able to support themselves. Introducing a consistent waiting period for Parental Leave Pay and Dad and Partner Pay is consistent with the existing principle of self-reliance for new migrants.

The changes detailed in this Bill do not interfere with the existing rights and protections under the *Fair Work Act 2009*, including access to 12 months of unpaid parental leave without loss of employment or seniority within the workplace. The changes also do not limit parents' ability to access employer-provided leave following the birth or adoption of a child. In addition, parents who do return to work or study or other approved activities and are using approved child care will continue to have access to child care subsidies.

The majority of newly arrived migrants in scope for this measure are expected to be able to provide for themselves and their family members during the NARWP, as they are settling in Australia through the skilled and family streams of the migration program. These migrants are well placed to support themselves through work, existing resources or family support. Most are also expected to be able to make informed decisions about growing their families within the settlement period.

This measure does not affect humanitarian migrants and their family members, acknowledging these people are often particularly vulnerable and may have less capacity to plan for their own support prior to coming to Australia.

The Government is ensuring that appropriate information is available to prospective migrants prior to the new rules commencing to ensure they are aware of the changes and can make informed decisions about whether to apply for or accept a permanent visa.

The measure was publically announced in December 2017 as part of the 2017-18 MYEFO. Following announcement of the measure, a brief summary of the upcoming changes and a fact sheet was

published on the Department of Social Services (DSS) website at www.dss.gov.au/living-in-australia-and-overseas/upcoming-changes. Information has also been included on other departmental websites, directing people to the DSS website for further information. More detailed information will be provided across a broader range of channels, including through migration agents, pending passage of the legislation, to ensure that existing visa applicants and prospective applicants will be able to access information on the new rules that will apply to them. This will allow them to make informed decisions and plans for how they will support themselves during their waiting period.

Transitional arrangements are also being provided to support those who may already be pregnant and have planned leave arrangements so they are not disadvantaged. Under these arrangements, people granted a permanent or eligible temporary visa on or after 1 July 2018 will still be able to access Parental Leave Pay and Dad and Partner Pay if they have a newborn or adopt a child between 1 July 2018 and 31 December 2018 (inclusive) and they are otherwise qualified for the payment (including meeting the work test and income test).

In addition, as outlined above, there are a number of key exemptions to the NARWP for Parental Leave Pay and Dad and Partner Pay for families with children who experience a change of circumstances and are unable to support themselves as originally planned, including those who become a lone parent after arrival and no longer have the support of their partner, and those in financial hardship.

Targeting expenditure remains an essential part of balancing the distribution of available resources with the most effective measures for addressing barriers and creating opportunity. Residency waiting periods already play a fundamental role in targeting immediate access to social security payments. This measure will strengthen the existing waiting periods by applying consistent rules across welfare payments types, including social security and family payments, ensuring that migrants support themselves and their families for a reasonable period before becoming eligible for taxpayer-funded parental leave or other payments.

As highlighted in the response above, ensuring that the welfare payments system, including the Paid Parental Leave Scheme, is targeted and sustainable over the long-term is a key part of the Government's commitment to fiscal responsibility and a balanced Budget.

To the extent that this measure places any limitation on the right to maternity leave, this limitation is reasonable and proportionate in the context of encouraging self-reliance by new migrants and maintaining the ongoing sustainability of the Paid Parental Leave Scheme and the welfare payments system more broadly. The measure provides for a safety net for the most vulnerable through a comprehensive range of exemptions and transitional arrangements; and does not affect other non-Government parental leave which will continue to be available.

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

Committee comment

1.266 The preceding analysis raises questions as to the compatibility of the measure with the right to equality and non-discrimination.

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

- **whether there is reasoning or evidence that establishes that the stated objective addresses a pressing or substantial concern in the specific circumstances of the proposed legislation;**
- **how the measure is effective to achieve (that is, rationally connected to) that objective;**
- **whether the limitation is a reasonable and proportionate measure to achieve its stated objective (including whether it is based on reasonable and objective criteria; the extent of the reduction in access to parental leave payments; the existence of relevant safeguards; and whether the measure is the least rights restrictive approach); and**

- **whether alternatives to reducing access to paid parental leave, in the context of Australia's use of its maximum available resources, have been fully considered.**

Response

This measure will extend the existing NARWP to new payment types, ensuring that the rules governing access to taxpayer-funded payments are consistent across the welfare payments system.

The new payments types that will be subject to the NARWP under this measure – the Paid Parental Leave Scheme, Family Tax Benefit and Carer Allowance – are not targeted specifically to women. However, it is acknowledged that women are more likely to access these payments as they often bear the majority of caring responsibilities for children and/or family members with a disability. As a result, women are more likely to have a NARWP applied in relation to these payments.

However, while the range of exemptions from the NARWP are not specifically targeted to women, some circumstances that attract an exemption for income support payments – for example, becoming a single parent or experiencing a change in circumstances such as domestic violence – are most likely to be experienced by women.

These exemptions ensure that migrants in these circumstances, particularly migrant women, can still access financial support through payments, such as Parenting Payment or Special Benefit, where eligible. Those who granted one of these payments under an exemption will also be exempt from the NARWP for the Paid Parental Leave Scheme, Family Tax Benefit and Carer Allowance. This ensures that migrants in these circumstances who have dependent children or caring responsibilities for a person with disability can also access additional support where eligible. For example, a woman granted Special Benefit because she is in hardship due to a change in circumstances would also be able to receive Family Tax Benefit for any eligible children and would also be able to transfer to Parental Leave Pay if she has a new baby and meets all the requirements.

The comprehensive range of exemptions and safeguards ensure migrants, particularly migrant women, retain access to payments, including Paid Parental Leave payments, where they find themselves in hardship. Given these exemptions, this measure is the least restrictive way of applying consistent rules and expectations for new migrants in order to improve the sustainability of the welfare payments system, both in the short and longer term.

This measure supports the Government's ongoing fiscal strategy to balance the Budget and ensure continued economic growth. To the extent that this measure places any limitation on the rights to equality and non-discrimination, this limitation is reasonable and proportionate in the context of achieving these fiscal objectives, while continuing to provide a safety net, particularly for vulnerable women.

Minister for Revenue and Financial Services
Minister for Women
Minister Assisting the Prime Minister for the Public Service
The Hon Kelly O'Dwyer MP

Mr Ian Goodenough MP
Chair
Parliamentary Joint Committee on Human Rights
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Parliament House
CANBERRA ACT 2600

Dear Mr Goodenough Ian

The Treasurer has asked me to respond to the Parliamentary Joint Committee on Human Rights (the Committee) request dated 28 March 2018, to *Report 3 of 2018* which seeks further advice on the human rights compatibility of the following legislation:

Treasury Laws Amendment (Black Economy Taskforce Measures No. 1) Bill 2018

As noted by the Committee in its Report, Schedule 1 to the Treasury Laws Amendment (Black Economy Taskforce Measures No. 1) Bill (the Bill) introduces offence provisions in relation to the production or supply of electronic sales suppression tools and the acquisition, possession or control of such tools where the person is required to keep or make records under an Australian taxation law. A person will also commit an offence where they have incorrectly kept records using electronic sales suppression tools. Each of these offences are offences of strict liability.

The Committee has sought advice about the following:

- whether the strict liability offences are aimed at achieving a legitimate objective for the purposes of human rights law;
- how this measure is effective to achieve that objective; and
- whether the limitation on the right to be presumed innocent is proportionate to achieve the stated objective.

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Achieving a legitimate objective for the purposes of human rights law

Schedule 1 to the Bill operates to prohibit the production, distribution and possession of sales suppression tools in relation to entities that have Australian tax obligations. The object of Schedule 1 to the Bill is to deter the production, use and distribution of tools to manipulate or falsify electronic point of sale records to facilitate tax evasion.

This is a legitimate objective for the purposes of human rights law because electronic sales suppression tools serve no legitimate function. They are specifically designed to understate income and assist in avoiding tax obligations. Such behaviour undermines the integrity of the tax system.

Whether the measures are effective to achieve that objective?

The measures contained in Schedule 1 to the Bill introduce strict liability offences. These offences will be effective in achieving the objective of prohibiting the production, distribution and possession of sales suppression tools.

Applying strict liability to these offences is appropriate because it substantially improves the effectiveness of the prohibition on electronic sales suppression tools. The provision has a rational connection to the objective as it will act as a significant and real deterrent to those entities who seek to profit by facilitating tax evasion and fraud through the tools' production and supply. Because an electronic sales suppression tool's principal function is, by definition, to facilitate tax evasion, there are no reasons for an entity to produce or supply such a tool beyond those covered by the applicable defences. The ability to prosecute people who facilitate the fraud earlier in the supply chain will significantly reduce the instances of fraud at the user level.

The maximum penalty for these offences exceeds the upper threshold for penalties specified in the *Guide to Framing Commonwealth Offences*. The amount of the penalty is justified on the basis that the offence relates to systematic fraud and tax evasion. The amount of the penalties are comparable to the penalties that currently apply to existing offences for promoting tax exploitation schemes under Division 290 of Schedule 1 to the TAA 1953 and in respect of breaches of directors' duties under the *Corporations Act 2001*.

Whether the limitation on the right to be presumed innocent is proportionate to achieve the stated objective?

The Committee states in its Report that Schedule 1 to the Bill engages and limits the right to the presumption of innocence by imposing strict liability offences.

I believe that Schedule 1 to the Bill does not engage or limit the right to the presumption of innocence. A strict liability offence removes the requirement for a fault element to be proven before a person can be found guilty of an offence. However the prosecution must still prove all of the physical elements to the offence before a court will impose any criminal liability.

The strict liability offences in Schedule 1 to the Bill are considered appropriate and proportionate in the context of tax evasion and fraud because an electronic sales suppression tool's principal function is, by definition, to facilitate tax evasion and fraud.

There are no reasons for an entity to produce or supply such a tool beyond those covered by the applicable defences.

Schedule 1 to the Bill provide offence-specific defences as safeguards to ensure that entities who undertake certain conduct in relation to an electronic sales suppression tool are protected from committing an offence where their conduct is undertaken to prevent or deter tax evasion, or to enforce a taxation law. These defences operate in conjunction with the general defences for honest and reasonable mistakes.

I appreciate the Committee's consideration of this Bill, and I trust this information will be of assistance to the Committee.

Yours sincerely

Kelly O'Dwyer

Appendix 4

Guidance Note 1 and Guidance Note 2

PARLIAMENTARY JOINT COMMITTEE ON HUMAN RIGHTS

GUIDANCE NOTE 1: Drafting statements of compatibility

December 2014

This note sets out the committee's approach to human rights assessments and its requirements for statements of compatibility. It is designed to assist legislation proponents in the preparation of statements of compatibility.

Background

Australia's human rights obligations

Human rights are defined in the *Human Rights (Parliamentary Scrutiny) Act 2011* as the rights and freedoms contained in the seven core human rights treaties to which Australia is a party. These treaties are:

- International Covenant on Civil and Political Rights
- International Covenant on Economic, Social and Cultural Rights
- International Convention on the Elimination of All Forms of Racial Discrimination
- Convention on the Elimination of All Forms of Discrimination against Women
- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
- Convention on the Rights of the Child
- Convention on the Rights of Persons with Disabilities

Australia has voluntarily accepted obligations under these seven core UN human rights treaties. Under international law it is the state that has an obligation to ensure that all persons enjoy human rights. Australia's obligations under international human rights law are threefold:

- **to respect** – requiring government not to interfere with or limit human rights;
- **to protect** – requiring government to take measures to prevent others (for example individuals or corporations) from interfering with human rights;
- **to fulfil** – requiring government to take positive measures to fully realise human rights.

Where a person's rights have been breached, there is an obligation to ensure accessible and effective remedies are available to that person.

Australia's human rights obligations apply to all people subject to Australia's jurisdiction, regardless of whether they are Australian citizens. This means Australia owes human rights obligations to everyone in Australia, as well as to persons outside Australia where Australia is exercising effective control over them, or they are otherwise under Australia’s jurisdiction.

The treaties confer rights on individuals and groups of individuals and not companies or other incorporated bodies.

Civil and political rights

Australia is under an obligation to respect, protect and fulfil its obligations in relation to all civil and political rights. It is generally accepted that most civil and political rights are capable of immediate realisation.

Economic, social and cultural rights

Australia is also under an obligation to respect, protect and fulfil economic, social and cultural rights. However, there is some flexibility allowed in the implementation of these rights. This is the obligation of progressive realisation, which recognises that the full realisation of economic, social and cultural rights may be achieved progressively. Nevertheless, there are some obligations in relation to economic, social and cultural rights which have immediate effect. These include the obligation to ensure that people enjoy economic, social and cultural rights without discrimination.

Limiting a human right

It is a general principle of international human rights law that the rights protected by the human rights treaties are to be interpreted generously and limitations narrowly. Nevertheless, international human rights law recognises that reasonable limits may be placed on most rights and freedoms – there are very few absolute rights which can never be legitimately limited.[1] For all other rights, rights may be limited as long as the limitation meets certain standards. In general, any measure that limits a human right has to comply with the following criteria (*The limitation criteria*) in order for the limitation to be considered justifiable.

Prescribed by law

Any limitation on a right must have a clear legal basis. This requires not only that the measure limiting the right be set out in legislation (or be permitted under an established rule of the common law); it must also be accessible and precise enough so that people know the legal consequences of their actions or the circumstances under which authorities may restrict the exercise of their rights.

Legitimate objective

Any limitation on a right must be shown to be necessary in pursuit of a legitimate objective. To demonstrate that a limitation is permissible, proponents of legislation must provide reasoned and evidence-based explanations of the legitimate objective being pursued. To be capable of justifying a proposed limitation on human rights, a legitimate objective must address a pressing or substantial concern, and not simply seek an outcome regarded as desirable or convenient. In addition, there are a number of rights that may only be limited for a number of prescribed purposes.[2]

Rational connection

It must also be demonstrated that any limitation on a right has a rational connection to the objective to be achieved. To demonstrate that a limitation is permissible, proponents of legislation must provide reasoned and evidence-based explanations as to how the measures are likely to be effective in achieving the objective being sought.

Proportionality

To demonstrate that a limitation is permissible, the limitation must be proportionate to the objective being sought. In considering whether a limitation on a right might be proportionate, key factors include:

- whether there are other less restrictive ways to achieve the same aim;
- whether there are effective safeguards or controls over the measures, including the possibility of monitoring and access to review;

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1 Absolute rights are: the right not to be subjected to torture, cruel, inhuman or degrading treatment; the right not to be subjected to slavery; the right not to be imprisoned for inability to fulfil a contract; the right not to be subject to retrospective criminal laws; the right to recognition as a person before the law.

2 For example, the right to association. For more detailed information on individual rights see Parliamentary Joint Committee on Human Rights, Guide to Human Rights (March 2014), available at http://www.aph.gov.au/~/media/Committees/Joint/PJCHR/Guide%20to%20Human%20Rights.pdf.

- the extent of any interference with human rights – the greater the interference the less likely it is to be considered proportionate;
- whether affected groups are particularly vulnerable; and
- whether the measure provides sufficient flexibility to treat different cases differently or whether it imposes a blanket policy without regard to the merits of an individual case.

Retrogressive measures

In respect of economic, social and cultural rights, as there is a duty to realise rights progressively there is also a corresponding duty to refrain from taking retrogressive measures. This means that the state cannot unjustifiably take deliberate steps backwards which negatively affect the enjoyment of economic, social and cultural rights. In assessing whether a retrogressive measure is justified the limitation criteria are a useful starting point.

The committee's approach to human rights scrutiny

The committee's mandate to examine all existing and proposed Commonwealth legislation for compatibility with Australia's human rights obligations, seeks to ensure that human rights are taken into account in the legislative process.

The committee views its human rights scrutiny tasks as primarily preventive in nature and directed at minimising risks of new legislation giving rise to breaches of human rights in practice. The committee also considers it has an educative role, which includes raising awareness of legislation that promotes human rights.

The committee considers that, where relevant and appropriate, the views of human rights treaty bodies and international and comparative human rights jurisprudence can be useful sources for understanding the nature and scope of the human rights referred to in the Human Rights (Parliamentary Scrutiny) Act 2011. Similarly, there are a number of other treaties and instruments to which Australia is a party, such as the International Labour Organization (ILO) Conventions and the Refugee Convention which, although not listed in the *Human Rights (Parliamentary Scrutiny) Act 2011,* may nonetheless be relevant to the interpretation of the human rights protected by the seven core human rights treaties. The committee has also referred to other non-treaty instruments, such as the United Nations Declaration on the Rights of Indigenous Peoples, where it considers that these are relevant to the interpretation of the human rights in the seven treaties that fall within its mandate. When the committee relies on regional or comparative jurisprudence to support its analysis of the rights in the treaties, it will acknowledge this where necessary.

The committee's expectations for statements of compatibility

The committee considers statements of compatibility as essential to the examination of human rights in the legislative process. The committee expects statements to read as stand-alone documents. The committee relies on the statement as the primary document that sets out the legislation proponent's analysis of the compatibility of the bill or instrument with Australia's international human rights obligations.

While there is no prescribed form for statements under the *Human Rights (Parliamentary Scrutiny) Act 2011*, the committee strongly recommends legislation proponents use the current templates provided by the Attorney-General's Department. [3]

The statement of compatibility should identify the rights engaged by the legislation. Not every possible right engaged needs to be identified in the statement of compatibility, only those that are substantially engaged. The committee does not expect analysis of rights consequentially or tangentially engaged in a minor way.

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[3] The Attorney-General's Department guidance may be found at https://www.ag.gov.au/RightsAndProtections/HumanRights/Human-rights-scrutiny/Pages/Statements-of-Compatibility.aspx.

Consistent with the approach set out in the guidance materials developed by the Attorney-General's department, where a bill or instrument limits a human right, the committee requires that the statement of compatibility provide a detailed and evidence-based assessment of the measures against the limitation criteria set out in this note. Statements of compatibility should provide analysis of the impact of the bill or instrument on vulnerable groups.

Where the committee's analysis suggests that a bill limits a right and the statement of compatibility does not include a reasoned and evidence-based assessment, the committee may seek additional/further information from the proponent of the legislation. Where further information is not provided and/or is inadequate, the committee will conclude its assessment based on its original analysis. This may include a conclusion that the bill or instrument (or specific measures within a bill or instrument) are incompatible with Australia's international human rights obligations.

This approach is consistent with international human rights law which requires that any limitation on a human right be justified as reasonable, necessary and proportionate in pursuit of a legitimate objective.

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PARLIAMENTARY JOINT COMMITTEE ON HUMAN RIGHTS

GUIDANCE NOTE 2: Offence provisions, civil penalties and human rights

December 2014

This guidance note sets out some of the key human rights compatibility issues in relation to provisions that create offences and civil penalties. It is not intended to be exhaustive but to provide guidance on the committee's approach and expectations in relation to assessing the human rights compatibility of such provisions.

Introduction

The right to a fair trial and fair hearing are protected by article 14(1) of the International Covenant on Civil and Political Rights (ICCPR). The right to a fair trial and fair hearing applies to both criminal and civil proceedings.

A range of protections are afforded to persons accused and convicted of criminal offences under article 14. These include the presumption of innocence (article 14(2)), the right to not incriminate oneself (article 14(3)(g)), the right to have a sentence reviewed by a higher tribunal (article 14(5)), the right not to be tried or punished twice for the same offence (article 14(7)), a guarantee against retrospective criminal laws (article 15(1)) and the right not to be arbitrarily detained (article 9(1)).[1]

Offence provisions need to be considered and assessed in the context of these standards. Where a criminal offence provision is introduced or amended, the statement of compatibility for the legislation will usually need to provide an assessment of whether human rights are engaged and limited.[2]

The *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* provides a range of guidance in relation to the framing of offence provisions.[3] However, legislation proponents should note that this government guide is neither binding nor conclusive of issues of human rights compatibility. The discussion below is intended to assist legislation proponents to identify matters that are likely to be relevant to the framing of offence provisions and the assessment of their human rights compatibility.

Reverse burden offences

Article 14(2) of the ICCPR protects the right to be presumed innocent until proven guilty according to law. Generally, consistency with the presumption of innocence requires the prosecution to prove each element of a criminal offence beyond reasonable doubt.

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1 For a more comprehensive description of these rights see Parliamentary Joint Committee on Human Rights, *Guide to Human Rights* (March 2014), available at http://www.aph.gov.au/~/media/Committees/Joint/PJCHR/Guide%20to%20Human%20Rights.pdf.

2 The requirements for assessing limitations on human rights are set out in *Guidance Note 1: Drafting statements of compatibility* (December 2014).

3 See *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers,* September 2011 edition, available at http://www.ag.gov.au/Publications/Documents/GuidetoFramingCommonwealthOffencesInfringementNoticesandEnforcementPowers/A%20Guide%20to%20Framing%20Cth%20Offences.pdf.

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

Reverse burden offences will be likely to be compatible with the presumption of innocence where they are shown by legislation proponents to be reasonable, necessary and proportionate in pursuit of a legitimate objective. Claims of greater convenience or ease for the prosecution in proving a case will be insufficient, in and of themselves, to justify a limitation on the defendant's right to be presumed innocent.

It is the committee's usual expectation that, where a reverse burden offence is introduced, legislation proponents provide a human rights assessment in the statement of compatibility, in accordance with Guidance Note 1.

Strict liability and absolute liability offences

Strict liability and absolute liability offences engage and limit the presumption of innocence. This is because they allow for the imposition of criminal liability without the need to prove fault.

The effect of applying strict liability to an element or elements of an offence therefore means that the prosecution does not need to prove fault. However, the defence of mistake of fact is available to the defendant. Similarly, the effect of applying absolute liability to an element or elements of an offence means that no fault element needs to be proved, but the defence of mistake of fact is not available.

Strict liability and absolute liability offences will not necessarily be inconsistent with the presumption of innocence where they are reasonable, necessary and proportionate in pursuit of a legitimate objective.

The committee notes that strict liability and absolute liability may apply to whole offences or to elements of offences. It is the committee's usual expectation that, where strict liability and absolute liability criminal offences or elements are introduced, legislation proponents should provide a human rights assessment of their compatibility with the presumption of innocence, in accordance with Guidance Note 1.

Mandatory minimum sentencing

Article 9 of the ICCPR protects the right to security of the person and freedom from arbitrary detention. An offence provision which requires mandatory minimum sentencing will engage and limit the right to be free from arbitrary detention. The notion of 'arbitrariness' under international human rights law includes elements of inappropriateness, injustice and lack of predictability. Detention may be considered arbitrary where it is disproportionate to the crime that has been committed (for example, as a result of a blanket policy).[4] Mandatory sentencing may lead to disproportionate or unduly harsh outcomes as it removes judicial discretion to take into account all of the relevant circumstances of a particular case in sentencing.

Mandatory sentencing is also likely to engage and limit article 14(5) of the ICCPR, which protects the right to have a sentence reviewed by a higher tribunal. This is because mandatory sentencing prevents judicial review of the severity or correctness of a minimum sentence.

The committee considers that mandatory minimum sentencing will be difficult to justify as compatible with human rights, given the substantial limitations it places on the right to freedom

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

from arbitrary detention and the right to have a sentence reviewed by a higher tribunal (due to the blanket nature of the measure). Where mandatory minimum sentencing does not require a minimum non-parole period, this will generally be insufficient, in and of itself, to preserve the requisite judicial discretion under international human rights law to take into account the particular circumstances of the offence and the offender.[5]

Civil penalty provisions

Many bills and existing statutes contain civil penalty provisions. These are generally prohibitions on particular forms of conduct that give rise to liability for a 'civil penalty' enforceable by a court. As these penalties are pecuniary and do not include the possibility of imprisonment, they are said to be 'civil' in nature and do not constitute criminal offences under Australian law.

Given their 'civil' character, applications for a civil penalty order are dealt with in accordance with the rules and procedures that apply in relation to civil matters. These rules and procedures often form part of a regulatory regime which provides for a graduated series of sanctions, including infringement notices, injunctions, enforceable undertakings, civil penalties and criminal offences.

However, civil penalty provisions may engage the criminal process rights under articles 14 and 15 of the ICCPR where the penalty may be regarded as 'criminal' for the purpose of international human rights law. The term 'criminal' has an 'autonomous' meaning in human rights law. In other words, a penalty or other sanction may be 'criminal' for the purposes of the ICCPR even though it is considered to be 'civil' under Australian domestic law.

There is a range of international and comparative jurisprudence on whether a 'civil' penalty is likely to be 'criminal' for the purpose of human rights law.[6] This criteria for assessing whether a penalty is 'criminal' for the purposes of human rights law is set out in further detail on page 4. The following steps (one to three) may assist legislation proponents in understanding whether a provision may be characterised as 'criminal' under international human rights law.

- **Step one:** *Is the penalty classified as criminal under Australian Law?*

  If so, the penalty will be considered 'criminal' for the purpose of human rights law. If not, proceed to step two.

- **Step two:** *What is the nature and purpose of the penalty?*

  The penalty is likely to be considered criminal for the purposes of human rights law if:

  a) the purpose of the penalty is to punish or deter; **and**

  b) the penalty applies to the public in general (rather than being restricted to people in a specific regulatory or disciplinary context.)

  If the penalty does not satisfy this test, proceed to step three.

- **Step three:** *What is the severity of the penalty?*

  The penalty is likely to be considered criminal for the purposes of human rights law if the civil penalty provision carries a penalty of imprisonment or a substantial pecuniary sanction.

Note: even if a penalty is not considered 'criminal' separately under steps two or three, it may still be considered 'criminal' where the nature and severity of the penalty are cumulatively considered.

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5 This is because the mandatory minimum sentence may be seen by courts as a 'sentencing guidepost' which specifies the appropriate penalty for the least serious case. Judges may feel constrained to impose, for example, what is considered the usual proportion for a non-parole period (approximately 2/3 of the head sentence).

6 The UN Human Rights Committee, while not providing further guidance, has determined that 'civil; penalties may be 'criminal' for the purpose of human rights law, see, for example, *Osiyuk v Belarus* (1311/04); Sayadi and *Vinck v Belgium* (1472/06).

When a civil penalty provision is 'criminal'

In light of the criteria described at pages 3-4 above, the committee will have regard to the following matters when assessing whether a particular civil penalty provision is 'criminal' for the purposes of human rights law.

a) Classification of the penalty under domestic law

The committee considers that in accordance with international human rights law, the classification of the penalty as 'civil' under domestic law will not be determinative. However, if the penalty is 'criminal' under domestic law it will also be 'criminal' under international law.

b) The nature of the penalty

The committee considers that a civil penalty provision is more likely to be considered 'criminal' in nature if it contains the following features:

- the penalty is intended to be punitive or deterrent in nature, irrespective of its severity;
- the proceedings are instituted by a public authority with statutory powers of enforcement;
- a finding of culpability precedes the imposition of a penalty; and
- the penalty applies to the public in general instead of being directed at people in a specific regulatory or disciplinary context (the latter being more likely to be viewed as 'disciplinary' or regulatory rather than as 'criminal').

c) The severity of the penalty

In assessing whether a pecuniary penalty is sufficiently severe to amount to a 'criminal' penalty, the committee will have regard to:

- the amount of the pecuniary penalty that may be imposed under the relevant legislation with reference to the regulatory context;
- the nature of the industry or sector being regulated and relative size of the pecuniary penalties and the fines that may be imposed (for example, large penalties may be less likely to be criminal in the corporate context);
- the maximum amount of the pecuniary penalty that may be imposed under the civil penalty provision relative to the penalty that may be imposed for a corresponding criminal offence; and
- whether the pecuniary penalty imposed by the civil penalty provision carries a sanction of imprisonment for non-payment, or other very serious implications for the individual in question.

The consequences of a conclusion that a civil penalty is 'criminal'

If a civil penalty is assessed to be 'criminal' for the purposes of human rights law, this does not mean that it must be turned into a criminal offence in domestic law. Human rights law does not stand in the way of decriminalisation. Instead, it simply means that the civil penalty provision in question must be shown to be consistent with the criminal process guarantees set out the articles 14 and 15 of the ICCPR.

By contrast, if a civil penalty is characterised as not being 'criminal', the specific criminal process guarantees in articles 14 and 15 will not apply. However, such provisions must still comply with the right to a fair hearing before a competent, independent and impartial tribunal contained in article 14(1) of the ICCPR. The Senate Standing Committee for the Scrutiny of Bills may also comment on whether such provisions comply with accountability standards.

As set out in Guidance Note 1, sufficiently detailed statements of compatibility are essential for the effective consideration of the human rights compatibility of bills and legislative instruments. Where

a civil penalty provision could potentially be considered 'criminal' the statement of compatibility should:

- explain whether the civil penalty provisions should be considered to be 'criminal' for the purposes of human rights law, taking into account the criteria set out above; and
- if so, explain whether the provisions are consistent with the criminal process rights in articles 14 and 15 of the ICCPR, including providing justifications for any limitations of these rights.

It will not be necessary to provide such an assessment in the statement of compatibility on every occasion where proposed legislation includes civil penalty provisions or draws on existing civil penalty regimes. For example, it will generally not be necessary to provide such an assessment where the civil penalty provision is in a corporate or consumer protection context and the penalties are small.

Criminal process rights and civil penalty provisions

The key criminal process rights that have arisen in the committee's scrutiny of civil penalty provisions include the right to be presumed innocent (article 14(2)) and the right not to be tried twice for the same offence (article 14 (7)). For example:

- article 14(2) of the International Covenant on Civil and Political Rights (ICCPR) protects the right to be presumed innocent until proven guilty according to law. This requires that the case against the person be demonstrated on the criminal standard of proof, that is, it must be proven beyond reasonable doubt. The standard of proof applicable in civil penalty proceedings is the civil standard of proof, requiring proof on the balance of probabilities. In cases where a civil penalty is considered 'criminal', the statement of compatibility should explain how the application of the civil standard of proof for such proceedings is compatible with article 14(2) of the ICCPR.
- article 14(7) of the ICCPR provides that no-one is to be liable to be tried or punished again for an offence of which she or he has already been finally convicted or acquitted. If a civil penalty provision is considered to be 'criminal' and the related legislative scheme permits criminal proceedings to be brought against the person for substantially the same conduct, the statement of compatibility should explain how this is consistent with article 14(7) of the ICCPR.

Other criminal process guarantees in articles 14 and 15 may also be relevant to civil penalties that are viewed as 'criminal', and should be addressed in the statement of compatibility where appropriate.

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