Parliamentary Joint Committee on Human Rights

Human rights scrutiny report

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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**).

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 18 and 21 June 2018 (consideration of 2 bills from this period has been deferred);[1]
- legislative instruments registered on the Federal Register of Legislation between 24 April and 23 May 2018 (consideration of 5 legislative instruments from this period has been deferred);[2] and
- bills and legislative instruments previously deferred.

Instruments not raising human rights concerns

1.2 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.

1.3 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.

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/.

Response required

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

Counter-Terrorism Legislation Amendment Bill (No. 1) 2018

Purpose	Seeks to make a range of amendments to the *Criminal Code Act 1995*, *Crimes Act 1914*, *Australian Security Intelligence Organisation Act 1979*, *Intelligence Services Act 2001* and the *Administrative Decisions (Judicial Review) Act 1977*, including to extend the operation of the control order regime, the preventative detention order regime, declared area provisions, and the stop, search and seize powers of the Australia Federal Police by a further three years; and to extend the operation of the Australian Security Intelligence Organisation's questioning, and questioning and detention powers for a further 12 months
Portfolio	Attorney-General
Introduced	House of Representatives, 24 May 2018
Rights	Equality and non-discrimination; liberty; freedom of movement; fair trial and the presumption of innocence; privacy; freedom of expression; freedom of association; protection of the family; prohibition on torture and cruel, inhuman or degrading treatment; work; social security; adequate standard of living; children (see **Appendix 2**)
Status	Seeking additional information

Background

1.5 The bill seeks to amend various Acts relating to counter-terrorism, including to extend for a further three years the following regimes which are scheduled to sunset on 7 September 2018, including:

- the control order regime in Division 104 of the *Criminal Code Act 1995* (Criminal Code);
- the preventative detention order regime in Division 105 of the Criminal Code;
- the declared areas provisions in sections 119.2 and 119.3 of the Criminal Code; and
- the stop, search and seize powers in Division 3A of Part IAA of the *Crimes Act 1914*.

1.6 The bill also seeks to amend the *Australian Security Intelligence Organisation Act 1979* (ASIO Act) to extend the operation of ASIO's questioning and detention powers for a further 12 months.

1.7 Other amendments relevant to the human rights analysis of the bill are discussed below.

1.8 The committee has considered the measures listed above on a number of previous occasions.[1]

Control orders

1.9 The committee has previously considered the control orders regime as part of its consideration of the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014; the Counter-Terrorism Legislation Amendment Bill (No. 1) 2014 and the Counter-Terrorism Legislation Amendment Bill (No. 1) 2016.[2]

1.10 The control orders regime grants the courts power to impose a control order on a person (including children aged between 14 and 17) at the request of the Australian Federal Police (AFP), with the Attorney-General's consent. The maximum penalty for contravening a condition of a control order is five years imprisonment.[3] The current 2018 bill would extend the operation of the control orders regime for a further three years noting the regime is currently due to sunset on 7 September 2018.[4] The 2018 bill also makes some specific amendments to the operation of the regime.[5]

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1 See, Parliamentary Joint Committee on Human Rights, *Fourteenth Report of the 44th Parliament* (28 October 2014) pp. 3-69; *Eighteenth Report of the 44th Parliament* (10 February 2015) pp. 71-73; *Nineteenth report of the 44th Parliament* (3 March 2015) pp. 56-100; *Thirtieth report of the 44th Parliament* (10 November 2015) pp. 82-101; and *Report 4 of 2018* (8 May 2018) pp. 88-90.

2 See Parliamentary Joint Committee on Human Rights, *Fourteenth Report of the 44th Parliament* (28 October 2014) p. 3; *Sixteenth Report of the 44th Parliament* (25 November 2014) p. 7; *Nineteenth Report of the 44th Parliament* (3 March 2015); *Twenty-second Report of the 44th Parliament* (13 May 2015); *Thirty-sixth Report of 44th Parliament* (16 March 2016) p. 85; *Report 7 of 2016* (11 October 2016) p. 64.

3 Criminal Code, section 104.5.

4 Explanatory Memorandum (EM) p. 2; Counter-Terrorism Legislation Amendment Bill (No. 1) 2018 (2018 bill), item 11.

5 These amendments include permitting an issuing court to vary an interim control order where there is agreement to a variation between the AFP and the subject of the control order; extending the minimum duration of time between the making of the interim control order and the confirmation proceeding from 72 hours to seven days; providing that the issuing court cannot make cost orders against the controlee except in limited circumstances where the controlee has acted unreasonably in conducting the control order proceedings: See EM, pp. 3-38, 40-41.

Terms of a control order

1.11 The terms of a control order may impose a number of obligations, prohibitions and restrictions on the person subject to the order. These include:

- requiring a person to stay in a certain place at certain times;
- preventing a person from going to certain places;
- preventing a person from talking to or associating with certain people;
- preventing a person from leaving Australia;
- requiring a person to wear a tracking device;
- prohibiting access or use of specified types of telecommunications, including the internet and telephones;
- preventing a person from possessing or using specified articles or substances; and
- preventing a person from carrying out specified activities, including in relation to their work or occupation.[6]

Steps for the issue of a control order

1.12 The steps for the issue of a control order are:

- a senior AFP member must obtain the Minister for Home Affairs'[7] consent to seek a control order on prescribed grounds;[8]
- once consent is granted, the AFP member must seek an interim control order from an issuing court through an ex parte proceeding. The court must be satisfied on the balance of probabilities:
    - (i) that making the order would substantially assist in preventing a terrorist act; or
    - (ii) that the person in respect of whom the control order is sought has provided training to, received training from or participated in training with a listed terrorist organisation; or
    - (iii) that the person has engaged in a hostile activity in a foreign country; or
    - (iv) that the person has been convicted in Australia of an offence relating to terrorism, a terrorist organisation or a terrorist act; or

6 See Criminal Code, section 104.5.

7 See Criminal Code, section 104.2; EM p. 8.

8 See Criminal Code, sections 104.2 and 104.4.

(v) that the person has been convicted in a foreign country for an equivalent offence; or

(vi) that making the order would substantially assist in preventing the provision of support for or the facilitation of a terrorist act; or

(vii) that the person has provided support for or otherwise facilitated the engagement in a hostile activity in a foreign country; and

- the court must also be satisfied on the balance of probabilities that each of the obligations, prohibitions and restrictions to be imposed on the person by the order is reasonably necessary, and reasonably appropriate and adapted, for the purpose of:

  (i) protecting the public from a terrorist act; or

  (ii) preventing the provision of support for or the facilitation of a terrorist act; or

  (iii) preventing the provision of support for or the facilitation of the engagement in a hostile activity in a foreign country.[9]

1.13 In determining whether each of the obligations, prohibitions and restrictions to be imposed on the person by the order is reasonably necessary, and reasonably appropriate and adapted, the court must take into account:

(a) as a paramount consideration in all cases the objects of:

  (i) protecting the public from a terrorist act;

  (ii) preventing the provision of support for or the facilitation of a terrorist act;

  (iii) preventing the provision of support for or the facilitation of the engagement in a hostile activity in a foreign country;

(b) as a primary consideration in the case where the person is 14 to 17 years of age—the best interests of the person; and

(c) as an additional consideration in all cases—the impact of the obligation, prohibition or restriction on the person's circumstances (including the person's financial and personal circumstances).[10]

1.14 The AFP must subsequently elect whether to seek the court's confirmation of the control order, with a confirmed order able to last up to 12 months (or three months if the person is aged between 14 and 17).[11] Currently, an interim control order is subject to confirmation by the court as soon as practicable but at least 72

9 See Criminal Code, section 104.4.

10 See Criminal Code, section 104.4.

11 See Criminal Code, sections 104.5(f); 104.14; EM, statement of compatibility (SOC) p. 8.

hours after the interim control order is made. The bill would extend this minimum period of time from 72 hours to seven days.[12]

Compatibility of continuing the control orders regime with human rights

1.15 The control orders regime involves significant limitations on human rights. Notably, it allows the imposition of a control order on an individual without following the regular criminal law process of arrest, charge, prosecution and determination of guilt beyond a reasonable doubt.

1.16 The extension of the control orders regime by the 2018 bill engages and may limit a number of human rights, including:

- right to equality and non-discrimination;
- right to liberty;
- right to freedom of movement;
- right to a fair trial and fair hearing;
- right to privacy;
- right to freedom of expression;
- right to freedom of association;
- right to the protection of the family;
- right to work;
- right to social security and an adequate standard of living; and
- rights of children.

1.17 The statement of compatibility acknowledges that the bill engages a range of human rights.[13] These rights may be subject to permissible limitations providing they pursue a legitimate objective and are rationally connected and proportionate to that objective.

1.18 The committee's previous reports have raised serious concerns as to whether control orders constitute permissible limitations on human rights.[14] Noting that the control orders regime was not previously subject to a foundational assessment of human rights, the committee previously recommended that a statement of compatibility be prepared for the control orders regime that set out in detail how the coercive powers provided for by control orders impose only a necessary and proportionate limitation on human rights having regard to the

12 EM, p. 4.

13 EM, SOC, from page 10.

14 See, for example, Parliamentary Joint Committee on Human Rights*, Thirty-sixth Report of 44th Parliament* (16 March 2016) p. 94; *Report 7 of 2016* (11 October 2016) p. 69.

availability and efficacy of existing ordinary criminal justice processes (e.g. arrest, charge and remand).[15] As set out below, the statement of compatibility for the 2018 bill provides some of this information.

Extending control orders - legitimate objective

1.19 In relation to whether extending the control orders regime pursues a legitimate objective, the statement of compatibility states that:

> The control order regime achieves the legitimate objective of preventing serious threats to Australia's national security interests, including in particular, preventing terrorist acts. In the current national security landscape, it is critical that law enforcement agencies have access to preventative powers such as control orders to proactively keep the Australian community safe.[16]

1.20 In this respect, the statement of compatibility also provides some information as to the importance of this objective as a pressing concern.[17] Based on this information the objective of preventing serious threats to Australia's national security interests, including preventing terrorist acts, is likely to constitute a legitimate objective for the purposes of international human rights law. The committee has previously considered that the objective of the measure constituted a legitimate objective.[18]

Extending control orders—rational connection to a legitimate objective

1.21 As set out above, a measure that limits human rights must be rationally connected to (that is, effective to achieve) its legitimate objective. In this respect, the human rights assessment in the committee's previous reports noted that there was doubt as to whether control orders are rationally connected to their stated objective. This was because it was unclear whether control orders are an effective tool to prevent terrorist acts noting the availability of regular criminal justice processes (including for preparatory acts).[19]

1.22 It is noted that since the committee's last report on control orders,[20] the current Independent National Security Legislation Monitor (INSLM), James Renwick

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15 Parliamentary Joint Committee on Human Rights, *Report 7 of 2016* (11 October 2016) p. 69.

16 EM, SOC, p. 9.

17 EM, SOC, p. 7.

18 See, for example, Parliamentary Joint Committee on Human Rights, *Fourteenth Report of the 44th Parliament* (28 October 2014) 16.

19 See Parliamentary Joint Committee on Human Rights, *Thirty-sixth Report of the 44th Parliament* (16 March 2016) p. 90; *Report 7 of 2016* (11 October 2016) p. 68. See, also, Independent National Security Legislation Monitor, *Declassified Annual Report* (20 December 2012) p. 30.

20 Parliamentary Joint Committee on Human Rights, *Report 7 of 2016* (11 October 2016) p. 64.

SC, has reported that control orders may be effective in preventing terrorism, based on recent court cases.[21] This contrasts with the findings of a previous INSLM, Bret Walker SC, who found that 'control orders in their present form are not effective, not appropriate and not necessary'.[22]

1.23 On this issue, the statement of compatibility notes that since control orders were introduced in 2005 they have been used only six times. However, rather than indicating that control orders are ineffective or not necessary, the statement of compatibility argues that this indicates that the control order regime has been used judiciously to date.[23] It refers to the findings of the Parliamentary Joint Committee on Intelligence and Security (PJCIS) that 'the limited use of the provisions reflects the AFP's position that, in circumstances where there is enough evidence to formally charge and prosecute a person, the AFP will take this approach over seeking the imposition of a control order'.[24] While this may be the case as a matter of policy and practice, there is no legal requirement that control orders be restricted in this matter.

1.24 It is therefore acknowledged that there is some evidence that the imposition of a control order could be capable of being effective in particular individual cases.[25] However, some questions remain as to whether the control order regime as a whole is rationally connected to its objective, noting in particular the availability of the regular criminal processes. It would have been useful if the statement of compatibility had provided further information about this issue.

Extending control orders—proportionality

1.25 In relation to proportionality, the human rights assessment in the committee's previous reports on the control orders regime noted that there may be questions as to whether control orders are the least rights restrictive approach to preventing terrorist-related or hostile activities, and whether control orders contain

21 INSLM, *Reviews of Divisions 104 and 105 of the Criminal Code (including the interoperability of Divisions 104 and 105A): Control Orders and Preventative Detention Orders* (2017) pp. 51-54. See, Parliamentary Joint Committee on Intelligence and Security, Review of police stop, search and seizure powers, the control order regime and the preventative detention order regime (1 March 2018) p. 54.

22 INSLM, *Declassified Annual Report* (20 December 2012) p. 4.

23 EM, SOC, p. 9.

24 Parliamentary Joint Committee on Intelligence and Security, *Review of police stop, search and seizure powers, the control order regime and the preventative detention order regime,* (February 2018) [3.56] p. 54.

25 INSLM, *Reviews of Divisions 104 and 105 of the Criminal Code (including the interoperability of Divisions 104 and 105A): Control Orders and Preventative Detention Orders* (2017) pp. 51-54.

sufficient safeguards to appropriately comply with Australia's human rights obligations.[26]

1.26 The previous human rights assessment raised concerns that control orders could be sought in circumstances where there is not necessarily an imminent threat to personal safety. The previous report stated that protection from imminent threats had been a critical rationale relied on for the introduction and use of control orders rather than ordinary criminal processes. It further stated that, in the absence of an imminent threat, it is difficult to justify as proportionate the imposition of significant limitations on human rights without criminal charge or conviction.[27]

1.27 As noted above, the issuing criteria for a control order set out in section 104.4 of the Criminal Code requires that each proposed condition of a control order must be reasonably necessary, and reasonably appropriate and adapted, to the purpose of protecting the public from the threat of a terrorist act, or support for terrorist or hostile activities. The issuing court must also have regard to the impact of the obligations on the person's circumstances.[28] The statement of compatibility explains that this threshold ensures that any restrictions on human rights are 'reasonable, necessary and proportionate'.[29] However, while this criterion may act as a relevant safeguard, there is no explicit requirement that the conditions be the least rights restrictive measures for the person subject to the control order to protect the public.[30] In this respect, it is noted that the impact on the individual is given the status of 'additional consideration', while the effect on preventing or providing support to terrorism is to be a 'paramount consideration' of the issuing court.[31]

1.28 As noted in the previous human rights assessment of control orders, a less rights restrictive approach would not mean that public protection would become a secondary consideration in the issuance of a control order. Rather, it would require a decision-maker to take into account any possible less invasive means of achieving public protection as an equally paramount consideration. In the absence of such requirements, it may be difficult to characterise the control orders regime as the least rights restrictive approach for protecting national security, and to assess the proposed measures as a proportionate way to achieve their stated objective.[32]

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26 Parliamentary Joint Committee on Human Rights, *Thirty-second Report of the 44th Parliament* (1 December 2015) p. 11.

27 See, for example, Parliamentary Joint Committee on Human Rights, *Report 7 of 2016* (11 October 2016) p. 64.

28 See Criminal Code section 104.4.

29 EM, SOC, p. 11.

30 Parliamentary Joint Committee on Human Rights, *Report 7 of 2016* (11 October 2016) p. 64.

31 See Criminal Code, section 104.4.

32 Parliamentary Joint Committee on Human Rights, *Report 7 of 2016* (11 October 2016) p. 64.

1.29 The statement of compatibility also outlines some additional safeguards relating to the application of the control orders regime against children (aged 14 to 17 years). This includes, subject to exceptions, the requirement that the court must appoint a lawyer to act for a young person (aged 14 to 17 years) in control order proceedings if the young person does not already have a lawyer. Additionally, when considering whether to impose a particular condition under a control order on a child, the court is required to consider the best interests of the child as a primary consideration and the safety and security of the community as a paramount consideration.[33] Overall, while these safeguards are relevant to the proportionality of the limitations imposed on human rights, questions remain as to whether they are sufficient to ensure that the application of the control orders regime to children is a proportionate limit on human rights. This includes questions as to whether applying a coercive regime to children (noting their maturity and particular vulnerabilities as children) constitutes a least rights restrictive approach.

1.30 In order to constitute a proportionate limitation on human rights, coercive powers must also be no more extensive than is strictly necessary to achieve their legitimate objective. In this respect, there are questions about how the coercive powers provided for by control orders impose only a necessary and proportionate limitation on human rights having regard to the availability and efficacy of existing ordinary criminal justice processes (e.g. arrest, charge and remand). The committee's previous human rights assessment of control orders noted there are a range of offences in the Criminal Code that cover preparatory acts to terrorism offences, which allow police to detect and prosecute terrorist activities at early stages.[34] In the absence of further information, and as indicated in the committee's previous assessment, the control orders regime is likely to be incompatible with a number of human rights.[35]

Committee comment

1.31 The control orders regime engages and limits a range of human rights.

1.32 The committee has previously raised serious concerns about the compatibility of the regime with human rights.

1.33 Noting that the control orders regime was not previously subject to a foundational assessment of human rights, the committee previously recommended that a statement of compatibility be prepared for the control orders regime that set out in detail how the coercive powers provided for by control orders impose

33 See Criminal Code, subsection 104.4(1)-(2).

34 Parliamentary Joint Committee on Human Rights, *Fourteenth Report of the 44th Parliament* (28 October 2014) p. 17.

35 See, for example, Parliamentary Joint Committee on Human Rights, *Fourteenth Report of the 44th Parliament* (28 October 2014) p. 17.

only a necessary and proportionate limitation on human rights having regard to the availability and efficacy of existing ordinary criminal justice processes (e.g. arrest, charge and remand). It is welcome that the statement of compatibility for the 2018 bill provides some of this foundational assessment.

1.34 It is noted that the control orders regime is likely to pursue a legitimate objective for the purposes of international human rights law.

1.35 However, in light of the proposed extension of the regime, the committee seeks the further advice of the minister as to:

- **how the control orders regime as a whole is effective to achieve (that is, rationally connected to) its stated objective; and**
- **whether the limitation is a reasonable and proportionate measure to achieve the stated objective (including whether it is necessary, whether it is the least rights restrictive approach and whether there are adequate and effective safeguards in place in relation to its operation).**

Compatibility of extending the minimum duration of time between the interim control order and the confirmation proceedings with the right to a fair hearing

1.36 As noted above, currently, an interim control order is subject to confirmation by the court as soon as practicable but at least 72 hours after the interim control order is made. The bill would extend this minimum period of time from 72 hours to seven days.[36] As interim control orders are made *ex parte* (that is, without the person subject to the control order being present), this means that the person will, generally, be subject to the conditions of the control order until the confirmation proceeding. In this context, while it is acknowledged that both parties to a confirmation proceeding may require sufficient time to prepare their case,[37] the extension of the minimum period raises other questions about the compatibility of the measure with the right to a fair hearing. This is because a delay in confirmation hearing may have significant implications for a person who remains subject to an interim control order while awaiting this hearing.

1.37 The explanatory memorandum explains the timing of confirmation hearings further in the context of the measure:

> Confirmation proceedings have to date occurred many months after the making of an interim control order. However, under existing subsection 104.5(1A), it remains open to the issuing court to set the confirmation date only 72 hours after the making of an interim control order. This would

36 EM, p. 2.

37 EM, SOC, p. 15.

> leave both parties potentially unprepared to make detailed submissions to the court at the confirmation proceeding.[38]

1.38 While this may be the case as a matter of practice, it is unclear why it is insufficient to leave to the court to set a confirmation date as soon as reasonably practicable. It would have been useful if the statement of compatibility had provided further information in this respect.

Committee comment

1.39 The committee seeks the advice of the minister as to the compatibility of extending the minimum duration of time between the interim control order and the confirmation proceedings with the right to a fair hearing.

Preventative detention orders

1.40 The committee has previously considered the Preventative Detention Orders (PDO) regime as part of its consideration of the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014, Counter-Terrorism Legislation Amendment Bill (No. 1) 2015, and the Counter-Terrorism Legislation Amendment Bill (No. 1) 2016.[39]

1.41 The AFP can apply for a PDO which allows a person to be taken into custody and detained[40] if it is suspected, on reasonable grounds, that a person will engage in a terrorist act, possesses something in connection with preparing for or engaging in a terrorist act, or has done an act in preparation for planning a terrorist act.[41] The terrorist act must be one that 'is capable of being carried out, and could occur, within the next 14 days'.[42]

1.42 The 2018 bill would extend the operation of the PDO regime for a further three years, noting the regime is currently due to sunset on 7 September 2018.[43]

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38 EM, p. 37.

39 See Parliamentary Joint Committee on Human Rights, *Fourteenth Report of the 44th Parliament* (28 October 2014) p. 3; *Sixteenth Report of the 44th Parliament* (25 November 2014) p. 7; *Nineteenth Report of the 44th Parliament* (3 March 2015); *Twenty-second Report of the 44th Parliament* (13 May 2015); *Thirty-sixth Report of 44th Parliament* (16 March 2016) p. 85; *Report 7 of 2016* (11 October 2016) p. 64.

40 The period of detention is up to 48 hours.

41 See subsection 105.4(4) of the Criminal Code. There is also the power for a PDO to be issued if a terrorist act has occurred within the last 28 days and it is reasonably necessary to detain the subject to preserve evidence of, or relating to, the terrorist act, and detaining the subject for the period for which the person is to be detained is reasonably necessary for preserving that evidence (subsection 105.4(6)).

42 Criminal Code, section 105.4(5).

43 EM, p. 2; Counter-Terrorism Legislation Amendment Bill (No. 1) 2018, item 11.

1.43 The police must not question the person subject to a PDO while they are detained subject to limited exceptions.[44]

1.44 There are restrictions on who the subject of the PDO can contact while detained.[45] A person subject to a PDO may contact a family member or employer. However, contact can be monitored by police and can only occur for the purposes of letting the contacted person know that the subject being detained is safe but is not able to be contacted for the time being.

Compatibility of extending the operation of the PDO with multiple human rights

1.45 The PDO regime engages and may limit a number of human rights, including:

- right to liberty;
- right to security of the person;
- right to a fair hearing and fair trial;
- right to freedom of expression;
- right to freedom of movement;
- right to privacy;
- right to be treated with humanity and dignity;
- right to protection of the family; and
- right to equality and non-discrimination.

1.46 In particular, as PDOs are administrative orders made, in the first instance, by a senior AFP member, which authorise an individual to be detained without charge, the extension of the PDO regime engages and limits the right to liberty. Further, as there are restrictions on who a person can contact while detained under a PDO and what they can say to those they contact, the regime also engages and limits the right to freedom of expression. Being held in a form of detention, which is in effect incommunicado, may also have implications for a number of other human rights.

1.47 The statement of compatibility acknowledges that PDOs engage and limit a number of these rights.[46] These rights may be subject to permissible limitations providing they pursue a legitimate objective and are rationally connected and proportionate to that objective.

1.48 Noting that the PDO regime was not previously subject to a foundational assessment of human rights, the committee previously recommended that a

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44 Criminal Code, section 105.42.

45 Criminal Code, sections 105.34, 105.35, 105.45.

46 EM, SOC, p. 19.

statement of compatibility be prepared for the PDO regime,[47] setting out in detail how the necessarily coercive powers impose only a necessary and proportionate limitation on human rights having regard to the availability and efficacy of existing ordinary criminal processes (e.g. arrest and charge).[48] As set out below, the statement of compatibility for the 2018 bill provides some of this information.

Extending the operation of the PDO regime – legitimate objective

1.49 In relation to the objective of the PDO regime, the statement of compatibility explains:

> The PDO regime supports the legitimate objective of preventing serious threats to Australia's national security and, in particular, preventing terrorist acts. In recent years, there has been an increase in the threat of smaller-scale, opportunistic attacks by lone actors. Law enforcement agencies have had less time to respond to these kinds of attacks than other terrorist plots.[49]

1.50 Consistent with the committee's previous analysis, the objective of preventing serious terrorist attacks is likely to constitute a legitimate objective for the purposes of international human rights law.

Extending the operation of the PDO regime – rational connection

1.51 Since the committee's last report on PDOs,[50] current INSLM Renwick reported that PDOs 'have the capacity to be effective'.[51] This contrasts with the findings of previous INSLM Walker who found that '[t]here is no demonstrated necessity for these extraordinary powers, particularly in light of the ability to arrest, charge and prosecute people suspected of involvement in terrorism'.[52] The PJCIS has

47 In accordance with the terms of the *Human Rights (Parliamentary Scrutiny) Act 2011.*

48 See, for example, Parliamentary Joint Committee on Human Rights: *Fourteenth Report of the 44th Parliament* (28 October 2014); *Sixteenth Report of the 44th Parliament* (25 November 2014); *Nineteenth Report of the 44th Parliament* (3 March 2015); *Twenty-second Report of the 44th Parliament* (13 May 2015); and *Thirty-Sixth Report of the 44th Parliament* (16 March 2016).

49 EM, SOC, p.18.

50 Parliamentary Joint Committee on Human Rights, *Report 7 of 2016* (11 October 2016) p. 64.

51 INSLM, *Reviews of Divisions 104 and 105 of the Criminal Code (including the interoperability of Divisions 104 and 105A): Control Orders and Preventative Detention Orders* (2017) pp. 51-54. See, Parliamentary Joint Committee on Intelligence and Security, Review of police stop, search and seizure powers, the control order regime and the preventative detention order regime (1 March 2018) p. xii.

52 INSLM, *Declassified Annual Report* (20 December 2012) p. 67.

also recommended that the PDO regime continue.[53] There is therefore conflicting evidence as to whether the PDO regime is effective to achieve its stated objective.

1.52 The statement of compatibility notes that to date no PDOs have been issued since the commencement of the regime in 2005.[54] However, it argues that this

> …reflects the policy intent that these orders should be invoked only in limited circumstances where traditional investigative powers available to law enforcement agencies are inadequate to respond to a terrorist threat.[55]

1.53 However, while this may be the policy intention of the measure, the fact that no PDOs have been issued also raises questions as to whether the PDO regime is effective to achieve its stated objective. Further, noting in particular the availability of the regular criminal processes, additional questions remain as to whether the PDO regime as a whole is rationally connected to its objective. It would have been useful if the statement of compatibility had provided further information about this issue.

Extending the operation of the regime – proportionality

1.54 In relation to proportionality, the previous human rights assessment of the PDO regime stated that the PDO regime involves very significant limitations on human rights. Notably, it allows the imposition of a PDO on an individual without following the normal criminal law process of arrest, charge, prosecution and determination of guilt beyond a reasonable doubt.

1.55 The previous assessment noted that it was unclear that the PDOs were necessary to achieve their stated objective, noting the availability of ordinary criminal justice processes including the criminalisation of preparatory terrorism offences.[56] In this respect, the UN Human Rights Committee has indicated that, in order to justify preventive detention, the state must show that the threat posed by the individual cannot be addressed by alternative (less rights restrictive) means.[57]

1.56 This issue was not fully addressed in the statement of compatibility.

1.57 In terms of proportionality, the statement of compatibility for the 2018 bill argues that the 'high threshold' for making a PDO ensures that it is 'inextricably linked to preventing an imminent terrorist incident' and is a proportionate limit on

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53 Parliamentary Joint Committee on Intelligence and Security, *Review of police stop, search and seizure powers, the control order regime and the preventative detention order regime,* (February 2018) [4.80] p. 103.

54 EM, SOC, p. 18.

55 EM, SOC, p. 18.

56 Section 101.6 of the Criminal Code makes it an offence to do 'any act in preparation for, or planning a terrorist act'.

57 *Miller & Carroll v New Zealand* (2502/2014) UN Human Rights Committee (2017) [8.5].

human rights.[58] However, the previous human rights assessment noted that given a PDO could be sought even where there is not an imminent threat to life, it was unclear that the regime imposes a proportionate limitation on the right to liberty in the pursuit of national security.[59] In this respect, it is noted that the regime would potentially allow for detention of a person, who may not themselves pose a risk to society, for the purpose of preserving evidence. This kind of power is an extraordinary one in the context of the right to liberty and appears not to be a least rights restrictive approach.

Committee comment

1.58 The PDO regime engages and limits a number of human rights.

1.59 The committee has previously raised serious concerns about the compatibility of the regime with human rights.

1.60 Noting that the PDO regime was not previously subject to a foundational assessment of human rights, the committee previously recommended that a statement of compatibility be prepared for the PDO regime, setting out in detail how the necessarily coercive powers impose only a necessary and proportionate limitation on human rights having regard to the availability and efficacy of existing ordinary criminal processes (e.g. arrest and charge). It is welcome that the statement of compatibility for the 2018 bill provides some of this foundational assessment.

1.61 It is noted that the PDO regime is likely to pursue a legitimate objective for the purposes of international human rights law.

1.62 However, in light of the proposed extension of the regime, the committee seeks the further advice of the minister as to:

- **how the PDO regime is effective to achieve (that is, rationally connected to) its stated objective; and**
- **whether the limitation is a reasonable and proportionate measure to achieve the stated objective (including whether it is necessary, whether it is the least rights restrictive approach and whether there are adequate and effective safeguards in place in relation to its operation).**

58 EM, SOC, p. 19.

59 See, for example, Parliamentary Joint Committee on Human Rights, *Report 7 of 2016* (11 October 2016) p. 64. Schedule 5 of the Counter-Terrorism Legislation Amendment Bill (No. 1) 2016 (now Act) changed the current definition of a 'terrorist act' as being one that is imminent and expected to occur in the next 14 days, to one that 'is capable of being carried out, and could occur, within the next 14 days'.

Extending the operation of declared area provisions

1.63 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.[60] Under section 119.3 of the Criminal Code, the Minister for Foreign Affairs 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.

1.64 In order to prove the offence, the prosecution is only required to prove that a person intentionally entered into (or remained in) a declared area 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, a declared area 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 (set out further below).

1.65 The committee considered these provisions as part of its assessment of the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014.[61] The committee has also considered specific declarations of an area in a foreign country for the purposes of section 119.2 of the Criminal Code.[62]

1.66 The current 2018 bill proposes to extend the operation of the declared area provisions by a further three years (until 7 September 2021), noting that the provisions are currently due to sunset (cease to have effect) on 7 September 2018.

Compatibility of the measure with multiple human rights

1.67 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

60 The offence carries a maximum penalty of up to 10 years imprisonment.

61 Parliamentary Joint Committee on Human Rights, *Fourteenth Report of the 44th Parliament* (28 October 2014) pp. 34-44; *Nineteenth report of the 44th Parliament* (3 March 2015) pp. 56-100; and *Thirtieth report of the 44th Parliament* (10 November 2015) pp. 82-101. The bill passed both Houses of Parliament and received Royal Assent on 2 November 2014.

62 See, for example, Parliamentary Joint Committee on Human Rights, 'Criminal Code (Foreign Incursions and Recruitment—Declared Areas) Declaration 2018—Mosul District, Ninewa Province, Iraq [F2018L00176],' *Report 4 of 2018* (8 May 2018) pp. 88-90. Also see, *Eighteenth Report of the 44th Parliament* (10 February 2015) pp. 71-73.

- the right to equality and non-discrimination.[63]

1.68 In light of the committee's previous conclusions in this regard, it follows that the extension of the declared area provisions for a further three years as proposed in the bill are also likely to be incompatible with human rights.

1.69 The statement of compatibility acknowledges that the measure engages the right to freedom of movement, the right to a fair trial and the presumption of innocence.[64] The right to equality and non-discrimination and the prohibition on arbitrary detention are not cited in the statement of compatibility as being engaged by this particular measure. These rights may be subject to permissible limitations providing they pursue a legitimate objective and are rationally connected and proportionate to that objective.

1.70 Regarding the objective of the measure, the statement of compatibility for the bill argues:

> The declared areas provisions support the legitimate objectives of protecting Australia's national security interests, deterring Australians from travelling to dangerous conflict areas where listed terrorist organisations are engaged in hostile activity, and protecting children by discouraging their parents and guardians from taking them to declared areas. There are two pressing and substantial concerns with Australians travelling to these conflicts areas. The first concern is that Australians who enter or remain in conflict areas put their own lives at risk. This concern also extends to children who have been taken to declared areas by their parents or guardians. The second is that foreign conflicts provide a significant opportunity for Australians to develop the necessary capability and ambition to undertake terrorist attacks.[65]

1.71 It is acknowledged that the objectives of protecting Australia's national security interests and deterring Australians from travelling to conflict zones where listed terrorist organisations are engaged in hostile activity may be capable of constituting legitimate objectives for the purposes of international human rights law.

1.72 However, the committee has previously raised questions as to why the declared area provisions are necessary to address the stated objectives, and whether it may be possible to rely on measures that may constitute a less rights restrictive approach, such as existing provisions of the Criminal Code which prohibit engaging in hostile activities in foreign countries.[66]

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

64 EM, SOC, pp. 23, 25.

65 EM, SOC, p. 22.

66 Parliamentary Joint Committee on Human Rights, *Report 4 of 2018* (8 May 2018) p. 90.

1.73 The statement of compatibility cites as a safeguard the existing exceptions contained in 119.2(3) of the Criminal Code that permit individuals to enter or remain in a declared area for 'legitimate purposes'.[67] These matters are relevant to the proportionality of the limitations the measure imposes on human rights.

1.74 In the context of limitations on the right to freedom of movement, the statement of compatibility also points to several new proposed provisions in the bill that may act as further safeguards. These include:

- an additional exception to the offence for persons performing an official duty for the International Committee of the Red Cross;[68]
- amending section 119.3 to provide that the Minister for Foreign Affairs may revoke a declaration at any time prior to the expiry of the declaration if the minister considers it necessary or desirable to do so;[69] and
- providing that the PJCIS may review a declaration at any time during which the declaration is in effect and report its findings to the parliament.[70]

1.75 These proposed new provisions may assist with the human rights compatibility of the measure. However, key human rights concerns remain in relation to the declared area offence, outlined in detail in the committee's *Fourteenth Report of the 44th Parliament*.[71]

1.76 In particular, the committee's previous analysis has noted that the statutory exceptions or defences to the declared area offence contained in 119.2(3) of the Criminal Code are relatively narrow. For example, it is not a defence to visit friends,

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67 These include: providing aid of a humanitarian nature; satisfying an obligation to appear before a court or other body exercising judicial power; performing an official duty for the Commonwealth, a State or Territory; performing an official duty for the government of a foreign country or the government of part of a foreign country; performing an official duty for the United Nations or an agency of the United Nations; making a news report of events in the area, where the person is working in a professional capacity as a journalist or is assisting another person working in a professional capacity as a journalist; making a bona fide visit to a family member; and other purposes prescribed by regulations. See, section 119.2(3) of the Criminal Code.

68 EM, SOC, p. 24.

69 Proposed subsection 119.3(6) (5a) of the Criminal Code. The statement of compatibility states that this new provision 'ensures that limitations on the right to freedom of movement are proportionate and operate for no longer than necessary in order to achieve the legitimate objective'. See EM, SOC, p. 24.

70 EM, SOC, p. 24. Currently, subsection 119.3(7) of the Criminal Code provides that the PJCIS may review a declaration before the end of the period during which the declaration made through a legislative instrument may be disallowed.

71 Parliamentary Joint Committee on Human Rights, *Fourteenth Report of the 44th Parliament* (28 October 2014) pp. 34-38.

retrieve personal property, transact business or undertake a religious pilgrimage. Accordingly, as stated in the previous human rights analysis, there appear to be a number of significant, innocent reasons why a person might enter or remain in a declared zone, but that would not bring a person within the scope of the legitimate purpose defence.[72] The expanded range of exemptions or defences provided for in the 2018 bill do not address these concerns.

1.77 In relation to the right to a fair trial and the presumption of innocence, the statement of compatibility states:

> The prosecution retains the legal burden and must disprove any legitimate purpose defence raised beyond a reasonable doubt, in addition to proving elements of the offence. It is appropriate for an evidential burden of proof to be placed on a defendant where the facts in relation to the defence, being their individual motivation for entering or remaining in a declared area, are peculiarly within their knowledge.[73]

1.78 The statement concludes that, to the extent the declared area provisions limit the right to a fair trial and the criminal process rights guaranteed under Article 14 of the International Covenant on Civil and Political Rights, including the presumption of innocence, any limitations are reasonable, necessary and proportionate to achieve legitimate objectives.

1.79 The committee previously acknowledged that under the relevant provisions the prosecution would still need to prove each element of the offence beyond reasonable doubt. However, the previous analysis noted that criminal liability will be *prima facie* established where a person enters or remains in a declared area, without the prosecution being required to prove any intent to engage in terrorist activity or other illegitimate activity.[74] Accordingly, the construction of the offence means that a person could commit the offence without actually knowing that the area was declared, and without any intention of engaging in or supporting terrorist activity.

1.80 In addition, as noted above, the committee's previous reporting has also raised concerns about the compatibility of the provisions with the right to equality and non-discrimination[75] and the prohibition on arbitrary detention.[76] The engagement of these rights was not addressed in the statement of compatibility.

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72 Parliamentary Joint Committee on Human Rights, *Fourteenth Report of the 44th Parliament* (28 October 2014) p. 41.

73 EM, SOC, p. 25.

74 Parliamentary Joint Committee on Human Rights, *Fourteenth Report of the 44th Parliament* (28 October 2014) p. 37.

75 Parliamentary Joint Committee on Human Rights, *Fourteenth Report of the 44th Parliament* (28 October 2014) pp. 42-44.

76 Parliamentary Joint Committee on Human Rights, *Fourteenth Report of the 44th Parliament* (28 October 2014) pp. 38-39.

Committee comment

1.81 Noting the concerns raised in the previous human rights assessments of the declared area offence and the above analysis, the committee draws the human rights implications of this measure in the bill to the attention of parliament.

Australian Federal Police – stop, search and seize powers

1.82 The committee has previously considered stop, search and seize powers as part of its consideration of the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014.[77]

1.83 Part IAA Division 3A of the *Crimes Act 1914* was first introduced in 2005 to provide 'a new regime of stop, question, search and seize powers…exercisable at airports and other Commonwealth places to prevent or respond to terrorism'.[78]

1.24 Division 3A provides a range of powers for the AFP and state and territory police officers that can be exercised if a person is in a 'Commonwealth place' (such as an airport)[79] and:

- the officer suspects on reasonable grounds that the person might have just committed, might be committing or might be about to commit a terrorist act; or
- the Commonwealth place is a 'prescribed security zone'.[80]

1.25 In these circumstances, the powers that the officers may exercise include:

- requiring a person to provide their name, residential address and reason for being there;
- stopping and searching persons, their items and vehicles for a terrorist related item; and
- seizing terrorism related items.[81]

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77 See, for example, Parliamentary Joint Committee on Human Rights, *Fourteenth Report of the 44th Parliament* (28 October 2014); *Nineteenth Report of the 44th Parliament* (3 March 2015); *Thirtieth Report of the 44th Parliament* (10 November 2015).

78 Explanatory memorandum, Anti-Terrorism Bill (No 2) 2005, p. 1.

79 'Commonwealth place' means a place (not being the seat of government) with respect to which the Parliament, by virtue of section 52 of the Constitution, has, subject to the Constitution, exclusive power to make laws for the peace, order, and good government of the Commonwealth: *Commonwealth Places (Application of Laws) Act 1970* section 3.

80 The minister may, upon application from a police officer, declare, in writing, a Commonwealth place to be a 'prescribed security zone' if the minister considers that a declaration would assist in preventing a terrorist act occurring, or in responding to a terrorist act that has occurred: *Crimes Act 1914*, section 3UJ.

81 *Crimes Act 1914*, sections 3UC-3UE.

1.84 Division 3A, section 3UEA also allows a police officer to enter and search premises without a search warrant and to seize property without the occupier's consent in certain circumstances.[82] These powers are not limited in their application to Commonwealth places.[83]

1.85 The 2018 bill would extend the operation of stop, search and seize powers for a further three years noting the regime is currently due to sunset on 7 September 2018.[84]

Compatibility of extending the stop, search and seize powers with multiple human rights

1.86 The stop, search and seize powers engage and may limit a number of human rights, including:

- the right to privacy;
- the right to freedom of movement;
- the right to security of the person and the right to be free from arbitrary detention;
- the right to a fair trial and fair hearing.[85]

1.87 These rights may be subject to permissible limitations providing they pursue a legitimate objective and are rationally connected and proportionate to that objective.

1.88 The committee's previous reports have raised concerns as to whether the stop, search and seize powers constitute permissible limitations on human rights.[86] Noting that the stop, search and seize powers were not previously subject to a foundational assessment of human rights, the committee previously recommended that a statement of compatibility[87] be prepared.[88] As set out below, the statement of compatibility for the 2018 bill provides some of this foundational assessment.

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82 *Crimes Act 1914*, section 3UEA.

83 EM, SOC, p. 26.

84 EM, SOC, p. 26; Counter-Terrorism Legislation Amendment Bill (No. 1) 2018 (2018 bill), item 11.

85 As noted in the committee's *Fourteenth Report of the 44th Parliament* (28 October 2014) p. 28: These powers may also engage and limit the right to freedom of expression; the right to be treated with humanity and dignity; and the right to equality and non-discrimination.

86 Parliamentary Joint Committee on Human Rights, *Nineteenth Report of the 44th Parliament* (3 March 2015) p. 69.

87 In accordance with the terms of the *Human Rights (Parliamentary Scrutiny) Act 2011.*

88 Parliamentary Joint Committee on Human Rights, *Nineteenth Report of the 44th Parliament* (3 March 2015) p. 69.

Extending stop, search and seize powers - legitimate objective

1.26 The statement of compatibility states that the powers 'achieve the legitimate purpose of protecting Australia's national security, including in particular, preventing and responding to terrorist acts'. This is likely to constitute a legitimate objective for the purposes of international human rights law.

Extending stop, search and seize powers – rational connection

1.89 The statement of compatibility acknowledges that the powers have not been used to date.[89] However, it points to recent reviews of the powers by INSLM Renwick and the PJCIS which recommended that the powers be continued as evidence of their importance.[90] Other than pointing to these other reviews, the statement of compatibility does not further explain how the powers are effective. Accordingly, it is unclear from the information provided how the powers are rationally connected to their stated objective.

Extending stop, search and seize powers – proportionality

1.90 The human rights assessment of the powers in the committee's previous report raised concerns about the proportionality of the limitation. The assessment noted that these powers are coercive and highly invasive in nature. For example, once a 'prescribed security zone' is declared, everyone in that zone is subject to stop, search, questioning and seizure powers, regardless of whether or not the police officer has reasonable grounds to believe the person may be involved in the commission, or attempted commission, of a terrorist act. In deciding whether to declare a prescribed security zone, the minister need only 'consider' that such a declaration would assist in preventing a terrorist act occurring or responding to a terrorist act that has occurred.[91]

1.27 There are further questions about whether the powers are more extensive than is strictly necessary to achieve their stated objective. The previous assessment noted that the powers are in addition to existing police powers under Commonwealth criminal law, including a range of powers to assist in the collection of evidence of a crime.[92] For example, Division 2 of Part IAA of the *Crimes Act 1914* sets out a range of search and seizure powers, including the primary Commonwealth search warrant provisions that apply to all offences against Commonwealth law. Under these provisions, an issuing officer can issue a warrant to search premises and persons if satisfied by information on oath that there are reasonable grounds for

89 EM, SOC, p. 26.

90 EM, SOC, pp. 26-27.

91 See, Parliamentary Joint Committee on Human Rights, *Fourteenth Report of the 44th Parliament* (28 October 2014) pp. 25-28.

92 See, Parliamentary Joint Committee on Human Rights, *Fourteenth Report of the 44th Parliament* (28 October 2014) pp. 25-28.

suspecting that there is, or will be in the next 72 hours, evidential material on the premises or in the possession of the person. An application for such a search warrant can be made by telephone in urgent situations.[93] A warrant authorises a police officer to seize anything found in the course of the search that he or she believes on reasonable grounds to be evidential material of an offence to which the warrant relates (or another indictable offence) and seizure of the thing is necessary to prevent its concealment, loss or destruction or its use in committing an offence.[94] The statement of compatibility does not explain how these ordinary powers are insufficient to protect national security.

1.28 The statement of compatibility argues that the powers are proportionate, pointing to restrictions on their use and noting they are subject to oversight by the ombudsman. The 2018 bill also proposes to introduce additional requirements for the AFP to report to the PJCIS after the AFP exercises such powers. These matters assist with the proportionality of the limitation. However, as noted above, questions remain as to whether the powers are more extensive than is strictly necessary and represent the least rights restrictive approach.

Committee comment

1.91 The committee therefore seeks the advice of the Attorney-General as to the compatibility with international human rights of each of the stop, question, search and seizure powers, and their proposed extension, including:

- **whether each of the stop, question, search and seizure powers, and their proposed extension, is effective to achieve (that is, rationally connected to) its stated objective; and**
- **whether each of the stop, question, search and seizure powers, and their proposed extension, is a reasonable and proportionate measure for the achievement of that objective (including whether it is necessary, whether it is the least rights restrictive approach and whether there are adequate and effective safeguards in place in relation to its operation).**

Extending the operation of ASIO's questioning and detention powers

1.92 Under Division 3 of Part III of the ASIO Act, ASIO has the power to apply for questioning warrants and questioning and detention warrants that permit ASIO to question or question and detain a person in order to collect intelligence in relation to a terrorism offence.

1.93 Currently, Division 3 of Part III of the ASIO Act will sunset on 7 September 2018. The bill seeks to provide for the continuation of this division of the ASIO Act for a further 12 months (until 7 September 2019).

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93 Section 3R of the *Crimes Act 1914*.

94 Division 2 of Part IAA of the *Crimes Act 1914.*

1.94 The committee reported on ASIO's questioning and detention powers (special powers regime) in its assessment of the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014 (now Act).[95]

Compatibility of the measure with multiple human rights

1.95 The statement of compatibility identifies that the special powers regime engages the right to freedom of movement and freedom from arbitrary detention.[96] In addition to these rights, the committee's previous assessment considered that the measures also engage a number of other human rights, including the right to freedom of expression; the right to a fair trial; the right to privacy; and the right of the child to have their best interests as a primary consideration (because persons aged 16 to 17 years are also subject to these powers, subject to restrictions[97]).

1.96 The committee previously noted that the special powers regime was legislated prior to the establishment of the committee, which means that it has not been subject to a foundational human rights compatibility assessment in accordance with the terms of the *Human Rights (Parliamentary Scrutiny) Act 2011*. The statement of compatibility for the 2018 bill goes some way to providing this foundational assessment.

1.97 The committee's previous assessment stated that, in the absence of a review into the measures by the PJCIS and the INSLM, it was unable to conclude that the special powers regime was compatible with human rights.[98] This finding is referred to in the statement of compatibility for the 2018 bill.[99] The previous human rights assessment also assessed that the measures were likely to be incompatible with human rights.[100] The proposed extension of the regime through the bill raises similar concerns as to the human rights compatibility of the measures, notwithstanding the further information provided in the statement of compatibility.

1.98 As noted above, most human rights may be subject to permissible limitations providing they pursue a legitimate objective and are rationally connected and proportionate to that objective.

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95 See, Parliamentary Joint Committee on Human Rights, *Fourteenth Report of the 44th Parliament* (28 October 2014) pp. 3-69; *Nineteenth report of the 44th Parliament* (3 March 2015) pp. 56-100; and *Thirtieth report of the 44th Parliament* (10 November 2015) pp. 82-101.

96 The SOC also refers to protections in the ASIO Act as a safeguard in relation to the prohibition on cruel, inhuman or degrading treatment or punishment. See EM, SOC, p. 33.

97 See, subsection 34ZE of Division 3 of Part III of the ASIO Act.

98 Parliamentary Joint Committee on Human Rights, *Nineteenth Report of the 44th Parliament* (3 March 2015) p. 69.

99 EM, SOC, p. 29.

100 Parliamentary Joint Committee on Human Rights, *Fourteenth Report of the 44th Parliament* (28 October 2014) p. 12.

1.99 In relation to the objective of the special powers regime, and why the proposed extension of the measures is necessary, the statement of compatibility for the bill states:

> The Division 3 powers support the legitimate objective of countering serious threats to Australia's national security interests and, in particular, preventing terrorist acts. Extending the operation of the Division 3 powers ensures Australia's counter-terrorism capabilities are maintained pending consideration of the PJCIS report reviewing the operation, effectiveness and implications of Division 3. The PJCIS completed its review on 1 March 2018.
>
> …The Division 3 powers were originally introduced following the 11 September 2001 terrorist attacks in the United States to improve the capacity of intelligence agencies to identify and counter threats of terrorism in Australia. The current threat environment has evolved considerably since 11 September 2001 and is steadily worsening. Accordingly, it is critical that these powers remain available to ASIO, beyond 7 September 2018, pending consideration of the PJCIS review and 2016 INSLM Report into Certain Questioning and Detention Powers in Relation to Terrorism.

1.100 It is acknowledged that the stated objective of the measures is likely to be a legitimate objective for the purposes of international human rights law. However, questions arise as to whether the measures are rationally connected to (that is, effective to achieve) and proportionate to, the stated objective.

1.101 In extending the special powers regime for an additional year, the bill is in line with recommendation 4 of the PJCIS inquiry report into ASIO's questioning and detention powers, tabled on 10 May 2018.[101] The PJCIS report recommends that ASIO's detention powers in Division 3 of Part III of the ASIO Act be repealed and that legislation should be developed to reform ASIO's compulsory questioning framework. The report recommends extending the relevant sunset date by one year in order to allow sufficient time for legislation to be developed by government and reviewed by the PJCIS.

1.102 The October 2016 report of the INSLM, The Hon Roger Gyles AO QC, 'Certain Questioning and Detention Powers in Relation to Terrorism,' also made several recommendations in relation to ASIO's special powers regime. These included that the questioning and detention powers be repealed or cease when the 7 September 2018 sunset date is reached.[102] In relation to these powers, the report stated that the

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101 Parliamentary Joint Committee on Intelligence and Security, *ASIO's questioning and detention Powers: Review of the operation, effectiveness and implications of Division 3 of Part III of the* Australian Security Intelligence Organisation Act 1979 (March 2018).

102 Independent National Security Legislation Monitor, *Certain Questioning and Detention Powers in Relation to Terrorism* (October 2016) p. 1.

measures 'are not proportionate to the threat of terrorism and are not necessary to carry out Australia's counter-terrorism and international security obligations'.[103] The report also recommended that ASIO's questioning power under Division 3 of Part III of the ASIO Act be repealed or not extended beyond the 2018 sunset date and 'be replaced by a questioning power following the model of coercive questioning available under the *Australian Crime Commission Act 2002* (Cth) as closely as possible'.[104]

1.103 While it is acknowledged that full consideration of the PJCIS and INSLM's respective reports may take time, it remains a concern that these measures are being extended for one year in the bill despite serious questions as to their effectiveness, necessity and proportionality.

1.104 It is noted that these measures have been little used to date. According to Attorney-General's Department figures, ASIO has successfully requested 16 questioning warrants beginning in 2004, with none requested since 2010.[105] As of April 2017, ASIO had never requested or been issued with a questioning and detention warrant.[106] It is therefore open to question whether these measures are effective or necessary, which is a particular concern in light of their highly invasive nature.

1.105 In particular, the committee's previous analysis stated that the special powers regime is essentially coercive in nature.[107] A questioning warrant, for example, empowers ASIO to request a person give information or produce records or things that are (or may be) relevant to intelligence in relation to a terrorism offence. Failure to appear for questioning or to answer questions or provide requested records or things, or the giving of false or misleading information is a criminal offence

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103 Independent National Security Legislation Monitor, *Certain Questioning and Detention Powers in Relation to Terrorism* (October 2016) p. 41.

104 Independent National Security Legislation Monitor, *Certain Questioning and Detention Powers in Relation to Terrorism* (October 2016) p. 1.

105 See figures cited in Parliamentary Joint Committee on Intelligence and Security, *ASIO's questioning and detention Powers: Review of the operation, effectiveness and implications of Division 3 of Part III of the* Australian Security Intelligence Organisation Act 1979 (March 2018) p. 11.

106 See, Attorney-General's Department, *Submission 7*, p. 14, made in relation to the Parliamentary Joint Committee on Intelligence and Security's review of ASIO's questioning and detention powers. See also, Parliamentary Joint Committee on Intelligence and Security, *ASIO's questioning and detention Powers: Review of the operation, effectiveness and implications of Division 3 of Part III of the* Australian Security Intelligence Organisation Act 1979 (March 2018) p. 11.

107 Parliamentary Joint Committee on Human Rights, *Fourteenth Report of the 44th Parliament* (28 October 2014) p. 11.

punishable by five years' imprisonment.[108] In requiring that a person give information or produce a record or thing, the privilege against self-incrimination is abrogated.[109]

1.106 Further, a questioning and detention warrant allows ASIO to request the detention of a non-suspect for the purpose of intelligence-gathering, and allows police officers to enter and search any premises where they reasonably believe the person is, and to use reasonable force in order to take the person into custody. In executing a detention warrant, the AFP officer is not required to give the person any information about the grounds for the warrant. A person may be detained for a maximum of seven days.[110]

1.107 The statement of compatibility for the 2018 bill argues that there are a range of safeguards in the ASIO Act in relation to the use of the measures.[111] These include that the Attorney-General must be satisfied of certain matters before issuing questioning and detention warrants[112] and that the ASIO Act provides for the appointment of 'prescribed authorities' to supervise the execution of questioning or questioning and detention warrants.[113]

1.108 However, consistent with the analysis in the committee's previous reports, such safeguards are unlikely to be sufficient to ensure the measures are a proportionate limitation on the human rights outlined at [1.95] above. It is noted in particular that the application of ASIO's special powers regime may be very broad in scope, as the powers may apply in relation to individuals who are not suspected of, nor charged with, any offence, including a terrorism-related offence.

Committee comment

1.109 Noting the concerns raised in its previous human rights assessments of ASIO's special powers regime and the above analysis, the committee draws the human rights implications of these measures in the bill to the attention of parliament.

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108 See, section 34L of Division 3 of Part III of the ASIO Act.

109 See, subsection (8), section 34L of Division 3 of Part III of the ASIO Act.

110 See, subsection 4(c), section 34G of Division 3 of Part III of the ASIO Act.

111 See EM, SOC, pp. 30-34.

112 This includes that relying on other methods of collecting the intelligence would be ineffective and that there is a written statement of procedures in force to be followed in the exercise of authority under the warrant. See, EM, SOC, p. 32.

113 A 'prescribed authority' is a person who has served as a judge in a superior court for a period of at least five years, and no longer holds a commission as a judge of a superior court, or in certain circumstances a current judge of a state or territory Supreme Court or District Court (or an equivalent) who has served in the position for at least five years. See, section 34B of Division 3 of Part III of the ASIO Act.

1.110 The committee recommends that, in considering any amendments to the special powers regime, the minister have regard to the human rights assessment of the special powers regime set out above.

Social Services Legislation Amendment (Cashless Debit Card Trial Expansion) Bill 2018

Social Security (Administration) (Trial of Cashless Welfare Arrangements) Determination 2018 [F2018L00245]

Social Security (Administration) (Trial – Declinable Transactions and Welfare Restricted Bank Account) Determination 2018 [F2018L00251]

Purpose	The bill seeks to expand the operation of the cashless debit card trial to the Bundaberg and Hervey Bay area. F2018L00245: determines the trial area and trial participants for the Goldfields trial area, East Kimberley trial area and the Ceduna trial area. F2018L00251: sets out the kind of bank account to be maintained by a participant in the trial
Portfolio	Social Services
Introduced	House of Representatives, 30 May 2018 F2018L00245: 15 sitting days after tabling (tabled Senate 20 March 2018) F2018L00251: 15 sitting days after tabling (tabled Senate 20 March 2018)
Rights	Social security; private life; family; equality and non-discrimination (see **Appendix 2**)
Status	Seeking additional information

Background

1.111 The committee has examined the income management regime in its 2013 and 2016 Reviews of the Stronger Futures measures.[1]

1.112 The committee has also previously considered the trial of cashless welfare arrangements in the two trial locations of Ceduna (and its surrounding region) and

1 See Parliamentary Joint Committee on Human Rights, *Eleventh Report of 2013: Stronger Futures in the Northern Territory Act 2012 and related legislation* (27 June 2013) and *2016 Review of Stronger Futures measures* (16 March 2016).

East Kimberley in previous reports, including in relation to the Social Security Legislation Amendment (Debit Card Trial) Bill 2015 (Debit Card Bill 2015).[2]

1.113 The Debit Card Bill 2015 amended the *Social Security (Administration) Act 1999* (Social Security Administration Act) to provide for a trial of cashless welfare arrangements in up to three prescribed locations. Persons on working age welfare payments in the prescribed sites would have 80 percent of their income support restricted, so that the restricted portion could not be used to purchase alcohol or to conduct gambling. A person subject to the trial is prevented from accessing this portion of their social security payment in cash. Rather, payment is accessible through a debit card which cannot be used at 'excluded businesses' or 'excluded services'.[3]

1.114 The trial arrangements were initially extended to a period of twelve months in two instruments[4] and, subsequently, by a further six months.[5] The trial was further extended in the Ceduna region for a further six months (until 14 March 2018) and in East Kimberley for a further six months (until 25 April 2018).[6]

1.115 The committee also considered amendments to the cashless debit card trial proposed to be introduced by the Social Services Legislation Amendment (Cashless Debit Card) Bill 2017 (the 2017 bill).[7] After the committee's consideration of the 2017 bill, the 2017 bill was amended and the version as passed specifically defined the 'trial areas' of the cashless debit card trial to be the Ceduna area, the East Kimberley Area and the Goldfields area in the Social Security Administration Act.[8] Section 124PF

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2 Parliamentary Joint Committee on Human Rights, *Twenty-seventh report of the 44th Parliament* (8 September 2015) pp. 20-29 and *Thirty-first report of the 44th Parliament* (24 November 2015) pp. 21-36. Also see, Parliamentary Joint Committee on Human Rights, Social Security (Administration) (Trial - Declinable Transactions) Amendment Determination (No. 2) 2016 [F2016L01248], *Report 7 of 2016* (11 October 2016) pp. 58-61.

3 See, further, Parliamentary Joint Committee on Human Rights, *2016 Review of Stronger Futures measures* (16 March 2016) p. 39.

4 Social Security (Administration) (Trial Area - Ceduna and Surrounding Region) Amendment Determination (No. 2) 2016 [F2016L01424] and Social Security (Administration) (Trial Area – East Kimberley) Amendment Determination 2016 [F2016L01599]. See Parliamentary Joint Committee on Human Rights, *Report 8 of 2016* (9 November 2016) p. 53.

5 See Parliamentary Joint Committee on Human Rights, *Report 5 of 2017* (14 June 2017) 31-33 and *Report 8 of 2017* (15 August 2017) pp. 122-125.

6 Social Security (Administration) (Trial Area) Amendment Determination (No. 2) 2017 [F2017L01170]; see Parliamentary Joint Committee on Human Rights, *Repot 9 of 2017* (5 September 2017) pp. 34-40; Parliamentary Joint Committee on Human Rights, *Report 11 of 2017* (17 October 2017) pp. 126-137.

7 Parliamentary Joint Committee on Human Rights, *Report 9 of 2017* (5 September 2017) pp. 34-40; Parliamentary Joint Committee on Human Rights, *Report 11 of 2017* (17 October 2017) pp. 126-137.

8 Item 1, Section 124PD(1) of the *Social Services Legislation Amendment (Cashless Debit Card) Act 2018.* Each of these areas were defined in section 124PD(1).

of that bill (as amended) also provided that the cashless debit card trial in the 'trial areas' was to end on 30 June 2019 and include no more than 10,000 trial participants.

Expansion of the cashless debit card trial to the Bundaberg and Hervey Bay area

1.116 The Social Services Legislation Amendment (Cashless Debit Card Trial Expansion) Bill 2018 (the 2018 bill) expands the cashless debit card trial to the Bundaberg and Hervey Bay area, to run until 30 June 2020.[9] It also expands the number of trial participants for the cashless welfare trial (including in the other trial sites) to 15,000.[10]

1.117 The trial participants in the Bundaberg and Hervey Bay area are defined in the bill. A 'trial participant' is a person whose usual place of residence 'is, becomes or was' within the Bundaberg and Hervey Bay area; is receiving newstart allowance, youth allowance (except those receiving the allowance as new apprentices or undertaking full-time study) or parenting payment; and is under the age of 35 years on the day the provision commences and has not turned 36 years of age.[11] There are also several circumstances identified in the bill where the person would not be a trial participant, including where the person has a payment nominee; where the person is subject to a determination under section 43(3A) (that is, where their social security periodic fortnightly payment may be paid in two instalments); and where the person is already subject to certain types of income management.[12] A person will also not be a trial participant if they are undertaking full-time study outside of the Bundaberg and Hervey Bay area.[13]

1.118 Section 124PGA(4) and (5) further provide:

> (4) The Secretary must determine that a person is not a trial participant under this section if the Secretary is satisfied that being a trial participant under this section would pose a serious risk to the person's mental, physical or emotional wellbeing.

9 Proposed section 124PF(1)(b) of the bill.

10 Proposed section 124PF(3) of the bill.

11 Proposed section 124PGA(1)(a)-(c) of the bill.

12 Proposed section 124PGA(1)(d)-(f) of the bill. The relevant types of income management are income management under section 123UC (child protection income management), 123UCB (disengaged youth income management), 123UCC (long-term welfare payment recipient income management), or 123UF (Queensland Family Responsibilities Commission income management).

13 Proposed section 124PGA(1)(g); 124PGA(3) of the bill.

> (5) The Secretary is not required to inquire into whether a person being a trial participant under this section would pose a serious risk to the person's mental, physical or emotional wellbeing.

1.119 The 2018 bill also includes provisions for the minister to make a determination varying the percentages of restricted and unrestricted portions for a person who is a trial participant in the Bundaberg or Hervey Bay area in certain circumstances. Circumstances include where the secretary is satisfied that the person is unable to use the person's cashless debit card as a direct result of a technological fault or natural disaster, or where the secretary is satisfied the person is being paid in instalments (at a time determined by the secretary pursuant to section 43(2) of the Social Security Administration Act) because the person is in severe financial hardship as a result of exceptional and unforeseen circumstances, or where a person is being paid in advance following a determination under section 51 of the Social Security Administration Act.[14]

Compatibility of the measure with multiple human rights

1.120 The previous human rights assessments of the cashless welfare trial measures raised concerns in relation to the compulsory quarantining of a person's welfare payments and the restriction of a person's agency and ability to spend their welfare payments at businesses including supermarkets. These concerns related to the right to social security, the right to privacy and family and the right to equality and non-discrimination.[15] Each of these rights is discussed in detail in the context of the income management regime more broadly in the committee's 2016 Review of Stronger Futures measures (2016 Review).[16]

1.121 The expansion of the trial to the Bundaberg and Hervey Bay area also engages and limits these rights. The statement of compatibility acknowledges these rights are engaged and limited by the bill.[17] These rights may be subject to permissible limitations where they pursue a legitimate objective, are rationally connected to (that is, effective to achieve) and proportionate to that objective.

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14 Proposed sections 124PJ(4B); 124PJ(4C).

15 See Parliamentary Joint Committee on Human Rights, *Thirty-first report of the 44th Parliament* (24 November 2015) pp. 21-36; *2016 Review of Stronger Futures measures* (16 March 2016) p. 61; and *Report 7 of 2016* (11 October 2016) pp. 58-61; Parliamentary Joint Committee on Human Rights, *Report 9 of 2017* (5 September 2017) pp. 34-40; Parliamentary Joint Committee on Human Rights, *Report 11 of 2017* (17 October 2017) pp. 126-137.

16 Parliamentary Joint Committee on Human Rights, *2016 Review of Stronger Futures measures* (16 March 2016) 43-63. It is noted that the statement of compatibility states that in the Bundaberg and Hervey Bay area, it is estimated that 14% of participants will be Aboriginal and Torres Strait Islander peoples. The statement of compatibility also states that the proportion of Indigenous participants across the four trial sites will be approximately 33%: SOC, p. 9.

17 Statement of compatibility (SOC) p. 1.

1.122 The statement of compatibility states that the objectives of the cashless debit card trial are 'reducing immediate hardship and deprivation, reducing violence and harm, encouraging socially responsible behaviour, and reducing the likelihood that welfare payment recipients will remain on welfare and out of the workforce for extended periods of time'.[18] The statement of compatibility describes the pressing and substantial concern justifying the expansion of the trial to the Bundaberg and Hervey Bay area as being that the area has 'significant issues regarding youth unemployment, intergenerational welfare dependency and families who require assistance in meeting the needs of their children'.[19]

1.123 The committee has previously accepted that the cashless welfare trial measures described above may pursue a legitimate objective.[20] However, concerns have previously been raised as to whether the measures are rationally connected to (that is, effective to achieve) and proportionate to this objective.[21]

1.124 The statement of compatibility cites the evaluation of the cashless debit card trial by ORIMA Research as evidence of the effectiveness of the trial.[22] The interim research undertaken by ORIMA had previously been relied upon for similar purposes in previous statements of compatibility for cashless welfare measures.[23] The statement of compatibility explains that the evaluation found that the cashless debit card trial has had a 'considerable positive impact' in the communities in which it operated, and that the trial had been effective in reducing alcohol consumption and gambling in both of the trial sites.[24] Statistics cited in the statement of compatibility from the ORIMA report include that 41 per cent of persons reported drinking alcohol less frequently,[25] and 37 per cent of binge drinkers were doing this less frequently;[26]

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18 SOC, p. 2.

19 SOC, p. 2. The SOC also provides some statistics as to the prevalence of these issues in the Bundaberg and Hervey Bay area on page 2 of the SOC.

20 See, for example, Parliamentary Joint Committee on Human Rights, *Report 11 of 2017* (17 October 2017) pp. 126-137.

21 See, for example, Parliamentary Joint Committee on Human Rights, *Report 11 of 2017* (17 October 2017) pp. 126-137.

22 SOC, pp. 2-3. See ORIMA Research, *Cashless Debit Card Trial Evaluation: Final Evaluation Report* (August 2017).

23 See, most recently, Parliamentary Joint Committee on Human Rights, *Report 11 of 2017* (17 October 2017) pp. 36-37.

24 SOC, p. 3.

25 SOC, p. 3; ORIMA Research, *Cashless Debit Card Trial Evaluation: Final Evaluation Report* (August 2017) p. 4.

26 SOC, p. 3; ORIMA Research, *Cashless Debit Card Trial Evaluation: Final Evaluation Report* (August 2017) p. 4.

48 per cent reported gambling less;[27] and 48 per cent reported using illegal drugs less often.[28]

1.125 However, it is noted that the report also contains some more mixed findings on the operation of the scheme. For instance, while the statement of compatibility notes that nearly 40 per cent of non-participants in the trial perceived that violence in their community had decreased,[29] and the ORIMA report pointed to evidence of the reduction in alcohol-related harm in the trial sites based on administrative data,[30] the ORIMA report states that 'with the exception of drug driving offense and apprehensions under the Public Intoxication Act (PIA) in Ceduna, crime statistics showed no improvement since the commencement of the trial'.[31] The ORIMA report also notes that 32 per cent of participants on average reported that the trial had made their lives worse;[32] 33 per cent of participants had experienced adverse complications and limitations from the trial, including difficulties transferring money to children that are away at boarding school and being unable to make small transactions at fundamentally cash-based settings (such as canteens);[33] 27 per cent of participants on average noticed more 'humbugging',[34] as did 29 per cent of non-participants;[35] and in the East Kimberley, a greater proportion of participants felt

27 SOC, p. 3; ORIMA Research, *Cashless Debit Card Trial Evaluation: Final Evaluation Report* (August 2017) p. 4.

28 SOC, p. 3; ORIMA Research, *Cashless Debit Card Trial Evaluation: Final Evaluation Report* (August 2017) p. 4. The report caveats, however, that self-reports of illegal drug use in a survey context are subject to a high risk of social desirability bias and should be interpreted with caution.

29 SOC, p. 3.

30 ORIMA Research, *Cashless Debit Card Trial Evaluation: Final Evaluation Report* (August 2017) pp. 4-5.

31 ORIMA Research, *Cashless Debit Card Trial Evaluation: Final Evaluation Report* (August 2017) p. 4.

32 ORIMA Research, *Cashless Debit Card Trial Evaluation: Final Evaluation Report* (August 2017) p. 6.

33 ORIMA Research, *Cashless Debit Card Trial Evaluation: Final Evaluation Report* (August 2017) p. 7.

34 Defined as 'making unreasonable financial demands on family members or other local community members'. See ORIMA Research, *Wave 1 Interim Evaluation Report of the Cashless Debit Card Trial* (February 2017) p. 6.

35 ORIMA Research, *Cashless Debit Card Trial Evaluation: Final Evaluation Report* (August 2017) p. 76.

that violence had increased rather than had decreased.[36] These statistics are not cited in the statement of compatibility.[37]

1.126 Further, as noted in the statement of compatibility, the Bundaberg and Hervey Bay area has a much larger population than the three current sites, and is not a remote location.[38] It is not clear, therefore, whether the positive findings from the ORIMA report are relevant in determining whether the cashless debit card trial in Bundaberg and Hervey Bay areas would be an effective means of achieving the legitimate objective. In particular, the statement of compatibility emphasises that the cashless debit card trial in the new area is targeted towards the issues of youth unemployment, intergenerational welfare dependency and families who require assistance in meeting the needs of their children.[39] While the ORIMA report identified that 40% of trial participants who had caring responsibility reported that they had been better able to care for their children,[40] the ORIMA report does not discuss effectiveness in relation to youth unemployment or intergenerational welfare dependency. While the statement of compatibility provides information as to the extent of these issues within the Bundaberg and Hervey Bay areas, there is no information provided as to how expanding the cashless debit card trial would be effective to achieve these objectives of the measure.

1.127 It is also unclear that the extension of the trials is a proportionate limitation on human rights. The existence of adequate and effective safeguards, to ensure that limitations on human rights are the least rights restrictive way of achieving the legitimate objective of the measure, are relevant to assessing the proportionality of these limitations.

1.128 Of particular concern, as has been discussed in previous reports, is that the cashless debit card trial would be imposed without an assessment of individuals' suitability for the scheme. In assessing whether a measure is proportionate, relevant factors to consider include whether the measure provides sufficient flexibility to treat different cases differently or whether it imposes a blanket policy without regard to the circumstances of individual cases.

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36 ORIMA Research, *Cashless Debit Card Trial Evaluation: Final Evaluation Report* (August 2017) p. 64.

37 It is noted that the ORIMA report findings and methodology have also been criticised in a review by the Centre for Aboriginal Economic Policy Research (CAEPR) at the Australian National University: see J Hunt, *The Cashless Debit Card Evaluation: Does it really prove success?* (CAEPR Topical Issue No.2/2017).

38 SOC, p. 2.

39 SOC, p. 2.

40 SOC, p. 3; ORIMA Research, *Cashless Debit Card Trial Evaluation: Final Evaluation Report* (August 2017) p. 6.

1.129 As the cashless debit card trial applies to anyone below the age of 35 residing in the trial location who receives the specified social security payments, there are serious doubts as to whether the measures are the least rights restrictive way of achieving the objective. In relation to the bill, this concern is heightened insofar as the trial applies not only to persons whose usual place of residence 'is or becomes' within the Bundaberg and Hervey Bay area, but also applies to a person whose usual place of residence *was* within the area.[41] By comparison, the income management regime in Queensland's Cape York allows for individual assessment of the particular circumstances of affected individuals and the management of their welfare payments.[42] The committee has previously stated that this regime may be less rights restrictive than the blanket location-based scheme applied under other income management measures.[43]

1.130 The statement of compatibility identifies that the bill includes several safeguards to protect persons whose mental, physical and emotional wellbeing may be at serious risk if they participate in the scheme. This includes the requirement that the secretary determine that a person no longer be a trial participant if satisfied that being a trial participant is seriously risking a person's mental, physical or emotional wellbeing.[44] However, this safeguard is qualified in the bill, as the secretary is not required to make inquiries on this matter but is only required to take action once being made aware of the relevant facts.[45] It is not clear how the secretary would be made aware of whether a person's participation in the trial is impacting a person's mental, physical and emotional wellbeing.

1.131 The compulsory nature of the cashless debit card trial also raises questions as to the proportionality of the measures. In its 2016 Review, the committee stated that, while income management 'may be of some benefit to those who voluntarily enter the program, it has limited effectiveness for the vast majority of people who are compelled to be part of it'.[46] The application of the cashless debit card scheme on a voluntary basis, or with a clearly defined process for individuals to seek exemption from the trial, would appear to be a less rights restrictive way to achieve the trial's objectives. This was not discussed in the statement of compatibility.

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41 Proposed section 124PGA(1)(a).

42 See Parliamentary Joint Committee on Human Rights, Social Services Legislation Amendment (Queensland Commission Income Management Regime) Bill 2017, *Report 5 of 2017* (14 June 2017) pp. 45-48.

43 Parliamentary Joint Committee on Human Rights, *Report 5 of 2017* (14 June 2017) 47.

44 SOC, pp. 5-6.

45 Proposed section 124PGA(5) of the bill.

46 Parliamentary Joint Committee on Human Rights, *2016 Review of Stronger Futures measures* (16 March 2016) p. 52.

Committee comment

1.132 The preceding analysis indicates that the expansion of the cashless debit card trial to the Bundaberg and Hervey Bay area engages and limits the right to social security, the right to privacy and family and the right to equality and non-discrimination.

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

- **how the measures are effective to achieve the stated objectives (including whether there is evidence in relation to how the measures will be effective to achieve the objectives of 'reducing the likelihood that welfare payment recipients will remain on welfare and out of the workforce for extended periods of time');**
- **how the limitation on human rights is proportionate to achieve the stated objectives, including:**
  - **why it is necessary for persons whose usual place of residence *was* the Bundaberg or Hervey Bay area to be included within the definition of 'trial participant'; and**
  - **whether the use of the cashless debit card could be restricted to instances where there has been an assessment of an individual's suitability to participate in the scheme rather than a blanket imposition based on location, or where individuals opt-in on a voluntary basis.**

Amendments to provisions relating to participant's use of funds from restrictable payments

1.134 The Social Security (Administration) Act presently permits certain welfare payments to be divided into 'restricted' and 'unrestricted' portions, with recipients being unable to spend the restricted portions of such payments on alcohol or gambling.[47] Currently, section 124PM provides that a person who receives a 'restrictable payment'[48] may use the restricted portion of the payment to purchase goods or services other than alcoholic beverages or gambling,[49] and 'may use the unrestricted portion of the payment, as paid to the person, at the person's discretion'.[50]

47 See section 124PB of the *Social Security (Administration) Act 1999*.

48 Which includes a number of payments, including specified social security payments and family tax benefits: see section 124PD(1) of the *Social Security (Administration) Act 1999*.

49 Section 124PM(a).

50 Section 124PM(b).

1.135 The 2018 bill includes an amendment to section 124PM which will come into effect if the proposed amendments to section 124PM in the Social Services Legislation Amendment (Housing Affordability) Bill 2017 (Housing Affordability Bill) have commenced at the time these amendments commence.[51] The Housing Affordability Bill proposes to repeal section 124PM and replace it, the effect of which (according to the explanatory memorandum to that bill) would be to remove what is currently section 124PM(b) (which refers to the person being able to use the unrestricted portion at their discretion) so as to allow for automatic rent deductions to be made from the unrestricted portion of a cashless debit card participant's welfare payment, if necessary.[52]

1.136 The proposed amendment would repeal section 124PM and substitute it with the following provision:

> A person who receives a restrictable payment may use the restricted portion of the payment, as paid under subsection 124PL(2), to obtain goods or services, other than:
>
> (a) alcoholic beverages; or
>
> (b) gambling; or
>
> (c) a cash-like product that could be used to obtain alcoholic beverages or gambling.

1.137 The effect of this amendment would be to expand the restriction on participants' use of funds to include 'cash-like' products that could be used to obtain alcoholic beverages or gambling,[53] and retain the proposed deletion of current section 124PM(b) which allows persons to use the unrestricted portion of the payment, as paid to the person, at the person's discretion.

1.138 There is also a proposed amendment to section 124PM(a) that is in similar terms which would apply in the event that the Housing Affordability Bill has not commenced (in other words, section 124PM(b) would remain unchanged if that bill has not commenced).[54]

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

1.139 In its *Report 1 of 2018,* the committee considered that the proposed amendment to section 124PM in the Housing Affordability Bill may be incompatible

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51 See item 20, proposed section 124PM and explanatory memorandum, p. 10.

52 Explanatory Memorandum to the *Social Services Legislation Amendment (Housing Affordability) Bill 2017,* 6.

53 'Cash-like' products are defined in proposed section 124PQA to include '(a) a gift card, store card, voucher or similar article (whether in a physical or electronic form); (b) a money order, postal order or similar order (whether in a physical or electronic form); (c) digital currency'.

54 See Item 17, proposed paragraph 124PM(a).

with the right to equality and non-discrimination.[55] This is because in allowing for automatic rent deductions to be made from the unrestricted portion of a cashless debit card participant's welfare payment, the Housing Affordability Bill appears to further restrict how a person subject to the cashless welfare regime may spend their social security payment or family tax benefit, and may limit, or entirely preclude, a person's discretionary income if they are subject to both the proposed automatic rent deduction scheme and the cashless debit card trial. As the committee has previously commented, while the cashless welfare scheme does not directly discriminate on the basis of race, Indigenous people are disproportionately affected by the cashless welfare regime in the locations where the scheme currently operates, giving rise to *prima facie* indirect discrimination.

1.140 To the extent that the bill retains the deletion of the reference to a person's unrestricted portion and allows for automatic rent deductions from the unrestricted portion of a cashless debit card participant's welfare payment, the concerns expressed in the committee's previous report apply equally to the proposed amendment in the bill.

Committee comment

1.141 The committee notes that, as set out in *Report 1 of 2018,* it previously considered that the proposed amendments to section 124PM introduced by the Social Services Legislation Amendment (Housing Affordability) Bill 2017 may be incompatible with the right to equality and non-discrimination.

1.142 To the extent that item 20 of the bill introduces contingent amendments to section 124PM if the Social Services Legislation Amendment (Housing Affordability) Bill 2017 has commenced by the time the bill commences, the committee reiterates its previous comment and draws the human rights implications of section 124PM to the attention of the parliament.

Amendments to the cashless welfare arrangements through the determinations

1.143 The Social Security (Administration) (Trial of Cashless Welfare Arrangements) Determination 2018 [F2018L00245] (the trial of cashless welfare arrangements determination) revokes and remakes previous determinations in light of the amendments introduced by the *Social Services Legislation Amendment (Cashless Debit Card) Act 2018*.[56] The measures contained in the determination include:

55 Parliamentary Joint Committee on Human Rights, *Report 1 of 2018* (6 February 2018) p. 137.

56 Previously, the trial areas of East Kimberley and Ceduna were primarily governed by legislative instruments, but the trials are now included in the primary legislation: section 124PD of the *Social Security (Administration) Act 1999*.

- defining the class of persons who will be trial participants in the Goldfields, Ceduna and East Kimberley regions pursuant to section 124PG(2) of the Social Security Administration Act;[57]
- removing the locality of Plumridge Lakes from the Goldfields trial area;
- repealing and remaking several determinations which were due to expire on 30 June 2018, extending their operation to 30 June 2019.[58]

1.144 The Social Security (Administration) (Trial – Declinable Transactions and Welfare Restricted Bank Account) Determination 2018 [F2018L00251] (the declinable transactions determination) sets out the kind of bank account to be maintained by participants in the cashless debit card trial, as well as setting out terms and conditions relating to the establishment, ongoing maintenance and closure of bank accounts, and declares the kind of business in relation to which transactions involving money in a welfare restricted bank account may be declined by a financial institution.

Compatibility of the determinations with human rights

1.145 The determinations raise the same human rights issues as those discussed above. The statement of compatibility to each of the determinations acknowledges these rights are engaged and limited by the determinations, and raises the same justifications for human rights limitations as discussed above in relation to the bill.

1.146 The committee has previously commented upon the human rights compatibility of earlier versions of the determinations. In relation to the declinable transactions determination, the committee raised concerns as to the compulsory quarantining of a person's welfare payments and the restriction of a person's agency and ability to spend their welfare payments at businesses including supermarkets. The committee drew the human rights implications of the earlier version of the declinable transactions determination to the attention of parliament noting the concerns previously discussed in relation to the cashless debit card trial.[59]

1.147 In relation to the trial of cashless welfare arrangements determination, the committee noted that the determination raised similar concerns to those raised in the 2016 Review of Stronger Futures measures, but since no response was received

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57 See Part 2 of the Social Security (Administration) (Trial of Cashless Welfare Arrangements) Determination 2018.

58 The determination repeals and remakes the following legislative instruments: Social Security (Administration) (Trial-Community Body- Ceduna Region Community Panel) Authorisation 2016, Social Security (Administration)(Trial-Community Body- East Kimberley Regional Community Panels) Authorisation 2015, Social Security (Administration)(Trial – Excluded Voluntary Participants) Determination 2016, Social Security (Administration)(Trial - Variation of Percentage Amounts) Determination 2016.

59 Parliamentary Joint Committee on Human Rights, *Report 7 of 2016* (11 October 2016) p. 61.

from the minister at the time of finalising the report, the committee concluded it was not possible to conclude that the determination was necessary and effective to achieve the objectives of the trials or was a proportionate limitation on human rights.[60] It is noted that the new trial of cashless welfare arrangements determination retains the provisions from the previous determination as to the class of trial participants insofar as it applies to the Ceduna and East Kimberley determinations,[61] but introduces new provisions to reflect the expansion of the trial to the Goldfields region.

1.148 As discussed above, while it is accepted that the cashless debit card trial may pursue a legitimate objective, there are concerns as to whether the measures are rationally connected to this objective. To the extent the determinations rely on the ORIMA report as evidence of the effectiveness of the cashless welfare regime,[62] the concerns discussed above in relation to the ORIMA report apply equally in relation to the determinations. It is also not clear from the statement of compatibility to the trial of cashless welfare arrangements determination how the findings of the ORIMA report are relevant to the effectiveness of the measure as it applies to the Goldfields region.

1.149 The concerns discussed above in relation to proportionality also apply in relation to the determinations. Additionally, in relation to the trial of cashless welfare arrangements determination, the determination provides that the class of persons who fall within the Goldfields area and would be subject to the cashless debit card trial includes the class of persons who 'have not reached pension age and will not reach pension age during the 12 month period commencing on 26 March 2018'.[63] It is not explained in the statement of compatibility the rationale for excluding persons of pension age in the Goldfields trial area but not the Ceduna or East Kimberley areas.

Committee comment

1.150 The preceding analysis indicates that the Social Security (Administration) (Trial of Cashless Welfare Arrangements) Determination 2018 [F2018L00245] and the Social Security (Administration) (Trial – Declinable Transactions and Welfare Restricted Bank Account) Determination 2018 [F2018L00251] engage and limit the

60 Parliamentary Joint Committee on Human Rights, *Report 8 of 2017* (15 August 2017) 124-125.

61 See Explanatory Statement, p. 1.

62 SOC to the Social Security (Administration) (Trial of Cashless Welfare Arrangements) Determination 2018 [F2018L00245], 5-6; SOC to the Social Security (Administration) (Trial – Declinable Transactions and Welfare Restricted Bank Account) Determination 2018 [F2018L00251] pp. 4-5.

63 See section 8 of the Social Security (Administration) (Trial of Cashless Welfare Arrangements) Determination 2018.

right to social security, the right to privacy and family and the right to equality and non-discrimination.

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

- **how the measures are effective to achieve the stated objectives (including whether there is evidence in relation to how the measures will be effective to achieve the stated objectives as they apply to the Goldfields area); and**
- **how the limitation on human rights is proportionate to achieve the stated objectives (including whether there are other, less rights restrictive measures available, and the rationale for excluding persons who have reached pension age in the Goldfields trial area but not the Ceduna or East Kimberley area).**

Bills not raising human rights concerns

1.152 Of the bills introduced into the Parliament between 18 and 21 June 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):

- Animal Export Legislation Amendment (Ending Long-haul Live Sheep Exports) Bill 2018;
- Commonwealth Electoral Amendment (Lowering Voting Age and Increasing Voter Participation) Bill 2018;
- Farm Household Support Amendment Bill 2018;
- Inspector-General of Animal Welfare and Live Animal Exports Bill 2018;
- Refugee Protection Bill 2018; and
- Treasury Laws Amendment (Protecting Your Superannuation Package) 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**.

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**)
Previous reports	4 of 2018
Status	Concluded examination

Background

2.3 The committee first reported on the bill in its *Report 4 of 2018*, and requested a response from the Minister for Health by 23 May 2018.[1]

2.4 The minister's response to the committee's inquiries was received on 24 May 2018. The response is discussed below and is reproduced in full at **Appendix 3**.

Collection of health and welfare-related information and statistics

2.5 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

1 Parliamentary Joint Committee on Human Rights, *Report 4 of 2018* (8 May 2018) pp. 2-3.

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

2.6 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.

2.7 The initial human rights analysis stated that it was 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.[2] 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.

2.8 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, as noted in the initial analysis, 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 was 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*.

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

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

- 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).

Minister's response

2.10 The minister's response states that the collection of personal information for statistical purposes is to support the Institute's core functions. The minister explains the importance of such information in this context:

> …collect[ing] for statistical purposes to support the development of an evidence base across the health, welfare and housing sectors. Specifically, the Institute collects personal information for survey purposes, to maintain health and welfare data sets, to maintain national registers and to undertake data linkage activities for health and medical research. The provision of such information is critical to enhance the quality and usefulness of its reports and publications, noting that the Institute is responsible for the production of over 180 reports covering subject areas; such as health and welfare expenditure, hospitals, disease and injury, mental health, ageing, homelessness, disability and child protection.

2.11 These purposes for which the Institute collects personal information are likely to be legitimate for the purposes of human rights law. The minister's response describes the change to remove the requirement to seek agreement from the ABS to collect health-related information and statistics and welfare-related information and statistics as one which would 'provide greater autonomy' to the Institute to collect data relating to these core functions. This would appear to be rationally connected to the legitimate objective.

2.12 In relation to the proportionality of the proposed measure, the minister's response first explains that the Institute is required to comply with the requirements of the *Privacy Act 1988* (the Privacy Act). In addition, the minister's response outlines the following safeguards relating to the protection of personal information:

> Furthermore, access to personal information is restricted by confidentiality provisions under Section 29 of the AIHW Act. Access to personal information held by the Institute is restricted to Institute staff, to staff of other bodies contracted to undertake specific functions on behalf of the Institute and to anyone outside the Institute with the approval of the AIHW Ethics Committee.

In addition, section 29 of the AIHW Act, prohibits individuals who acquire information, either arising from their employment or doing any act or thing under an arrangement with the Institute, from disclosing (or making a record of) information concerning a person where the disclosure is not made for the purposes of the AIHW Act. It also prevents individuals in receipt of information acquired under the AIHW Act from being required to divulge or communicate that information to a court.

Section 29 also provides criminal penalties for the unauthorised disclosure of personal information where it is not made for the purpose of the AIHW Act. Fines of up to $2,000 or imprisonment for 12 months, or both, apply.

The AIHW Ethics Committee (established under section 16 of the AIHW Act) is responsible for making decisions on the ethical acceptability of proposals that relate to the Institute's activities and Institute-assisted activities (activities engaged in by bodies or persons, other than the Institute). These proposals may include identifiable data (i.e. data that contains personal information) and the AIHW Ethics Committee can impose conditions on the release of such data as it deems appropriate. Researchers are required to complete an Undertaking of Confidentiality should they be provided with access to personal information by the AIHW Ethics Committee.

These legislative provisions are backed by internal policies and procedures at the Institute to protect personal information collected by the Institute. This includes information security and privacy (technical, physical and personnel aspects), data custody, data linkage protocols, data confidentialisation techniques and the release of statistical information. Institute staff and contractors are required to sign confidentiality deeds before being granted access to data.

The Institute also has measures in place to ensure the safe and secure storage of personal information. Electronic and paper records containing personal information are stored in accordance with the Australian Government's Protective Security Policy Framework and record management practices comply with the Australian Government requirements as specified in the *Archives Act 1983*. Physical security policies also provide additional protections and are in place for regulating access to, and the storage of, linked data sets.

2.13 Having regard to the safeguards to protect personal information identified in the minister's response, it is likely that the measure will be a proportionate limitation on the right to privacy.

Committee response

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

2.15 In light of the further information provided by the minister, the committee considers that the measure is likely to be compatible with the right to privacy.

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**)
Previous reports	4 of 2018
Status	Concluded examination

Background

2.16 The committee first reported on the bill in its *Report 4 of 2018*, and requested a response from the Minister for Home Affairs by 23 May 2018.[1]

2.17 A response from the Assistant Minister for Home Affairs was received on 30 May 2018. The response is discussed below and is reproduced in full at **Appendix 3**.

Expansion of visa bar

2.18 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.

2.19 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.

2.20 These proposed amendments were previously introduced in the Migration and Maritime Powers Amendment Bill (No. 1) 2015. That bill lapsed on the

1 Parliamentary Joint Committee on Human Rights, *Report 4 of 2018* (8 May 2018) pp. 4-11.

prorogation of the 44th parliament.[2] The committee considered the human rights compatibility of these measures in its *Thirtieth Report of the 44th Parliament* and *Thirty-fourth report of the 44th Parliament.*[3]

Compatibility of the measure with the right to liberty

2.21 The right to liberty includes the right not to be unlawfully or arbitrarily detained.[4] 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.[5] 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 expanded visa bar, where individual circumstances are not taken into account, and a person may be subject to a significant length of detention.[6] The initial human rights analysis stated that 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.

2.22 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'.[7] 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:

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2 See Parliament of Australia, Migration and Maritime Powers Amendment Bill (No.1) 2015, available https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=r5532.

3 Parliamentary Joint Committee on Human Rights, *Thirtieth Report of the 44th Parliament* (10 November 2015) pp. 28-52; *Thirty-fourth report of the 44th Parliament* (23 February 2016) pp. 29-65.

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

5 See Migration Act, sections 189, 198.

6 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'].

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

> 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.[8]

2.23 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. [9]

2.24 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 was noted that discretionary or administrative 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'.[10]

2.25 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.

2.26 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-

8 SOC, p. 26.

9 SOC, p. 26.

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

citizens…being treated differently',[11] it was unclear from the information provided in the statement of compatibility why the visa bar is necessary. In this respect, it was 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.[12] That is, given the context of mandatory immigration detention, there was a question as to whether the application of the visa bar is the least rights restrictive approach.

2.27 The committee therefore requested 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
- 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).

Assistant minister's response

2.28 The assistant minister's response provides the following information on the measure:

> The *Migration Act 1958* (the Act) currently imposes bars on all non-citizens preventing them from lodging further protection visa applications in circumstances where a non-citizen has previously had a protection visa cancelled or an application for a protection visa refused. These mechanisms prevent non-citizens, either lawful or unlawful, from lodging ongoing visa applications to inappropriately prolong their stay in Australia and delay their departure.
>
> Currently, where a non-citizen is removed from Australia, but is refused entry into the destination country and the non-citizen is returned to Australia, visa bars continue to apply. However, where the Department of Home Affairs (the Department) has attempted to remove a non-citizen but the removal from Australia cannot be completed, for a reason other than

11 SOC, p. 23.

12 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; Parliamentary Joint Committee on Human Rights, *Thirty-fourth report of the 44th Parliament* (23 February 2016) pp. 33-34.

refusal in the destination country, visa bars no longer apply on return to Australia.

The amendments are necessary to ensure that any non-citizen who the Department attempts to remove, but is then returned to Australia, irrespective of the circumstances, is treated in the same way. These arrangements would treat non-citizens as if they had never departed Australia (i.e. that they were continuously in the Migration Zone) and restore them to their previous immigration status. The visa bars are no more advantageous or disadvantageous than if the Department had not attempted to remove the non-citizen.

Visa bars are the least restrictive approach within the Act to achieve the Department's legislative objectives and ensure that the Department is able to re-facilitate the removal of non-citizens from Australia as soon as reasonably practicable.

2.29 In relation to the availability of relevant safeguards, the assistant minister's response states:

The Department has safeguards to ensure that non-citizens are not subject to arbitrary detention. The Detention Review Committee conducts formal review of efforts to progress all non-citizens detained in immigration held detention towards status resolution outcomes. The committee ensures that:

- where a non-citizen is managed in a held detention environment, that the detention remains lawful and reasonable;
- the location of the person, whether held detention, specialised detention, community detention or in the community on a Bridging visa, remains appropriate to the non-citizen's situation and conducive to status resolution;
- where a non-citizen is managed in the community, either on a residence determination or through a Bridging visa, community risk is regularly and appropriately considered; and
- regardless of the location, the non-citizen's status resolution progresses and the appropriate departmental services are in place to support an outcome.

The Minister has a personal, non-compellable power to lift a visa bar or grant a visa, if he thinks it is in the public interest to do so. Generally, the Department on behalf of a person makes a request for the Minister to use their public interest powers. However, a non-citizen or a non-citizen's authorised representative can request in writing for the Minister to exercise his public interest power. Requests are referred to the Minister where they meet the Minister's issued guidelines under section 48B of the Act.

2.30 The minister's identification of policy safeguards is relevant to the proportionality of the limitation on the right to liberty. However, as the committee

has previously stated in relation to Australia's mandatory immigration detention system and statutory bar on visa applications, the internal review mechanisms identified by the minister, while important, do not meet the standard required under international human rights law.[13] This is because none of these mechanisms are set out in statute and no person in immigration detention has any legal entitlement to require those reviews to occur, such as by seeking administrative or judicial review. The other mechanisms set out in the minister's response are entirely at the discretion of the minister personally. The UN Human Rights Committee and the Working Group on Arbitrary Detention have on many occasions raised concerns as to Australia's application of mandatory immigration detention and the impossibility of challenging such detention, and has found such detention to be in breach of Article 9(1) of the ICCPR.[14] By extending the visa bar further and accordingly extending the scope of non-citizens who may be subsequently liable for detention under the Migration Act, the measure is consequently also incompatible with the right to liberty.

Committee response

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

2.32 In its *Thirty-fourth report of the 44th Parliament,* the committee considered that the statutory bar on visa claims in the event of unsuccessful removal from Australia, in the context of Australia's mandatory immigration detention policy, was incompatible with Article 9 of the ICCPR.[15]

2.33 As the measures in the bill seek to reintroduce this statutory bar in identical terms, and having regard to relevant international jurisprudence, the committee considers that the proposed statutory bar on visa claims in the event of unsuccessful removal from Australia is incompatible with Article 9 of the ICCPR.

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

2.34 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

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13 See, for example, Parliamentary Joint Committee on Human Rights, *Thirty-fourth report of the 44th Parliament* (23 February 2016) pp. 33-34.

14 See, for example, *FJ et al v Australia,* Communication No.2233/2013, UN Doc. CCPR/C/116/D/2233/2013 (2016); *Opinions adopted by the Working Group on Arbitrary Detention at its eightieth session, 20-24 November 2017,* Opinion No. 71/2017, UN Doc. A/HRC/WGAD/2017/71 (2017).

15 Parliamentary Joint Committee on Human Rights, *Thirty-fourth report of the 44th Parliament* (23 February 2016) pp. 33-34. The relevant bill, *Migration and Maritime Powers Amendment Bill (No. 1) 2015*, lapsed at prorogation on 15 April 2016.

Treatment or Punishment (CAT) for all, including people who are found not to be refugees.[16] 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.[17] Non-refoulement obligations are absolute and may not be subject to any limitations.

2.35 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.[18]

2.36 The initial analysis stated that 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.[19] 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 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.[20]

2.37 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.

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16 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).

17 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.

18 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.

19 Migration Act, section 198.

20 SOC, p. 27.

2.38 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.[21] 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 was 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.

2.39 The committee therefore sought 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).

Assistant minister's response

2.40 The assistant minister provides the following information in response to the committee's inquiries:

> The Australian Government takes its international obligations seriously. Australia is party to several treaties that contain both explicit and implicit non-refoulement obligations not to forcibly remove a non-citizen to a place where they may be subjected to persecution or particular forms of harm. The Department does not seek to resile from or limit Australia's non-refoulement obligations under Article 6 and 7 of the ICCPR and Article 3(1) of the Convention Against Torture.
>
> A non-citizen will [not be] removed from Australia in breach of our non-refoulement obligations.
>
> The pre-removal clearance process is used to review a non-citizen's circumstances and relevant country information to identify whether there is any risk that the proposed removal would breach Australia's international non-refoulement obligations. This process is also used to identify whether there are any protection claims that have not already been assessed by the Department which raise protection issues and whether new information, such as country information, suggests that previously assessed claims may now raise a risk.

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

> Additionally, the Minister has a personal, non-compellable power to lift a visa bar or grant a visa, if he thinks it is in the public interest to do so. This may include where new information has been identified to support a person's protection claim, allowing new protection claims to be assessed by the Department. The Minister has issued guidelines, to outline the circumstances in which he may consider exercising his public interest power under section 48B of the Act and to inform departmental officers about when and how to refer cases. These guidelines are consistent with the intention of the visa bar and cover circumstances where there is new information or significant changes in circumstances, which relates to Australia's non-refoulement obligations.
>
> The form of administrative arrangements in place to support Australia meeting its *non-refoulement* obligations is a matter for the Government. It is the Government's position that there are sufficient procedural safeguards in place for ensuring all non-citizens are afforded an opportunity to have their claims assessed.

2.41 Notwithstanding the minister's identification that the department does not seek to resile from or limit Australia's non-refoulement obligations, it is noted that section 197C of the Migration Act provides that, for the purposes of removing a person from Australia under section 198, 'it is irrelevant whether Australia has non-refoulement obligations in respect of an unlawful non-citizen' and that the duty to remove a person as soon as practicable arises irrespective of whether there has been an assessment of Australia's non-refoulement obligations.

2.42 As noted in the initial analysis, UN human rights jurisprudence also makes clear that the provision of effective and impartial review of non-refoulement decisions by a court or tribunal is integral to complying with the obligation of non-refoulement under the ICCPR and CAT. Further, the committee's long-standing view is that the minister's non-compellable powers are an insufficient protection against unlawful refoulement and that international law is clear that administrative arrangements are insufficient to protect against unlawful refoulement.[22] This is because 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.[23]

2.43 The mechanisms set out in the minister's response are entirely administrative and there is no legal protection against non-refoulement in the form of a reviewable decision. Consistent with the committee's longstanding position, the

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22 See, for example, Parliamentary Joint Committee on Human Rights, *Thirtieth Report of the 44th Parliament* (10 November 2015) 32; *Thirty-fourth report of the 44th Parliament* (23 February 2016) 35-36; *Second Report of the 44th Parliament* (11 February 2014), [1.89] to [1.99]; *Fourth Report of the 44th Parliament* (18 March 2014) [3.55] to [3.66].

23 Parliamentary Joint Committee on Human Rights, *Thirty-fourth report of the 44th Parliament* (23 February 2016) p. 35.

absence of an effective and impartial review of non-refoulement decisions is incompatible with Australia's non-refoulement obligations under international law.

Committee response

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

2.45 In its *Thirty-fourth report of the 44th Parliament,* the committee considered that the statutory bar on visa claims in the event of unsuccessful removal from Australia failed to provide for effective and impartial review of non-refoulement decisions, and accordingly the measure was incompatible with Australia's non-refoulement obligations under international law.

2.46 As the measures in the bill seek to reintroduce this statutory bar in identical terms, the committee considers that the proposed statutory bar on visa claims in the event of unsuccessful removal from Australia is incompatible with Australia's non-refoulement obligations under international law.

Obligation to consider the best interests of the child

2.47 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.[24] The statement of compatibility acknowledges that the expansion of the visa bar engages the rights of children as it would also apply to them.[25] 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.[26]

2.48 However, the initial analysis stated that while the department and the minister may consider the best interests of the child as a matter of policy and

24 CRC, article 3(1).

25 SOC, p. 28.

26 SOC, p. 28.

discretion, the proposed expanded visa bar will still generally apply to children. This may be the case regardless of whether the 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 appeared 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 was noted in this respect that the UN Committee on the Rights of the Child has explained that:

> …the expression "primary consideration" means that the child's best interests may not be considered on the same level as all other considerations. This strong position is justified by the special situation of the child…'[27]

2.49 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 did 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.

2.50 As such, the initial analysis stated that 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 was not possible to conclude that the measure is compatible with the obligation to consider the best interests of the child.

2.51 The committee therefore sought 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;

27 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).

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

Assistant minister's response

2.52 In response to the committee's inquiries, the assistant minister provides the following information:

> In planning the removal of a child, the best interests of the minor must be taken into consideration as **'a'** but not **'the' only** consideration. As such, other primary considerations may outweigh the best interests of the child in certain circumstances.
>
> In considering the best interests of the child, during the removal planning, the Department considers the age, mental capacity, maturity, health, welfare and special needs of the minor. The views of the minor is another consideration that can be given due weight in the removal process and in accordance with the maturity of the minor. The amendments to the visa bars will not change these processes or considerations.
>
> The Department also carefully considers the placement of children and their families when facilitating their removal. The Department takes steps to minimise the impact of detention on minors by considering alternatives to held detention such as alternative places of detention, immigration residential housing or immigration transit accommodation. This approach is consistent with paragraph 3 of the Department's Detention Values … which prescribe that children and, where possible, their families will not be detained in an immigration detention facility. This is reflected in domestic legislation through s 4AA of the Act, which provides that the Parliament affirms as a principle that a minor shall only be detained as a measure of last resort.
>
> The visa bars treat all non-citizens, including children, as if they had never departed Australia restoring them to their previous immigration status. The visa bars are no more advantageous or disadvantageous than if the non-citizen had not been attempted to be removed from Australia. They achieve the Department status resolution and removal objectives of managing and maintaining the integrity of the migration programme and are a reasonable and proportionate mechanism for consistently managing

> all unlawful non-citizens including those that the Department must re-progress to remove from Australia.
>
> The Minister maintains his personal and non-compellable power to lift a visa bar or grant a visa, to a non-citizen, including children, if he thinks it is in the public interest to do so.

2.53 A copy of the 'Detention Values' document was attached to the minister's response (and is set out in full at appendix 3).

2.54 In relation to the minister's response that the best interests of the child is 'a', but not 'the only' consideration, such that other primary considerations may outweigh the best interests of the child in certain circumstances, as noted in the initial analysis, the UN Committee on the Rights of the Child has made clear that the child's best interests may not be considered on the same level as all other considerations.[28]

2.55 As to the considerations noted by the minister in the Detention Values policy document and section 4AA of the Migration Act, these matters may assist in the proportionality of the limitation as it applies to the detention of children but it does not assist in assessing the impact of the expanded visa bar on Australia's non-refoulement obligations. In any event, while section 4AA affirms the principle that a minor shall only be detained as a measure of last resort, in light of the minister's identification that other primary considerations might outweigh the best interests of the child, it is not clear that this statutory provision would of itself be sufficient. In relation to the matters set out in the Detention Values policy statement, as discussed above, policy safeguards are less reliable than the protection of safeguards set out in legislation and are not sufficient from the perspective of international human rights law. The minister's personal and non-compellable power is also not a sufficient safeguard, for the reasons discussed above.

Committee response

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

2.57 In its *Thirty-fourth report of the 44th Parliament,* the committee considered that the statutory bar on visa claims in the event of unsuccessful removal from Australia was incompatible with Australia's obligations under the Convention on the Rights of the Child to consider the best interests of the child.

2.58 The measures in the bill seek to reintroduce this statutory bar in identical terms. In view of the further information provided by the minister and the preceding analysis, the committee considers the measures are likely to be

28 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).

incompatible with Australia's obligations under the Convention on the Rights of the Child to consider the best interests of the child.

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**)
Previous reports	4 of 2018
Status	Concluded examination

Background

2.59 The committee first reported on the bill in its *Report 4 of 2018*, and requested a response from the Treasurer by 23 May 2018.[1]

2.60 The Treasurer's response to the committee's inquiries was received on 24 May 2018. The response is discussed below and is reproduced in full at **Appendix 3**.

Background

2.61 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.[2] 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.*[3]

1 Parliamentary Joint Committee on Human Rights, *Report 4 of 2018* (8 May 2018) pp. 12-16.

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

3 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.

2.62 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.[4]

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

2.64 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[5] 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.

2.65 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.[6]

Compatibility of the measure with the right to privacy

2.66 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.

2.67 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

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

5 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).

6 See Division 3 of Schedule 1 of the bill.

thus the measure limits the right to privacy. The statement of compatibility acknowledges that the right to privacy is engaged by the bill.[7]

2.68 As noted in the initial human rights analysis, 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 was noted that by making the scheme mandatory for large ADIs instead of the current 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.

2.69 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.

2.70 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'.[8] 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.[9]

2.71 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 was required to determine whether (and if so, how) this specific measure of mandatory credit reporting addresses a pressing or substantial concern. It was noted in this respect that a legitimate objective must be supported by a reasoned and evidence-based

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7 Statement of compatibility (SOC), [2.12].

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

9 SOC, [2.15].

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.

2.72 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'.[10] It is in this respect that the amendments to the Privacy Act 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.[11]

2.73 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.

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10 SOC, [2.21].

11 SOC, [2.17]-[2.19]

2.74 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.[12] The initial analysis stated that 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 of individuals), this raised questions as to whether the limitations on the right to privacy are sufficiently circumscribed.

2.75 It was 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'.[13] However, it was 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.[14] 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.

2.76 The committee therefore sought further information from the Treasurer 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;

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

13 SOC, [2.22].

14 APP 9; APP 6.2(b).

- 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).

Treasurer's response

2.77 As to the legitimate objective of the measure, the Treasurer's response provides more information on the underlying objective of the 2012 Act, by reference to the explanatory memorandum to that Act:

> … The introduction of comprehensive credit reporting is aimed at providing a more balanced and accurate picture of an individual's credit situation than currently exists, providing positive information about a person's credit situation such as when an individual has met their credit payments.
>
> The introduction of more comprehensive credit reporting allows credit providers to access an enhanced set of personal information tools directly relevant to establishing an individual's credit worthiness. This will allow credit providers to make a more robust assessment of credit risk, which is expected [to] lead to lower credit default rates. More comprehensive credit reporting is also expected to improve competition in the credit market, which may result in reductions to the cost of credit for individuals. The amendments will enable legitimate commercial activity, facilitating consumer lending and transactions, and thus the participation of individuals in the economy. These are legitimate objectives.

2.78 The Treasurer's response explains that there has been a 'first mover problem' in relation to the voluntary scheme established by the 2012 Act, such that 'credit providers have failed to participate in the voluntary regime'. The Treasurer's response explains that prior to the enactment of the 2012 Act, a number of credit providers had indicated their intention to participate in the (voluntary) comprehensive credit regime, but this did not eventuate.

2.79 The overall objectives of comprehensive credit reporting, being to lower credit default rates and improve competition in the credit market, are likely to be legitimate objectives for the purposes of human rights law. In the context of this particular measure, the pressing and substantial concern the Treasurer has identified appears to be that the voluntary scheme does not address these objectives. This is because the credit providers have not participated in the scheme on a voluntary basis. On balance, and having regard to the overall objectives of the comprehensive credit reporting scheme, the measure is likely to pursue a legitimate objective for the purposes of international human rights law.

2.80 The Treasurer's response also explains that mandatory comprehensive credit reporting will be an effective means of achieving the objective of lowering credit default rates and improving competition in the credit market, as it will ensure that credit providers' participation in the scheme 'occurs in a more timely and coordinated way'. Such participation is necessary for the scheme to achieve its objectives.

2.81 In relation to the proportionality of the proposed measure, the Treasurer's response provides the following information as to the safeguards in the bill in relation to information security and the retention of data:

> The Bill includes new security provisions to further guarantee the security and protection of consumer information. The Bill requires that credit reporting bodies store credit information within Australia and, where information is stored on a cloud server, the cloud server will have to be recognised by the Australian Systems Directorate.
>
> These new security arrangements are in addition to the existing protections in the Privacy Act. The Privacy Act imposes requirements on both credit reporting bodies and credit providers to take reasonable steps to protect credit-related information from misuse, interference and loss, and from unauthorised access, modification or disclosure (section 20Q and section 21S of the Privacy Act). The law also currently requires credit reporting bodies to ensure that regular audits of credit providers are conducted by an independent person to determine whether credit providers are taking the required actions.
>
> The Privacy Act also already sets out the period that information can be retained before it must be destroyed (see sections 20V to 20ZA) and includes requirements for both a credit reporting body and credit provider to correct information including at the person's request (see sections 20S to 20U and section 21U to 21W of the Privacy Act).
>
> While the mandatory regime will increase the volume of information in the credit reporting system, this was the volume that was anticipated would be in system as a result of the Privacy Amendment Act and was contemplated when considering the impacts on an individual's privacy as part of the development of that Act.

2.82 The Treasurer's response also provides information from the explanatory memorandum to the 2012 Act as to safeguards that allow individuals to access information about them that is collected and disclosed through the comprehensive credit reporting scheme:

> The [2012 Act] introduces a number of safeguards to provide individuals with the tools to access information held about them, and correct any inaccuracies. The [2012 Act] also makes improvements to the complaints process, to ensure that the first organisation to receive the individual's complaint is responsible for taking action. In moving to more comprehensive credit reporting it has been recognised that additional

> safeguards around the use of repayment history information, the fifth new category of information, are also necessary. Repayment performance history will only be available by credit providers who are licensees [and to lenders mortgage insurers in relation to services they provide to credit providers] and subject to the responsible lending obligations in the National Consumer Credit Protection Act 2009.

2.83 The response further points to the following safeguards in the 2012 Act relating to the use of credit reporting information for the purposes of pre-screening individuals, which continue to apply to the new mandatory scheme introduced by the bill:

> Pre-screening is subject to specific requirements, including only the use of negative credit reporting information, the requirement for notice at the time of collection that information may be used for this purpose, an opt out opportunity, and a prohibition on individuals being identified for other direct marketing. Any entity involved in pre-screening must maintain auditable evidence to verify compliance, and which is available to individuals. Pre-screening is also only available to credit providers who are subject to the National Consumer Credit Protection Act 2009.

2.84 The Treasurer's response explains that these safeguards ensure that 'the smallest possible set of data is used for the narrowest purposes to achieve the objective of providing a functional consumer credit market'.

2.85 The Treasurer's response identifies that the approach adopted in the 2012 Act and the bill is a less rights restrictive approach than that which was recommended by the Australian Law Reform Commission, which had recommended that secondary uses of credit reporting information should be subject to a broad discretion exercised by credit reporting bodies or credit providers.[15] This recommendation was not accepted by the government. The response also explains that the approach of taking into account positive action such as payment as well as negative information like defaults allows for 'more effective risk assessment' than if only negative information were used.

2.86 Overall, the mandatory supply of comprehensive credit information to credit reporting bodies represents a significant limitation on a person's right to privacy, in light of the extensive financial information about people (including repayment history information and credit limits) that will be able to be disclosed. However, on balance the safeguards identified in the response to protect people's right to privacy, including relating to the storage and retention of the information, restrictions on who can access the comprehensive information, and the applicable provisions of the Privacy Act, suggest that the measure is accompanied by adequate safeguards so as to constitute a proportionate limitation on the right to privacy.

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15 See Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice (ALRC Report 108)* (2008) Recommendation 57-2.

Committee response

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

2.88 The committee considers that the mandatory comprehensive credit scheme introduced by the bill engages and limits the right to privacy. However, having regard to the information provided by the minister as to the safeguards in place to protect the right to privacy, the committee considers that the measure is likely to be a proportionate limitation on the right to privacy.

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**)
Previous report	4 of 2018
Status	Concluded examination

Background

2.89 The committee first reported on the bill in its *Report 4 of 2018*, and requested a response from the Minister for Urban Infrastructure and Cities by 23 May 2018.[1]

2.90 The minister's response to the committee's inquiries was received on 23 May 2018. The response is discussed below and is reproduced in full at **Appendix 3**.

Reverse burden offences

2.91 A number of provisions in the bill seek to introduce offences which include offence-specific defences.[2]

Compatibility of the measures with the right to be presumed innocent

2.92 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.

2.93 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

1 Parliamentary Joint Committee on Human Rights, *Report 4 of 2018* (8 May 2018) pp. 20-25.

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

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.

2.94 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.

2.95 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 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.

2.96 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.[3] 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[4] and that the defendant would be in a 'significantly better position than the Commonwealth'[5] 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.[6]

2.97 However, the initial analysis stated that without additional information it was unclear that these matters are a sufficient basis for permissibly limiting the right to be presumed innocent.

2.98 Further, it was unclear that reversing the evidential burden is necessary as opposed to including additional elements within the offence provisions themselves.

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

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

5 EM, p. 28.

6 EM, p. 13.

This raised questions as to whether the measure is the least rights restrictive approach.

2.99 The committee drew to the attention of the minister its *Guidance Note 1* and *Guidance Note 2*, which set out information specific to reverse burden offences, and requested the minister's advice 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;
- 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.

Minister's response

2.100 The minister's response usefully addresses the reverse burden offences in each of the proposed subsections 16(3), 24(3)-(4), 32(2) and 43(2). In general, the response explains that the legitimate objective of the offences is to ensure road vehicles provided for the first time in Australia meet the necessary standards, including safety standards, thereby limiting risks to the community. This is likely to be a legitimate objective for the purposes of international human rights law.

2.101 The minister's response states that in some cases it would be more costly and resource-intensive for the prosecution to disprove, rather than for the defendant to establish the relevant matter. While this particular difficulty is acknowledged, it is noted that this justification alone is unlikely to be sufficient for reversing the burden of proof for the purposes of international human rights law.

2.102 The minister's response further states that the offence provisions in proposed subsections 16(3), 24(3)-(4) and 43(2) are reasonable and proportionate as the relevant matters necessary to prove an exception to the offences would be peculiarly within the knowledge of the defendant. For example, in relation to subsection 16(3), which relates to the entry of non-compliant vehicles onto the Register of Approved Vehicles (RAV), the response states:

> …[T]he precise details of the design and manufacture of the vehicle, and the procurement and use of components, is peculiarly within the knowledge of the type approval holder. It is a core requirement of type approvals that type approval holders retain this information in 'supporting documentation', rather than provide all this information to the Department of Infrastructure, Regional Development and Cities (the

> Department) to gain an approval. While the Department can access this information by requesting it, this is a costly and resource intensive exercise, requiring the Department to obtain a full outline of the design and manufacturing process and spend taxpayer resources to develop a detailed understanding of one type approval holder's production process.
>
> Secondly, an inability to effectively prosecute would undermine the Department's ability to achieve the objective of clause 16. The reversal of evidential burden is reasonable and proportionate — the provision reverses only the evidential, and not the legal, burden of proof. Type approval holders, to whom this offence relates, will already be required under the Act to possess or have access to the relevant documentation, and a detailed understanding of their own processes. That is, they will already be required to hold the information that would be necessary for discharging the evidentiary burden. A circumstance that would require a person to bear an evidential burden would apply almost exclusively to corporations, rather than individuals, because individuals are unlikely to be able to hold the technical information and ensure conformity of production in fulfilment of a type approval holder's obligations.

2.103 Based on the further detailed information provided by the minister, it may be accepted that the matters such as those stated above in relation to subsection 16(3) would be peculiarly within the knowledge of the defendant. In relation to subsection 16(3), for example, the response states that persons to whom the offence relates will already be required to possess the type of information relevant to discharging the evidentiary burden. This indicates that the reversal of the evidential burden of proof may constitute a reasonable and proportionate limitation on the presumption of innocence. The minister provides a similar justification in relation to subsections 24(3)-(4) and 43(2).[7] The fact that the reverse burden offences impart an evidential rather than a legal burden on defendants also assists with the proportionality of the measures.

2.104 The regulatory context in which these measures operate, and the importance of the objective being sought, is also relevant to a human rights compatibility assessment. In particular, this broader context is explained by the minister in relation to section 32(2):[8]

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7 With respect to subsection 24(3), it is noted that one of the exceptions to the offence of providing a vehicle in Australia for the first time that is not on the RAV includes 'a circumstance set out in the rules': subsection 24(3)(f) of the Road Vehicle Standards Bill 2018. The committee will consider the human rights compatibility of any legislative instrument enacted pursuant to this proposed section of the bill once it is received.

8 Subsection 32(2) provides that the offence of giving false or misleading information or documents under or for the purposes of the bill does not apply if the information or document is not false or misleading in a material particular.

> …[T]his is a proportionate measure within the broader context of the regulatory framework. Entities regulated by the Bill are given significant freedoms to import and provide vehicles without Government oversight of each vehicle. For example, type approval holders can import thousands of vehicles per year with no individual vehicle checks. In return for such freedoms, the Australian government sets high standards for integrity and honesty, such as requiring all information to be true and accurate. Commensurate with this expectation the evidentiary burden is placed on the person who furnished the false or misleading information initially to provide evidence that the matter was not false or misleading in a material particular. This is a reasonable and proportionate trade-off in the context of the potential scale of community impact incurred should the false or misleading information be of a material nature.
>
> Secondly, this offence is reasonable and proportionate when you consider the context of volumes of information and the cost to Government (and thus the community) of regulatory actions. Approval holders have significant record keeping obligations. For example, type approval holders must maintain supporting information that outlines the entire manufacturing and compliance process - from source material to testing evidence to manufacturing instructions. This information is important for demonstrating compliance with the national road vehicle standards.
>
> The information can be requested to audit compliance with the Bill. Any false or misleading information, regardless of its materiality, can cause significant delays in the auditing of such documentation. The wrong contact details provided for a testing facility or incorrectly recorded qualification of test engineers (although the real qualifications may be compliant) are such examples. The burden to present evidence about the materiality of such false or misleading information - particularly after causing significant delays to an audit - presents an unreasonable cost to Government, a cost that is ultimately borne by the community. Therefore it is reasonable and proportionate that the person providing false or misleading information in the first place has the burden of presenting evidence that the information was not materially false or misleading.

2.105 In this case, having regard to the regulatory context of the measures as described by the minister and the importance of ensuring compliance with the national road vehicle standards, the offence provision in section 32 may be a reasonable and proportionate limitation on the right to be presumed innocent.

2.106 In light of the minister's further information, the offence-specific defences or exceptions in proposed subsections 16(3), 24(3)-(4), 32(2) and 43(2) appear, on balance, to be compatible with the presumption of innocence.

Committee response

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

2.108 Based on the further information provided, the committee considers that, on balance, the offence provisions in the bill may be compatible with the right to be presumed innocent.

Coercive evidence gathering powers

2.109 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.

2.110 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.[9] 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.[10]

Compatibility of the measure with the right not to incriminate oneself

2.111 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)).

2.112 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.

2.113 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 appropriate to override the right not to incriminate oneself 'as failure to comply could seriously undermine the effectiveness of the regulatory scheme'.[11] 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:

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9 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.

10 Section 43 of part 3, division 4.

11 EM, SOC, p. 20.

> 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.[12]

2.114 The initial analysis stated that 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 was noted that it would have been useful had this information been included in the statement of compatibility as well as the explanatory memorandum.

2.115 Questions arose, 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.

2.116 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 was 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).

12 EM, p. 44.

2.117 Further, it was 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.

2.118 In this case, the statement of compatibility does not substantively address why a 'derivative use' immunity would not be reasonably available. This raised 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.

2.119 The committee therefore sought 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.

Minister's response

2.120 In relation to the proportionality of the measure, the minister's response explains that the proposed disclosure notices would only apply to a limited cohort of persons in a particular regulatory context, namely, to persons who supply road vehicles or components in trade or commerce.

2.121 The minister's response further states that the use of disclosure notices is reasonable in the context of seeking to obtain information on road vehicles or related components that may pose a danger to the public in a timely manner. The response states that, while in some cases it may be feasible to obtain information by other means, 'the additional time taken to obtain such information may significantly increase the risk to public safety'.

2.122 As to the scope of information that may be subject to compulsory disclosure by persons who supply road vehicles or road vehicle components, the minister's response states:

> …[T]he broad scope of information that can be obtained through a disclosure notice under s 42 is necessary to achieve the objective of the provision. Information relevant to whether a vehicle has a safety defect or

> demonstrates non-compliance varies greatly. Given the complexity of road vehicles and their supply chains, relevant information could range from information about a source material (such as quality of steel), customer complaints through dealership service departments, evidence of testing results or the calibration metrics on a specific piece of machinery.
>
> Given the breadth of relevant circumstances and information, listing all the types of information that can be requested would risk missing vital or unique information that was not considered when drafting the list. This would unreasonably limit the achievement of the objective of the clause - to gather all relevant information on dangerous vehicles or components in a timely manner to mitigate risks to the community.

2.123 The minister's response also provides the following information as to whether a derivative use immunity would be reasonably available:

> Including a derivative use immunity for this offence is not appropriate in the broader context of ensuring that the Bill is able to meet its objectives.
>
> The Bill, including clause 42, has been drafted to be consistent with the existing requirements of the *Australian Consumer Law*, which overlaps to some extent with the recalls scheme set out in the Bill. This is designed to prevent suppliers of road vehicles 'legislation shopping' by pressuring regulators to use legislation with more lenient compliance tools.
>
> A disclosure notice is used in situations where information about unsafe or non-compliant vehicles is not forthcoming from vehicle suppliers - presenting an immediate risk of harm to the community. A derivative use immunity may provide an incentive for non-compliant suppliers to initially withhold information from the regulator, then use the subsequent disclosure notice to 'confess' to other serious non-compliance. This is not appropriate in the context of the serious community harm that can be caused by any delay.
>
> It should be noted, providing for derivative use immunity may prevent the Department from sharing information with other Departments or State and Federal Police. Such an agency will also be bound by any derivative use immunity. In the event that the other agency wished to commence criminal or civil penalty proceedings against that person, it would not be able to make use of any evidence derived as a result of the originally received information. It would also face the additional evidentiary hurdle of establishing that no use was made of the shared information in obtaining the evidence to be relied upon in the prosecution. This is particularly concerning as the Department will continue to collaborate with the Australian Competition and Consumer Commission where information raises consumer protection issues.

2.124 It is acknowledged that, from a practical perspective, the inclusion of a derivative use immunity could make subsequent investigations by different agencies more difficult. However, this reasoning of itself would not be sufficient to justify a limitation on the right not to incriminate oneself. This is because it is not permissible

to limit a human right where the measure is merely seeking an outcome that is desirable or convenient rather than addressing a pressing and substantial concern.

2.125 However, as noted above, there is a range of matters which influence whether a limitation on the right not to incriminate oneself is permissible. In this case, the minister has provided useful information on the pressing need for the evidence gathering powers, the regulatory context of the proposed measures and the limited cohort of persons (those who supply road vehicles or road vehicle components) who may be subject to them. It is further noted that the bill as drafted only provides for the issuance of a disclosure notice if the minister, secretary or a Senior Executive Service employee 'reasonably believes' that, broadly, there is a safety issue in relation to road vehicles or components of that kind or that they do not comply with applicable road safety standards (see [2.109] above). The requirement that the power only be exercised on these 'reasonably' held grounds may further assist the proportionality of the measure.

2.126 In light of the further information provided by the minister, on balance, it is likely that the limitation on the right not to incriminate oneself is proportionate to the legitimate objective of the measure.

Committee response

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

2.128 Based on the further information provided by the minister, including as to the particular regulatory context of the measure, the committee considers that the measure is likely to be compatible with the right not to incriminate oneself.

Compatibility of the measure with the right to privacy

2.129 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.

2.130 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.

2.131 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.[13] It was unclear from the information provided as to the extent to

13 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.

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, the initial analysis stated that questions arose as to whether the measure is a proportionate means of achieving the objective in the context of limitations on the right to privacy.

2.132 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.

2.133 The committee therefore sought 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.

Minister's response

2.134 In relation to the types of information that may be subject to disclosure, the minister's response explains that this may include a wide range of information 'in order to capture all relevant information about an unsafe vehicle or component', possibly including personal or confidential information. The minister argues that imposing limitations on the capturing of personal or confidential information would undermine the objective of the measure on the following grounds:

> First, it risks vital information not being provided that goes to the safety of a vehicle or component, on the basis that it may contain personal information. Secondly, it would provide a screen for suppliers of dangerous road vehicles or components to hide behind when responding to a disclosure notice by being able to claim that relevant information cannot be provided due to the presence of personal or confidential information.

2.135 The minister further states that, while the department will have regard to whether relevant information, documents or other evidence are likely to be

otherwise available, including whether they may be provided voluntarily, this is not always possible or appropriate. The response cites a number of reasons for this, including that a person may have previously failed to respond or to fully respond to a voluntary request; concerns that a voluntary request will be met with delays or protracted negotiations; or the department has information from other sources that is inconsistent with the information voluntarily provided. The minister therefore appears to argue that a less rights restrictive approach to obtaining information in the particular circumstances of the measure may not be reasonably available.

2.136 The minister also cites a range of matters the department will consider before issuing a disclosure notice, including:

- whether there is a risk that the information, documents or evidence may otherwise be destroyed, not provided or provided only on terms unacceptable to the Department;
- whether it may be appropriate to issue a disclosure notice to obtain such information or documents from a potential respondent for evidentiary purposes, including obtaining oral evidence under oath or by way of affirmation;
- whether it is appropriate to use other powers to obtain the information, documents or evidence (e.g. search warrant powers or wait for any future discovery process); and
- the burden of the disclosure on the recipient, including time and cost considerations.

2.137 While these factors may potentially assist the proportionality of the measure, they appear to be departmental policies or procedures, rather than a legal requirement. In this respect, it is noted that departmental policies and procedures are less stringent than legislation as they can be removed, revoked or amended at any time and are not subject to the same levels of scrutiny or accountability as if the policies were enshrined in legislation.

2.138 As noted above at [2.124] in relation to the compatibility of the measure with the right not to incriminate oneself, the bill provides that a disclosure notice be issued on certain limited and reasonably held grounds. In this respect, the minister cites as a relevant safeguard the fact that under the bill a disclosure notice may only be issued if the person giving the notice reasonably believes that a supplier is capable of giving information, producing documents or giving evidence in relation to the vehicles or components in question.[14]

2.139 Finally, the minister explains other safeguards in place relating to the disclosure of information:

14 See, subsection 41(1)(b) of the bill.

> This overarching legal framework for personal information also includes robust oversight arrangements for the handling of personal information. Central to the oversight regime are judicial review, the Commonwealth Ombudsman and the *Privacy Act 1988* (Privacy Act). The Department will be required to collect, handle and store such information in accordance with the *Privacy Act 1988*, including the *Australian Privacy Principles*. Departmental officers that receive personal and confidential information are also bound by the *Public Service Act 1999* and the Australia Public Service Code of Conduct.
>
> The Department is also under an implied legal obligation to use information, documents or evidence provided in response to a disclosure notice for the purposes for which the notice was issued, the purpose being to assist the Department in investigating a possible recall under Part 3 of the Bill and to reach a view as to whether such a recall notice is necessary. This obligation reflects the legal requirement that statutory powers are to be used for proper purposes.

2.140 It is noted that the Australian Privacy Principles in the *Privacy Act 1988* are not a complete answer to concerns about interference with the right to privacy in this context, as those principles contain a number of exceptions to the prohibition on disclosure of personal information.[15] However, noting the information provided on potential safeguards, including the limited grounds on which a disclosure notice may be issued and the specific regulatory context of the proposed powers, on balance, the limitation on the right to privacy may be proportionate.

Committee response

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

2.142 Based on the further information provided, the committee considers that, on balance, the measure may be compatible with the right to privacy.

15 For example, an agency may disclose personal information or a government related identifier of an individual where its use or disclosure is required or authorised by or under an Australian Law: Australian Privacy Principles 6.2(b) and 9.

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
Rights	Just and favourable conditions of work (see **Appendix 2**)
Previous report	4 of 2018
Status	Concluded examination

Background

2.143 The committee first reported on the bill in its *Report 4 of 2018*, and requested a response from the Minister for Revenue and Financial Services by 23 May 2018.[1]

2.144 The minister's response to the committee's inquiries was received on 24 May 2018. The response is discussed below and is reproduced in full at **Appendix 3**.

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

2.145 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.[2] The chairperson would also determine in writing the ASIC Code of Conduct and the ASIC Values which apply to ASIC members and staff members.[3]

2.146 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

1 Parliamentary Joint Committee on Human Rights, *Report 4 of 2018* (8 May 2018) pp. 26-29.

2 Item 7, proposed section 120.

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

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

2.147 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).

2.148 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.

2.149 The PS Act contains a range of provisions relating to the terms and conditions of employment of public servants. The initial human rights analysis stated that, 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.

2.150 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.

2.151 The explanatory memorandum states that the proposed amendments will 'support ASIC to more effectively recruit and retain staff in positions requiring specialist skills'.[4] The initial analysis stated that 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.

2.152 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'.[5] 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

4 Explanatory memorandum (EM), p. 9.

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

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.[6] 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.

2.153 There were also questions about the proportionality of the measures and, in particular, whether the measures are the least rights restrictive approach. It was unclear, for example, why barriers to recruitment and retention of staff could not be addressed through the negotiation of entitlements through the usual enterprise agreement process or the current provisions for Individual Flexibility Arrangements (IFAs).[7] 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.[8] Questions arose 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.

2.154 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.[9] 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. As a result, 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,[10] concerns arose as to whether the

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

7 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.

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

9 See also EM, p. 13.

10 See Article 2(1) of ICESCR.

measure as proposed contained adequate safeguards to protect just and favourable conditions of work.

2.155 The committee therefore sought 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;
- 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.

Minister's response

2.156 The minister's response restates the objective of the bill, as set out in the explanatory memorandum, as supporting 'more effective recruitment and retention strategies' for ASIC. As indicated at [2.151] above, this may be capable of being a legitimate objective for the purposes of international human rights law. As to whether the measure addresses a pressing and substantial concern and is effective to achieve the stated objective, the minister's response states that ASIC is required to recruit staff with knowledge of, and expertise in, financial markets and financial services. The minister explains that as a result, ASIC is 'often competing against the private sector, as opposed to other public sector agencies, when recruiting suitable staff' and accordingly that '[e]mployment under the PS Act restricts ASIC's ability to provide conditions which allow ASIC to be able to compete more effectively in the labour market for suitable staff'. The minister further explains that this will bring ASIC into line with other financial regulators (the Australian Prudential Regulation Authority and the Reserve Bank of Australia) that are also able to recruit staff outside of the PS Act.

2.157 The minister's response also provides information as to how the PS Act may operate as a barrier to the effective recruitment and retention of appropriate staff:

> - Limitations on employment of temporary employees
>
> ASIC can only employ temporary staff under the PS Act for a total maximum period of three years, even though it may require employees for major litigation and other enforcement matters for a longer period of time. The move from the PS Act allows ASIC to employ staff for periods over the entire life of the matter or project. It also allows ASIC to reemploy

temporary staff who have the relevant litigation and regulatory experience.

- Limitation on the employment of contractors and consultants

Subsection 120(3) of the current legislation limits the ASIC Chairperson's ability to employ contractors and consultants because:

— the power to employ consultants and contractors is not able to be delegated, so the Chairperson is the only person able to employ these staff and must do so directly; and

— the terms and conditions for contractors and consultants must be approved by the Minister.

- Classification structure

The public sector classification and remuneration system is not suited to the work ASIC (and the other financial regulators) undertakes. To recruit and retain staff in positions requiring specialist skills, ASIC needs to be able to separate remuneration from the public sector classified levels. This is particularly important given the significance of the powers delegated to ASIC staff.

- Delegations

The current staffing delegations set out in the PS Act lack clarity and have resulted in ASIC having to seek legislative amendments in 2017. The lack of clarity is an on-going risk.

2.158 Based on the information provided, the removal of the requirement for ASIC to employ staff under the PS Act may be rationally connected to the stated objective noting the particular context in which ASIC operates.

2.159 The minister also provides information as to the safeguards that are in place to protect just and favourable conditions of work, which is relevant to determining the proportionality of the measure. Safeguards identified by the minister include the protections provided under Part 2-4 of Chapter 2, Division 7 of the *Fair Work Act 2009*, which set out the circumstances in which enterprise agreements may be varied or terminated. In particular, the minister notes that variations to or terminations of enterprise agreements cannot take place without the agreement of employees. The minister states in relation to the next enterprise agreement, due for negotiation in 2019, that:

> The move from the PS Act will not change those negotiations at all, as the procedures under which terms and conditions of employment are negotiated are prescribed in the FW Act [*Fair Work Act 2009*]. The FW Act provides that for the agreement to be approved it must pass the "better off overall" test when compared against the relevant modern award. Similarly, the EAC Bill has no impact on the requirement for ASIC to comply with the Australian Workplace Bargaining Policy.

2.160 The minister also reiterates that under the transitional provisions set out in the bill, staff who transfer from employment under the PS Act to employment under the ASIC Act 'retain the same terms and conditions of employment that applied immediately before the commencement date', including maintaining accrued entitlements, and that the existing enterprise agreement remains in place. This is an important safeguard for existing ASIC staff employed under the PS Act. While these transitional provisions do not provide specific protection for ASIC employees who will be subject to future arrangements set by the chairperson, on balance, some of the existing measures referred to by the minister under the *Fair Work Act* would assist with proportionality from the perspective of international human rights law.

2.161 Based on the information provided by the minister, including the existence of relevant safeguards, on balance, the measure may be a proportionate limitation on the right to just and favourable conditions of work, and the obligation not to unjustifiably take any backwards steps (retrogressive measures) in relation to this right. However, this may depend on how these measures are implemented in practice.

Committee response

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

2.163 Based on the further information provided, the committee considers that, on balance, the measure may be compatible with 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**)
Previous reports	4 of 2018
Status	Concluded examination

Background

2.164 The committee first reported on the bill in its *Report 4 of 2018*, and requested a response from the Minister for Revenue and Financial Services by 23 May 2018.[1]

2.165 The minister's response to the committee's inquiries was received on 24 May 2018. The response is discussed below and is reproduced in full at **Appendix 3**.

Strict liability and absolute liability offences

2.166 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.[2] 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.[3]

2.167 Schedule 1 would also 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.[4]

2.168 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.[5]

1 Parliamentary Joint Committee on Human Rights, *Report 4 of 2018* (8 May 2018) pp. 30-32.

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

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

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

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

A person will not commit an offence to the extent that they are not capable of complying with the order.[6]

Compatibility of the measure with the presumption of innocence

2.169 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, 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.

2.170 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.

2.171 The initial human rights analysis stated that, while the statement of compatibility provides a general description of the nature and effect of each of the proposed offences,[7] 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.[8]

2.172 It was 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.[9] However, the initial analysis stated that 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

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

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

8 SOC, [10.11] and [10.31].

9 Explanatory memorandum (EM), pp. 12-14, 25-26, 82-84.

legislation proponent's analysis of the compatibility of the bill with Australia's international human rights obligations.

2.173 The committee referred to its *Guidance Note 1* and sought 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;
- 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.

Minister's response

Schedule 1 of the Bill

2.174 In relation to whether the proposed strict liability and absolute liability offences in Schedule 1 of the bill pursue a legitimate objective for the purposes of international human rights law, the minister's response explains that the objective of the measures is to ensure compliance with superannuation guarantee obligations. The minister's response further states:

> Ensuring compliance with superannuation guarantee obligations forms a legitimate objective for the purposes of human rights law because, unlike other debts owed to the Commonwealth, the ultimate beneficiaries of the superannuation guarantee payments are individuals. Any amounts of superannuation guarantee charge paid by the employer to the Commissioner are distributed to the superannuation funds of employees who did not receive the minimum level of contributions from their employer.

2.175 Based on the information provided, ensuring compliance with superannuation guarantee obligations appears to be advancing a legitimate objective for the purposes of international human rights law.

2.176 The minister's response also explains how the measures are rationally connected to (that is, effective to achieve) this objective. The response states that applying absolute liability and strict liability to these offences 'substantially improves the effectiveness of ensuring employer compliance with existing and future superannuation guarantee obligations which are required by superannuation and taxation laws' and acts as a 'significant and real deterrent to those entitles who fail to meet their superannuation guarantee obligations'.

2.177 As to whether the limitation on the presumption of innocence introduced by the strict liability offence for failing to comply with a direction from the Commissioner to pay a superannuation guarantee charge is proportionate, the

minister's response states that the strict liability offence is appropriate and proportionate in the circumstances in light of the defences that are available that will protect persons who have taken reasonable steps to try and discharge liability.[10] The minister's response further explains that the direction from the commissioner (failure to comply with which gives rise to the strict liability offence) 'is only intended to be applied to employers who have the capability to pay but have consistently refused to do so' and that 'outside of these defences there are no reasons for an employer not to pay their employee's superannuation guarantee contribution'. Having regard to these matters, and the availability of the defence of honest mistake of fact, on balance the strict liability offence introduced by Schedule 1 appears to be a proportionate limitation on the presumption of innocence.

2.178 As to the absolute liability offence for failing to attend an approved education course where the employer has failed to comply with superannuation guarantee obligations, the minister's response states this is proportionate to the stated objectives, having regard to the defence that is available under section 8C(1B) of the TAA that a person will not commit an offence to the extent the person is not capable of complying with the education direction. The effect of the defence, as explained in the explanatory memorandum, is that 'an employer who is genuinely incapable of complying with the direction will not commit an offence'.[11] The minister's response explains that there are no reasons for an employer not to attend the education course under the direction beyond those covered by this defence. Noting the direction to attend an education course arises in circumstances where an employer has failed to comply with superannuation guarantee obligations, and in light of the information provided by the minister, this would appear to be a proportionate limitation on the presumption of innocence.

Schedule 5 of the Bill

2.179 In relation to whether the proposed offence in Schedule 5 of the bill pursues a legitimate objective for the purposes of international human rights law, the minister states:

> This measure addresses instances of non-compliance with the security deposit rules which predominantly arise where the value of the security deposit (which reflects the value of the tax related liability) exceeds the existing penalty for failing to provide the security deposit. Entities who fail to comply with a Court order risk committing a criminal offence resulting in criminal penalties. These consequences provide appropriate incentives to ensure compliance with the Court order and reflect the seriousness of a failure to comply.

10 See proposed section 265-95(3) discussed above.

11 Explanatory memorandum, p. 26.

> This is a legitimate objective for the purposes of human rights law because it addresses the underlying non-compliance by taxpayers who actively avoid paying their tax related liabilities. These taxpayers have already committed an offence under the tax law for failing to comply with the existing security deposit requirement.

2.180 The objective of addressing non-compliance by taxpayers actively avoiding their tax-related liabilities is likely to be legitimate for the purposes of international human rights law.

2.181 The minister's response further explains how the strict liability offence is an effective means (that is, is rationally connected) to achieve the objective:

> Applying strict liability to this offence will substantially improve the effectiveness of ensuring taxpayer compliance with existing and future tax related liabilities required under the tax law. The provision has a rational connection to the objective as it will act as a significant and real deterrent to those entities who fail to comply with a Federal Court order to provide the security. It is also consistent with the existing offence for failing to comply with tax related obligations, which as noted above, are subject to an offence of absolute liability.

2.182 As to the proportionality of the proposed offence, the minister states:

> The strict liability offence in Schedule 5 to the Bill is appropriate and proportionate in the context of ensuring greater compliance with orders made by the Court to provide security to the Commissioner for an outstanding tax related liability. There are no reasons for a taxpayer to not comply with the Court order beyond those covered by the applicable defence of not being capable of complying.

2.183 Having regard to the availability of the defence available to a defendant if they are not capable of complying with the court order, as well as the availability of the defence of honest mistake of fact, on balance the strict liability offence appears to be compatible with the presumption of innocence.

Committee response

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

2.185 The committee considers that the strict liability and absolute liability offences are likely to be compatible with the presumption of innocence.

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**)
Previous reports	4 of 2018
Status	Concluded examination

Background

2.186 The committee first reported on the bill in its *Report 4 of 2018*, and requested a response from the Minister for the Environment and Energy by 23 May 2018.[1]

2.187 A response from the Assistant Minister for the Environment was received on 25 May 2018 and is discussed below and is reproduced in full at **Appendix 3**.

Civil penalties for breaches of protected underwater cultural heritage regime

2.188 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,[2] possessing protected underwater cultural heritage without a permit,[3] and exporting underwater cultural heritage without a permit.[4] 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

1 Parliamentary Joint Committee on Human Rights, *Report 4 of 2018* (8 May 2018) pp. 33-37.

2 Proposed section 29(6).

3 Proposed section 31(6).

4 Proposed section 35(5).

heritage without a permit.[5] 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

2.189 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 acknowledges that the civil penalty provisions may engage criminal process rights if they are considered 'criminal' for the purposes of international human rights law.

2.190 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.

2.191 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

5 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).

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'.[6] The initial human rights analysis noted that, 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.

2.192 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 was noted that the conduct regulated by the bill that 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. This raised 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. The initial analysis stated that 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.

2.193 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)).[7]

2.194 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

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

7 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.

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.[8] This would ensure that a person could not be punished twice for the same conduct, consistent with Article 14(7).

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

2.196 The committee therefore sought 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. The committee also sought 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.

Assistant minister's response

2.197 The assistant minister's response addresses each of the relevant tests for determining whether a civil penalty is 'criminal' for the purposes of human rights law. The response states that the civil penalties are classified as such under domestic law. However, as noted in the initial analysis, this is not determinative as the term 'criminal' has an autonomous meaning in human rights law.

2.198 As to the second part of the test, the assistant minister's response explains the nature and purpose of the penalty:

> The penalties proposed in the Underwater Cultural Heritage Bill 2018 (the Bill) aim to deter and punish conduct that could harm protected underwater cultural heritage, and are set at a level reflecting the significant value of the non-renewable heritage resource that would be negatively impacted by a breach of any of the regulated actions. Although the application of the penalty provisions is not expressly limited in the Bill, in practice only a particular sector of the community will be regulated by this Bill, notably natural persons and bodies corporate who possess and or

8 SOC, p. 12.

> trade in protected underwater cultural heritage or who undertake development actions that may impact protected underwater cultural heritage (for example by physically damaging, disturbing or removing protected underwater cultural heritage from the marine environment). As such the primary groups likely to offend are limited to a small group of persons or bodies corporate.

2.199 The assistant minister's response clarifies that while the purpose of the penalties is to deter and punish, the penalties in practice apply to a particular sector of the community. This narrow application and particular regulatory context suggests that the penalties are unlikely to be classified as 'criminal' under the second step of the test.

2.200 As to the third step (severity of the penalty), the assistant minister's response firstly emphasises that the pecuniary penalty 'reflects the intrinsic and social value of protected sites and individual articles that may be possessed or traded and are framed to be an appropriate and proportionate deterrent to natural persons and bodies corporate'. As to the size of the penalties, the assistant minister's response explains:

> The size of the pecuniary penalties also reflects the broad range and scale of contraventions that can occur such as systemic breaches of requirements to possess a permit (prior to exporting protected underwater cultural heritage), deliberate actions (such as disturbance of a site and the recovery of protected underwater cultural heritage without permit), or a cost of business approach by developers to the total destruction of underwater cultural heritage sites.
>
> The inclusion of civil penalties in the Bill provides an option for an appropriate and proportionate response to the deliberate contravention of provisions protecting underwater cultural heritage. A criminal conviction may result in a disproportionate response which would impact on an individual's current or future ability to work. This scale of the pecuniary penalties give the court flexibility in identifying a suitable penalty for each case on its merits enabling a proportionate response to corporate bodies and individuals.

2.201 It is acknowledged that the nature of the industry being regulated by the bill is such that its conduct may cause substantial and potentially irreversible damage to underwater sites. However, the penalties are substantial for an individual (300 penalty units for breaches of sections 29(6), 31(6) and 35(5) and 800 penalty units for breaching section 30(6)). Notwithstanding the particular regulatory context in which the penalties operate, concerns remain that the overall severity of the penalty may be such that the penalties would be classified as 'criminal' for the purposes of international human rights law.

2.202 As noted in the initial analysis, civil penalty provisions that may be classified as 'criminal' for the purposes of human rights law must be shown to be consistent with the criminal process guarantees. Relevantly, the civil penalties in the bill must

be compatible with the presumption of innocence. In this context, concerns arise due to the fact that the standard of proof required in civil penalty proceedings is the civil standard of proof on the balance of probabilities, rather than the criminal standard of 'beyond reasonable doubt'. This would constitute a limitation on the right to be presumed innocent.

2.203 While the assistant minister's position is that the penalties are not 'criminal', the response nonetheless helpfully addresses whether the measure would constitute a permissible limitation on the right to be presumed innocent. As to the legitimate objective of such a limitation, the assistant minister's response discusses the overall objective of the bill:

> The Bill pursues a legitimate objective which is to provide for the identification, protection and conservation of Australia's underwater cultural heritage. Underwater cultural heritage is threatened by a mix of environmental, chemical, biological and cultural processes. The Bill aims to manage the negative impacts to underwater cultural heritage which can be caused by both natural persons and bodies corporate.

2.204 This is likely to be a legitimate objective for the purposes of international human rights law. Regulating this conduct by requiring permits in relation to protected underwater cultural heritage, and civil penalties (and the accompanying civil standard of proof) to address breaches of these requirements, appears to be rationally connected to this objective. As to proportionality, the minister's response explains that the limitation on the presumption of innocence is proportionate in light of the 'unique and irreplaceable underwater cultural heritage in-situ' and notes that courts will have 'flexibility in identifying a suitable penalty for each case on its merits enabling a proportionate response to corporate bodies and individuals'.

2.205 As to whether the bill could be amended to a less rights restrictive approach of applying the criminal standard of proof to the civil penalties, the assistant minister's response states that the purpose of having civil penalties (with a civil standard of proof) alongside criminal penalties is to 'provide regulatory flexibility in responding appropriately and proportionately to contraventions'.

2.206 On balance, having particular regard to the purpose of the penalties and the overall scheme within which the penalties operate, the application of the civil standard of proof to the penalty provisions may be a proportionate limitation on the presumption of innocence.

Committee response

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

2.208 The committee considers that, having regard to the overall severity of the penalties, the civil penalty provisions in proposed sections 29(6), 30(6), 31(6), and 35(5) may be considered 'criminal' for the purposes of international human rights law. This means that the penalties must be compatible with criminal process

guarantees. In light of the information provided by the minister, the committee considers that the civil penalty provisions may be compatible with criminal process guarantees.

Strict liability offences

2.209 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.[9]

Compatibility of the measure with the presumption of innocence

2.210 As noted above, 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).

2.211 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:

> 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.[10]

2.212 However, further information was 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.

2.213 The committee therefore sought the advice of the minister as to the compatibility of the strict liability offences with the presumption of innocence, in particular:

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9 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).

10 SOC, p.13.

- 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.

Assistant minister's response

2.214 The assistant minister's response states that the purpose of the strict liability offences is to 'ensure the integrity of the regulatory regime in order to prevent potential harm to Australia's protected underwater cultural heritage'. This objective, in light of the broader objective of the bill to protect Australia's underwater cultural heritage, is likely to be a legitimate objective for the purposes of international human rights law. The introduction of offence provisions to address non-compliance with the regime also is rationally connected to this objective.

2.215 As to proportionality, the assistant minister's response states:

> The use of strict liability is proportionate to achieve the stated objective because the penalty amounts are within reasonable limits. As noted in the Explanatory Memorandum to the Bill, the penalties for the strict liability provisions in the Bill are limited to 60 penalty units for an individual, and do not include imprisonment. Consequently, individuals who contravene a strict liability provision of the Bill will not be subject to unreasonable or unduly harsh penalties, taking into account the Bill's legitimate objective of protecting and conserving Australia's underwater cultural heritage.
>
> Finally, the strict liability provisions of the Bill maintain the defendant's right to a defence. This is because defence of mistake of fact will remain available to a defendant, so that a person cannot be held liable if he or she had an honest and reasonable belief that they were complying with relevant legal obligations. Additionally, the existence of strict liability also does not make any other defence unavailable to a defendant.

2.216 The further information provided from the assistant minister indicates that the penalties are within reasonable limits and maintain the defendant's right to a defence. Having regard to the further information provided by the assistant minister, the strict liability offences are likely to be compatible with the presumption of innocence.

Committee response

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

2.218 The committee considers that the strict liability offences are likely to be compatible with the presumption of innocence.

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) [F2017L01063] and [F2017L01080]: 15 sitting days after tabling (tabled Senate 4 September 2017) [F2017L01592]: 15 sitting days after tabling (tabled Senate 8 February 2018) [F2018L00102] and [F2018L00108]: 15 sitting days after tabling (tabled Senate 15 February 2018) [F2018L00099], [F2018L00101] and [F2018L00100]: 15 sitting days after tabling (tabled Senate 14 February 2018)
Rights	Multiple rights (see **Appendix 2**)
Previous reports	3 & 4 of 2018
Status	Concluded examination

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

2.219 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] The minister's response to the committee's inquiries was received on 27 April 2018 and discussed in *Report 4 of 2018*.[3]

2.220 The committee requested a further response from the minister by 23 May 2018.

2.221 The minister's further response to the committee's inquiries was received on 4 June 2018. The response is discussed below and is reproduced in full at **Appendix 3**.

2.222 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).[4] 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).

2.223 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 undertaken in 2015 and 2016.[5] 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*.[6] 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.[7]

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

3 Parliamentary Joint Committee on Human Rights, *Report 4 of 2018* (8 May 2018) pp. 64-83.

4 See footnote 1.

5 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.

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

7 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.

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

2.224 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 Australia, or will otherwise deal with matters, things or relationships outside Australia.[8] The 2011 regulations set out the countries and activities for which a person or entity can be designated or declared.[9] 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.

2.225 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.[10] 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.

2.226 The autonomous sanctions regime provides that the minister may grant a permit authorising the making available of certain assets to a designated person.[11] An application for a permit can only be made for basic expenses, to satisfy a legal judgment or where a payment is contractually required.[12] A basic expense includes foodstuffs; rent or mortgage; medicines or medical treatment; public utility charges; insurance; taxes; legal fees and reasonable professional fees.[13]

Compatibility of the designations and declarations with multiple human rights

2.227 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

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

9 Section 6 of the Autonomous Sanctions Regulations 2011.

10 Section 14 of the Autonomous Sanctions Regulations 2011.

11 See section 18 of the Autonomous Sanctions Regulations 2011.

12 See section 20 of the Autonomous Sanctions Regulations 2011.

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

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.

2.228 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.

2.229 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.

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

2.231 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 June 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).[14] 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.

14 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

2.232 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.

2.233 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

2.234 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 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.[15]

15 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

2.235 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.[16] 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

2.236 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.[17]

Right to freedom of movement

2.237 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.[18] 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

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

17 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.

18 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

2.238 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.

2.239 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.[19] 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.

2.240 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,[20] 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.[21] 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.

2.241 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

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

20 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

21 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.[22]

2.242 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.[23]

2.243 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.[24]

2.244 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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22 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].

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

24 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.[25] 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.

2.245 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.[26] 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.[27]

2.246 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.[28] 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.[29]

2.247 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

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. 49.

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

29 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.[30]

2.248 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.[31]

2.249 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.[32] 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.[33]

2.250 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.[34] 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.

2.251 The committee has also previously discussed comparative models of sanctions regimes which provide safeguards not present in the Australian

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

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

32 See further below.

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

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

autonomous sanctions regime, including the United Kingdom (UK).[35] The committee noted that safeguards in comparable asset-freezing regimes are highly relevant indicia that there are more proportionate methods of achieving the legitimate 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

2.252 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.[36] Non-refoulement obligations are absolute and may not be subject to any limitations.

2.253 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.

2.254 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.[37] It was not clear whether this provision would

35 On 23 May 2018, the *Sanctions and Anti-Money Laundering Act 2018* (UK) (SAML Act) was passed, repealing and replacing Part 1 of the *Terrorist Asset Freezing etc Act 2010* (UK), which was previously referred to in the committee's reports on sanctions regimes. The *Sanctions and Anti-Money Laundering Act 2018* (UK) retains some of the safeguards previously discussed by the committee, including the requirement to report to parliament on the operation of the regime (section 30 of SAML Act) and oversight by an independent reviewer of sanctions enacted for a counter-terrorism purpose (section 31 of SAML Act). However, some of the safeguards previously discussed have been repealed. The United Kingdom Joint Committee on Human Rights (JCHR) reported on the SAML bill and raised a number of human rights concerns in relation to it: see JCHR, *Legislative Scrutiny: The Sanctions and Anti-Money Laundering Bill* (28 February 2018). The JCHR's report also made a number of recommendations to amend the (then) SAML bill, and the government subsequently accepted the JCHR's recommendation that there be independent review of counter-terrorism sanctions (as had been the case under the previous law) and amended the bill accordingly: see *Government response from the Minister of State for Europe and the Americas, relating to the Committee's report on Legislative Scrutiny: The Sanctions and Anti-Money Laundering Bill*, dated 25 April 2018, available https://www.parliament.uk/documents/joint-committees/human-rights/Sanctions-Anti-Money-Laundering-bill-response.pdf.

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

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

apply to visa holders who have been found to engage Australia's non-refoulement obligations.

2.255 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.[38]

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

2.257 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.

2.258 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 regime.

2.259 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 [2.232] to [2.251] above.

38 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.

2.260 The committee also drew the minister's attention to the committee's recommendations in *Report 9 of 2016* that consideration be given to the measures which have been implemented in relation to comparable regimes, to ensure compatibility with human rights.

2.261 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.[39]

Minister's first response

Minister's first response - Compatibility of the measure with the prohibition on non-refoulement and the right to an effective remedy

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

> 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.

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

2.263 The minister's response helpfully provided 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 clarified that persons on protection, refugee or humanitarian visas could not have their visa cancelled under section 2.43(1)(aa) of the Migration Regulations.[40] This indicated 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,[41] 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.

2.264 For persons who may have their visa cancelled under section 2.43 of the Migration Regulations, the response identified 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 pointed to the human rights compatibility assessment in the explanatory memorandum to the bill which introduced section 197C of the Migration Act.[42] However, it was noted that the mechanisms referred to are entirely at the discretion of the relevant minister. While the minister identified 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.[43]

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40 '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).

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

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

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

2.265 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:

> 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.[44]

2.266 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.

2.267 The committee noted 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.

2.268 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 reiterated 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.

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44 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.

Minister's first response - 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

2.269 In relation to the remaining human rights discussed above, the minister's first response did not substantively address the committee's inquiries but instead provided the following general information:

> 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.

2.270 While the minister 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,[45] 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.

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

2.271 Finally, in relation to the statements of compatibility for the instruments, the minister's first response stated:

> 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.

2.272 The committee noted that the minister's response did not substantively address the committee's inquiries in relation to the compatibility of the instruments with multiple rights.

2.273 The committee therefore reiterated its previous request for advice from the minister. The committee also noted the minister has requested the Department of Foreign Affairs and Trade to include additional detail in future statements of compatibility, and drew the minister and department's attention to the committee's *Guidance Note 1*.

Minister's second response

2.274 The minister's second response firstly notes the committee's recommendations in *Report 9 of 2016* of changes that could be made to make the sanctions regime more human rights-compliant, having regard to comparable international sanctions regimes. The minister's response notes that 'the Government continues to be satisfied that Australia's autonomous sanctions regime is compatible with human rights' and that 'the Government has no immediate plans to adopt the measures proposed by the Committee', but that it will keep the sanctions regime under review.

2.275 The minister's second response also reiterates the legitimate objectives of the sanctions regimes:

> It is the Government's view that modern sanctions regimes impose highly targeted measures in response to situations of international concern. This includes the grave repression of human rights or democratic freedoms of a population by a government, or the proliferation of weapons of mass destruction or their means of delivery, or internal or international armed conflict. Thus, autonomous sanctions pursue legitimate objectives, and have appropriate safeguards in place to ensure that that any limitation of human rights engaged by the imposition of sanctions is justified.

2.276 As noted previously, it is accepted that the sanctions regime pursues a legitimate objective for the purposes of international human rights law.

Compatibility of the measures with the right to a fair hearing

2.277 In relation to the compatibility of the measures with the right to a fair hearing, the response states that the 'limitation on access to merits review in this context is reasonable as it reflects the seriousness of the foreign policy and national security considerations involved, as well as the nature of the material relied upon'. The response further states:

> Further, while merits review is unavailable for a decision to designate and/or declare a person under the Regulations, there are clear procedures for requesting revocation of designations and declarations, and judicial review is available under the *Administrative Decisions (Judicial Review) Act 1976* (the ADJR Act).
>
> In addition, there is a three-yearly review process for targeted financial sanctions and travel bans that ensures that effective safeguards and controls are in place. This three-yearly review process includes a public consultation period, which invites submissions from the public to inform the assessment of whether a person continues to meet the criteria for designation and declaration under regulation 6 of the Regulations.
>
> Finally, a person may apply at any time requesting the revocation of their designation or declaration in the event of changed circumstances or if new evidence comes to light. Failure to make a decision or unreasonable delay following such a request may be grounds for judicial review. Finally, the Minister may review and/or revoke designations and declarations at any time on her own initiative, including when circumstances change or new evidence comes to light.

2.278 As noted in previous analysis, the availability of judicial review to secure the minimum requirement that the minister act in accordance with the law is one relevant safeguard available. However, as noted in previous analysis, 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 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.[46] It is noted that this formulation limits the scope to challenge such a

46 For example, under the autonomous sanctions regime a person can be designated or declared by the minister on a number of grounds relating to whether the minister is subjectively satisfied the person is or has been involved in certain activities. These include, for example, that a person is a supporter of the former regime of Slobodan Milosevic; is a close associate of the former Qadhafi regime in Libya (or an immediate family member); is providing support to the Syrian regime; is responsible for human rights abuses in Syria; has engaged in activities that seriously undermine democracy, respect for human rights and the rule of law in Zimbabwe; or is responsible for, or complicit in, the threat to the sovereignty and territorial integrity of Ukraine.

decision on the basis of there being an error in law (as opposed to an error on the merits) under the ADJR Act or at common law.

2.279 It is also not clear that the request for revocation process and three-yearly review process outlined in the minister's response would overcome the fair hearing concerns raised in previous analysis. In particular, a designated or declared person will only have their application for revocation considered once per year and the minister is not required to consider an application if it is made within the year. Similarly, while the minister may review or revoke designations or declarations at their own initiative, there is no requirement to reconsider or review the designation within the three-yearly review period if circumstances change or new evidence comes to light, raising concerns that a person may remain subject to sanctions notwithstanding the circumstances have changed.

2.280 More broadly, as noted in the previous analysis, the European Court of Human Rights has considered that persons subject to sanctions should be 'afforded at least a genuine opportunity to submit appropriate evidence to a court, for examination on the merits, to seek to show their inclusion on the impugned lists had been arbitrary'.[47] The Court of Justice of the European Union has similarly held that when considering the compatibility of judicial review of sanctions decisions in light of the right to an effective remedy and to a fair trial,[48] that 'judicial review cannot be restricted to an assessment of the cogency in the abstract of the reasons relied on, but must concern whether those reasons…[are] substantiated'.[49] It is also noted that the UK Joint Committee on Human Rights has recently expressed concern about the restriction of court reviews of sanctions to judicial review.[50]

2.281 For these reasons, serious concerns remain as to whether the autonomous sanctions regime is compatible with the right to a fair hearing.

Compatibility of the measures with the right to privacy

2.282 In relation to the compatibility of the designations and declarations of persons under the 2011 regulations with the right to privacy, the minister's second response states:

> As noted above, an interference with privacy will not be arbitrary where it is reasonable, necessary and proportionate in the individual circumstances.

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

48 Pursuant to Article 47 of the EU Charter of Fundamental Freedoms.

49 *European Commission and Others v Kadi,* Court of Justice of the European Union (Grand Chamber)(Cases C‑584/10 P, C‑593/10 P and C‑595/10 P)(18 July 2013) [119].

50 JCHR, *Legislative Scrutiny: The Sanctions and Anti-Money Laundering Bill* (28 February 2018) [48]-[54].

> The imposition of targeted financial sanctions and travel bans is reasonable. The Minister uses predictable, publicly available criteria when designating or declaring a person as being subject to such measures. These criteria are designed to capture only those persons the Minister is satisfied are involved in activities giving rise to situations of international concern, as set out in regulation 6 of the Regulations.
>
> Targeted financial sanctions and travel bans under the autonomous sanctions regime are necessary and proportionate. They are only imposed, by definition, in response to situations of international concern, including where there are, or have been, human rights abuses, weapons proliferation (in defiance of UN Security Council resolutions), indictment in international criminal tribunals, activities that seriously undermine democracy, and threats to the sovereignty and territorial integrity of a State. Given the seriousness of these issues, the Government considers that targeted financial sanctions and travel bans are the least rights-restrictive ways to respond to situations of international concern.
>
> The Government's position is that any interference with the right to privacy as a consequence of the operation of the autonomous sanctions regime is not unlawful or arbitrary.

2.283 It is acknowledged that in an individual case, when accompanied by sufficient safeguards, the imposition of sanctions on an individual may constitute a proportionate limitation on a person's right to a private and home life. For example, in *Bouchra Al Assad v Council of the European Union*, the General Court of the European Union held that the freezing of a person's funds pursuant to targeted sanctions did not constitute a disproportionate impact on a person's private life, having regard to the 'primary importance of protecting the civilian populations in Syria', the availability of periodic review, and the possibility of authorising funds in order to meet basic needs or certain commitments.[51]

2.284 By contrast, before the European Court of Human Rights in *Nada v Switzerland,* the complainant was subject to a travel ban pursuant to UN sanctions and was restricted access to Swiss territory, the effect of which was that he was confined to an Italian enclave within Swiss territory. The Court considered that preventing the applicant from leaving the confined area impacted the person's ability to exercise their right to maintain contact with family, which was an interference with the applicant's right to respect for his private life. The Court found that, notwithstanding the legitimate aims pursued by the sanctions, the state's failure to

51 *Bouchra Al Assad v Council of the European Union* Judgment of the General Court (Sixth Chamber) (Case No. T-202/12) (12 March 2014) [107]-[121].

take 'all possible measures to adapt the sanctions regime to the applicant's individual situation' meant that the interference was not proportionate.[52]

2.285 To that end, whether the imposition of sanctions on an individual constitutes a proportionate limitation on the right to a private life will depend on the availability of other safeguards, including the availability of review. As noted above, there are serious concerns as to whether the current mechanisms for review of decisions relating to the sanctions regime are sufficient from the perspective of the right to a fair hearing. There is a risk, therefore, that the absence of sufficient safeguards may result in the autonomous sanctions regime being incompatible with the right to privacy.

2.286 The minister's response does not address the committee's specific concern as to the impact of the designation process on the right to privacy of close family members of a designated person who may not be able to access their own funds without needing to account for all expenditure (due to the possibility that use of their funds may indirectly benefit a designated person, which would be an offence).[53] This remains a concern with respect to the personal autonomy of family members of designated and declared persons.

2.287 It is noted that UN Human Rights Committee jurisprudence confirms the risk that the domestic implementation of sanctions regimes may breach the right to privacy. In *Sayadi and Vinck v Belgium,* the UN Human Rights Committee found a violation of Article 17 of the ICCPR in circumstances where the complainants' names were on a UN sanctions list notwithstanding the dismissal of criminal investigations against them and attempts by the state party to request removal of the names from the list. The UN Human Rights Committee found that Belgium (as the state party responsible for the presence of the authors' names on the list) violated Article 17, due in part to the fact that 'the dissemination of personal information about the authors constitutes an attack on their honour and reputation, in view of the negative association that some persons could make between the authors' name and the title of the sanctions list'.[54]

Compatibility of the measures with the right to protection of the family

2.288 As to the compatibility of the measures with the right to protection of the family, the response states:

52 *Nada v Switzerland,* ECHR (Grand Chamber) (Application No. 10592/08) (12 September 2012) [167]-[199].

53 See Parliamentary Joint Committee on Human Rights, *Report 3 of 2018* (27 March 2018) [1.287].

54 *Sayadi and Vinck v Belgium,* UN Human Rights Committee (Application No. 1472/2006) (22 October 2008) [10.12].

> As the listing criteria in regulation 6 are drafted by reference to specific foreign countries, it is rare, as a practical matter, that a person declared for a travel ban will have immediate family in Australia and face deportation from Australia.
>
> To the extent that a person has known connections to Australia, the Department of Foreign Affairs and Trade (DFAT) is able to consult with relevant agencies in advance of a designation and declaration to determine the possible impacts of the designation and declaration on any family members in Australia.
>
> To the extent that the travel bans imposed pursuant to the Instruments engage and limit the right to protection of the family in a particular case, the Regulations allow the Minister to waive the operation of a travel ban on the grounds that it would be either: (a) in the national interest; or (b) on humanitarian grounds. This provides a mechanism to address circumstances in which issues such as the possible separation of family members in Australia are involved. In addition, this decision may be judicially reviewed.
>
> Finally, were such a separation to take place, for the reasons outlined in relation to Article 17 above, the position of the Australian Government is that such a separation would be justified in the circumstances of the individual case.

2.289 The minister's response helpfully provides information as to the practical operation of the sanctions regime and the process undertaken by DFAT to ascertain the impact on family members, and it is acknowledged that as a practical matter the impact on family members in Australia would be rare. The possibility of waiving the travel ban on humanitarian grounds or in the national interest to protect a family in an individual case is also a relevant safeguard.

2.290 As with the right to privacy discussed above, whether the imposition of a travel ban would constitute a proportionate limitation on the right to protection of the family will depend on the availability of other safeguards, such as the availability of review. For the reasons discussed above in relation to the right to a fair hearing, the availability of judicial review of a decision to waive a travel ban may not, of itself, be a sufficient safeguard. Further, as with the right to privacy, there is a risk that the absence of sufficient safeguards may result in the autonomous sanctions regime being incompatible with the right to protection of the family.

Compatibility of the measures with the right to an adequate standard of living

2.291 In relation to the compatibility of the measures with the right to an adequate standard of living, the minister states:

> The Government considers any limitation on the enjoyment of Article 11(1), to the extent that it occurs, is justified. The Regulations allow for any adverse impacts on family members as a consequence of targeted financial sanctions to be mitigated. As the Committee notes, the

> Regulations state that the Minister may grant a permit for the payment of basic expenses (among others) if it is in the national interest to do so. The objective of the basic expenses exemption is, in part, to enable the Australian Government to administer the sanctions regime in a manner compatible with relevant human rights standards.
>
> As noted above, DFAT consults relevant agencies in advance of a designation and declaration of a person with known connections to Australia to determine the possible impacts of the designation and declaration on any family members in Australia. Where such impacts are identified, the Minister may issue a permit to ensure that the asset freeze does not adversely affect any person who does not meet the criteria for designation.
>
> The Government considers that the permit process is a flexible and effective safeguard on any limitation to the enjoyment of Article 11(1).

2.292 The ability of the minister to grant a permit for the payment of basic expenses is an important safeguard. However, as also indicated in the minister's response, this safeguard is qualified by the requirement that the minister must not grant such a permit unless the minister is satisfied that it would be in the national interest to do so.[55] The minister may also make the permit subject to conditions.[56] As the committee has previously noted, this discretion of the minister does not appear to be the least rights-restrictive way of achieving the legitimate objective.[57]

Right to freedom of movement

2.293 In relation to the compatibility of the measures with the right to freedom of movement, the minister states:

> To the extent that Article 12(4) is engaged in an individual case, such that a person is prevented from entering Australia as their 'own country', the Government's position is that the imposition of the travel ban would be justified. As set out above in relation to Article 17 of the ICCPR, travel bans are a reasonable and proportionate means of achieving the legitimate objectives of Australia's autonomous sanctions regime.
>
> Travel bans are reasonable because they are only imposed on persons who the Minister is satisfied are responsible for giving rise to situations of international concern. Thus, preventing a person who is, for example,

55 Section 18(3)(a) of the Autonomous Sanctions Regulations 2011.

56 Section 18(4) of the Autonomous Sanctions Regulations.

57 By way of contrast, the sanctions that were the subject of scrutiny in the decision of *Bouchra Al Assad v Council of the European Union*, discussed above in relation to the right to privacy, allowed for the authorisation of the release of funds after having determined the funds were necessary to satisfy basic needs, without an additional requirement that it be in the national interest: See Article 19(3) of *Council Decision 2011/782/CFSP concerning restrictive measures against Syria.*

> responsible for human rights abuses in Syria, from travelling to, entering or remaining in Australia, is a reasonable means to achieve the legitimate foreign policy objective of seeking to influence and penalising those responsible for such abuses, and signal Australia's condemnation of such acts. Australia's practice in this respect is consistent with likeminded partners such as the US, the EU, and the UK.
>
> Travel bans are proportionate because while they engage and limit declared individuals' right to freedom of movement, they are the least restrictive means by which to achieve the legitimate objective of influencing and penalising those responsible for giving rise to situations of international concern. As set out above, by denying access to international travel, travel bans seek to influence persons who contribute to situations of international concern, including human rights abuses and weapons proliferation.

2.294 It is acknowledged that the travel bans are in pursuit of a legitimate objective and that they are a means to achieve the legitimate objective of seeking to influence and penalise people responsible for human rights abuses. However, as with the other human rights discussed above, the safeguards currently in place in the autonomous sanctions regime may not be sufficient, such that the limitation on freedom of movement may not be proportionate. In this respect, the UN Human Rights Committee noted in *Sayadi and Vinck v Belgium* (discussed above in relation to the right to privacy) that UN Security Council resolutions do not prevent consideration of whether travel bans for persons on sanctions lists are compatible with the right to freedom of movement.[58] The UN Human Rights Committee considered that in that case the facts of the case did not disclose that the restrictions of the authors' right to leave the country were necessary to protect national security and public order, and accordingly concluded there was a violation of Article 12.[59]

Overall assessment of the compatibility of the autonomous sanctions regime with human rights

2.295 It is acknowledged that the autonomous sanctions regime is a complex regime undertaken to give domestic effect to international obligations. However, the committee is required to assess the instruments for compatibility with human rights under the seven core human rights treaties to which Australia is a party. The autonomous sanctions regime may have significant human rights impacts on individuals and their immediate families. As such, it is important from a human rights perspective that sanctions regimes impose only proportionate limitations on human rights.

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58 *Sayadi and Vinck v Belgium,* UN Human Rights Committee (Application No. 1472/2006) (22 October 2008) [10.6].

59 *Sayadi and Vinck v Belgium,* UN Human Rights Committee (Application No. 1472/2006) (22 October 2008) [10.8].

2.296 From the analysis above, there are serious concerns that the current operation of the sanctions regime is not accompanied by adequate safeguards so as to constitute a proportionate limitation on the rights discussed above. There is therefore a serious risk of incompatibility with these rights.

Committee response

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

2.298 The committee notes that the information provided in the minister's response would be useful to include in future statements of compatibility relating to the autonomous sanctions regime.

2.299 The preceding analysis indicates that there is a risk that the autonomous sanctions regime may be incompatible with the right to a fair hearing, right to privacy, right to protection of the family, right to an adequate standard of living and the right to freedom of movement.

2.300 The committee reiterates its previous comment from *Report 9 of 2016* that consideration be given to the following measures that may ensure the autonomous sanctions regime is compatible 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.**

Designations or declarations in relation to specified countries

2.301 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

2.302 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.

2.303 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.[60] 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.

2.304 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.

2.305 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 first response

2.306 The minister's first response did not substantively respond to the committee's concerns, as outlined at [2.269]-[2.273] above. The committee therefore reiterated its request for advice as to the compatibility of the measures with the right to equality and non-discrimination.

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

Minister's second response

2.307 As to the compatibility of the measures with the right to equality and non-discrimination, the minister states:

> The Government's position is that any differential treatment of people as a consequence of the application of the Regulations does not amount to discrimination pursuant to Article 26 of the ICCPR.
>
> The Government refers the Committee to the listing criteria in regulations 6(1) and 6(2) of the Regulations, and notes that the criteria contained in the Regulation are reasonable and objective. They are reasonable insofar as they list only those States and activities which the Government has specifically determined give rise to situations of international concern. The criteria are also objective, as they provide a clear, consistent and objectively-verifiable reference point by which the Minister is able to make a designation or declaration. The Regulations serve a legitimate objective, as discussed above.
>
> Finally, they are proportionate. As discussed above, the Government's view is that denying access to international travel and the international financial system are a justified and less rights-restrictive means of achieving the aims of the Regulations. The Government does not have information that supports the view that affected groups are vulnerable; rather, they are people the Minister is satisfied are involved in activities giving rise to situations of international concern. Further, there are several safeguards, such as the availability of judicial review and regular review processes, in place to ensure that any limitation is proportionate to the objective being sought.

2.308 The minister's response indicates that there may be an objective and justifiable basis for a difference in treatment on the basis of national origin and nationality. In relation to the question of whether this difference in treatment is reasonable or proportionate, the minister's response relies on the existing safeguards under the sanctions regime. For the reasons discussed above, there are concerns as to whether those safeguards are sufficient for the purposes of international human rights law. Accordingly, based on the information provided it is not possible to conclude whether the designations or declarations in relation to specified countries are compatible with the right to equality and non-discrimination.

Committee response

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

2.310 Noting the concerns discussed in the previous analysis as to the adequacy of the safeguards in the sanctions regime, the committee considers that it is not possible to conclude whether the designations or declarations in relation to specified countries are compatible with the right to equality and non-discrimination.

Mr Ian Goodenough MP

Chair

Appendix 1

Deferred legislation

3.1 The committee has deferred its consideration of the following legislation for the reporting period:

- Export Control (Animals) Amendment (Information Sharing and Other Matters) Order 2018 [F2018L00580];
- Migration (Validation of Port Appointment) Bill 2018;
- National Disability Insurance Scheme (Complaints Management and Resolution) Rules 2018 [F2018L00634];
- National Disability Insurance Scheme (Incident Management and Reportable Incidents) Rules 2018 [F2108L00633];
- National Disability Insurance Scheme (Protection and Disclosure of Information—Commissioner) Rules 2018 [F2018L00635];
- National Disability Insurance Scheme (Restrictive Practice and Behaviour Support) Rules 2018 [F2018L00632]; and
- Unexplained Wealth Legislation Amendment Bill 2018.

3.2 The committee continues to defer its consideration of the following legislation:

- Customs (Prohibited Exports) Amendment (Defence and Strategic Goods) Regulations 2018 [F2018L00503];
- Family Assistance (Public Interest Certificate Guidelines) (Education) Determination 2018 [F2018L00464];
- Financial Framework (Supplementary Powers) Amendment (2018 Measures No. 1) Regulations 2018 [F2018L00456]; and
- Migration (IMMI 18/046: Determination of Designated Migration Law) Instrument 2018 [F2018L00446].

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 Greg Hunt MP
Minister for Health

Ref No: MC18-010471

Mr Ian Goodenough MP
Chair
Parliamentary Joint Committee on Human Rights
Parliament House
CANBERRA ACT 2600

21 MAY 2018

Dear Mr Goodenough Ian

Thank you for your letter of 9 May 2018 regarding the Parliamentary Joint Committee on Human Rights' consideration of the Australian Institute of Health and Welfare Amendment Bill 2018 in Report 4 of 2018. I appreciate the Committee's comments on the Bill and this response seeks to address the key issues raised by the Committee.

The Committee raised concerns about the impact of the Bill on the right to privacy under Article 17 of the International Covenant on Civil and Political Rights. The Committee sought clarification as to whether the collection of health-related information and statistics, and welfare-related information and statistics, included personal information and sought further information on how measures contained in the Bill are a legitimate objective under human rights law, are effective and are proportionate to the stated objectives.

The proposed change, as described in Items 13 and 14 of the Bill, seeks to provide greater autonomy for the Australian Institute of Health and Welfare (the Institute) to collect data relating to its core functions. Section 5 of the *Australian Institute of Health and Welfare Act 1987* (the AIHW Act) specifies that these functions include the collection of health-related information and statistics and welfare-related information and statistics. The proposed change removes the need for agreement to be sought from the Australian Bureau of Statistics for such collections. Instead, there will be ongoing consultation between the two agencies on data collection activities undertaken by the Institute.

The Institute collects personal information as part of its core functions. This information is collected for statistical purposes to support the development of an evidence base across the health, welfare and housing sectors. Specifically, the Institute collects personal information for survey purposes, to maintain health and welfare data sets, to maintain national registers and to undertake data linkage activities for health and medical research. The provision of such information is critical to enhance the quality and usefulness of its reports and publications, noting that the Institute is responsible for the production of over 180 reports covering subject areas; such as health and welfare expenditure, hospitals, disease and injury, mental health, ageing, homelessness, disability and child protection.

There is no change to the data collection activities under this Bill or to the strict privacy obligations which govern such activities. The *Privacy Act 1988* (the Privacy Act) contains guidelines regarding acts or practices that may have an impact on the privacy of individuals. These guidelines, as specified in the Australian Privacy Principles, govern the way in which Commonwealth agencies collect, use and disclose personal information, along with access and security arrangements.

The Institute, as a Commonwealth agency, is required to comply with the requirements of the Privacy Act.

Furthermore, access to personal information is restricted by confidentiality provisions under Section 29 of the AIHW Act. Access to personal information held by the Institute is restricted to Institute staff, to staff of other bodies contracted to undertake specific functions on behalf of the Institute and to anyone outside the Institute with the approval of the AIHW Ethics Committee.

In addition, section 29 of the AIHW Act, prohibits individuals who acquire information, either arising from their employment or doing any act or thing under an arrangement with the Institute, from disclosing (or making a record of) information concerning a person where the disclosure is not made for the purposes of the AIHW Act. It also prevents individuals in receipt of information acquired under the AIHW Act from being required to divulge or communicate that information to a court.

Section 29 also provides criminal penalties for the unauthorised disclosure of personal information where it is not made for the purpose of the AIHW Act. Fines of up to $2,000 or imprisonment for 12 months, or both, apply.

The AIHW Ethics Committee (established under section 16 of the AIHW Act) is responsible for making decisions on the ethical acceptability of proposals that relate to the Institute's activities and Institute-assisted activities (activities engaged in by bodies or persons, other than the Institute). These proposals may include identifiable data (i.e. data that contains personal information) and the AIHW Ethics Committee can impose conditions on the release of such data as it deems appropriate. Researchers are required to complete an Undertaking of Confidentiality should they be provided with access to personal information by the AIHW Ethics Committee.

These legislative provisions are backed by internal policies and procedures at the Institute to protect personal information collected by the Institute. This includes information security and privacy (technical, physical and personnel aspects), data custody, data linkage protocols, data confidentialisation techniques and the release of statistical information. Institute staff and contractors are required to sign confidentiality deeds before being granted access to data.

The Institute also has measures in place to ensure the safe and secure storage of personal information. Electronic and paper records containing personal information are stored in accordance with the Australian Government's Protective Security Policy Framework and record management practices comply with the Australian Government requirements as specified in the *Archives Act 1983*. Physical security policies also provide additional protections and are in place for regulating access to, and the storage of, linked data sets.

Thank you for writing on this matter.

Yours sincerely

Greg Hunt

THE HON ALEX HAWKE MP
ASSISTANT MINISTER FOR HOME AFFAIRS

Ref No: MS18-001844

Mr Ian Goodenough MP
Chair
Parliamentary Joint Committee on Human Rights
S1.111
Parliament House
CANBERRA ACT 2600

Dear Mr Goodenough

Thank you for your letters of 9 May 2018 in which further information was requested on the:

- Home Affairs Legislation Amendment (Miscellaneous Measures) Bill 2017 (the Home Affairs Legislation Amendment Bill); and
- Migration (IMMI/003: Specified courses and exams for registration as a migration agent) Instrument 2018 [F2017L01708] (the Migration Instrument).

My response to both requests are attached.

I trust the information provided is helpful.

Yours sincerely

ALEX HAWKE

24 / 5 / 2018

Parliament House Canberra ACT 2600 Telephone: (02) 6277 4430 Facsimile: (02) 6277 8522

Home Affairs Legislation Amendment (Miscellaneous Measures) Bill 2018

Parliamentary Joint Committee on Human Rights – *Report 4 of 2018*
Department Response

1.21 The committee requests the advice as to the compatibility of the measures 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 s198 of the Migration Act;***
- ***whether there are less restrictive approaches than the application of visa bars; and***
- ***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.***

The *Migration Act 1958* (the Act) currently imposes bars on all non-citizens preventing them from lodging further protection visa applications in circumstances where a non-citizen has previously had a protection visa cancelled or an application for a protection visa refused. These mechanisms prevent non-citizens, either lawful or unlawful, from lodging ongoing visa applications to inappropriately prolong their stay in Australia and delay their departure.

Currently, where a non-citizen is removed from Australia, but is refused entry into the destination country and the non-citizen is returned to Australia, visa bars continue to apply. However, where the Department of Home Affairs (the Department) has attempted to remove a non-citizen but the removal from Australia cannot be completed, for a reason other than refusal in the destination country, visa bars no longer apply on return to Australia.

The amendments are necessary to ensure that any non-citizen who the Department attempts to remove, but is then returned to Australia, irrespective of the circumstances, is treated in the same way. These arrangements would treat non-citizens as if they had never departed Australia (i.e. that they were continuously in the Migration Zone) and restore them to their previous immigration status. The visa bars are no more advantageous or disadvantageous than if the Department had not attempted to remove the non-citizen.

Visa bars are the least restrictive approach within the Act to achieve the Department's legislative objectives and ensure that the Department is able to re-facilitate the removal of non-citizens from Australia as soon as reasonably practicable.

The Department has safeguards to ensure that non-citizens are not subject to arbitrary detention. The Detention Review Committee conducts formal review of efforts to progress all non-citizens detained in immigration held detention towards status resolution outcomes. The committee ensures that:

- where a non-citizen is managed in a held detention environment, that the detention remains lawful and reasonable;
- the location of the person, whether held detention, specialised detention, community detention or in the community on a Bridging visa, remains appropriate to the non-citizen's situation and conducive to status resolution.
- where a non-citizen is managed in the community, either on a residence determination or through a Bridging visa, community risk is regularly and appropriately considered; and
- regardless of the location, the non-citizen's status resolution progresses and the appropriate departmental services are in place to support an outcome.

The Minister has a personal, non-compellable power to lift a visa bar or grant a visa, if he thinks it is in the public interest to do so. Generally, the Department on behalf of a person makes a request for the Minister to use their public interest powers. However, a non-citizen or a non-citizen's authorised representative can request in writing for the Minister to exercise his public interest power. Requests

are referred to the Minister where they meet the Minister's issued guidelines under section 48B of the Act.

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.

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 persons' claim for protection).

The Australian Government takes its international obligations seriously. Australia is party to several treaties that contain both explicit and implicit non-refoulement obligations not to forcibly remove a non-citizen to a place where they may be subjected to persecution or particular forms of harm. The Department does not seek to resile from or limit Australia's non-refoulement obligations under Article 6 and 7 of the ICCPR and Article 3(1) of the Convention Against Torture.

A non-citizen will be not removed from Australia in breach of our non-refoulement obligations.

The pre-removal clearance process is used to review a non-citizen's circumstances and relevant country information to identify whether there is any risk that the proposed removal would breach Australia's international non-refoulement obligations. This process is also used to identify whether there are any protection claims that have not already been assessed by the Department which raise protection issues and whether new information, such as country information, suggests that previously assessed claims may now raise a risk.

Additionally, the Minister has a personal, non-compellable power to lift a visa bar or grant a visa, if he thinks it is in the public interest to do so. This may include where new information has been identified to support a person's protection claim, allowing new protection claims to be assessed by the Department. The Minister has issued guidelines, to outline the circumstances in which he may consider exercising his public interest power under section 48B of the Act and to inform departmental officers about when and how to refer cases. These guidelines are consistent with the intention of the visa bar and cover circumstances where there is new information or significant changes in circumstances, which relates to Australia's non-refoulement obligations.

The form of administrative arrangements in place to support Australia meeting its *non-refoulement* obligations is a matter for the Government. It is the Government's position that there are sufficient procedural safeguards in place for ensuring all non-citizens are afforded an opportunity to have their claims assessed.

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

In planning the removal of a child, the best interests of the minor must be taken into consideration as **'a'** but not **'the' only** consideration. As such, other primary considerations may outweigh the best interests of the child in certain circumstances.

In considering the best interests of the child, during the removal planning, the Department considers the age, mental capacity, maturity, health, welfare and special needs of the minor. The views of the minor is another consideration that can be given due weight in the removal process and in accordance with the maturity of the minor. The amendments to the visa bars will not change these processes or considerations.

The Department also carefully considers the placement of children and their families when facilitating their removal. The Department takes steps to minimise the impact of detention on minors by considering alternatives to held detention such as alternative places of detention, immigration residential housing or immigration transit accommodation. This approach is consistent with paragraph 3 of the Department's Detention Values (**attached**) which prescribe that children and, where possible, their families will not be detained in an immigration detention facility. This is reflected in domestic legislation through s 4AA of the Act, which provides that the Parliament affirms as a principle that a minor shall only be detained as a measure of last resort.

The visa bars treat all non-citizens, including children, as if they had never departed Australia restoring them to their previous immigration status. The visa bars are no more advantageous or disadvantageous than if the non-citizen had not been attempted to be removed from Australia. They achieve the Department status resolution and removal objectives of managing and maintaining the integrity of the migration programme and are a reasonable and proportionate mechanism for consistently managing all unlawful non-citizens including those that the Department must re-progress to remove from Australia.

The Minister maintains his personal and non-compellable power to lift a visa bar or grant a visa, to a non-citizen, including children, if he thinks it is in the public interest to do so.

FACT SHEET

Immigration Detention Values

The Rudd Labor Government has committed to these values by a decision of Cabinet.

These seven key values will inform all aspect of the Department of Immigration Detention Services.

The Government's immigration detention seven key values are:

1. Mandatory detention is an essential component of strong border control.

2. To support the integrity of Australia's immigration program three groups will be subject to mandatory detention:
    a. all unauthorised arrivals, for management of health, identity and security risks to the community;
    b. unlawful non-citizens who present unacceptable risks to the community; and
    c. unlawful non-citizens who have repeatedly refused to comply with their visa conditions;

3. Children, including juvenile foreign fishers and, where possible, their families, will not be detained in an immigration detention centre (IDC);

4. Detention that is indefinite or otherwise arbitrary is not acceptable and the length and conditions of detention, including the appropriateness of both the accommodation and the services provided, will be subject to regular review;

5. Detention in IDCs is only to be used as a last resort and for the shortest practicable time;

6. People in detention will be treated fairly and reasonably within the law; and

7. Conditions of detention will ensure the inherent dignity of the human person.

These key values will underpin the operations of the Department and those that are contracted to provide detention services in any form.

TREASURER

Mr Ian Goodenough MP (Chair)
Parliamentary Joint Committee on Human Rights
Parliament House
CANBERRA ACT 2600

Dear Chair

Thank you for the letter of 9 May 2018 from the Parliamentary Joint Committee on Human Rights about the issues raised in the Committee's *Report 4 of 2018* on the National Consumer Credit Protection Amendment (Mandatory Comprehensive Credit Reporting) Bill 2018.

I would like to thank you for the opportunity to provide further information on the issues identified by the Committee. I have addressed each of the issues in **Attachment A** to this letter.

I trust that this information will be of assistance to the committee.

Yours sincerely

The Hon Scott Morrison MP
20 / 5 / 2018

Attachment A

Issue: Compatibility of the measure with the right to privacy

The committee seeks further information on:

- **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).**

Explanation

As the Committee notes, the framework that establishes Australia's credit reporting regime is set out in the *Privacy Act 1988* (Privacy Act). The current framework has been in operation since 2014 after amendments were made to the Privacy Act by the *Privacy Amendment (Enhancing Privacy Protection) Act 2012* (Privacy Amendment Act).

The National Consumer Credit Protection Amendment (Mandatory Comprehensive Credit Reporting) Bill 2018 (the Bill) requires that certain credit providers participate in the existing voluntary system established by the Privacy Amendment Act. The Bill does not establish a new or broader credit reporting system.

The Government Bill seeks to overcome the first mover problem which has meant that credit providers have failed to participate in the voluntary regime. Prior to the Government's announcement a number of credit providers had indicated their intention to participate in the comprehensive credit regime. However, the timeframes were delayed. The Bill will ensure that participation occurs in a more timely and coordinated way.

The Committee specifically asks for more information about the security arrangements between credit providers and credit reporting bodies, the period that data can be retained and a person's correction and review rights.

The Bill includes new security provisions to further guarantee the security and protection of consumer information. The Bill requires that credit reporting bodies store credit information within Australia and, where information is stored on a cloud server, the cloud server will have to be recognised by the Australian Systems Directorate.

These new security arrangements are in addition to the existing protections in the Privacy Act. The Privacy Act imposes requirements on both credit reporting bodies and credit providers to take reasonable steps to protect credit-related information from misuse, interference and loss, and from unauthorised access, modification or disclosure (section 20Q and section 21S of the Privacy Act). The law also currently requires credit reporting bodies to ensure that regular audits of credit providers are conducted by an independent person to determine whether credit providers are taking the required actions.

The Privacy Act also already sets out the period that information can be retained before it must be destroyed (see sections 20V to 20ZA) and includes requirements for both a credit reporting body and credit provider to correct information including at the person's request (see sections 20S to 20U and section 21U to 21W of the Privacy Act).

While the mandatory regime will increase the volume of information in the credit reporting system, this was the volume that was anticipated would be in system as a result of the Privacy

Amendment Act and was contemplated when considering the impacts on an individual's privacy as part of the development of that Act.

For this reason the explanation included in the Statement of Compatibility with Human Rights included in the explanatory memorandum to the Privacy Amendment (Enhancing Privacy Protection) Bill 2012 is still relevant in understanding that the measure achieves a legitimate objective and that the limitation on the right to privacy is proportionate. The safeguards included in that Bill remain appropriate.

The relevant excerpts are copied out below:

The Bill implements the ALRC's recommendations to move to a more comprehensive credit reporting system. In this respect, the Bill may limit the prohibition on arbitrary interference with privacy by adding five new categories to the types of personal information that make up an individual's credit information in the credit reporting system. Four of the new categories, which are introduced in the new definition of consumer credit liability information in subsection 6(1), are:

- *the type of credit account opened*
- *the date on which the consumer credit is entered into*
- *the date on which the consumer credit is terminated, and*
- *the current limit of the credit account.*

The fifth category, repayment history information, is added directly to the definition of credit information, at part (c) of clause 6N of the Bill.

The Act currently enables the collection and disclosure of personal information that primarily detracts from an individual's credit worthiness—such as the fact that an individual has defaulted on a loan. This is commonly referred to as 'negative' or 'delinquency-based' credit reporting. The introduction of comprehensive credit reporting is aimed at providing a more balanced and accurate picture of an individual's credit situation than currently exists, providing positive information about a person's credit situation such as when an individual has met their credit payments.

The introduction of more comprehensive credit reporting allows credit providers to access an enhanced set of personal information tools directly relevant to establishing an individual's credit worthiness. This will allow credit providers to make a more robust assessment of credit risk, which is expected lead to lower credit default rates. More comprehensive credit reporting is also expected to improve competition in the credit market, which may result in reductions to the cost of credit for individuals. The amendments will enable legitimate commercial activity, facilitating consumer lending and transactions, and thus the participation of individuals in the economy. These are legitimate objectives.

The Bill introduces a number of safeguards to provide individuals with the tools to access information held about them, and correct any inaccuracies. The Bill also makes improvements to the complaints process, to ensure that the first organisation to receive the individual's complaint is responsible for taking action. In moving to more comprehensive credit reporting it has been recognised that additional safeguards around the use of repayment history information, the fifth new category of information, are also necessary. Repayment performance history will only be available by credit providers who are licensees [and to lenders mortgage insurers in relation to services they provide to credit providers] and subject to the responsible lending obligations in the National Consumer Credit Protection Act 2009.

The Bill continues to state clearly defined and limited uses and disclosures for credit reporting information. The Government did not support the ALRC's recommendation that secondary uses of credit reporting information should be subject to a broad discretion exercised by credit reporting bodies or credit providers. The Government's approach ensures any effect on privacy rights is 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.*

Pre-screening is subject to specific requirements, including only the use of negative credit reporting information, the requirement for notice at the time of collection that information may be used for this purpose, an opt out opportunity, and a prohibition on individuals being identified for other direct marketing . Any entity involved in pre-screening must maintain auditable evidence to verify compliance, and which is available to individuals. Pre-screening is also only available to credit providers who are subject to the National Consumer Credit Protection Act 2009.

In the consumer credit environment it is important to achieve a balance between privacy protection and the efficient operation of the credit market. Access to narrowly defined categories of credit information to ensure a more balanced picture of an individual's credit situation, taking into account positive action such as payment, and not just negative information like defaults, and to allow for more effective risk assessment by credit providers is balanced with the enhanced privacy protections set out above.

Any limitations on the prohibition against arbitrary interference with privacy in the Bill are clearly and narrowly defined, for the legitimate purpose of improving the management of personal and credit reporting information, and accompanied by sufficient safeguards to maintain reasonable privacy protections. The measures are reasonable, necessary and proportionate as they ensure the smallest possible set of data is used for the narrowest purposes to achieve the objective of providing a functional consumer credit market.

PARLIAMENT OF AUSTRALIA • HOUSE OF REPRESENTATIVES

PAUL FLETCHER MP
Federal Member for Bradfield
Minister for Urban Infrastructure and Cities

PDR ID: MC18-004214

Mr Ian Goodenough MP
Chair
Parliamentary Joint Committee on Human Rights
PO Box 6100
Parliament House
CANBERRA ACT 2600

Dear Mr Goodenough Ian

Response to Parliamentary Joint Committee on Human Rights – Road Vehicle Standards Bills

Thank you for your letter of 9 May 2018, seeking my advice on a number of matters related to the assessment of the Road Vehicle Standards Bill 2018 by the Parliamentary Joint Committee on Human Rights (the Committee).

I have attached my response to the matters raised by the Committee regarding the Road Vehicle Standards Bill 2018 Attachment A.

I trust this information supports the Committee in finalising its consideration of the Bill.

I have copied this letter and its attachments to the Committee's Secretariat.

Yours sincerely

Paul Fletcher

23 / 5 /2018

Enc

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Attachment A

Reversal of Evidential Burden - Compatibility of measures with the right to be presumed innocent

The Parliamentary Joint Committee on Human Rights (the Committee) has sought advice as to the appropriateness of reversing the evidential burden in offence specific defences.

The Committee noted that reverse burden offences are not necessarily inconsistent with the presumption of innocence provided such provisions pursue a legitimate objective, are rationally connected to that objective and are a proportionate means to achieve that objective.

The Committee also notes that while the bill's Explanatory Memorandum includes information about the reverse evidential burdens, the Statement of Compatibility does not identify that the reverse burden offences engage and limit the presumption of innocence.

The Committee has requested additional information about whether the reversal of burden is aimed at achieving a legitimate objective for the purposes of international human rights law; how the reverse burden offences are effective to achieve their objective; whether the limitation is a reasonable and proportionate measure to achieve the stated objective; and whether it would be feasible to amend the measures to remove the burden.

The offence provisions in question - (16(3), 24(3)-(4), 32(2) and 43(2) - have been crafted so they are consistent with the Attorney-General's Department's 'Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers', which provides that a matter should only be included in an offence-specific defence where:

- It is peculiarly within the knowledge of the defendant; and
- It would be significantly more difficult and costly for the prosecution to disprove than for the defendant to establish the matter.

Subclause 16(3) – Entry of non-compliant vehicles on the RAV

This offence prevents vehicles that do not meet the requirements of a Register of Approved Vehicles (RAV) entry pathway from being entered onto the RAV. Paragraphs 16(3)(a), (b), (c) and (d) provide a defence if the only reason that the vehicle did not comply with the entry pathway was due to the use of a non-compliant component represented by its supplier to be covered by a component type approval.

The RAV is the core element of the Bill. It is the means by which a vehicle's approval for provision to the Australian market is recorded and evidenced. Consumers, industry stakeholders and state and territory registration authorities will rely on the RAV to ensure the vehicle provided to the Australian market meets the national road vehicle standards for safety, environmental and anti-theft devices and is suitable to be registered for use on roads.

Road vehicles that do not meet the necessary standards but are placed on the RAV present a significant risk, not only to the individuals using the vehicle, but all road users. Therefore, the offences provided for in subclauses 16(1) and (2) aim to achieve the fundamental objective of the legislation - ensuring road vehicles being provided for the first time in Australia meet the necessary standards.

The reversal of evidential burden proof in relation to subclause 16(3) is rationally connected to this objective for a number of reasons. First, the precise details of the design and manufacture of the vehicle, and the procurement and use of components, is peculiarly within the knowledge of the type approval holder. It is a core requirement of type approvals that type approval holders retain this information in 'supporting documentation', rather than provide all this information to the Department of Infrastructure, Regional Development and Cities (the Department) to gain an approval. While the Department can access this information by requesting it, this is a costly and resource intensive exercise, requiring the Department to obtain a full outline of the design and manufacturing process and spend taxpayer resources to develop a detailed understanding of one type approval holder's production process.

Secondly, an inability to effectively prosecute would undermine the Department's ability to achieve the objective of clause 16. The reversal of evidential burden is reasonable and proportionate - the provision reverses only the evidential, and not the legal, burden of proof. Type approval holders, to whom this offence relates, will already be required under the Act to possess or have access to the relevant documentation, and a detailed understanding of their own processes. That is, they will already be required to hold the information that would be necessary for discharging the evidentiary burden. A circumstance that would require a person to bear an evidential burden would apply almost exclusively to corporations, rather than individuals, because individuals are unlikely to be able to hold the technical information and ensure conformity of production in fulfilment of a type approval holder's obligations.

Drafting this as a defence, rather than as an element of the offence ensures a reasonable balance between efficiency of regulation, safety for consumers, and applying appropriate obligations on approval holders that can supply unlimited numbers of vehicles in Australia. To remove the evidential burden for this provision would undermine the legitimate objects of the Act by limiting the community's assurance of a vehicle's compliance with the national standards when first provided to the Australian market.

Clause 24 - Providing road vehicle for the first time in Australia vehicle not on RAV

Subclause 24(1) makes it an offence for a person to provide a road vehicle to another person in Australia for the first time, if the vehicle is not on the RAV. Vehicles that are not on the RAV have not been declared as compliant with the applicable safety, environmental, and safety standards and pose a significant risk to the user and the community - potentially resulting in serious injury or death. This offence pursues the legitimate objective of limiting risks to the community.

Subclause 24(3) provides for situations where a vehicle that is not on the RAV can be provided to another person. Paragraph 24(4)(a) provides a defence if the person providing the vehicle holds a non-RAV entry import approval for the vehicle. Paragraph 24(4)(b) provides a defence if the road vehicle is manufactured in Australia and the person providing the vehicle makes the recipient aware that either the vehicle is not to be used in transport on a public road or is only to be used on a public road in limited circumstances.

There are a number of reasons for drafting the offence in this way.

First, the core objective of this offence is to make it very clear that provision of vehicles that are not on the RAV is unacceptable, unless in very limited circumstances. The burden of

demonstrating that one of the limited circumstances applies is, rightly, on the person undertaking the activity creating community risk, that is, the person providing the vehicle. This structure ensures the objectives of the offence provisions are met and places a reasonable and proportionate burden on the defendant.

Secondly, applying these matters as a defence is appropriate because the evidence of whether a vehicle was provided in a permissible circumstance is peculiarly within the knowledge of the defendant. For paragraph 24(4)(a), while the Department has access to records of non-RAV entry import approval holders, whether a specific vehicle transacted relates to a non-RAV entry import approval is knowledge peculiarly within the knowledge of the defendant, as determining this requires access to the vehicle. The defendant has access to the vehicle, its sale and importation documents and would therefore be able to easily demonstrate link between the vehicle and non-RAV entry import approval. This makes it significantly more difficult and costly for the prosecution to disprove the link than for the defendant to establish the matter.

Crafting the offence to make these circumstances elements of the offence would undermine the clarity of this serious offence and impose significant burden on the Commonwealth to produce evidence that is (and should) be held by the person undertaking in the risky activity. This would compromise the enforceability of a significant offence provision - risking non-compliance and subsequently, community safety. The structure of this offence is therefore achieving legitimate objectives, is rationally connected to the offending, and is proportionate to the overall purpose of the offence - noting that deliberate contravention of Clause 24 will mostly have a profit motive.

Clause 32 – False or misleading information

Subclause 32(1) creates an offence for providing false or misleading information to another person in purported compliance with the Bill.

This offence clearly sets the Australian Government's expectation that all documents or other information supplied by corporations and individuals in purported compliance with the Bill should be true and accurate, regardless of the materiality of the false or misleading information. Materiality remains a relevant factor, but it is up to the person who provided the false or misleading information to provide evidence that the information was false or misleading in a material particular.

The Government consider that this is a reasonable and proportionate structure for the offence. First, this is a proportionate measure within the broader context of the regulatory framework. Entities regulated by the Bill are given significant freedoms to import and provide vehicles without Government oversight of each vehicle. For example, type approval holders can import thousands of vehicles per year with no individual vehicle checks. In return for such freedoms, the Australian government sets high standards for integrity and honesty, such as requiring all information to be true and accurate. Commensurate with this expectation the evidentiary burden is placed on the person who furnished the false or misleading information initially to provide evidence that the matter was not false or misleading in a material particular. This is a reasonable and proportionate trade-off in the context of the potential scale of community impact incurred should the false or misleading information be of a material nature.

Secondly, this offence is reasonable and proportionate when you consider the context of volumes of information and the cost to Government (and thus the community) of regulatory actions. Approval holders have significant record keeping obligations. For example, type approval holders must maintain supporting information that outlines the entire manufacturing and compliance process – from source material to testing evidence to manufacturing instructions. This information is important for demonstrating compliance with the national road vehicle standards.

The information can be requested to audit compliance with the Bill. Any false or misleading information, regardless of its materiality, can cause significant delays in the auditing of such documentation. The wrong contact details provided for a testing facility or incorrectly recorded qualification of test engineers (although the real qualifications may be compliant) are such examples. The burden to present evidence about the materiality of such false or misleading information – particularly after causing significant delays to an audit – presents an unreasonable cost to Government, a cost that is ultimately borne by the community. Therefore it is reasonable and proportionate that the person providing false or misleading information in the first place has the burden of presenting evidence that the information was not materially false or misleading.

Reducing costs to regulated entities and the community, by providing operational freedoms to approval holders, is rationally connected to the objectives of the Bill. For example, achieving a choice of compliant vehicles in Australia requires a competitive automotive industry hence significant regulatory freedoms being granted. However, such freedom in the face of providing a dangerous good to Australia must come with reasonable and proportionate bearing of certain costs, such as the cost of providing evidence that false or misleading information is not materially false or misleading – if such a defence is required. These measures provide significant benefits to the community through a choice of less expensive and safer vehicles, as well as a fair and proportionate allocation of costs when false or misleading information is provided.

It is important to note that the reversal of evidential burden in this offence is consistent with the *Criminal Code Act 1995* and other Commonwealth legislation that operate in a similar regulatory environment, such as the *Biosecurity Act 2015*.

Clause 43 – Compliance with disclosure notices

Subclause 43(1) creates a contravention of the Bill where a disclosure notice has been given to a person and the person refuses or fails to comply with the notice. The offence does not apply if the person complied with the disclosure notice to the extent that it was possible to comply with it – however, the defendant must bear an evidential burden for this. Only the defendant knows whether they complied with a disclosure notice to the extent to which they are capable of complying. Given this information is peculiarly within the knowledge of the defendant, it is a reasonable and proportionate evidential burden to apply. This is the most effective way of ensuring compliance with disclosure notices, while providing protection to defendants who have legitimate reasons about why they cannot comply further with the disclosure notice.

The reasonableness and proportionality of this reversal of evidential burden is supportable when the broader context of this offence is considered. To get to the situation where an

evidential burden is placed on a defendant, that defendant must have supplied unsafe or non-compliant vehicles in trade or commerce. They must have also refused to voluntarily recall that vehicle for rectification and they must have then failed to fully comply with a request that they provide information about that unsafe good or product. During this period, an unsafe vehicle likely to cause significant injury or death is being provided for use on public roads - presenting a significant risk to all road users. Requiring a defendant in such a circumstance to provide evidence about why they were unable to comply is not only reasonable and proportionate, it goes to the objectives of the Bill to ensure compliant vehicles are being supplied.

Privilege against self-incrimination

The Committee has sought advice as to whether the limitation under clause 42 of the right not to incriminate oneself is a reasonable and proportionate measure to achieve the clause's objective of allowing timely gathering of information on road vehicles or road vehicle components that may pose a danger to the public.

The Government acknowledges the privilege against self-incrimination is an important common law and international law principle that provides an individual with the right not to answer questions or produce materials which may incriminate them. However, in certain circumstance this privilege may be subject to limitations if such limitation pursues a legitimate objective and is rationally connected to that objective and is a proportionate way of achieving that objective.

The Committee has sought advice as to whether the persons and information that may be subject to compulsory disclosure are sufficiently circumscribed with respect to the objective of the measure, being to allow timely gathering of information on road vehicles or road vehicle components that may pose a danger to the public.

First, it is not possible to further limit the persons to whom a compulsory disclosure notice can be issued without undermining the objective. It is necessary for a disclosure notice to be given to a person who supplies road vehicles or approved road vehicle components of a particular kind in trade or commerce, if there is a safety or compliance concern relating to such a vehicle or component. The scope of this power is sufficiently narrow – it does not capture anyone who supplies vehicles, only those who do so in trade or commerce, and it requires that the person has supplied a vehicle with a safety defect or other non-compliance. Therefore the scope of persons captured by the provision is reasonable and proportionate to the objectives.

Secondly, the broad scope of information that can be obtained through a disclosure notice under s 42 is necessary to achieve the objective of the provision. Information relevant to whether a vehicle has a safety defect or demonstrates non-compliance varies greatly. Given the complexity of road vehicles and their supply chains, relevant information could range from information about a source material (such as quality of steel), customer complaints through dealership service departments, evidence of testing results or the calibration metrics on a specific piece of machinery.

Given the breadth of relevant circumstances and information, listing all the types of information that can be requested would risk missing vital or unique information that was not considered when drafting the list. This would unreasonably limit the achievement of the objective of the clause - to gather all relevant information on dangerous vehicles or components in a timely manner to mitigate risks to the community.

Thirdly, the use of disclosure notices is reasonable when compared to alternative approaches. While in some cases it may be feasible to obtain information by other means (for example, through a warrant), the additional time taken to obtain such information may significantly increase the risk to public safety. If the privilege is not abrogated, the Commonwealth's ability to manage risks through a responsive, evidence-led approach would be significantly reduced, and the safety of road users could be put at serious risk.

Fourth, the offence includes a use immunity, which reduces the impact of the limitation, without undermining the objective. The Committee has noted that clause 42 of the Bill provides for 'use immunity', that is, information given to the Department under a disclosure notice cannot be used as evidence against that individual. However, clause 42 does not provide for 'derivative use immunity'. This means that information or evidence indirectly obtained as a consequence of a person's incriminating evidence can be used in criminal proceedings against the individual. The Committee has asked whether a derivative use immunity is reasonably available.

Including a derivative use immunity for this offence is not appropriate in the broader context of ensuring that the Bill is able to meet its objectives.

The Bill, including clause 42, has been drafted to be consistent with the existing requirements of the *Australian Consumer Law*, which overlaps to some extent with the recalls scheme set out in the Bill. This is designed to prevent suppliers of road vehicles 'legislation shopping' by pressuring regulators to use legislation with more lenient compliance tools.

A disclosure notice is used in situations where information about unsafe or non-compliant vehicles is not forthcoming from vehicle suppliers - presenting an immediate risk of harm to the community. A derivative use immunity may provide an incentive for non-compliant suppliers to initially withhold information from the regulator, then use the subsequent disclosure notice to 'confess' to other serious non-compliance. This is not appropriate in the context of the serious community harm that can be caused by any delay.

It should be noted, providing for derivative use immunity may prevent the Department from sharing information with other Departments or State and Federal Police. Such an agency will also be bound by any derivative use immunity. In the event that the other agency wished to commence criminal or civil penalty proceedings against that person, it would not be able to make use of any evidence derived as a result of the originally received information. It would also face the additional evidentiary hurdle of establishing that no use was made of the shared information in obtaining the evidence to be relied upon in the prosecution. This is particularly concerning as the Department will continue to collaborate with the Australian Competition and Consumer Commission where information raises consumer protection issues.

Circumstances where an individual will be required to provide evidence are exceptional. The suppliers most likely to be subject to disclosure notices are type approval holders. To obtain a type approval, an individual or body corporate must demonstrate control over the entire

design and manufacturing process of a vehicle. It is very unlikely that an individual will be able to meet these requirements and therefore unlikely to be impacted by this clause.

Given costs imposed on the community by potential 'legislation shopping'; any incentives to delay providing information about unsafe vehicles; additional burdens imposed on the prosecution of non-compliant entities and the limited likelihood of individuals having to disclose information, it is the Government's view that the public benefit in the removal of the derivative use immunity outweighs the limited loss of personal liberty in this case.

Clause 41 – Disclosure Notices - Compatibility of the measure with the right to privacy

The Committee has inquired as to the types of information that may be subject to a disclosure notice, including whether it may include personal or confidential information.

As the Minister responsible for the Bill will have the power to issue a recall notice, any information that assists the Department in informing the decision maker whether to issue a recall notice, often in urgent circumstances, must be readily available. Careful consideration has been made when drafting the Bill to balance the rights of individuals against the ramifications of non-compliance in circumstances potentially requiring a recall.

As outlined above, the type of information that may be requested through a disclosure notice will depend on the nature of each individual matter the Department investigates. Indeed, it is reasonable and proportionate that a wide range of information can be requested under a disclosure notice in order to capture all relevant information about an unsafe vehicle or component. At times this may, incidentally, include personal or confidential information.

For example, a disclosure notice may be issued when the Department reasonably believes that vehicles supplied by a type approval holder has a defective steering assembly that will likely cause injury to a person if it fails. In such circumstances, the Department may seek technical information from the type approval holder, such as evidence about the construction of the assembly and information about whether the type approval holder was aware that the steering wheel assembly had caused injuries. In seeking such information from the type approval holder, personal or confidential information may be received. For example, emails to the type approval holders from customers detailing their experiences with the steering assembly may be provided as a result of the disclosure notice. This could provide the vital information needed to establish the need for and ensure a successful vehicle recall.

While this means that a number of people's right to privacy may be limited, the general community is provided a level of protection of their right to life and right to health by the Government's ability to respond to serious issues quickly.

Imposing a limitation on capturing personal or confidential information, while possible in this clause, would undermine the objective of the clause in two ways. First, it risks vital information not being provided that goes to the safety of a vehicle or component, on the basis that it may contain personal information. Secondly, it would provide a screen for suppliers of dangerous road vehicles or components to hide behind when responding to a disclosure notice by being able to claim that relevant information cannot be provided due to the presence of personal or confidential information.

The proportionality and reasonableness of the clause has a number of other factors that must be considered when utilising disclosure notices that may collect personal information.

The Department, when considering whether to issue a disclosure notice, will have regard to whether the information, documents or evidence are necessary and relevant to the investigation. Consideration will also be given to whether the relevant information, documents or evidence are likely to be otherwise available, including whether it is likely to be provided voluntarily.

However, the voluntary production of information, documents and evidence is not always appropriate. For example, it may not be appropriate in circumstances where:

- it is important that the Department's decision making on investigations relating to recalls has confidence it has full and complete information on key issues in circumstances where voluntary requests will not deliver the same confidence;
- a party may have previously failed to respond or respond fully to a voluntary request;
- the Department has information from other sources that is inconsistent with information voluntarily provided by the party under investigation or an informal review;
- the Department has concerns that a voluntary request will be met with delays or protracted negotiations impacting on the Department's ability to carry out its functions and appropriately act to address to risk of community harm;
- a party does not want to cooperate with the Department; or
- critical information required by the Department will be most efficiently sought through the use of a disclosure notice.

Prior to issuing a disclosure notice, the Department will also consider:

- whether there is a risk that the information, documents or evidence may otherwise be destroyed, not provided or provided only on terms unacceptable to the Department;
- whether it may be appropriate to issue a disclosure notice to obtain such information or documents from a potential respondent for evidentiary purposes, including obtaining oral evidence under oath or by way of affirmation;
- whether it is appropriate to use other powers to obtain the information, documents or evidence (e.g. search warrant powers or wait for any future discovery process); and
- the burden of the disclosure on the recipient, including time and cost considerations.

The Bill also provides safeguards such as:

- The Department cannot issue a disclosure notice unless it has a "reason to believe" that a supplier is capable of giving information, producing documents or giving evidence in relation to those vehicles or components;
- The Disclosure Notice must be in writing and in the form prescribed by the regulation (if any);
- A person appearing before a person issuing a disclosure notice to give evidence under oath or affirmation may be legally represented; and
- Self-incriminating information, documents or answer given in response to a Disclosure Notice cannot be used against the person who gave evidence if they are an individual, unless the person has committed an offence in very limited circumstances prescribed under paragraph 42(2)(d) of the Bill.

This overarching legal framework for personal information also includes robust oversight arrangements for the handling of personal information. Central to the oversight regime are judicial review, the Commonwealth Ombudsman and the Privacy Act 1988 (Privacy Act). The Department will be required to collect, handle and store such information in accordance with the *Privacy Act 1988*, including the *Australian Privacy Principles*. Departmental officers that receive personal and confidential information are also bound by the Public Service Act 1999 and the Australia Public Service Code of Conduct.

The Department is also under an implied legal obligation to use information, documents or evidence provided in response to a disclosure notice for the purposes for which the notice was issued, the purpose being to assist the Department in investigating a possible recall under Part 3 of the Bill and to reach a view as to whether such a recall notice is necessary. This obligation reflects the legal requirement that statutory powers are to be used for proper purposes.

While the Department may use information and documents in its investigations and subsequent legal proceedings arising from its investigation, the Department will treat personal and confidential information responsibly and in accordance with the law.

For these reasons, the limitation on the right to privacy that is caused by the power to issue disclosure notices is reasonable, proportionate and has safeguards. In order to achieve the objective of receiving all relevant information quickly and efficiently, the disclosure clause is, by necessity, drafted to capture a wide variety of possibly unique information. While the necessary breadth of the clause may lead to the disclosure of personal information, this is not central to its intention. In addition, the Commonwealth has a robust legislative framework in place to deal with the handling of personal information received via a disclosure notice. Therefore, the clause represents a reasonable and proportionate means to achieve a legitimate objective.

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
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Dear Mr Goodenough Ian

Thank you for your letters on behalf of the Parliamentary Joint Committee on Human Rights (the Committee) dated 9 May 2018, drawing my attention to the Committee's *Report 4 of 2018* which seeks further advice on the following legislation:

- Treasury Laws Amendment (2018 Measures No. 4) Bill 2018; and
- Treasury Laws Amendment (Enhancing ASIC's Capabilities) Bill 2018.

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

As noted by the Committee in its Report, Schedule 1 to the Treasury Laws Amendment (2018 Measures No. 4) Bill 2018 (the Bill) seeks to introduce a range of strict liability and absolute liability offences. The Committee has sought advice about the following:

- whether the strict liability and absolute liability offences are aimed at achieving a legitimate objective for the purposes of human rights law;
- how these measures are effective in achieving the objectives; and
- whether the limitation on the right to be presumed innocent introduced by the strict liability and absolute liability offences is proportionate to achieve the stated objective.

Schedule 1 to the Bill - Achieving a legitimate objective for the purposes of human rights law

As noted by the Committee, Schedule 1 introduces a strict liability offence for employers who fail to comply with a direction from the Commissioner to pay a superannuation guarantee charge (the direction to pay). An employer 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.

Schedule 1 also allows the Commissioner to direct an employer to attend an approved education course where that employer has failed to comply with their superannuation guarantee obligations (the education direction). Failure to comply with the education direction is an absolute liability offence.

This schedule provides the Commissioner with additional tools to enforce compliance with the existing obligations to pay amounts in respect of the superannuation guarantee. The additional penalties that can apply under these new directions provide additional incentives to employers to ensure that they are fully compliant with their existing superannuation guarantee obligations.

The direction to pay will only apply to a narrow subset of employers with serious contraventions of their obligations to pay superannuation guarantee liabilities and whose actions are consistent with an ongoing and intentional disregard of those obligations. Such behaviour undermines the integrity of the superannuation system.

Ensuring compliance with superannuation guarantee obligations forms a legitimate objective for the purposes of human rights law because, unlike other debts owed to the Commonwealth, the ultimate beneficiaries of the superannuation guarantee payments are individuals. Any amounts of superannuation guarantee charge paid by the employer to the Commissioner are distributed to the superannuation funds of employees who did not receive the minimum level of contributions from their employer.

Schedule 1 to the Bill - whether the offences are effective in achieving the objective

The measures contained in Schedule 1 to the Bill introduce strict liability and absolute liability offences.

Importantly, the approach taken with the directions is consistent with the existing offences that apply in respect of other failures to comply with tax related obligations. In this respect, the education direction is inserted into the existing framework for the offence for failing to comply with tax related obligations. This offence is already framed as an offence of absolute liability. The direction to pay is framed as a separate offence of strict liability to reflect the different penalty framework that is to apply to that offence.

Applying strict liability and absolute liability to these offences substantially improves the effectiveness of ensuring employer compliance with existing and future superannuation guarantee obligations which are required by superannuation and taxation laws. The provisions have a rational connection to their objectives as they will act as a significant and real deterrent to those entities who fail to meet their superannuation guarantee obligations.

The direction to pay is only intended to be applied to employers who have the capability to pay but have consistently refused to pay. Those who are not capable of paying will be covered by the applicable defence, provided they have taken reasonable steps to try and discharge the liability. The ability to prosecute employers with a history of continuously and wilfully failing to pay their superannuation guarantee liabilities will reduce instances of non-compliance in the future.

The maximum penalties for these offences are below the threshold for penalties specified in the *Guide to Framing Commonwealth Offences,* with the exception of the 12 months imprisonment penalty for the offence of failing to comply with the direction to pay. This penalty is justified on the basis that the offence relates to continuous failures to pay the superannuation guarantee liability. The penalty is comparable to the highest tiered penalty that currently applies to offences under section 8C of the *Taxation Administration Act 1953* (for the failure to comply with certain requirements under a taxation law). These penalties are provided for by section 8E and apply different penalties to first, second, and third or subsequent offences. An employer who commits a first offence is liable to a fine of up to 20 penalty units; a second offence attracts a fine of up to 40 penalty units; and a third or subsequent offence attracts a fine of up to 50 penalty units and/or imprisonment of 12 months.

Schedule 1 to the Bill - proportionality of offence with stated objective

The Committee states in its Report that the relevant offences in Schedule 1 to the Bill engages and limits the right to the presumption of innocence by imposing strict liability and absolute liability offences.

While a strict liability and absolute liability offence removes the requirement for a fault element to be proven before a person can be found guilty of an offence, the prosecution must still prove all of the physical elements to the offence before a Court will impose any criminal liability.

The strict liability offence in Schedule 1 to the Bill is considered appropriate and proportionate in the context of ensuring greater compliance with superannuation guarantee obligations. Defences are provided where reasonable steps have been taken by the employer, however, outside of these defences there are no reasons for an employer not to pay their employee's superannuation guarantee contribution.

The absolute liability offence in Schedule 1 to the Bill is appropriate and proportionate in the context of ensuring compliance with superannuation guarantee obligations. There are no reasons for an employer not to attend the education course under the direction beyond those covered by subsection 8C(1B) of the *Taxation Administration Act 1953* which provides that an offence does not occur if an employer is not capable of complying with the education direction.

Schedule 5 to the Bill - achieving a legitimate objective for the purposes of human rights law

Schedule 5 to the Bill enables the Commissioner to seek a Court order to compel an entity to comply with the existing tax law requirement to provide a security deposit for an existing or future tax related liability. The measure introduces a strict liability offence for failing to provide security where ordered to do so by the Federal Court. A

person will not commit an offence where they are not capable of complying with the order.

This measure addresses instances of non-compliance with the security deposit rules which predominantly arise where the value of the security deposit (which reflects the value of the tax related liability) exceeds the existing penalty for failing to provide the security deposit. Entities who fail to comply with a Court order risk committing a criminal offence resulting in criminal penalties. These consequences provide appropriate incentives to ensure compliance with the Court order and reflect the seriousness of a failure to comply.

This is a legitimate objective for the purposes of human rights law because it addresses the underlying non-compliance by taxpayers who actively avoid paying their tax related liabilities. These taxpayers have already committed an offence under the tax law for failing to comply with the existing security deposit requirement.

Schedule 5 to the Bill - whether the offence is effective in achieving the objective

Applying strict liability to this offence will substantially improve the effectiveness of ensuring taxpayer compliance with existing and future tax related liabilities required under the tax law. The provision has a rational connection to the objective as it will act as a significant and real deterrent to those entities who fail to comply with a Federal Court order to provide the security. It is also consistent with the existing offence for failing to comply with tax related obligations, which as noted above, are subject to an offence of absolute liability.

The maximum penalty for this offence is below the threshold for penalties specified in the *Guide to Framing Commonwealth Offences,* with the exception of the 12 months imprisonment penalty. This penalty is justified on the basis that the offence relates to failing to comply with a Federal Court order. This penalty ensures that appropriate consequences apply to entities that refuse to comply with an order that has been made against them by the Federal Court. The amount of the penalty and the application of strict liability is the same as the offence for refusing to comply with other Court orders and the associated penalty that are already imposed under sections 8G and 8H of the *Taxation Administration Act 1953.* Applying the same consequences in respect of a Federal Court order to provide security ensures a consistent outcome between the two sets of rules and is appropriate as they both deal with failures to comply with Court orders.

Schedule 5 to the Bill - proportionality of offence with the stated objective

The Committee states in its Report that the relevant offence in Schedule 5 to the Bill engages and limits the right to the presumption of innocence by imposing strict liability and absolute liability offences.

While a strict liability offence removes the requirement for a fault element to be proven before a person can be found guilty of an offence, the prosecution must still prove all of the physical elements to the offence before a Court will impose any criminal liability.

The strict liability offence in Schedule 5 to the Bill is appropriate and proportionate in the context of ensuring greater compliance with orders made by the Court to provide security to the Commissioner for an outstanding tax related liability. There are no

reasons for a taxpayer to not comply with the Court order beyond those covered by the applicable defence of not being capable of complying.

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

As noted by the Committee in its Report, Schedule 2 to the Treasury Laws Amendment (Enhancing ASIC's Capabilities) Bill 2018 (the EAC Bill) seeks to remove the requirement for the Australian Securities and Investments Commission (ASIC) to engage staff under the *Public Service Act 1999* (PS Act).

The Committee has sought advice about the following:

- 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 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.

The EAC Bill is consistent with the findings in the Financial Services Inquiry, and fulfils the Government's commitment to implement the recommendations made by the ASIC Capability Review to support more effective recruitment and retention strategies.

The amendments in the EAC Bill provide that the ASIC Chairperson is able to engage ASIC staff directly under the ASIC Act rather than under the PS Act. The amendment has no impact on the requirement for ASIC to comply with the universal employment protections provided under the *Fair Work Act 2009* (FW Act). These protections will continue to apply to ASIC staff engaged by the ASIC Chairperson in the same way they apply to all other individuals employed in Australia.

Removing the requirement for ASIC to employ people under the PS Act will promote greater operational flexibility, bringing ASIC into line with the other financial regulators (the Australian Prudential Regulation Authority and the Reserve Bank of Australia) that are also able to recruit staff outside of the PS Act.

In order to be effective, ASIC needs to recruit staff with knowledge of, and expertise in, financial markets and financial services. ASIC is therefore often competing against the private sector, as opposed to other public sector agencies, when recruiting suitable staff. Employment under the PS Act restricts ASIC's ability to provide conditions which allow ASIC to be able to compete more effectively in the labour market for suitable staff.

Restraints imposed by the PS Act include:

- Limitations on employment of temporary employees

ASIC can only employ temporary staff under the PS Act for a total maximum period of three years, even though it may require employees for major litigation and other enforcement matters for a longer period of time. The move from the PS Act allows ASIC to employ staff for periods over the entire life of the matter or project. It also allows ASIC to reemploy temporary staff who have the relevant litigation and regulatory experience.

- Limitation on the employment of contractors and consultants

Subsection 120(3) of the current legislation limits the ASIC Chairperson's ability to employ contractors and consultants because:

  - the power to employ consultants and contractors is not able to be delegated, so the Chairperson is the only person able to employ these staff and must do so directly; and

  - the terms and conditions for contractors and consultants must be approved by the Minister.

- Classification structure

The public sector classification and remuneration system is not suited to the work ASIC (and the other financial regulators) undertakes. To recruit and retain staff in positions requiring specialist skills, ASIC needs to be able to separate remuneration from the public sector classified levels. This is particularly important given the significance of the powers delegated to ASIC staff.

- Delegations

The current staffing delegations set out in the PS Act lack clarity and have resulted in ASIC having to seek legislative amendments in 2017. The lack of clarity is an on-going risk.

Maintaining conditions of employment

Schedule 2 to the EAC Bill inserts transitional provisions in Part 25 of the ASIC Act to ensure that the terms and conditions of employment that ASIC employees currently enjoy will remain the same. Terms and conditions of employment are determined by modern awards and enterprise agreements which are negotiated by each agency and not under the PS Act. In this context, the Bill provides that:

- staff who transfer from employment under the PS Act to employment under the ASIC Act retain the same terms and conditions of employment that applied immediately before the commencement date (subparagraph 311(2)(c)(i));

- all accrued entitlements transfer with the staff (subparagraph 311(2)(c)(ii)); and

- the existing Enterprise Agreement remains in force (section 312).

The Enterprise Agreement, which applies to all staff currently employed under the PS Act, provides significantly better conditions including significantly higher wages than the relevant Modern Award, the Australian Public Service Enterprise Award 2015, which provides minimum terms and conditions of employment for employees who work in the Australian Public Service. As stated above, the Enterprise Agreement remains in place. As such there is no change to pay, working conditions, hours of work or paid holidays.

Safeguards for current conditions of employment

The safeguards in place protecting existing ASIC staff's employment conditions under the Enterprise Agreement are set out in the FW Act. In particular, Part 2-4 of Chapter 2, Division 7 sets out the circumstances in which enterprise agreements may be terminated or varied. This cannot take place without the agreement of employees. The next enterprise agreement is coming up for negotiation in 2019.

The move from the PS Act will not change those negotiations at all, as the procedures under which terms and conditions of employment are negotiated are prescribed in the FW Act. The FW Act provides that for the agreement to be approved it must pass the "better off overall" test when compared against the relevant modern award. Similarly, the EAC Bill has no impact on the requirement for ASIC to comply with the Australian Workplace Bargaining Policy.

Accordingly, ASIC employees will continue to enjoy the just and favourable conditions of work that they currently enjoy. Employment under the ASIC Act does not change those conditions.

I appreciate the Committee's consideration of these Bills, and I trust this information will be of assistance to the Committee.

Yours sincerely

Kelly O'Dwyer

THE HON MELISSA PRICE MP
ASSISTANT MINISTER FOR THE ENVIRONMENT

MC18-006549

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 regarding the Parliamentary Joint Committee on Human Rights' consideration of the Underwater Cultural Heritage Bill 2018 (the Bill) in its Report 4 of 2018.

I am pleased to have the opportunity to address the issues raised by the Committee in regards to the compatibility of the Bill with criminal process rights and the presumption of innocence, and have attached the response to the report as requested in your letter.

Thank you for raising this matter.

Yours sincerely

MELISSA PRICE

CC: The Hon Josh Frydenberg MP

Enc

Advice to the Parliamentary Joint Committee on Human Rights in response to questions regarding the Underwater Cultural Heritage Bill 2018

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.

Answer

1.116 - *Compatibility of the measure with criminal process rights*

A civil penalty provision may be regarded as 'criminal for the purposes of international human rights law' if the amount of the pecuniary penalty is high, the nature and purpose of the penalty is to punish or deter, and the penalty applies to the public in general. These tests are set out in the Guidance notes of the Parliamentary Joint Committee on Human Rights, Appendix 4 guidance note 2.

Is the penalty classified as criminal under Australian law?

No. Sections 29(6), 30(6), 31(6) and 35(5) are civil penalty provisions. It is not a criminal offence to contravene these sections.

What is the nature and purpose of the penalty?

The penalties proposed in the Underwater Cultural Heritage Bill 2018 (the Bill) aim to deter and punish conduct that could harm protected underwater cultural heritage, and are set at a level reflecting the significant value of the non-renewable heritage resource that would be negatively impacted by a breach of any of the regulated actions. Although the application of the penalty provisions is not expressly limited in the Bill, in practice only a particular sector of the community will be regulated by this Bill, notably natural persons and bodies corporate who possess and or trade in protected underwater cultural heritage or who undertake development actions that may impact protected underwater cultural heritage (for example by physically

damaging, disturbing or removing protected underwater cultural heritage from the marine environment). As such the primary groups likely to offend are limited to a small group of persons or bodies corporate.

What is the scale of the penalty?

The penalty provisions do not carry a penalty of imprisonment. The scale of the pecuniary penalties reflects the intrinsic and social value of protected sites and individual articles that may be possessed or traded and are framed to be an appropriate and proportionate deterrent to natural persons and bodies corporate.

The size of the pecuniary penalties also reflects the broad range and scale of contraventions that can occur such as systemic breaches of requirements to possess a permit (prior to exporting protected underwater cultural heritage), deliberate actions (such as disturbance of a site and the recovery of protected underwater cultural heritage without permit), or a cost of business approach by developers to the total destruction of underwater cultural heritage sites.

The inclusion of civil penalties in the Bill provides an option for an appropriate and proportionate response to the deliberate contravention of provisions protecting underwater cultural heritage. A criminal conviction may result in a disproportionate response which would impact on an individual's current or future ability to work. This scale of the pecuniary penalties give the court flexibility in identifying a suitable penalty for each case on its merits enabling a proportionate response to corporate bodies and individuals.

As the civil penalty provisions in sections 29(6), 30(6), 31(6), and 35(5) are limited to a particular groups of the general public the Bill is considered consistent with Articles 14 and 15 of the ICCPR.

Committee comment

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.

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.

Answer

It is considered that no issue of compatibility with the presumption of innocence arises because the provisions are not criminal for the purposes of international human rights law. However, assuming that the civil penalty provisions in sections 29(6), 30(6), 31(6), and 35(5) are considered 'criminal" for the purposes of international human rights law, the Bill would still be

compatible with the presumption of innocence in Article 14(2) of the ICCPR because the provisions are rationally connected to the legitimate objective pursued by the Bill.

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,

Answer

The Bill pursues a legitimate objective which is to provide for the identification, protection and conservation of Australia's underwater cultural heritage. Underwater cultural heritage is threatened by a mix of environmental, chemical, biological and cultural processes. The Bill aims to manage the negative impacts to underwater cultural heritage which can be caused by both natural persons and bodies corporate.

To this end, the Bill will regulate certain conduct in relation to protected underwater cultural heritage, as well as the possession, trade and supply of articles of protected underwater cultural heritage. Under the Bill, persons will be required to possess a permit issued by the Minister to do certain things or engage in certain activities, such as supplying articles of underwater cultural heritage or engaging in certain conduct in a protected zone.

The civil penalty provisions of the Bill pursue this objective by penalising conduct that contravenes the regulatory framework established by the Bill, thereby preventing harm to protected underwater cultural heritage. In this way, the civil penalty provisions of the Bill pursue and are rationally connected to the Bill's legitimate objective.

Finally, the use of civil penalty provisions is proportionate to achieve the stated objective of protecting Australia's unique and irreplaceable underwater cultural heritage in-situ. The penalty amounts have been set at an appropriate level for both individuals and bodies corporate who undertake development activities in the marine environment. Courts will have flexibility in identifying a suitable penalty for each case on its merits enabling a proportionate response to corporate bodies and individuals.

whether the civil penalty provisions could be amended to apply the criminal standard of proof.

Answer

Since the provisions are civil in nature and do not impose criminal penalties, it would not be suitable to amend civil penalties from a 'balance of probabilities' civil standard to a criminal standard of proof, 'beyond reasonable doubt'. The purpose of having a range of civil, criminal and strict liability penalties which may apply to contraventions of the provisions of the Bill is to provide regulatory flexibility in responding appropriately and proportionately to contraventions.

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.**

Answer

1.122 - *Compatibility of the measure with the presumption of innocence* - Strict liability provisions

As noted by the Committee, strict liability offences can engage and limit the presumption of innocence in Article 14(2) of the ICCPR as they allow for the imposition of criminal liability without the need to prove fault. However, strict liability provisions may be appropriate where they are reasonable, necessary and proportionate to the legitimate objective being sought.

The legitimate objective of the Bill is to establish a regulatory framework to protect Australia's underwater cultural heritage, and to regulate the possession, trade and supply of articles of protected underwater cultural heritage. The Bill will preserve this important cultural asset for future generations. It will also align Australia's regulatory framework with the international best practice standards contained in the 2001 UNESCO *Convention on the Protection of the Underwater Cultural Heritage*.

To this end, Part 3 of the Bill (Regulation of Protected Underwater Cultural Heritage) applies strict liability to a number of offences relating to conduct that contravenes the regulatory regime established by the Bill. For example, strict liability applies to conduct that adversely impacts protected underwater cultural heritage without a permit (proposed section 30(5)), to the supply of articles protected underwater cultural heritage unless authorised by a permit (proposed section 31(5)), and to the importation and exportation of articles of protected underwater cultural heritage unless authorised by a permit (proposed sections 34(4) and 35(4)).

The use of strict liability offences is rationally connected to the legitimate objective of the Bill because the provisions are necessary to ensure the integrity of the regulatory regime in order to prevent potential harm to Australia's protected underwater cultural heritage. Most offences under the Bill encompass a wide range of offence scenarios and severities.

For example, the unpermitted possession, custody or control of protected underwater cultural heritage (proposed section 31) could involve a person holding a single article or thousands of articles and the illegal possession could be a case of a failure to adhere to the statutory procedures or could be associated with the looting of underwater cultural heritage sites. There are legitimate grounds for penalising non-compliance when the person should be, or is, aware of their obligations. In the case of a person having possession of single article and neglecting to follow the known statutory process, and where the elements of a strict liability offence have been determined, the issuing of an infringement notice under proposed section 44(1) (a) would be fairer and less costly to the person.

The use of strict liability is proportionate to achieve the stated objective because the penalty amounts are within reasonable limits. As noted in the Explanatory Memorandum to the Bill, the penalties for the strict liability provisions in the Bill are limited to 60 penalty units for an individual, and do not include imprisonment. Consequently, individuals who contravene a strict liability provision of the Bill will not be subject to unreasonable or unduly harsh penalties, taking into account the Bill's legitimate objective of protecting and conserving Australia's underwater cultural heritage.

Finally, the strict liability provisions of the Bill maintain the defendant's right to a defence. This is because defence of mistake of fact will remain available to a defendant, so that a person cannot be held liable if he or she had an honest and reasonable belief that they were complying with relevant legal obligations. Additionally, the existence of strict liability also does not make any other defence unavailable to a defendant.

For these reasons, the strict liability provisions in proposed sections 29(6), 30(6), 31(6), and 35(5) are considered consistent with Articles 14(2) of the ICCPR.

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 Chair

Thank you for your letter of 9 May 2018 regarding the human rights compatibility of various instruments (together, the Instruments) made under the *Autonomous Sanctions Act 2011* (the Act).

In conjunction with the *Autonomous Sanctions Regulations 2011* (the Regulations), and various instruments made under the Regulations, the Act empowers the Australian Government to impose measures not involving the use of armed force in response to situations of international concern.

The attached document responds to the request for further advice made by the Parliamentary Joint Committee on Human Rights (the Committee) in *Report 4 of 2018* (the Report).

I also note the recommendations for changes to Australia's sanctions regime which the Committee made in *Report 9 of 2016*. The Government continues to be satisfied that Australia's autonomous sanctions regime is compatible with human rights. The Government has no immediate plans to adopt the measures proposed by the Committee in paragraph 1.285 of the Report but will keep its sanctions regime under review.

I trust the attached information will assist you in concluding your consideration of the Instruments.

Yours sincerely

Julie Bishop

31 MAY 2018

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Attachment A

Response to Parliamentary Joint Committee on Human Rights
Human Rights Scrutiny Report (8 May 2018)

Introduction

The Explanatory Memorandum to the Autonomous Sanctions Bill 2010 states that autonomous sanctions measures have three objectives:

- limiting the adverse consequences of the situation of international concern (for example, by denying access to military or paramilitary goods, or to goods, technologies or funding that are enabling the pursuit of programs of proliferation concern);
- seeking to influence those responsible for giving rise to the situation of international concern to modify their behaviour to remove the concern (by motivating them to adopt different policies); and
- penalising those responsible (for example, by denying access to international travel or to the international financial system).

It is the Government's view that modern sanctions regimes impose highly targeted measures in response to situations of international concern. This includes the grave repression of human rights or democratic freedoms of a population by a government, or the proliferation of weapons of mass destruction or their means of delivery, or internal or international armed conflict. Thus, autonomous sanctions pursue legitimate objectives, and have appropriate safeguards in place to ensure that that any limitation of human rights engaged by the imposition of sanctions is justified.

Section 10 of the *Autonomous Sanctions Act 2011* permits regulations relating to, among other things: 'proscription of persons or entities (for specified purposes or more generally)'; and 'restriction or prevention of uses of, dealings with, and making available of, assets'. The Regulations, which are made within the framework of the *Autonomous Sanctions Act 2011*, permit the Minister to designate a person or entity for targeted financial sanctions and/or declare a person for the purposes of a travel ban, if they satisfy a range of criteria, as set out in regulation 6.

The purpose of a designation is to subject the designated person or entity to targeted financial sanctions. There are two types of targeted financial sanctions under the Regulations:

- the designated person or entity becomes the object of the prohibition in regulation 14 (which prohibits directly or indirectly making an asset available to, or for the benefit of, a designated person or entity, other than as authorised by a permit granted under regulation 18); and/or

- an asset owned or controlled by a designated person or entity is a "controlled asset", subject to the prohibition in regulation 15 (which requires a person who holds a controlled asset to freeze that asset, by prohibiting that person from either using or dealing with that asset, or allowing it to be used or dealt with, or facilitating the use of or dealing with it, other than as authorised by a permit granted under regulation 18).

The purpose of a declaration is to prevent a person from travelling to, entering or remaining in Australia.

Human rights compatibility

The Committee sought further advice as to the compatibility of designations and declarations made pursuant to the *Autonomous Sanctions Regulations 2011* (the Regulations) with the following human rights:

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

In particular, the Committee restated its request as to how the designation and declaration of persons pursuant to the autonomous sanctions regime is a proportionate limitation on the above rights, having regard to the matters set out at paragraphs [1.234] to [1.254] of the Report. The human rights compatibility of the Regulations is addressed by reference to the rights identified above.

Right to privacy

Right

Article 17 of the International Covenant on Civil and Political Rights (the ICCPR) prohibits arbitrary or unlawful interferences with an individual's privacy, family, correspondence and home.

The use of the term 'arbitrary' in the ICCPR means that any interferences with privacy must be in accordance with the provisions, aims and objectives of the ICCPR and should be reasonable in the individual circumstances. Arbitrariness connotes elements of injustice, unpredictability, unreasonableness, capriciousness and "unproportionality".[1]

Report

[1] Manfred Nowak, *United Nations Covenant on Civil and Political Rights: CCPR Commentary* (NP Engel, 1993) 178.

The Committee has noted that the Regulations engage the right to privacy under Article 17 of the ICCPR, including on the basis that the freezing of a person's assets impacts their individual autonomy. In paragraphs [1.234] and [1.235] of the Report, the Committee expresses the view that the designation and declaration of a person under the autonomous sanctions regime is a 'significant incursion into a person's right to personal autonomy in one's private life'. It notes in particular the freezing of a person's assets, and the requirement for a permit to access their funds for basic expenses.

The Committee also considers the impact of designations and declarations on close family members of a designated and/or declared person. It notes that it may be difficult for these family members to access their own funds for basic expenses (such as household goods), without having to account for the expenditure.

Response

The Instruments are not an unlawful interference with an individual's right to privacy. As noted above, section 10 of the Act permits regulations relating to, among other things: 'proscription of persons or entities (for specified purposes or more generally)'; and 'restriction or prevention of uses of, dealings with, and making available of, assets'. The Instruments are made pursuant to regulation 6 of the Regulations, which states that the Foreign Minister (the Minister) may, by legislative instrument, designate and/or declare a person for targeted financial sanctions and/or travel bans.

As noted above, an interference with privacy will not be arbitrary where it is reasonable, necessary and proportionate in the individual circumstances.

The imposition of targeted financial sanctions and travel bans is reasonable. The Minister uses predictable, publicly available criteria when designating or declaring a person as being subject to such measures. These criteria are designed to capture only those persons the Minister is satisfied are involved in activities giving rise to situations of international concern, as set out in regulation 6 of the Regulations.

Targeted financial sanctions and travel bans under the autonomous sanctions regime are necessary and proportionate. They are only imposed, by definition, in response to situations of international concern, including where there are, or have been, human rights abuses, weapons proliferation (in defiance of UN Security Council resolutions), indictment in international criminal tribunals, activities that seriously undermine democracy, and threats to the sovereignty and territorial integrity of a State. Given the seriousness of these issues, the Government considers that targeted financial sanctions and travel bans are the least rights-restrictive ways to respond to situations of international concern.

The Government's position is that any interference with the right to privacy as a consequence of the operation of the autonomous sanctions regime is not unlawful or arbitrary.

Right to a fair hearing

Right

Article 14 of the ICCPR protects the right to a fair hearing. The right concerns procedural fairness, and applies where rights and obligations, such as personal property and other private rights, are to be determined.

Report

The Committee has taken the view that that the Regulations engage Article 14 in so far as they limit the avenues available to challenge the designation or declaration of a person under the Regulations. In paragraph [1.236], the Committee reiterates previous human rights analyses, which noted that the process for making designations and declarations under the autonomous sanctions regimes limit the right to a fair hearing because it does not provide for merits review.

Response

The Government's position is that any limitation on the access to merits review is justified. The sanctions regime has the legitimate objective of providing a foreign policy mechanism to the Australian Government to address situations of international concern. The limitation on access to merits review in this context is reasonable as it reflects the seriousness of the foreign policy and national security considerations involved, as well as the nature of the material relied upon.

Further, while merits review is unavailable for a decision to designate and/or declare a person under the Regulations, there are clear procedures for requesting revocation of designations and declarations, and judicial review is available under the *Administrative Decisions (Judicial Review) Act 1976* (the ADJR Act).

In addition, there is a three-yearly review process for targeted financial sanctions and travel bans that ensures that effective safeguards and controls are in place. This three-yearly review process includes a public consultation period, which invites submissions from the public to inform the assessment of whether a person continues to meet the criteria for designation and declaration under regulation 6 of the Regulations.

Finally, a person may apply at any time requesting the revocation of their designation or declaration in the event of changed circumstances or if new evidence comes to light. Failure to make a decision or unreasonable delay following such a request may be grounds for judicial review. Finally, the Minister may review and/or revoke designations and declarations at any time on her own initiative, including when circumstances change or new evidence comes to light.

Right to protection of the family

Right

The right to respect for the family is protected by Articles 17 and 23 of the ICCPR. It covers, among other things, the separation of family members under migration laws, and arbitrary or unlawful interferences with the family.

Limitations on the right to protection of the family under Articles 17 and 23 of the ICCPR will not violate those articles if the measures in question are lawful and non-arbitrary. An interference with privacy of the family will be consistent with the ICCPR where it is reasonable, necessary and proportionate in the individual circumstances.

Report

The Committee has noted that the Regulations engage the right to protection of the family. In paragraph [1.237] of the Report, the Committee notes that 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*. 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.

Response

As set out above, the autonomous sanctions regime is authorised by domestic law and is not unlawful.

As the listing criteria in regulation 6 are drafted by reference to specific foreign countries, it is rare, as a practical matter, that a person declared for a travel ban will have immediate family in Australia and face deportation from Australia.

To the extent that a person has known connections to Australia, the Department of Foreign Affairs and Trade (DFAT) is able to consult with relevant agencies in advance of a designation and declaration to determine the possible impacts of the designation and declaration on any family members in Australia.

To the extent that the travel bans imposed pursuant to the Instruments engage and limit the right to protection of the family in a particular case, the Regulations allow the Minister to waive the operation of a travel ban on the grounds that it would be either: (a) in the national interest; or (b) on humanitarian grounds. This provides a mechanism to address circumstances in which issues such as the possible separation of family members in Australia are involved. In addition, this decision may be judicially reviewed.

Finally, were such a separation to take place, for the reasons outlined in relation to Article 17 above, the position of the Australian Government is that such a separation would be justified in the circumstances of the individual case.

Right to an adequate standard of living

Right

The right to an adequate standard of living is contained in Article 11(1) of the *International Covenant on Economic, Social and Cultural Rights* (the ICESCR) and requires States to ensure the availability and accessibility of the resources that are essential to the realisation of the right, namely food, water, and housing.

Article 4 of ICESCR provides that this right may be subject 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'. To be consistent with the ICESCR, limitations must be proportionate.

Report

The Committee has noted that the Regulations engage Article 11(1) of the ICESCR. In paragraph [1.238], the Committee considers that economic sanctions (generally) engage and limit Article 11(1) of the ICESCR, as persons subject to such sanctions will have their assets effectively frozen and may therefore have difficulty paying for basic expenses.

Response

The Government considers any limitation on the enjoyment of Article 11(1), to the extent that it occurs, is justified. The Regulations allow for any adverse impacts on family members as a consequence of targeted financial sanctions to be mitigated. As the Committee notes, the Regulations state that the Minister may grant a permit for the payment of basic expenses (among others) if it is in the national interest to do so. The objective of the basic expenses exemption is, in part, to enable the Australian Government to administer the sanctions regime in a manner compatible with relevant human rights standards.

As noted above, DFAT consults relevant agencies in advance of a designation and declaration of a person with known connections to Australia to determine the possible impacts of the designation and declaration on any family members in Australia. Where such impacts are identified, the Minister may issue a permit to ensure that the asset freeze does not adversely affect any person who does not meet the criteria for designation.

The Government considers that the permit process is a flexible and effective safeguard on any limitation to the enjoyment of Article 11(1).

Right to freedom of movement

Right

Article 12 of the ICCPR protects the right to freedom of movement, which includes a right to leave Australia, as well as the right to enter, remain, or return to one's 'own country'.

The right to freedom of movement may be restricted under domestic law on any of the grounds in Article 12(3) of the ICCPR, namely national security, public order,

public health or morals or the rights and freedoms of others. Any limitation on the enjoyment of the right also needs to be reasonable, necessary and proportionate.

Report

The Committee has expressed the view that the Regulations may in certain circumstances engage Article 12(4) of the ICCPR, concerning the right to enter one's own country. In paragraph [1.239], the Committee notes that the power to cancel a person's visa that is enlivened by declaring a person for a travel ban may engage and limit the right to enter one's own country pursuant to Article 12(4) of the ICCPR. According to the Committee, 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 a close and enduring connection to Australia such that Australia may be considered their 'own country' for the purposes of the ICCPR, even if that person is not a citizen.

Response

To the extent that Article 12(4) is engaged in an individual case, such that a person is prevented from entering Australia as their 'own country', the Government's position is that the imposition of the travel ban would be justified. As set out above in relation to Article 17 of the ICCPR, travel bans are a reasonable and proportionate means of achieving the legitimate objectives of Australia's autonomous sanctions regime.

Travel bans are reasonable because they are only imposed on persons who the Minister is satisfied are responsible for giving rise to situations of international concern. Thus, preventing a person who is, for example, responsible for human rights abuses in Syria, from travelling to, entering or remaining in Australia, is a reasonable means to achieve the legitimate foreign policy objective of seeking to influence and penalising those responsible for such abuses, and signal Australia's condemnation of such acts. Australia's practice in this respect is consistent with likeminded partners such as the US, the EU, and the UK.

Travel bans are proportionate because while they engage and limit declared individuals' right to freedom of movement, they are the least restrictive means by which to achieve the legitimate objective of influencing and penalising those responsible for giving rise to situations of international concern. As set out above, by denying access to international travel, travel bans seek to influence persons who contribute to situations of international concern, including human rights abuses and weapons proliferation.

Right to equality and non-discrimination

Right

The right to equality and non-discrimination under Article 26 of the ICCPR 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.

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, serves a legitimate objective, and is a proportionate means of achieving that objective.

Report

The Committee has taken the view that the Regulations engage Article 26 of the ICCPR to the extent that they result in the indirect discrimination of certain persons on the basis of national origin or nationality. In paragraph [1.284], the Committee expresses the view that the designation or declarations in relation to specified countries in the Instruments appear to have a disproportionate impact on persons on the basis of national origin or nationality. The Committee restates its request for the Minister's advice as to the compatibility of these measures with the right to equality and non-discrimination.

Response

The Government's position is that any differential treatment of people as a consequence of the application of the Regulations does not amount to discrimination pursuant to Article 26 of the ICCPR.

The Government refers the Committee to the listing criteria in regulations 6(1) and 6(2) of the Regulations, and notes that the criteria contained in the Regulation are reasonable and objective. They are reasonable insofar as they list only those States and activities which the Government has specifically determined give rise to situations of international concern. The criteria are also objective, as they provide a clear, consistent and objectively-verifiable reference point by which the Minister is able to make a designation or declaration. The Regulations serve a legitimate objective, as discussed above.

Finally, they are proportionate. As discussed above, the Government's view is that denying access to international travel and the international financial system are a justified and less rights-restrictive means of achieving the aims of the Regulations. The Government does not have information that supports the view that affected groups are vulnerable; rather, they are people the Minister is satisfied are involved in activities giving rise to situations of international concern. Further, there are several safeguards, such as the availability of judicial review and regular review processes, in place to ensure that any limitation is proportionate to the objective being sought.

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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