



# Parliamentary Joint Committee on Human Rights

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Human rights scrutiny report

Report 4 of 2019

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



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## Committee information

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

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

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

Some human rights obligations are absolute under international law. However, in relation to most human rights, prescribed limitations on the enjoyment of a right may be permissible 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 permissible. A measure that limits a right must be **prescribed by law**; be in pursuit of a **legitimate objective**; be **rationaly connected** to its stated objective; and be a **proportionate** way to achieve that objective (the **limitation criteria**). These four criteria provide the analytical framework for the committee.

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

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

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

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

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

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

# Chapter 1

## New and continuing matters<sup>1</sup>

- 1.1 This chapter provides assessments of the human rights compatibility of:
- bills introduced into the Parliament, or restored to the notice paper, between 29 July and 1 August 2019;
  - legislative instruments registered on the Federal Register of Legislation between 5 June and 1 August 2019;<sup>2</sup> and
  - bills and legislative instruments previously deferred.<sup>3</sup>

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1 This section can be cited as: Parliamentary Joint Committee on Human Rights, New and continuing matters, *Report 4 of 2019*; [2019] AUPJCHR 64.

2 The committee examines all legislative instruments registered in the relevant period, as listed on the Federal Register of Legislation. To identify all of the legislative instruments scrutinised by the committee during this period, select 'legislative instruments' as the relevant type of legislation, select the event as 'assent/making', and input the relevant registration date range in the Federal Register of Legislation's advanced search function, available at: <https://www.legislation.gov.au/AdvancedSearch>.

3 See, Parliamentary Joint Committee on Human Rights, *Report 3 of 2019* (30 July 2019) p. 23.

## Response required<sup>1</sup>

1.2 The committee seeks a response from the relevant minister with respect to the following bill.

### Migration Amendment (Repairing Medical Transfers) Bill 2019<sup>2</sup>

<b>Purpose</b>	Amends the <i>Migration Act 1958</i> to: remove provisions inserted by the <i>Home Affairs Legislation Amendment (Miscellaneous Measures) Act 2019</i> (the medical transfer provisions) which created a framework for the transfer of transitory persons (and their family members, and other persons recommended to accompany the transitory person) from regional processing countries to Australia for the purposes of medical or psychiatric assessment or treatment; and provide for the removal from Australia, or return to a regional processing country, of transitory persons who are brought to Australia under the medical transfer provisions, once the temporary purpose for which they were brought to Australia is complete
<b>Portfolio</b>	Home Affairs
<b>Introduced</b>	House of representatives, 4 July 2019
<b>Rights</b>	Non-refoulement; effective remedy; health
<b>Status</b>	Seeking additional information

#### Repeal of the medical transfer provisions

1.3 Currently, the medical transfer provisions of the *Migration Act 1958* (Migration Act)<sup>3</sup> allow two treating doctors to recommend that a person, held under regional processing arrangements<sup>4</sup> be transferred to Australia for medical treatment or assessment.<sup>5</sup> Within 72 hours, the minister must approve the transfer unless the minister reasonably believes or suspects there are security, character or medical

1 This section can be cited as: Parliamentary Joint Committee on Human Rights, Response required, *Report 4 of 2019*; [2019] AUPJCHR 65.

2 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Migration Amendment (Repairing Medical Transfers) Bill 2019, *Report 4 of 2019*; [2019] AUPJCHR 65.

3 As amended by the *Home Affairs Legislation Amendment (Miscellaneous Measures) Act 2019*.

4 Nauru and Papua New Guinea are 'regional processing countries' for the purpose of the *Migration Act 1958*.

5 *Migration Act 1958*, section 198E.

grounds<sup>6</sup> for refusal.<sup>7</sup> If the minister's ground for refusing a transfer is medical, the matter is reviewed by the Independent Health Advice Panel. If the panel recommends the transfer be approved, the minister must approve the transfer unless there remain security or character grounds for refusal.<sup>8</sup>

1.4 The Migration Amendment (Repairing Medical Transfers) Bill 2019 (the bill) seeks to repeal these medical transfer provisions.<sup>9</sup> Additionally, the bill seeks to apply the requirement under section 198(1A) of the Migration Act so that persons transferred to Australia under the medical transfer provisions are to be removed from Australia or returned to a regional processing country, as soon as reasonably practicable, unless a specified exemption applies.<sup>10</sup>

### ***The obligation of non-refoulement and the right to an effective remedy***

1.5 Australia has 'non-refoulement' obligations under the International Covenant on Civil and Political Rights (ICCPR) and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT). This means that Australia must not return any person to a country where there is a real risk that they would face persecution, torture or other serious forms of harm, such as the death penalty; arbitrary deprivation of life; or cruel, inhuman or degrading treatment or punishment.<sup>11</sup> Non-refoulement obligations are absolute and may not be subject to any limitations. The obligation of non-refoulement and the right to an effective remedy require an opportunity for independent, effective and impartial review of decisions to deport or remove a person.<sup>12</sup>

1.6 As a matter of international law, the obligation of non-refoulement in this bill does not involve the extraterritorial application of obligations. This is because the persons who may be removed from Australia as a result of these amendments are currently present in Australian territory. Australia therefore owes human rights obligations to them, including an obligation not to send them to a country where there is a real risk of that they would face persecution, arbitrary deprivation of life, torture or cruel, inhuman or degrading treatment or punishment.

1.7 In relation to the potential risk of harm of sending or returning someone to a regional processing country, in 2013 the committee raised human rights concerns about such transfers and about the conditions in regional processing countries

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6 Except in cases of children under 18 years of age: *Migration Act 1958*, sections 198D.

7 *Migration Act 1958*, sections 198D; 198E (3), (3A), (4).

8 *Migration Act 1958*, section 198F.

9 Schedule 1.

10 Schedule 1, items 3-8.

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

12 International Covenant on Civil and Political Rights, article 2 (the right to an effective remedy).

including in offshore immigration detention. This included concerns in relation to the right to humane treatment in detention; the right not to be arbitrarily detained; the right to health and the rights of the child.<sup>13</sup> The United Nations (UN) Committee Against Torture has also expressed concerns about the transfer of individuals to regional processing centres in Papua New Guinea (Manus Island) and Nauru in view of reports of 'harsh conditions' and 'serious physical and mental pain and suffering'.<sup>14</sup> Similarly, the UN Special Rapporteur on the human rights of migrants has also raised concerns about 'systemic human rights violations' and recommended the closure of regional processing centres.<sup>15</sup> In relation to the conditions on Nauru and Manus Island, the UN Special Rapporteur has specifically stated that '[t]he forced offshore confinement (although not necessarily detention anymore) in which asylum seekers and refugees are maintained constitutes cruel, inhuman and degrading treatment or punishment according to international human rights law standards'.<sup>16</sup>

1.8 However, the statement of compatibility does not specifically address the issue of whether sending someone back to a regional processing country complies with Australia's non-refoulement obligations in the context of the reported conditions for individuals in regional processing countries. More generally, in relation to the obligation of non-refoulement, the statement of compatibility states:

The Government takes Australia's *non-refoulement* obligations seriously, and will ensure administrative arrangements are in place to support Australia to meet its *non-refoulement* obligations to those individuals... The amendments do not impact on the protections against *refoulement*, which already exist in Australia's legislation, policies and procedures. In making the amendments, the Government is not creating any new obligations or seeking to avoid obligations. Australia will continue to meet its *non-refoulement* obligations through other mechanisms under the Migration Act, policies and procedures.<sup>17</sup>

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

14 UN Committee Against Torture, *Concluding observations on the combined fourth and fifth periodic reports of Australia*, CAT/C/AUS/CO/4-5 (2014) [17]. See, also, UN Committee on Economic, Social and Cultural Rights, *Concluding observations on the fifth periodic report of Australia*, E/C.12/AUS/CO (2017) [17].

15 UN Human Rights Council, François Crépeau, *Report of the Special Rapporteur on the human rights of migrants on his mission to Australia and the regional processing centres in Nauru*, A/HRC/35/25/Add.3 (2017) [77]–[79],[82] and [118].

16 UN Human Rights Council, François Crépeau, *Report of the Special Rapporteur on the human rights of migrants on his mission to Australia and the regional processing centres in Nauru*, A/HRC/35/25/Add.3 (2017) [80].

17 Statement of compatibility (SOC), p. 10.

1.9 While it is welcome that the Australian government takes non-refoulement obligations seriously, it is unclear from the information provided what safeguards exist to ensure a person is not removed from Australia in violation of Australia's non-refoulement obligations. On a number of previous occasions, the committee has raised serious concerns about the adequacy of protections against the risk of refoulement in the context of the existing legislative regime.<sup>18</sup> In the context of the proposed application of the requirement under section 198AD of the Migration Act to remove a person as soon as reasonably practicable, it is unclear there is sufficient scope for independent and effective review of such a removal.<sup>19</sup> More generally, there do not appear to be sufficient legislative and procedural mechanisms to guard against the consequence of a person being sent to a regional processing country even in circumstances where there may be a risk of harm to the person in that country including in the context of immigration detention. Further, as noted above, the statement of compatibility does not specifically address the issue of whether sending someone to a regional processing country complies with Australia's non-refoulement obligations in the context of the reported conditions for individuals in regional processing countries.

**1.10 The committee notes that the bill would provide for the removal from Australia, or return to a regional processing country, of all persons brought to Australia under the medical transfer provisions once the purpose for which they were brought to Australia is complete. The committee has previously raised human rights concerns about the conditions for individuals transferred to regional processing countries.**

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18 See, for example, the committee's analysis of the Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014 in Parliamentary Joint Committee on Human Rights, *Fourteenth Report of the 44th Parliament* (October 2014) pp. 77-78. The UN Human Rights Committee in its Concluding observations on Australia recommended '[r]epealing section 197(c) of the *Migration Act 1958* and introducing a legal obligation to ensure that the removal of an individual must always be consistent with the State party's non-refoulement obligations': CCPR/C/AUS/CO/6 (2017), [34]. See, also, Parliamentary Joint Committee on Human Rights, *Report 1 of 2019* (12 February 2019) pp.14-17; *Report 12 of 2018* (27 November 2018) pp. 2-22; *Report 11 of 2018* (16 October 2018) pp. 84-90; *Thirty-sixth report of the 44th Parliament* (16 March 2016) pp. 196-202; *Report 12 of 2017* (28 November 2017) p. 92 and *Report 8 of 2018* (21 August 2018) pp. 25-28.

19 In relation to the requirement for independent, effective and impartial review, see *Agiza v Sweden*, UN Committee against Torture Communication No.233/2003 (2005) [13.7]; *Singh v Canada*, UN Committee against Torture Communication No.319/2007 (2011) [8.8]-[8.9]; *Josu Arkauz Arana v France*, UN Committee against Torture Communication No.63/1997 (2000); *Alzery v Sweden*, UN Human Rights Committee Communication No.1416/2005 (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.

**1.11 The committee seeks the minister's advice as to the compatibility of these measures with the obligation of non-refoulement and the right to an effective remedy, in particular:**

- **what are the conditions for such individuals in regional processing countries and is there a risk that such conditions could amount to torture or cruel, inhuman or degrading treatment or punishment;**
- **what safeguards are in place to ensure that a person is not removed from Australia to a regional processing country in contravention of Australia's non-refoulement obligations; and**
- **is there independent, impartial and effective review of any decision to remove the person from Australia.**

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### ***Right to health***

1.12 By repealing the medical transfer provisions, the measure engages and may limit the right to health.<sup>20</sup> This is because restricting access to a type of medical transfer to Australia may in turn restrict access to appropriate health care for those held under regional processing arrangements (in circumstances where Australia may owe human rights protection obligations, see paragraphs [1.14] to [1.15] below). The right to health is understood as the right to enjoy the highest attainable standard of physical and mental health, and requires available, accessible, acceptable and quality health care. 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). The right to health requires States parties to ensure the right of access to health facilities, goods and services on a non-discriminatory basis.<sup>21</sup>

1.13 In 2013 the committee raised concerns about the adequacy of access to health care and the right to health for those held under regional processing

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20 The measure may also engage and may limit the right to humane treatment in detention, the rights of children and the rights to protection of family. It is noted that this analysis does not address the rights of children noting that the Prime Minister announced that '[e]very asylum seeker child has now been removed from Nauru or has had their claim processed and has a clear path off the island': Prime Minister, *Media Release* (3 February 2019). <https://www.pm.gov.au/media/asylum-seeker-children-nauru>. Further the SOC p. 12 notes that '[n]o children have been transferred to Australia under section 198C of the Migration Act.'

21 International Covenant on Economic, Social and Cultural Rights, article 12(1).

arrangements.<sup>22</sup> More recently, the UN Committee on Economic, Social and Cultural Rights has expressed serious concerns about 'harsh conditions' in regional processing centres and 'limited access to basic services, including health care.'<sup>23</sup> It has called on Australia to halt its policy of offshore processing of asylum claims.<sup>24</sup> The UN Special Rapporteur on the human rights of migrants has also raised concerns about the health and health care of those held in regional processing countries including that 'protracted periods of closed detention and the uncertainty about the future reportedly creates serious physical and mental anguish and suffering'.<sup>25</sup>

1.14 In relation to the scope of Australia's human rights obligations, under international law Australia owes obligations to everyone within its territory but also to anyone located outside Australia over whom Australia is exercising power, effective control or who is otherwise subject to Australia's jurisdiction. In this respect, the statement of compatibility notes that persons in regional processing countries are outside Australia's territory. While the statement of compatibility acknowledges that there may be some exceptional circumstances where Australia has obligations for persons outside its territory, it states that 'the Government's position is that Australia does not exercise the degree of control necessary in regional processing countries to enliven Australia's international obligations',<sup>26</sup> which would include the right to health.

1.15 However, the 'power' or 'effective control' test in international law is essentially one of sufficient control. Therefore, whether Australia is exercising sufficient control and authority to amount to 'effective control' is a question of fact and degree in the particular circumstances. The committee has previously noted that Australia's involvement in the arrangements, upkeep and provision of services to persons transferred from Australia to regional processing countries is significant. In 2013 the committee concluded that this evidence demonstrated that Australia could be viewed as exercising 'effective control' of the arrangements relating to the

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22 See, Parliamentary Joint Committee on Human Rights, *Migration Legislation Amendment (Regional Processing and Other Measures) Act 2012 and related legislation: Ninth Report of 2013* (19 June 2013) p. 83.

23 UN Committee on Economic, Social and Cultural Rights, *Concluding observations on the fifth periodic report of Australia*, E/C.12/AUS/CO (2017) [17].

24 UN Committee on Economic, Social and Cultural Rights, *Concluding observations on the fifth periodic report of Australia*, E/C.12/AUS/CO (2017) [17].

25 UN Human Rights Council, François Crépeau, *Report of the Special Rapporteur on the human rights of migrants on his mission to Australia and the regional processing centres in Nauru*, A/HRC/35/25/Add.3 (2017) [73] and [77].

26 SOC, p. 9.

treatment of persons transferred to Manus Island or Nauru.<sup>27</sup> The UN Committee Against Torture has also found that those held in regional processing countries are under the 'effective control' of Australia as 'they were transferred by the State party to centres run with its financial aid and with the involvement of private contractors of its choice'.<sup>28</sup> The UN Human Rights Committee has also considered that 'the significant levels of control and influence exercised by [Australia] over the operation of the offshore regional processing centres, including over their establishment, funding and service provided therein, amount to such effective control.'<sup>29</sup> The UN Special Rapporteur on the human rights of migrants has further stated that '[t]he Government of Australia is ultimately accountable for any human rights violations that occur in the regional processing centres based in Nauru and Papua New Guinea.'<sup>30</sup> Noting that Australia has been held to be exercising effective control, it follows that as a matter of international law Australia also owes human rights obligations to those transferred to, and held in, regional processing countries, including in relation to the right to health.

1.16 In relation to the proposed repeal of the medical transfer provisions, the statement of compatibility addresses the right to health in relation to those persons currently present in Australia. It states that persons already transferred to Australia for a temporary purpose will continue to receive medical care in Australian medical facilities.<sup>31</sup> In relation to the right to health of those present in a regional processing country, the statement of compatibility explains:

The Bill will not affect the existing provisions for the temporary transfer of transitory persons for medical treatment in a third country. Section 198B provides a standing authority for individuals in need of medical care not available in the regional processing country to be brought to a third country, including Australia, for medical treatment.<sup>32</sup>

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27 See, Parliamentary Joint Committee on Human Rights, *Migration Legislation Amendment (Regional Processing and Other Measures) Act 2012 and related legislation: Ninth Report of 2013* (19 June 2013) p. 43. See, also, Legal and Constitutional Affairs References Committee, *Incident at the Manus Island Detention Centre from 16 February to 18 February 2014* (11 December 2014) pp. 131–142.

28 UN Committee Against Torture, *Concluding observations on the combined fourth and fifth periodic reports of Australia*, CAT/C/AUS/CO/4-5 (2014) [17]. See, also, UN Committee on Economic, Social and Cultural Rights, *Concluding observations on the fifth periodic report of Australia*, E/C.12/AUS/CO (2017) [17].

29 UN Human Rights Committee, *Concluding observations on the sixth periodic report of Australia*, CCPR/C/AUS/CO/6 (2017) [35].

30 UN Human Rights Council, François Crépeau, *Report of the Special Rapporteur on the human rights of migrants on his mission to Australia and the regional processing centres in Nauru*, A/HRC/35/25/Add.3 (2017) [73].

31 SOC, p. 13.

32 SOC, p. 13.

1.17 However, the committee is concerned that the repeal of the medical transfer provisions may constitute a backward step, that is, a retrogressive measure with respect to the level of attainment of right to health including access to health care. While the statement of compatibility points to the ongoing availability of section 198B of the Migration Act to allow for medical transfers, there is a serious concern that section 198B is likely to provide a lower level of attainment of the right to health and access to health care than the medical transfer provisions which are proposed to be repealed.<sup>33</sup> This is because the use of section 198B to bring a person requiring treatment to a third country including Australia is discretionary and may or may not be exercised. Further, it could potentially be used to transfer a person requiring medical attention to a third country that has a lower standard of health care than Australia.<sup>34</sup> Retrogressive measures, as a type of limitation, may be permissible under international human rights law provided that they address a legitimate objective and are rationally connected and proportionate to achieve that objective. The statement of compatibility did not address this issue and provided no justification as to whether any retrogressive measure is permissible. It also does not provide any evidence or reasoning as to the adequacy of any remaining arrangements under section 198B. As such, further information is required in order for the committee to complete its assessment of the human rights compatibility of the measure.

**1.18 The committee has previously raised concerns about the adequacy of access to health care and the right to health for those held under regional processing arrangements.**

**1.19 The committee seeks the minister's advice as to the compatibility of the measure with the right to health,<sup>35</sup> including:**

- **to what extent the repeal of the medical transfer provisions will restrict access to health care for those held on Nauru and Manus Island; and**
- **the adequacy and effectiveness of the remaining discretionary transfer provisions under section 198B of the *Migration Act 1958* in protecting the right to health.**

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33 Section 198B of the Migration Act provides that 'an officer may, for a temporary purpose, bring a transitory person to Australia from a country or place outside Australia'.

34 For a discussion of the Commonwealth's duty of care relating to offshore medical transfers under section 198B, see *Plaintiff S99/2016 v Minister for Immigration and Border Protection* [2016] FCA 483. By contrast for a discussion of the new medical transfer provisions that this bill proposes to repeal see, *CEU19 v Minister for Immigration, Citizenship and Multicultural Affairs* [2019] FCA 1050.

35 The committee's consideration of the compatibility of a measure which limits a right is assisted if the response explicitly addresses the limitation criteria set out in the committee's [Guidance Note 1](#), pp. 2-3.

## Advice only<sup>1</sup>

1.20 The committee reiterates its views as set out in its previous reports on the following bills. These bills have been reintroduced in relevantly substantially similar terms to those previously commented on:

- Australian Passports Amendment (Identity-matching Services) Bill 2019  
[Report 3 of 2018](#), pp. 41-51; [Report 5 of 2018](#), pp. 109-143.
- Counter-Terrorism Legislation Amendment (2019 Measures No. 1) Bill 2019<sup>2</sup>  
[Report 2 of 2019](#), pp. 27-37.
- Identity-matching Services Bill 2019  
[Report 3 of 2018](#), pp. 41-51; [Report 5 of 2018](#), pp. 109-143.

1.21 The committee notes that the following private members' and senators' bills appear to engage and may limit human rights. Should any of these bills proceed to further stages of debate, the committee may request further information from the legislation proponent as to the human rights compatibility of the bill:

- Aged Care Quality and Safety Commission Amendment (Worker Screening Database) Bill 2019
- Human Rights (Parliamentary Scrutiny) Amendment (Australian Freedoms) Bill 2019
- Human Services Amendment (Photographic Identification and Fraud Prevention) Bill 2019
- Ministers of State (Checks for Security Purposes) Bill 2019

1.22 Further, the committee draws the following bills and legislative instrument to the attention of the relevant minister on an advice only basis. The committee does not require a response to these comments.

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1 This section can be cited as: Parliamentary Joint Committee on Human Rights, Advice only, *Report 4 of 2019*; [2019] AUPJCHR 66.

2 The committee notes that it initially drew a number of human rights concerns to the attention of the Parliament in relation to the Counter-Terrorism Legislation Amendment Bill 2019 in its *Report 2 of 2019*. It also requested the Attorney-General's advice in relation to a number of human rights. The statement of compatibility to the present bill sets out further detail in response to the committee's *Report 2 of 2019* and, as such, the committee is not seeking the Attorney-General's response on this bill.

## Appropriation Bill (No. 1) 2019-2020

## Appropriation Bill (No. 2) 2019-2020

## Appropriation (Parliamentary Departments) Bill (No. 1) 2019-2020<sup>1</sup>

<b>Purpose</b>	Seeks to appropriate money from the Consolidated Revenue for services
<b>Portfolio</b>	Finance
<b>Introduced</b>	House of Representatives, 14 February 2019
<b>Rights</b>	Multiple rights; economic, social and cultural; civil and political; equality and non-discrimination
<b>Status</b>	Advice only

### Background

1.23 The committee has considered the human rights implications of appropriations bills in a number of previous reports,<sup>2</sup> and such bills have been the subject of correspondence and meetings with the Department of Finance.<sup>3</sup> In its *Report 2 of 2019* the committee continued to request that statements of compatibility for future appropriations bills contain an assessment of human rights

1 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Appropriation Bill (No. 1) 2019-2020, Appropriation Bill (No. 2) 2019-2020, Appropriation (Parliamentary Departments) Bill (No. 1) 2019-2020, *Report 4 of 2019*; [2019] AUPJCHR 67.

2 See, Parliamentary Joint Committee on Human Rights, *Third Report of 2013* (13 March 2013) p. 65; *Seventh Report of 2013* (5 June 2013) p. 21; *Third Report of the 44<sup>th</sup> Parliament* (4 March 2014) p. 3; *Eighth Report of the 44<sup>th</sup> Parliament* (24 June 2014) pp. 5 and 31; *Twentieth Report of the 44<sup>th</sup> Parliament* (18 March 2015) p. 5; *Twenty-third Report of the 44<sup>th</sup> Parliament* (18 June 2015) p. 13; *Thirty-fourth Report of the 44<sup>th</sup> Parliament* (23 February 2016) p. 2; *Report 2 of 2017* (21 March 2017) p. 44; *Report 5 of 2017* (14 June 2017) p. 42; *Report 3 of 2018* (27 March 2018) p. 97; *Report 5 of 2018* (19 June 2018) pp. 49-52; *Report 2 of 2019* (2 April 2019) pp. 106-111.

3 During the 44<sup>th</sup> Parliament, the Minister for Finance invited the committee to meet with departmental officials about this issue, see Parliamentary Joint Committee on Human Rights, *Eighth Report of the 44<sup>th</sup> Parliament* (June 2014) pp. 5-7, 33. In its *Report 5 of 2018* the committee recommended that departmental officials meet with the committee secretariat on behalf of the committee to develop workable approaches to statements of compatibility for appropriations bills and sought the advice of the minister as to this course of action. Departmental officials met with the committee secretariat on 30 October 2018, see Parliamentary Joint Committee on Human Rights, *Report 2 of 2019* (2 April 2019) pp. 106 -111.

compatibility which met the standards outlined in the committee's *Guidance Note 1*. It recommended that departmental officials and the committee secretariat on behalf of the committee continue to liaise regarding workable approaches to statements of compatibility for appropriations bills.<sup>4</sup>

1.24 On 25 July 2019 the committee received correspondence from the Department of Finance regarding statements of compatibility for appropriations bills. This correspondence is discussed below and is available in full on the committee's website.<sup>5</sup>

### **Appropriation bills: engagement, promotion and limitation of human rights**

1.25 The committee has previously noted that proposed government expenditure to give effect to particular policies may engage and limit and/or promote a range of human rights. This includes rights under the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR).<sup>6</sup>

1.26 The committee has previously noted that:

the allocation of funds via appropriations bills is susceptible to a human rights assessment that is directed at broader questions of compatibility—namely, their impact on progressive realisation obligations and on vulnerable minorities or specific groups. In particular, the committee considers there may be specific appropriations bills or specific appropriations where there is an evident and substantial link to the carrying out of a policy or program under legislation that gives rise to human rights concerns.<sup>7</sup>

1.27 Under international human rights law, Australia has obligations to respect, protect and fulfil human rights. These include specific obligations to *progressively realise* economic, social and cultural rights using the *maximum of resources available*;<sup>8</sup> and a corresponding duty to refrain from taking *retrogressive measures*,

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4 Parliamentary Joint Committee on Human Rights, *Report 2 of 2019* (2 April 2019) pp. 106 -111.

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

6 See, Parliamentary Joint Committee on Human Rights, *Third Report of 2013* (13 March 2013); *Seventh Report of 2013* (5 June 2013); *Third Report of the 44<sup>th</sup> Parliament* (4 March 2014); and *Eighth Report of the 44<sup>th</sup> Parliament* (24 June 2014), *Report 5 of 2017* (14 June 2017) p. 42.

7 Parliamentary Joint Committee on Human Rights, *Twenty-third Report of the 44<sup>th</sup> Parliament* (18 June 2015) p. 17.

8 See, United Nations (UN) Office of the High Commissioner for Human Rights, *Manual on Human Rights Monitoring* at: <http://www.ohchr.org/Documents/Publications/Chapter20-48pp.pdf>; International Covenant on Economic, Social and Cultural Rights (ICESCR), article 2(1).

or backwards steps, in relation to the realisation of these rights. ESC rights may be particularly affected by appropriations bills. Accordingly, any reduction in allocated government funding for measures which realise economic, social and cultural rights, such as specific health and education services, may be considered as retrogressive in respect of the attainment of such rights and, accordingly, must be justified for the purposes of international human rights law.

### **Statements of compatibility for appropriations bills**

1.28 The current bills are accompanied by brief statements of compatibility which note that the High Court has stated that, beyond authorising the withdrawal of money for broadly identified purposes, appropriations Acts do not or do not ordinarily 'confer authority to engage in executive action.' The statements of compatibility state that, in particular, appropriations Acts either do not, or do not ordinarily, 'confer legal authority to spend'.<sup>9</sup> The statements of compatibility conclude that, as the legal effect of appropriations Acts are limited in this way, the bills are not seen as engaging, or otherwise affecting, human rights.<sup>10</sup> The statements of compatibility also state that detailed information on the relevant appropriations are contained in the portfolio Budget statements.<sup>11</sup>

1.29 However, it has been the committee's longstanding view that the cited view of the High Court, that appropriations Acts do not create rights or duties as a matter of Australian law, does not address the fact that appropriations may nevertheless engage human rights for the purposes of international law, as reduced appropriations for particular areas may be regarded as retrogressive, or as limiting rights. The appropriation of funds also facilitates the taking of actions which may affect both the progressive realisation of, and the failure to fulfil, Australia's obligations under the treaties listed in the *Human Rights (Parliamentary Scrutiny) Act 2011*. That is, appropriation bills may have an impact on the implementation of human rights obligations and potential violations.

1.30 The committee has accordingly previously expressed concerns that the statements of compatibility for appropriations bills do not meet the standards outlined in the committee's *Guidance Note 1* and the requirement that a statement

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9 Appropriation Bill (No. 1) 2019-2020, Explanatory Memorandum (EM), Statement of compatibility (SOC) p. 4 (Bill No. 1, SOC); Appropriation Bill (No. 2) 2019-2020, EM, SOC p. 4 (Bill No. 2, SOC); Appropriation (Parliamentary Departments) Bill (No. 1) 2019-2020, EM, SOC p. 4 (Parliamentary Bill, SOC). Such statements are broadly similar to the SOC's which accompanied previous appropriations bills: see, for example, Appropriation Bill (No. 4) 2018-2019 (Bill No. 4): EM, SOC, p. 4; Appropriation Bill (No. 3) 2018-2019: EM, SOC, p. 4 (Bill No. 3); Appropriation (Parliamentary Departments) Bill (No. 2) 2018-2019 (Parliamentary Departments): EM, SOC, p. 4.

10 Bill No. 1, EM, SOC, p. 4; Bill No. 2, EM, SOC, p. 4; Parliamentary Departments, EM, SOC, p. 4.

11 Bill No. 1, EM, SOC, p. 4; Bill No. 2, EM, SOC, p. 4; Parliamentary Departments, EM, SOC, p. 4.

of compatibility contain an *assessment* of the measures.<sup>12</sup> As previously stated, while such bills present some difficulties for human rights assessments because they generally include high-level appropriations for a wide range of outcomes and activities across many portfolios, the allocation of funds via appropriations bills is susceptible to a human rights assessment directed at questions of compatibility.<sup>13</sup>

1.31 The committee has previously recommended that the statement of compatibility contain an assessment of:

- overall trends in the progressive realisation of economic, social and cultural rights (including any retrogressive trends or measures);
- the impact of budget measures (such as spending or reduction in spending) on vulnerable groups (women, Aboriginal and Torres Strait Islander Peoples, persons with disabilities and children);<sup>14</sup> and
- key individual measures which engage human rights including a brief assessment of their human rights compatibility.

1.32 In relation to overall trends and Australia's obligations to progressively realise economic, social and cultural rights, the committee recommended that relevant questions to guide an assessment could include:

- do funding trends indicate the progressive realisation of human rights using the maximum of resources available (such as the right to health, education, housing or social security)? Is there an increase in funding over time in real terms?
- are there any trends that increase expenditure in such a way that would benefit vulnerable groups (see further below)?
- are there any trends towards a reduction in the allocation of funding that may impact on the realisation of human rights (such as the right to health, education, housing or social security)?
- if so, is this reduction a backward step, that is, a retrogressive trend, in the realisation of such human rights, or is there another explanation?
- if this reduction is a backward step, is the retrogressive trend permissible under international human rights law?

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12 See, *Human Rights (Parliamentary Scrutiny) Act 2011*, section 8.

13 Parliamentary Joint Committee on Human Rights, *Report 2 of 2019* (2 April 2019) pp. 106 -111.

14 Spending or reduction of spending may have disproportionate impacts on such groups and accordingly may engage the right to equality and non-discrimination.

1.33 In relation to the impact of spending or reduction in spending on vulnerable groups, the committee recommended that some relevant considerations may include:

- are there any specific budget measures that may disproportionately impact on particular groups (either directly or indirectly)?
- are there any budget measures or trends in spending over time that seek to fulfil the right to equality and non-discrimination for particular groups?<sup>15</sup>

1.34 As part of its project to improve statements of compatibility, the committee has also previously provided additional resources to the Department of Finance to assist it in preparing statements of compatibility for appropriations bills including relevant examples.<sup>16</sup>

#### *Correspondence from the Department of Finance*

1.35 In relation to the current appropriations bills, the Department of Finance provided an explanation as to why the Department would not be substantially changing its approach to statements of compatibility for appropriations bills:

Since our most recent discussions, we have reviewed the content of the statements of compatibility included in the explanatory memoranda accompanying the annual Appropriation Bills and have sought legal advice. Through this process we have affirmed our view of the limited legal operation of the annual Appropriation Acts. In this respect, the annual Appropriation Acts only perform the function of authorising the withdrawal of money from the Consolidated Revenue Fund and of identifying the purposes for which that money may be withdrawn.

Accordingly, we hold the view that the annual Appropriation Acts do not confer any legal authority to spend. We consider that this authority must

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15 Parliamentary Joint Committee on Human Rights, *Report 2 of 2019* (2 April 2019) pp. 106 -111.

16 There are a range of resources to assist in the preparation of human rights assessments of budgets: see, for example, UN Office of the High Commissioner for Human Rights, *Realising Human Rights through Government Budgets* (2017) at: <https://www.ohchr.org/Documents/Publications/RealizingHRThroughGovernmentBudgets.pdf>; South African Human Rights Commission, *Budget Analysis for Advancing Socio-Economic Rights* (2016) at: <http://spii.org.za/wp-content/uploads/2018/05/2016-SPII-SAHRC-Guide-to-Budget-Analysis-for-Socio-Economic-Rights.pdf>; Ann Blyberg and Helena Hofbauer, *Article 2 and Governments' Budgets* (2014) at: <https://www.internationalbudget.org/wp-content/uploads/Article-2-and-Governments-Budgets.pdf>; Diane Elson, *Budgeting for Women's Rights: Monitoring Government Budgets for Compliance with CEDAW*, (UNIFEM, 2006) at: <https://www.internationalbudget.org/wp-content/uploads/Budgeting-for-Women%E2%80%99s-Rights-Monitoring-Government-Budgets-for-Compliance-with-CEDAW.pdf>; Rory O'Connell, Aoife Nolan, Colin Harvey, Mira Dutschke, Eoin Rooney, *Applying an International Human Rights Framework to State Budget Allocations: Rights and Resources* (Routledge, 2014).

be derived from either the Constitution or from other legislation (often a mechanism is provided through s 32B of the *Financial Framework (Supplementary Powers) Act 1997*). The statements of compatibility for the annual Appropriation Bills have been drafted accordingly.

1.36 However, consistent with the committee's longstanding view, as noted above at paragraph [1.29], this technical response does not fully address the fact that, as a matter of international law, authorising appropriation of funds is part of a process that facilitates the taking of actions that may affect human rights. As such, the statements of compatibility for appropriations bills continue to fall short of the committee's expectations as set out in its *Guidance Note 1*.

1.37 Where proposed budget measures require further legislation in order to be given effect, the committee is required to examine the human rights compatibility of such legislation individually, as well as any information provided in the statement of compatibility accompanying such legislation. This provides some human rights scrutiny of budget measures. In relation to some legislation in this category, the Department of Finance's response states that they are 'currently working to ensure that legislative instruments that do authorise expenditure, better meet the requirements of the *Human Rights (Parliamentary Scrutiny) Act 2011*'.<sup>17</sup> It is welcome that additional information will be provided in relation to these types of instruments. However, the absence of an assessment of issues of human rights compatibility at the appropriations level may still create challenges, including by making it more difficult to assess where Australia is doing *well* with respect to realising its human rights obligations. This is because it may be difficult to assess questions of whether Australia is progressively realising economic, social and cultural rights to its *maximum available resources* or whether a measure is a *retrogressive measure* without the benefit of an appropriations level assessment. For example, a retrogressive measure in an individual bill may not, in fact, be retrogressive when understood within the budgetary context as a whole.

**1.38 As with previous appropriations bills, the statements of compatibility for the current bills provide no assessment of their compatibility with human rights, on the basis that they do not engage or otherwise impact on human rights.**

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17 As part of its project to improve statements of compatibility, in December 2018 the committee wrote to minister regarding the adequacy of information contained in statements of compatibility which amend the *Financial Framework (Supplementary Powers) Regulations 1997* (FF(SP) Regulations) to establish legislative authority for Commonwealth spending on one or more government policies or programs. Following this correspondence, in February 2019, the Minister for Finance, Senator the Hon Mathias Cormann, responded to the committee to advise that the Department of Finance is working with other departments to ensure sufficient information is included in statements of compatibility for legislative instruments which amend the FF(SP) Regulations.

**1.39** As the committee has previously noted, the appropriation of funds may engage and potentially limit or promote a range of human rights that fall under the committee's mandate. In this respect, the committee's longstanding view is that such bills are capable of a human rights assessment and the statement of compatibility should provide this assessment.

**1.40** Accordingly, the committee continues to recommend that statements of compatibility for future appropriations bills should contain an assessment of human rights compatibility which meets the standards outlined in the committee's *Guidance Note 1* including with reference to the matters outlined at paragraph [1.31].

**1.41** The committee draws this matter to the attention of the minister and the Parliament.

## Crimes Legislation Amendment (Police Powers at Airports) Bill 2019<sup>1</sup>

<b>Purpose</b>	Seeks to amend the <i>Crimes Act 1914</i> to introduce new powers at major airports, including the power for constables and protective service officers to give directions to persons to provide identification, move-on, or stop
<b>Portfolio</b>	Home Affairs
<b>Introduced</b>	House of Representatives, 4 July 2019
<b>Rights</b>	Privacy; freedom of movement; liberty; equality and non-discrimination; freedom of expression; freedom of assembly
<b>Previous reports</b>	Report 11 of 2018 and Report 12 of 2018
<b>Status</b>	Advice only

### Background

1.42 The committee initially reported on the Crimes Legislation Amendment (Police Powers at Airports) Bill 2018 (2018 bill) in its *Report 11 of 2018* and concluded its examination of the bill in its *Report 12 of 2018* (previous reports).<sup>2</sup> The Crimes Legislation Amendment (Police Powers at Airports) Bill 2019 (2019 bill) reintroduces the 2018 bill with amendments.

### Increased police powers at airports

1.43 The 2019 bill seeks to amend the *Crimes Act 1914* to expand the powers of police, and introduce new powers for protective service officers (PSO), to require identity information, give move-on directions and give stop and directions powers to persons at major airports.<sup>3</sup> Such powers would enable constables and PSOs to direct persons at airports to produce identity documents, vacate the airport or direct them not to take a flight.

1.44 The proposed powers can be exercised on two main grounds:

1 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Crimes Legislation Amendment (Police Powers at Airports) Bill 2019, *Report 3 of 2019*; [2019] AUPJCHR 68.

2 Parliamentary Joint Committee on Human Rights, *Report 11 of 2018* (16 October 2018), pp. 12-15 and Parliamentary Joint Committee on Human Rights, *Report 12 of 2018* (27 November 2018), pp. 55-76. The committee previously concluded that the measures appeared to be compatible with the right to liberty and the right to equality and non-discrimination. The committee recommended that the use of the powers be monitored by the government to ensure the exercise of the powers, in practice, is compatible with the right to equality and non-discrimination.

3 Schedule 1, item 1, proposed sections 3UP, 3UQ and 3US.

- where the constable or PSO suspects on reasonable grounds that the person has committed, is committing, or will commit an offence,<sup>4</sup> or it is necessary to prevent or disrupt criminal activity; or
- where the constable or PSO considers on reasonable grounds that it is necessary to safeguard the 'public order and safe operation' of a major airport.

1.45 Proposed section 3UN gives a definition of 'public order and safe operation' as meaning the public order, the safety of persons and the safe operation of the airport and all flights to and from the airport. It also provides:

However, the exercise of a person's right to engage lawfully in advocacy, protest, dissent or industrial action is not, by itself, to be regarded as prejudicial to the public order and safe operation of a major airport.<sup>5</sup>

1.46 In contrast, the 2018 bill provided that the same proposed powers could be exercised when a person was suspected of committing an offence or to prevent criminal activity, but also where it was considered on reasonable grounds necessary to safeguard 'aviation security'. 'Aviation security' was defined broadly as including the 'good order and safe operation' of a major airport and flights to and from the airport.<sup>6</sup> 'Good order' was not defined in the 2018 bill.

1.47 In its previous reports the committee noted that the breadth of the definition of 'aviation security', which included the 'good order' of a major airport, raised concerns that the power would apply to a broader range of conduct than was strictly necessary to fulfil the legitimate objectives of the 2018 bill. As such, it concluded that there was a risk that the powers may operate in a way that may not be a proportionate limitation on the rights to privacy, freedom of movement, freedom of expression and freedom of assembly. The new narrower definition of 'public order and safe operation' in the 2019 bill appears to address these human rights concerns.<sup>7</sup> However, it is noted that the proposed powers to require identity information and issue move on directions remain serious from the perspective of human rights. If the bill is passed, continued monitoring of these powers, in practice,

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4 This includes offences against a law of the Commonwealth or a law of a State having a federal aspect, punishable by imprisonment for 12 months or more.

5 Schedule 1, item 1, proposed section 3UN(2).

6 See Schedule 1, item 2 of the Crimes Legislation Amendment (Police Powers at Airports) Bill 2018.

7 In the Second Reading Speech to the Crimes Legislation Amendment (Police Powers at Airports) Bill 2019, the Minister for Home Affairs noted: 'The amendments incorporated into this bill are also consistent with the views expressed by the Parliamentary Joint Committee on Human Rights and the Senate Standing Committee for the Scrutiny of Bills as part of their inquiries into the bill.'

would assist to ensure that they are only exercised in a way that is compatible with human rights.

**1.48 The committee welcomes the changes to the Crimes Legislation Amendment (Police Powers at Airports) Bill 2019 which provide that safeguarding the 'public order and safe operation' of a major airport does not apply, by itself, to persons exercising their right to lawfully engage in advocacy, protest, dissent or industrial action. The committee considers these changes adequately address the concerns raised by the committee in its previous reports in relation to the scope of the powers to issue identity or move on directions. However, noting the potentially serious consequences of issuing such directions, the committee recommends that, should the bill be passed, the government monitor the use of the powers to ensure that, in practice, their use is compatible with human rights.**

## Social Security (Administration) (Trial of Cashless Welfare Arrangements) (Declinable Transactions and Welfare Restricted Bank Account) Determination 2019 [F2019L00911]<sup>65</sup>

<b>Purpose</b>	Sets out the kind of bank account to be maintained by a trial participant, or voluntary participant, of cashless welfare arrangements and the kinds of businesses in relation to which transactions involving money in such an account may be declined by a financial institution.
<b>Portfolio</b>	Social Services
<b>Authorising legislation</b>	<i>Social Security (Administration) Act 1999</i>
<b>Last day to disallow</b>	15 sitting days after tabling (tabled in the Senate and the House of Representatives on 2 July 2019). Notice of motion to disallow must be given by 16 September 2019 <sup>66</sup>
<b>Rights</b>	Social security, private life, equality and non-discrimination
<b>Status</b>	Advice only

### Cashless welfare trial

1.49 The Social Security (Administration) (Trial of Cashless Welfare Arrangements) (Declinable Transactions and Welfare Restricted Bank Account) Determination 2019 (the instrument) provides for the kind of bank accounts to be maintained by persons subject to the cashless welfare trial and sets out the limitations to be placed on such

65 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Social Security (Administration) (Trial of Cashless Welfare Arrangements) (Declinable Transactions and Welfare Restricted Bank Account) Determination 2019, *Report 4 of 2019*; [2019] AUPJCHR 69.

66 In the event of any change to the Senate or House's sitting days, the last day for the notice would change accordingly.

bank accounts in order to regulate spending of the restricted component.<sup>67</sup> In doing so, the instrument supports the operation of the cashless welfare trial to 30 June 2020.<sup>68</sup>

1.50 The cashless welfare trial, which is being undertaken only in certain geographical areas,<sup>69</sup> quarantines 80 per cent of an individual's eligible welfare payments to a debit card linked to a 'welfare restricted bank account'.<sup>70</sup> The intention is that 80 per cent of a participant's welfare payments cannot be used to purchase alcoholic beverages, conduct gambling, or obtain cash-like products (such as gift cards) which could be used to do so.

1.51 The committee has previously considered the trial of cashless welfare arrangements and has observed that the arrangements engage and limit a number of human rights.<sup>71</sup>

### ***Rights to equality and non-discrimination, social security and private life***

1.52 As the committee has previously noted, by compulsorily quarantining the welfare payments of particular individuals, and restricting their ability to make decisions about spending their welfare payments at some businesses, the cashless welfare trial engages and limits the rights to:

- equality and non-discrimination;
- social security; and

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67 It replaces references to 'gift cards, store cards or vouchers' with the term 'cash-like product', which is defined in section 124PQA of the *Social Security (Administration) Act 1990* to include gift cards, store cards, vouchers or similar, money orders, postal orders or similar, and digital currency. It also removes a list of businesses in the geographical catchment area of the cashless welfare trial (from which alcohol could be procured or gambling undertaken) as being establishments from which transactions may be declined, as well as declaring that the purchase of online money orders at Australia Post are declinable transactions. The instrument repeals and replaces the *Social Security (Administration) (Trial – Declinable Transactions and Welfare Restricted Bank Account) Determination 2018*, which this committee has previously considered; see, Parliamentary Joint Committee on Human Rights, *Report 8 of 2018* (21 August 2018), pp. 48-52.

68 Explanatory Statement, p. 2.

69 *Social Security (Administration) Act 1990*, sections 124PG-124PH.

70 *Social Security (Administration) Act 1990*, sections 124PD and 124PL.

71 See, Parliamentary Joint Committee on Human Rights, *Report 2 of 2019* (2 April 2019), pp. 146-152; *Report 8 of 2018* (21 August 2018), pp. 37-52; *Report 6 of 2018* (26 June 2018), pp. 30-43; *Report 1 of 2018* (6 February 2018), pp. 134-137; *Report 12 of 2017* (28 November 2017), pp. 50-52; *Report 11 of 2017* (17 October 2017), pp. 126-137; *Report 9 of 2017*, pp. 34-40; *Report 8 of 2017* (5 September 2017), pp. 122-125; *Report 5 of 2017*, pp. 31-33; *Report 8 of 2016* (14 June 2017), pp. 53-54; *Report 7 of 2016* (11 October 2016), pp. 58-61.

- private life.<sup>72</sup>

1.53 These rights are discussed in detail in the context of the income management regime more broadly in the committee's *2016 Review of Stronger Futures measures*.<sup>73</sup> These rights may be subject to permissible limitations where those limitations pursue a legitimate objective, and are rationally connected to (that is, effective to achieve) and proportionate to that objective.

1.54 The statement of compatibility acknowledges that the instrument, in supporting arrangements for the cashless debit card trial, engages the rights to social security and privacy, and provides the same justification for the measures as previously considered by the committee. In particular, the statement of compatibility explains that the objectives of the cashless debit card are to reduce the amount of some restrictable payments available to be spent on alcohol, gambling and illegal drugs, to determine whether such a reduction decreases violence or harm in the trial areas, and to encourage socially responsible behaviour. It also states that the program does not detract from a person's eligibility to receive welfare, or reduce the total amount of their entitlement, and that the limitation on the right to respect for private life is directly related to efforts to reduce high levels of social harm in the targeted areas.<sup>74</sup>

1.55 The statement of compatibility does not address the compatibility of this measure with the right to equality and non-discrimination.<sup>75</sup> This is despite the committee's previous findings that such a measure, in this context, engages and limits the right to equality and non-discrimination, and may in fact be incompatible with the enjoyment of this right.<sup>76</sup>

1.56 The committee has previously accepted that the cashless welfare trial measures may pursue a legitimate objective,<sup>77</sup> however, it has raised concerns as to whether the measures are rationally connected to, and proportionate to this

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72 See, for example, Parliamentary Joint Committee on Human Rights, *Report 8 of 2018* (21 August 2018) p. 48.

73 Parliamentary Joint Committee on Human Rights, *2016 Review of Stronger Futures measures* (16 March 2016) pp. 43-63.

74 Statement of compatibility, pp. 2-3. The statement of compatibility also states that the trial will not impact on the right to self-determination and will contribute to an adequate standard of living.

75 The statement of compatibility to the Social Security (Administration) (Trial – Declinable Transactions and Welfare Restricted Bank Account) Determination 2018 did address the right to equality and non-discrimination.

76 See, Parliamentary Joint Committee on Human Rights, *Report 8 of 2018* (21 August 2018) p. 48.

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

objective.<sup>78</sup> The committee has found that the measures associated with the cashless welfare trial may not be compatible with the rights to private life, social security, and to equality and non-discrimination.<sup>79</sup> This instrument, in supporting the arrangements for the cashless welfare trial raises similar human rights concerns.

**1.57 As this instrument supports arrangements for the cashless welfare trial, the committee reiterates its previous human rights concerns regarding this trial, in particular noting the effect of the cashless welfare measures on the rights to equality and non-discrimination, social security and private life. The committee draws its human rights scrutiny concerns to the attention of the minister and the Parliament.**

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

79 See, for example, Parliamentary Joint Committee on Human Rights, *Report 8 of 2018* (21 August 2018) p. 48.

## Bills and instruments with no committee comment<sup>1</sup>

1.58 The committee has no comment in relation to the following bills which were introduced into the Parliament, or restored to the notice paper, between 29 July and 1 August 2019, or which were previously deferred. This is on the basis that the bills do not engage, or only marginally engage, human rights; promote human rights; and/or permissibly limit human rights:<sup>2</sup>

- Australian Broadcasting Corporation Amendment (Rural and Regional Measures) Bill 2019
- Combatting Child Sexual Exploitation Legislation Amendment Bill 2019<sup>3</sup>
- Constitution Alteration (Freedom of Expression and Freedom of the Press) 2019 [No. 2]
- Constitution Alteration (Water Resources) 2019 [No. 2]
- Family Assistance Legislation Amendment (Extend Family Assistance to ABSTUDY Secondary School Boarding Students Aged 16 and Over) Bill 2019
- Inspector-General of Live Animal Exports Bill 2019
- Landholders' Right to Refuse (Gas and Coal) Bill 2015
- New Skilled Regional Visas (Consequential Amendments) Bill 2019
- Social Security (Administration) Amendment (Cashless Welfare) Bill 2019<sup>4</sup>
- Treasury Laws Amendment (Ending Grandfathered Conflicted Remuneration) Bill 2019

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1 This section can be cited as: Parliamentary Joint Committee on Human Rights, Bills and instruments with no committee comment, *Report 4 of 2019*; [2019] AUPJCHR 70.

2 Inclusion in the list is based on an assessment of the bill and relevant information provided in the statement of compatibility accompanying the bill. The committee may have determined not to comment on a bill notwithstanding that the statement of compatibility accompanying the bill may be inadequate. Where the committee considers that a statement of compatibility is inadequate it may write to the relevant minister setting out its concerns, see Parliamentary Joint Committee on Human Rights, *Annual Report 2018*, pp. 36-37.

3 Previously deferred, see Parliamentary Joint Committee on Human Rights, *Report 3 of 2019* (30 July 2019) p. 23.

4 Previously deferred, see Parliamentary Joint Committee on Human Rights, *Report 3 of 2019* (30 July 2019) p. 23. The committee has determined not to comment on this bill as it provides for individuals to apply to exit the cashless debit card trial. However, the committee notes that underlying concerns regarding the human rights implications of the cashless debit card trial and income management remain: see, most recently, pp. 21-24 of this report and Parliamentary Joint Committee on Human Rights, *Report 2 of 2019* (2 April 2019) pp. 146-152.

- Veterans' Affairs Legislation Amendment (Partner Service Pension and Other Measures) Bill 2019

1.59 The committee has examined the legislative instruments registered on the Federal Register of Legislation between 5 June 2019 and 1 August 2019.<sup>5</sup> The committee has reported on one legislative instrument from this period earlier in this chapter. The committee has determined not to comment on the remaining instruments from this period on the basis that the instruments do not engage, or only marginally engage, human rights; promote human rights; and/or permissibly limit human rights.

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5 The committee examines all legislative instruments registered in the relevant period, as listed on the Federal Register of Legislation. To identify all of the legislative instruments scrutinised by the committee during this period, select 'legislative instruments' as the relevant type of legislation, select the event as 'assent/making', and input the relevant registration date range in the Federal Register of Legislation's advanced search function, available at: <https://www.legislation.gov.au/AdvancedSearch>.

## **Chapter 2**

### **Concluded matters**

2.1 The committee has deferred its consideration of ministerial responses.

**Mr Ian Goodenough MP**

**Chair**



## Appendix 1

### Deferred legislation<sup>1</sup>

3.1 The committee has deferred its consideration of the **National Integrity Commission Bill 2019 [No. 2]** and continues to defer its consideration of the **Discrimination Free Schools Bill 2018**.<sup>2</sup>

3.2 The committee also continues to defer its consideration of the **Quality of Care Amendment (Minimising the Use of Restraints) Principles 2019 [F2019L00511]**, as it is currently conducting an inquiry into this instrument. The committee notes that the disallowance period for the instrument ends in the House of Representatives on 12 September 2019 and in the Senate on 16 September 2019. The committee notes that the disallowance procedure is the primary mechanism by which the Parliament may exercise control over delegated legislation. As the committee has not yet finalised its inquiry into the instrument, the committee has resolved to place protective notices of motion to disallow the instrument, to extend the disallowance period by a further 15 sitting days in order to protect parliamentary control over the instrument pending completion of the committee's inquiry.

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1 This appendix can be cited as: Parliamentary Joint Committee on Human Rights, *Deferred legislation, Report 4 of 2019*; [2019] AUPJCHR 71.

2 Previously deferred in Parliamentary Joint Committee on Human Rights, *Report 3 of 2019* (30 July 2019) p. 23.