Parliamentary Joint Committee on Human Rights

Human rights scrutiny report

Report 8 of 2018

21 August 2018

ISSN 2204-6356 (Print)

ISSN 2204-6364 (Online)

PO Box 6100
Parliament House
Canberra ACT 2600

Phone: 02 6277 3823
Fax: 02 6277 5767

Email: human.rights@aph.gov.au
Website: http://www.aph.gov.au/joint_humanrights/

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

Membership of the committee

Members

Mr Ian Goodenough MP, Chair	Moore, Western Australia, LP
Mr Graham Perrett MP, Deputy Chair	Moreton, Queensland, ALP
Mr Russell Broadbent MP	McMillan, Victoria, LP
Senator Carol Brown	Tasmania, ALP
Senator Lucy Gichuhi	South Australia, LP
Ms Madeleine King MP	Brand, Western Australia, ALP
Mr Julian Leeser MP	Berowra, New South Wales, LP
Senator Nick McKim	Tasmania, AG
Senator Claire Moore	Queensland, ALP
Senator James Paterson	Victoria, LP

Secretariat[1]

Ms Zoe Hutchinson, Acting Committee Secretary
Dr Kate Mitchell, Principal Research Officer
Ms Shennia Spillane, Principal Research Officer
Mr Andrew McIntyre, Senior Research Officer
Ms Laura Sweeney, Senior Research Officer
Mr David Hopkins, Legislative Research Officer

External legal adviser

Dr Jacqueline Mowbray

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).

Table of contents

Chapter 1

New and continuing matters

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

- bills introduced into the Parliament between 13 and 16 August 2018 (consideration of 1 bill from this period has been deferred);[1]
- legislative instruments registered on the Federal Register of Legislation between 19 and 20 June 2018;[2] and
- bills and legislative instruments previously deferred.

1.2 The committee has concluded its consideration of the Migration (IMMI 18/015: English Language Tests and Evidence Exemptions for Subclass 500 (Student) Visa) Instrument 2018 [F2018L00713], which was previously deferred.

Instruments not raising human rights concerns

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

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

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

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

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

Purpose	Seeks to make a range of amendments to the *Defence Act 1903* including to permit states and territories to request that the Commonwealth call out the Australian Defence Force (ADF) in a wider range of circumstances; enable call out orders to authorise the ADF to operate in multiple jurisdictions, as well as the offshore area; allow the ADF to be pre-authorised to respond to land and maritime threats, in addition to aviation threats; increase the requirements for the ADF to consult with state and territory police where it is operating in their jurisdictions; expand the power of the ADF to search and seize, and to control movement during an incident
Portfolio	Attorney-General
Introduced	House of Representatives, 28 June 2018
Rights	Life; liberty; freedom of movement; privacy; expression; assembly; association (see **Appendix 2**)
Status	Seeking additional information

Call outs of the Australian Defence Force domestically

1.6 The bill proposes to amend Part IIIAA of the *Defence Act 1903* (Defence Act) to expand the circumstances[1] in which the ADF may be called out in response to 'domestic violence'[2] in Australia under two types of types of orders:

1 Currently, there are a number of preconditions to the Australian Defence Force (ADF) being called out in response to 'domestic violence' including that the 'State or Territory is not, or is unlikely to be, able to protect Commonwealth interests against the domestic violence': Defence Act section 51A.

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

Call out orders

Commonwealth interests call out order

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

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

State or territory call out order

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

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

1.9 In determining whether the ADF should be called out and whether either type of order should be made, the authorising ministers must consider the nature of the domestic violence, whether using the ADF would be likely to enhance the ability of states and territories to protect Commonwealth interests or to protect the state or territory and any other matter considered relevant.[6] Under both types of order the ADF can be called out immediately or under a contingent call out order including

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

4 Proposed section 33.

5 Proposed section 35.

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

for reasons of urgency.[7] Under a contingent call out order the ADF will be called out automatically if specified circumstances arise.[8]

Powers of the ADF once called out

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

1.10 Divisions 3 and 4[9] of the bill confer powers on members of the ADF if the ADF is being utilised under a call out order that specifies the divisions apply. This includes powers to:

- capture or recapture a location, prevent or put an end to violence;
- take measures including the use of force against an aircraft or vessel;
- control the movement of persons by means of transport;
- erect barriers, stop any person, direct any person not to enter or leave or move within a 'specified area';
- search persons, locations, premises, transport or things for items that may be seized;
- seize any item that the member believes on reasonable grounds is a thing that may be seized in relation to the call out order;
- detain any person that the member believes on reasonable grounds may be detained;[10]
- direct a person to answer a question or produce a document that is readily accessible to the person (including requiring the person to provide identification);
- direct a person to operate machinery or a facility;
- actions incidental to such powers.[11]

1.11 It is an offence for a person to fail to comply with a direction, with a penalty of 60 penalty units.[12]

---

7 Proposed sections 34 and 36.

8 Proposed sections 34 and 36.

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

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

11 Division 3 and division 4 of the bill.

Division 5 – powers to protect declared infrastructure

1.12 Division 5 of the bill confers powers on members of the ADF if the ADF is being utilised under a call out order that specifies the division applies and the powers are to protect 'declared infrastructure'.[13] The member may take a number of actions to prevent, or put an end to, damage or disruption or exercise a range of powers including those outlined above at [1.10].[14]

Division 6 - Use of force

1.13 Division 6 provides that a member of the ADF being utilised under a call out order may use reasonable and necessary force, whether the member is exercising a power under Part IIIAA of the Defence Act or not.[15]

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

- the member believes on reasonable grounds that the use of force is:
    - necessary to protect the life of, or to prevent serious injury to, a person (including the member) (subsection 51N(3)(a)(i)); or
    - necessary to protect the declared infrastructure (subsection 51N(3)(a)(ii); or
    - in relation to powers exercised to take authorised action under subsection 46(5)(d) or (e) (taking measures against an aircraft or vessel including destroying it), reasonable and necessary to give effect to the order under which, or under the authority of which, the member is acting (51N(3)(a)(iii)); and
- if a person against whom force is to be used is attempting to escape being detained by fleeing—the person has, if practicable, been called on to surrender and the member believes on reasonable grounds that the person cannot be apprehended in any other manner.

Civil and criminal liability for ADF members

1.15 Proposed section 51Z provides a defence of superior orders for criminal acts done by ADF members operating under call out orders in certain circumstances.

---

12 Proposed section 51R of the bill.

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

14 Division 5, subdivision C of the bill.

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

Additionally proposed subsection 51S(2) provides that an ADF member will not be criminally and civilly liable for a purported exercise of powers if the order, declaration or authorisation was not validly made and, if the member made the authorisation, the powers were exercised or purportedly exercised in good faith.

Compatibility of the measures with multiple rights

1.16 The call out orders engage and may limit a number of human rights including:

- the right to life;
- the right to liberty;
- the right to freedom of movement;
- the right to privacy;
- the rights to freedom of expression, association and assembly;
- the right to an effective remedy.

1.17 Each of these rights is discussed further below.

Compatibility of the measure with the right to life

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

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

1.20 A measure that limits the right to life may be justifiable if it is demonstrated that it addresses a legitimate objective, is rationally connected to that objective and is a proportionate means of achieving that objective. In relation to the legitimate objective of the measure, the statement of compatibility states that the:

> …measure is necessary to achieve the legitimate objective of the protection of the Australian populace from acts of significant violence, such as terrorism incidents. It ensures that members of the ADF have the necessary powers to assist state and territory police responding to incidents of domestic violence in a manner that minimises risk to members of the public. Given the nature of incidents of domestic violence, such as a terrorist incident or other mass casualty attack, it is necessary to empower

> ADF members to use lethal force (or force that may cause grievous bodily harm) in appropriate circumstances.[16]

1.21 In general terms, protecting the Australian populace from acts of significant violence would be capable of constituting a legitimate objective for the purposes of international human rights law. However, in order to establish whether this is indeed a legitimate objective in relation to this measure, further information is required as to whether there are currently pressing and substantial concerns regarding the protection of the Australian populace from acts of significant violence, which give rise to the need for the specific measure. In particular, the statement of compatibility does not fully address why current powers and state policing are insufficient to achieve the stated objective. Further, it does not address why the threshold for the call out of the ADF needs to be lowered, or the need for the powers to be so broad, in particular in relation to the use of force, once the ADF is called out.

1.22 In relation to whether the measure is rationally connected to (that, is effective to achieve) its stated objective, the statement of compatibility argues:

> Each of the circumstances in which ADF members may use lethal force is connected with the protection of others' lives. For proposed subparagraph 51N(3)(a)(i), this is explicit. For proposed subparagraph 51N(3)(a)(ii), this is implicit, as infrastructure may only be the subject of a declaration under proposed section 51H if damage to it or disruption of its operations would endanger life. For proposed subparagraph 51N(3)(a)(iii), this is implicit, as the taking of measures against an aircraft or vessel (that may involve the loss of life or grievous bodily harm) would only be reasonable and necessary if that aircraft or vessel posed a significant threat (eg. by causing mass casualties).[17]

1.23 While the use of lethal force may be rationally connected to achieving the protection of other's lives in some circumstances, it is less clear that the scope of the proposed power will address this objective in all circumstances. For example, in relation to the power to use lethal force to protect declared infrastructure, for infrastructure to be declared the threshold is that 'damage or destruction would directly or indirectly endanger the life of, or cause serious injury to any person'.[18] However, there is potentially a broad range of infrastructure[19] that may fall into this category from power generation facilities to traffic lights (which may cause serious injury through their non-operation). This means the risk to human life caused by any damage or disruption to declared infrastructure may be either immediate or remote. In circumstances where the risk is more remote, use of lethal force to protect

16 Statement of compatibility (SOC) p.8.

17 SOC, p. 8.

18 See, for example, proposed section 51H.

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

declared infrastructure may not be effective to achieve the stated objective. Accordingly, there are questions as to whether the measure as drafted is rationally connected to its stated objective.

1.24 As to proportionality, measures authorising the use of force must be no more extensive than is strictly necessary to achieve their stated objective. The test of proportionality that applies in relation to the deprivation of life is a strict one and also requires the use of precautionary measures by government forces to reduce risk to life when planning operations.[20] The use of force (including lethal force) by the ADF against people domestically is a serious and exceptional measure. While the statement of compatibility addresses the specifics of the measure and relevant safeguards, it does not explain why existing powers are insufficient to address the stated objective. As noted above, it is unclear from the statement of compatibility why reducing the threshold for the call out of the ADF and consequentially conferring coercive powers on the ADF is necessary.

1.25 While the stated objective of the measure is the 'protection of the Australian populace from acts of significant violence, such as terrorism incidents,' the proposed call out powers are not limited in this way and may be broader in scope. Specifically, while the ADF may be called out in response to 'domestic violence' which is occurring or is likely to occur, 'domestic violence' is not specifically defined.[21] The statement of compatibility states that 'domestic violence' refers to 'conduct that is marked by great physical force'.[22] However, it appears that by not specifically defining 'domestic violence' in the legislation there is a risk that 'domestic violence' could apply to a broader range of disturbances not necessarily involving great physical force (including, potentially, forms of civil disturbances, such as political protest and civil disobedience). As such, the measure as framed would appear to be overly broad with respect to its stated objective. Ultimately, if the conferral of powers on the ADF through the call out powers is not the least rights restrictive approach then the measure may not be a proportionate limitation on human rights.

1.26 In relation to the specific use of lethal force provisions, it is acknowledged that these are accompanied by some safeguards including, as set out in the statement of compatibility, that the force must be 'necessary and reasonable in all the circumstances' for identified grounds. However, while some grounds may accord with standards relating to when it might be permissible to use lethal force (for example, where it is necessary to protect the life of others or self-defence), it is less clear that the grounds relating to protecting declared infrastructure or taking

---

20 *McCann v United Kingdom,* ECHR (1995) No. 18984/91 [147] – [149].

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

22 SOC, p. 6.

measures against an aircraft or vessel under an authorisation accord with these standards.

1.27 In relation to the use of force, including lethal force where necessary, to protect declared infrastructure, the statement of compatibility argues that this is proportionate as damage to the declared infrastructure or disruption to its operations would 'directly or indirectly endanger the lives of, or cause significant injury to, other persons'.[23] However, it is unclear to what extent the threshold for declaring infrastructure requires that there be a level of specific risk of direct or indirect injury or to life through damage or disruption of the declared infrastructure.[24] This is of concern as there is potentially a wide range of infrastructure, damage or disruption of which may directly or indirectly lead to risk to life or injury. Further, it is unclear whether there might be less rights restrictive ways of mitigating such risk such as, for example, bringing alternative infrastructure online. Accordingly, it is unclear from the statement of compatibility that, in every case, the degree of risk associated with damage or disruption to such infrastructure would necessarily be such as to warrant the potential use of lethal force.

1.28 In relation to the use of force when taking measures against an aircraft or vessel, the statement of compatibility explains that the ADF cannot use force likely to cause death, or grievous bodily harm, unless they believe on reasonable grounds it is necessary for the purposes of giving effect to an order under which they are acting.[25] However, the statement of compatibility acknowledges that deprivation of life under these powers may be considerable:

> There will be some circumstances where the use of lethal force would require a decision to destroy an aircraft or vessel, which may be carrying large numbers of innocent people, in order to save the lives of other people. There may be other circumstances where only the person causing or threatening the domestic violence may be killed or injured.[26]

1.29 The statement of compatibility points to some safeguards in relation to taking such lethal measures. For example, the authorising minister must not authorise taking measures against a craft or vessel unless the minister is satisfied that it is reasonable and necessary or that it would be reasonable and necessary in relation to a contingent call out order if the circumstances specified in the contingent order arose.[27] However, measures may also be taken where the ADF member believes on reasonable grounds that there is insufficient time to obtain the

23 SOC, p. 9.

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

25 SOC, p. 9.

26 SOC, p. 9.

27 SOC, p. 9; section 46(3).

authorisation from the minister because a sudden and extraordinary emergency exists.[28] In such circumstances, the ADF member is still required to consider whether using lethal force is reasonable and necessary to give effect to a superior's order. However, it is unclear to what extent there is a requirement for the ADF member to expressly consider whether a use of lethal force is absolutely necessary to protect the lives of others (as opposed to necessary to give effect to a superior's order.) This raises concerns that the measure may not be a proportionate limitation on the right to life.

1.30 The situation described in [1.28], where an aircraft or vessel is destroyed, resulting in the loss of life of large numbers of innocent people, raises particular concerns regarding proportionality. Bearing in mind the fundamental nature of the right to life, and the fact that it may be difficult to assess the degree of risk to others which provides the justification for such action, it is not clear, in the absence of further information, that this is a proportionate limit on the right to life under international human rights law.[29]

1.31 It is also noted that the powers would permit lethal force to be used when a person is attempting to escape or flee if the ADF believes on reasonable grounds that a person cannot be apprehended in any other way. The statement of compatibility explains that this is accompanied by relevant safeguards, including that one of the grounds for the use of lethal force has been met and if practicable the person has been called upon to surrender. However, given that some of the grounds for the use of lethal force appear to be overly broad, use of lethal force in circumstances where a person is fleeing or attempting to escape may also raise concerns.

Committee comment

1.32 The preceding analysis raises questions about the compatibility of the measure with the right to life.

1.33 The committee therefore seeks the advice of the Attorney-General as to:

- **whether there is reasoning or evidence that establishes that the stated objective addresses a pressing or substantial concern or whether the proposed changes are otherwise aimed at achieving a legitimate objective (including how current laws are insufficient to address this objective);**

28 SOC, p. 9.

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

- **how the measure is effective to achieve (that is, rationally connected to) that objective (in each of the circumstances where use of lethal force is permissible); and**
- **whether the limitation is a reasonable and proportionate measure to achieve the stated objective (including whether the measure is sufficiently circumscribed and is the least rights restrictive approach; whether there are sufficient safeguards; whether what amounts to 'domestic violence' could be explicitly defined; in relation to the situation described in [1.28], where an aircraft or vessel is destroyed, resulting in the loss of life of large numbers of innocent people, whether the measure is proportionate).**

Compatibility of the measure with the right to liberty

1.34 The right to liberty includes the right not to be subject to arbitrary detention which requires that detention must be lawful, reasonable, necessary and proportionate in all the circumstances. As the measures allow for the detention of individuals in a number of circumstances, they engage and limit the right to liberty.[30] This limitation is acknowledged in the statement of compatibility which argues it is permissible on the basis that it is 'reasonable, necessary and proportionate'.[31]

1.35 The statement of compatibility sets out the objective of the measure as 'responding to, and protecting the Australian populace from, acts of significant violence, including terrorism'.[32] As noted above, while generally this may be capable of constituting a legitimate objective, further information is required as to its importance in the context of the specific measure and why current powers are insufficient to achieve the objective.

1.36 The detention of a person in circumstances where they pose a threat to any person's life, health or safety, or public health or safety, or where they have committed an offence related to the domestic violence, is likely to be rationally connected to the stated objective.[33]

1.37 In relation to the proportionality of the measure, as set out above at [1.25], further information is required to determine whether providing the ADF access to such powers is necessary. In relation to the specific detention power, the statement of compatibility sets out a number of relevant safeguards including the specific context of a call out order and the requirement that a member of the ADF must believe on reasonable grounds that the person poses a relevant threat or has committed a relevant offence in circumstances where it is necessary to detain them

30 'Person who may be detained' is defined in proposed section 31 as a person

31 SOC p. 11.

32 SOC p. 11.

33 SOC p. 11.

as a matter of urgency. Further, the statement of compatibility explains that detention under a call out order must be for the purpose of placing the person in the custody of the police force at the earliest practicable time.[34] These are relevant safeguards that assist with the proportionality of the measure.

1.38 However, it is noted that a deprivation of liberty is a serious matter and generally where a deprivation of liberty occurs in a regular policing context it is accompanied by considerable safeguards. This may include timeframes for a person to be charged, released or brought before a bail authority or court. It is unclear from the information provided in the statement of compatibility to what extent these usual safeguards apply following the handover of a person to the police. Further, noting that there would appear to be more extensive safeguards in these other contexts, it is unclear from the information provided that the measure represents the least rights restrictive approach.

Committee comment

1.39 The preceding analysis raises questions about the compatibility of the measure with the right to liberty.

1.40 The committee therefore seeks the advice of the Attorney-General as to:

- **whether there is reasoning or evidence that establishes that the stated objective addresses a pressing or substantial concern or whether the proposed changes are otherwise aimed at achieving a legitimate objective;**
- **whether the limitation is a reasonable and proportionate measure to achieve the stated objective (including what safeguards apply once a person is handed over to police; prior to a handover to police whether there are sufficient safeguards; and whether the measure is the least rights restrictive approach).**

Compatibility of the measure with the right to freedom of movement

1.41 The right to freedom of movement includes the right of people to move freely within Australia and to access public places. The right to freedom of movement may be subject to permissible limitations in particular circumstances.

1.42 By providing the ADF powers to erect barriers, to stop individuals and vehicles and to require people to move on from particular areas, the measures engage and limit the right to freedom of movement. This right was not addressed in the statement of compatibility and so no assessment is provided as to whether the measures constitute a permissible limitation on this right.

34 SOC, p. 12.

Committee comment

1.43 The preceding analysis raises questions about the compatibility of the measure with the right to freedom of movement. This right was not addressed in the statement of compatibility.

1.44 The committee therefore seeks the advice of the Attorney-General as to:

- **whether the measure pursues a legitimate objective for the purposes of international human rights law (including how current laws are insufficient to address this objective);**
- **how the measure is effective to achieve (that is, rationally connected to) that objective; and**
- **whether the limitation is a reasonable and proportionate measure to achieve the stated objective.**

Compatibility of the measure with the right to privacy

1.45 The right to privacy prohibits arbitrary or unlawful interferences with an individual's privacy, family, correspondence or home.[35] A number of measures in the bill engage and limit the right to privacy including:

- powers to search locations, things, means of transport; and
- powers to direct a person to answer a question or produce a document which is reasonably accessible to the person (including identification).[36]

1.46 The statement of compatibility acknowledges that these measures engage and limit the right to privacy but argues that the limitation is permissible.[37] The right to privacy may be subject to permissible limitations which are provided by law and are not arbitrary. In order for limitations not to be arbitrary, the measure must pursue a legitimate objective and be rationally connected and proportionate to achieving that objective.

1.47 The statement of compatibility sets out the objective of the measure as outlined above. While generally this may be capable of constituting a legitimate objective, further information is required as to its importance in the context of the specific measure and why current powers are insufficient to achieve the objective.

1.48 As to whether the measures are rationally connected to that objective, the statement of compatibility outlines some information as to how incidental search powers may be effective to achieve the stated objective. However, there are concerns in relation to the proportionality of the limitation. As set out above at

35 Article 17, ICCPR.

36 SOC, p. 13.

37 SOC, p. 13.

[1.25], there are a number of questions as to whether providing the ADF access to such powers is necessary. Further, these powers are coercive and highly invasive in nature. For example, in relation to a specified area, everyone in that area may be subject to stop, search, questioning and seizure powers. While there are some restrictions on what can be searched for, there is no requirement that the ADF member have a reasonable suspicion in relation to the search or the individual.

1.49 There are further questions about whether the powers are more extensive than is strictly necessary to achieve their stated objective. These 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.[38] They are also in addition to stop, search and seize powers contained in Part IAA Division 3A of the *Crimes Act 1914.*

Committee comment

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

1.51 The committee therefore seeks the advice of the Attorney-General as to:

- **whether there is reasoning or evidence that establishes that the stated objective addresses a pressing or substantial concern or whether the proposed changes are otherwise aimed at achieving a legitimate objective (including how current laws are insufficient to address this objective);**
- **how the measure is effective to achieve (that is, rationally connected to) that objective; and**
- **whether the limitation is a reasonable and proportionate measure to achieve the stated objective (including whether it is necessary, whether it is the least rights restrictive approach and whether there are adequate and effective safeguards in place in relation to its operation).**

Compatibility of the measure with the right to freedom of expression, association and assembly

1.52 The rights to freedom of expression, association and assembly, including the right to strike, are protected by the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR).[39]

1.53 These rights are potentially engaged in a number of ways by the measure. First, given the breadth of the powers of the ADF operating under a call out order, there are questions as to whether the powers could be used to, for example, move

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

39 ICCPR articles 19, 21, 22; ICESCR article 8.

on protesters from a particular area. Secondly, as noted above, subject to some other conditions, a precondition for the call out powers being invoked is that they are in response to 'domestic violence.' It is unclear the breadth of this definition and whether it may capture a broader range of conduct than is necessary to achieve the stated objective of the legislation. As noted above, while the statement of compatibility explains that 'domestic violence' is marked by great physical force, the term is not so defined in the bill. In this respect, proposed subsections 33(4), 34(4), 35(4) and 36(4) provide that 'the Reserves must not be called out or utilised in connection with an industrial dispute'. While this is a relevant safeguard, by implication it appears that the permanent ADF could be called out in relation to industrial disputes. Further, proposed subsection 39(3) provides that the chief of the ADF must not stop or restrict any protest, dissent or assembly or industrial action, except if there is a reasonable likelihood of the death or serious injury of persons or serious damage to property. While this also acts as a potential safeguard, also by implication, it is unclear the extent to which call out orders could be made in relation to strikes, protests or acts of civil disobedience. As these rights were not addressed in the statement of compatibility, no assessment is provided as to whether the measures are compatible with the rights to freedom of assembly, expression and association including the right to strike.

Committee comment

1.54 The preceding analysis raises questions as to whether the measures are compatible with the right to freedom of assembly, expression and association. These rights were not addressed in the statement of compatibility.

1.55 The committee therefore seeks the advice of the Attorney-General as to:

- **whether the measure pursues a legitimate objective for the purposes of international human rights law (including how current laws are insufficient to address this objective);**
- **how the measure is effective to achieve (that is, rationally connected to) that objective; and**
- **whether the limitation is a reasonable and proportionate measure to achieve the stated objective, including:**
    - **the extent to which 'domestic violence' could capture political protests or industrial action;**
    - **whether 'domestic violence' could be defined in the bill and appropriately circumscribed;**
    - **whether there are adequate and effective safeguards in place.**

Compatibility of the measure with the right to an effective remedy

1.56 The right to an effective remedy requires states parties to ensure access to an effective remedy for violations of human rights. This may take a variety of forms,

such as prosecutions of suspected perpetrators or compensation to victims of abuse. Proposed section 51Z engages this right as it provides a defence of superior orders for criminal acts done by ADF members in certain circumstances.[40] If the conduct in question also constitutes a breach of human rights, this could potentially raise concerns about the availability of an effective remedy for victims in these circumstances. However, the right to an effective remedy was not addressed in the statement of compatibility and accordingly no assessment was provided as to the compatibility of the measure with this right.

Committee comment

1.57 The preceding analysis raises questions as to the compatibility of the measure with the right to an effective remedy. This right was not addressed in the statement of compatibility.

1.58 The committee therefore seeks the advice of the Attorney-General as to the compatibility of the measure with the right to an effective remedy.

40 See, also proposed subsection 51S(2).

Modern Slavery Bill 2018

Purpose	Seeks to require certain large businesses and government entities to make annual reports (Modern Slavery Statements) on actions to address modern slavery risks in their operations and supply chains. Also seeks to require the minister to publish Modern Slavery Statements in an online register
Portfolio	Home Affairs
Introduced	House of Representatives, 28 June 2018
Rights	Multiple rights (see **Appendix 2**)
Status	Seeking additional information

Modern slavery reporting requirements

1.59 The bill seeks to require certain government and non-government entities (reporting entities)[1] to provide an annual report (Modern Slavery Statement) to the minister. The Modern Slavery Statement would be required to identify the reporting entity, and to describe:

- the reporting entity's structure, operations and supply chains;
- the risks of modern slavery practices[2] in the operations and supply chains of the reporting entity, and any entities that the reporting entity owns or controls;
- the actions taken by the reporting entity and any entity that the reporting entity owns, to assess and address those risks, including due diligence and remediation processes;
- how the reporting entity assesses the effectiveness of such actions;

1 Proposed section 4 provides that 'reporting entities' include: entities with a consolidated revenue of at least $100 million for the reporting period that are Australian entities or that carry on business in Australia; the Commonwealth; corporate Commonwealth entities and Commonwealth companies with a consolidated revenue of at least $100 million for the reporting period; and entities that have volunteered to comply with the modern slavery reporting requirements.

2 'Modern slavery' is defined in proposed section 4 as conduct which would constitute: an offence under Division 270 or 271 of the *Criminal Code* (those Divisions create offences relating to slavery and human trafficking); an offence under either of those Divisions if the conduct took place in Australia; trafficking in persons, as defined in Article 3 of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children; and the worst forms of child labour, as defined in Article 3 of the ILO Convention.

- consultation undertaken with entities that the reporting entity owns, and entities with which the reporting entity has prepared a joint statement; and
- any other relevant information.[3]

1.60 The bill also seeks to require the minister to register all Modern Slavery Statements given in accordance with the requirements in the bill in an online register.[4] Where a Modern Slavery Statement does not comply with the requirements in the bill, the minister would still be able to register the statement, although they would not be required to do so.[5]

1.61 Additionally, the bill seeks to permit other entities (so long as they are Australian entities or carry on business in Australia) to comply with the reporting requirements in the bill on a voluntary basis. An entity would be able to volunteer to comply with the reporting requirements by giving written notice to the minister.[6]

Compatibility of the measure with multiple rights

1.62 By requiring reporting entities to prepare Modern Slavery Statements, and requiring the minister to make those statements publicly available, the bill engages positively with (promotes) multiple rights. These include:

- the right to freedom from slavery and forced labour;[7]
- the right to freedom from torture and other cruel, inhuman or degrading treatment;[8]
- the right to work and the right to just and favourable conditions of work;[9]
- the rights of women to protection from exploitation, violence and abuse;[10]
- the rights of children to protection from exploitation, violence and abuse;[11]
- the right to freedom of movement;[12] and

3 Proposed section 16.

4 Proposed section 19(1).

5 Proposed section 19(2).

6 Proposed section 6.

7 Article 8 of the International Covenant on Civil and Political Rights (ICCPR).

8 Article 7 of the ICCPR; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

9 Articles 6 and 7 of the International Covenant on Economic, Social and Cultural Rights (ICESCR).

10 Article 6 of the Convention on the Elimination of All Forms of Discrimination against Women.

11 Article 20 of the ICCPR; Article 19 of the Convention on the Rights of the Child.

12 Article 12 of the ICCPR.

- the right to health[13] (see **Appendix 2**).

1.63 The key right promoted by the bill is the right to freedom from slavery and forced labour, protected under Article 8 of the International Covenant on Civil and Political Rights (ICCPR).

1.64 Article 8 of the ICCPR provides that no one shall be held in slavery or servitude and that no one shall be required to perform forced or compulsory labour. The right to freedom from slavery and forced labour is an absolute right, meaning that it cannot lawfully be limited in any circumstances. The prohibition on slavery and servitude is a prohibition on 'owning' another person or exploiting or dominating another and subjecting them to 'slavery-like' conditions.

1.65 The right to be free from forced or compulsory labour prohibits requiring a person to undertake work which he or she has not voluntarily consented to, but does so because of threats made, either physical or psychological. This does not include lawful work required of prisoners or those in the military; work required during an emergency threatening the community; or other work or service that is a part of normal civic obligation (for example, jury service).

1.66 In the context of the right to freedom from slavery and forced labour, states' obligations include duties not to subject anyone to such treatment itself, to prohibit slavery and related practices in domestic law, to ensure there are adequate laws and measures in place to prevent private individuals or companies from subjecting people to such treatment (such as laws and measures in place to prevent trafficking), to ensure that allegations of forced labour are investigated, and to ensure that victims of modern slavery have access to adequate and effective redress.[14] Jurisprudence from the European Court of Human Rights (ECHR) indicates that these obligations extend to ensuring adequate measures are in place to regulate businesses that may be used as a cover for human trafficking.[15]

1.67 While Australia has a number of measures in place that prohibit slavery and related practices,[16] as well as programs that provide support for victims of modern

13 Article 12 of ICESCR.

14 See, for example, UN Human Rights Committee, *General Comment No. 31: The Nature of the General Legal Obligations Imposed on State Parties to the Covenant* (2004), [6]-[8]. See also United Nations, *Guiding Principles on Business and Human Rights* (2011).

15 See e.g. *Rantsev v Cyprus and Russia*, European Court of Human Rights (ECHR) Application No. 25965/04, 7 January 2010, [284], in relation to article 4 of the European Convention on Human Rights, which is the substantive equivalent to article 8 of the ICCPR.

16 For example, Divisions 270 and 271 of the *Criminal Code* set out a number of offences relating to slavery, forced labour, servitude and human trafficking. These offences are punishable by custodial penalties of between 4 and 25 years' imprisonment.

slavery,[17] there is currently no mechanism that requires Australian companies to report on modern slavery in business operations and supply chains. The measures introduced by the bill would therefore address a gap in Australia's capacity to identify, investigate and respond to instances of modern slavery. Accordingly, the bill promotes the right to be free from slavery and forced labour.

1.68 It should be noted that legislation designed to combat modern slavery in some other jurisdictions includes measures that go further in fulfilling the absolute obligation in relation to the right to freedom from slavery and forced labour.[18] In this respect, there may be further mechanisms to fulfil Australia's obligations in relation to the right to freedom from slavery and forced labour including, for example, by strengthening the enforcement of requirements relating to Modern Slavery Statements, or including express requirements for reporting entities to conduct due diligence with respect to their supply chains. Nevertheless, the bill clearly promotes the right to freedom from slavery and forced labour, and is to be welcomed from a human rights perspective.

Committee comment

1.69 The committee draws the positive human rights implications of the Modern Slavery Bill 2018 to the attention of the minister and parliament.

1.70 The committee welcomes the proposed reporting requirements, which promote the right to freedom from slavery and forced labour.

Compatibility of the measure with the right to privacy

1.71 The right to privacy encompasses respect for informational privacy, including the right to respect for private information and private life, particularly the storing, use and disclosure of personal information (see Appendix 2).

1.72 As outlined above at [1.59]–[1.61], the bill would require reporting entities to give annual Modern Slavery Statements to the minister, and would require the minister to publish these statements online. It appears that the information in a Modern Slavery Statement would generally relate to businesses, rather than to individuals. However, as noted in the statement of compatibility:

- in certain circumstances, an individual's personal information may be so closely connected with information about their business that information about that business can constitute personal information; and

17 For example, the Support for Trafficked People Program (Support Program)—administered by the Department of Social Services and delivered by the Red Cross. The Support Program provides case management support, counselling, accommodation, and financial assistance to victims of modern slavery. See, https://www.dss.gov.au/women/programs-services/reducing-violence/anti-people-trafficking-strategy/support-for-trafficked-people-program.

18 *Modern Slavery Act 2015* (UK) sections 8-9, 40, 45, 47.

- there is a 'very small' risk that a Modern Slavery Statement could identify victims or potential victims of modern slavery.[19]

1.73 In those circumstances, the measures engage and limit the right to privacy, as they may result in the disclosure of personal information, and could identify a victim or potential victim—thereby compromising their right to privacy and reputation. The identification of a victim of modern slavery may also expose that person to additional abuse or exploitation.

1.74 The statement of compatibility recognises that the right to privacy is engaged and limited by the bill. However, the statement of compatibility further states that the limitation is reasonable and necessary as the disclosure of certain information is required to achieve the legitimate objectives of the bill.[20]

1.75 The objective of the bill is described in the statement of compatibility as 'strengthen[ing] Australia's approach to modern slavery by equipping and enabling Australia's business community to respond effectively to modern slavery and develop and maintain responsible and transparent supply chains'.[21] This is likely to be a legitimate objective for the purposes of international human rights law. Requiring particular entities to identify and report on risks of modern slavery within their supply chains, and requiring that this information be published on an online register, also appears to be rationally connected to that objective.

1.76 The statement of compatibility states that the collection and retention of information relevant to the bill is carefully regulated, with only limited information required to be disclosed.[22] The statement of compatibility also sets out a number of safeguards that are intended to ensure Modern Slavery Statements do not disclose information that would identify victims or potential victims of modern slavery. These include:

- the reporting criteria do not mandate the provision of any information that would identify victims or potential victims of modern slavery;
- detailed guidance will be issued prior to the commencement of the bill, which will underscore the importance of ensuring victims of modern slavery are not identified;
- the legislation will be publicly accessible and accompanied by detailed guidance so that affected persons have adequate information about how the bill may limit their right to privacy;

19 SOC, p. 31.

20 SOC, p. 31.

21 SOC, p. 31.

22 SOC, p. 31.

- information may only be collected by the minister or by delegates, and the information that may be collected is clearly prescribed and limited to that which is most important to achieving the objectives of the bill.[23]

1.77 These safeguards are important and relevant to the proportionality of the measures. However, they appear to rely largely on the discretion and diligence of reporting entities. In this respect, it is noted that the requirements for the content of Modern Slavery Statements[24] are broadly worded. There also do not appear to be any statutory prohibitions in the bill on including personal information, or other information that could identify a victim or potential victim of modern slavery, in Modern Slavery Statements. There would therefore appear to be other, less rights-restrictive approaches available, such as an express requirement that a Modern Slavery Statement not contain personal or other identifying information.

1.78 The bill also does not appear to prohibit the minister from publishing a statement that contains information of this kind. It is also unclear the extent to which the minister may be able to redact any information from a Modern Slavery Statement, or request that the reporting entity cause the statement to be redacted, in order to protect personal or sensitive information from being publicly disclosed. Further information in this respect would assist in determining whether there are adequate safeguards in place to protect the right to privacy.

Committee comment

1.79 The preceding analysis indicates that the measures may engage and limit the right to privacy.

1.80 The committee therefore seeks the advice of the minister as to whether the measures are a reasonable and proportionate means of achieving the stated objective (including any safeguards in place against the disclosure of personal information, or information that could identify the victim or potential victim of modern slavery).

23 SOC, p. 32.

24 Proposed section 16.

Advice only

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

Migration (IMMI 18/019: Fast Track Applicant Class) Instrument 2018 [F2018L00672]

Purpose	Specifies a class of persons who are fast track applicants
Portfolio	Home Affairs
Authorising legislation	*Migration Act 1958*
Last day to disallow	15 sitting days after tabling (tabled Senate 18 June 2018)
Rights	Non-refoulement; fair hearing; effective remedy; best interests of the child (see **Appendix 2**)
Status	Advice only

Background

1.82 The committee has previously reported on the human rights compatibility of the 'fast track assessment process' for asylum seekers, which was introduced by the Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014.[1] The bill passed both Houses of Parliament on 5 December 2014 and received Royal Assent on 15 December 2014, and became the *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014* (the Migration and Maritime Powers Act).

1.83 The Migration and Maritime Powers Act established a new fast track assessment process for 'fast track applicants', defined as protection visa applicants who entered Australia as unauthorised maritime arrivals on or after 13 August 2012. The minister also has the power to extend this process to other groups of asylum seekers.

1.84 'Fast track applicants' who are refused a protection visa ('fast track decision') do not have access to the Migration and Refugee Division of the Administrative Appeals Tribunal (formerly the Refugee Review Tribunal), but instead have access to a statutory body, the Immigration Assessment Authority (IAA), to review protection claims.

1 See, for example, Parliamentary Joint Committee on Human Rights, *Thirty-sixth report of the 44th Parliament* (16 March 2016) pp. 174-187; *Report 4 of 2017* (9 May 2017) pp. 101-106.

1.85 Reviews of decisions by the IAA under the 'fast track' system are conducted on the papers rather than at a hearing before the IAA, and the IAA are unable to consider new information at the review stage unless there are exceptional circumstances.[2] Fast track applicants also have access to judicial review of protection visa decisions. The committee previously concluded that the fast-track process may be incompatible with a number of human rights.[3]

Specifying a class of persons as fast track applicants

1.86 The instrument specifies a class of persons who are included in the definition of 'fast track applicant'. The instrument provides that a person is a 'fast track applicant' if the person is an unauthorised maritime arrival, the person has made a protection claim, and:

> (c) the person had their protection claim considered, or reconsidered, through an administrative process that occurred in relation to the [Migration] Act or [Migration] Regulations, including (but not limited to) the following processes:
>
> (i) Refugee Status Assessment;
>
> (ii) Protection Obligations Evaluation;
>
> (iii) Independent Merits Review;
>
> (iv) Independent Protection Assessment;
>
> (v) International Treaties Obligation Assessment; and
>
> (d) the person has been assessed as not engaging Australia's protection obligations; and
>
> (e) the person applied to the High Court or Federal Circuit Court to review the assessment and one of the following occurred:
>
> (i) the Court made a declaration that the assessment was not made according to law;
>
> (ii) the Minister withdrew from the court proceedings before the Court made a decision.[4]

1.87 The instrument also provides that children of a person described as 'fast track applicants' will also be fast track applicants.[5]

---

2 Parliamentary Joint Committee on Human Rights, *Thirty-sixth report of the 44th Parliament* (16 March 2016) p. 179.

3 See, Parliamentary Joint Committee on Human Rights; *Thirty-sixth report of the 44th Parliament* (16 March 2016) p. 179. See, also, *Report 4 of 2017* (9 May 2017) pp. 99-106; *Report 2 of 2017* (21 March 2017) pp. 10-17; *Report 12 of 2017* (28 November 2017) pp. 89-92.

4 Section 6 of the Instrument.

5 Section 6(2) of the Instrument.

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

1.88 The obligation of non-refoulement requires 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.[6] Non-refoulement obligations are absolute and may not be subject to any limitations.

1.89 Compliance with the obligation of non-refoulement requires that sufficient procedural and substantive safeguards are in place to ensure a person is not removed in contravention of this obligation, given the irreversible nature of the harm that may result. Effective, independent and impartial review by a court or tribunal of decisions to deport or remove a person in accordance with the right to an effective remedy, is integral to giving effect to non-refoulement obligations.[7]

1.90 The effect of the instrument is that persons falling within the amended definition of 'fast track applicant' must pursue the re-assessment of their protection claims through the fast track assessment process.[8] Determining certain persons to be 'fast track applicants' such that their claims are assessed through the fast track process therefore engages Australia's non-refoulement obligations and the right to an effective remedy because of the limitations on independent and effective review of fast track decisions.

1.91 The statement of compatibility also acknowledges that Australia's non-refoulement obligations are engaged.[9] However, it states that the instrument does not affect the substance of Australia's adherence to its non-refoulement obligations for several reasons. First, the statement of compatibility states that there is no express requirement in the International Covenant on Civil and Political Rights (ICCPR) or the Convention against Torture (CAT) for any particular process or procedure for the assessment of non-refoulement obligations, and that it is for each

6 Australia's obligations arise under article 33 of the Refugee Convention in respect of refugees, and also under articles 6(1) and 7 of the International Covenant on Civil and Political Rights (ICCPR), article 3(1) of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) and the Second Optional Protocol to the International Covenant on Civil and Political Rights Aiming at the Abolition of the Death Penalty.

7 ICCPR, article 2(3). See Parliamentary Joint Committee on Human Rights, *Second Report of the 44th Parliament* (11 February 2014) p. 45; *Fourth Report of the 44th Parliament* (18 March 2014) p. 51; *Thirty-sixth report of the 44th Parliament* (16 March 2016) pp. 174-187.

8 The Statement of compatibility (SOC) explains that at present, these persons are barred from making an application for protection visa as a result of section 46A(1) of the Migration Act.

9 SOC, p.2.

state to establish the most appropriate procedures for processing claims and review mechanisms.[10] The statement of compatibility further states that:

> All fast track applicants are afforded an opportunity to have their claims determined in an open and transparent statutory process while ensuring priority is given to identifying applications that present legitimate claims and in turn, persons who require Australia's protection. While merits review can be an important safeguard, there is no express requirement under the ICCPR or the CAT for merits review in the assessment of *non-refoulement* obligations. Fast track applicants are afforded a different form of merits review to persons who are not fast track applicants. It is the Government's view that it is reasonable and proportionate for this cohort of UMAs, who have already been through a number of processes to assess their claims, to have their claims re-assessed in a process which has a more limited form of merits review. This limited form of merits review is intended to be efficient, quick, cost-effective and to uphold the overall integrity of Australia's protection status determination process, as well as being competent, independent and impartial. Fast track applicants also have access to judicial review of their protection visa decisions.[11]

1.92 As to the review of decisions by the IAA, as noted above and in previous analysis the merits review conducted by the IAA is limited as it is conducted on the information provided by the applicant to the department and will not involve an interview. Further, the IAA is only able to reaffirm the decision or remit it to the department for further consideration rather than substitute the correct or preferable decision.[12] Previous human rights analysis has considered that this limited form of review 'is substantially apart from other forms of merits review in Australia', and raises significant questions as to the effectiveness of the process in light of Australia's non-refoulement obligations.[13]

1.93 As to the absence of any external merits review, previous human rights analysis has noted that while there is no express requirement for merits review in the articles of the relevant conventions or jurisprudence relating to obligations of non-refoulement, analysis of how the obligation applies, and may be fulfilled, in the Australian domestic legal context indicates that the availability of merits review of

---

10 SOC, pp. 2-3.

11 SOC, p.3

12 Parliamentary Joint Committee on Human Rights, *Thirty-sixth report of the 44th Parliament* (16 March 2016) p. 184; see Immigration Assessment Authority, *What you need to know about the Immigration Assessment Authority* (2018) http://www.iaa.gov.au/IAA/media/IAA/Files/Fact%20Sheets/What-you-need-to-know-about-the-IAA.pdf.

13 Parliamentary Joint Committee on Human Rights, *Thirty-sixth report of the 44th Parliament* (16 March 2016) p. 185; *Report 12 of 2017* (28 November 2017) pp. 89- 92.

such decisions would likely be required to comply with Australia's obligations under international law.[14]

1.94 The jurisprudence of the UN Human Rights Committee and the UN Committee against Torture establish the proposition that there is a strict requirement for 'effective review' of non-refoulement decisions.[15] The purpose of an 'effective' review is to 'avoid irreparable harm to the individual'.[16] In the current context, as noted, external merits review is unavailable but judicial review is available. Judicial review in Australia is governed by the *Administrative Decisions (Judicial Review) Act 1977* and the common law,[17] and represents a limited form of review in that it allows a court to consider only whether the decision was lawful (that is, within the power of the relevant decision maker). The court cannot undertake a full review of the facts (that is, the merits), as well as the law and policy aspects of the original decision to determine whether the decision is the correct or preferable decision. There are therefore serious concerns as to whether judicial review in the Australian context would be sufficient to be 'effective review' for the purposes of Australia's non-refoulement obligations.

1.95 Further, while the statement of compatibility states that it is 'reasonable and proportionate' for the persons affected by this instrument to go through the fast track process because they have already been through a number of processes, this is not a sufficient explanation in the context of the obligation of non-refoulement. This is because the obligation is absolute, and so considerations of reasonableness and proportionality do not apply. Further, the fact that fast track applicants (as defined in the instrument) have previously pursued their claims through the fast track process and judicial review does not lessen the need for any re-assessment to comply with Australia's non-refoulement obligations.

1.96 Accordingly, the committee has previously concluded that judicial review in the Australian context is not likely to be sufficient to fulfil the international standard required of 'effective review' because it is only available on a number of restricted grounds of review. This is particularly in light of the purpose of 'effective' review of non-refoulement decisions under international law to avoid irreparable harm to the individual. Previous human rights analysis has therefore concluded that the fast track

---

14 Parliamentary Joint Committee on Human Rights, *Thirty-sixth report of the 44th Parliament* (16 March 2016) pp. 182-183; *Report 12 of 2017* (28 November 2017) pp. 89- 92.

15 See *Agiza v Sweden,* Communication No.233/2003, Committee against Torture (2005) [13.7]; *Josu Arkauz Arana v France,* Communication No.63/1997, Committee against Torture (2000); *Alzery v Sweden*, Communication No.1416/2005, Human Rights Committee (2006) [11.8]. For an analysis of this jurisprudence, see Parliamentary Joint Committee on Human Rights, *Thirty-sixth report of the 44th Parliament* (16 March 2016) pp. 182-183.

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

17 See section 75(v) of the *Constitution* and section 39B of the *Judiciary Act*.

assessment process is likely to be incompatible with Australia's non-refoulement obligations.[18]

Committee comment

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

1.98 The instrument, by applying the fast track assessment process to particular applicants, provides for a very limited form of merits review of non-refoulement decisions.

1.99 Accordingly, consistent with the committee's previous conclusions, the preceding analysis indicates that the measure is likely to be incompatible with Australia's obligations under the International Covenant on Civil and Political Rights and the Convention Against Torture to ensure independent, effective and impartial review, including merits review, of non-refoulement decisions.

Compatibility of the measure with the right to a fair hearing and the obligation to consider the best interests of the child

1.100 The right to a fair trial and fair hearing is protected by article 14 of the ICCPR and applies to both criminal and civil proceedings, including where rights and obligations are determined (*suit at law*). The measures may engage and limit this right due to the restricted scope that is provided for review of the refusal to grant a protection visa. As noted above, such decisions will be reviewed by the IAA process and will not be subject to external merits review.

1.101 Further, articles 3 and 10 of the Convention on the Rights of the Child requires that, in all actions concerning children, the best interests of the child are a primary consideration. The statement of compatibility acknowledges that this right is engaged by the measures, as section 6(2) of the instrument prescribes that children of fast track applicants (as defined in the instrument) are also fast track applicants.

1.102 The statement of compatibility acknowledges that article 14 is engaged by the instrument.[19] However, it states that the measures are compatible with this right for the following reason:

> As previously outlined, the UNHCR recognises that it is for each State to establish the most appropriate procedures for processing claims, including review mechanisms, although it recommends that certain minimum requirements should be met. There are sufficient safeguards in place to ensure all fast track applicants are afforded an opportunity to have their claims determined in an open and transparent statutory assessment process. Bringing this class of persons into the fast track process will not

18 Parliamentary Joint Committee on Human Rights, *Thirty-sixth report of the 44th Parliament* (16 March 2016) pp. 174-187.

19 SOC, p.4.

> affect their ability to seek asylum, or their ability to access judicial review of a refusal decision, nor will it prevent grant of a protection visa for applicants satisfying the criteria for a visa.[20]

1.103 The previous human rights analysis noted that the review process provided by the IAA is quite limited and may not ensure the right to a fair hearing or that the best interests of the child are taken into account as a primary consideration. This is because nothing expressly requires the IAA to give a referred applicant any material that was before the primary decision maker. There is also no right for an applicant to comment on the material before the IAA. These provisions therefore diminish procedural fairness and the applicant's prospects of correcting factual errors or wrong assumptions in the primary decision at the review stage.

1.104 In addition, the previous analysis noted that reviewers are not statutory appointments but employees under the *Public Service Act 1999.* This affects the independence of such a review and therefore the impartiality of such a review. While judicial review is still available in the Australian context, judicial review is limited to the lawfulness of a decision and does not consider its merit (that is, whether the decision was the correct or preferable decision). Accordingly, the committee previously concluded that the fast track assessment process may be incompatible with the right to a fair hearing.[21]

Committee comment

1.105 Consistent with the committee's previous conclusions, the preceding analysis indicates that the measure may be incompatible with the right to a fair hearing and the obligation to consider the best interests of the child.

20 SOC, p.5.

21 Parliamentary Joint Committee on Human Rights, *Thirty-sixth report of the 44th Parliament* (16 March 2016) pp. 174-187; *Report 12 of 2017* (28 November 2017) pp. 89- 92.

Various Social Security Determinations[1]

Purpose	Prescribes various measures inserted into the *Social Security Act 1991* and *Social Security (Administration) Act 1999* by the Welfare Reform Act 2018 to implement the new targeted compliance framework
Portfolio	Social Services
Authorising legislation	*Social Security Act 1991*
Last day to disallow	15 days after tabling ([F2018L00777] and [F2018L00779] tabled in the House of Representatives 18 June, tabled in the Senate 19 June 2018; [F2018L00783] tabled in the House of Representatives 19 June, tabled in the Senate on 20 June; [F2018L00795] tabled in the House of Representatives 20 June, tabled in the Senate 21 June 2018)
Rights	Equality and non-discrimination; social security; adequate standard of living (see **Appendix 2**)
Status	Advice only

Background

1.106 The *Social Security (Welfare Reform) Act 2018* (Welfare Reform Act) inserted a number of new measures into the *Social Security Act 1991* (Social Security Act) and *Social Security (Administration) Act 1999* (Social Security (Administration) Act). The committee previously considered these measures in its human rights assessment of the Welfare Reform Act in *Report 8 of 2017* and *Report 11 of 2017*.[2]

1.107 The determinations prescribe certain matters for the purposes of the measures introduced by the Welfare Reform Act.

1 Social Security (Declared Program Participant) Determination 2018 [F2018L00777] (Declared Program Participant Determination); Social Security (Administration) (Reasonable Excuse – Participation Payments) Determination 2018 [F2018L00779] (Reasonable Excuse Determination); Social Security (Administration) Legislation Amendment and Repeal (Reasonable Excuse – Participation Payments) Determination 2018 [F2018L00783] Legislation Amendment and Repeal (Reasonable Excuse) Determination; Social Security (Administration) (Non-Compliance) Determination 2018 (No. 1) [F2018L00795] (Non-Compliance Determination).

2 Parliamentary Joint Committee on Human Rights, *Report 8 of 2017* (15 August 2017) pp. 46-77; *Report 11 of 2017* (17 October 2011) pp. 138-203.

Reasonable excuse: drug and alcohol misuse and dependency

1.108 The Social Security (Administration Act), as amended by the Welfare Reform Act, provides that where a recipient of certain social security payments fails to meet a 'mutual obligation requirement',[3] the secretary must determine that the person's participation payment[4] is suspended for a period.[5] Additionally, if the secretary is satisfied that the person has persistently committed mutual obligation failures,[6] and does not have a 'reasonable excuse'[7] for the relevant failure, the person's payment may be reduced or cancelled.[8] The secretary also has the power to make a legislative instrument setting out matters that must and must not be taken into account when deciding whether a person has a 'reasonable excuse' for committing a participation failure.[9]

1.109 The Social Security (Administration) (Reasonable Excuse – Participation Payments) Determination 2018 [F2018L00779] (Reasonable Excuse Determination) sets out the matters which the secretary must and must not take into account when deciding whether a person has a 'reasonable excuse' for committing a mutual obligation failure.[10]

1.110 Section 5 prescribes the matters to which the Secretary must have regard in deciding whether a person has a 'reasonable excuse', and includes drug and alcohol

---

3 A mutual obligation failure is a failure to comply with obligations relating to participation payments, such as attending appointments, undertaking activities, or taking action to gain employment: see section 42AA of the Social Security (Administration) Act.

4 A 'participation payment' refers to Newstart Allowance, and, in some cases, Youth Allowance, Parenting Payment or special benefit: Social Security (Administration) Act, section 42AA.

5 Sections 42AF, 42AG, 42AL of the Social Security (Administration) Act. A person may be eligible for back pay once the person's suspension period ends: section 42AL(4).

6 See further below 'Penalties for persistent mutual obligation failures'.

7 Sections 42AI and 42AJ the Social Security (Administration) Act.

8 Section 42AF of the Social Security (Administration) Act.

9 See sections 42AI, 42AF and 42AR of the Social Security (Administration) Act. There is a separate compliance framework for persons who are 'declared program participants', who are persons who participate in employment services programs specified in a determination made under section 28C of the Social Security Act: see Division 3A of Part 3 of the Act. The Declared Program Participant Determination specifies that a participant in the Community Development Program is a 'declared program participant'.

10 Legislation and Amendment Repeal (Reasonable Excuse) Determination amends the Social Security (Reasonable Excuse – Participation Obligations (DEEWR) Determination 2009 (No. 1) and repeals the Social Security (Reasonable Excuse – Participation Payment Obligation (FaHCSIA) Determination 2009 (No. 1), 'to ensure that the Reasonable Excuse Determination is the sole instrument governing reasonable excuse matters relevant to participation payments': Legislation and Amendment Repeal Determination, explanatory statement, p. 3.

dependency.[11] The secretary also retains discretion to consider other factors which may directly prevent a person from complying with their obligations regarding a participation payment.

1.111 Section 6 prescribes the matters which the secretary must not take into account in deciding whether a person has a reasonable excuse for failing to comply with their obligations. Relevantly, section 6(4) provides that the secretary must not take into account drug or alcohol misuse or dependency, if the person (other than a declared program participant) has previously relied on this as a reasonable excuse,[12] and has refused to participate in treatment to which they have been referred.[13] The second component is subject to a number of exceptions, relating to:

- the availability of appropriate treatment;[14]
- the availability of the prospective participant;[15] and
- whether the prospective participant has previously completed the same or substantially similar treatment and, in the opinion of a suitably qualified medical professional, would not benefit from further treatment of the same kind.[16]

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

1.112 The previous human rights analysis of the Welfare Reform Act considered that narrowing the circumstances in which a person may rely upon their drug and

11 Other matters include whether the person had access to safe, secure and adequate housing, or was using emergency accommodation or a refuge at the time of the failure (section 5(2)(a)); the literacy and language skills of the person (section 5(2)(b)); whether the person had an illness, injury, impairment or disability (section 5(2)(c)); a cognitive, neurological, psychiatric or psychological impairment or mental illness of the person (section 5(2)(d)); whether the person had unforeseen family or caring responsibilities (section 5(2)(f)); whether the person was subjected to criminal violence (including domestic violence and sexual assault) (section 5(2)(g)); whether the person was adversely affected by the death of an immediate family member or close relative (section 5(2)(h)) and whether the person was working or attending a job interview at the time of the failure (sections 5(2)(i), (j)).

12 Reasonable Excuse Determination, section 6(4)(a)-(b). Section 6(4) does not apply to 'declared program participants'.

13 Reasonable Excuse Determination, section 6(4)(c)-(d). Section 6(4) does not apply to 'declared program participants'.

14 Reasonable Excuse Determination, section 6(4)(e), (g). Section 6(4) does not apply to 'declared program participants'.

15 Reasonable Excuse Determination, section 6(4)(f). Section 6(4) does not apply to 'declared program participants'.

16 Reasonable Excuse Determination, section 6(4)(h). Section 6(4) does not apply to 'declared program participants'.

alcohol misuse or dependency as a reasonable excuse engaged a number of human rights. While the previous human rights analysis considered that the measure appeared to be compatible with some of these rights,[17] it concluded that it was likely to be incompatible with the rights to social security and an adequate standard of living.[18] This was because:

> The inability of a person to cite their drug or alcohol dependency as a 'reasonable excuse' may have significant negative financial consequences on a person through the suspension or cancellation of their social security, or through financial penalties. It is unlikely that this potentially significant financial consequence, which may impair a person's ability to afford basic necessities, will be considered proportionate to the legitimate objectives of the measure as a matter of international human rights law.[19]

1.113 By prescribing the circumstances when drug and alcohol dependency must and must not be taken into account and limiting the circumstances in which drug and alcohol dependency may be a 'reasonable excuse', the Reasonable Excuse Determination gives effect to this measure. The Determination does not include any additional measures to address the concerns raised in the initial human rights analysis.

Committee comment

1.114 The Reasonable Excuse Determination gives effect to a measure in the Welfare Reform Act that narrows the circumstances in which a person's drug and alcohol dependency may be taken into account as a 'reasonable excuse' for committing a participation failure.

1.115 Consistent with the committee's previous conclusions in *Report 11 of 2017*, the measures in the determination are likely to be incompatible with the right to social security and the right to an adequate standard of living.

Penalties for persistent mutual obligation failures

1.116 As noted above, section 42AF of the Social Security (Administration) Act (introduced by the Welfare Reform Act) provides that the secretary must reduce or cancel a person's participation payment (other than a declared program participant)

17 The previous human rights analysis of the Welfare Reform Act concluded that the measure also engaged the right to equality and non-discrimination; however, it considered that the measure appeared to include adequate safeguards to protect the rights of people with disabilities related to alcohol or drugs (*Report 11 of 2017* (17 October 2011) p. 176). The Reasonable Excuse Determination is consistent with the proposed safeguards described by the legislative proponent in this respect.

18 Parliamentary Joint Committee on Human Rights, *Report 11 of 2017* (17 October 2011) p. 174.

19 Parliamentary Joint Committee on Human Rights, *Report 11 of 2017* (17 October 2011) p. 179.

if the secretary is satisfied that a person has persistently committed a mutual obligation failure and does not have a reasonable excuse for the failure.[20]

1.117 The Non-Compliance Determination sets out the circumstances in which the Secretary must or must not be satisfied that a person has persistently committed mutual obligation failures.[21] It also sets out the matters about which the secretary must be satisfied to reduce or cancel a person's participation payment.[22] The Reasonable Excuse Determination, discussed above, sets out the matters which the secretary must and must not take into account in deciding whether a person has a reasonable excuse for committing mutual obligation failures.[23]

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

1.118 The previous human rights analysis of the Welfare Reform Act raised concerns about the compatibility of section 42AF with the rights to social security and an adequate standard of living.[24] The previous analysis noted that the prescription of what does and does not constitute a persistent mutual obligation failure by way of legislative instrument could 'assist to ensure that a non-payment penalty is only applied to objective criteria', which in turn could 'assist with the proportionality' of the measure.[25] However, the previous analysis considered that, without a requirement in the relevant instruments that the secretary must be satisfied of a person's capacity to meet their basic necessities prior to imposing a penalty, the measure would be likely to be incompatible with the right to social security and an adequate standard of living.[26]

1.119 The committee concluded that the measure in section 42AF of the Welfare Reform Bill was likely to be incompatible with the right to social security, noting that there could be circumstances in which a person whose participation payment has been reduced or cancelled due to persistent mutual obligation failures without a reasonable excuse would be unable to meet their basic necessities.[27]

---

20 Social Security (Administration) Act, section 43AF.

21 Section 5(1)-(4) of the Non-Compliance Determination set out the circumstances in which a person has persistently committed mutual obligation failures. Sections 5(5) and (6) set out the circumstances in which a person has not persistently committed mutual obligation failures.

22 Non-Compliance Determination, section 6.

23 Inserted by the Welfare Reform Act, schedule 14, item 7; schedule 15, item 1.

24 Parliamentary Joint Committee on Human Rights, *Report 11 of 2017*, p. 190.

25 Parliamentary Joint Committee on Human Rights, *Report 11 of 2017*, p. 193

26 Parliamentary Joint Committee on Human Rights, *Report 11 of 2017*, p. 193.

27 Parliamentary Joint Committee on Human Rights, *Report 11 of 2017*, p. 194.

1.120 Neither the Non-Compliance Determination nor the Reasonable Excuse Determination requires the secretary to have regard to whether a person would be able to meet basic necessities in determining whether a person's payment must be reduced or cancelled. Further, there do not appear to be any additional safeguards which would apply to allow a person to otherwise meet basic necessities. Accordingly, the determinations do not alter the committee's conclusions on the compatibility of the penalties for persistent mutual obligation failures in *Report 11 of 2017*.[28]

Committee comment

1.121 The Non-Compliance Determination and the Reasonable Excuse Determination do not require the secretary to be satisfied of a person's capacity to meet their basic necessities in determining that they have committed persistent mutual obligation failures without a reasonable excuse under section 42AF of the Welfare Reform Act.

1.122 Consistent with the committee's previous conclusions in *Report 11 of 2017*, the measures in these determinations are therefore likely to be incompatible with the right to social security and the right to an adequate standard of living.

28 Parliamentary Joint Committee on Human Rights, *Report 11 of 2017*, p. 194.

Bills not raising human rights concerns

1.123 Of the bills introduced into the Parliament between 13 and 16 August, 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):

- Customs Amendment (Pacific Agreement on Closer Economic Relations Plus Implementation) Bill 2018;
- Customs Tariff Amendment (Pacific Agreement on Closer Economic Relations Plus Implementation) Bill 2018;
- Farm Household Support Amendment (Temporary Measures) Bill 2018;
- Intelligence Services Amendment (Enhanced Parliamentary Oversight of Intelligence Agencies) Bill 2018;
- Offshore Petroleum and Greenhouse Gas Storage Amendment (Reporting of Gas Reserves) Bill 2018;
- Social Services Legislation Amendment (Student Reform) Bill 2018; and
- Tobacco Plain Packaging Amendment 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**.

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**)
Previous report	6 of 2018
Status	Concluded examination

Background

2.3 The committee first reported on the Social Services Legislation Amendment (Cashless Debit Card Trial Expansion) Bill 2018 (2018 bill) and the determinations in its *Report 6 of 2018*, and requested a response from the Minister for Social Services by 11 July 2018.[1]

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

2.5 The 2018 bill includes an amendment to section 124PM of the *Social Security (Administration) Act 1999* 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. The committee previously considered that the proposed amendments to section 124PM introduced by the Housing Affordability Bill may be incompatible with the right to equality and non-discrimination.[2] In its *Report 6 of 2018*, the committee drew the human rights implications of section 124PM to the attention of the parliament.[3]

2.6 The committee has examined the income management regime in its 2013 and 2016 Reviews of the Stronger Futures measures.[4]

2.7 The committee has also previously considered the trial of cashless welfare arrangements in the two trial locations of Ceduna (and its surrounding region) and East Kimberley in previous reports, including in relation to the Social Security Legislation Amendment (Debit Card Trial) Bill 2015 (Debit Card Bill 2015).[5]

2.8 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

---

1 Parliamentary Joint Committee on Human Rights, *Report 6 of 2018* (26 June 2018) pp. 30-43.

2 Parliamentary Joint Committee on Human Rights, *Report 1 of 2018* (6 February 2018) pp. 123-137.

3 See, Parliamentary Joint Committee on Human Rights, *Report 6 of 2018* (26 June 2018) p. 40.

4 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).

5 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.

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'.[6]

2.9 The trial arrangements were initially extended to a period of twelve months in two instruments[7] and, subsequently, by a further six months.[8] 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).[9]

2.10 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).[10] 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.[11] Section 124PF 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

2.11 The 2018 bill expands the cashless debit card trial to the Bundaberg and Hervey Bay area, to run until 30 June 2020.[12] It also expands the number of trial

---

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

7 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.

8 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.

9 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.

10 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.

11 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).

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

participants for the cashless welfare trial (including in the other trial sites) to 15,000.[13]

2.12 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.[14] 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.[15] A person will also not be a trial participant if they are undertaking full-time study outside of the Bundaberg and Hervey Bay area.[16]

2.13 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.
>
> (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.

2.14 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

---

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

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

15 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).

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

where a person is being paid in advance following a determination under section 51 of the Social Security Administration Act.[17]

Compatibility of the measure with multiple human rights

2.15 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.[18] 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).[19]

2.16 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.[20] 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.

2.17 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'.[21] 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'.[22]

---

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

18 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.

19 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.

20 Statement of compatibility (SOC) p. 1.

21 SOC, p. 2.

22 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.

2.18 The committee has previously accepted that the cashless welfare trial measures described above may pursue a legitimate objective.[23] 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.[24]

2.19 The statement of compatibility cites the evaluation of the cashless debit card trial by ORIMA Research as evidence of the effectiveness of the trial.[25] The interim research undertaken by ORIMA had previously been relied upon for similar purposes in previous statements of compatibility for cashless welfare measures.[26] 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.[27] Statistics cited in the statement of compatibility from the ORIMA report include that 41 per cent of persons reported drinking alcohol less frequently,[28] and 37 per cent of binge drinkers were doing this less frequently;[29] 48 per cent reported gambling less;[30] and 48 per cent reported using illegal drugs less often.[31]

2.20 However, the initial analysis of the 2018 bill 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,[32]

---

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

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

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

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

27 SOC, p. 3.

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

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

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

31 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.

32 SOC, p. 3.

and the ORIMA report pointed to evidence of the reduction in alcohol-related harm in the trial sites based on administrative data,[33] 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'.[34] The ORIMA report also notes that 32 per cent of participants on average reported that the trial had made their lives worse;[35] 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);[36] 27 per cent of participants on average noticed more 'humbugging',[37] as did 29 per cent of non-participants;[38] and in the East Kimberley, a greater proportion of participants felt that violence had increased rather than had decreased.[39] These statistics are not cited in the statement of compatibility.[40]

2.21 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.[41] It was not clear, therefore, whether the positive findings from the ORIMA report are relevant in determining whether the cashless debit card trial in the 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

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

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

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

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

37 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.

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

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

40 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).

41 SOC, p. 2.

assistance in meeting the needs of their children.[42] While the ORIMA report identified that 40 per cent of trial participants who had caring responsibility reported that they had been better able to care for their children,[43] 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.

2.22 It was 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.

2.23 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.

2.24 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.[44] 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.[45] 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.[46]

---

42 SOC, p. 2.

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

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

45 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.

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

2.25 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.[47] 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.[48] It was 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.

2.26 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'.[49] 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.

2.27 The committee therefore sought 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.

47 SOC, pp. 5-6.

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

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

Minister's response

2.28 The minister's response restates the broad objectives of the cashless debit card trial as to reduce harm from alcohol, drugs and gambling and to help welfare recipients 'stabilise their lives' and participate in the workforce. As indicated above, the committee has previously assessed that the cashless welfare trial measures may pursue legitimate objectives for the purposes of international human rights law.

2.29 In relation to how the measures are effective to achieve the stated objectives, the minister refers to the findings of the ORIMA Research evaluation report, as set out in the statement of compatibility, as 'evidence as to the ability of the Cashless Debit Card to address the expected objectives of the trial'. However, as outlined above, it is unclear whether the positive findings from the ORIMA report, which assessed the cashless debit card trial in Ceduna and the East Kimberley, are relevant in determining whether the implementation of the trial in the Bundaberg and Hervey Bay area would be an effective means of achieving the legitimate objectives.

2.30 In particular, the ORIMA report does not discuss the effectiveness of the trial in relation to addressing youth unemployment or intergenerational welfare dependency. The statement of compatibility explains that the cashless debit card trial in the Bundaberg and Hervey Bay area 'has been tailored to best target these issues'.[50] While the minister notes that the ORIMA report indicated an increase in the percentage of surveyed respondents who spent 11 hours or more per week looking for paid work (from 11 per cent to 23 percent between the initial and final evaluation reports),[51] no further information is provided as to how the expansion of the trial may be effective to address these specific issues. As such, based on the information provided, it remains unclear whether the measures are rationally connected to the stated objectives.

2.31 Further, as set out at [2.20] above, the final evaluation report contains some mixed findings on the scheme which indicate concerns over its effectiveness and operation. The minister's response states that, as outlined in the statement of compatibility,[52] a second evaluation of the cashless debit card trial has been commissioned by the government to assess the ongoing effectiveness of the scheme in the existing trial sites of East Kimberley, Ceduna and the Goldfields. While further evaluation of the scheme is important, it is noted that the 2018 bill provides for the expansion of the trial to a new location in advance of the findings of this evaluation.

---

50 Another key issue cited is families who require assistance in meeting the needs of their children. See, SOC, p. 2.

51 ORIMA Research, *Cashless Debit Card Trial Evaluation: Final Evaluation Report* (August 2017) p. 73.

52 SOC, p. 5.

2.32 In relation to the proportionality of the measures, the minister states that the restrictions on how social security payments may be spent 'are proportionate given the high levels of harm in potential communities, and the demonstrated positive results of the program to date'. The minister further states that:

> All decisions around the extension of the Cashless Debit Card have been made and will continue to be made in close partnership with community leaders. Engagement with community members and leaders has been ongoing, informally and formally, in all locations to help Government better understand local needs and gauge interest in the continuation of the program.
>
> The 2018 Bill enables the option for a community body in the Bundaberg and Hervey Bay area. This mechanism would allow the community to take ownership of variations to the amount of a person's welfare payment that is placed on the Cashless Debit Card and encourage positive social behaviour.

2.33 It is relevant that consultation with community members on the operation of the scheme is ongoing and that decisions have been and will be made in partnership with community leaders. It is also acknowledged that the Department of Social Services conducted over 100 meetings in the Bundaberg and Hervey Bay area between July to September 2017, before the announcement of the area as a new trial location.[53] However, previous human rights assessments of the cashless welfare scheme have noted that there is no requirement to undertake consultation and secure community agreement in the enabling legislation.[54] The ability of a community body to give a written direction to vary the restricted portion of a person's welfare payment may assist to provide some flexibility to the operation of the scheme.[55] However, this does not address broader concerns over the compulsory nature of the scheme for all persons receiving specified social security payments.

2.34 Further, the imposition of the cashless debit card trial without an assessment of individuals' suitability for the scheme remains a particular concern. The minister's response does not directly address 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 or where individuals opt-in on a voluntary basis. This raises specific concerns that the measure may not be the least rights restrictive method of achieving its legitimate objective as required in order to be a proportionate limit on human rights.

---

53 SOC, p. 4.

54 See, Parliamentary Joint Committee on Human Rights, *Report 11 of 2017* (17 October 2017) p. 135.

55 See proposed section 124PE(2).

2.35 As stated above, a further concern arises 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.[56] In relation to this matter, the minister states:

> The Cashless Debit Card is designed so that it can be used outside of trial locations if a participant moves during the trial period. Participants that do not spend a large proportion of their income support payment on alcohol, gambling or drugs, will see little impact.

2.36 No further information is provided as to why it is necessary to include persons whose usual place of residence was within the area under the definition of a trial participant.

2.37 Finally, as outlined above, the bill includes a 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. 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. No further information on this matter is provided in the minister's response. It therefore remains unclear how the secretary would be made aware of whether a person's participation in the trial is affecting their mental, physical and emotional wellbeing.

Committee response

2.38 The committee thanks the minister for his response and has concluded its examination of the bill.

2.39 The preceding analysis indicates that the expansion of the cashless welfare trial to the Bundaberg and Hervey Bay area may not be rationally connected to (that is, effective to achieve) the stated objectives of the measures.

2.40 The analysis further indicates that, based on the information provided, the measures may not be a reasonable and proportionate limitation on human rights.

2.41 Accordingly, and noting concerns raised by previous human rights assessments of the cashless welfare card trial, as well as related concerns regarding income management identified in the committee's *2016 Review of Stronger Future measures*, the measures may not be compatible with the right to social security, the rights to privacy and family, and the right to equality and non-discrimination.

Amendments to the cashless welfare arrangements through the determinations

2.42 The Social Security (Administration) (Trial of Cashless Welfare Arrangements) Determination 2018 [F2018L00245] (the trial of cashless welfare arrangements

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

determination) revokes and remakes previous determinations in light of the amendments introduced by the *Social Services Legislation Amendment (Cashless Debit Card) Act 2018*.[57] The measures contained in the determination include:

- 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;[58]
- 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.[59]

2.43 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

2.44 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.

2.45 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

57 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*.

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

59 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.

declinable transactions determination to the attention of parliament noting the concerns previously discussed in relation to the cashless debit card trial.[60]

2.46 In relation to the trial of cashless welfare arrangements determination, the committee previously noted that the earlier version of the determination raised similar concerns to those raised in the 2016 Review of Stronger Futures measures, but since no response was received from the minister at the time of finalising the report, it was not possible to conclude that the previous determination was necessary and effective to achieve the objectives of the trials or was a proportionate limitation on human rights.[61] The previous analysis noted that the new 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,[62] but introduces new provisions to reflect the expansion of the trial to the Goldfields region.

2.47 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,[63] the concerns discussed above in relation to the ORIMA report apply equally in relation to the determinations. It was 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.

2.48 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'.[64] It is not explained in the statement of compatibility the rationale for

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

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

62 See Explanatory Statement, p. 1.

63 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], 4-5.

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

excluding persons of pension age in the Goldfields trial area but not the Ceduna or East Kimberley areas.

2.49 The committee therefore sought 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).

Minister's response

2.50 The minister's response provides some general information on the extent of alcohol-related harm in the Goldfields area, which was also included in the statements of compatibility for the determinations. This provides some context as to why the Goldfields area was selected as a trial location, in light of the stated objectives of the trial, which include reducing alcohol-related harm.

2.51 The minister's response generally relates to the broader cashless debit card trial across all three current sites, as well as the expansion to the Bundaberg and Hervey Bay area. No specific information is provided in the response as to how the measures as they apply to the Goldfields area are effective to achieve (that is, rationally connected to) the stated objectives. To the extent that the determinations rely on the ORIMA report as evidence of the effectiveness of the trial, it remains unclear whether the measures are rationally connected to the stated objectives.

2.52 In relation to the basis for excluding persons from the trial in the Goldfields area who have reached pension age during the 12 month period commencing on 26 March 2018, but not in the Ceduna or East Kimberley area, the minister states:

> The Cashless Debit Card Trial is designed to provide assistance to people receiving welfare and who are of working age. Payments such as Mature Age Allowance, Age Pension or Bereavement Allowance for a person of pension age are not captured.
>
> However, as some people may transition to the Age Pension during the trial period, these measures are necessary. A transitional provision has been inserted for the Goldfields site to ensure people reaching age pension age in the first twelve months of operation will not be captured when they would only be on the card for a short period of time and may not see the full benefits of the program. As the Cashless Debit Card has been in operation since 2016 in Ceduna and East Kimberley, a transitional provision for this class of person in these sites is no longer required.

2.53 This information clarifies that the measure excludes this class of persons from the trial in the Goldfields area as they would only be subject to the measures

for a short period of time before transitioning to the age pension. It is acknowledged that this measure is less applicable in Ceduna and East Kimberley, where the trial has been operating since 2016.

2.54 As to how the measures are a proportionate limitation on human rights, no further reasoning is provided in the minister's response specific to the determinations, outside the information discussed above in relation to the 2018 bill. As such, the concerns discussed above in relation to the proportionality of the 2018 bill also apply in relation to the determinations. That is, there are concerns that the measures may not be the least rights restrictive alternative in order to constitute a proportionate limitation on human rights.

Committee response

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

2.56 The preceding analysis in relation to the Social Services Legislation Amendment (Cashless Debit Card Trial Expansion) Bill 2018 applies in relation to the determinations. That is, broadly, that concerns remain as to whether the cashless debit card trial is effective to achieve its stated objectives and is a proportionate limitation on human rights.

2.57 Accordingly, and noting concerns raised by previous human rights assessments of the cashless welfare card trial, as well as related concerns regarding income management identified in the committee's *2016 Review of Stronger Future measures*, the determinations may not be compatible with the right to social security, the rights to privacy and family, and 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:

- Plebiscite (Future Migration Level) Bill 2018.

Appendix 2

Short guide to human rights

4.1 The following guide contains short descriptions of human rights regularly considered by the committee. State parties to the seven principal human rights treaties are under a binding obligation to respect, protect and promote each of these rights. For more detailed descriptions please refer to the committee's *Guide to human rights*.[1]

4.2 Some human rights obligations are absolute under international law, that is, a state cannot lawfully limit the enjoyment of an absolute right in any circumstances. The prohibition on slavery is an example. However, in relation to most human rights, a necessary and proportionate limitation on the enjoyment of a right may be justified under international law. For further information regarding when limitations on rights are permissible, please refer to the committee's *Guidance Note 1* (see Appendix 4).[2]

Right to life

*Article 6 of the International Covenant on Civil and Political Rights (**ICCPR**); and article 1 of the Second Optional Protocol to the ICCPR*

4.3 The right to life has three core elements:

- it prohibits the state from arbitrarily killing a person;
- it imposes an obligation on the state to protect people from being killed by others or identified risks; and
- it imposes on the state a duty to undertake an effective and proper investigation into all deaths where the state is involved (discussed below, [4.5]).

4.4 Australia is also prohibited from imposing the death penalty.

Duty to investigate

Articles 2 and 6 of the ICCPR

4.5 The right to life requires there to be an effective official investigation into deaths resulting from state use of force and where the state has failed to protect life. Such an investigation must:

- be brought by the state in good faith and on its own initiative;
- be carried out promptly;

1 Parliamentary Joint Committee on Human Rights, Guide to Human Rights (June 2015).

2 Parliamentary Joint Committee on Human Rights, Guidance Note 1 (December 2014).

- be independent and impartial; and
- involve the family of the deceased, and allow the family access to all information relevant to the investigation.

Prohibition against torture, cruel, inhuman or degrading treatment

*Article 7 of the ICCPR; and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (**CAT**)*

4.6 The prohibition against torture, cruel, inhuman or degrading treatment or punishment is absolute. This means that torture or cruel, inhuman or degrading treatment or punishment is not permissible under any circumstances.

4.7 The prohibition contains a number of elements:

- it prohibits the state from subjecting a person to torture or cruel, inhuman or degrading practices, particularly in places of detention;
- it precludes the use of evidence obtained through torture;
- it prevents the deportation or extradition of a person to a place where there is a substantial risk they will be tortured or treated inhumanely (see also non-refoulement obligations, [4.9] to [4.11]); and
- it requires an effective investigation into any allegations of such treatment and steps to prevent such treatment occurring.

4.8 The aim of the prohibition against torture, cruel, inhuman or degrading treatment is to protect the dignity of the person and relates not only to acts causing physical pain but also acts causing mental suffering. The prohibition is also an aspect of the right to humane treatment in detention (see below, [4.18]).

Non-refoulement obligations

Article 3 of the CAT; articles 2, 6(1) and 7 of the ICCPR; and Second Optional Protocol to the ICCPR

4.9 Non-refoulement obligations are absolute and may not be subject to any limitations.

4.10 Australia has non-refoulement obligations under both the ICCPR and the CAT, as well as under the Convention Relating to the Status of Refugees and its Protocol (**Refugee Convention**). This means that Australia must not under any circumstances return a person (including a person who is not a refugee) to a country where there is a real risk that they would face persecution, torture or other serious forms of harm, such as the death penalty; arbitrary deprivation of life; or cruel, inhuman or degrading treatment or punishment.

4.11 Effective and impartial review by a court or tribunal of decisions to deport or remove a person, including merits review in the Australian context, is integral to complying with non-refoulement obligations.

Prohibition against slavery and forced labour

Article 8 of the ICCPR

4.12 The prohibition against slavery, servitude and forced labour is a fundamental and absolute human right. This means that slavery and forced labour are not permissible under any circumstances.

4.13 The prohibition on slavery and servitude is a prohibition on 'owning' another person or exploiting or dominating another person and subjecting them to 'slavery-like' conditions.

4.14 The right to be free from forced or compulsory labour prohibits requiring a person to undertake work that they have not voluntarily consented to, but which they do because of either physical or psychological threats. The prohibition does not include lawful work required of prisoners or those in the military; work required during an emergency; or work or service that is a part of normal civic obligations (for example, jury service).

4.15 The state must not subject anyone to slavery or forced labour, and ensure adequate laws and measures are in place to prevent individuals or companies from subjecting people to such treatment (for example, laws and measures to prevent trafficking).

Right to liberty and security of the person

Article 9 of the ICCPR

Right to liberty

4.16 The right to liberty of the person is a procedural guarantee not to be arbitrarily and unlawfully deprived of liberty. It applies to all forms of deprivation of liberty, including detention in criminal cases, immigration detention, forced detention in hospital, detention for military discipline and detention to control the spread of contagious diseases. Core elements of this right are:

- the prohibition against arbitrary detention, which requires that detention must be lawful, reasonable, necessary and proportionate in all the circumstances, and be subject to regular review;
- the right to reasons for arrest or other deprivation of liberty, and to be informed of criminal charge;
- the rights of people detained on a criminal charge, including being promptly brought before a judicial officer to decide if they should continue to be detained, and being tried within a reasonable time or otherwise released (these rights are linked to criminal process rights, discussed below);
- the right to challenge the lawfulness of any form of detention in a court that has the power to order the release of the person, including a right to have

access to legal representation, and to be informed of that right in order to effectively challenge the detention; and

- the right to compensation for unlawful arrest or detention.

Right to security of the person

4.17 The right to security of the person requires the state to take steps to protect people from others interfering with their personal integrity. This includes protecting people who may be subject to violence, death threats, assassination attempts, harassment and intimidation (for example, protecting people from domestic violence).

Right to humane treatment in detention

Article 10 of the ICCPR

4.18 The right to humane treatment in detention provides that all people deprived of their liberty, in any form of state detention, must be treated with humanity and dignity. The right complements the prohibition on torture and cruel, inhuman or degrading treatment or punishment (see above, [4.6] to [4.8]). The obligations on the state include:

- a prohibition on subjecting a person in detention to inhumane treatment (for example, lengthy solitary confinement or unreasonable restrictions on contact with family and friends);
- monitoring and supervision of places of detention to ensure detainees are treated appropriately;
- instruction and training for officers with authority over people deprived of their liberty;
- complaint and review mechanisms for people deprived of their liberty; and
- adequate medical facilities and health care for people deprived of their liberty, particularly people with disability and pregnant women.

Freedom of movement

Article 12 of the ICCPR

4.19 The right to freedom of movement provides that:

- people lawfully within any country have the right to move freely within that country;
- people have the right to leave any country, including the right to obtain travel documents without unreasonable delay; and
- no one can be arbitrarily denied the right to enter or remain in his or her own country.

Right to a fair trial and fair hearing

Articles 14(1) (fair trial and fair hearing), 14(2) (presumption of innocence) and 14(3)-(7) (minimum guarantees) of the ICCPR

4.20 The right to a fair hearing is a fundamental part of the rule of law, procedural fairness and the proper administration of justice. The right provides that all persons are:

- equal before courts and tribunals; and
- entitled to a fair and public hearing before an independent and impartial court or tribunal established by law.

4.21 The right to a fair hearing applies in both criminal and civil proceedings, including whenever rights and obligations are to be determined.

Presumption of innocence

Article 14(2) of the ICCPR

4.22 This specific guarantee protects the right to be presumed innocent until proven guilty of a criminal offence according to law. Generally, consistency with the presumption of innocence requires the prosecution to prove each element of a criminal offence beyond reasonable doubt (the committee's *Guidance Note* 2 provides further information on offence provisions (see Appendix 4)).

Minimum guarantees in criminal proceedings

Article 14(2)-(7) of the ICCPR

4.23 These specific guarantees apply when a person has been charged with a criminal offence or are otherwise subject to a penalty which may be considered criminal, and include:

- the presumption of innocence (see above, [4.22]);
- the right not to incriminate oneself (the ill-treatment of a person to obtain a confession may also breach the prohibition on torture, cruel, inhuman or degrading treatment (see above, [4.6] to [4.8]);
- the right not to be tried or punished twice (double jeopardy);
- the right to appeal a conviction or sentence and the right to compensation for wrongful conviction; and
- other specific guarantees, including the right to be promptly informed of any charge, to have adequate time and facilities to prepare a defence, to be tried in person without undue delay, to examine witnesses, to choose and meet with a lawyer and to have access to effective legal aid.

Prohibition against retrospective criminal laws

Article 15 of the ICCPR

4.24 The prohibition against retrospective criminal laws provides that:

- no-one can be found guilty of a crime that was not a crime under the law at the time the act was committed;
- anyone found guilty of a criminal offence cannot be given a heavier penalty than one that applied at the time the offence was committed; and
- if, after an offence is committed, a lighter penalty is introduced into the law, the lighter penalty should apply to the offender. This includes a right to benefit from the retrospective decriminalisation of an offence (if the person is yet to be penalised).

4.25 The prohibition against retrospective criminal laws does not apply to conduct which, at the time it was committed, was recognised under international law as being criminal even if it was not a crime under Australian law (for example, genocide, war crimes and crimes against humanity).

Right to privacy

Article 17 of the ICCPR

4.26 The right to privacy prohibits unlawful or arbitrary interference with a person's private, family, home life or correspondence. It requires the state:

- not to arbitrarily or unlawfully invade a person's privacy; and
- to adopt legislative and other measures to protect people from arbitrary interference with their privacy by others (including corporations).

4.27 The right to privacy contains the following elements:

- respect for private life, including information privacy (for example, respect for private and confidential information and the right to control the storing, use and sharing of personal information);
- the right to personal autonomy and physical and psychological integrity, including respect for reproductive autonomy and autonomy over one's own body (for example, in relation to medical testing);
- the right to respect for individual sexuality (prohibiting regulation of private consensual adult sexual activity);
- the prohibition on unlawful and arbitrary state surveillance;
- respect for the home (prohibiting arbitrary interference with a person's home and workplace including by unlawful surveillance, unlawful entry or arbitrary evictions);

- respect for family life (prohibiting interference with personal family relationships);
- respect for correspondence (prohibiting arbitrary interception or censoring of a person's mail, email and web access), including respect for professional duties of confidentiality; and
- the right to reputation.

Right to protection of the family

*Articles 17 and 23 of the ICCPR; and article 10 of the International Covenant on Economic, Social and Cultural Rights (**ICESCR**)*

4.28 Under human rights law the family is recognised as the natural and fundamental group unit of society and is therefore entitled to protection. The right requires the state:

- not to arbitrarily or unlawfully interfere in family life; and
- to adopt measures to protect the family, including by funding or supporting bodies that protect the family.

4.29 The right also encompasses:

- the right to marry (with full and free consent) and found a family;
- the right to equality in marriage (for example, laws protecting spouses equally) and protection of any children on divorce;
- protection for new mothers, including maternity leave; and
- family unification.

Right to freedom of thought and religion

Article 18 of the ICCPR

4.30 The right to hold a religious or other belief or opinion is absolute and may not be subject to any limitations.

4.31 However, the right to exercise one's belief may be subject to limitations given its potential impact on others.

4.32 The right to freedom of thought, conscience and religion includes:

- the freedom to choose and change religion or belief;
- the freedom to exercise religion or belief publicly or privately, alone or with others (including through wearing religious dress);
- the freedom to exercise religion or belief in worship, teaching, practice and observance; and
- the right to have no religion and to have non-religious beliefs protected (for example, philosophical beliefs such as pacifism or veganism).

4.33 The right to freedom of thought and religion also includes the right of a person not to be coerced in any way that might impair their ability to have or adopt a religion or belief of their own choice. The right to freedom of religion prohibits the state from impairing, through legislative or other measures, a person's freedom of religion; and requires it to take steps to prevent others from coercing persons into following a particular religion or changing their religion.

Right to freedom of opinion and expression

*Articles 19 and 20 of the ICCPR; and article 21 of the Convention on the Rights of Persons with Disabilities (**CRPD**)*

4.34 The right to freedom of opinion is the right to hold opinions without interference. This right is absolute and may not be subject to any limitations.

4.35 The right to freedom of expression relates to the communication of information or ideas through any medium, including written and oral communications, the media, public protest, broadcasting, artistic works and commercial advertising. It may be subject to permissible limitations.

Right to freedom of assembly

Article 21 of the ICCPR

4.36 The right to peaceful assembly is the right of people to gather as a group for a specific purpose. The right prevents the state from imposing unreasonable and disproportionate restrictions on assemblies, including:

- unreasonable requirements for advance notification of a peaceful demonstration (although reasonable prior notification requirements are likely to be permissible);
- preventing a peaceful demonstration from going ahead or preventing people from joining a peaceful demonstration;
- stopping or disrupting a peaceful demonstration;
- punishing people for their involvement in a peaceful demonstration or storing personal information on a person simply because of their involvement in a peaceful demonstration; and
- failing to protect participants in a peaceful demonstration from disruption by others.

Right to freedom of association

Article 22 of the ICCPR; and article 8 of the ICESCR

4.37 The right to freedom of association with others is the right to join with others in a group to pursue common interests. This includes the right to join political parties, trade unions, professional and sporting clubs and non-governmental organisations.

4.38 The right prevents the state from imposing unreasonable and disproportionate restrictions on the right to form associations and trade unions, including:

- preventing people from forming or joining an association;
- imposing procedures for the formal recognition of associations that effectively prevent or discourage people from forming an association;
- punishing people for their membership of a group; and
- protecting the right to strike and collectively bargain.

4.39 Limitations on the right are not permissible if they are inconsistent with the guarantees of freedom of association and the right to organise as contained in the International Labour Organisation Convention of 1948 concerning Freedom of Association and Protection of the Right to Organize (ILO Convention No. 87).

Right to take part in public affairs

Article 25 of the ICCPR

4.40 The right to take part in public affairs includes guarantees of the right of Australian citizens to stand for public office, to vote in elections and to have access to positions in public service. Given the importance of free speech and protest to the conduct of public affairs in a free and open democracy, the realisation of the right to take part in public affairs depends on the protection of other key rights, such as freedom of expression, association and assembly.

4.41 The right to take part in public affairs is an essential part of democratic government that is accountable to the people. It applies to all levels of government, including local government.

Right to equality and non-discrimination

*Articles 2, 3 and 26 of the ICCPR; articles 2 and 3 of the ICESCR; International Convention on the Elimination of All Forms of Racial Discrimination (**CERD**); Convention on the Elimination of all Forms of Discrimination Against Women (**CEDAW**); CRPD; and article 2 of the Convention on the Rights of the Child (**CRC**)*

4.42 The right to equality and non-discrimination is a fundamental human right that is essential to the protection and respect of all human rights. The human rights treaties provide that everyone is entitled to enjoy their rights without discrimination of any kind, and that all people are equal before the law and entitled to the equal and non-discriminatory protection of the law.

4.43 'Discrimination' under the ICCPR encompasses both measures that have a discriminatory intent (direct discrimination) and measures which have a

discriminatory effect on the enjoyment of rights (indirect discrimination).[3] The UN Human Rights Committee has explained indirect discrimination as 'a rule or measure that is neutral on its face or without intent to discriminate', which exclusively or disproportionately affects people with a particular personal attribute.[4]

4.44 The right to equality and non-discrimination requires that the state:

- ensure all laws are non-discriminatory and are enforced in a non-discriminatory way;
- ensure all laws are applied in a non-discriminatory and non-arbitrary manner (equality before the law);
- have laws and measures in place to ensure that people are not subjected to discrimination by others (for example, in areas such as employment, education and the provision of goods and services); and
- take non-legal measures to tackle discrimination, including through education.

Rights of the child

CRC

4.45 Children have special rights under human rights law taking into account their particular vulnerabilities. Children's rights are protected under a number of treaties, particularly the CRC. All children under the age of 18 years are guaranteed these rights, which include:

- the right to develop to the fullest;
- the right to protection from harmful influences, abuse and exploitation;
- family rights; and
- the right to access health care, education and services that meet their needs.

Obligation to consider the best interests of the child

Articles 3 and 10 of the CRC

4.46 Under the CRC, states are required to ensure that, in all actions concerning children, the best interests of the child are a primary consideration. This requires active measures to protect children's rights and promote their survival, growth and wellbeing, as well as measures to support and assist parents and others who have

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

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

day-to-day responsibility for ensuring recognition of children's rights. It requires legislative, administrative and judicial bodies and institutions to systematically consider how children's rights and interests are or will be affected directly or indirectly by their decisions and actions.

4.47 Australia is required to treat applications by minors for family reunification in a positive, humane and expeditious manner. This obligation is consistent with articles 17 and 23 of the ICCPR, which prohibit interference with the family and require family unity to be protected by society and the state (see above, [4.29]).

Right of the child to be heard in judicial and administrative proceedings

Article 12 of the CRC

4.48 The right of the child to be heard in judicial and administrative proceedings provides that states assure to a child capable of forming his or her own views the right to express those views freely in all matters affecting them. The views of the child must be given due weight in accordance with their age and maturity.

4.49 In particular, this right requires that the child is provided the opportunity to be heard in any judicial and administrative proceedings affecting them, either directly or through a representative or an appropriate body.

Right to nationality

Articles 7 and 8 of the CRC; and article 24(3) of the ICCPR

4.50 The right to nationality provides that every child has the right to acquire a nationality. Accordingly, Australia is required to adopt measures, both internally and in cooperation with other countries, to ensure that every child has a nationality when born. The CRC also provides that children have the right to preserve their identity, including their nationality, without unlawful interference.

4.51 This is consistent with Australia's obligations under the Convention on the Reduction of Statelessness 1961, which requires Australia to grant its nationality to a person born in its territory who would otherwise be stateless, and not to deprive a person of their nationality if it would render the person stateless.

Right to self-determination

Article 1 of the ICESCR; and article 1 of the ICCPR

4.52 The right to self-determination includes the entitlement of peoples to have control over their destiny and to be treated respectfully. The right is generally understood as accruing to 'peoples', and includes peoples being free to pursue their economic, social and cultural development. There are two aspects of the meaning of self-determination under international law:

- that the people of a country have the right not to be subjected to external domination and exploitation and have the right to determine their own political status (most commonly seen in relation to colonised states); and

- that groups within a country, such as those with a common racial or cultural identity, particularly Indigenous people, have the right to a level of internal self-determination.

4.53 Accordingly, it is important that individuals and groups, particularly Aboriginal and Torres Strait Islander peoples, should be consulted about decisions likely to affect them. This includes ensuring that they have the opportunity to participate in the making of such decisions through the processes of democratic government, and are able to exercise meaningful control over their affairs.

Rights to and at work

Articles 6(1), 7 and 8 of the ICESCR

Right to work

4.54 The right to work is the right of all people to have the opportunity to gain their living through decent work they freely choose, allowing them to live in dignity. It provides:

- that everyone must be able to freely accept or choose their work, including that a person must not be forced in any way to engage in employment;
- a right not to be unfairly deprived of work, including minimum due process rights if employment is to be terminated; and
- that there is a system of protection guaranteeing access to employment.

Right to just and favourable conditions of work

4.55 The right to just and favourable conditions of work provides that all workers have the right to just and favourable conditions of work, particularly adequate and fair remuneration, safe working conditions, and the right to join trade unions.

Right to social security

Article 9 of the ICESCR

4.56 The right to social security recognises the importance of adequate social benefits in reducing the effects of poverty and plays an important role in realising many other economic, social and cultural rights, in particular the right to an adequate standard of living and the right to health.

4.57 Access to social security is required when a person lacks access to other income and is left with insufficient means to access health care and support themselves and their dependents. Enjoyment of the right requires that sustainable social support schemes are:

- available to people in need;
- adequate to support an adequate standard of living and health care;

- accessible (providing universal coverage without discrimination; and qualifying and withdrawal conditions that are lawful, reasonable, proportionate and transparent); and
- affordable (where contributions are required).

Right to an adequate standard of living

Article 11 of the ICESCR

4.58 The right to an adequate standard of living requires that the state take steps to ensure the availability, adequacy and accessibility of food, clothing, water and housing for all people in its jurisdiction.

Right to health

Article 12 of the ICESCR

4.59 The right to health is the right to enjoy the highest attainable standard of physical and mental health. It is a right to have access to adequate health care (including reproductive and sexual healthcare) as well as to live in conditions that promote a healthy life (such as access to safe drinking water, housing, food and a healthy environment).

Right to education

Articles 13 and 14 of the ICESCR; and article 28 of the CRC

4.60 This right recognises the right of everyone to education. It recognises that education must be directed to the full development of the human personality and sense of dignity, and to strengthening respect for human rights and fundamental freedoms. It requires that primary education shall be compulsorily and freely available to all; and the progressive introduction of free secondary and higher education.

Right to culture

Article 15 of the ICESCR; and article 27 of the ICCPR

4.61 The right to culture provides that all people have the right to benefit from and take part in cultural life. The right also includes the right of everyone to benefit from scientific progress; and protection of the moral and material interests of the authors of scientific, literary or artistic productions.

4.62 Individuals belonging to minority groups have additional protections to enjoy their own culture, religion and language. The right applies to people who belong to minority groups in a state sharing a common culture, religion and/or language.

Right to an effective remedy

Article 2 of the ICCPR

4.63 The right to an effective remedy requires states to ensure access to an effective remedy for violations of human rights. States are required to establish

appropriate judicial and administrative mechanisms for addressing claims of human rights violations under domestic law. Where public officials have committed violations of rights, states may not relieve perpetrators from personal responsibility through amnesties or legal immunities and indemnities.

4.64 States are required to make reparation to individuals whose rights have been violated. Reparation can involve restitution, rehabilitation and measures of satisfaction—such as public apologies, public memorials, guarantees of non-repetition and changes in relevant laws and practices—as well as bringing to justice the perpetrators of human rights violations. Effective remedies should be appropriately adapted to take account of the special vulnerability of certain categories of persons including, and particularly, children.

Appendix 3

Correspondence

The Hon Dan Tehan MP
Minister for Social Services

Parliament House
CANBERRA ACT 2600

Telephone: 02 6277 7560

MC18-004924

24 JUL 2018

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

Dear Mr Goodenough Ian,

Thank you for your email of 27 June 2018 regarding the assessment by the Parliamentary Joint Committee on Human Rights (the Committee) on the following legislation:

- Social Services Legislation Amendment (Cashless Debit Card Trial Expansion) Bill 2018 (the 2018 Bill);
- Social Security (Administration) (Trial of Cashless Welfare Arrangements) Determination 2018; and
- Social Security (Administration) (Trial – Declinable Transactions and Welfare Restricted Bank Account) Determination 2018.

The Committee has requested further information around the human rights compatibility of the 2018 Bill and the two Determinations as assessed in the Committee's Report 6 of 2018.

The Cashless Debit Card's primary purpose is to reduce harm from the use of products such as alcohol, drugs and gambling, and to help participants to stabilise their lives, increasing their ability to participate in the workforce.

The consumption of alcohol and drugs and gambling at harmful levels can negatively impact on a person's ability to work, and can lead to long-term welfare dependency.

The Goldfields area was selected as a third trial area because of the high level of community support, for its introduction and demonstrated need for additional support to address social issues within the area. Western Australia Police data indicated the domestic and non-domestic assault rate in the Goldfields is more than twice the state average. Alcohol is a factor in two thirds of all domestic assaults (2009-13) and half of all non-domestic assaults. Alcohol-related hospitalisations and deaths are 25 per cent higher than the WA state average in 2007-11.

As previously stated in the Statement of Compatibility with Human Rights for the 2018 Bill, the Evaluation Report of the Cashless Debit Card Trial detailed findings that provide evidence as to the ability of the Cashless Debit Card to address the expected objectives of the trial. Findings from the Evaluation Report relating to the stabilisation of participants' lives in communities were also particularly encouraging, and provide evidence of secondary impacts of the card in relation to seeing impacts such as caring for children, ability to save money and purchase of necessary items for children. In addition, there was an increase in survey respondents who indicated that they spent 11 hours or more per week trying to get a job or paid work, between the two waves of reporting.

In order to build on the findings of the first Evaluation Report, the Government is funding a second evaluation of the Cashless Debit Card trial, to further assess the ongoing effectiveness of the program. This second evaluation will be conducted across the three current trial sites (East Kimberley, Ceduna and the Goldfields) and will be undertaken by the University of Adelaide and the University of Queensland.

The expansion of the Cashless Debit Card in the Bundaberg and Hervey Bay area will apply the program to a specific cohort of income support recipients in that region. All persons aged under 36 years, who are in receipt of Newstart Allowance, Youth Allowance (Other) or Parenting Payment (Partnered or Single) will be triggered onto the Cashless Debit Card. This applies to all persons meeting these criteria in the same way that it applies in current sites.

Across all Cashless Debit Card sites, the right to social security is limited only in the participant's ability to use a proportion of their payment to purchase harmful goods, in an area where there are demonstrated high levels of community harm. The amendment does not detract from the eligibility of a person to receive welfare, nor reduce the amount of a person's social security entitlement.

The limitations put in place restrict transactions at businesses selling goods that contribute to social harms in the communities, with this directly related to the objective of the cashless debit card. The restrictions are proportionate given the high levels of harm in potential communities, and the demonstrated positive results of the program to date.

Cashless Debit Card Trial Sites are chosen using objective criteria. However, to date there has been a significant proportion of Aboriginal and Torres Strait Islander people, women and Disability Support Pensioners in scope as participants. The 2018 Bill allows the Government the opportunity to expand the program to a larger urban location, providing an opportunity to test the program in more diverse settings and with a larger population which should help address the overrepresentation of certain cohorts on the Cashless Debit Card.

All decisions around the extension of the Cashless Debit Card have been made and will continue to be made in close partnership with community leaders. Engagement with community members and leaders has been ongoing, informally and formally, in all locations to help Government better understand local needs and gauge interest in the continuation of the program.

The 2018 Bill enables the option for a community body in the Bundaberg and Hervey Bay area. This mechanism would allow the community to take ownership of variations to the amount of a person's welfare payment that is placed on the Cashless Debit Card and encourage positive social behaviour.

The Cashless Debit Card is designed so that it can be used outside of trial locations if a participant moves during the trial period. Participants that do not spend a large proportion of their income support payment on alcohol, gambling or drugs, will see little impact.

The Committee has also enquired as to the rationale for excluding persons who will reach pension age during the 12 month period from March 2018 in the Goldfields, but not in the Ceduna and East Kimberley sites.

The Cashless Debit Card Trial is designed to provide assistance to people receiving welfare and who are of working age. Payments such as Mature Age Allowance, Age Pension or Bereavement Allowance for a person of pension age are not captured.

However, as some people may transition to the Age Pension during the trial period, these measures are necessary. A transitional provision has been inserted for the Goldfields site to ensure people reaching age pension age in the first twelve months of operation will not be captured when they would only be on the card for a short period of time and may not see the full benefits of the program. As the Cashless Debit Card has been in operation since 2016 in Ceduna and East Kimberley, a transitional provision for this class of person in these sites is no longer required.

I hope this information is of assistance to the Committee.

Yours sincerely

DAN TEHAN

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;

---

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.

---

[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.

Parliamentary Joint Committee on Human Rights
PO Box 6100
Parliament House
Canberra ACT 2600

Phone: 02 6277 3823
Fax: 02 6277 5767

E-mail: human.rights@aph.gov.au
Internet: http://www.aph.gov.au/joint_humanrights

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.

---

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.

---

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.

Parliamentary Joint Committee on Human Rights
PO Box 6100
Parliament House
Canberra ACT 2600

Phone: 02 6277 3823
Fax: 02 6277 5767

E-mail: human.rights@aph.gov.au
Internet: http://www.aph.gov.au/joint_humanrights