Parliamentary Joint Committee on Human Rights

Human rights scrutiny report

Report 4 of 2020

9 April 2020

© Commonwealth of Australia 2020

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 report can be cited as: Parliamentary Joint Committee on Human Rights, *Report 4 of 2020*; [2020] AUPJCHR 42.

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

Senator the Hon Sarah Henderson, Chair	Victoria, LP
Mr Graham Perrett MP, Deputy Chair	Moreton, Queensland, ALP
Senator Patrick Dodson	Western Australia, ALP
Mr Steve Georganas MP	Adelaide, South Australia, ALP
Mr Ian Goodenough MP	Moore, Western Australia, LP
Senator Nita Green	Queensland, ALP
Ms Celia Hammond MP	Curtin, Western Australia, LP
Senator Nick McKim	Tasmania, AG
Senator Andrew McLachlan CSC	South Australia, LP
Dr Anne Webster	Mallee, Victoria, Nats

Secretariat

Anita Coles, Committee Secretary
Sevda Clark, Principal Research Officer
Charlotte Fletcher, Principal Research Officer
Ingrid Zappe, Legislative Research Officer

External legal adviser

Associate Professor Jacqueline Mowbray

Table of contents

Membership of the committee .... **ii**

Committee information .... **vii**

Chapter 1—New and continuing matters **1**

Response required **2**

Census and Statistics Amendment (Statistical Information) Regulations 2020 [F2020L00109] 2

Defence Amendment (2020 Measures No. 1) Regulations 2020 [F2020L00120] 6

Telecommunications Legislation Amendment (International Production Orders) Bill 2020 9

Advice only 27

Bills and instruments with no committee comment 28

Chapter 2—Concluded matters **31**

Anti-Money Laundering and Counter-Terrorism Financing and Other Legislation Amendment Bill 2019 31

Australian Sports Anti-Doping Authority Amendment (Enhancing Australia's Anti-Doping Capability) Bill 2019 40

Australian Sports Anti-Doping Authority Amendment (Sport Integrity Australia) Bill 2019 49

Aviation Transport Security Amendment (Security Controlled Airports) Regulations 2019 [F2019L01656] 59

Fair Work (Registered Organisations) Amendment (Ensuring Integrity No. 2) Bill 2019 68

Legislation (Deferral of Sunsetting—Sydney Harbour Federation Trust Regulations) Certificate 2019 [F2019L01211] 98

National Radioactive Waste Management Amendment (Site Specification, Community Fund and Other Measures) Bill 2020 103

National Redress Scheme for Institutional Child Sexual Abuse Amendment (2019 Measures No. 1) Rules 2019 [F2019L01491] and National Redress Scheme for Institutional Child Sexual Abuse Amendment (2020 Measures No. 1) Rules 2020 [F2020L00096] 122

National Vocational Education and Training Regulator Amendment (Governance and Other Matters) Bill 2020 131

Native Title Legislation Amendment Bill 2019 139

Tertiary Education Quality and Standards Agency Amendment (Prohibiting Academic Cheating Services) Bill 2019 149

Treasury Laws Amendment (Registries Modernisation and Other Measures) Bill 2019 and related bills 163

Dissenting Report by Labor and Greens Members 171

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.[1] A description of the rights most commonly arising in legislation examined by the committee is available on the committee's website.[2]

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 **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.

---

1 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).

2 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

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.[3]

---

3 See *Guidance Note 1 – Drafting Statements of Compatibility*, https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Guidance_Notes_and_Resources

Chapter 1[1]

New and continuing matters

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

- bills introduced into the Parliament between 24 February and 5 March 2020;
- legislative instruments registered on the Federal Register of Legislation between 6 February and 4 March 2020.[2]

---

1 This section can be cited as Parliamentary Joint Committee on Human Rights, New and continuing matters, *Report 4 of 2020*; [2020] AUPJCHR 43.

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.

Response required

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

Census and Statistics Amendment (Statistical Information) Regulations 2020 [F2020L00109][1]

Purpose	This instrument amends the Census and Statistics Regulation 2016 to update the list of topics in relation to which the Statistician shall collect statistical information
Portfolio	Treasury
Authorising legislation	*Census and Statistics Act 1905*
Last day to disallow	15 sitting days after tabling (tabled in the House of Representatives on 11 February 2020 and in the Senate on 12 February 2020. Notice of motion to disallow must be given by 12 May 2020 in the House of Representatives and by 17 June 2020 in the Senate[2]
Right	Privacy
Status	Seeking additional information

Collection of personal information

1.3 Schedule 1 of the regulations updates the list of statistical information to be collected by the Census in the *Census and Statistics Regulation 2016*, to insert topics relating to 'health conditions as diagnosed by a doctor or a nurse' and service in the Australian Defence Force (ADF). It also removes a topic relating to access to the internet at the dwelling.

Preliminary international human rights legal advice

Right to privacy

1.4 Requiring the statistician to collect personal information about respondents' diagnosed health conditions engages the right to privacy.[3] The right to privacy

1 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Census and Statistics Amendment (Statistical Information) Regulations 2020, Report 4 of 2020; [2020] AUPJCHR 44.

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

3 International Covenant on Civil and Political Rights (ICCPR), article 17.

encompasses respect for informational privacy, including the right to respect for private information and private life, particularly in relation to the storing, use, and sharing of personal information.[4] The right may be subject to permissible limitations which are prescribed by law and are not arbitrary. In order for a limitation not to be arbitrary, it must pursue a legitimate objective, be rationally connected to that objective, and be a proportionate means of achieving that objective.[5]

1.5 The statement of compatibility acknowledges that the regulations engage the right to privacy, but states that any limitation on privacy is in pursuit of a legitimate objective, because 'all levels of government in Australia need information about Australia's population to inform their decisions and policy making'.[6] The statement of compatibility further explains that due to Australia's aging population health services in many states are coming under pressure, and that while extensive information is collected at the national and broad state and territory levels, there is currently no information available to policy-makers on the prevalence of diagnosed health conditions for small population groups, and at small geographical areas'.[7] The collection of statistical data for the adequate provision of health services is likely to be considered to be a legitimate objective for the purposes of international human rights law.

1.6 The statement of compatibility also states that there is a rational connection between the regulations and the legitimate objective, as 'if the Government did not have access to the information collected on Census night, it would be unable to make informed decisions that balance Australia's future needs and ensure our scarce resources are appropriately allocated'.[8] However, in assessing if a measure is rationally connected to its stated objectives it is necessary to consider whether the relevant measure is likely to be effective in achieving the objectives being sought. As a result of these regulations the census will now collect statistical information on the number of 'health conditions diagnosed by a doctor or a nurse'. This appears to be broad in scope, as acknowledged in the statement of compatibility, which states that 'respondents only need to identify whether they have diagnosed health conditions and they do not need to provide any specifics about their medical condition or

4 See, UN Human Rights Committee, *General Comment No. 16: Article 17* (1988) [10]; and *General Comment No. 34 (Freedom of opinion and expression)* (2011) [18].

5 See, for example, *Leyla Sahin v Turkey,* European Court of Human Rights (Grand Chamber) Application No. 44774/98 (2005); *Al-Adsani v United Kingdom*, European Court of Human Rights (Grand Chamber) Application No. 35763/97 (2001) [53] - [55]; *Manoussakis and Others v Greece*, European Court of Human Rights, Application No. 18748/91 (1996) [36] - [53]. See also the reasoning applied by the High Court of Australia with respect to the proportionality test in *Lange v Australian Broadcasting Corporation* [1997] HCA 25.

6 Statement of compatibility, p. 3.

7 Statement of compatibility, pp. 3-4.

8 Statement of compatibility, p. 4.

treatment'.[9] However, without any details of what the medical conditions are, it is not clear how having such information will assist with government planning for the provision of services, when the nature of the service provision required is unknown.

1.7 In relation to the proportionality of the measure, the statement of compatibility argues that the limitation on the right to privacy is reasonable, necessary and sufficiently precise, and that 'the Regulations do not impose obligations on persons to provide personal information'.[10] However, section 14 of the *Census and Statistics Act 1905* (Census Act) makes it a criminal offence[11] for a person not to fill in their census form, or answer the questions on the form. This offence is subject to strict liability, meaning there is no need for the prosecution to prove fault. Therefore, as a result of these regulations, respondents will be obligated to disclose if they have a diagnosed medical condition, and it will be a criminal offence to refuse to answer. Whether the limitation on the right to privacy can be justified as being proportionate to the objective being sought is thus unclear.

1.8 The statement of compatibility also states there are safeguards to ensure personal information is appropriately safeguarded, used and handled, noting that section 19 of the Census Act makes it an offence for officers to disclose census information to third parties. However, no information is provided as to whether the information is securely held and how long identifiable information is retained.

1.9 Therefore, more information is required in order to assess the compatibility of this measure with the right to privacy, in particular:

- how collecting information as to people's diagnosed medical conditions can assist with government planning for the provision of services (noting that the nature of the medical condition is unknown and could capture a range of conditions, including those that require no provision of services);
- whether the measure is sufficiently circumscribed; in particular why it is appropriate that a person who does not disclose a diagnosed health condition would be subject to a criminal penalty; and
- what other safeguards would protect the privacy of personal information which respondents would be compelled to provide, including whether the information is securely held and how long identifiable information is retained.

Committee view

1.10 The committee notes that these regulations will require all Australians on census night to disclose if they have a diagnosed health condition. The committee

9 Statement of compatibility, p. 4.

10 Statement of compatibility, p. 4.

11 Subject to one penalty unit, currently $210 (*Crimes Act 1914*, section 4AA).

notes the legal advice that the measures engage and limit the right to privacy. In order to assess the compatibility of this measure with the right to privacy, the committee seeks the Assistant Treasurer's advice as to the matters set out at paragraph [1.9].

Defence Amendment (2020 Measures No. 1) Regulations 2020 [F2020L00120][1]

Purpose	This instrument sets out the circumstances when written notice is not required before a decision is made to terminate an Australian Defence Force member's service
Portfolio	Veterans Affairs
Authorising legislation	Defence Act 1903
Last day to disallow	15 sitting days after tabling (tabled in the House of Representatives 13 February 2020 and in the Senate on 24 February 2020). Notice of motion to disallow must be given by 14 May 2020 in the House of Representatives and 11 August 2020 in the Senate[2]
Right	Work
Status	Seeking additional information

Terminating without notice the service of an Australian Defence Force member

1.11 These regulations amend section 24 of the Defence Regulation 2016 to establish two new grounds on which the employment of a member of the Australian Defence Force (ADF) may be terminated without written notice. These grounds are where the member has been imprisoned for an offence; or where they have pleaded guilty to, or been convicted of, an offence and the Chief of the Defence Force is satisfied that it is not in the interests of the defence force for notice to be given to them.[3]

1.12 The regulations also remake what currently exists in section 24, to provide that a member's employment may be terminated without written notice where: the appointment or enlistment is subject to a probationary period; they have failed to

1 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Defence Amendment (2020 Measures No. 1) Regulations 2020 [F2020L00120], *Report 4 of 2020*; [2020] AUPJCHR 45.

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

3 Schedule 1, Item 5, subsection 24(3). The reasons for something being or not being in the interests of the defence force are set out at subsection 6(2) of the regulations, and expanded by this instrument to include a member's failure to meet one or more conditions of the member's enlistment, appointment or promotion. See, Schedule 1, Item 1, subsection 6(2)(c).

meet a condition of their appointment or enlistment; or they have been absent without leave for a continuous period of three months or more.

Preliminary international human rights legal advice

Right to work

1.13 Providing that an ADF member's employment may be terminated without notice to them, for reasons related to their conduct or performance, engages and may limit the right to work. The right to work includes a right not to be unfairly deprived of work.[4] A person's employment must not be terminated for reasons related to their conduct or performance before they are provided an opportunity to defend themselves against the allegations made, unless the employer cannot reasonably be expected to provide this opportunity.[5] Any decision to terminate employment should be 'preceded by dialogue and reflection between the parties'.[6]

1.14 The right to work may be limited, provided limitations are prescribed by law, pursue a legitimate objective, are rationally connected to (that is, effective to achieve) that objective, and are a proportionate means of achieving that objective.[7]

1.15 The statement of compatibility recognises that the regulations could be seen as limiting the right to work, however, it states that any limitation is reasonable, necessary and proportionate in pursuit of a legitimate objective. It notes that service in the ADF differs from civilian employment in that ADF members face combat, and must follow all lawful commands, making discipline and a system of command essential.[8] It also states that an ADF member who fails to attend duty may be charged with an offence and liable to imprisonment, and states that section 24 enhances the rights of ADF members at work by providing specific grounds for termination, and a process which must be followed before deciding to terminate a person's service.[9]

1.16 The statement of compatibility gives a detailed explanation as to why the two new bases on which employment can be terminated without notice are

4 See, International Covenant on Economic, Social and Cultural Rights, articles 6-7.

5 International Labour Organization (ILO) Convention 158 , article 7 and ILO, *Protection against Unjustified Dismissal*, [146].

6 ILO, *Protection against Unjustified Dismissal*, [148].

7 See, for example, *Leyla Sahin v Turkey,* European Court of Human Rights (Grand Chamber) Application No. 44774/98 (2005); *Al-Adsani v United Kingdom*, European Court of Human Rights (Grand Chamber) Application No. 35763/97 (2001) [53] - [55]; *Manoussakis and Others v Greece*, European Court of Human Rights, Application No. 18748/91 (1996) [36] - [53]. See also the reasoning applied by the High Court of Australia with respect to the proportionality test in *Lange v Australian Broadcasting Corporation* [1997] HCA 25.

8 Statement of compatibility, p. 5.

9 Statement of compatibility, p. 5.

reasonable and necessary. However, the regulations also remake the existing bases on which employment can be terminated without notice. As such, it is necessary to examine the entirety of these regulations and any limitation on the right to work.

1.17 It is unclear whether terminating a member's employment without notice where they have failed to meet a condition of their appointment or enlistment, or where they have been absent without leave for three months or longer is a permissible limitation. In particular, it is noted that the ability to terminate without notice could apply for a failure to meet *any* condition of a member's employment. It is unclear why a member should not be notified of a decision to terminate their employment in such circumstances.

1.18 In order to assess the compatibility of the entirety of the measure with the right to work, further information is required as to:

- whether terminating the employment of an ADF member for failure to meet a condition of their employment or enlistment, or being absent without leave, without notifying them of the decision, is compatible with the right to work; and
- in the absence of notification, what opportunities ADF members would have to respond to allegations related to a failure to meet a condition of their employment or service, or to an absence without leave, prior to their employment being terminated.

Committee view

1.19 The committee notes that the regulations sets out the circumstances in which written notice is not required before a decision is made to terminate an Australian Defence Force member's service. The committee notes the legal advice that the measure engages and may limit the right to work. In order to assess compatibility with the right to work the committee seeks the minister's advice as to the matters set out at paragraph [1.18].

Telecommunications Legislation Amendment (International Production Orders) Bill 2020[1]

Purpose	The bill seeks to amend the *Telecommunications (Interception and Access) Act 1979* to establish a new framework for international production orders to provide Australian agencies access to overseas communications data for law enforcement and national security purposes
Portfolio	Home Affairs
Introduced	House of Representatives, 5 March 2020
Right[s]	Life; prohibition against torture, cruel, inhuman or degrading treatment or punishment; privacy; and effective remedy
Status	Seeking additional information

International Production Orders to access personal telecommunications data

1.20 The bill seeks to provide the legislative framework for Australia to give effect to future bilateral and multilateral agreements for cross-border access to electronic information and communications data.[2] To do so, the bill seeks to introduce International Production Orders (IPOs). Such orders would allow Commonwealth, state and territory law enforcement and national security agencies to acquire data held in a foreign country by a designated communications provider, and to allow foreign governments to access private communications data.[3]

1.21 Proposed new Schedule 1 to the *Telecommunications (Interception and Access) Act 1979* (Interception Act) sets out the scheme, and proposes the introduction of three new types of IPOs, relating to:

- the interception of telecommunications data for up to 90 days;
- accessing stored communications and telecommunication data (for example, stored messages, voice mails, video calls); and
- telecommunications data (being information about the communication, but not including the substance of the communication).

1.22 IPOs can be issued for three different purposes:

1 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Telecommunications Legislation Amendment (International Production Orders) Bill 2020, *Report 4 of 2020*; [2020] AUPJCHR 46.

2 Explanatory memorandum, p. 1.

3 Statement of compatibility, [3] and [8].

- to enforce a number of serious offences or offences punishable by imprisonment of at least seven years (for intercepted material) or three years (for stored communications data and telecommunications data); [4]
- in connection with the monitoring of a person subject to a control order; [5] and
- in connection with the carrying out of the Australian Security and Intelligence Organisation's (ASIO) functions.[6]

1.23 IPOs to enforce the criminal law or monitor a person subject to a control order can be issued by a judge (or in some cases a magistrate) or a nominated member of the AAT. IPOs that relate to the carrying out of ASIO's functions can be issued by a nominated AAT Security Division member.

1.24 It would appear that once an IPO is granted, foreign communications providers, subject to there being an agreement between Australia and that country, would then be able to provide Australian law enforcement agencies and ASIO with access to private communications data.[7]

Preliminary international human rights legal advice

Right to privacy

1.25 The interception and disclosure of personal telecommunications data which reveals a person's conversations and messages engages and limits the right to privacy. The right to privacy includes respect for informational privacy, including the right to respect for private and confidential information, particularly the storing, use and sharing of such information.[8] It also includes the right to control the dissemination of information about one's private life. The right to privacy may be subject to permissible limitations where the limitation pursues a legitimate objective, is rationally connected to that objective and is a proportionate means of achieving that objective.

1.26 The statement of compatibility acknowledges that the bill limits the right to privacy. It states that the objective of the bill is to protect national security, public

---

4 See Schedule 1, item 43, proposed new Schedule 1, Part 2.

5 See Schedule 1, item 43, proposed new Schedule 1, Part 3.

6 See Schedule 1, item 43, proposed new Schedule 1, Part 4.

7 Statement of compatibility, [8].

8 International Covenant on Civil and Political Rights, article 17. Every person should be able to ascertain which public authorities or private individuals or bodies control or may control their files and, if such files contain incorrect personal data or have been processed contrary to legal provisions, every person should be able to request rectification or elimination. UN Human Rights Committee, *General Comment No. 16: Article 17* (1988) [10]. See also, *General Comment No. 34 (Freedom of opinion and expression)* (2011), [18].

safety, address crime and terrorism and protect the rights and freedoms of individuals by providing law enforcement and national security agencies with the tools they need to keep Australia safe. Such objectives would appear to constitute legitimate objectives for the purposes of international human rights law, and the measure appears to be rationally connected to this objective.

1.27 The question is whether the measures in the bill are proportionate to achieving the stated objective, in particular whether the measures are sufficiently circumscribed and whether there are sufficient safeguards in place.

1.28 The statement of compatibility details a number of safeguards that exist in the bill that must be considered before an IPO can be granted (depending on the purpose for which the IPO is granted). These include requiring the judge or AAT member to consider:

- how much the privacy of any person would be likely to be interfered with by issuing the order;
- the gravity of the conduct being investigated;
- how much the information to be gathered would be likely to assist with the investigation; and
- to what extent methods of investigation that do not involve accessing such data exist, and how much these would be likely to assist, or prejudice, the investigation.

1.29 Further, where an interception IPO would allow an innocent third party's communications to be intercepted (for example, third party phone calls are intercepted because it is thought that the suspect will be in touch with that person), the bill additionally provides that the order will be for 45 days or three months (instead of 90 days or six months) and the judge or AAT member must not issue the IPO unless satisfied that:

- the interception agency has exhausted all other practicable methods of identifying the carriage services used, or likely to be used, by the suspect; and
- interception of the suspect's communications would not otherwise be possible. [9]

1.30 In addition, where Victorian and Queensland law enforcement agencies make an application for an IPO, the Public Interest Monitors that exist in those states can appear at hearings of IPO applications to test the content and sufficiency of the information relied on, can question any person giving information, and can make submissions as to the appropriateness of granting the application, which must be considered by the judge or AAT member when deciding whether to grant an IPO.

---

9 See Schedule 1, item 43, proposed new subsections 30(6), 60(7) and (8), 89(6) and (7).

1.31 The statement of compatibility therefore states that in light of these statutory safeguards to ensure the decision maker evaluates the individual circumstances of each application before issuing an IPO, any limitation on the right to privacy is reasonable, necessary and proportionate. These are important safeguards and assist when evaluating the proportionality of the IPOs. However, there are a number of questions as to whether these safeguards are sufficient in all circumstances.

Public Interest Monitors

1.32 As set out in the statement of compatibility, Public Interest Monitors strengthen the protections in the bill against arbitrary and unlawful interference with privacy.[10] As the suspect is not able to be personally represented at the application for the IPO, having an independent expert to appear at the hearing to test the content and sufficiency of the information relied on, to question any person giving information, and to make submissions as to the appropriateness of granting the application, is an important safeguard to protect the rights of the affected person. As the European Court of Human Rights has held:

> the very nature and logic of secret surveillance dictate that not only the surveillance itself but also the accompanying review should be effected without the individual's knowledge. Consequently, since the individual will necessarily be prevented from seeking an effective remedy of his own accord or from taking a direct part in any review proceedings, it is essential that the procedures established should themselves provide adequate and equivalent guarantees safeguarding his rights.[11]

1.33 However, the bill only applies this important safeguard when the law enforcement agency making the request is located in Victoria or Queensland. The statement of compatibility provides that 'there is scope to accommodate similar oversight bodies in the framework, should they be established in other jurisdictions in the future'.[12] However, there is nothing in the legislation to this effect, and as currently drafted, the majority of jurisdictions in Australia would have no such protection. It is not clear why this bill could not itself establish Public Interest Monitors that apply to jurisdictions that do not otherwise have them, and if Public Interest Monitors are established in these jurisdictions, to ensure these bodies will automatically be able to appear at hearings of IPO applications.

1.34 In addition, the bill provides that these Monitors only operate in relation to the 'interception' of telecommunications. There is no role for them when an application is made for an IPO for stored communications data or

---

10 Statement of compatibility, [30].

11 *Roman Zakharov v Russia*, European Court of Human Rights, Grand Chamber, application no. 47143/06 (4 December 2015), [233].

12 Statement of compatibility, [30].

telecommunications data. Stored communications data would enable agencies to access all existing messages, including text messages and recordings of voice and video messages. It is unclear that the impact on privacy for intercepting telecommunications for a time limited period is that much greater than accessing all stored data in relation to an individual, given the breadth of the data that may be stored. It is therefore unclear why the safeguard of the Public Interest Monitor does not also apply to an application for an IPO to access stored telecommunications data.

Issuing authority

1.35 The bill provides that applications for an IPO in relation to enforcing the criminal law and monitoring a control order are to be made to a judge (or in some cases a magistrate) who has consented to be appointed as an issuing authority, or an AAT member of any level, who has been enrolled as a legal practitioner for at least five years.[13] In relation to applications for an IPO in connection with carrying out ASIO's functions, the application is to be made to a member, of any level, of the Security Division, of the AAT who has been enrolled as a legal practitioner for at least five years.[14]

1.36 However, it is not clear why it is appropriate to enable non-judicial officers, such as a member of the AAT, of any level and with potentially only five years experience as an enrolled legal practitioner, to issue orders that significantly limit the right to privacy. As the European Court of Human Rights has said in relation to interception:

> In a field where abuse is potentially so easy in individual cases and could have such harmful consequences for democratic society as a whole, it is in principle desirable to entrust supervisory control to a judge, judicial control offering the best guarantees of independence, impartiality and a proper procedure.[15]

Additional safeguards

1.37 The bill currently provides an additional safeguard before an interception IPO can be issued, namely that the judge or AAT member must have regard to whether intercepting communications 'would be the method that is likely to have the least

13 Schedule 1, item 43, proposed new section 16.

14 Schedule 1, item 43, proposed new section 16.

15 *Roman Zakharov v Russia*, European Court of Human Rights, Grand Chamber, application no. 47143/06 (4 December 2015), [233]. See also *Klass and Others v Germany*, European Court of Human Rights, application no. 5029/71), (6 September 1978) [55]: 'The rule of law implies, inter alia, that an interference by the executive authorities with an individual's rights should be subject to an effective control which should normally be assured by the judiciary, at least in the last resort, judicial control offering the best guarantees of independence, impartiality and a proper procedure'.

interference with any person's privacy'.[16] This is in addition to considering how much the privacy of any person would be likely to be interfered with. This is an important safeguard to help prevent the arbitrary interference with the right to privacy. However, it only applies to interception IPOs in relation to control orders, and not in relation to the enforcement of the criminal law or in connection with ASIO's activities. Nor does it apply to IPOs in relation to accessing stored communications data or telecommunications data. The statement of compatibility states that this additional protection was considered appropriate noting that the IPO can be issued in connection with the monitoring of a person subject to a control order rather than in connection with the investigation into a specific offence.[17] While it is welcome that this additional protection has been included for this one category of IPOs, it is unclear why such a protection could not apply to all IPOs, to ensure that the decision maker turns their mind to considering whether issuing the IPO would be likely to have the least interference with a person's privacy.

1.38 In addition, the bill provides that an IPO to investigate serious crimes and in connection with ASIO's activities can be issued if to do so would be 'likely to assist' the investigation.[18] However, IPOs in connection with monitoring a person subject to a control order require that the IPO would be likely to 'substantially assist' the investigation.[19] Given the impact on a person's privacy by intercepting and accessing their communications, it is not clear why all IPOs are not restricted to those that will 'substantially' assist in an investigation.

Duration of interception IPO

1.39 The bill provides that an IPO to allow for interception in relation to enforcing the criminal law and monitoring a control order cannot be longer than 90 days in most cases, and 45 days when an innocent third party's communications are intercepted.[20] In relation to IPOs in connection with carrying out ASIO's functions, the order cannot be longer than six months in most cases, and three months where an innocent third party's communications are intercepted.[21] The explanatory materials do not explain why these time periods have been chosen or why interception IPOs in connection with carrying out ASIO's functions are twice as long as other IPOs. The statement of compatibility only states that the period for intercepting innocent third parties is half that of other IPOs, given such interception

---

16 Schedule 1, item 43, proposed new paragraph 60(5)(f).

17 Schedule 1, item 43, proposed new paragraph 60(5)(f).

18 Schedule 1, item 43, proposed new paragraphs 30(2)(g) and (h), 39(2)(d), 48(2)(d), 89(2)(g) and (h), 98(2)(e).

19 Schedule 1, item 43, proposed new paragraph 60(2)(i) and (j), 69(2)(e) and 78(2)(e)

20 Schedule 1, item 43, proposed subsections 30(4) and 60(4)

21 Schedule 1, item 43, proposed subsection 89(4).

'inherently involves a potential for privacy intrusion of persons who may not be involved in the commission of an offence'.[22] However, it does not explain how this time period is an appropriate time period in all of the circumstances. It is also noted that further interception IPOs may be made, so long as it begins after the other IPO has ended.[23]

1.40 In addition, there does not appear to be anything in the bill to ensure that if the circumstances that lead to the issuing of the IPO have changed, such that the IPO is no longer warranted, that the IPO ceases to have effect. International case law provides that legislation authorising surveillance warrants should set out the circumstances in which it must be cancelled when no longer necessary, and that without this, the law will not contain sufficient guarantees against arbitrary interference with the right to privacy.[24]

Control orders

1.41 The bill provides that IPOs can be issued in order to monitor persons subject to a control order so as to protect the public from a terrorist act, prevent support for terrorist and hostile act overseas and determine whether the control order has been, or is being, complied with. The control order regime itself engages and limits multiple human rights.[25] It is noted that it is already an offence for a person to fail to comply with the conditions of a control order,[26] which is subject to imprisonment of up to five years. As such, it is unclear why it is necessary to enable an IPO to be made simply to determine if the order is being complied with, rather than relying on the IPOs to investigate breaches of the criminal law. It is also noteworthy that unlike IPOs for investigating serious crime, there is no requirement for the judge or AAT member to consider the gravity of the conduct being investigated. It is unclear why it is necessary to enable IPOs to be granted to determine whether a control order is being complied with rather than relying on the other powers to investigate breaches of serious crimes and why the control order IPOs do not require the judge or AAT member to consider the gravity of the conduct being investigated.

National security

1.42 IPOs may be issued in connection with carrying out ASIO's functions. In particular, an IPO to intercept communications or to access stored telecommunications data can be issued if there are reasonable grounds to suspect

22 Statement of compatibility, [38].

23 Schedule 1, item 43, proposed sections 32, 62 and 91.

24 *Roman Zakharov v Russia*, European Court of Human Rights, Grand Chamber, application no. 47143/06 (4 December 2015), [250]-[252].

25 See Parliamentary Joint Committee on Human Rights, *Report 10 of 2018* (18 September 2019) pp. 21-36.

26 Section 104.27 of the *Criminal Code Act 1995*.

the communications services are being, or are likely to be, used by a person for activities or purposes that are 'prejudicial to security'.[27] There appears to be no definition of what conduct constitutes matters that are 'prejudicial to security', nor an explanation in the explanatory materials accompanying the bill. An IPO in relation to the disclosure of telecommunications data (information about the communication, but not its substance) can be issued simply if it 'would be in connection with the performance by ASIO of its functions'.

1.43 Human rights standards require that interferences with rights must have a clear basis in law (that is, they must be prescribed by law). This principle includes the requirement that laws must satisfy the 'quality of law' test, which means that any measures which interfere with human rights must be sufficiently certain and accessible, such that people understand the legal consequences of their actions or the circumstances under which authorities may restrict the exercise of their rights.[28]

1.44 The United Nations Human Rights Committee has said that relevant legislation must specify in detail the precise circumstances in which any interferences with privacy may be permitted.[29] The European Court of Human Rights has found in relation to interception warrants that this does not go so far as to compel states to detail all conduct that may prompt a decision to subject an individual to secret surveillance on 'national security' grounds, given that threats to national security may vary in character and may be unanticipated or difficult to define in advance. However, in matters affecting fundamental rights 'it would be contrary to the rule of law, one of the basic principles of a democratic society enshrined in the Convention, for a discretion granted to the executive in the sphere of national security to be expressed in terms of unfettered power'.[30] Consequently, the Court has held that the law must indicate the scope of any such discretion and the manner of its exercise with sufficient clarity to give the individual adequate protection against arbitrary interference. This includes some indication of the circumstances under which an individual's communications may be intercepted on account of events or activities endangering security, and limits on which events or acts constitute a serious enough threat to justify surveillance.[31]

1.45 In this context it is also significant that IPOs issued in connection with ASIO's activities do not require the nominated AAT member (judges or magistrates are not

27 Schedule 1, item 43, proposed subsection 89(2), 98(2)

28 *Pinkney v Canada,* United Nations (UN) Human Rights Communication No.27/1977 (1981), [34].

29 United Nations Human Rights Committee, General Comment 16: Article 17 (Right to Privacy), UN Doc. HRI/GEN/1/Rev.1 (1988) 21, [8].

30 *Roman Zakharov v Russia*, European Court of Human Rights, Grand Chamber, application no. 47143/06 (4 December 2015), [247]-[248].

31 *Roman Zakharov v Russia*, European Court of Human Rights, Grand Chamber, application no. 47143/06 (4 December 2015), [247]-[248].

involved in such orders) to consider how much the privacy of any person would be likely to be interfered with by issuing the order or the gravity of the conduct being investigated. The statement of compatibility states that while this is not in the legislation, ASIO 'must conduct their security intelligence activities in accordance with Ministerial Guidelines', including that the actions be proportionate to the gravity of the threat posed and the probability of its occurrence and that investigations should be done with as little intrusion into privacy as possible.[32] While this may constitute something of a safeguard it is not clear why these requirements are not set out in the legislation and required to be considered at the point at which the IPO is issued.

Disclosure of protected information

1.46 Proposed new Part 11 provides that it is an offence to use, record or disclose protected information, being information obtained in accordance with an IPO or other information relating to an IPO. However, there are numerous exceptions to this, which would allow such information to be used, recorded, disclosed or used in evidence. These include:

- in investigations or proceedings relating to a serious offence;
- for the performance of the function, or exercise of the powers, of ASIO;
- in relation to control orders, preventative detention order or continuing detention orders;
- certain extradition proceedings or for providing mutual assistance to foreign governments;
- for unexplained wealth proceedings;
- corruption or misconduct proceedings;
- the enforcement of the criminal law, a law imposing a pecuniary penalty, or the protection of the public revenue (in relation to telecommunication data).[33]

1.47 Having such a broad range of exceptions raises concerns as to whether the right to privacy is adequately safeguarded. It is unclear why it is necessary or appropriate to allow sensitive personal information obtained as a result of an IPO for a particular stated purpose to be used, recorded or disclosed for other broad purposes. The statement of compatibility does not address the limitation of the right to privacy from these exceptions. Rather it states that the exceptions operate in 'specific limited circumstances', and that it promotes the right to privacy as it does not permit the use of information for a purpose not relevant to achieving a

32 Statement of compatibility, [36].

33 Schedule 1, item 43, proposed sections 153-159.

legitimate purpose of the bill.[34] However, it is not clear that all of the stated purposes are relevant to achieving the stated objective of protecting national security, public safety, address crime and terrorism. For example, it is not clear how disclosing protected information for the purposes of protecting the public revenue could be linked to the objectives of the bill.

Further information required

1.48 In order to fully assess the proportionality of this proposed measure, in particular the adequacy of the safeguards that apply, further information is required as to:

- why the bill does not include provision for Public Interest Monitors to apply nationwide (rather than only in Victoria and Queensland) and why the Monitors have no role in an application for an IPO to access stored telecommunications data;
- whether the interference with the right to privacy is greater for the interception of communications than accessing stored communications data, and if so, why;
- why the power to issue an IPO is conferred on a member of the AAT, of any level and with a minimum of five years experience as an enrolled legal practitioner, and whether this is consistent with the international human rights law requirement that judicial authorities issue surveillance warrants;
- why does the bill not require, in all instances, that before issuing an IPO the decision maker turn their mind to considering whether doing so would be likely to have the least interference with a person's privacy;
- why the bill does not require, in all instances, that IPOs may only be issued where to do so will be likely to 'substantially' assist an investigation (rather than simply being 'likely to assist');
- how the timeframe for the duration of an interception IPO was chosen and why interception IPOs issued in connection with carrying out ASIO's functions are twice as long as those to investigate serious offences;
- why there is no provision in the bill to ensure that if the circumstances that led to the issuing of the IPO have changed, such that the IPO is no longer warranted, that the IPO ceases to have effect;
- why are existing powers to investigate serious crimes insufficient to achieve the objectives of the measure, such that a separate power to issue an IPO in relation to control orders is considered necessary;

34 Statement of compatibility, [59].

- why do the control order IPOs not require the judge or AAT member to consider the gravity of the conduct being investigated;
- what does conduct that is 'prejudicial to security' mean, and is this sufficiently certain to allow people to know what conduct it covers;
- why can an IPO to access telecommunications data be granted if it would be in connection with the performance of ASIO's functions, without any other requirement that there is any alleged prejudice to national security;
- why does the bill not provide that an AAT member when determining whether to issue an IPO must consider how much the privacy of any person would be likely to be interfered with by issuing the order, or the gravity of the conduct being investigated; and
- whether all of the exceptions to the prohibition on the use, recording or disclosure of protected information obtained pursuant to an IPO are appropriate. It would be useful if a justification were provided in relation to each of the exceptions in proposed sections 153-159 and how these are compatible with the right to privacy.

Right to an effective remedy

1.49 If IPOs are issued inappropriately they may violate a person's right to privacy. The right to an effective remedy requires states parties to ensure access to an effective remedy for violations of human rights.[35] This may take a variety of forms, such as prosecutions of suspected perpetrators or compensation to victims of abuse. While limitations may be placed in particular circumstances on the nature of the remedy provided (judicial or otherwise), state parties must comply with the fundamental obligation to provide a remedy that is effective.[36]

1.50 The statement of compatibility identifies that the right to an effective remedy is engaged by these measures, but states that any limitations on that right are reasonable, necessary and proportionate.[37] It notes that judicial review is not available under the *Administrative Decisions (Judicial Review) Act 1977* (ADJR Act) for decisions made under the Interception Act, and states that this is consistent with other national security and law enforcement decisions. However, it further notes that a decision of a decision-maker or AAT member will be subject to judicial review under the *Judiciary Act 1903*, providing an avenue to challenge unlawful decisions (where there has been a jurisdictional error). The statement of compatibility further

35 International Covenant on Civil and Political Rights, article 2(3).

36 See, UN Human Rights Committee, General Comment 29: States of Emergency (Article 4), (2001), [14].

37 Statement of compatibility, p 16.

notes that the general laws of evidence would serve to protect affected persons, as courts retain the discretion to exclude evidence which has been improperly or illegally obtained.[38] Finally, the statement of compatibility notes that the use of these powers would be subject to the oversight of the Commonwealth Ombudsman and the Inspector-General of Intelligence and Security, which would ensure that the powers are used in accordance with the legislation.

1.51 However, while the oversight of the Commonwealth Ombudsman and Inspector-General of Intelligence and Security may serve as a useful safeguard to help ensure decision-makers are complying with the legislation, this would not appear to provide any remedy to individuals. Further, given that IPOs are designed to be sought covertly, it is also unclear how an applicant could practically seek judicial review of a decision of which they are unaware. United Nations bodies and the European Court of Human Rights have provided specific guidance as to what constitutes an effective remedy where personal information is being collected in the context of covert surveillance activities. The United Nations High Commissioner for Human Rights has explained that in the context of violations of privacy through digital surveillance, effective remedies may take a variety of judicial, legislative or administrative forms, but those remedies must be known and accessible to anyone with an arguable claim that their rights have been violated.[39] The European Court of Human Rights has also stated that if an individual is not subsequently notified of surveillance measures which have been used against them, there is 'little scope for recourse to the courts by the individual concerned unless the latter is advised of the measures taken without his knowledge and thus able to challenge their legality retrospectively'.[40] The court acknowledged that, in some instances, notification may not be feasible where it would jeopardize long-term surveillance activities.[41] However, it explained that '[a]s soon as notification can be carried out without jeopardising the purpose of the restriction after the termination of the surveillance measure, information should, however, be provided to the persons concerned'.[42]

1.52 It is not clear that a person who has their communications intercepted or accessed would ever be made aware of that fact (if it does not lead to a prosecution),

38 See *Evidence Act 1995*, section 138.

39 Report of the Office of the United Nations High Commissioner for Human Rights on The right to privacy in the digital age (A/HRC/27/37, [40].

40 *Roman Zakharov v Russia* (European Court of Human Rights, Grand Chamber, (Application no. 47143/06) 2015,[234]. See also, *Klass and Others v Germany* (European Court of Human Rights, Plenary Court, (Application no. 5029/71) 1978, [57].

41 *Roman Zakharov v Russia* (European Court of Human Rights, Grand Chamber, (Application no. 47143/06) 2015, [287].

42 *Roman Zakharov v Russia* (European Court of Human Rights, Grand Chamber, (Application no. 47143/06) 2015 [287]. See also *Klass and Others*, [58].

and therefore it is not clear how such a person could have access to an effective remedy for any potential violation of their right to privacy.

1.53 In order to assess whether any person whose right to privacy might be violated by the issuance of an IPO would have access to an effective remedy, further information is required as to:

- whether a person who was the subject of an IPO will be made aware of that after the investigation has been completed; and
- if not, how such a person would effectively access a remedy for any violation of their right to privacy.

Committee view

1.54 The committee notes that the bill seeks to introduce International Production Orders to allow Commonwealth, state and territory law enforcement and national security agencies to acquire data held in a foreign country by a designated communications provider.

1.55 The committee notes the legal advice that the measure engages and limits the right to privacy. In order to fully assess whether the measure is proportionate to the important objective of protecting national security and public safety, and addressing crime and terrorism, the committee seeks the minister's advice as to the matters set out at paragraph [1.48].

1.56 The committee also notes the legal advice that the measure engages the right to an effective remedy. In order to fully assess whether the right to an effective remedy is available, the committee seeks the minister's advice as to the matters set out at paragraph [1.53].

Providing communications data to a foreign government

1.57 Schedule 1, item 13 of the bill seeks to amend the *Mutual Assistance in Criminal Matters Act 1987* ('Mutual Assistance Act') to broaden the scope of materials which the Attorney-General may authorise be provided to a foreign country, to include 'protected IPO intercept information', 'protected IPO stored communications information' or 'protected IPO telecommunications data information' relevant to offences punishable by certain periods of imprisonment or the death penalty.[43]

43 The terms 'protected IPO intercept information', 'protected IPO stored communications information', and 'protected IPO telecommunications data information' would be defined in subsection 3(1) of the Act, pursuant to amendments in Schedule 1, Part 1, Item 11.

1.58 The bill also provides that all applications for an IPO must nominate a 'designated international agreement'.[44] Proposed section 3[45] provides that if there is an agreement between Australia and a foreign government (or two or more governments) and that agreement is specified in the regulations, it is a 'designated international agreement'. However, it also provides that where one or more offences against the law of the foreign country are punishable by death, the agreement cannot be specified unless the minister has received a written assurance from the foreign government relating to 'the use or non-use', in connection with any proceeding for prosecuting a death penalty offence, of Australian-sourced information obtained in accordance with such an order.[46]

Preliminary international human rights legal advice

Right to life

1.59 Providing that protected IPO intercept information can be shared with a foreign country to investigate or prosecute an offence against the laws of that country that is punishable by the death penalty, engages and may limit the right to life.[47] The right to life imposes an obligation on Australia to protect people from being killed by others or from identified risks. While the International Covenant on Civil and Political Rights does not completely prohibit the imposition of the death penalty, international law prohibits states which have abolished the death penalty (such as Australia) from exposing a person to the death penalty in another state.[48] The provision of information to other countries that may be used to investigate and convict someone of an offence to which the death penalty is also prohibited.[49] In 2009, the UN Human Rights Committee stated its concern that Australia lacks 'a comprehensive prohibition on the providing of international police assistance for the investigation of crimes that may lead to the imposition of the death penalty in another state', and concluded that Australia should take steps to ensure it 'does not provide assistance in the investigation of crimes that may result in the imposition of the death penalty in another State'.[50]

---

44 Schedule 1, item 43, proposed subsections 22(2), 33(2), 42(2), 52(2), 63(2), 72(2), 83(2), 92(2) and 101(2). The order itself must also set out the name of the designated international agreement, see proposed paragraphs 31(3)(d), 40(3)(d), 49(3)(d), 61(3)(d), 70(3)(d), 79(3)(d), 90(3)(c), 99(3)(c), and 108(3)(c).

45 Schedule 1, item 43, proposed section 3.

46 Schedule 1, item 43, proposed subsection 3(2) and (5).

47 International Covenant on Civil and Political Rights, article 6.

48 Second Optional Protocol to the International Covenant on Civil and Political Rights.

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

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

1.60 The Mutual Assistance Act provides that a request by a foreign country for assistance under the Act must be refused if the offence is one in respect of which the death penalty may be imposed.[51] However, the Act qualifies this by saying that this prohibition will not apply if 'the Attorney-General is of the opinion, having regard to the special circumstances of the case, that the assistance requested should be granted'.[52] Consequently, it appears that the Mutual Assistance Act creates a risk of facilitating the exposure of individuals to the death penalty.[53]

1.61 The statement of compatibility notes that the right to life is engaged and 'recognised' by the bill.[54] It notes that Australia opposes the death penalty in all circumstances, and states that 'Requiring governments of foreign countries to provide a written assurance acknowledges the right to life is engaged by the Bill as it does not permit an agreement to be specified where no assurance is given'.[55] It further states that:

> As governments of foreign countries are responsible for their own criminal offences, it may be contemplated that Australia designates an agreement with a foreign country where death is the penalty for certain serious criminal offences and therefore, in accordance with the framework of the Bill, enables communications providers in Australia to provide communications data to that foreign government for the purpose of prosecuting a person for an offence for which the death penalty relates.[56]

1.62 As acknowledged by this statement, the bill does not prevent the sharing of information that may be used to investigate or prosecute a person who may be subject to the death penalty. Rather, it simply requires there be a written assurance relating to the 'use or non-use' of such information. As such, the legislation only requires that a written assurance relating to the death penalty be provided, not that the written assurance state that the relevant information will not be used in death penalty proceedings. While the explanatory memorandum states that the 'policy intention of this provision is to give effect to Australia's long-standing bipartisan opposition to the death penalty in the context of reciprocal cross-border access to communications data', there is nothing in law that would prohibit mutual assistance where it may lead to the imposition of the death penalty. This raises significant concerns as to Australia's international obligations relating to the right to life.

---

51 Subsection 8(1A).

52 Subsection 8(1A).

53 This was previously observed by the Parliamentary Joint Committee on Human Rights in 2013. See, Parliamentary Joint Committee on Human Rights, *Report 6 of 2013*, Mutual Assistance in Criminal Matters (Cybercrime) Regulation 2013, pp. 167-169.

54 Statement of compatibility, p. 15.

55 Statement of compatibility, p. 15.

56 Statement of compatibility, p. 15.

Prohibition against torture, cruel, inhuman or degrading treatment or punishment

1.63 The sharing of information, including personal information, with foreign countries, may, in some circumstances, expose individuals to a risk of torture or other cruel, inhuman or degrading treatment or punishment. International law absolutely prohibits torture and cruel, inhuman or degrading treatment or punishment.[57] There are no circumstances in which it will be permissible to subject this right to any limitations. The statement of compatibility does not identify that the right is engaged, and so no assessment of its engagement is provided.

1.64 The proposed IPO scheme does not contemplate that the provision of information pursuant to a 'designated international agreement', could expose a person to torture or other cruel, inhuman or degrading treatment or punishment. The bill does not require that a designated international agreement not be declared for the purposes of an IPO if there are substantial grounds for believing that, if the request were granted, the person would be in danger of being tortured. Further, in the issuing of an IPO, the bill does not require that a judge or AAT member turn their mind to whether to do so may expose a person to a risk of torture or cruel, inhuman or degrading treatment or punishment. The Mutual Assistance Act requires that a request by a foreign country for assistance must be refused if, in the opinion of the Attorney-General, there are substantial grounds for believing that, if the request was granted, the person would be in danger of being subjected to 'torture'.[58] However, the Act does not also specifically require that the Attorney-General consider whether there is a risk of a person being subjected to cruel, inhuman or other degrading treatment or punishment.

1.65 As the statement of compatibility does not address this right, it is not clear what safeguards, if any, exist to ensure that information which may be shared under the IPO scheme does not lead to a person being tortured, or subjected to cruel, inhuman or degrading treatment or punishment.

1.66 In order to fully assess the compatibility of the measure with the right to life and the prohibition on torture, cruel, inhuman or other degrading treatment or punishment, further information is required as to:

- why the bill does not provide that an international agreement will not be designated unless there is a written assurance that information provided pursuant to an IPO will not be used in connection with any proceeding by way of a prosecution for an offence against the law of the foreign country that is punishable by death;

57 International Covenant on Civil and Political Rights, article 7, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

58 Subsection 8(1)(ca).

- what safeguards are in place to ensure that information from an IPO would not be shared overseas in circumstances that could expose a person to torture, or cruel, inhuman or degrading treatment or punishment.

1.67 The committee notes that the bill would broaden the scope of Australian sourced information that may be provided to a foreign country, including foreign countries which use the death penalty.

1.68 The committee notes the legal advice that the measures engage and may limit the right to life and the prohibition against cruel, inhuman or degrading treatment or punishment. In order to fully assess the compatibility of the bill with these rights, the committee seeks the minister's advice as to the matters set out at paragraphs [1.66].

Exemptions from existing privacy protections for orders and requests from foreign countries

1.69 The bill also provides that where there is a designated agreement between Australia and a foreign country and the foreign country issues an order or makes a request in accordance with that agreement, then the usual protections in the Interception Act and *Privacy Act 1988* do not apply.[59]

Preliminary international human rights legal advice

Right to privacy

1.70 Removing existing protections designed to prevent the use of surveillance mechanisms without a warrant or order, or the disclosure of personal information, engages and limits the right to privacy. The right to privacy may be subject to permissible limitations where the limitation pursues a legitimate objective, is rationally connected to that objective and is a proportionate means of achieving that objective.

1.71 The statement of compatibility states that the removal of these provisions is reasonable and necessary in the circumstances as it ensures Australian communications service providers are not prevented from responding to requests for communications data by foreign governments with which Australia has a designated international agreement. As such it appears that the objective is to comply with our reciprocal obligations under such agreements. However, it is not clear that complying with an agreement that itself may limit the right to privacy constitutes a legitimate objective for the purposes of international human rights law. No information is provided as to what safeguards will be in place to ensure that the foreign governments that make such requests or orders do so in a manner that protects the right to privacy. The explanatory memorandum states that it is 'expected' that

59 Schedule 1, item 43, proposed new sections 167 and 168.

consideration of protections and safeguards related to privacy will be a consideration when developing international agreements.[60] However, there is nothing in the legislation to this effect and it is not clear that such agreements will be subject to any form of independent scrutiny. The statement of compatibility states that this Part of the bill 'does not diminish the responsibility of Australian communications providers to comply with privacy obligations in providing information to foreign parties'.[61] However, as the bill removes the existing protections in the *Privacy Act 1988* and the Interception Act in relation to requests and orders made by foreign governments with whom Australia has an agreement, it is unclear how this could be the case.

1.72 In order to more fully assess the compatibility of this measure with the right to privacy, further information is required as to:

- what is the legitimate objective of removing existing privacy protections to allow personal telecommunications data to be intercepted and accessed by foreign governments; and
- what safeguards apply before foreign governments can issue an order or make such a request and what oversight mechanisms are there before such agreements are entered into.

Committee view

1.73 The committee notes the bill would remove all existing privacy protections against intercepting and accessing personal communications data where a foreign government with whom Australia has a designated international agreement makes a request or order to do so.

1.74 The committee notes the legal advice that this engages and limits the right to privacy. In order to fully assess the compatibility of this measure with the right to privacy, the committee seeks the minister's advice as to the matters set out at paragraph [1.72].

60 Explanatory memorandum, [559].

61 Statement of compatibility, [56].

Advice only[1]

1.75 The committee notes that the following private members' bills appear to engage and may limit human rights. Should either 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:

- Foreign Acquisitions and Takeovers Amendment (Strategic Assets) Bill 2020; and
- Representation Amendment (6 Regions Per State, 2 Senators Per Region) Bill 2020.

1 This section can be cited as Parliamentary Joint Committee on Human Rights, Advice Only, *Report 4 of 2020*; [2020] AUPJCHR 47.

Bills and instruments with no committee comment[1]

1.76 The committee has no comment in relation to the following bills which were introduced into the Parliament between 24 February and 5 March 2020. 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:[2]

- Aged Care Legislation Amendment (Improved Home Care Payment Administration No. 1) Bill 2020;
- Australian Capital Territory (Self-Government) Amendment (ACT Integrity Commission Powers) Bill 2020;
- Australian Education Amendment (Direct Measure of Income) Bill 2020;
- Banking Amendment (Deposits) Bill 2020;
- Climate Emergency Declaration Bill 2020;
- Family Assistance Legislation Amendment (Improving Assistance for Vulnerable and Disadvantaged Families) Bill 2020;
- Health Insurance Amendment (General Practitioners and Quality Assurance) Bill 2020;
- Intelligence and Security Legislation Amendment (Implementing Independent Intelligence Review) Bill 2020;
- Liability for Climate Change Damage (Make the Polluters Pay) Bill 2020;
- National Greenhouse and Energy Reporting Amendment (Transparency in Carbon Emissions Accounting) Bill 2020
- Therapeutic Goods Amendment (2020 Measures No. 1) Bill 2020.

1.77 The committee has examined the legislative instruments registered on the Federal Register of Legislation between 6 February and 4 March 2020.[3] The

---

1 This section can be cited as Parliamentary Joint Committee on Human Rights, Bills and instruments with no committee comment, *Report 4 of 2020*; [2020] AUPJCHR 48.

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.

3 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.

committee has reported on three legislative instruments from this period in this report. 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.

Chapter 2

Concluded matters

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

2.2 Correspondence relating to these matters is available on the committee's website.[1]

Anti-Money Laundering and Counter-Terrorism Financing and Other Legislation Amendment Bill 2019[2]

Purpose	This bill seeks to amend a number of Acts in relation to combatting of money laundering and financing of terrorism to: • expand the circumstances in which reporting entities may rely on customer identification and verification procedures undertaken by a third party; • prohibit reporting entities from providing a designated service if customer identification procedures cannot be performed; • increase protections around correspondent banking; • expand exceptions to the prohibition on tipping off to permit reporting entities to share suspicious matter reports and related information with external auditors, and foreign members of corporate and designated business groups; • amend the framework for the use and disclosure of financial intelligence; • create a single reporting requirement for the cross-border movement of monetary instruments including physical currency and bearer negotiable instruments; • amend the Criminal Code to deem money or property provided by undercover law enforcement as part of a

1 See https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Scrutiny_reports.

2 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Anti-Money Laundering and Counter-Terrorism Financing and Other Legislation Amendment Bill 2019, *Report 4 of 2020*; [2020] AUPJCHR 49.

	controlled operation to be the proceeds of crime for the purposes of prosecution; • expand the rule-making powers of the Chief Executive Officer of AUSTRAC; and • make it an offence for a person to dishonestly represent that a police award has been conferred on them
Portfolio	Home Affairs
Introduced	House of Representatives on 17 October 2019
Right	Fair hearing
Status	Concluded

2.3 The committee requested a response from the minister in relation to the bill in *Report 1 of 2020*.[3]

Anti-money laundering and terrorism financing

2.4 Item 125 of the bill seeks to insert a new section 400.10A into the *Criminal Code Act 1995* to provide that money or property provided by a law enforcement participant (or civilian participant acting under their direction) as part of a controlled operation does not need to be proved to be the proceeds of crime in any prosecution for dealing with the proceeds of crime.[4]

Summary of initial assessment

Preliminary international human rights legal advice

Right to a fair trial

2.5 By providing that money or property provided by, or on behalf of, a law enforcement participant in a controlled undercover operation does not need to be proved to be the proceeds of crime for the purposes of a prosecution, this measure may engage the right to a fair trial. The right to a fair trial and fair hearing is protected by article 14 of the International Covenant on Civil and Political Rights (ICCPR). The right applies to both criminal and civil proceedings and to cases before both courts and tribunals.

2.6 When considering the impact of undercover police operations on the right to a fair trial, the main issue that arises is whether the conduct being authorised by the measure would amount to entrapment.

3 Parliamentary Joint Committee on Human Rights, *Report 1 of 2020* (5 February 2020), pp. 2-6.

4 Being a prosecution under sections 400.3 to 400.8 of the *Criminal Code Act 1995*.

2.7 In considering whether a law might risk empowering conduct that amounts to entrapment (or incitement), the presence of 'clear, adequate and sufficient procedural safeguards set permissible police conduct aside from entrapment'.[5] In addition to clear guidelines around the authorisation of such conduct, these safeguards might also include requirements for sufficient documentation to enable the subsequent independent scrutiny of the conduct.[6]

2.8 The initial analysis considered more information was required in order to assess the compatibility of this measure with the right to a fair trial. In particular:

- whether there are adequate procedural safeguards in place to prevent covert law enforcement operations, which may result in a charge for an alleged offence under sections 400.3 to 400.8 of the *Criminal Code Act 1995*, from amounting to incitement;
- whether there is any independent oversight, or rights of review, in relation to the conduct of covert law enforcement operations; and
- whether there are any limits on the admissibility of evidence provided by a law enforcement or civilian participant in the context of a controlled operation, in relation to the prosecution for a proceeds of crime offence, if the conduct of such operation were to amount to incitement.

2.9 The full initial legal analysis is set out at *Report 1 of 2020*.

Committee's initial view

2.10 The committee noted the legal advice on the bill that if the conduct by law enforcement participants amounted to entrapment, these measures may engage and limit the right to a fair trial. In order to assess the compatibility of this measure with this right, the committee sought the minister's advice as to the matters set out at paragraph [2.8].

Minister's response[7]

2.11 The minister advised:

> Section 400.10A provides that money or property provided by a law enforcement participant in a controlled operation or civilian participant acting under the direction of a law enforcement officer does not need to

5 *Ramanauskas v Lithuania*, European Court of Human Rights Application No. 74420/01 (5 February 2008), [52].

6 See, eg, *Matanovit v. Croatia*, European Court of Human Rights Application no. 2742/12, (4 July 2017), [131]-[134].

7 The minister's response to the committee's inquiries was received on 3 March 2020. The response is available in full on the committee's website at: https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Scrutiny_reports .

be proven to be the proceeds of crime for the purposes of the money laundering offences under sections 400.3-400.8 of the *Criminal Code Act 1995*.

Section 400.10A may engage the rights in Article 14 of the ICCPR to that extent that covert law enforcement operations may limit a person's rights to a fair trial or a fair hearing if such operations amounted to incitement or entrapment.

…

Procedural safeguards to prevent entrapment

The controlled operations regime has strong protections to prevent it from being used to induce an individual into committing a criminal offence.

As acknowledged by the Committee (at paragraph 1.7), an authorising officer must not grant an authority to conduct a controlled operation unless the authorising officer is satisfied on reasonable grounds that the controlled operation will not be conducted in such a way that a person is likely to be induced to commit a Commonwealth offence or an offence against a law of a State or Territory that the person would not otherwise have intended to commit (see paragraph 15Gl(2)(f) of the Crimes Act).

The Committee has raised concerns that this threshold requirement appears to be overly broad and has requested further information. The term 'reasonable grounds' ensures that authorising officers may only approve a controlled operation where there are objectively reasonable grounds for finding that the threshold requirement under paragraph 15Gl(2)(f) is met. It is also open to an authorising officer to request additional information from the applicant under subsection 15GH(5) and attach conditions to an authority to conduct a controlled operation under subsection 15Gl(1).

As part of a controlled operation, a participant will only be protected from criminal responsibility for an offence committed in the course of the operation, and be indemnified from civil liability, where the conduct does not involve the participant intentionally inducing a person to commit a Commonwealth offence or an offence under a law of a State or Territory that the person would not otherwise have intended to commit (subsections 15HA(2)(c) and 15HB(c)). This ensures that a participant who induces an individual is not protected from criminal responsibility or civil liability.

Agencies that conduct controlled operations also have robust procedures to ensure that entrapment does not occur. Participants are required to complete regular education and training in relation to their legal responsibilities, and receive guidance materials and advanced training in avoiding circumstances of entrapment. All controlled operation applications are comprehensively reviewed before authorisation is sought or granted, and the principal law enforcement officer responsible for the

conduct of the controlled operation monitors the process to ensure that participants only act in accordance with their relevant authorisation.

An appropriate authorising officer may, at any time and for any reason, cancel an authority to conduct a controlled operation (section 15GY). This cancellation must occur if any of the matters in section 15GI can no longer be satisfied, including that a person is likely to be induced to commit an offence.

These procedural safeguards support the right to a fair trial and a fair hearing by ensuring that controlled operations are only authorised where there are reasonable grounds for believing that a person will not be induced to commit an offence they would not otherwise have committed and by providing that a participant is not protected from criminal or civil liability if they do act in a way which induces a person to commit an offence.

Independent oversight

Controlled operations are subject to the independent oversight of the Commonwealth Ombudsman.

In its oversight role, the Ombudsman has the power to inspect the records of the Australian Federal Police (AFP), the Australian Criminal Intelligence Commission (ACIC) and the Australian Commission for Law Enforcement Integrity (ACLEI) at any time (see section 15HS of the Crimes Act) and obtain relevant information from any law enforcement officer, including an officer from an agency other than the AFP, the ACIC or ACLEI (see section 15HT). It is an offence to fail or refuse to give information to the Ombudsman or answer questions asked by the Ombudsman under section 15HU.

The chief officers of the AFP, ACLEI and the ACIC (as defined at section 15GC) are also required, under section 15HP, to keep a copy of all formal variation applications and authorisations (amongst other documents). If the Ombudsman finds any irregularity in these documents, the Ombudsman is able to report these concerns to the Minister. In addition, these chief officers must report every six months to the Ombudsman and the Minister on all controlled operations authorised by their agency during the previous six months, and the Ombudsman may require the chief officer of an authorising agency to give additional information covering any controlled operation to which a report relates.

Under section 15HO, the Ombudsman is required to prepare an annual report as soon as practicable after 30 June each year on the work and activities of the Ombudsman under Part IAB of the Crimes Act. The Minister must cause a copy of the report to be tabled in Parliament within 15 sitting days of receiving the report.

Rights of review

Individuals who are affected by the conduct of controlled operations will have the right to seek independent review.

The decision to authorise a controlled operation is an administrative decision, and can therefore be subject to judicial review under section 75(v) of the Commonwealth Constitution or section 39B of the *Judiciary Act 1903*.

Under section 15HF the Commonwealth is liable to pay a person compensation for any loss or serious damage to property, or personal injury, incurred in the course of, or as a direct result of a controlled operation authorised under Part IAB of the Crimes Act.

Furthermore, a controlled operation will not protect a participant from civil or criminal liability if they engage in conduct that:

- is intended to entrap a person;
- is not in accordance with the authority to conduct the controlled operation;
- is likely to cause the death of, or serious injury to, any person; or
- involves the commission of a sexual offence against any person.

If a participant engages in any of the above prohibited conduct, the protection from criminal responsibility and indemnification from civil liability will not be available (see sections 15HA and 15HB). These measures support the right to a fair trial and a fair hearing in Article 14 of the ICCPR by ensuring that a decision to authorise a controlled operation can be reviewed and that if a participant engages in prohibited conduct, they may face civil or criminal penalties for that conduct, and a person who suffers loss as a result of a controlled operation is able to seek compensation for the loss.

Limits on admissibility of evidence in cases of entrapment

If a participant in a controlled operation engages in conduct which is outside of, or contrary to, the terms of a controlled operations authority, such conduct will not be 'controlled conduct' for the purposes of the controlled operations scheme. Any evidence obtained as a result of such conduct will therefore be subject to the general laws of evidence (see section 15GA of the Crimes Act).

Evidence that is obtained improperly or illegally in contravention of Australian law, or as a consequence of such impropriety or illegality, must not be admitted into evidence by a Court unless the desirability of admitting the evidence outweighs the undesirability of admitting the evidence (see section 138 of the *Evidence Act 1995* (Cth)). Where a participant in a controlled operation intentionally induces a person to commit a Commonwealth, State or Territory offence that the person would not otherwise have intended to commit, such conduct will be in clear contravention of the controlled operations authority. Any evidence obtained as a result of such conduct is therefore likely to be excluded by a

> Court in exercise of its discretion. This discretion, together with the strict limits placed on 'controlled conduct' by the controlled operations scheme, provides courts with the proper authority to ensure that an accused person receives a fair trial, supporting the rights in Article 14 of the ICCPR.
>
> ***Right to a fair trial and fair hearing***
>
> While controlled operations amounting to entrapment could engage and limit the right to a fair trial and a fair hearing, there are sufficient procedural safeguards to prevent incitement and entrapment. Combined with the deterrent of civil and criminal penalties and the overarching discretion of the courts regarding the admissibility of evidence, these safeguards ensure that the bill does not limit the right to a fair trial or a fair hearing in Article 14 of the ICCPR.

Concluding comments

International human rights legal advice

2.12 The minister has provided a detailed explanation of the procedural safeguards that exist to help to prevent covert law enforcement operations from amounting to entrapment. In particular, the minister has noted that an authorising officer must not provide the authority to conduct a controlled operation unless they are satisfied on objectively reasonable grounds that it will not be conducted in such a way as to be likely to incite someone to commit a crime, and can request further information and attach conditions to an authority to conduct such an operation. All controlled operations applications are also reviewed prior to being authorised. The minister also notes that the authorising officer can cancel the authority at any time for any reason, noting that the operation *must* be cancelled if the authorising officer can no longer be reasonably satisfied that a person will not be incited to commit a crime. In addition, the principal law enforcement officer responsible for the conduct of the operation monitors the process to ensure participants only act in accordance with their authorisation.

2.13 The minister has also noted that law enforcement participants are only protected from criminal responsibility for an offence committed in the course of the operation, or indemnified for civil liability, where their conduct did not involve intentionally inducing a person to commit a crime. The minister has also advised that participants in controlled operations are required to undergo regular education and training in relation to their legal responsibilities (including guidance about avoiding circumstances of entrapment).

2.14 The minister has advised that controlled operations are subject to the independent oversight of the Commonwealth Ombudsman, which has the power to report any irregularity in documents (include formal variation applications and authorisations) to the minister. The minister has further noted that chief officers of relevant law enforcement organisations are required to report to the Ombudsman and the minister every six months on all authorised controlled operations and the Ombudsman is required to prepare an annual report to be tabled in Parliament. The

minister has also advised that the decision to authorise a controlled operation would be subject to judicial review, and any person who suffers loss of, or serious damage to, property, or personal injury as a result of a controlled operation is able to seek compensation for the loss.[8]

2.15 The minister has also provided advice as to whether there are any limits on the admissibility of evidence obtained as part of a controlled operation, if the conduct of such operation were to amount to incitement. The minister has advised that where a participant in a controlled operation acts outside of, or contrary to, the terms of the authority, the conduct would no longer be treated as 'controlled conduct', and any evidence obtained would be subject to the general laws of evidence.[9] The minister notes that evidence obtained illegally or improperly must not be admitted into evidence by a court unless the desirability of admitting it outweighs the undesirability of admitting it.[10] The minister has advised that, consequently, any evidence obtained as a result of conduct constituting incitement would likely be excluded by a court in exercising this discretion. It is also notable that, in exercising this discretion a court may take into account whether the impropriety or contravention in question was contrary to or inconsistent with a right of a person recognised by the International Covenant on Civil and Political Rights.[11]

2.16 It would therefore appear that there are a number of procedural safeguards and oversight mechanisms in place to safeguard against conduct which could otherwise amount to incitement or entrapment in the context of controlled operations. In addition, if, despite the authorising officer having had reasonable grounds for believing the controlled operation would not amount to incitement, the conduct of the participants during the operation itself nevertheless amounted to incitement, it is left to the court to determine the appropriateness of admitting such evidence. This would appear to provide the courts with the proper authority to ensure that an accused person receives a fair trial, in accordance with the requirements in article 14 of the International Covenant on Civil and Political Rights.

Committee view

2.17 The committee thanks the minister for this response. The committee notes that the bill seeks to deem money or property provided by, or on behalf of, a law enforcement participant to a person during an undercover police operation to be 'proceeds of crime', for the purposes of prosecuting a person for dealing with proceeds of crime.

8 *Crimes Act 1915* , section 15HF.

9 *Crimes Act 1915*, section 15GA.

10 *Evidence Act 1995*, subsection 138(1).

11 *Evidence Act 1995*, subsection 138(3)(f).

2.18 The committee notes the legal advice and considers that there are sufficient procedural safeguards and oversight mechanisms in place to safeguard against conduct which could otherwise constitute entrapment as well as mechanisms that provide the courts with the proper authority to ensure that an accused person receives a fair trial. The committee therefore makes no further comment in relation to this bill.

Australian Sports Anti-Doping Authority Amendment (Enhancing Australia's Anti-Doping Capability) Bill 2019[1]

Purpose	This bill seeks to amend the *Australian Sports Anti-Doping Authority Act 2006*, and other Acts, to: abolish the Anti-Doping Rule Violation Panel; empower the Chief Executive Officer to initiate a suspected anti-doping rule violation investigation, and require the provision of information or the production of documents or things where the CEO 'reasonably suspects' that a person has such information; increase the penalty for non-compliance with a disclosure notice; and extend the protection from civil actions to National Sporting Organisations
Portfolio	Youth and Sport
Introduced	House of Representatives on 17 October 2019
Rights	Privacy
Status	Concluded

2.19 The committee requested a response from the minister in relation to the bill in *Report 1 of 2020*.[2]

Lowering threshold to issue a disclosure notice

2.20 The bill seeks to amend the *Australian Sports Anti-Doping Authority Act 2006* (ASADA Act) to lower the threshold by which the Chief Executive Officer (CEO) of the Australian Sports Anti-Doping Authority (ASADA) may issue a disclosure notice.[3] Currently, the CEO of ASADA may issue a written notice (disclosure notice), requiring a person to attend an interview to answer questions or to produce documents or

1 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Australian Sports Anti-Doping Authority Amendment (Enhancing Australia's Anti-Doping Capability) Bill 2019, *Report 4 of 2020*; [2020] AUPJCHR 50.

2 Parliamentary Joint Committee on Human Rights, *Report 1 of 2020* (5 February 2020), pp. 7-11.

3 'Disclosure notice' is defined in subsection 13A(1) of the ASADA Act to mean a written notice requiring the person to attend an interview to answer questions, give information of the kind specified in the notice, and/or produce documents or things of the kind specified in the notice.

things.[4] The CEO may currently only issue such a notice if they 'reasonably believe' that the person has information, documents or things relevant to the administration of the national anti-doping scheme, and three members of the Anti-Doping Rule Violation Panel agree with that belief.[5]

2.21 Items 43 and 44 of the bill seek to lower this threshold, enabling the CEO to issue a disclosure notice where they 'reasonably suspect' that the person in question has such information, documents or things. As Part 1 of Schedule 1 of the bill also seeks to abolish the Anti-Doping Rule Violation Panel, item 13 of the bill seeks to remove the requirement that three panel members agree in writing that the CEO's belief is reasonable. Item 46 of the bill would also double the penalty for non-compliance with such a disclosure notice, increasing it to 60 penalty units (currently $12,600).[6]

Summary of initial assessment

Preliminary international human rights legal advice

Right to privacy

2.22 Disclosure notices may require a person to provide personal information to the CEO of ASADA, and therefore engage and limit the right to privacy.[7] By lowering the threshold for issuing a disclosure notice and increasing penalties for non-compliance, the proposed measures would increase the existing limitations on the right to privacy associated with the disclosure notice regime. 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 sharing of personal information.[8]

2.23 The right to privacy may be subject to permissible limitations which are prescribed by law and are not arbitrary. In order for a limitation not to be arbitrary, it

---

4 Proposed section 13D(1) would provide that a person is not excused from answering questions, giving information or producing a document or thing pursuant to a disclosure notice on the grounds that to do so might tend to incriminate the person or expose them to a penalty. However, proposed section 13D(2) would also provide that 'use' and 'derivative use' immunities are available in relation to answering questions, giving information, and producing information, documents and things. Accordingly, the measure does not raise human rights concerns in relation to the right not to incriminate oneself due to the availability of relevant safeguards.

5 Sections 13(1)(ea) and 13A of the ASADA Act. Currently, the penalty for non-compliance with a disclosure notice is 30 penalty units (currently $6,300).

6 A 'penalty unit' is defined as $210 (subject to indexation) under the *Crimes Act 1914*, section 4AA.

7 International Covenant on Civil and Political Rights (ICCPR), article 17.

8 See, UN Human Rights Committee, *General Comment No. 16: Article 17* (1988) [10]; and *General Comment No. 34 (Freedom of opinion and expression)* (2011) [18].

must pursue a legitimate objective, and be rationally connected to, and a proportionate means of achieving, that objective.[9]

2.24 The initial analysis stated that in order to assess the proportionality of the proposed measures with the right to privacy, more information was required as to:

- what, if any, oversight would apply to the CEO's decision to issue a disclosure notice, noting that the bill seeks to remove the need to have the agreement of three members of the Anti-Doping Rule Violation Panel;
- whether there are other, less rights restrictive, methods for investigating doping related matters when the CEO suspects (but does not yet believe) a contravention may have occurred; and
- the nature of the information, documents or things that may be required to be provided pursuant to a disclosure notice.

2.25 The full initial legal analysis is set out at *Report 1 of 2020*.

Committee's initial view

2.26 The committee noted the legal advice and in order to assess whether these measures constitute a proportionate limitation on the right to privacy, the committee sought the minister's advice as to the matters set out at paragraph [2.24].

Minister's response[10]

2.27 The minister advised:

> *Oversight of the notice decision*
>
> Issuing a disclosure notice involves an administrative decision. As such, it is subject to judicial review and is open to challenge in the same way as the coercive powers available to various bodies entrusted with the investigation of matters in the Commonwealth interest.
>
> Moreover, the Chief Executive Officer of the Australian Sports Anti-Doping Authority (ASADA) appreciates every step taken in an investigation is liable to be subject to scrutiny in any court or tribunal proceedings (including the new National Sports Tribunal).

9 See, for example, *Leyla Sahin v Turkey,* European Court of Human Rights (Grand Chamber) Application No. 44774/98 (2005); *Al-Adsani v United Kingdom*, European Court of Human Rights (Grand Chamber) Application No. 35763/97 (2001) [53] - [55]; *Manoussakis and Others v Greece*, European Court of Human Rights, Application No. 18748/91 (1996) [36] - [53]. See also the reasoning applied by the High Court of Australia with respect to the proportionality test in *Lange v Australian Broadcasting Corporation* [1997] HCA 25.

10 The minister's response to the committee's inquiries was received on 2 March 2020. The response is available in full on the committee's website at: https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Scrutiny_reports .

It is also open to an aggrieved recipient of a notice to complain to the Commonwealth Ombudsman if there is any suggestion of the notice powers not being used properly. The Ombudsman would be able to access any information relevant to the ASADA decision.

This level of review and scrutiny is typical in relation to the various bodies given coercive powers to perform their investigative functions. It is proportionate in those cases and there is nothing to suggest it is insufficient or disproportionate in relation to ASADA. I am advised there does not appear to be any investigative body with a power to issue production notices that is required to seek external endorsement of the reasonableness of the issuing officer's state of mind in issuing a notice. The existing situation appears unique and is, on reflection, unnecessary.

If anything, the role of the ADRVP in this respect imposes a disproportionate and unnecessary administrative burden on the investigative process, given the very limited value added by it in a practical sense. The ADRVP does not consider the merits of the decision generally to issue a notice in a given case. It merely considers whether the CEO's assessment as to the prospect of the recipient of the information *having* relevant information, documents or things is *reasonably* made. That is a limited matter for investigative judgment. It does not require an additional layer of approval by convening three members of an expert panel established for a different purpose. With the adoption of a threshold of suspicion, rather than belief, there will be even less reason to query the reasonableness of the CEO's judgment in this very narrow respect.

The fact it has been decided to discontinue the other functions of the ADRVP provides a timely opportunity to remove this unnecessary step in the investigative process. As mentioned, I am advised there appears to be no equivalent requirement in comparable investigative powers. It is unnecessary and counter-productive to impose another body into what should be a relatively routine investigative process entrusted to the ASADA CEO. The existence of the standard review mechanisms applying in relation to other agencies ensure the notice power is exercised reasonably in any event.

There are no effective alternatives

The effectiveness of conventional 'drug tests' in combating sports doping in an increasingly sophisticated environment is limited. In recommending the change to the threshold for issuing disclosure notices, the Review of Australia's Sports Integrity Arrangements (Wood Review) found intelligence-led investigations are indispensable in the detection of doping incidents and programs. Disclosure notices are a critical feature of ASADA's intelligence-led approach.

Self-evidently, if relevant information can be obtained effectively without resort to a notice, then ASADA investigators will do so. The overwhelming majority of information relied on by ASADA is obtained without a disclosure notice.

But, once a credible intelligence lead is collected or developed, it is imperative it is resolved effectively and efficiently, without prejudicing an investigation or prejudicing interests of any stakeholders. The capacity to require relevant information before a credible allegation or indication of a threat develops to the 'belief threshold is vital. Information and evidence needs to be collected at an early stage and it is in no-one's interests for unresolved risks to sports integrity to fester for lack of information before an informed assessment can be made about them.

Disclosure notices are an important part of ASADA investigations on several levels. The sophistication and capability of those involved in sports doping is increasingly challenging to combat. Simply asking for information voluntarily from a person suspected of being complicit in, or sympathetic to, doping activity may be met with a refusal and alert those concerned to the investigation, providing an opportunity to destroy or conceal relevant evidence.

Reliance on a notice in appropriate cases also allows ASADA investigators to obtain key information quickly, including to corroborate or test information provided by whistle-blowers or others who come forward in a way best protecting the confidence and privacy of those persons. In some cases, where relevant information is held by non-suspects, those persons prefer to provide the information in response to a notice rather than volunteering it, because of the protections coming with responding to a legal obligation.

A disclosure notice is less intrusive than other powers of investigation, such as search warrants, which allow the use of force to trawl through premises in search for something relevant. They require specification of the relevant information, documents or things to be produced. The point of the notice process is to enable access to relevant information in a way that advances the investigation and protects the interests of all concerned.

If a person does not have the information the CEO suspects they hold, then there will be nothing to produce. If it transpires information produced is not relevant to the investigation then there are strict secrecy provisions applying to its further use or disclosure. However, the objective of the notice regime would be defeated if other methods of investigation had to be attempted first. Investigations would be compromised and evidence would be lost. Attempts to resolve allegations or indications of doping would need to proceed in an indirect and protracted manner, increasing the risks to the individuals who come forward with information needing to be tested or corroborated and offering those who are complicit in doping activity an opportunity to evade detection.

The nature of the information, documents or things

In a practical sense, the information, documents or things required to be produced under a notice is determined by their relevance to the National Anti-Doping Scheme. And, while relevance can only be determined case by case, given the serious and sophisticated nature of the sports doping

> threat a wide variety of information, documents or things may prove to be relevant.
>
> There are restrictions on even relevant information able to be sought. In particular, a notice can only be given to a medical practitioner if the CEO of ASADA has declared in writing the practitioner is reasonably believed to be involved in the violation under investigation. However, within those restrictions, the relevance of particular information, documents or things will turn on the threat under investigation.
>
> In some cases, a notice might be used to require the production of something going to the heart of an investigation. It may, for example, require the production of a vial of a prohibited substance in the person's possession. Of course, if the person does not have that thing, then there will be nothing to produce in answer to the notice.
>
> In other cases, information might be sought to develop an intelligence led investigation. Records held on communications devices evidencing contact or communications between a person complicit in doping activities and particular athletes or support persons would be an example. And records of internet searches demonstrating athletes or support persons seeking information at relevant times as to how long certain prohibited drugs remain in their system have been used in anti-doping proceedings.
>
> Records from third parties can also be vital. Information about financial transactions or orders relating to the purchase of prohibited substances can be obtained pursuant to a disclosure notice.
>
> Again, ASADA understands its practices in this respect to be consistent with those of other agencies with similar coercive powers. The proposed amendments do not affect the nature of the information, documents or things required to be produced.

Concluding comments

International human rights legal advice

Right to privacy

2.28 With regard to the proposed removal of the requirement for the CEO to have the agreement of three members of the Anti-Doping Rule Violation Panel (the panel) in order to issue a notice, the minister has advised that the panel does not consider the merits of a decision to issue a notice in a given case, but merely considers the reasonableness of the CEO's assessment as to the prospect that the recipient has the relevant information. The minister has advised that there does not appear to be another investigatory body with such power which requires the external endorsement of the reasonableness of the issuing officer's state of mind, and describes the panel as imposing a 'disproportionate and unnecessary burden' with 'very limited value added'. The minister has also advised that the CEO's decision would be subject to judicial review; scrutiny in any court or tribunal proceedings; and could be the subject of a complaint to the Commonwealth Ombudsman. However, it

is noted that this kind of review would only take place after the disclosure notice had already been issued, which limits its value as a safeguard.

2.29 As to the kinds of information which may be required to be produced, the minister has advised that this will vary in each case, and will depend on the threat being investigated. It may include production of a vial of a prohibited substance, digital records, records of internet searches, or financial transactions. It would appear, therefore, that the kind of information which may be required to be produced or disclosed could include a range of personal information.[11]

2.30 As to whether there are other, less rights restrictive, methods for investigating doping related matters when the CEO suspects (but does not yet believe) a contravention may have occurred, the minister advises that the effectiveness of conventional 'drug tests' in combating sports doping is limited. The minister advises that the overwhelming majority of information relied on by ASADA is obtained without a disclosure notice, but that the capacity to require relevant information before a credible allegation or indication of a threat develops to the 'belief' threshold is vital. The minister has also stated that asking for information to be supplied voluntarily from a person suspected of being complicit in, or sympathetic to, doping activity may be met with a refusal and alert to those concerned, thereby providing an opportunity for evidence to be destroyed or concealed. In this respect, the minister states, the objective of the notice regime would be defeated if other methods of investigation had to be attempted first.

2.31 As noted in the initial analysis, the collection, storage and use of a person's private information using coercive evidence-gathering powers engages and limits the right to privacy. The right to privacy may be subject to permissible limitations which are prescribed by law and are not arbitrary. In order for a limitation not to be arbitrary, it must pursue a legitimate objective, and be rationally connected to, and a proportionate means of achieving, that objective.[12] Ensuring that ASADA is able to effectively investigate potential anti-doping rule violations is likely to be a legitimate objective for the purposes of international human rights law, and the measures seem rationally connected to that objective. Requiring a person to provide information or attend an interview where the CEO reasonably 'suspects' that they may have

---

11 Additionally, it is unclear whether the potential breadth of documents or other information which may be required to be produced pursuant to a disclosure notice will further expand following the passing of the Australian Sports Anti-Doping Authority Amendment (Sports Integrity Australia) Bill 2019 into law on 24 February 2020, which expands ASADA's role from dealing with sports doping to include other threats to 'sports integrity'.

12 See, for example, *Leyla Sahin v Turkey,* European Court of Human Rights (Grand Chamber) Application No. 44774/98 (2005); *Al-Adsani v United Kingdom*, European Court of Human Rights (Grand Chamber) Application No. 35763/97 (2001) [53] - [55]; *Manoussakis and Others v Greece*, European Court of Human Rights, Application No. 18748/91 (1996) [36] - [53]. See also the reasoning applied by the High Court of Australia with respect to the proportionality test in *Lange v Australian Broadcasting Corporation* [1997] HCA 25.

information related to doping, but before a 'credible allegation' exists, is a relatively low basis on which to compel a person to provide personal information. The minister's response does not provide any specific examples of when a reasonable 'belief' would not allow for an effective investigation, whereas 'suspicion' would. However, it is noted that the minister has provided such a response to the Senate Committee for the Scrutiny of Bills,[13] which demonstrate the type of cases where belief may be too high a threshold. It appears, on the basis of this information, that in limited circumstances there may be no other less rights restrictive ways to gather the requisite information to adequately investigate suspected doping cases. It is noted that there are safeguards already in the *Australian Sports Anti-Doping Authority Act 2006*[14] to prevent the disclosure of information collected under a disclosure notice.

2.32 Noting the potential impact on personal privacy of requiring the production of personal information, such as internet searches and bank records, it is relevant that the majority of information relied on by ASADA is obtained without a disclosure notice. However, it is noted that there is nothing in the legislation requiring the CEO of ASADA to consider alternative mechanisms prior to issuing a disclosure notice. If the Act or regulations were to include such a requirement this would assist in demonstrating the proportionality of the measure. Nonetheless, on balance any limitation on the right to privacy by lowering the threshold by which a disclosure notice may be issued would appear to be a permissible limitation under international human rights law.

Committee view

2.33 The committee thanks the minister for this response. The committee notes that the bill seeks to lower the threshold for the Chief Executive Officer (CEO) of the Australian Sports Anti-Doping Authority (ASADA) to issue a disclosure notice,

---

13 Senate Standing Committee for the Scrutiny of Bills, Scrutiny Digest 10 of 2019, pp. 37-40, at p. 38. 'For example, ASADA may have financial evidence of multiple transactions between a support person and a website known to sell prohibited substances. In the absence of evidence of the substance purchased or the details of the transaction, it would be difficult to form a reasonable belief. However, a reasonable suspicion could be formed to allow for further investigation. Similarly, information obtained as a result of a tip-off may only raise a suspicion a possible breach of a rule has occurred. If a reasonable belief is required then this information may not be able to be pursued. This is especially the case where an athlete support person is suspected of committing a possible breach of the rules as there are no further tools, such as initiating a drug· test, available to obtain evidence of the possible breach. The issuing of a Disclosure Notice based on 'reasonable suspicion' would address this gap and allow ASADA to better direct its investigative resources at facilitators and sophisticated doping programs.'

14 See section 67 of the Australian Sports Anti-Doping Authority Act 2006 and the World Anti-Doping Code International Standard for the Protection of Privacy and Personal Information, which ASADA is bound by.

requiring persons to answer questions or provide information, documents or things regarding a suspected doping violation, which may include personal information.

2.34 The committee notes the legal advice that these measures engage and limit the right to privacy, but considers that any limitation on the right to privacy would appear to be a permissible limitation under international human rights law.

Australian Sports Anti-Doping Authority Amendment (Sport Integrity Australia) Bill 2019[1]

Purpose	This bill seeks to amend the *Australian Sports Anti-Doping Authority Act 2006* to rename the Australian Sports Anti-Doping Authority as 'Sport Integrity Australia'; provide Sport Integrity Australia with a new set of functions; list Sport Integrity Australia as an enforcement body under the *Privacy Act 1988*; and make consequential amendments to other Acts
Portfolio	Youth and Sport
Introduced	House of Representatives on 17 October 2019
Right	Privacy
Status	Concluded

2.35 The committee requested a response from the minister in relation to the bill in *Report 1 of 2020*.[2]

Exempting Sport Integrity Australia from aspects of the *Privacy Act 1988*

2.36 The bill seeks to rename the Australian Sports Anti-Doping Authority (ASADA), whose focus is on anti-doping, as Sport Integrity Australia (SIA), and provide SIA with a broader set of responsibilities and functions. Item 24 of the bill would establish that the SIA Chief Executive Officer (CEO) is responsible for coordinating a national approach to Australia's response to matters relating to 'sports integrity', including threats to sports integrity.[3] 'Threats' to sports integrity are defined to include manipulation of sporting competitions, the use of drugs or doping methods in sport, the abuse of children and other persons in a sporting environment and the failure to protect members of sporting organisations from bullying, intimidation, discrimination or harassment.[4]

1 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Australian Sports Anti-Doping Authority Amendment (Sport Integrity Australia) Bill 2019, *Report 4 of 2020*; [2020] AUPJCHR 51.

2 Parliamentary Joint Committee on Human Rights, *Report 1 of 2020* (5 February 2020), pp. 12-16.

3 Schedule 1, item 11 of the bill. 'Sports integrity' being defined to mean the manifestation of the ethics and values that promote community confidence in sport.

4 Schedule 1, item 12.

2.37 Furthermore, the bill seeks to amend subsection 6(1) of the Privacy Act to include SIA as an 'enforcement body'.[5] This would have the effect that:

- SIA would not be required to notify of an eligible data breach under Part IIIC of the Privacy Act, where the CEO believes on reasonable grounds that notifying the breach would be likely to prejudice one or more enforcement related activities conducted by, or on behalf of, the enforcement body;[6]
- SIA would not be required to obtain an individuals' consent to collect sensitive information, where the collection of that information is reasonably necessary for, or directly related to, one or more of SIA's functions or activities;[7]
- another Australian Privacy Principle (APP) entity would be able to disclose information to SIA,[8] including a person's government identifier,[9] where that entity reasonably believes that the use or disclosure of the information is reasonably necessary for one or more of SIA’s enforcement related activities;
- SIA would not be required to obtain a person's consent to disclose their personal information to an overseas recipient, where that recipient is a body that performs functions, or exercises powers, that are similar to those performed or exercised by an enforcement body; [10] and
- SIA would not be required to give a person access to their personal information where to do so would be likely to prejudice one or more enforcement related activities conducted by SIA.[11]

---

5 Schedule 2, item 23.

6 *Privacy Act 1988*, section 26WN. 'Enforcement related activity' is defined in subsection 5(1) of the *Privacy Act 1988* to mean: the prevention, detection, investigation, prosecution or punishment of criminal offences, or breaches of a law imposing a penalty or sanction; the conduct of surveillance activities, intelligence gathering activities or monitoring activities; the conduct of protective or custodial activities; the enforcement of laws relating to the confiscation of the proceeds of crime; the protection of public revenue; the prevention, detection, investigation or remedying of misconduct of a serious nature, or other conduct prescribed by the regulations; or the preparation for, or conduct of, proceedings before any court or tribunal, or the implementation of court/tribunal orders.

7 Australian Privacy Principle (APP) 3.4(d)(ii).

8 APP 6.2(e).

9 APP 9.2(e).

10 APP 8.2(f).

11 APP 12.3(i).

Summary of initial assessment

Preliminary international human rights legal advice

Right to privacy

2.38 The proposed inclusion of SIA as an enforcement body for the purposes of the Privacy Act, which would enable SIA to use and disclose personal information, engages the right to privacy.[12] The right to privacy encompasses respect for informational privacy, including the right to respect for private information and private life, particularly in relation to the storing, use, and sharing of personal information.[13] The right may be subject to permissible limitations which are prescribed by law and are not arbitrary. In order for a limitation not to be arbitrary, it must pursue a legitimate objective, be rationally connected to that objective, and be a proportionate means of achieving that objective.[14]

2.39 The initial analysis stated that more information was required in order to assess the compatibility of this measure with the right to privacy, in particular:

- the legitimate objective that the measure seeks to address (including any reasoning or evidence that establishes that the objective addresses a substantial and pressing concern);
- the type of information it is anticipated that SIA would obtain and/or share in addressing threats to 'sports integrity' (including what investigations are likely to be conducted by SIA in relation to the abuse of children and any bullying, intimidation, discrimination or harassment in a sporting environment);
- whether there are any other, less rights restrictive, methods to achieve the stated objective;
- whether an eligible data breach would be required to be notified once any prejudice to an enforcement related activity has ceased; and
- what safeguards would protect the privacy of personal information which SIA could share (including with overseas entities).

2.40 The full initial legal analysis is set out at *Report 1 of 2020*.

12 International Covenant on Civil and Political Rights (ICCPR), article 17.

13 See, UN Human Rights Committee, *General Comment No. 16: Article 17* (1988) [10]; and *General Comment No. 34 (Freedom of opinion and expression)* (2011) [18].

14 See, for example, *Leyla Sahin v Turkey,* European Court of Human Rights (Grand Chamber) Application No. 44774/98 (2005); *Al-Adsani v United Kingdom*, European Court of Human Rights (Grand Chamber) Application No. 35763/97 (2001) [53] - [55]; *Manoussakis and Others v Greece*, European Court of Human Rights, Application No. 18748/91 (1996) [36] - [53]. See also the reasoning applied by the High Court of Australia with respect to the proportionality test in *Lange v Australian Broadcasting Corporation* [1997] HCA 25.

Committee's initial view

2.41 The committee noted the legal advice and in order to assess whether these measures constitute a proportionate limitation on the right to privacy, the committee sought the minister's advice as to the matters set out at paragraph [2.39].

Minister's response[15]

2.42 The minister advised:

> *Legitimate objective*
>
> The Wood Review recommended the proposed National Sports Integrity Commission (Sport Integrity Australia) be made an enforcement body for the purposes of the *Privacy Act 1988* (Privacy Act) (at p 172). This recommendation was in the following terms:
>
>> *That the...[NSIC]...be authorised to deal with information captured by the Privacy Act, and have the ability to collect and use 'sensitive information' about a person without consent. The NSIC be designated as a law enforcement agency to have the confidence of international and Australian law enforcement agencies as both a receiver and provider of personal information, and material alleging criminality.*
>
> In recommending the establishment of a national sports integrity body, the Wood Review described it as being: (at 175)
>
>> *... the central point for overseeing the full range of integrity issues and challenges including collecting, assessing and disseminating relevant intelligence to policing and law enforcement agencies and NSOs, and other relevant organisations as may be appropriate. It would have extra functions in supporting sporting bodies in the development of their own integrity requirements and capabilities, including education and training. It would also have a strategic risk assessment role in relation to risk levels and threats in individual sports and of their capacity to manage those risks or threats, in line with the...approach mentioned earlier in this report.*
>
> Consistent with the recommendation and observations of the Wood Review, Sport Integrity Australia's [sic] cannot achieve its functions in a vacuum. It is vital there be seamless communications between relevant stakeholders, including between Sport Integrity Australia, regulators and existing law enforcement agencies.

15 The minister's response to the committee's inquiries was received on 2 March 2020. The response is available in full on the committee's website at: https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Scrutiny_reports .

Serious criminal activity is fundamental to at least some of Sport Integrity Australia's responsibilities, for example, match-fixing and organised crime elements of sports doping, among other things. That said, other elements of threats to sport integrity do not necessarily involve criminal behaviour and fall outside of the functions and responsibilities of conventional law enforcement agencies. In one sense, a key role of Sport Integrity Australia will be to bridge that gap.

By exchanging information seamlessly with a wide range of sources, including sports organisations and other entities, Sport Integrity Australia will be able to identify patterns and matters relevant to detecting threats to sports integrity.

There is a rational connection between these legitimate objectives and designating Sport Integrity Australia to be an enforcement body for the purposes of the *Privacy Act 1988*. Most relevantly in this context, the effects of making Sport Integrity Australia an enforcement body include:

- the capacity to be given information that is reasonably believed to be necessary for one or more of Sport Integrity Australia's enforcement related activities;
- permitting Sport Integrity Australia to collect sensitive information about a person who may be subject to its enforcement related activities. In many cases, it would defeat the purpose of Sport Integrity Australia's functions if suspects had to be informed they had come to Sport Integrity Australia's notice; and
- permitting Sport Integrity Australia to exchange information effectively with overseas enforcement bodies, consistent with exchanges with existing Australian enforcement bodies.

These effects would only apply in relation to Sport Integrity Australia's enforcement related activities. They would have no application to other activities conducted by Sport Integrity Australia. On that basis, the effect of this measure is limited and proportionate to the overall objective.

Sport Integrity Australia's enforcement related activities

It is anticipated Sport Integrity Australia's enforcement related activities will focus on detection and intelligence gathering relevant to threats to sports integrity. As explained, in some cases those threats could involve possible criminal conduct. It could also involve misconduct of a serious nature within the terms of the definition of 'enforcement related activity' in s 6(1) of the *Privacy Act 1988*.

Inevitably, this will involve the exchange of personal information, and in some cases, sensitive information. It remains the case information can only be provided by an APP entity to Sport Integrity Australia where it is reasonably necessary to do so for the purpose of one of Sport Integrity Australia's enforcement related activities. It is not an unconstrained

authority to share information with Sport Integrity Australia. It is a proportionate means of achieving the legitimate objective discussed above for the *Privacy Act 1988* to enable provision to Sport Integrity Australia of this limited class of information.

It is not anticipated those activities would ordinarily include Sport Integrity Australia's functions in relation to matters involving, for example, less serious behavioural issues.

Type of information Sport Integrity Australia is anticipated to receive and/ or share

Sport Integrity Australia's key role in this respect is detecting activities requiring an enforcement response. To do this, it requires timely access to information from all areas of the sports environment relevant to integrity threats, to enable it to respond effectively, before a threat is realised. There can be a fine line between indicators apparent in sporting code of conduct matters and those developing into grave threats to the integrity of Australian sport, potentially doing irreparable damage to the reputation of Australian sport. Where criminal activity is disclosed, ordinarily a prosecution response by a law enforcement agency will take its course, but in the event relevant conduct is not proved to the criminal standard, it may still be necessary for Sport Integrity Australia to facilitate action involving the sport's controlling body or by others.

For example, in its enforcement activity of detecting criminal activity or serious misconduct, potentially crucial information could come from one or more sources indicating the integrity of a sporting event will be, or has been, compromised. It could start with something as simple as detection of suspicious betting patterns, followed by separate reports of suspicious conduct in the sporting arena and intelligence from a separate source about organised crime figures suggesting they are corrupting sporting events, or involved in the supply of prohibited substances to elite athletes. Enabling Sport Integrity Australia to deal with differing sources of information such as these will enable a more effective response to sport integrity threats.

Links between organised crime and drugs in sport are well reported and, in some cases, high profile investigations have ultimately been resolved by disciplinary action within the sporting codes, because there was insufficient evidence for criminal prosecutions. For this reason, it is important Sport Integrity Australia has the capacity to traverse the discrete areas of the sports environment, for example sporting bodies, wagering bodies, the pharmaceutical industry, regulators and law enforcement.

Consistent with Sport Integrity Australia's overall purpose, it will have the ability to disclose information to law enforcement and/or sports and/or regulators from time to time. Where the information is protected by separate secrecy provisions, then any disclosure by Sport Integrity Australia would need to be consistent with those laws. Similarly, if another

body gives Sport Integrity Australia information on condition it not be further disclosed or used for other purposes, then Sport Integrity Australia would be obliged to respect those conditions in the usual way.

Other, less restrictive methods to achieve stated objective

As implicitly recognised by the recommendations of Wood Review, this is a necessary step to achieve the stated objective.

As discussed above, the designation of Sport Integrity Australia as an enforcement body will be relevant only to the extent Sport Integrity Australia engages in its enforcement related activities.

Eligible data breaches

This exception applies only to the extent notification to a subject would prejudice Sport Integrity Australia's enforcement related activities. It is not a general exemption from the data breach notification obligations.

Noting this notification obligation could affect investigations being conducted by agencies other than Sport Integrity Australia, it is appropriate and important this provision apply. A decision about further disclosure to an affected individual would be a matter for the Sport Integrity Australia CEO, taking into account the circumstances existing at the time.

The report also suggests Sport Integrity Australia, as an enforcement body, would not be required to give a person access to their personal information where to do so would be likely to prejudice one or more enforcement related activities conducted by Sport Integrity Australia. It suggests APP 12.3(i) is the source of that exception. I am advised APP 12.3 would have no effect on Sport Integrity Australia's obligations in this respect, because, as an agency, the applicable obligation falls under APP 12.2, which does not distinguish enforcement bodies from other agencies.

If access to personal information held by an organisation would prejudice enforcement activities conducted by or on behalf of Sport Integrity Australia, then the exception in APP 12.3(i) would be engaged. For the reasons outlined above, this is appropriate and necessary, so as not to undermine Sport Integrity Australia achieving its lawful objectives.

Safeguards to protect privacy of in formation shared with overseas entities

The Wood Review noted, by way of example of a match-fixing case in the Victorian Football Premier League, the transnational character of corruption. It was evidenced in this case by the corruption of players in a Victorian club involving athletes imported from the United Kingdom, Australian support staff and an international criminal syndicate based in Singapore and Hungary.

In a sporting sense, Australia is not an island. Most major sports have an international element and elite athletes train and compete overseas. Further, betting on Australian domestic sports is widespread internationally.

> If it is accepted Sport Integrity Australia has a role in address threats to sports integrity, it is important Sport Integrity Australia is able to deal with its overseas counterparts on an equal footing in this vital area of exchanging information relevant to sport integrity threats with overseas bodies performing enforcement functions.

Concluding comments

International human rights legal advice

2.43 In relation to the legitimate objective of the measure, the minister has advised that designating SIA an 'enforcement body' for the purposes of the Privacy Act will enable the agency to address both the elements of threats to sports integrity which constitute serious and/or organised criminal activity, and such threats which do not involve criminal conduct and so fall outside the responsibilities of law enforcement agencies. The minister has explained that, in order to effectively bridge this gap SIA must be able to communicate with relevant stakeholders, including regulators and law enforcement agencies; and has stated that this may enable SIA to identify patterns and other matters relevant to detecting threats to sports integrity. Addressing both criminal and non-criminal conduct which threatens sports integrity may be capable of constituting a legitimate objective for the purposes of international human rights law. It also appears that designating SIA as an enforcement body for the purposes of the Privacy Act is rationally connected to that objective.

2.44 In relation to the proportionality of the measure and the type of information it is anticipated that SIA would obtain and/or share in addressing threats to 'sports integrity', the minister has advised that information could come from one or more sources indicating that the integrity of a sporting event will be, or has been compromised (for example, detection of suspicious betting patterns, or intelligence about organised crime figures corrupting sporting events or supplying prohibited substances to athletes). However, it remains unclear what types of information, including private information, SIA may obtain and/or share as part of its role in investigating other threats to sports integrity, including information related to the abuse of children and other persons in a sporting environment and the failure to protect members of sporting organisations from bullying, intimidation, discrimination or harassment. The minister has advised that SIA's enforcement related activities will focus on detection and intelligence gathering relevant to threats to sports integrity, but that it is not 'anticipated that those activities would ordinarily include Sport Integrity Australia's functions in relation to matters involving, for example, less serious behavioural issues'. However, it would appear that there is nothing in the legislation to prevent SIA from examining less serious behavioural issues, and if doing so for the purposes of enforcement, such activities would appear to be exempt from certain aspects of the *Privacy Act 1988*.

2.45 As to safeguards which would protect the privacy of personal information which SIA could share, the minister has noted that where such information is

protected by separate secrecy provisions, any such disclosure would have to be consistent with those laws. The minister has also advised that if a separate body had provided SIA with information on the condition that it not be disclosed further, SIA would be obliged to comply with such a condition. The minister has advised that SIA's designation as an enforcement body would exempt it from the obligation to notify of an eligible data breach, but only to the extent that such a notification would prejudice SIA's enforcement related activities.[16] The minister has stated that this is appropriate because such notifications could affect investigations being undertaken by other agencies. As to whether an eligible data breach would be required to be notified once any prejudice to law enforcement has ceased, the minister has advised that any decisions about further disclosure would be a matter for the CEO of SIA 'taking into account the circumstances existing at the time'. However, it is noted that there does not appear to be anything in law that would require the CEO to consider disclosing the data breach to affected individuals once the prejudice to law enforcement activities had passed.

2.46 In terms of protecting information which SIA may share with overseas entities, the minister has stated that SIA has to be able to deal with overseas counterparts on an equal footing in terms of exchanging information. However, the minister's response did not address the question as to what safeguards, if any, would protect the privacy of personal information which SIA may share with overseas entities.

2.47 As such, it remains unclear what type of personal information SIA may obtain and/or share in investigating threats to 'sports integrity'; whether any safeguards would protect the privacy of personal information which SIA may share with overseas entities; and whether an eligible data breach would be required to be notified once any prejudice to law enforcement related activity has ceased. Consequently, it is not clear that these measures would constitute a proportionate limitation on the right to privacy.

Committee view

2.48 The committee thanks the minister for this response. The committee notes that the bill seeks to expand the functions currently being exercised by the Australian Sports Anti-Doping Authority. In exercising these broader functions, the newly named Sport Integrity Australia would also be given the status of an 'enforcement body' for the purposes of the *Privacy Act 1988,* thereby enlivening a number of powers in relation to the gathering, sharing and control over access to personal information.

16 Privacy Act, section 26WN.

2.49 The committee notes the legal advice regarding the impact of these measures on the right to privacy.

2.50 However, as this bill has now passed both houses of Parliament the committee makes no further comment in relation to this matter.

Aviation Transport Security Amendment (Security Controlled Airports) Regulations 2019 [F2019L01656][1]

Purpose	This instrument amends the *Aviation Transport Security Regulations 2005* to establish new categories of security controlled airports, and provide for new security screening thresholds for air services.
Portfolio	Home Affairs
Authorising legislation	*Aviation Transport Security Act 2004*
Last day to disallow	15 sitting days after tabling (tabled in the House of Representatives and the Senate on 4 February 2020). Notice of motion to disallow must be given by 12 May 2020 in the Senate[2]
Rights	Privacy; freedom of movement
Status	Concluded

2.51 The committee requested a response from the minister in relation to these regulations in *Report 2 of 2020*.[3]

Expanded use of body scanners in Australian airports

2.52 These regulations amend the way in which Australian airports, and aircraft, are categorised for security purposes. This would have the effect of permitting the use of advanced security screening measures, including body scanners, at domestic airports.

2.53 The Aviation Transport Security Regulations 2005 (the primary regulations) currently provide for seven categories of security controlled airport, which are defined in relation to the weight of the aircrafts operating from them.[4] The amending regulations repeal those categories, providing instead for three tiers of security controlled airport, and a category of 'designated airport'.[5] The four

1 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Aviation Transport Security Amendment (Security Controlled Airports) Regulations 2019 [F2019L01656], *Report 4 of 2020*; [2020] AUPJCHR 52.

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

3 Parliamentary Joint Committee on Human Rights, *Report 2 of 2020* (12 February 2020), pp. 2-7.

4 Section 3.01B.

5 Schedule 1, Item 3, section 3.01B.

categories are not defined in the amending regulations, and it would appear that the Secretary of the Department of Home Affairs may assign a particular security controlled airport to one of these categories,[6] having regard to a range of matters.[7] The regulations also amend the definition of an aircraft which must be subject to security screening.[8]

2.54 The statement of compatibility explains that the effect of this revised airport security tier classification, and revised aircraft screening threshold, would be that a 'small number of airports and aircraft' which were not previously security screened will now be security screened.[9] The statement of compatibility explains that these measures will see a number of additional measures to strengthen security, 'including the use of body scanners for domestic flights'.[10]

Summary of initial assessment

Preliminary international human rights legal advice

Right to privacy and freedom of movement

2.55 The implementation of advanced security screening at airport security screening areas, in particular the use of body scanners, engages the right to privacy. This is because such scanners produce an image of a person's body, and may reveal objects contained under a person's clothing, or within a person's body. The right to privacy includes the right to personal autonomy, and physical and psychological integrity.[11] 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

---

6 *Aviation Transport Security Act 2004*, subsection 28(6).

7 Aviation Transport Security Regulations 2005, section 3.01C. The Secretary may consider: whether the airport is a designated airport; whether an international air services operates to or from the airport; whether aircraft operate regular public transport operations or open charter operations to or from the airport; whether the design of the existing terminal will prevent the airport operator from complying with particular screening requirements; and a number of other matters.

8 See Schedule 2, item 5, amendments to regulation 4.02.

9 Statement of compatibility, p. 5.

10 Statement of compatibility, p. 6. Subsection 44(3A) of the *Aviation Transport Security Act 2004* provides that equipment which may be used for screening may include body scanning equipment, metal detection equipment, and explosive trace detection equipment.

11 International Covenant on Civil and Political Rights (ICCPR), article 17; Convention on the Rights of the Child, article 16; and Convention on the Rights of Persons with Disabilities, article 22. The UN Human Rights Committee has explained, for example, that personal and body searches must be accompanied by effective measures to ensure that such searches are carried out in a manner consistent with the dignity of the person who is being searched. See, UN Human Rights Committee, *General Comment No.16: The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation* (1988), [8].

measure must pursue a legitimate objective and be rationally connected to (that is, effective to achieve) and proportionate to that objective. In order to be proportionate, a limitation on the right to privacy should only be as extensive as is strictly necessary to achieve its legitimate objective and must be accompanied by appropriate safeguards.[12]

2.56 As a person who does not agree to undergo a body scan at an airport would be prevented from proceeding through the airport and boarding a flight,[13] and cannot pass the screening point for 24 hours after the refusal,[14] the expansion of the use of body scanners also engages and limits the right to freedom of movement. This includes the right to move freely within a country for those who are lawfully within the country, and to leave the country.[15] The right may be subject to permissible limitations in particular circumstances, including where it is necessary and proportionate to achieve the objectives of protecting the rights and freedoms of others, national security, public health or morals, and public order. Measures that limit the right to freedom of movement must also be rationally connected and proportionate to these legitimate objectives.

2.57 The initial analysis stated that in order to assess whether the regulations constitute a permissible limitation on the rights to privacy and freedom of movement, further information was required as to:

- the nature of the image that would be produced by the body scanners which would be used in domestic airports (the provision of an example image would be most useful to illustrate this);
- evidence of the effectiveness of body scanner devices in detecting non-metallic improvised explosive devices and other weapons, including those which walk-through metal detectors cannot detect, and whether other existing security screening processes, including pat-downs, could also detect such devices and weapons;
- whether an individual who does not wish to undergo a body scan can request to undergo an alternative to the security screening procedure, and if not, why not (noting the importance of treating different cases differently when rights are limited); and

12 Legislation must specify in detail the precise circumstances in which interferences with privacy may be permitted. See, *NK v Netherlands*, UN Human Rights Committee Communication No.2326/2013 (2018) [9.5].

13 Aviation Transport Security Regulations 2005, section 4.03A.

14 Aviation Transport Security Regulations 2005, section 4.03A.

15 International Covenant on Civil and Political Rights, article 12.

- what safeguards are in place to ensure that photographs are not taken of the digital images produced on the display screens of body scanner devices in airports.

2.58 The full initial legal analysis is set out at *Report 2 of 2020*.

Committee's initial view

2.59 The committee noted the legal advice that this measure engages and may limit the rights to privacy and freedom of movement and sought the minister's advice as to the matters set out at paragraph [2.57].

Minister's response[16]

2.60 The minister advised:

> - **the nature of the image that would be produced by the body scanners which would be used in domestic airports (the provision of an example image would be most useful to illustrate this);**
>
> In accordance with section 44 of the *Aviation Transport Security Act 2004*, a body scanner used for aviation security screening must only produce a generic image that is gender-neutral and from which an individual cannot be identified. The generic image (examples below) do not show specific anatomical detail or identifying information of the individual being screened. The image is the same for each person. Automated body scanner detection software identifies locations on the person that may require further investigation by a screening officer. These markers are generic and do not reveal the nature of the concern. As such, to the extent that a generic, non-specific image engages and limits the right to privacy in Article 17 of the International Covenant on Civil and Political Rights, the limitation is reasonable and proportionate to the legitimate objective of enhancing aviation security.

16 The minister's response to the committee's inquiries was received on 4 March 2020. The response is available in full on the committee's website at: https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Scrutiny_reports .

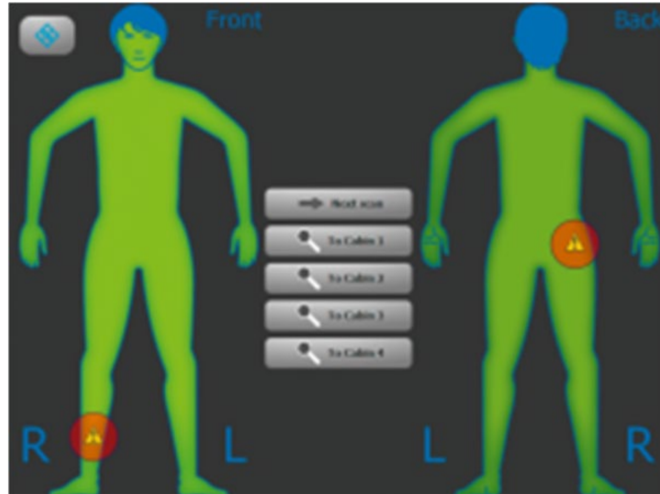

Image provided by Rapiscan Systems:
Rohde & Schwarz QPS 201 body scanner

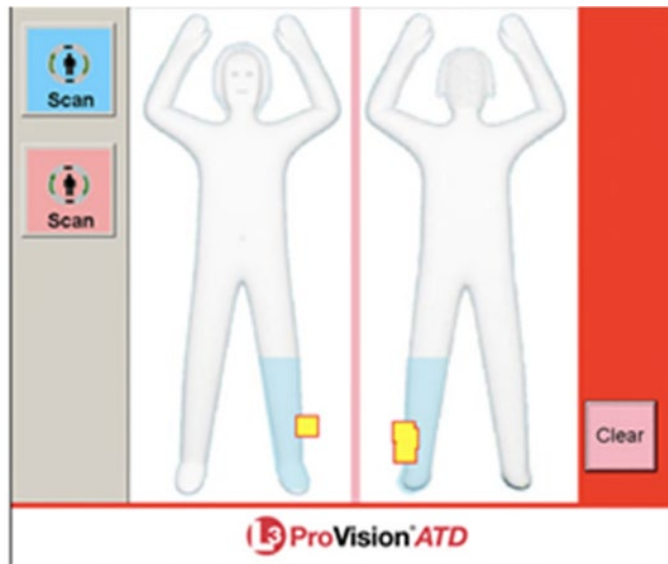

Image provided by L3 Harris:
ProVision body scanner image

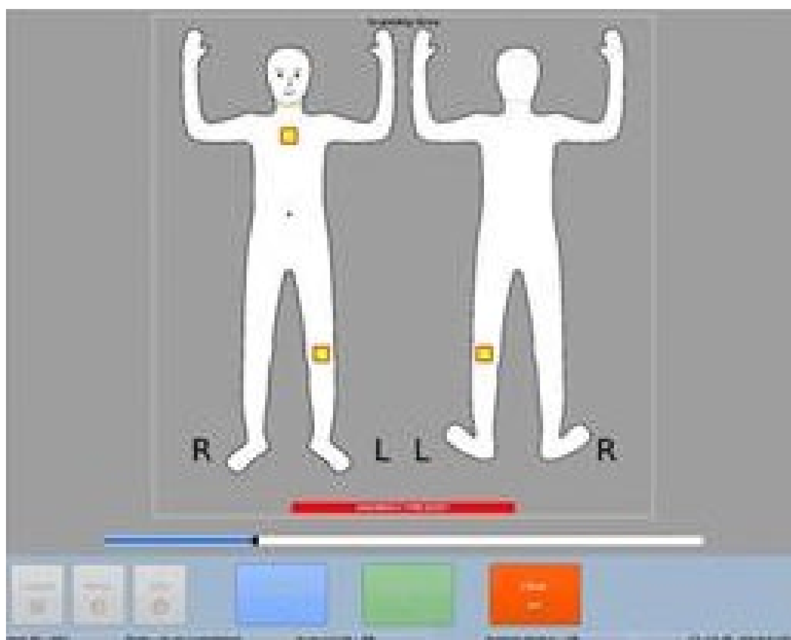

Image provided by Smiths Detection:
eqo body scanner image

- **evidence of the effectiveness of body scanner devices in detecting non-metallic improvised explosive devices and other weapons, including those which walkthrough metal detectors cannot detect, and whether other existing security screening processes, including pat-downs, could also detect such devices and weapons;**

Equipment detection standards, which outline the effectiveness of body scanners, are classified and cannot be made public for national security reasons.

Based on testing and certification undertaken by United States Department of Homeland Security Transportation Security Administration (https://www.dhs.gov/science-and-technology/transportation-security-laboratory) and the European Civil Aviation Conference (https://www.ecac-ceac.org/security), the body scanners used at Australian airports are the most advanced passenger screening technology available. Testing undertaken by these international bodies has proven that these systems are capable of detecting a range of sophisticated threats that other screening technologies, such as a walk-through metal detector cannot. These threats include non-metallic improvised explosive devices, weapons and prohibited items. Australia's current security environment is such that we are vulnerable to these types of threats.

The only alternative that offers an equivalent level of screening to a body scanner is an enhanced full body frisk search. This would involve a thorough frisk of the entire body, including sensitive areas, as well as the possible loosening and/or removing of some clothing. As this is very intrusive, the full body frisk search is not part of aviation security screening arrangements. Consequently, body scanners are the most reasonable and

proportionate screening technology that are the least restrictive limitation on the right to privacy.

- **whether an individual who does not wish to undergo a body scan can request to undergo an alternative to the security screening procedure, and if not, why not (noting the importance of treating different cases differently when rights are limited); and**

As body scanners have significant security benefits, the Australian Government has a no opt-out policy for body scanner screening. An individual selected for a body scan, who is medically and physically able, will not be offered an alternative screening method as it is the most reasonable and proportionate screening option, providing the least intrusive means of screening a person for threat items. A less rights restrictive option is not available, as the only alternative is an enhanced full body frisk search, which is more intrusive and more rights restrictive (and consequently is not part of aviation security screening arrangements).

An individual with a medical or physical condition that prevents them from undertaking a body scan will be offered an alternative screening method suitable to their particular circumstances. This includes those who have disabilities, the elderly and people who rely on mobility equipment, who may not be able to stand for the required time, or hold the necessary pose to be screened successfully. A full Privacy Impact Assessment on the use of body scanners, including traveller selection and options for travellers with different needs, was conducted in 2012 and can be found at https://www.homeaffairs.gov.au/travelsecure-subsite/files/airport-body-scanners-privacy-impact-assessment.pdf.

- **what safeguards are in place to ensure that photographs are not taken of the digital images produced on the display screens of body scanner devices in airports.**

As discussed above, the image displayed by the body scanner is generic, gender-neutral and from which an individual cannot be identified, therefore safeguards that prevent a digital image being taken of the image displayed are not required. As such, while body scanner screening may engage a person's right to privacy, a digital image taken of the image displayed does not limit the person's right to privacy, as the person is not identifiable in any way.

Concluding comments

International human rights legal advice

2.61 With regard to the nature of the image that would be produced by the body scanners which would be used in domestic airports, the minister has provided three example images which would be produced by airport body scanners. The minister notes that the images generated by these machines are the same for each person, and do not show specific anatomic detail or identifying information. The minister has advised that as the image being displayed is generic, gender-neutral and does not

allow for a person to be identified, safeguards to prevent a digital image being taken of such an image are not required. Noting the generic nature of the image, it would appear that these images do not disproportionately interfere with an individual's right to privacy and it is reasonable not to require specific safeguards to prevent photographs being taken of such images.

2.62 The minister has advised that body scanner devices can effectively detect non-metallic improvised explosive devices and other weapons (including those which walk-through metal detectors cannot detect), and can detect threats which other screening technologies cannot, which goes to whether the measure is rationally connected to (that is, effective to achieve) the objective of increasing safety for the travelling public.

2.63 The minister has further advised that there is no opt-out policy for individuals who have been selected to undergo body scanner screening, although certain persons may not be required to undergo it based on physical needs, for example, people with disabilities, the elderly, people in mobility equipment, and people who cannot stand for the required time or hold the required pose. The minister has also advised that the only alternative offering the equivalent level of screening as a body scanner would be an 'enhanced full body frisk search', which would involve frisking a person's entire body (including sensitive areas), as well as the possible removal of or loosening of clothing. The minister has advised that as this 'is more intrusive and more rights restrictive' than a body scan, it will not be offered as an alternative. However, it is not clear why individuals who do not wish to submit to a body scan (whether for medical, personal, or religious reasons) could not also be offered an alternative screening method. This is particularly the case in light of the fact that selection for body scanning is random; and the availability of alternative screening for some persons who have been selected is not connected to an assessment of their potential security risk, merely a judgment as to their medical and/or physical capacity to undergo a body scan. The fact that an enhanced full body frisk search may be more invasive would appear to be something that would be better left to each individual to weigh up, in light of all available evidence.

2.64 As such, where passengers have been randomly selected to undergo a body scan, there appears to be extremely limited capacity to treat different cases differently, with the only flexibility being where a security officer has judged that a passenger is physical or medically unable to submit to a scan. It is unclear why any passenger who has been randomly selected for a scan (a selection process which would appear to have no connection with any assessment of their potential security risk) could not request to undergo an alternative screening method such as a physical frisk search. It is noted that body scanners may have a disproportionate impact on certain persons, such as transgender and intersex passengers,[17] as any unknown

17 See Department of Infrastructure and Transport, *The use of body scanners for aviation security screening in Australia: Privacy Impact Assessment*, February 2012, para. [10.10].

object on the body (including prosthetics) will show up on a scan. Although it appears that the images presented do not themselves limit the right to privacy, failing to allow people to choose an alternative screening method risks disproportionately limiting the rights to privacy and freedom of movement, as a person who does not agree to undergo a body scan would be prevented from proceeding through the airport and boarding a flight,[18] and cannot pass the screening point for 24 hours after the refusal.[19]

Committee view

2.65 The committee thanks the minister for this response. The committee notes that the instrument establishes new categories of security controlled airports, and provides for new security screening thresholds for air services, which would have the effect of expanding the use of body scanners at domestic airports.

2.66 The committee notes that the legal advice and considers that the nature of the images generated by body scanner devices themselves are sufficiently generic so as not to limit the right to privacy. The committee notes that the only alternative to a body scan is an enhanced full body frisk search, and appreciates the government's view that, as such, body scanners are the most reasonable and proportionate screening technology. However, given the impact on certain passengers of being required to pass through a body scanner, the committee considers that failing to allow people to choose which screening method they wish to undergo, may risk disproportionately limiting the rights to privacy and freedom of movement.

2.67 The committee draws these human rights concerns to the attention of the minister and the Parliament.

18 Aviation Transport Security Regulations 2005, section 4.03A.

19 Aviation Transport Security Regulations 2005, section 4.03A.

Fair Work (Registered Organisations) Amendment (Ensuring Integrity No. 2) Bill 2019[1]

Purpose	This bill seeks to amend the *Fair Work (Registered Organisations) Act 2009* to expand the grounds on which a person can be disqualified from holding office in a union; expand the grounds on which the registration of unions may be cancelled; expand the grounds for a union to be placed into administration and provide a public interest test for amalgamations
Portfolio	Industrial Relations
Introduced	House of Representatives, 4 December 2019
Rights	Freedom of association; right to form and join trade unions; just and favourable conditions at work
Status	Concluded[2]

2.68 The committee requested a response from the minister in relation to the bill in *Report 1 of 2020*.[3]

Disqualification of individuals from holding office in a union

2.69 Schedule 1 of the bill would expand the circumstances in which a person can be automatically disqualified from holding office in a registered organisation and make it a criminal offence for a person who is disqualified from holding office in a registered organisation to continue to hold office or act in a manner that would significantly influence the organisation.[4]

2.70 Specifically, Schedule 1 seeks to amend the *Fair Work (Registered Organisations) Act 2009* to include a discretionary regime of disqualification. The Fair Work Commissioner (the Commissioner) would be able to apply to the Federal Court

1 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Fair Work (Registered Organisations) Amendment (Ensuring Integrity No. 2) Bill 2019, *Report 4 of 2020*; [2020] AUPJCHR 53.

2 The committee noted this bill in Parliamentary Joint Committee on Human Rights, *Report 3 of 2019* (30 July 2019), p. 15, referring to substantive comments it made with regards to the 2017 iteration of the bill in *Report 9 of 2017* (5 September 2017) pp. 13-24 and *Report 12 of 2017* (28 November 2017), pp. 113-136.

3 Parliamentary Joint Committee on Human Rights, *Report 1 of 2020* (5 February 2020), pp. 20-34.

4 Explanatory memorandum, p. 2.

for an order disqualifying a person from holding office in a union. The Federal Court could disqualify a person if satisfied that a ground for disqualification applies and it would not be unjust to disqualify the person having regard to the nature of the ground, the circumstances and any other matters the court considers relevant. Under proposed section 223[5] the grounds for the disqualification include:

- a 'designated finding' or contempt in relation to designated law;[6]
- contempt of court in relation to an order or injunction under any law (other than designated law);
- two or more failures to take reasonable steps to prevent such conduct by a union while the person was an officer of that union;
- breach of directors' and officers' duties; or
- a person is not a 'fit and proper' person having regard to a range of factors.[7]

2.71 The bill seeks to make it a criminal offence for a person who is disqualified from holding office in a registered organisation to run for, hold or continue to hold office or act in a registered organisation.[8]

2.72 Under proposed section 9C[9] a 'designated finding' is defined to include a conviction against the person for an offence against a 'designated law' or any order for the person to pay a pecuniary penalty.[10]

Summary of initial assessment

Preliminary international human rights legal advice

Right to freedom of association and the right to just and favourable conditions at work

2.73 Expanding the circumstances in which individuals can be disqualified from holding office in a union engages and limits the right to freedom of association, the right to just and favourable conditions at work and, in particular, the right of unions to elect their own leadership freely. The right to freedom of association includes the

5 Schedule 1, item 11, proposed section 223.

6 As detailed in proposed subsections 9C(1)(a) and (b).

7 See proposed subsection 223(6) for the grounds for disqualification.

8 Schedule 1, item 11, proposed Division 4, Part 4 of Chapter 7.

9 Schedule 1, item 2, proposed section 9C.

10 The designated laws include the following: *Fair Work (Registered Organisations) Act* 2009; *Fair Work Act 2009*; *Building and Construction Industry (Improving Productivity) Act 2016*; *Work Health and Safety Act 2011;* each State or Territory OHS law (as prescribed by regulations made under the *Fair Work Act 2009*); Part 7.8 of the *Criminal Code* (causing harm to, and impersonation and obstruction of, Commonwealth public officials): See definition of designated law in proposed subsection 9C(2).

right to form and join trade unions. The right to just and favourable conditions of work also encompasses the right to form trade unions. These rights are protected by the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR).[11]

2.74 The interpretation of these rights is informed by International Labour Organization (ILO) treaties, including the ILO Convention of 1948 concerning Freedom of Association and Protection of the Right to Organise (ILO Convention No. 87) and the ILO Convention of 1949 concerning the Right to Organise and Collective Bargaining (ILO Convention No. 98).[12] ILO Convention 87 protects the right of workers to autonomy of union processes including electing their own representatives in full freedom, organising their administration and activities and formulating their own programs without interference.[13] Convention 87 also protects unions from being dissolved, suspended or de-registered and protects the right of workers to form organisations of their own choosing.[14]

2.75 The right to freedom of association may be subject to permissible limitations providing certain conditions are met. Generally, to be capable of justifying a limit on human rights, the measure must address a legitimate objective, be rationally connected to that objective and be a proportionate way to achieve that objective. However, article 22(3) of the ICCPR and article 8 of ICESCR expressly provide that no limitations are permissible on this right if they are inconsistent with the guarantees of freedom of association and the right to collectively organise contained in ILO Convention No. 87.

2.76 As an aspect of the right to freedom of association, the right to strike (or take industrial action) is protected and permitted under international law.[15] The existing restrictions on taking industrial action under Australian domestic law have been consistently criticised by international supervisory mechanisms as going beyond

11 See, article 22 of the ICCPR and article 8 of the ICESCR.

12 The Freedom of Association and Protection of the Right to Organize (ILO Convention No. 87) is expressly referred to in the ICCPR and the ICESCR.

13 See ILO Convention N.87 article 3.

14 See ILO Convention N.87 articles 2, 4. See, also, ILO Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO, Fifth Edition (2006) [292]-[308].

15 The right to strike is expressly protected in article 8(1)(d) of the ICESCR.

what is permissible under international law.[16] As noted in the initial analysis, it appears that the proposed measure could lead to the disqualification of an individual for conduct that may be protected as a matter of international law. In this respect the measure would appear to further limit the right to strike. Additionally, this aspect of the measure raises questions about its rational connection to the stated objective of protecting the interests of members, where members may be of the view that taking particular forms of industrial action are in their interests.

2.77 It was further noted in the initial analysis, that under the proposed measure a person may be disqualified from holding office in a union on the basis of their failure to take reasonable steps to prevent more than one contravention by their union that amounts to a 'designated finding' or contempt of court or that relates to two or more civil designated findings that total at least 900 penalty units.[17] As noted above, 'designated findings' are defined to apply in relation to a broad range of contraventions of industrial law including taking unprotected industrial action. Where a union has engaged in two or more such contraventions, the effect of the measure could be that the entire elected union leadership could be subject to disqualification. This is regardless of whether or not union members agreed to participate in, for example, conduct which led to 'designated findings' or contempt of court and whether they considered that this was in their best interests.

2.78 The initial analysis stated that more information was required in order to assess whether these are permissible limitations on the rights to freedom of association and just and favourable conditions at work, and in particular:

- how the measure is effective to achieve (that is, rationally connected to) its stated objective, noting in particular concerns regarding the impact of the

16 See, UN Committee on Economic Social and Cultural Rights (UNCESCR), Concluding Observations on Australia, E/C.12/AUS/CO/5 (23 June 2017) [29]-30]: ' The Committee is also concerned that the right to strike remains constrained in the State party (art. 8).The Committee recommends that the State party bring its legislation on trade union rights into line with article 8 of the Covenant and with the provisions of the relevant International Labour Organization (ILO) Conventions (nos. 87 and 98), particularly by removing penalties, including six months of incarceration, for industrial action, or the secret ballot requirements for workers who wish to take industrial action.' See, also, ILO CEACR, Observation Concerning Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), Australia, 103rd ILC session, 2013 ILO CEACR, Observation Concerning Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), Australia, 101st ILC session, 2013; ILO CEACR, Observation Concerning Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), Australia, 99th ILC session, 2009; ILO CEACR, Individual Observation Concerning the Right to Organise and Collective Bargain Convention, 1949, (No. 98), Australia, 99th session, 2009, See also, UNCESCR, Concluding Observations on Australia, E/C.12/AUS/CO/4 (12 June 2009) 5.

17 Schedule 1, item 11, proposed subsection 223(3) and (3A).

measures on the right to strike, which union members may consider to be in their best interests; and

- whether the limitation is a reasonable and proportionate measure to achieve the stated objective (in particular, whether the measure is the least rights restrictive way of achieving its stated objective; the extent of the limitation including in respect of the right to strike noting previous concerns raised by international supervisory mechanisms and the existence of relevant safeguards).

2.79 The full initial human rights analysis is set out at [*Report 1 of 2020*](#).

Committee's initial view

2.80 The committee noted the legal advice that this bill engages and limits the right to freedom of association and the right to just and favourable conditions at work, and in order to assess the permissibility of any limitation under international human rights law sought the minister's advice as to the matters set out at paragraph [2.78].

Minister's response[18]

2.81 The minister advised:

> *Current provisions*
>
> Under the current provisions of the *Fair Work (Registered Organisations) Act 2009* (RO Act)[19], a person can be disqualified from office automatically where he or she has been convicted of:
>
> - offences involving fraud, dishonesty, violence or property damage; or
> - offences relating to the formation, registration or management of associations and elections within registered organisations.
>
> In addition, the RO Act also includes a discretionary power for the Federal Court (the Court) to order disqualification from office where a person has contravened a civil penalty provision in the RO Act and the Court is satisfied that the disqualification is justified.[20]
>
> There are currently no penalties (and thus no disincentives) for a person who is disqualified from holding office to continue to act as an official whilst they are disqualified.

---

18 The minister's response to the committee's inquiries was received on 28 February 2020. The response is available in full on the committee's website at: https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Scrutiny_reports .

19 Section 215 of the *Fair Work (Registered Organisations) Act 2009*.

20 Section 307 A of the *Fair Work (Registered Organisations) Act 2009*.

Changes proposed

The Fair Work (Registered Organisations) Amendment (Ensuring Integrity No. 2) Bill 2019 (the Bill) expands the categories of offences for which a person can be automatically disqualified from holding office to include conviction of a serious offence, that is, an offence against any law in Australia carrying a penalty of five years' imprisonment or more.

On application by the Registered Organisations Commissioner (the Commissioner) only, the Court will also have the discretionary power to disqualify a person from office for a period the Court considers appropriate, in circumstances where one of the expanded grounds for disqualification exists and the Court does not consider it would be unjust to disqualify the person.

The Bill significantly lifts the threshold for when a Court can disqualify a person from holding office under the expanded discretionary disqualification regime in comparison with the previous iteration of the Bill, the Fair Work (Registered Organisations) Amendment (Ensuring Integrity) Bill 2019 (the previous Bill). This higher threshold enhances the Bill's compatibility with human rights obligations.

Under the Bill, for a relevant ground for disqualification to be made out in relation to 'designated findings', the person must have committed an offence against a range of workplace laws ('designated laws') or there must be orders for the person to pay a pecuniary penalty for the contravention of one or more civil penalty provisions of a designated law with combined maximum penalties of 180 penalty units within the last 10 years. The ground for multiple failures to prevent contraventions etc. by an organisation also provides that there must be orders for an organisation to pay a pecuniary penalty for civil contravention breaches against at least two civil penalty provisions with a combined total of the maximum penalties of at least 900 penalty units within the last 10 years.

Engaging in action that may constitute an offence or civil contravention under a designated law is not a designated finding for the purposes of the Bill of itself unless and until a previous Court, following separate legal action by the appropriate regulator or person with relevant standing, has found that a person has committed a relevant offence, or imposed orders requiring the person to pay a pecuniary penalty for a relevant civil contravention.

As noted in the Human Rights Scrutiny Report No. 1 of 2020 (Scrutiny Report), the Bill includes a number of safeguards, including:

- limiting standing to only allow the Commissioner to make an application for disqualification;
- putting the onus on the Commissioner to satisfy the Court that disqualification would not be unjust, having regard to the nature of the matters, the circumstance and nature of the person's involvement and any other matters the Court considers relevant; and

- prohibiting the Court from making an order unless it is satisfied that disqualification would not be unjust, having regard to the gravity of matters constituting the ground.

Objectives

The objective of the Bill is to protect the interests of workers and ensure that they are represented by officers who demonstrate a willingness to uphold standards reasonably expected of a person with the responsibility of holding office within an organisation. As identified by the Scrutiny Report (p 23), this is a legitimate objective for the purposes of human rights law. The amendments to the existing disqualification regimes in the RO Act will be effective in achieving this objective.

The amendments to the disqualification provisions of the RO Act are in response to the recommendations of the Royal Commission into Trade Union Governance and Corruptions (Royal Commission) concerning the current disqualification regime. Recommendation 38 specifically recommended the RO Act be amended to insert a new provision giving the Court jurisdiction, upon the application of the regulator, to disqualify a person from holding any office if the person has been found to have contravened a civil remedy provision of the *Fair Work Act 2009* (Fair Work Act) or civil remedy provision of the RO Act or *Work Health and Safety Act 2011* (WHS Act).

In response to the Committee's specific concern, the Bill does not contain provisions circumscribing the right to strike as protected by the right to freedom of association. The Bill does not alter the circumstances in which industrial action will be considered protected industrial action, or the consequences in Part 3-3 of the Fair Work Act for failures to comply with those provisions, dealing with industrial action.

In addition, even where a prima facie ground for disqualification is established, the Court still has a discretion not to disqualify a person where it would be unjust to do so.

Reasonableness and proportionality

The Bill seeks to achieve its objectives by providing appropriate mechanisms to disqualify a person from holding office in circumstances where a person has failed to uphold the standards expected of a person acting as an officer in an organisation. These mechanisms are administered and supervised by the Court, an impartial and independent judicial body.

The measures in the Bill are reasonable and proportionate methods of ensuring that officers who deliberately disobey the law are restricted in their ability to be in charge of registered organisations. This will serve to protect the interest of members and promote public order by ensuring the leadership of registered organisations act lawfully.

As already noted, the Bill does not restrict the right to strike as protected by the right to freedom of association. In addition, the various safeguards

> in the Bill, including the increased threshold that applies before the various designated finding grounds can be enlivened (s223(1)(b) and s223(3A)) ensure that the disqualification power is only exercised in appropriate circumstances. In this way, the Bill achieves its legitimate objective while ensuring that the no officer can be disqualified for inconsequential or minor misconduct.
>
> Finally, union members and officers who act lawfully will not be affected by this Bill. This Bill provides that officers who repeatedly break the law may, if the relevant grounds are made out, the regulator decides to take action, and a court decides it would not be unjust to make the relevant order, be disqualified from their office as they do not demonstrate the standard expected of them to access the rights and privileges that come with holding office.

Concluding comments

International human rights legal advice

2.82 The initial analysis asked how the measure is effective to achieve its stated objective of protecting the interests of workers and ensuring they are well represented, noting in particular concerns regarding the impact of the measures on the right to strike. The minister advised that this measure is a response to a recommendation by the Royal Commission into Trade Union Governance and Corruptions (Royal Commission).[21] The minister's response highlights what are seen as gaps in current regulation. However, the response does not address whether the basis and breadth of the proposed grounds for disqualification are effective to achieve the previously stated objective of 'improving the governance of registered organisations and protecting the interests of members'.[22] As previously stated, the proposed grounds for disqualification are extremely broad. Relevantly, conduct that could result in disqualification includes a 'designated finding', that is, a finding of a contravention of an industrial relations law, including contraventions that are less serious in nature. This would include taking unprotected industrial action.

2.83 The minister also advised that the bill does not contain any provisions circumscribing the right to strike as protected by the right to freedom of association, and that it does not alter the circumstances in which industrial action will be considered protected industrial action, or the existing provisions in Part 3-3 of the *Fair Work Act 2009* (Fair Work Act). It is acknowledged that the measure does not alter the existing requirements for taking protected industrial action. However, what it does is render non-compliance with these provisions a ground for disqualification from holding office in a registered organisation. That is, the measure creates an

21 Recommendation 38, which specifically recommended the Act be amended to insert a new provision expressly granting the Court jurisdiction to disqualify a person, on the application by the regulator.

22 Statement of compatibility p. viii.

additional sanction or disincentive for taking industrial action that does not, or may not, comply with the requirements of Part 3-3 of the Fair Work Act. As noted in the initial analysis, the existing restrictions on taking industrial action under Australian domestic law have been consistently criticised by international supervisory mechanisms as going beyond what is permissible under international human rights law.[23] For these reasons the measure appears to further engage and limit the right to strike. Further, this aspect of the measure continues to raise concerns that it is not effective to achieve the stated objective of protecting the interests of members, where members may be of the view that taking particular forms of industrial action (including taking unprotected industrial action) are in their interests.

2.84 In relation to proportionality, the minister advises that the bill provides appropriate mechanisms to disqualify a person from holding office, which are administered and supervised by the Federal Court, an impartial and independent judicial body. The minister also advises that the bill limits standing to allow only the Commissioner to make an application, puts the onus on the Commissioner to satisfy the court that the disqualification would not be unjust and prohibits the court from making an order unless satisfied disqualification would not be unjust. While it is a relevant safeguard that disqualification orders are to be made by the Federal Court, this alone is insufficient to ensure that the measure constitutes a proportionate limitation. The court's discretion in determining that a ground for disqualification exists and that it would not be unjust to make such an order does not address the breadth of the grounds for disqualification in the proposed legislation that the court will apply. The minister's response does not also address the specific concerns raised in the initial analysis regarding the breadth of the proposed powers of disqualification. As noted above, 'designated findings' are defined to apply in relation to a broad range of contraventions of industrial law including, for example, taking unprotected industrial action or a failure to comply with union right of entry

---

23 See, UN Committee on Economic Social and Cultural Rights (UNCESCR), Concluding Observations on Australia, E/C.12/AUS/CO/5 (23 June 2017) [29]-30]: ' The Committee is also concerned that the right to strike remains constrained in the State party (art. 8).The Committee recommends that the State party bring its legislation on trade union rights into line with article 8 of the Covenant and with the provisions of the relevant International Labour Organization (ILO) Conventions (nos. 87 and 98), particularly by removing penalties, including six months of incarceration, for industrial action, or the secret ballot requirements for workers who wish to take industrial action.' See, also, ILO CEACR, Observation Concerning Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), Australia, 103rd ILC session, 2013 ILO CEACR, Observation Concerning Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), Australia, 101st ILC session, 2013; ILO CEACR, Observation Concerning Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), Australia, 99th ILC session, 2009; ILO CEACR, Individual Observation Concerning the Right to Organise and Collective Bargain Convention, 1949, (No. 98), Australia, 99th session, 2009, See also, UNCESCR, Concluding Observations on Australia, E/C.12/AUS/CO/4 (12 June 2009) 5.

provisions. Where a union has engaged in two or more such contraventions, the effect of the measure could be that the entire elected union leadership could be subject to disqualification. This is regardless of whether or not union members agreed to participate in, for example, conduct which lead to 'designated findings' or contempt of court and whether they considered that this was in their best interests.

2.85 The minister's response notes that for the purposes of the bill, engaging in action that may constitute an offence or civil contravention under a designated law is not a designated finding 'unless and until' a person is convicted or has pecuniary orders made against them by a court. However, the expanded basis for criminal offences to constitute a ground for either mandatory or discretionary disqualification raises a concern that some of these offences may be unrelated to a person's capacity or suitability to perform functions in union office. In this respect, international supervisory mechanisms have cautioned that:

> Conviction on account of offences the nature of which is not such as to call into question the integrity of the person concerned and is not such as to be prejudicial to the exercise of trade union functions should not constitute grounds for disqualification from holding trade union office, and any legislation providing for disqualification on the basis of any offence is incompatible with the principles of freedom of association.[24]

2.86 More generally, the minister's response does not address the findings by international supervisory mechanisms which indicate that a generally broad scope should be afforded to unions to choose their leadership freely.[25] Applying these findings by international supervisory mechanisms to the proposed measures, it appears that the scope and extent of the limitation on holding union office goes beyond what is permissible as a matter of international human rights law.[26]

2.87 In conclusion, in seeking to expand the grounds on which a person can be disqualified from office in a union, the bill engages and limits the right to freedom of association and, in particular, the right of unions to elect their own leadership freely. It remains unclear from the further information provided how the breadth and impact of this measure is effective to achieve the stated objective of protecting the interests of members, where members may be of the view that taking particular forms of industrial action is in their interests. It also appears that the measure may not be the least rights restrictive way of achieving this objective, and as such would appear to be a disproportionate limitation on the right to freedom of association.

---

24 ILO, *Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO*, Fifth Edition (2006) [422].

25 ILO, *Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO*, Fifth Edition (2006) [391].

26 ILO, *Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO*, Fifth Edition (2006) [388]-[391], [421]-[424].

Committee view

2.88 The committee thanks the minister for this response. The committee notes that the bill seeks to expand the circumstances in which a person can be automatically disqualified from holding office in registered organisations.

2.89 The committee considers that the bill seeks to achieve the important and legitimate objective of protecting the interests of workers and ensuring that they are represented by officers who demonstrate a willingness to uphold standards reasonably expected of a person with the responsibility of holding office within an organisation. The committee notes the minister's advice that the bill does not alter the existing circumstances in which industrial action will be considered protected action, or the consequences for failure to comply with requirements regarding industrial action, and therefore does not limit the right to strike (as protected by the right to freedom of association).

2.90 However, as a matter of international human rights law, the committee notes the legal advice that a generally broad scope should be afforded to unions to choose their leadership freely. Expanding the grounds on which a person can be disqualified from office in a union, including when they have taken unprotected industrial strike action, creates an additional sanction or disincentive for taking such action. The committee draws this matter to the attention of the minister and the Parliament.

Cancellation of registration of registered organisations

2.91 The registration of a union under the *Fair Work (Registered Organisations) Act 2009* grants the organisation a range of rights and responsibilities, including representing the interests of its members. Schedule 2 of the bill seeks to expand the grounds for the cancellation of the registration of unions under this Act. Under proposed section 28 the Fair Work Commissioner can apply to the Federal Court for an order cancelling registration of an organisation, if the Commissioner considers there are grounds for such cancellation,[27] including:

- if the organisation or parts of it have acted in their own interest rather than that of their members, or acted contrary to the interests of members, or not complied with designated laws;[28]
- if the organisation has been found to have committed serious breaches of criminal laws (defined as an offence punishable by at least 1,500 penalty units);[29]

27 Schedule 2, item 4, proposed section 28.

28 Schedule 2, item 4, proposed section 28C.

29 Schedule 2, item 4, proposed section 28D.

- if there have been multiple designated findings against a substantial number of members.[30]

2.92 The bill also aims at simplifying some of the existing grounds for cancellation, including:

- that the organisation has failed to comply with an order or injunction;[31]
- that the organisation or a substantial number of members have organised or engaged in 'obstructive industrial action'.[32]

2.93 Under proposed section 28J, the court may cancel the organisation's registration if the court finds the ground is established and if the Commissioner satisfies the court that it would not be unjust to cancel the registration (having regard to the nature of the matters constituting that ground; the action (if any) that has been taken by or against the organisation; the best interests of the members of the organisation as a whole and any other matters the court considers relevant).

2.94 The Federal Court would also be empowered to make a range of alternative orders including the disqualification of certain officers, the exclusion of certain members or the suspension of the rights of the organisation.[33]

Summary of initial assessment

Preliminary international human rights legal advice

Right to freedom of association and the right to just and favourable conditions at work

2.95 By expanding the grounds on which unions can be de-registered or suspended, the measure engages and limits the right to freedom of association and the right to just and favourable conditions at work. In this respect, it is noted that international supervisory mechanisms have recognised the importance of registration as 'an essential facet of the right to organize since that is the first step that workers' or employers' organizations must take in order to be able to function efficiently, and represent their members adequately'.[34] They have further noted that 'the dissolution of trade union organizations is a measure which should only occur in

30 Schedule 2, item 4, proposed section 28E.

31 Schedule 2, item 4, proposed section 28F.

32 Schedule 2, item 4, proposed section 28G. The section covers industrial action other than protected industrial action which prevented, hindered or interfered with a federal system employer or the provision of any public service and that had or is having a substantial adverse impact on the safety, health or welfare of the community or part of the community.

33 Schedule 2, item 4, proposed sections 28M-28P.

34 ILO Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO, Fifth Edition (2006) [391].

extremely serious cases' noting the serious consequences for the representation of workers.[35]

2.96 The initial analysis found that the protection of the interests of members and the maintenance of public order may be considered legitimate objectives for the purposes of international human rights law. However, it must be shown that the limitation imposed by the measure is effective to achieve (that is, rationally connected to) and proportionate to these stated objectives. The initial analysis stated that more information was required in order to assess whether these are permissible limitations under international human rights law, and in particular:

- how de-registering an organisation, in addition to other sanctions for non-compliance with particular laws, including industrial relations laws, would achieve the stated objectives of 'protecting the interests of members' and promoting public order, noting in particular that many of the grounds for cancellation could relate to less serious contraventions of industrial law or taking unprotected industrial action, which members may have decided to be in their best interests;
- whether the limitation is a reasonable and proportionate measure to achieve the stated objectives (in particular whether the grounds for cancellation of registration are sufficiently circumscribed); and
- the extent of the limitation in respect of the right to strike, noting previous concerns raised by international supervisory mechanisms.

2.97 The full initial human rights analysis is set out at *Report 1 of 2020*.

Committee's initial view

2.98 The committee noted the legal advice that this engages and limits the right to freedom of association and the right to just and favourable conditions at work, and in order to assess the permissibility of any limitation under international human rights law sought the minister's advice as to the matters set out at paragraph [2.96].

Minister's response

2.99 The minister advised:

> *Current provisions*
>
> Under the current provisions of the RO Act, the Court may make an order cancelling the registration of an organisation in limited circumstances, including where the conduct of the organisation or a substantial number of its members has prevented or hindered the intention or objects of the Fair Work Act or the RO Act. Cancellation by the Fair Work Commission (Commission) may also be effected on technical grounds.

35 ILO Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO, Fifth Edition (2006) [696], [699].

Changes proposed

While the Bill includes a number of additional grounds for cancellation of registration, the 'obstructive industrial action' ground in s28G of the Bill has been a long-standing feature of the statutory framework, most recently included in the RO Act in current paragraphs 28(1)(b) and (c).

This ground can only arise where the organisation or a substantial number of its members has organised or engaged in unprotected industrial action that also has additional features. These features are that the action:

- has prevented, hindered or interfered with the activities of a federal system employer or the provision of any public service by the Commonwealth or a State or Territory or an authority thereof, or
- has had, or is having or is likely to have, a substantial adverse effect on the safety, health or welfare of the community of a part of the community.

To be clear, unprotected industrial action without these additional features cannot give rise to a ground for cancellation of registration under the Bill by a Court.

The Bill also significantly lifts the threshold for when a Court can deregister an organisation compared to the previous iteration of the Bill. For example, in determining whether the ground in s 28C(1)(c) relating to the conduct of affairs resulting in a record of non-compliance with designated laws, only 'designated findings' and certain contempt orders are relevant. This will ensure an appropriately high threshold before the ground can be enlivened.

As with the disqualification provisions, additional safeguards in respect of the cancellation of registration provisions also include:

- limiting standing to only allow the Commissioner to make an application for deregistration;
- putting the onus on the Commissioner to satisfy the Court that deregistration would not be unjust having regard to the nature of the matters, the action (if any) that has been taken by or against the organisation or its members or officers in relation to those matters, the best interests of the members of the organisation as a whole, and any other matters the Court considers relevant; and
- prohibiting the Court from making an order unless it is satisfied that deregistration would not be unjust, having regard to the gravity of matters constituting the ground.

In response to the Committee's specific concern, the Bill does not contain additional provisions circumscribing the right to strike as protected by the right to freedom of association. As already noted, the provisions of the Bill allowing for an application for cancellation of registration to be made on the basis that an organisation, part of the organisation or a class of

members, have engaged in obstructive industrial action effectively replicate the existing provisions of the RO Act.

Objectives

The objective of the Bill is to protect the interest of members and promote public order by ensuring that organisations are administered lawfully. As identified by the Scrutiny Report (p 27), the objective is a legitimate objective.

The Final Report of the Royal Commission identified numerous examples of organisations no longer serving the interest of their members because of pervasive breaches of duties by officers and widespread and repeated law-breaking by officials.

Deregistration is an appropriate sanction in particular cases. Courts have observed that some registered organisations appear to show contempt for the law and treat court fines as the cost of doing business. Where an organisation considers that breaking the law is their business model, this is not in the best interests of their members, nor the members of registered organisations more broadly. The grounds in the Bill target this behaviour to ensure that organisations do act in the best interests of their members.

The Bill pursues the legitimate objective by providing a clearer and more streamlined scheme for deregistration than currently contained in the RO Act. The cancellation provisions in the Bill make it abundantly clear to organisations, their officers and members which types of conduct could form grounds for deregistration.

Reasonableness and proportionality

The measures in Bill are reasonable and proportionate to achieving the objective, and compared to the previous Bill, set an even higher threshold before an organisation can be deregistered by the Court or alterative orders made by the Court. For example, the changes to the ground in s28C(1)(c) (discussed above) before it can be enlivened.

Even the 'obstructive industrial action' ground in s28G will, in effect, be a higher bar, since even if the ground prima facie applies, the Commissioner must satisfy the Court that it would not be unjust to cancel the organisation's registration, and the Court is prohibited from cancelling an organisation's registration unless it is satisfied that, having regard to the gravity of the matters, cancellation would not be unjust. New subsection 28J(l) of the Bill also states the Court 'may' as opposed to 'must' (the latter being the terminology included in the previous Bill) deregister an organisation after considering it is not unjust. These measures have been included in the Bill to sufficiently circumscribe the proposed power.

In addition, the availability of alternative orders provides the Court with appropriate means of limiting the effect on members who have not been involved in activity that would ground an order for cancellation.

> The cancellation and alternative measures in the Bill set a high threshold to ensure that the consequences of deregistration is only applied in serious cases. The Bill would not provide a Court with the means to dissolve registered organisation, rather, it would enable a Court to cancel the organisation's registration. The organisation will continue to exist as an employee or employer association, but would not enjoy the rights and privileges that come with being registered.
>
> The grounds in this Schedule do not limit the right to strike as protected by the right to freedom of association. As discussed above, the obstructive industrial action ground is already contained in the current provision of the RO Act. These provisions have never been enlivened and the Bill does not broaden their scope or application.

Concluding comments

International human rights legal advice

2.100 The minister advises that the 'obstructive industrial action' ground[36] for cancellation of registration already exists in the Act,[37] and the bill simply includes a number of additional grounds for cancellation of registration. However, it is noted that this does not itself address the question of whether the measure, as replicated and expanded in this bill, is compatible with the right to freedom of association. Regarding the question as to the extent of the limitation in respect to the right to strike, noting concerns raised by international supervisory mechanisms, the response states that the measures in the bill are reasonable and proportionate to achieving the objective, particularly as compared with the previous iteration of the bill. However, the previous bill cannot be the comparator for the purposes of an assessment of whether this bill justifiably limits the right to association, nor indeed, can the Act itself, noting, as set out above, that restrictions on taking industrial action in Australian domestic law have been subject to serious criticisms by international treaty bodies.

2.101 In relation to whether de-registration of an organisation would achieve the stated objectives of 'protecting the interests of members' and promoting public order, the minister advises that deregistration is an appropriate sanction in particular cases, as where an organisation considers breaking the laws is their business model 'this is not in the best interests of their members, nor the members of registered organisations more broadly'. It is acknowledged that ensuring compliance with the law may be an important mechanism to achieve a particular objective. However, consideration needs to be given to the nature of the laws being enforced and whether the enforcement of those laws are effective to achieve the stated objectives of the measure as a matter of international human rights law. In this case, it would

36 Proposed section 28G of the bill.

37 Subsections 28(1)(b) and (c) of the *Fair Work (Registered Organisations) Act 2009*.

have been useful if the minister had provided information as to how further 'sanctioning' non-compliance with particular laws, including industrial relations laws, would achieve the stated objectives of 'protecting the interests of members' or 'guaranteeing the democratic functioning of organisations'.

2.102 In relation to whether the limitation on human rights is proportionate, the minister states that the bill affords a higher threshold than the provisions in the Act, since even where the grounds for cancellation may apply, the onus is on the Commissioner to satisfy the court that it would not be unjust to cancel the registration of an organisation and the court must not cancel registration unless it is satisfied, having regard to the gravity of the matters, that cancellation would not be unjust. The requirement that the Federal Court not cancel an organisation's registration unless satisfied this would not be unjust, is an important safeguard. However, concerns remain that the role of the court may not be sufficient to ensure that the limitation is the least rights restrictive way to achieving its stated objectives, in view of the breadth of the grounds for cancellation of union registration set out above. It is noted that the possible grounds for cancellation could include two or more relatively minor breaches of industrial laws.[38] Depending on the approach taken by the courts to their discretion not to cancel registration, the cancellation powers may operate in a manner that is not a proportionate limitation on the right to freedom of association.

2.103 The minister also advises that the effect of the measure would not enable a court to dissolve a registered organisation, but instead, to cancel an organisation's registration. This would mean that the organisation would continue to exist as an employee or employer association, but be deprived of the rights and privileges that come with registration. However, international supervisory mechanisms have recognised the importance of registration as 'an essential facet of the right to organize'.[39]

2.104 In conclusion, by expanding the grounds on which unions can be de-registered or suspended, the measure engages and limits the right to freedom of association. It has not been demonstrated that further sanctioning non-compliance with particular laws meets the stated objectives of protecting the interests of members or guaranteeing the democratic functioning of organisations. Some concerns also remain that the role of the court may not be sufficient to ensure that the limitation is the least rights restrictive way to achieve the stated objective, in

---

38 See the grounds listed in Division 3 of Schedule 2. This includes proposed section 28E which provides a ground exists if designated finding have been made against a substantial number of members of all or part of the organisation. Item 2, Schedule 1, proposed section 9C defines 'designated finding' to mean any conviction for an offence or order to pay a pecuniary penalty under the *Fair Work Act 2009* and other related Acts.

39 ILO Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO, Fifth Edition (2006) [295].

view of the breadth of the grounds for cancellation of union registration. As such, there is a risk that the measure may result in the cancellation of a union's registration in circumstances that may not accord with the right to freedom of association.

Committee view

2.105 The committee thanks the minister for this response. The committee notes that the bill seeks to expand the grounds for the cancellation of the registration of unions.

2.106 The committee considers that the bill seeks to promote the important and legitimate objective of protecting the interests of union members and promoting public order by ensuring that organisations are administered lawfully. The committee considers that the role of the Federal Court in determining whether to cancel registration is an important safeguard to ensure registration is not cancelled where it would be unjust to do so. However, noting the legal advice as to the basis on which union registration may be cancelled, the committee considers there is some risk that this measure may result in the cancellation of a union's registration in circumstances that may not accord with the right to freedom of association. The committee draws this matter to the attention of the minister and the Parliament.

Placing unions into administration

2.107 The bill seeks to expand the grounds for a remedial scheme to be approved by the Federal Court including through the appointment of an administrator.[40]

2.108 Proposed new section 323 enables the Federal Court to make a declaration on a number of bases including that 'an organisation or part of an organisation has ceased to exist or function effectively'.[41]

2.109 Proposed subsection 323(4) provides that an organisation will have ceased to 'function effectively' if the court is satisfied that officers of the organisation or a part of an organisation have, on multiple occasions, contravened designated laws; or misappropriated funds of the organisation or part; or otherwise repeatedly failed to fulfil their duties as officers of the organisation or part of the organisation.

2.110 If a court makes a declaration under proposed section 323 that an organisation or its officers are dysfunctional, have engaged in misconduct or positions are vacant, etc, then it may order a scheme to resolve the circumstances of the declaration including providing for: the appointment of an administrator; reports

40 Statement of compatibility, p. 12.

41 Schedule 3, item 4, proposed section 232.

to be given to a court; when the scheme begins and ends and when elections (if any) are to be held.[42]

Summary of initial assessment

Preliminary international human rights legal advice

Right to freedom of association and the right to just and favourable conditions at work

2.111 By allowing for unions to be placed into administration, the measure engages and limits the right to freedom of association and, in particular, the right of unions to organise their internal administration and activities and to formulate their own programs without interference. International supervisory mechanisms have noted that '[t]he placing of trade union organizations under control involves a serious danger of restricting the rights of workers' organizations to elect their representatives in full freedom and to organize their administration and activities.'[43] A limitation on these rights which is imposed by the measure must be effective to achieve (that is, rationally connected to) and proportionate to a legitimate objective.

2.112 The initial analysis stated that more information was required in order to assess whether these are permissible limitations under international human rights law. In particular, further information was required as to:

- how the measure is effective to achieve (that is, rationally connected to) the objective of protecting the interests of members (noting, for example, that members may have determined it was in their interests to take unprotected strike action, which could contravene a designated law); and
- whether the measure is proportionate to the objectives sought to be achieved, in particular, whether the grounds for placing organisations under administration are sufficiently circumscribed.

2.113 The full initial human rights analysis is set out at *Report 1 of 2020*.

Committee's initial view

2.114 The committee noted the legal advice that this engages and limits the right to freedom of association and the right to just and favourable conditions at work, and in order to assess the permissibility of any limitation under international human rights law, the committee sought the minister's advice as to the matters set out at paragraph [2.112].

42 Schedule 3, item 4, proposed section 323A.

43 ILO Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO, Fifth Edition (2006) [450].

Minister's response

2.115 The minister advised:

Current provisions

Section 323 of the RO Act contains the current framework for dealing with organisational dysfunction and provides for applications to be made to the Court for a declaration in relation to an organisation or any part of it. If a declaration is made, the Court may approve a scheme for the taking of action to resolve the matters to which the declaration relates. The provision, as currently drafted, does not provide for remedial action to be taken if officers act in their own interests, break the law, or breach duties under the RO Act. The RO Act does not expressly provide for the appointment of an administrator.

Changes proposed

The Bill expands the categories of declaration for a remedial scheme in relation to an organisation to be approved by the Court to include:

- That one or more officers of an organisation or part of an organisation have engaged in financial misconduct in relation to carrying out of their functions or in relation to the organisation or part.
- That a substantial number of the officers of the organisation or part of an organisation have, in the affairs of the organisation or part, acting in their own interests rather than in the interests of members of the organisation or part as a whole.
- That affairs of an organisation or part of an organisation are being conducted in a manner that is oppressive or unfairly prejudicial to, or unfairly discriminatory against a member or members in a manner that is contrary to the interests of the members of the organisation or part as a whole.

The Bill also amends the Court's power to approve a scheme consequent to the making of a declaration to expressly permit the appointment of an administrator, and the functions of the administrator will be clearly set out. The administrator will control and may manage the property and affairs of the organisation, or perform any functions or powers that the organisation or its officers would typically perform. Officers and employees must assist administrators and there are criminal penalties for failing to do so.

The Bill also expands the standing to apply for a declaration and order for a scheme, to include the Commissioner and the Minister.

In response to the Committee's specific concern, the Bill does not restrict the right to strike as protected by the right to freedom of association. Bill does not alter the circumstances in which industrial action will be considered protected industrial action, or the consequences provided for

failures to comply with Part-3-3 of the Fair Work Act, dealing with industrial action.

Objectives

These measures have the objective of protecting the interests of members and guaranteeing the democratic functioning of organisations under the stewardship of officials and a membership that respects the law and thus promotes public order.

The Final Report of the Royal Commission identified numerous examples of organisations no longer serving the interests of their members because of pervasive breaches of duties by officers and widespread and repeated law-breaking by union officials. The proposed changes will improve the effectiveness of the administration provisions by allowing the Court to take appropriate remedial and facilitative action to overcome such maladministration or dysfunction associated with a culture of lawlessness or financial maladministration.

The proposed changes pursue the legitimate objective of ensuring that organisations are functioning effectively to be able to serve the interests of their members. The amendments are rationally connected to this objective because the new grounds for a declaration are all instances of an organisation not acting in the interests of their members and therefore not functioning effectively.

Reasonableness and proportionality

The measures are reasonable and proportionate for the following reasons:

- The new grounds under which the Court may make a declaration are clearly set out and if present, indicate that an organisation is not serving the interests of their members and is not functioning effectively.
- The measures limit the effect on members who have not been involved in maladministration or unlawful activity by providing for orders to be limited to the part of the organisation that has conducted those activities.
- Relief is discretionary[44] and the Court may find that no action is necessary or justified.
- Consistent with the current administration provisions, the Court must be satisfied that an order (should it choose to make one) would not do substantial injustice to the organisation or any member of the organisation.[45]

44 Proposed subsection 323A(1).

45 Proposed subsection 323A(3).

> In addition to the abovementioned safeguards, without limiting other measures in the Bill, in assessing whether an organisation or a part of an organisation has ceased to function effectively because officers of the organisation or a part of an organisation have contravened designated laws, the Bill directs the Court to consider multiple occasions of contravention.[46] However, as already noted, the Bill does not contain provisions circumscribing the right to strike as protected by the right to freedom of association and it does not alter the circumstances in which industrial action will be considered protected industrial action, or the consequences provided for failures to comply with Part-3-3 of the Fair Work Act, dealing with industrial action.

Concluding comments

International human rights legal advice

2.116 The minister advises that the measure is rationally connected to the objective of ensuring that organisations are functioning effectively to be able to serve the interests of their members 'because the new grounds for a declaration are all instances of an organisation not acting in the interests of their members and therefore not functioning effectively'. While ensuring that registered organisations act in the interests of their members may constitute a legitimate objective, it is unclear from the minister's response the basis for this claim that the new grounds for a declaration are all instances of an organisation not acting in the interests of members.

2.117 While it would appear that a number of the proposed grounds for a declaration would appear to be rationally connected to the stated objective, some of the proposed grounds for a declaration may capture conduct that does not run contrary to the interests of members. In particular, a declaration may be made that 'an organisation or part of an organisation has ceased to exist or function effectively',[47] which includes where officers of the organisation have, on multiple occasions, contravened designated laws.[48] However, designated laws are defined broadly to include breaches of industrial relations laws (including minor or less serious breaches) or conduct related to taking unprotected industrial action. It is unclear whether minor, less serious or technical breaches are necessarily, in all cases, contrary to the interests of members. Further, it may also be that members have decided on a democratic basis to engage in conduct such as, for example, taking unprotected industrial action precisely because they consider it is in their interests to do so. This raises concerns that the measure as formulated does not appear to be

46 Proposed paragraph 323(4)(a).

47 Schedule 3, item 4, proposed section 323.

48 Schedule 3, item 4, proposed subsection 323(4).

rationally connected in all respects to ensuring that registered organisations act in the interests of members.

2.118 As to whether the limitation is reasonable and proportionate to achieve the stated objective, the minister's response states: that the new grounds are clearly set out; the measures limit the effect on members not involved in maladministration or unlawful activity by providing for orders limited to part of an organisation; relief is discretionary; and the court must be satisfied that an order would not do substantial injustice to the organisation or any one of its members.

2.119 While these appear to be relevant safeguards in relation to the operation of the measure, given the scope of the grounds for a declaration questions remain as to whether the measure is the least rights restrictive approach in all circumstances.

2.120 In conclusion, it would appear that some of the grounds on which a declaration may be made to place a union into administration, do not necessarily capture conduct that would always run contrary to the interests of members. As such, it has not been established in relation to all of the grounds on which a declaration may be made that the measure is rationally connected to the stated objective of protecting the interests of members. In addition, the breadth of the grounds on which a declaration may be made raises questions as to whether the measure is the least rights restrictive means of achieving the stated objective. As such, there is a risk, in some circumstances, that the measure may result in a registered organisation being placed into administration in circumstances which may not accord with the right to freedom of association. This risk may be alleviated if the bill were amended to provide that prior to placing a registered organisation into administration the court must be satisfied that it is in the best interests of the members of the organisation to do so.

Committee view

2.121 The committee thanks the minister for this response. The committee notes that the bill seeks to expand the grounds on which organisations may be placed under administration.

2.122 The committee considers that the bill seeks to achieve the important and legitimate objective of protecting the interests of members and guaranteeing the democratic functioning of organisations that respect the law, and so promote public order. The committee notes the minister's advice that the proposed changes will improve the effectiveness of the administration provisions by allowing the Federal Court to take appropriate action to overcome maladministration and dysfunction.

2.123 However, in light of the legal advice regarding the breadth of the grounds on which a declaration may be made to place a union into administration, the committee considers there is some risk that, in some circumstances, the measure may result in a registered organisation being placed into administration in

circumstances which may not accord with the right to freedom of association. The committee draws this matter to the attention of the minister and the Parliament.

Introduction of a public interest test for amalgamations of unions

2.124 Under proposed section 72A, before fixing a date for an amalgamation of unions, the Fair Work Commission must decide if the public interest test is to apply to the amalgamation, and if so, decide whether the amalgamation is in the public interest.[49] The Commission may only decide that the public interest test is to apply to a proposed amalgamation if there is information before the Commission that there are at least 20 compliance record events for an organisation (such as a designated finding against the organisation, contempt of court or engaging in certain industrial action)[50] within the 10 year period prior to an application for approval.[51] In determining whether an amalgamation is in the 'public interest' the Fair Work Commission must have regard to a range of factors including any compliance record events for each of the existing organisations and whether the amalgamation is otherwise in the public interest having regard to the impact it is likely to have on employees and employers in the industry, and may have regard to any other matter it considers relevant.[52] In relation to compliance record events, if having regard to the incidence, age and gravity of the events the Commission considers the organisation has a record of not complying with the law, the Commission must decide that the amalgamation is not in the public interest.[53]

Summary of initial assessment

Preliminary international human rights legal advice

Rights to freedom of association and to just and favourable conditions at work

2.125 By inserting a public interest test in relation to the amalgamation of organisations, the measure engages and limits the rights to freedom of association and to just and favourable conditions at work, and particularly the right to form associations of one's own choosing. International supervisory mechanisms have noted concerns with measures that limit the ability of unions to amalgamate stating

---

49 As set out in Schedule 4, item 7, proposed paragraph 72A(1)(b) (the 'public interest test').

50 See Schedule 4, item 7, proposed section 72E.

51 See Schedule 4, item 7, proposed subsection 72A(2).

52 See Schedule 4, item 7, proposed section 72D.

53 See Schedule 4, item 7, proposed subsection 72D(2).

that '[t]rade union unity voluntarily achieved should not be prohibited and should be respected by the public authorities.'[54]

2.126 The initial analysis stated that more information was required in order to assess the compatibility of the proposed measure with international human rights law, and in particular:

- how each aspect of the application of the 'public interest' test is effective to achieve (that is, rationally connected to) the stated objectives;
- whether making amalgamations of an organisation subject to a public interest test is reasonable and proportionate to achieving the stated objective. In particular, more information is required as to whether the measure is the least rights restrictive way of achieving the objectives, is sufficiently circumscribed, and the extent of the limitation with respect to the right to strike (noting concerns raised by international supervisory mechanisms).

2.127 The full initial human rights analysis is set out at *Report 1 of 2020*.

Committee's initial view

2.128 The committee noted the legal advice that this engages and limits the right to freedom of association and the right to just and favourable conditions at work, and in order to assess the permissibility of any limitation under international human rights law, the committee sought the minister's advice as to the matters set out at paragraph [2.126].

Minister's response

2.129 The minister advised:

> *Current provisions*
>
> The RO Act currently provides that once an application for amalgamation of organisations is lodged with the Fair Work Commission (FWC), the FWC must set a hearing date to approve the 'scheme of amalgamation'. Unless an exemption is granted, the FWC will then direct the Australian Electoral Commission to conduct a secret postal ballot of members of each of the organisations.
>
> An amalgamations day will be fixed on which the new organisation will be the only registered organisation, and the amalgamated organisations will be deregistered, provided that: the ballot has no irregularities; the FWC is satisfied that there are no relevant pending proceedings against the existing organisations; and the newly amalgamated organisation will be bound by the obligation of the existing organisations.

54 ILO Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO, Fifth Edition (2006) [332].

Changes proposed

The existing framework in the RO Act does not require the FWC to decide whether an amalgamation is in the public interest when considering the amalgamation of two or more organisations.

In contrast to the previous Bill, the Bill will now not require that all proposed amalgamations be subject to a public interest test. The Bill now introduces as a threshold matter, a requirement for the FWC to decide whether a proposed amalgamation should be subject to a public interest test, based on the compliance history of the relevant organisations.

The FWC may only decide that the public interest is to apply if there is evidence that at least 20 compliance record events have occurred for at least one of the existing organisations in the last ten years. This is a significantly high threshold, and would require an organisation or its officers or members to have engaged in a significant amount of contraventions of the law - on average two each year. Compliance record events for an organisation would not pick up inadvertent or minor breaches of law. There must be a designated finding, a finding of contempt of court or obstructive industrial action.

If the FWC does decide that the public interest test is to apply, having regard to compliance record events, the FWC will be required to have consider to the incidence, age and gravity of compliance record events for each existing organisation, to determine whether the organisation has a record of not complying with the law. This is a comprehensive examination and inquiry by the FWC.

Objectives

The public interest test for amalgamations will improve organisational governance, protect the interests of members, ensure that organisations meet the minimum standards set out in the RO Act and address community concerns by creating a disincentive for a culture of "contempt for the rule of law" that has been identified amongst some registered organisations. As stated in the Scrutiny Report (p 33), this a pressing and substantial concerns and constitutes a legitimate objective.

The introduction of a public interest test for organisations that meet the statutory threshold, will be effective in meeting this objective as it will reduce the risk of an adverse effect of an amalgamation of existing organisations, where one organisation has a high number of compliance records events. This is because a culture of lawlessness in one or more amalgamating organisation will be prevented from pervading the other organisations involved in the amalgamation.

Importantly, the FWC will be required to consider as a preliminary matter whether a proposed amalgamation should be subject to a public interest test at all. This enhances compatibility with human rights by explicitly providing that the FWC may only decide that the public interest test if there is a significant history of law-breaking. In this way, the Bill would

only affect those amalgamating organisation who demonstrate a pattern of not respecting the law. The introduction of a public interest test for organisations who meet the requisite threshold achieves the legitimate objective of protecting the interest of workers and ensuring that organisations meet the minimum standards of organisational behaviour set out in the RO Act.

Reasonableness and proportionality

The Bill ensures that the application of the public interest is reasonable and proportionate in that it is only applied to those amalgamations where at least one organisation has 20 or more compliance records events in the previous 10 years.

The requirement for the FWC to decide whether the public interest test is to apply, before applying the test, also ensures that the public interest case is not applied unnecessarily to all amalgamations. The amalgamating organisations that will be affected will be those with a history of breaking the law. The measures in the Bill are the least restrictive way of achieving the objective of protecting members from amalgamations that are not in their collective interests.

The measures in the Bill are sufficiently circumscribed as they do not limit the rights to freedom of association or the right to form associations of one's own choosing. The effect of the public interest test may be to prevent an amalgamation of organisations. However, organisations will not lose their registration or cease to exist if it is found that an amalgamation is not in the public interest.

Although the amalgamation process is a democratic process, in that members vote for an amalgamation, it is often the case that amalgamations can occur even if only a small portion of the members vote for the amalgamation. Under the current law, not all mergers go to a ballot of members. Those that do only require 25 per cent of members on the organisations' roll of voters to vote for the ballot to be valid. Only 50 per cent plus one of those voting need to vote yes for the amalgamation to go ahead. This means organisations could amalgamate if just over 12.5 per cent of members vote for it. The public interest test ensures that members do not find their organisation merged with an organisation who has a history of law breaking without consideration by an independent body.

Lastly, it is also important to note that judicial review applies to both FWC decisions about whether a public interest test should apply to a merger, and to the public interest test itself. As these decision will be made by a Full Bench of the FWC, they can be reviewed by the High Court under section 75(v) of the Constitution or the Federal Court under section 39B of the *Judiciary Act 1903*.

Concluding comments

International human rights legal advice

2.130 In relation to whether the measure is rationally connected to (that is, effective to achieve) a legitimate objective, the minister states that the public interest test for amalgamations will be effective in meeting the stated objectives of improving organisational governance, protecting the interests of members and addressing community concerns by creating a disincentive for a 'culture of contempt for the rule of law' by preventing the 'culture of lawlessness' in one or more amalgamating organisation from 'pervading the other organisations involved in the amalgamation'.

2.131 Ensuring compliance with the law may be an important mechanism to achieve a particular legitimate objective. However, as noted above, there needs to be consideration of the nature of the laws being enforced and whether the enforcement of those laws are effective to achieve a legitimate objective as a matter of international human rights law. Further, it is unclear that each aspect of the proposed 'public interest' test is rationally connected to the stated objectives. This is because the Commissioner must also have regard to the impact of the amalgamation not only on members, but also on employers, and any other matter the Commissioner considers relevant.[55] These factors may in fact run contrary to the interests of members.

2.132 The minister's response provides information as to whether the limitation imposed is reasonable and proportionate, and notes that the requirement for the Commissioner to decide whether the public interest test is to apply, before applying the test, ensures that the public interest test is not applied unnecessarily to all organisations. It states that the limitation is sufficiently circumscribed as even if the effect of the public interest test may be to prevent an amalgamation of organisations, those organisations will not lose their registration or cease to exist if it is found that an amalgamation is not in the public interest. However, while members may still be able to be represented by their existing union, the measure does limit choices as to the form of representation including joining together with another union. The effect of this on members' rights is exacerbated by the fact that, while the likely benefit to members in an amalgamation is one factor to be taken into account, the Commissioner is required to consider other factors including the 'impact on employers'. These factors may in fact run contrary to the interests of members. For example, the amalgamation of unions may lead to greater campaigning capacity which, by its nature, may be in the interests of members but not employers in a particular industry. The scope of the measure as currently formulated would appear to potentially operate to prevent unions amalgamating on the basis of concerns that they could have too much bargaining or campaigning power against employers. The

55 Schedule 4, item 7, proposed paragraph 72D(3)(b) and subsection 72D(4).

measure runs contrary to jurisprudence from international monitoring bodies which states '[t]rade union unity voluntarily achieved should not be prohibited and should be respected by the public authorities'.[56] In this respect, the measure appears to be overly broad with respect to a number of the objectives identified. For example, it does not appear to be the least rights restrictive approach to protecting the interests of members or even ensuring greater compliance with the law.

2.133 The minister's response also notes that judicial review applies to both decisions about whether a public interest test should apply to a merger, and to the public interest test itself. In terms of an assessment of the proportionality of the limitation, while it is a relevant safeguard that the decision as to whether an amalgamation is in the 'public interest' is to be made by the Commissioner, this alone appears to be insufficient to ensure that the measure constitutes a proportionate limitation.

2.134 In addition, the minister's response argues that the measure does not further limit the right to strike. It is acknowledged that the measure does not alter the existing requirements for taking protected industrial action. However, what it does is render non-compliance with these provisions a basis on which union amalgamations may be prevented. As such, it creates an additional sanction for taking industrial action that does not, or may not, comply with the requirements of Part 3-3 of the Fair Work Act. Indeed, the objective of the measure initially identified in the statement of compatibility was 'to reduce the adverse effects of industrial disputation' and a further objective identified in the minister’s response is to provide an effective 'sanction' for non-compliance with the law. In this respect, one of the objectives of the measure may extend to 'sanctioning' industrial action which does not comply with Part 3-3 of the Fair Work Act. As such, by providing that the Commissioner must decide that the amalgamation is not in the public interest if the organisation has a record of not complying with the law, the measure appears to further limit the right to strike in circumstances where non-compliance relates to taking unprotected industrial action. As set out above, international supervisory mechanisms have consistently raised concerns about the current restrictions on taking industrial action under Australian domestic law.

2.135 In conclusion, by inserting a public interest test in relation to the amalgamation of organisations, the measure engages and limits the rights to freedom of association, in particular the right to form associations of one's own choosing. It has not been demonstrated that each aspect of the 'public interest test' is rationally connected to the stated objectives, noting that the Commissioner is required to consider issues such as the impact on employers. In addition, the measure does not appear to be the least rights restrictive approach to protecting the

56 ILO, Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO, Fifth Edition (2006) [332].

interests of members, and as such the measure does not appear to constitute a permissible limitation on the right to freedom of association.

Committee view

2.136 The committee thanks the minister for this response. The committee notes that the bill seeks to insert a public interest test before organisations can amalgamate.

2.137 The committee considers that the public interest test for amalgamations seeks to pursue the important and legitimate objectives of improving organisational governance, protecting the interests of members, ensuring that organisations meet the minimum standards set out in the Fair Work Act and addresses community concerns by creating a disincentive for a culture of contempt for the rule of law.

2.138 However, the committee notes the legal advice that the right to freedom of association includes a right to form associations of one's own choosing. The committee draws this matter to the attention of the minister and the Parliament.

Legislation (Deferral of Sunsetting—Sydney Harbour Federation Trust Regulations) Certificate 2019 [F2019L01211][1]

Purpose	This instrument defers the sunsetting of the Sydney Harbour Federation Trust Regulations 2001 for two years
Portfolio	Attorney-General
Authorising legislation	*Sydney Harbour Federation Trust Act 2001*
Last day to disallow	15 sitting days after tabling (tabled in the Senate and the House of Representatives on 14 October 2019).
Rights	Freedom of expression; assembly
Status	Concluded

2.139 The committee requested a response from the Attorney-General in relation to the instrument in *Report 1 of 2020*.[2]

Extension of prohibition on public assembly

2.140 This legislative instrument defers the sunsetting of the Sydney Harbour Federation Trust Regulations 2001 [F2010C00261] (the regulations) for two years. The regulations apply to the management of 'Trust land' under the *Sydney Harbour Federation Trust Act 2001* (the Act).

2.141 Section 11 of the regulations provides that '[a] person must not organise or participate in a public assembly on Trust land.' 'Trust land' is defined in section 3 and listed in Schedules 1 and 2 of the Act. It includes a number of Lots in Middle Head, Georges Heights, Woolwich, and Cockatoo Island. A 'public assembly' is defined in section 11(3) to include an organised assembly of persons for the purpose of holding a meeting, demonstration, procession or performance.

2.142 Section 23(d) provides that the activity that would otherwise be an offence under section 11 is not an offence if it 'is authorised by a licence or permit' granted by the Trust. Section 25 provides for the application for such a licence or permit, and

1 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Legislation (Deferral of Sunsetting—Sydney Harbour Federation Trust Regulations) Certificate 2019 [F2019L01211], *Report 4 of 2020*; [2020] AUPJCHR 54.

2 Parliamentary Joint Committee on Human Rights, *Report 1 of 2020* (5 February 2020), pp. 35-37.

for review of any decision made by the Sydney Harbour Federation Trust in the Administrative Appeals Tribunal (AAT).

Summary of initial assessment

Preliminary international human rights legal advice

Rights to freedom of expression and assembly

2.143 By providing a blanket prohibition against organising or participating in organised assemblies, the regulations engage and appear to limit the rights to freedom expression and assembly. The right to freedom of opinion and expression extends to the communication of information or ideas through any medium, including public protest.[3] The right to freedom of assembly protects the freedom of individuals and groups to meet and engage in peaceful protest and other forms of collective activity in public.[4] These rights may be subject to limitations that are necessary for the purpose of protecting the rights or reputations of others, national security, public order, or public health or morals.[5] Such limitations must be prescribed by law, and be rationally connected (that is, effective to achieve) and proportionate to achieving the prescribed purpose.[6] In determining whether limitations on the freedom of expression are proportionate, the UN Human Rights Committee has previously noted that restrictions on the freedom of expression must not be overly broad.[7]

2.144 The initial analysis stated that more information was required in order to assess the compatibility of this measure with the rights to freedom of expression and assembly, and in particular:

3 International Covenant on Civil and Political Rights (ICCPR), article 19.

4 ICCPR, article 21.

5 UN Human Rights Committee, *General Comment No.34: Article 19: Freedoms of Opinion and Expression* (2011) [21]-[36].

6 See, for example, *Leyla Sahin v Turkey,* European Court of Human Rights (Grand Chamber) Application No. 44774/98 (2005); *Al-Adsani v United Kingdom*, European Court of Human Rights (Grand Chamber) Application No. 35763/97 (2001) [53] - [55]; *Manoussakis and Others v Greece*, European Court of Human Rights, Application No. 18748/91 (1996) [36] - [53]. See also the reasoning applied by the High Court of Australia with respect to the proportionality test in *Lange v Australian Broadcasting Corporation* [1997] HCA 25.

7 UN Human Rights Committee, *General Comment No.34: Article 19: Freedoms of Opinion and Expression* (2011) [34]-[35].

- what is the objective underlying the broad prohibition of public assemblies on Trust Land contained in section 11 of the Sydney Harbour Federation Trust Regulations 2001; [8]
- whether there are any less rights restrictive means of achieving this objective; and
- the availability of safeguards to protect the rights to freedom of expression and assembly.

2.145 The full initial human rights analysis is set out at *Report 1 of 2020*.

Committee's initial view

2.146 The committee noted the legal advice and sought the Attorney-General's advice as to the compatibility of this measure with the rights to freedom of expression and assembly,[9] as set out above at paragraph [2.144].

Attorney-General's response[10]

2.147 The Attorney-General advised:

> The Committee has requested further information in relation to the compatibility of the Certificate with the rights to freedom of expression and assembly. The Certificate itself is machinery in nature, extending the operation of the Sydney Harbour Federation Trust Regulations 2001 for a further 24 months beyond their originally scheduled sunsetting day of 1 October 2019. It does not alter the arrangements in place under the Regulations, but, as the Committee notes, results in the Regulations' restrictions on public assembly continuing in effect until 1 October 2021 (unless repealed earlier).
>
> Certificates of deferral enable legislative instruments that would otherwise sunset to remain in force for a further, but strictly limited, period of time. Deferrals are most commonly used to enable the effective review of the deferred legislative instruments' fitness for purpose in the existing legal

8 Noting that under articles 19(3), 20 and 21(3) of the ICCPR any limitation on the rights to freedom of expression and assembly must be demonstrated to be necessary to 'protect the rights or reputations of others, national security, public order, or public health or morals' or to prohibit '[a]ny advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence'.

9 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.

10 The Attorney-General's response to the committee's inquiries was received on 3 March 2020. The response is available in full on the committee's website at: https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Scrutiny_reports .

environment, or the anticipated impact of broader legislative changes. In this case, the deferral has been made so that the Regulations and their enabling legislation can be considered as part of a broader independent review of the work of the Trust. The outcome of this review will inform the development of replacement regulations, which are anticipated to commence by 1 October 2021.

These particular Regulations commenced at a time when Trust land, which had formerly been Defence land, was still closed to the public. The lands are now public parkland and must be managed to ensure that public order is protected. Section 11 of the Regulations provides a similar mechanism for permitting public assemblies to that which applies generally in New South Wales, under the *Summary Offences Act 1988* (NSW). Whether the approach taken in section 11 of the Regulations remains appropriate will be considered during the review and as the replacement regulations are developed.

To avoid pre-empting this process, and acknowledging that the replacement regulations will face parliamentary scrutiny of their impact on human rights and freedoms, it is in my view appropriate that scrutiny of this Certificate should focus on the mechanism of deferral rather than engaging in a full analysis of the deferred Regulations.

Concluding comments

International human rights legal advice

2.148 In relation to assessing any limitation on the rights to freedom of expression and assembly, the Attorney-General has advised that when the regulations commenced the land in question was closed to the public, and the land is now open to the public and must be managed in order to protect public order. However, no information has been provided as to how the organisation of, or participation in, a public assembly (including a meeting, demonstration, procession, performance, or sporting event) on this land would constitute a threat to public order. No information was given as to what safeguards, if any, exist to protect the rights to freedom of expression and assembly, noting that the regulations establish a blanket prohibition on a public assembly, which is broadly defined and would appear to include assemblies which may pose no threat to public order on public lands.

2.149 The Attorney-General has also stated that section 11 of the regulations provides a mechanism for permitting public assemblies that is similar to that which applies generally in New South Wales. However, section 11 of the regulations automatically criminalises the holding of a public assembly, other than in circumstances outlined in section 23, and as such the defendant bears the evidentiary burden of proving that the activity is authorised by a licence or permit granted by the Trust. In contrast, the *Summary Offences Act 1988* (NSW), to which the Attorney-General makes reference, outlines the circumstances in which a public assembly will be an authorised assembly. It does not impose a blanket prohibition on

public assemblies in New South Wales in the same way that section 11 imposes a blanket prohibition on public assemblies on Trust land. It is not clear that this blanket prohibition of public assemblies on Trust land constitutes the least rights restrictive means of achieving the objective of protecting public order.

2.150 In addition, the Attorney-General notes that this instrument merely defers the sunsetting of the regulations in question, and does not establish the provisions themselves. However, as the deferral of sunsetting causes these provisions to continue to have effect, the provisions themselves are liable to an analysis of their compatibility with Australia's international human rights obligations because they extend the operation of the regulations that do engage such rights.

Committee view

2.151 The committee thanks the Attorney-General for this response. The committee notes this legislative instrument defers the sunsetting of the Sydney Harbour Federation Trust Regulations 2001 for two years, thereby continuing in operation a measure that prohibits public assembly on public land without a permit. The committee considers that extending such a measure requires it to substantively examine the compatibility of the 2001 regulations with Australia's international human rights obligations. The committee considers that insufficient information has been provided to demonstrate that the blanket prohibition of public assemblies on Sydney Harbour Federation Trust land constitutes a permissible limitation on the right to freedom of expression and assembly.

2.152 The committee appreciates that the operation of the Sydney Harbour Federation Trust Regulations 2001 will be reviewed as part of a broader review of the work of the Trust, with new regulations anticipated to commence by 1 October 2021. The committee urges the Attorney-General to give close consideration to the concerns raised in relation to this instrument when reviewing these regulations.

National Radioactive Waste Management Amendment (Site Specification, Community Fund and Other Measures) Bill 2020[1]

Purpose	This bill seeks to amend the *National Radioactive Waste Management Act 2012* to establish the National Radioactive Waste Management Facility
Portfolio	Industry, Science, Energy and Resources
Introduced	House of Representatives, 13 February 2020
Rights	Culture; self-determination; equality and non-discrimination
Status	Concluded

2.153 The committee requested a response from the minister in relation to the instrument in *Report 3 of 2020*.[2]

Specification of site for radioactive waste disposal

2.154 The bill seeks to amend the *National Radioactive Waste Management Act 2012* (the Act) to establish a single, purpose built National Radioactive Waste Management Facility (Facility) for the disposal of radioactive nuclear waste. The bill would specify the site on which the Facility would be established and operated, which is named in the bill as Napandee, located in the district council of Kimba in South Australia (the site).

Summary of initial assessment

Preliminary international human rights legal advice

Rights to culture and self-determination

2.155 The specification of the site as one where nuclear waste will be stored appears to engage and may limit the rights to culture and self-determination. The statement of compatibility states that native title rights have been extinguished at the specified site, however, 'Aboriginal heritage, either tangible or intangible, may still be present'.[3]

1 This entry can be cited as: Parliamentary Joint Committee on Human Rights, National Radioactive Waste Management Amendment (Site Specification, Community Fund and Other Measures) Bill 2020, *Report 4 of 2020*; [2020] AUPJCHR 55.

2 Parliamentary Joint Committee on Human Rights, *Report 3 of 2020* (26 February 2020), pp. 2-10.

3 Statement of compatibility, p. 6.

2.156 The right to culture provides that people have the right to benefit from and take part in cultural life.[4] Individuals belonging to minority groups have additional protections to enjoy their own culture, religion and language.[5] The right for minority groups has both an individual and a group dimension: while the right is conferred on individuals, it must be exercised within the minority group. In the context of indigenous peoples, the right to culture includes the right for indigenous people to use land resources, including through traditional activities such as hunting and fishing, and to live on their traditional lands. The state is prohibited from denying individuals the right to enjoy their culture, and may be required to take positive steps to protect the identity of a minority and the rights of its members to enjoy and develop their culture.[6] A limitation on the right to culture will be permissible where it pursues a legitimate objective, is rationally connected to this objective and is a proportionate means of achieving this objective.

2.157 The right to self-determination, which is a right of 'peoples' rather than individuals, includes the right of peoples to freely determine their political status and to freely pursue their economic, social and cultural development.[7] This includes the right of groups within a country, such as those with a common racial or cultural identity (in the Australian context, particularly Indigenous people), to have a level of internal self-determination.

2.158 In addition, in determining whether any limits on the rights to culture and self-determination are permissible under international human rights law, it is necessary to consider the extent to which relevant groups have been consulted. As part of its obligations in relation to the rights to culture and self-determination, Australia has an obligation to consult with Indigenous peoples in relation to actions which may affect them.[8] This should protect the right of Indigenous peoples to 'influence the outcome of decision-making processes affecting them, which is 'not a

4 Article 15 of the International Covenant on Economic, Social and Cultural Rights.

5 Article 27 of the International Covenant on Civil and Political Rights.

6 See, UN Human Rights Committee, *General Comment No. 23: The rights of minorities* (1994).

7 Articles 1 of both the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights. See, UN Committee on the Elimination of Racial Discrimination, *General Recommendation 21 on the right to self-determination* (1996).

8 The UN Human Rights Council has recently provided guidance on the right to be consulted, as part of its Expert Mechanism on the Rights of Indigenous Peoples, stating that 'states' obligations to consult with indigenous peoples should consist of a qualitative process of dialogue and negotiation, with consent as the objective' and that consultation does not entail 'a single moment or action but a process of dialogue and negotiation over the course of a project, from planning to implementation and follow-up', see UN Human Rights Council, *Free, prior and informed consent: a human rights-based approach - Study of the Expert Mechanism on the Rights of Indigenous Peoples,* A/HRC/39/62 (2018) paras [15]-[16].

mere right to be involved in such processes or merely to have their views heard'.[9] The principles contained in the United Nations Declaration on the Rights of Indigenous Peoples (the Declaration) are also relevant. The Declaration provides context as to how human rights standards under international law apply to the particular situation of indigenous peoples. The Declaration affirms the right of indigenous peoples to self-determination[10] and to have their culture respected, including the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, and have access in privacy to their religious and cultural sites.[11] While the Declaration is not included in the definition of 'human rights' under the *Human Rights (Parliamentary Scrutiny) Act 2011,* it provides clarification as to how human rights standards under international law, including under the International Covenant on Civil and Political Rights and the International Covenant on Economic, Cultural and Social Rights, apply to the particular situation of indigenous peoples.[12]

2.159 The initial analysis stated that further information was required in order to assess the engagement and compatibility of the measure with the rights to culture and self-determination, in particular:

- what percentage of those who were eligible to vote in the community ballot (which asked whether people supported the proposed facility being located in the community of Kimba, were Indigenous);
- what other consultation was held specifically with relevant Indigenous groups and what was the level of support for the site specification; and
- once the radioactive waste facility is operational, if culturally significant findings are made on the site in future, how the *Environment Protection and Biodiversity Conservation Act 1999* would operate to ensure appropriate protection for cultural heritage.

2.160 The full initial human rights analysis is set out at *Report 3 of 2020*.

Committee view

2.161 The committee noted the legal advice that as the site may have cultural significance for First Nations people the bill engages and may limit the right to culture and self-determination. In order to assess whether the bill engages and limits these rights the committee sought the minister's advice as to the matters set out at paragraph [2.159].

9 UN Human Rights Council, *Free, prior and informed consent: a human rights-based approach - Study of the Expert Mechanism on the Rights of Indigenous Peoples,* A/HRC/39/62 (2018) paras [15]-[16].

10 UN Declaration on the Rights of Indigenous Peoples, article 3.

11 UN Declaration on the Rights of Indigenous Peoples, article 11 and 12.

12 Parliamentary Joint Committee on Human Rights, *Report 4 of 2017* (9 May 2017) pp. 122-123.

Minister's response[13]

2.162 The minister advised:

> ***What percentage of those who were eligible to vote in the community ballot were Indigenous***
>
> A range of inputs were considered to determine community sentiment at the site, including the District Council of Kimba Ballot, ballots of Traditional Owner groups' members, surveys of businesses and neighbours, a national submissions process, petitions and ministerial correspondence.
>
> The District Council of Kimba Ballot was undertaken by the local council, in the local government area surrounding the Napandee site, following procedures consistent with standard council elections under the *Local Government (Elections) Act 1999* (SA) (LGE Act). Eligibility to vote in the ballot was based on the qualification criteria set out in section 14 of the LGE Act. A person's Indigenous status was not a determining factor in the ballot, and it is not possible to determine what percentage of eligible voters may have been Indigenous.
>
> The ballot was well-advertised through public meetings, news print advertising, social media posts and mail outs, and all members of the local community were encouraged to check their availability and register if they were not currently listed on the voters roll. The District Council of Kimba also encouraged broad participation. Specifically, in a media statement:
>
> *If you aren't eligible to be on the House of Assembly roll but live in Kimba or own rateable property in the district, I encourage you to speak to Council staff to assess your eligibility to be included on the voters roll,", and "It's vital that every eligible member of our community who is eligible gets to have a vote so the Minister can get a comprehensive picture on the amount of support for the facility being located at one of the two sites that have been nominated in Kimba".*
>
> The Barngarla Determination area, which came into effect on 6 April 2018, covers about 44,500 square kilometres of the Eyre Peninsula and includes the cities of Port Lincoln and Whyalla. The Gawler Ranges determination area, which came into effect in December 2011, covers about 34,000 square kilometres in the Gawler Ranges area and Lake Gardiner National Park. While Traditional owners are an important stakeholder to the Facility development program, there is no native title on the land parcel and immediate surrounds of the Napandee site.
>
> The Barngarla People nominated the Barngarla Determination Aboriginal Corporation (BDAC) as their Registered Native Title Body Corporate to

13 The minister's response to the committee's inquiries was received on 13 March 2020. This is an extract of the response. The response is available in full on the committee's website at: https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Scrutiny_reports.

speak on heritage matters within the boundaries of their native title determination, and have a membership list of approximately 209 individuals.

The Gawler Ranges Aboriginal Corporation (GRAC) was incorporated on 16 December 2011. GRAC have a membership list of approximately 456 individuals. The GRAC wrote to the department in 2 October 2019, advising that, in their view, the Barngarla People are culturally responsible for area covering the nominated sites in Kimba, and that it was not culturally appropriate for them to comment on the proposal.

The department offered financial support to both entities (along with other Traditional Owner groups surrounding the shortlisted site at Wallerberdina Station), to assist them in undertaking a ballot or survey of their members.

The BDAC completed a ballot of its members through a private third party company (Australian Election Company) in November 2019. Of its 209 members who were eligible to vote in the ballot, 87 responded (41.62 per cent), 4 votes were rejected at preliminary scrutiny, the remaining 83 votes responded 'No' (100 per cent) to the question "Do you support the proposed National Radioactive Waste Management Facility being located at one of the nominated sites in the community of Kimba?"

In addition, submissions from a number of Traditional Owner representative groups were received and considered. Previous submissions by Traditional Owner representative groups, to the 2018 Parliamentary inquiry into the site selection process, were also considered.

What other consultation was held specifically with relevant Indigenous groups and what was the level of support for the site specification

The department has sought to engage the Barngarla People throughout the site selection process. At the request of the BDAC, the department's engagement has primarily occurred through their legal representatives. The department has over 60 documented interactions with the BDAC or their legal representatives including:

- meetings with the BDAC board, to discuss the project and understand their views;
- information sharing requests, including requests to distribute information to their members or enable the department to make presentations to, and answer questions of their members;
- offers to conduct a cultural heritage assessment in collaboration with a working group of Barngarla knowledge holders - a preliminary desk-top assessment is available athttps://www.industry.gov.au/data-and-publications/aboriginal-heritage-desktop-assessment-report-kimba;
- offers of funding for BDAC to conduct a ballot to gauge its members views towards the National Radioactive Waste Management Facility (Facility); and

- offers of a funded trip for its board and interested members to visit the ANSTO's Lucas Heights facility to see how radioactive waste is currently managed.

In addition, in October 2019, prior to the Kimba community ballot, the department promoted specific information sessions for Barngarla and Gawler Ranges people, in Port Lincoln and Whyalla, where it is understood the majority of their members reside, to ensure convenience in accessing information and participating in the consultation process.

The Australian Government has also made available $3 million to support the economic and heritage development of the Barngarla people, to help ensure that they can maximise the benefits of the Facility development. The department has sought BDAC's participation in the development of an economic development plan for this purpose.

As noted above, the BDAC completed a ballot of its members through a private third party company (Australian Election Company) in November 2019. Of its 209 members who were eligible to vote in the ballot, 87 responded (41.62 per cent), 4 votes were rejected at preliminary scrutiny, the remaining 83 votes responded 'No' (100 per cent) to the question "Do you support the proposed National Radioactive Waste Management Facility being located at one of the nominated sites in the community of Kimba?" Submissions from BDAC have also indicated a lack of support for the Facility at Kimba.

Once the radioactive waste facility is operational, if culturally significant findings are made on the site in future, how the Environment Protection and Biodiversity Conservation Act 1999 would operate to ensure appropriate protection for cultural heritage

The *National Radioactive Waste Management Act 2012* expressly provides that the *Australian Radiation Protection and Nuclear Safety Act 1998*; the *Environment Protection and Biodiversity Conservation Act 1999* and the *Nuclear Non-Proliferation (Safeguards) Act 1987* cannot be overridden for purposes relating to the preparation and development of the Facility site, and to the operation and decommissioning of the Facility.

Before its establishment, the Facility must receive regulatory approvals under the *Environmental Protection and Biodiversity Conservation Act 1999* and the *Australian Radiation Protection and Nuclear Safety Act 1998*.

While there is no native title on the site and no registered heritage, the department, through its preliminary desktop study and engagement with BDAC and their legal representatives, is aware of the potential for Aboriginal cultural heritage to exist. The department will work with BDAC and the Department of Agriculture, Water and Environment to ensure that all relevant obligations under the *Environmental Protection and Biodiversity Conservation Act 1999* are met in relation to all aspects, including the protection of any identified cultural heritage.

> Further activities the department will undertake in order to appropriately identify and manage cultural heritage, and achieve regulatory approvals include:
>
> - undertaking a detailed cultural heritage assessment with qualified archaeologists and anthropologists; and
> - the creation of a heritage management plan to minimise and mitigate any potential impacts to heritage.
>
> The department has sought, and will continue to seek the involvement of the BDAC in these processes.

Concluding comments

International human rights legal advice

2.163 In determining whether any limits on the rights to culture and self-determination are permissible it is necessary to consider the extent to which relevant groups, in this case Indigenous People, have been consulted. As part of its obligations in relation to respecting the right to self-determination, Australia has an obligation under customary international law to consult with Indigenous peoples in relation to actions which may affect them. The UN Human Rights Council has recently provided guidance on the right to be consulted, stating that the right to be consulted should be understood as a right of Indigenous peoples to 'influence the outcome of decision-making processes affecting them, not a mere right to be involved in such processes or merely to have their views heard'.[14]

2.164 The statement of compatibility had stated that the level of engagement and community support for the location of the Facility is evidenced by the outcome of the community ballot. However, the minister has advised it is not possible to determine what percentage of those eligible to vote in the community ballot were Indigenous. The minister advised that eligibility in the ballot was based on the qualification criteria set out in the *Local Government (Elections) Act 1999* (South Australia). That Act provides that eligibility is, in essence, determined by residence in the local area or whether a person is a ratepayer. It would appear that holding native

14 UN Human Rights Council, Free, prior and informed consent: a human rights-based approach - Study of the Expert Mechanism on the Rights of Indigenous Peoples, A/HRC/39/62 (2018) [15]-[16].

title in the area is not a ground for eligibility in this ballot.[15] As such, the ballot conducted by the Barngarla Determination Aboriginal Corporation (Barngarla Corporation) would appear to be more relevant to the question of consultation with Indigenous people. This ballot sought the views of members of the Barngarla People, who from the minister's response appear to be those that are culturally responsible for the area covering the nominated site. The minister advised that 100 per cent of Barngarla respondents to this ballot were opposed to locating the radioactive waste management facility at the nominated site. The minister's response states that additionally, various submissions were received and considered from other Traditional Owner representative groups, and that submissions from the Barngarla Corporation have also indicated a lack of support for the location of the Facility.

2.165 The minister also advised that the department sought to engage the Barngarla People throughout the site selection process, and have over 60 documented interactions with the Barngarla Corporation or their legal representatives. These include: meetings to discuss the project; offers to conduct a cultural heritage assessment; offers of funding for Barngarla Corporation to conduct a separate ballot of its members to gauge their views towards the site nomination; and offers of a funded trip for the Barngarla Corporation Board to visit the Lucas Heights facility to see how radioactive waste is currently managed.

2.166 As affirmed by the UN Human Rights Council, the nature of consultation with the Indigenous community should consist of a qualitative process of dialogue and negotiation, with consent as the objective.[16] In this context consultation is not satisfied with 'a single moment or action but a process of dialogue and negotiation over the course of a project, from planning to implementation and follow-up'.[17] While inputs were requested and received from representative groups of the Indigenous community, separately and independently of the community ballot,

15 As set out in a Federal Court decision, the local council did not consider that members of the Barngarla Determination Aboriginal Corporation (BDAC) were eligible to vote, as set out in a letter from the Council dated 31 May 2018, the 'Council acknowledged that BDAC's members hold native title in respect of several parcels of land within its local government area and, further, that those native title rights and interests satisfied the definition of "owner" in the LG Act […] however, that this ownership did not entitle BDAC's members to be included on the voters roll as the land was "non-rateable", and the native title holders were not ratepayers. Accordingly, they did not meet the enrolment criteria contained in s 14(1)(ab), (b) or (c) of the LGE Act.' *Barngarla Determination Aboriginal Corporation RNTBC v District Council of Kimba* [2019] FCA 1092, [54].

16 UN Human Rights Council, *Free, prior and informed consent: a human rights-based approach – Study of the Expert Mechanism on the Rights of Indigenous Peoples*, A/HRC/39/62 (2018), [15]-[16].

17 UN Human Rights Council, *Free, prior and informed consent: a human rights-based approach – Study of the Expert Mechanism on the Rights of Indigenous Peoples*, A/HRC/39/62 (2018), [15]-[16].

nomination of the site seems to rest heavily on the local council ballot from which native title holders were excluded, which the minister uses as evidence of local community support.[18] In contrast, it would appear that the Indigenous group culturally responsible for the site was unanimously opposed to the site nomination.

2.167 Given the nature and extent of the consultation with affected Indigenous groups and the unanimous opposition of Indigenous groups to the nomination of the site, it appears that the right of indigenous peoples to influence the outcome of decision-making processes affecting them may not be sufficiently protected by this bill.

2.168 In relation to how cultural heritage would be adequately protected once the radioactive waste facility was established, the minister advised that a number of Acts, including the *Environment Protection and Biodiversity Conservation Act 1999*, cannot be overridden for purposes relating to the operation of the facility. The minister advised that although there is no native title on the site and no registered heritage, the department is aware of the potential of Aboriginal cultural heritage to exist and will work with Barngarla Corporation to ensure that all relevant obligations are met, including the protection of any identified cultural heritage. The minister advises that the department has sought, and will continue to seek, the involvement of Barngarla Corporation in these processes. The protection of any identified cultural heritage is an important safeguard to protecting the right to culture. However, in relation to any cultural and spiritual significance attaching to the land itself, it remains unclear how this would be protected once a radioactive waste facility is operational on the site. Further, it is unclear how Indigenous people will be able to access sites of cultural significance, should they be determined to exist.

2.169 In conclusion, noting the clear opposition of the Barngarla Peoples to the specification of Napandee as the site for the establishment of a radioactive waste facility, and the potential for the site to impact on Indigenous cultural heritage, the specification of this site may impermissibly limit the right to culture and self-determination.

Committee view

2.170 The committee thanks the minister for this response. The committee notes that the bill would enable the establishment of a national radioactive waste management facility at a specified location in South Australia. The committee notes the minister's advice that it is aware of the potential for Aboriginal cultural heritage to exist over the specified location.

2.171 The committee welcomes the minister's advice that the department has sought and will continue to seek the involvement of the Barngarla Determination

18 See the statement of compatibility that states the 'level of engagement and local community support is evidenced in the outcome of a community ballot (conducted by the Australian Electoral Commission)', p. 6.

Aboriginal Corporation as a representative Indigenous group, in the identification and management of cultural heritage. However, the committee notes the legal advice that in determining whether any limits on the rights to culture and self-determination are permissible under international human rights law, it is necessary to consider the extent to which relevant groups have been consulted, which should consist of a qualitative process of dialogue and negotiation, with consent as the objective.

2.172 Noting the stated opposition of the Barngarla peoples to the specification of Napandee as the site for the establishment of a radioactive waste facility, and the potential for the site to impact on Indigenous cultural heritage, the committee considers there is a significant risk that the specification of this site will not fully protect the right to culture and self-determination.

Acquisition of additional land for expansion of site

2.173 The bill also provides that the regulations may prescribe additional land that is required to expand the specified site for the establishment and operation of the Facility, or the minister may make a notifiable instrument to specify additional land to provide all-weather access to the site.[19] It provides that if such land is prescribed, all rights and interests in the land are acquired by the Commonwealth or extinguished and freed and discharged from all other rights and interests.[20] This would appear to include the extinguishment of native title.

2.174 Before prescribing additional land the minister must be satisfied that consultation is undertaken, by inviting (through publication in a newspaper) each person with 'a right or interest in the land' to comment and taking such comments into account.[21] The bill provides that these consultation requirements are taken to be an exhaustive statement of the requirements of the natural justice hearing rule.[22]

Summary of initial assessment

Preliminary international human rights legal advice

Rights to self-determination, culture and equality and non-discrimination

2.175 The ability to compulsorily acquire additional land, which could lead to all rights and interests in that land being extinguished (including any native title), appears to engage and may limit the rights to culture, self-determination and equality and non-discrimination. The rights to culture and self-determination are set

---

19 See Schedule 1, item 15, proposed new sections 19A and 19B.

20 See Schedule 1, item 15, proposed new subsections 19A(4) and 19B(3).

21 Schedule 1, item 15, proposed new subsections 19A(3) and 19B(2) and section 19C.

22 Schedule 1, item 15, proposed new subsection 19C(4).

out above at paragraphs [2.156] to [2.158]. The right to equality and non-discrimination provides that everyone is entitled to enjoy their rights without discrimination of any kind, which encompasses both 'direct' discrimination (where measures have a discriminatory *intent*) and 'indirect' discrimination (where measures have a discriminatory *effect* on the enjoyment of rights).[23] Indirect discrimination occurs where 'a rule or measure that is neutral at face value or without intent to discriminate', exclusively or disproportionately affects people with a particular protected attribute.[24]

2.176 The United Nations Committee on the Elimination of Racial Discrimination (CERD Committee) has said that Australia's historically 'racially discriminatory land practices have endured as an acute impairment of the rights of Australia's indigenous communities' and that 'the land rights of indigenous peoples are unique and encompass a traditional and cultural identification of the indigenous peoples with their land that has been generally recognized'.[25] It has found that the extinguishment of native title raises concerns as to Australia's compliance with the International Convention on the Elimination of All Forms of Racial Discrimination.[26] In 2017, the CERD Committee expressed concern 'about information that extractive and development projects are carried out on lands owned or traditionally owned by Indigenous Peoples without seeking their prior, free and informed consent' and recommended that Australia 'ensure that the principle of free, prior and informed consent is incorporated into the *Native Title Act 1993* and in other legislation as appropriate, and fully implemented in practice'.[27]

2.177 The initial analysis stated that further information was required in order to assess the engagement and compatibility of the measure with the rights to culture, self-determination and equality and non-discrimination, in particular:

- whether the additional land for the expansion of the site (the boundaries of which are specified in the bill) currently has native title rights attaching;

---

23 UN Human Rights Committee, *General Comment 18: Non-discrimination* (1989).

24 *Althammer v Austria*, UN Human Rights Committee Communication no. 998/01 (2003) para. [10.2]. The prohibited grounds of discrimination are race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Under 'other status' the following have been held to qualify as prohibited grounds: age, nationality, marital status, disability, place of residence within a country and sexual orientation. The prohibited grounds of discrimination are often described as 'personal attributes'.

25 Committee on the Elimination of Racial Discrimination (CERD), Decision 2(54) on Australia, UN doc CERD/C/54/Misc.40/Rev.2, 18 March 1999.

26 Committee on the Elimination of Racial Discrimination (CERD), Decision 2(54) on Australia, UN doc CERD/C/54/Misc.40/Rev.2, 18 March 1999.

27 UN Committee on the Elimination of Racial Discrimination, Concluding Observations of the committee on the Elimination of Racial Discrimination: Australia, UN Doc CERD/C/AUS/CO/18-20 (2017) paras [21]-[22].

- whether the bill would enable native title rights to be extinguished without the full, free and informed consent of native title holders, and if so, how the rights to culture, self-determination and equality and non-discrimination will be protected;
- whether the requirement to consult with anyone with a 'right or interest' in the land includes those who may have cultural ties to the land (but not native title);
- why the consultation requirements set out in the bill are taken to be an exhaustive statement of the rules of natural justice, and what this means in practice;
- why the bill enables the minister to make a notifiable instrument to prescribe additional land for all-weather access to the site (which is not subject to any form of parliamentary oversight); and
- if native title is extinguished without the full, free and informed consent of the traditional owners, what remedies are available to affected persons for any contravention of their rights to culture, self-determination and equality and non-discrimination.

Committee view

2.178 The committee noted the legal advice that as the site may have cultural significance for First Nations people and as native title may be extinguished by these provisions, the bill appears to engage and may limit the rights to culture, self-determination and equality and non-discrimination. In order to assess whether the bill engages and limits these rights the committee sought the minister's advice as to the matters set out at paragraph [2.177].

Minister's response

2.179 The minister advised:

> Any native title over the site specified in the National Radioactive Waste Management Amendment (Site Specification, Community Fund and Other Measures} Bill 2020 (the Bill), as well as the bounds of the additional land that may be acquired for the expansion of the site, has been extinguished. The Barngarla people's native title claim is set out in the determination of the Federal Court which came into effect on 6 April 2018.
>
> The Bill provides that (unspecified) land may also be acquired for the purposes of providing all-weather road access to the Facility. While it is unlikely that all-weather road access, if required, would extend into any land with native title interests (which are sufficiently outside of the site boundary}, the exact location of such a road would be determined by the regulators and cannot be anticipated at this stage.
>
> As currently drafted, the Bill would provide the Minister with the ability to expressly exclude native title rights and interests (or any other rights or

interests in the relevant land) from road access acquisitions, as it is not necessary for government to have exclusive rights and interests in supporting road infrastructure. Similar discretion is provided by the Act in its current form.

The Minister has received advice from the Attorney-General's Department and will act in accordance with the future acts regime under the *Native Title Act 1993*.

It is not the government's intention to extinguish native title rights or interests in the process of developing the National Radioactive Waste Management Facility, and amendments may be considered to make this clear.

In relation to land that may be acquired for all-weather road access, the Bill provides a mandatory consultation requirement which provides that the Minister must invite each person having a right or interest in the land to comment on the proposed acquisition, and must take all comments into account.

Why the consultation requirements set out in the bill are taken to be an exhaustive statement of the rules of natural justice, and what this means in practice

The Bill has been introduced to give effect to the Government's commitment to establish a single, purpose built National Radioactive Waste Facility at Napandee, near Kimba in South Australia, and to provide certainty to impacted communities and other stakeholders regarding the location of the Facility.

Although the Bill would prescribe the location for the Facility, the Facility could not be established without the necessary regulatory approvals, licences and permits. In the process of applying for these, it may become necessary for the Commonwealth to acquire additional land to allow for further enabling works, cultural heritage protection, community research and development opportunities, and to accommodate site-specific designs for the Facility. Regulators may also require secondary or emergency all-weather road access to the site.

New sections 19A and 19B would allow for the Commonwealth to make the additional land acquisitions that may be necessary for the Facility to be established at Napandee. They provide further certainty to impacted communities by ensuring the Commonwealth is equipped to deal with critical issues that could be raised by regulators that have the potential to prevent the Facility from being established at Napandee, and the validity of these acquisitions could become critical to ensuring that the Facility is ultimately able to be established at Napandee.

New section 19C would provide an exhaustive statement of the requirements of the natural justice hearing rule in relation to additional land acquisitions made under new sections 19A and 19B. At common law, the natural justice hearing rule broadly requires that a person 'be given a

hearing before a decision is made that adversely affects a right, interest or expectation which they hold.[28] The requirements in new section 19C embody this principle, insofar as they would require the Minister to:

- notify the community of any proposals to make acquisitions under section 19A or 19B;
- invite interested persons to comment on the proposed acquisition; and
- take into account any relevant comments received prior to making the acquisition.

This would operate in a similar manner to section 18 of the current Act, which also provides an exhaustive statement of the rules of natural justice with respect to site selection decisions under section 14 of the Act. Both these sections would be repealed as part of the broader repeal of the current framework for selecting a site.

New section 19C seeks to retain the key elements of the 'procedural fairness requirements' set out in section 18 of the current Act, however these requirements have been adjusted to account for the fact that the Minister will no longer be empowered to decide the primary location for the Facility. Under the amendments, the Minister[29] would only be making minor, ancillary acquisition decisions with respect to land nearby the area prescribed by new section 5. In light of this, the requirements imposed by new section 19C will be less onerous than those imposed by current section 18. Among other things, the Minister will now need to provide at least 30 days for interested parties to comment on a proposed acquisition, as opposed to the 60 minimum required under the current arrangements.

New section 19C would ensure fairness remains at the centre of any decision-making under section 19A or 19B, while also addressing the uncertainties that flow from continually-evolving common law conceptions of natural justice. The codification of the natural justice hearing rule in this respect serves the broader objects of the Bill namely, to provide certainty to impacted communities and stakeholders. This is achieved by ensuring all parties are precisely aware of what is required to comply with the natural justice hearing rule, and to ensure additional land acquisitions are properly made.

New section 19C ensures an appropriate balance is struck between the rights of interested parties (to be heard before an additional land acquisition is made), and the need for communities and stakeholders to

28 R Creyke & J McMillan, Control of Government Action: Text, Cases and Commentary, 3rd ed, 2012, p 629.

29 In the case of an acquisition made under section 19A, in the Minister' s capacity as the rule maker for the regulations.

have certainty about the Commonwealth's ability to establish the Facility at Napandee.

By codifying the requirements of the natural justice hearing rule in this way, new section 19C promotes confidence in the validity of any additional land acquisitions that may be required to establish the Facility at Napandee.

Why the bill enables the minister to make a notifiable instrument to prescribe additional land for all-weather access to the site (which is not subject to any form of parliamentary oversight)

The provision to acquire additional land for all-weather road access exists in the current legislation. The specification of the site that would connect to such land, and requirement to make a notifiable instrument to prescribe such land, provides oversight beyond current provisions that enable a single minister to apply their absolute discretion to the land acquisition.

It is necessary to carry over a provision that provides that additional land may be acquired for these purposes to retain the ability to respond to regulatory requirements for access to the site.

The process to develop the National Radioactive Waste Management Facility is lengthy and complex, involving multiples phases of investigation and approvals. As part of the site selection process, the Commonwealth has undertaken 2 years of preliminary assessments and concept design of the site. Once the land described in new section 5 is acquired, the next phase involves further site investigations to support site-specific design development and regulatory approvals. While investigations to date have not identified the need for additional all-weather roads access, there remains the potential for such access to be required as a condition of the Australian Radiation Protection and Nuclear Safety Agency siting, construction and/or operational licenses. The Bill provides for this additional land to be acquired under s19B by notifiable instrument.

It is appropriate that this land be acquired through notifiable instrument rather than regulations, which would be subject to disallowance, as being unable to acquire this land at this point in the development process would adversely impact on the ability for the government to deliver the Facility which is necessary to support the nuclear medicine industry.

This is consistent with the approach in the *Lands Acquisition Act 1989* and *Land Acquisition Act 1969* (SA) both of which provide that land may be compulsorily acquired by government without Parliamentary oversight.

If native title is extinguished without the full, free and informed consent of the traditional owners, what remedies are available to affected persons for any contravention of their rights to culture, self-determination and equality and non-discrimination

There is no native title or registered heritage at the site or bounds of additional land specified in the Bill, and the Australian Government has no

> intention to extinguish native title in the course of acquiring land for the purposes of providing all-weather road access to the site.
>
> If the Facility requires an all-weather road to traverse native title land, the government will engage with Traditional Owners in accordance with the future acts regime under the *Native Title Act 1993*.
>
> The department is aware of the potential for unregistered Aboriginal cultural heritage to exist in the area, and has sought, and will continue to seek, the involvement of the Barngarla Development Aboriginal Corporation in minimising potential impacts on cultural heritage. To this end, the department is seeking Barngarla involvement in conducting a detailed cultural heritage assessment with qualified archaeologists and anthropologists, and creating a heritage management plan to assist with minimising and managing any potential impacts to heritage.
>
> Any acquisition of any additional land will require consultation in accordance with new section 19C. That section is similar in effect to existing section 18, which will be repealed, and continues those procedural fairness requirements. Any person with a right or interest in the land must be given an opportunity to comment on the proposed acquisition, and their comments must be taken into account.
>
> In any acquisition of land, people with rights or interest in the land can claim reasonable compensation.

Concluding comments

International human rights legal advice

Rights to self-determination, culture and equality and non-discrimination

2.180 The ability to compulsorily acquire additional land, which could lead to all rights and interests in that land being extinguished (including any native title) engages and may limit the rights to self-determination, culture and equality and non-discrimination. The minister has advised that any native title over the land specified for the site in the bill, including the expansion of the site, has already been extinguished. However, in relation to the expansion of the site for 'all weather access' the minister states that though it may be 'unlikely' that all-weather road access, if required, will extend into any land with native title interests, the exact location of such a road would be determined by the regulators and cannot be anticipated at this stage. The minister advised that such land would be acquired by way of a notifiable instrument, which is not subject to any form of parliamentary oversight,[30] because if the instrument were disallowed and land was then unable to be acquired, this would 'adversely impact on the ability for the government to deliver the Facility'. However, the minister advises that it is 'not the government's

30 Noting that section 42 of the *Legislation Act 2003* provides that only legislative instruments are subject to disallowance, not notifiable instruments.

intention' to extinguish native title rights or interests through the measures in the bill, and that amendments may be necessary in order to make this clear. The minister states that if all-weather road access acquisition is necessary, the government will engage with the traditional owners in accordance with the future acts regime under the *Native Title Act 1993*.

2.181 As a matter of law, as the bill is currently drafted it would allow the minister, without any parliamentary oversight, to specify additional land for all weather access that may lead to the extinguishment of native title. Amendments to proposed subsection 19B(3) to specifically provide that native title cannot be extinguished, would be necessary to give effect to the government's stated intention. Without such an amendment, there is a significant risk that the bill could lead to the extinguishment of native title in circumstances that would not comply with the international human rights obligations of the right to self-determination, culture and equality.

2.182 In addition, even if native title is not extinguished, the expansion of the site appears to engage and may limit the rights to culture and self-determination, noting the minister's advice as to the potential for unregistered Aboriginal cultural heritage to exist in the area. As noted above, in determining whether any limits on the rights to culture and self-determination are permissible it is necessary to consider the extent to which relevant groups have been consulted. As set out above, this should protect the right of indigenous peoples to influence the outcome of decision-making processes affecting them, which is 'not a mere right to be involved in such processes or merely to have their views heard'.[31]

2.183 Proposed subsection 19C sets out that each person who has a right or interest in the land must be invited, via a newspaper advertisement, to comment and the minister must take those comments into account. The bill provides that these requirements are taken to be an exhaustive statement of the rules of natural justice. The minister advises that this embodies common law principles and ensures fairness remains at the centre of decision-making, but also addresses the uncertainties that flow from continually evolving common law conceptions of natural justice. The minister's response states that there is a balance to be struck between the rights of interested parties (to be heard before an additional land acquisition is made) and the need for communities and stakeholders to have certainty about the establishment of the site at Napandee.

2.184 It is an important safeguard that the minister must invite any person having a right or interest in the land to comment on the proposed acquisition, and must consider any submissions from such persons. However, the obligation under

---

31 UN Human Rights Council, *Free, prior and informed consent: a human rights-based approach – Study of the Expert Mechanism on the Rights of Indigenous Peoples*, A/HRC/39/62 (2018), [15]-[16].

international human rights law to consult is much broader than mere comment prior to government acquisition. Proposed section 19C would seem to limit the consultation of the affected Indigenous groups to a 'consideration' of the comments of the affected persons or groups. In contrast, under international human rights law the requirement to consult has as its objective to seek the consent of the affected Indigenous groups, with consultation not limited to a single act but being a process of continued engagement with a view to not merely hearing the views of the affected Indigenous groups, but facilitating their contribution to the outcome.

2.185 The minister's response also confirms that the department is aware of the potential for unregistered cultural heritage to exist in the area, and that the department has sought and will continue to seek the involvement of the Barngarla Corporation in minimising the potential impact to cultural heritage. This is relevant to protecting the right to culture and self-determination, however, this should be considered in light of the opposition of the Barngarla Corporation to the establishment of the Facility, which would therefore be likely to extend to any expansion of the facility.

2.186 In conclusion, the bill as currently drafted would allow the minister, without any parliamentary oversight, to specify additional land for all weather access that may lead to the extinguishment of native title. If this were not amended to specifically provide that native title cannot be extinguished, there is a significant risk that the bill could lead to the extinguishment of native title in circumstances that would not comply with the international human rights obligations of the right to self-determination, culture and equality. In addition, while the bill provides that before additional land is acquired, each person who has a right or interest in the land must be invited, via a newspaper advertisement, to comment and the minister must take those comments into account, the obligation under international human rights law to consult is much broader than mere comment prior to government acquisition. As such, there is some risk that the expansion of this site may not fully protect the rights to culture and self-determination.

Committee view

2.187 The committee thanks the minister for this response. The committee notes that the bill would enable additional land to be acquired or extinguished to allow for the expansion of the site or to provide all-weather access to the site.

2.188 The committee welcomes the minister's assurance that it is not the government's intention to extinguish native title rights or interests in the process of developing the radioactive waste facility, and amendments may be necessary to make this clear. The committee considers it would be appropriate for the bill to be amended accordingly.

2.189 The committee also welcomes the minister's assurance that the department is aware of the potential for unregistered cultural heritage to exist in the area, and that the department has sought and will continue to seek the

involvement of the Barngarla Corporation in minimising the potential impact to cultural heritage, and that the bill sets out an obligation for the minister to consult anyone with a right or interest in the expansion of the site.

2.190 However, the committee notes the legal advice that the obligation under international human rights law to consult is much broader than mere comment prior to government acquisition. As such, the committee considers that there is a significant risk that the expansion of this site will not fully protect the rights to culture and self-determination.

National Redress Scheme for Institutional Child Sexual Abuse Amendment (2019 Measures No. 1) Rules 2019 [F2019L01491]

National Redress Scheme for Institutional Child Sexual Abuse Amendment (2020 Measures No. 1) Rules 2020 [F2020L00096][1]

Purpose	These instruments amend the National Redress Scheme for Institutional Child Sexual Abuse Rules 2018 to exclude eight Queensland grammar schools and three New South Wales independent schools from the definition of 'state institution' in section 111 of the *National Redress Scheme for Institutional Child Sexual Abuse Act 2018*.
Portfolio	Families and Social Services
Authorising legislation	*National Redress Scheme for Institutional Child Sexual Abuse Act 2018*
Last day to disallow	15 sitting days after tabling (F2019L01491 tabled in both Houses on 25 November 2019 F2020L00096 tabled in both Houses on 10 February 2020). Notice of motion to disallow F2020L00096 must be given by 26 March 2020 in the House of Representatives and by 15 June 2020 in the Senate.
Rights	Effective remedy; rights of the child
Status	Response required

2.191 The committee requested a response from the minister in relation to the National Redress Scheme for Institutional Child Sexual Abuse Amendment (2019 Measures No. 1) Rules 2019 (2019 rules) in *Report 1 of 2020*.[2]

1 This entry can be cited as: Parliamentary Joint Committee on Human Rights, National Redress Scheme for Institutional Child Sexual Abuse Amendment (2019 Measures No. 1) Rules 2019 [F2019L01491], National Redress Scheme for Institutional Child Sexual Abuse Amendment (2020 Measures No. 1) Rules 2020, *Report 4 of 2020*; [2020] AUPJCHR 56.

2 Parliamentary Joint Committee on Human Rights, *Report 1 of 2020* (5 February 2020), pp. 44-46.

Participation in the National Redress Scheme for Institutional Child Sexual Abuse

2.192 Subsection 111(1) of the *National Redress Scheme for Institutional Child Sexual Abuse Act 2018* (the Redress Act) provides that an institution is a 'state institution' if it is, or was, part of the state, or is, or was, a body established for public purposes by or under a law of a state. Subsection 111(2) of the Redress Act states that an institution is not a state institution if the rules prescribe this. The 2019 rules prescribe eight Queensland grammar schools[3] and the National Redress Scheme for Institutional Child Sexual Abuse Amendment (2020 Measures No. 1) Rules 2020 (2020 rules) prescribe three New South Wales independent schools as not being state institutions.[4]

2.193 The effect is that these 11 schools will only become 'participating institutions' in the National Redress Scheme for Institutional Child Sexual Abuse if the minister makes a declaration that they are a participating non-government institution,[5] and is satisfied that the institution has agreed to participate in the scheme.[6] By contrast, a state or territory institution may be declared to be a participating institution where the relevant state or territory has agreed to the institution participating in the scheme.[7]

Summary of initial assessment

Preliminary international human rights legal advice

Rights of the child and right to an effective remedy

2.194 For an individual to be eligible for redress pursuant to this scheme, the relevant institution against which a claim is being made must be participating in the scheme.[8] The prescription of schools as not being State institutions for the purposes of the Act, means that they will not become participating institutions unless the minister is satisfied that the institutions themselves agree to participate in the scheme.

---

3 In Queensland: Brisbane Girls Grammar School; Brisbane Grammar School; Ipswich Girls' Grammar School including Ipswich Junior Grammar School; Ipswich Grammar School; Rockhampton Girls Grammar School; The Rockhampton Grammar School; Toowoomba Grammar School; Townsville Grammar School; and the boards of trustees for these schools.

4 In New South Wales: Sydney Grammar School; Newington College; and The King’s School, Parramatta.

5 National Redress Scheme for Institutional Child Sexual Abuse Act 2018 (Redress Act), section 114.

6 Redress Act, subsection 115(3)(c).

7 Redress Act, subsection 115(3)(a) and (b).

8 Redress Act, s. 107.

2.195 Access to redress for child sexual abuse pursuant to this scheme engages the obligation under international human rights law to take all appropriate measures to protect children from all forms of violence or abuse, including sexual abuse.[9] The prescription of these institutions, and the potential for delay in securing redress for individuals making a claim in relation to them, therefore engages and may limit the right to an effective remedy, as this right exists in relation to the rights of children.

2.196 The United Nations Committee on the Rights of the Child explains that for rights to have meaning, effective remedies must be available to redress violations, noting that children have a special and dependent status.[10] This right to an effective remedy also exists in relation to individuals who are now adults, but regarding conduct which took place when they were children.[11]

2.197 The initial legal analysis of the 2019 rules noted that further information was required in order to assess whether the prescription of the eight Queensland schools as not being state institutions for the purposes of this scheme, limits the rights of any individuals to access an effective remedy for the purposes of international human rights law. In particular, further information was required as to what other forms of redress (if any) are available for persons who may have suffered abuse at any of these prescribed institutions, including whether there are substantial differences between such remedies and the established redress scheme, particularly whether other avenues would likely cause greater difficulty for the claimant to access the remedy.

2.198 The full human rights analysis is set out at *Report 1 of 2020*.

Committee's initial view

2.199 The committee noted the legal advice in relation to the 2019 rules, and in order to assess the potential engagement of the rights of the child and right to an effective remedy, the committee sought the minster's advice in relation to the matters set out at paragraph [2.197].

9 Convention on the Rights of the Child, article 19.

10 See, United Nations Committee on the Rights of the Child, *General Comment No. 5 (2003): general measures of implementation of the Convention on the Rights of the Child*, [24].

11 Article 5(1) of the Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure (OP3 CRC) provides that a communication can be submitted by any *individual.* This reflects that the understanding of the temporal nature of childhood has been adopted in OP3 CRC, which facilitates complaints submitted by adults in relation to claims of abuse of their rights as children; see Malcolm Langford and Sevda Clark, 'New Kid on the Block: A Complaints Procedure for the Convention on the Rights of the Child', *Nordic Journal of Human Rights*, vol. 28, no. 3-4, 2010, pp. 376, 393-4.

Minister's response[12]

2.200 The minister advised:

> It is the Government's view that the amendments do not limit the rights of a child to an effective remedy.
>
> For a survivor to access redress under the Scheme an institution responsible for the abuse must be participating in the Scheme. Under the Act, participation is voluntary and the Government cannot compel state or non-government institutions to join.
>
> Under section 115 of the Act the Minister for Families and Social Services may only declare a state institution to be participating in the Scheme with the agreement of that state. The Queensland Government has not agreed for the eight Queensland Grammar Schools to participate as state institutions as they operate independently of government control.
>
> The amendments clarify that the Queensland Grammar Schools are not state institutions under section 111 of the Act. The power to prescribe that an institution is not a state institution allows the Scheme to deal with instances where it is more appropriate for an institution to pay redress for a person, rather than the State. This is especially beneficial where, for this reason, a state has not agreed to the institution participating in the Scheme, as required by section 115 of the Act.
>
> The amendments enable the Queensland Grammar Schools to join the National Redress Scheme (the Scheme) as non-government institutions, providing opportunities for people who have experienced institutional child sexual abuse in these institutions to seek an effective remedy through the Scheme.
>
> The Department of Social Services is actively engaging with institutions, including the Queensland Grammar Schools, to encourage them to join the Scheme.
>
> It is anticipated that further amendments to the Rules will be required to clarify that other institutions (which may meet the definition of a state institution but similarly operate independently of government control) are not state institutions for the purposes of the Scheme. For example, when the relevant jurisdiction does not agree to the institution participating in the Scheme.
>
> The Committee has requested further information as to what other forms of redress (if any) are available for persons who may have suffered abuse

---

12 The minister's response to the committee's inquiries was received on 21 February 2020. The response is available in full on the committee's website at: https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Scrutiny_reports .

> at any of the prescribed institutions identified in the Amending Rules. The Scheme offers people who have experienced institutional child sexual abuse by participating institutions an alternative to civil litigation, with a lower evidentiary burden and a high level of discretion. If a person chooses not to seek redress through the Scheme or is unable to do so due to not meeting the legislative requirements, for example, or the responsible institution does not participate in the Scheme, they are still able to seek a remedy through the civil justice system.
>
> The amendment to the Rules are considered compatible with human rights, as they ensure that people who have experienced institutional child sexual abuse have access to a remedy. The amendment clarifies that the relevant institutions can participate in the Scheme in their own right, therefore the amendment facilitates access to redress.
>
> The Government will continue to monitor and review the operation of the Scheme to ensure that the Scheme remains compatible with human rights.

Concluding comments

International human rights legal advice

Rights of the child and right to an effective remedy

2.201 In relation to whether exempting these schools from the operation of the scheme limits the right of any individuals to access an effective remedy, the minister has noted how the scheme operates, and that the Queensland government has not agreed to these eight schools participating as state institutions as they operate independently of state control. The minister has also advised that the Queensland Grammar Schools can join the scheme as non-government institutions, and they are being encouraged by the relevant government department to do so.

2.202 As to what other forms of redress (if any) are available to persons who may have suffered abuse at any of the prescribed institutions, the minister has advised that the scheme is an alternative to civil litigation, with a lower evidentiary burden and a high level of discretion, but that seeking a remedy through the civil justice system remains available. The minister states that as the amendment clarifies that the relevant institutions can participate in the Scheme in their own right, it therefore 'facilitates access to redress'.

2.203 However, the effect of both legislative instruments is to exclude 11 schools from the operation of the redress scheme. As such, those who wish to receive redress for abuse that occurred at any of these 11 schools[13] are now no longer able

13 At least one of these schools, Brisbane Grammar, is listed as one where abuse had been alleged to have occurred, see National Redress Scheme, Institutions that have not yet joined the Scheme, 2 March 2020 https://www.nationalredress.gov.au/institutions/institutions-have-not-yet-joined.

to do so under the scheme, unless each school voluntarily agrees to participate. It is therefore necessary to consider whether there now exists access to an effective remedy for those whose rights under various human rights treaties, including the Convention on the Rights of the Child, have been violated.

2.204 The right to an effective remedy may take a variety of forms, such as prosecutions of suspected perpetrators or compensation to victims of abuse.[14] Further, Australia must ensure 'that individuals also have accessible and effective remedies to vindicate those rights' and that 'such remedies should be appropriately adapted to as to take account of the special vulnerability of certain categories of person, including in particular children'.[15]

2.205 While limitations may be placed in particular circumstances on the nature of the remedy provided (judicial or otherwise), state parties must comply with the fundamental obligation to provide a remedy that is effective.[16] The UN Committee on the Convention on the Rights of the Child (CRC Committee) has stressed that in cases of violence, '[e]ffective remedies should be available, including compensation to victims and *access to redress mechanisms* and appeal or independent complaint mechanisms'.[17] An assessment of the effectiveness of the remedy available to individuals in light of the measures in the instruments will turn on whether there are sufficient remedies so as to be 'effective' for the purposes of international human rights law.

2.206 The redress scheme seeks to provide remedies in response to historical failures of the Commonwealth and other government and non-government organisations to uphold human rights, including the right of every child to protection by society and the state,[18] from physical and mental violence, injury or abuse (including sexual exploitation and abuse).[19] The statement of compatibility to the 2020 rules states that the scheme 'aims to provide an alternative to civil litigation for those who have experienced institutional sexual abuse to access justice'.

---

14 UN Human Rights Committee, *General comment No. 31* on t*he nature of the general legal obligation imposed on states parties to the Covenant* CCPR/C/21/Rev.1/Add. 13 (2004) [16]

15 UN Human Rights Committee, *General comment No. 31* on t*he nature of the general legal obligation imposed on states parties to the Covenant* CCPR/C/21/Rev.1/Add. 13 (2004) [15].

16 See UN Human Rights Committee, *General Comment No. 29 on States of Emergency* (Article 4) CCPR/C/21/Rev.1/Add.11 (2001) [14].

17 See UN Committee on the Rights of the Child, *General comment No. 13* on t*he right of the child to freedom from all forms of violence* CRC/C/GC/13 (2011) [56] (emphasis added).

18 Article 24 of the International Covenant on Civil and Political Rights.

19 The statement of compatibility to the Commonwealth Redress Scheme for Institutional Child Sexual Abuse Bill 2017, p. 70.

2.207 As the *National Redress Scheme for Institutional Child Sexual Abuse Act 2018* (Redress Act) sets a two-year deadline for institutions to join the scheme,[20] from 1 July 2020 institutions will not be able to join the scheme (unless the deadline is extended).[21] In terms of redress for victims it appears that none of the listed schools being exempted by these rules have yet joined the scheme, including a school named in the Royal Commission as having victims of abuse.[22] The minister's response also indicates that further amendments to the rules will be required to clarify that other institutions are not state institutions for the purposes of the scheme. Noting that there is limited time for any such exempted institutions to become participating institutions, this raises concerns that persons who have had their rights violated at these specific schools may not be able to receive redress under the scheme.

2.208 As noted by the minister, the alternative of civil litigation against the institutions responsible is available to victims of child sexual abuse, which is relevant to whether there exists an effective remedy. However, as the minister notes, the scheme offers a lower evidentiary burden and a high level of discretion, and therefore potentially affords a more effective remedy, particularly in historical abuse cases which may be harder to prove over time, noting also that civil litigation does not address systemic issues of redress and may not be available in all cases.[23]

2.209 In addition, international human rights law may require an effective remedy to be available against the state, regardless of the availability of civil remedies

---

20 Section 115(4)(a) of the *National Redress Scheme for Institutional Child Sexual Abuse Act 2018*.

21 Section 115(4)(b) of the *National Redress Scheme for Institutional Child Sexual Abuse Act 2018*.

22 National Redress Scheme, Institutions that have not yet joined the Scheme, 2 March 2020 https://www.nationalredress.gov.au/institutions/institutions-have-not-yet-joined. The Brisbane Grammar School was named in the Royal Commission. It is listed as 'intending to join'.

23 See for example the national legal service Knowmore's submission to the issues paper on civil litigation systems by the Royal Commission into Institutional Child Sexual Abuse (Child Abuse Royal Commission): Knowmore, Submission in Response to Issues Paper 5: Civil Litigation, 17 March 2000, pp. 3-4, https://www.childabuseroyalcommission.gov.au/sites/default/files/file-list/Issues%20Paper%205%20-%20Submission%20-%2017%20Knowmore.pdf , which lists an array of procedural and evidentiary hurdles also undermines the chances of a successful civil claim. These include the expiry of limitation periods within which a survivor may sue; the need to overcome multiple pre-trial steps in order to initiate proceedings and the high upfront costs and delay; the destruction of records, the passage of tie and the resulting difficulties of credibility for the courts; proving that a survivor’s injuries and losses were caused by the abuse; and the difficulty many survivors face in participating in early dispute or mediation processes with the relevant institution, in light of the power disparities that underlie sexual offending against children and the continuing adverse impacts of the resulting trauma. It was also noted that if some institutions no longer exist, if it was an unincorporated association, it cannot be sued in its own name as it does not exist as a juridical entity.

against other individuals and non-state actors. The European Court of Human Rights has held that the state itself has a positive duty to take steps to protect children from abuse and to provide an effective remedy.[24] In *O'Keeffe v Ireland*, where a victim of sexual abuse by her primary school principal took a case against the State, the court held that 'a State cannot absolve itself from its obligations to minors in primary schools by delegating those duties to private bodies or individuals'.[25] It noted that the court's role is to determine whether the civil remedies available constituted effective remedies 'which were available to the applicant in theory and in practice, that is to say, *were accessible, capable of providing redress and offered reasonable prospects of success'*.[26] It found that the availability of civil remedies against other individuals and non-State actors in that case were ineffective, regardless of their chances of success.[27] In addition, the UN Committee on the Convention on the Rights of the Child has indicated that :

> States have an obligation to provide effective remedies and reparations for violations of the rights of the child, including by third parties such as business enterprises. The Committee states in General Comment No.5 that for rights to have meaning, effective remedies must be available to redress violations. Several provisions in the CRC call for penalties, compensation, judicial action and measures to promote recovery after harm caused or contributed to by third parties.[28]

2.210 It is questionable whether the fact that the schools prescribed under these rules operate independently of government control[29] is a sufficient basis under international human rights law to potentially exclude victims of abuse from access to the redress scheme. Unless the institutions independently (re)join the Scheme, the

---

24 *Case of O'Keeffe v Ireland*, European Court of Human Rights Application no 35810/09 (2014). The judgment concluded a fifteen year-long legal battle whereby the applicant – who was abused by her teacher when attending primary school in Ireland – brought a case against the state.

25 *Case of O'Keeffe v Ireland*, European Court of Human Rights Application no 35810/09 (2014), para. [150].

26 *Case of O'Keeffe v Ireland*, European Court of Human Rights Application no 35810/09 (2014), para. [177] (emphasis added).

27 *Case of O'Keeffe v Ireland*, European Court of Human Rights Application no 35810/09 (2014) [179].

28 See UN Committee on the Rights of the Child, *General comment No. 16 on State obligations regarding the impact of business on children's rights* CRC/C/GC/16 (2013) [30].

29 See p. 1 to the explanatory statements to the National Redress Scheme for Institutional Child Sexual Abuse Amendment (2019 Measures No. 1) Rules 2019 [F2019L01491] and the National Redress Scheme for Institutional Child Sexual Abuse Amendment (2020 Measures No. 1) Rules 2020 [F2020L00096]

state may be responsible for providing redress to survivors of child sexual abuse at these educational institutions.

2.211 As such there is a risk that exempting these 11 schools from the operation of the redress scheme, and relying on those schools voluntarily rejoining the scheme, may result in a victim of sexual abuse, whose rights under the International Covenant on Civil and Political Rights and the Convention on the Rights of the Child have been violated, not having access to an effective remedy.

Committee view

2.212 The committee thanks the minister for this response. The committee notes that the instrument prescribes eight Queensland grammar schools and three New South Wales independent schools that are exempt from the operation of the National Redress Scheme for Institutional Child Sexual Abuse.

2.213 The committee understands that the exempted schools operate independently of government control and that it may be more appropriate that such institutions participate in the redress scheme in their own right, rather than as state institutions. However, the committee notes the legal advice that the State is responsible for providing accessible redress mechanisms and, as such, considers that there is a risk that these rules, in exempting these institutions, may result in a victim of sexual abuse not having access to an effective remedy, for the purposes of international human rights law.

2.214 The committee draws these international human rights law implications to the attention of the Joint Select Committee on Implementation of the National Redress Scheme for its consideration. The committee otherwise draws this matter to the attention of the minister and the Parliament.

National Vocational Education and Training Regulator Amendment (Governance and Other Matters) Bill 2020[1]

Purpose	This bill seeks to amend the *National Vocational Education and Training Regulator Act 2011* to: • revise the governance of the National VET Regulator; • establish the National Vocational Education and Training Regulator Advisory Council; and • provide information sharing arrangements in relation to information collected by the National Centre for Vocational Education Research
Portfolio	Education, Skills and Employment
Introduced	House of Representatives, 13 February 2020
Right[s]	Privacy
Status	Concluded

2.215 The committee requested a response from the minister in relation to the instrument in *Report 3 of 2020*.[2]

Information sharing

2.216 Schedule 2 of the bill enables the National Centre for Vocational Education Research (NCVER) to disclose information collected in accordance with the 'Data Provision Requirements' to a number of bodies. The explanatory memorandum states that under the Data Provision Requirements a registered training organisation is required to collect student information and disclose that information to NCVER.[3] It states that this information will usually be collected at enrolment and will include personal information and potentially sensitive information (such as disability status).[4]

2.217 The information may be disclosed to the relevant Department; another Commonwealth authority; a State or Territory authority that deals with, or has

1 This entry can be cited as: Parliamentary Joint Committee on Human Rights, National Vocational Education and Training Regulator Amendment (Governance and Other Matters) Bill 2020, *Report 4 of 2019*; [2019] AUPJCHR 57.

2 Parliamentary Joint Committee on Human Rights, *Report 3 of 2020* (26 February 2020), pp. 11-13.

3 Explanatory memorandum, p. 37.

4 Explanatory memorandum, p. 38.

responsibility for, matters relating to vocational education and training (VET); and a VET regulator. It may be disclosed to these bodies 'for the purposes of that body'.[5] It may also be disclosed to a person engaged by the NCVER to conduct research on its behalf, but only if the person and the NCVER satisfies any requirements that may be prescribed by the rules.[6]

Summary of initial assessment

Preliminary international human rights law advice

Right to privacy

2.218 The disclosure of personal information engages and limits the right to privacy. The right to privacy includes respect for informational privacy, including the right to respect for private and confidential information, particularly the storing, use and sharing of such information. It also includes the right to control the dissemination of information about one's private life.[7] The right to privacy may be subject to permissible limitations where the limitation pursues a legitimate objective, is rationally connected to that objective and is a proportionate means of achieving that objective.

2.219 The initial analysis considered that more information was required to assess whether the measure is compatible with the right to privacy, including:

- why it is necessary to disclose identifiable student data in all instances to all of the listed bodies, and whether some, or all, of the objectives of the measure could be achieved by disclosing de-identified student data;
- why it is necessary to enable the disclosure of personal information to each of the bodies listed, 'for the purposes of that body', rather than limiting the disclosure for the purposes of administering the VET sector; and
- why the bill states that the minister 'may' make information safeguard rules, rather than requiring the minister to make such rules, and why such rules would only apply to disclosure to research bodies and not the broader range of disclosures under proposed subsection 210A(1).

2.220 The full initial human rights analysis is set out at *Report 3 of 2020*.

Committee view

2.221 The committee noted the legal advice that this engages and limits the right to privacy. In order to assess whether the bill constitutes a permissible limitation on the right to privacy the committee sought the minister's advice as to the matters set out at paragraph [2.219].

---

5 Schedule 2, item 2, proposed subsection 210A(1).

6 Schedule 2, item 2, proposed subsections 210A(2) and (3).

7 Article 17, International Covenant on Civil and Political Rights.

Minister's response[8]

2.222 The minister advised:

The necessity to disclose identifiable student data

The Committee sought advice on 'why it is necessary to disclose identifiable student data in all instances to all of the listed bodies, and whether some, or all, of the objectives of the measure could be achieved by disclosing de-identified student data'.

Identified data is required by the listed bodies in subsection 210A(1) in item 2 of Schedule 2 of the Bill in order to perform their core functions. Specifically, there are community expectations that the broad gamut of functions that a department undertakes will be cognisant of individual circumstances and that portfolio departments will not work in silos.

De-identified data is currently available to the listed bodies but they are unable to understand how a person moves across the tertiary system and into work, how outcomes can be improved for people with different needs and in different regions, and how to target funding and programs to match individual aspirations with the needs of the Australian labour market. By overcoming these evidence barriers, the Australian Government will be able to enhance the rights of individuals to work and pursue education.

To develop policies based on evidence and target services to assist those with different needs and circumstances, vocational education and training (VET) data will need to be linked with other data sets to enhance evidence about the employment, social and personal factors that affect a person's engagement with the VET system. The only way to form these datasets is to start with identified sensitive personal information, in order to understand the pathways and outcomes for different people including those with disability, Indigenous Australians and people for whom English is not their first language.

Excluding this information may exacerbate disadvantage as policies and funding cannot be calibrated to meet the needs of all segments of Australian society. Any limitation of the right to privacy resulting from these provisions is offset by the legitimate objective of promoting and enhancing other human rights, including the right to education, the right to work, the right to social security, and the rights of people with disability.

I note the stringent requirements that are followed when data is linked, as overseen by the Cross Portfolio Data Integration Oversight Board. To link separate data sets, it is essential to begin with identified data. However, to ensure privacy is protected, once linked, the merged data set can be de-

8 The minister's response to the committee's inquiries was received on 12 March 2020. This is an extract of the response. The response is available in full on the committee's website at: https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Scrutiny_reports.

identified for analysis and research. The identifiers used to create the linkage (whether they are Unique Student Identifiers, names or something else) are stripped from the integrated analytical data set once the data has been successfully merged. This is referred to as the separation principle and Commonwealth data integration projects for statistical and research purposes adhere to this process.

In relation to the disclosure of VET data, I note that:

1. Students will be made fully aware of the use of their data. At the point that personal information is collected from VET students, they are made aware that their information will be shared with the National Centre for Vocational Education Research (NCVER) and authorised government agencies. All registered training organisations (RTOs) are required to issue a Privacy Notice to students that outlines how VET data may be used, and RTOs may be found in breach of their registration requirements if they do not comply. The Department of Education, Skills and Employment will review the minimum mandatory content of the Privacy Notice for VET on passage of the Bill.
2. Bodies accessing data will almost certainly be APP entities under the Privacy Act 1988 or subject to similar requirements under state and territory legislation and as such will only be expected to request identified information where it is strictly necessary.
3. NCVER is purposely given discretion to exercise judgement over the release of identified data, providing an opportunity to assess whether identified data is indeed required for the purposes of the request. Identified data will not necessarily be disclosed by NCVER in all instances. However, there are critical public policy cases that require identified data, and more details on these are below. The Bill gives the NCVER the discretion (rather than a compulsion) to disclose data. It is expected that the entities listed in subsection 210A(1) will request particular data from NCVER, and list the specific data required and the purpose for the request. In line with arrangements already in place to ensure individuals' privacy is protected, NCVER will assess all data requests, giving consideration to a range of factors, and will not disclose identified data if de-identified or confidentialised data will achieve the relevant purpose.

Disclosure to bodies for the purposes of that body

The Committee sought advice on 'why it is necessary to enable the disclosure of personal information to each of the bodies listed, 'for the purposes of that body', rather than limiting the disclosure for the purposes of administering the VET sector'.

Generally, with around four million students per year participating in VET, the training sector touches all industries and aspects of the Australian economy. A narrow definition such as 'administering the VET sector' would preclude the value that all portfolios derive from the VET sector, whether

they are directly administering the system, reliant on it for a skilled workforce or engaging with these same four million people and designing services around their lifelong learning journey. In this way, Commonwealth, state and territory bodies are able to work together to develop policy and programs that enhance the right to work and to education.

VET regulators require identified data to enable them to analyse student movements between RTOs and the actions of RTOs, in order to identify emerging risks and respond to issues, such as placing students of RTOs that cease trading.

I believe that while the purposes expressed in the Bill are broad, they are transparent and appropriate to the reach of the VET sector across public administration. Further, the protections conferred by privacy legislation and discretion by NCVER ensure that this identified data will only be used where necessary.

Department or another Commonwealth authority

The Department and other Commonwealth authorities listed under subsections 210A(1)(a) and (b) are generally bound by the *Privacy Act 1988* and the Australian Privacy Principles (APPs), ensuring a level of privacy protection for the information of individuals.

The purposes of these bodies are transparent, and are generally articulated in Corporate Plans and Annual Reports required under the *Public Governance Performance and Accountability Act 2013* and subject to Parliamentary scrutiny as they change, through the consideration of Appropriation Bills from time to time.

As noted above, there are a range of policy issues that are best explored through cross portfolio data integration. As an example, data about the demographics of people undertaking aged care training in VET disclosed to a Commonwealth authority tasked with the future development of the aged care workforce would be 'for the purposes of that authority' and also 'for the purposes of making VET policy' as well as 'the administration of VET'.

State or territory authority that deals with VET or VET regulator

Like Commonwealth authorities, state and territory authorities jointly responsible for VET and are also interested in examining VET's role broadly in the economy and community, and over the life-course of individuals. State and territory departments dealing with VET are also bound by jurisdiction privacy legislation, rules and public scrutiny. As the states and territories directly administer VET and report to ministers who are joint members of the NCVER company with the Commonwealth Minister, it is more than appropriate that they have access to the VET data collected by the NCVER. For the reasons outlined above, narrowing the purposes to 'the administration of VET' would not be appropriate.

In the case of a VET regulator, limiting disclosure to the 'purposes of that body' effectively limits disclosure to the purposes of administration and regulation of VET.

Information safeguard rules

The Committee sought advice as to 'why the Bill states that the Minister 'may' make information safeguard rules, rather than requiring the Minister to make such rules, and why such rules would only apply to disclosure to research bodies and not the broader range of disclosures under proposed subsection 210A(1)'.

As stated earlier, government bodies to which data may be released are already bound by various privacy legislation, rules and public scrutiny. Research bodies are not necessarily answerable in the same way and therefore it is appropriate that there be a capacity to specify rules with which they need to comply.

Appropriate levels of safeguards and guidance have been included on the face of primary legislation. For example, subsection 210A(2) ensures that NCVER only discloses to a person that is engaged by NCVER so as to support NCVER to carry out its research functions. This person would likely be someone that is contracted to NCVER to perform those functions, and would undergo various scrutiny measures to ensure the person engaged has the ability to fulfil the role and meets all requirements under that contract such as suitability checks and privacy considerations. The provision also supports current use of information processes by NCVER, and similarly when an Australian Government department engages a person by contract to carry out duties for that department. NCVER is an APP entity under the *Privacy Act 1988* and must already meet those collection, use or disclosure requirements, in particular under APP 6 – use or disclosure of personal information.

The proposed arrangements under subsection 210A(2) do not increase the risk of inappropriate disclosure of personal information and support NCVER's use of personal information where additional persons are engaged to assist NCVER to perform its functions.

The information safeguard rules add an additional layer of protection to those already included on the face of primary legislation for the specified bodies to satisfy. As the protection of an individual's personal information is a serious matter and if unforeseen issues were to arise, over time and with changing technological capabilities, the information safeguard rules give the Commonwealth Minister the power to respond to emerging issues in a manner appropriate and proportionate to the new circumstances.

I plan to draft information safeguard rules for consideration by the Ministerial Council. These rules will list the factors that should be considered before a decision is made by the NCVER or the Secretary to disclose identified personal information. These factors will include the purpose for the request, how the data will be used, and how privacy will

> be protected. They will also state that identified data should not be disclosed if de-identified or confidentialised data will achieve the relevant purpose.
>
> I believe the extent to which measures in the Bill place a limitation on the right to privacy, such limitations are reasonable and proportionate to the benefits that will be achieved.

Concluding comments

International human rights legal advice

2.223 The minister has provided detailed information as to why it is necessary to disclose identifiable data, noting that information is required in order to understand the pathways and outcomes for different people in the VET system. The minister states that de-identified data, which is already available to the bodies listed in subsection 210A(1), does not enable those bodies to understand how people move across the tertiary system and into the workforce, and how to target funding and programs. The minister states that identifiable information, which links VET data with other data sets, is needed in order to develop policies based on evidence and to target services. The minister also states that bodies accessing the relevant data will most likely be APP entities, and will be expected to request identified information only where it is strictly necessary. This would appear to be rationally connected to the legitimate objective of calibrating policies to meet the needs of all segments of Australian society, and thereby promoting the rights to education, work, social security and of persons with disability.

2.224 In relation to the proportionality of the measure, the minister advised that where identified data has been linked, the merged data set can subsequently be de-identified for research and analysis purposes. This may represent a useful safeguard, however, it is not clear that identified data *must* be de-identified prior to analysis and research. The minister further advised that it is necessary to enable the disclosure of personal information to each of the bodies listed, 'for the purposes of that body' because a narrow definition would preclude the value that all portfolios derive from the VET sector, noting that related policy issues require cross portfolio data integration. The minister also advised that the Department and other Commonwealth authorities are generally bound by the *Privacy Act 1988* and the Australian Privacy Principles, and state or territory authorities are also bound by privacy legislation applicable in those jurisdictions, as well as rules and public scrutiny, which may operate to help safeguard the right to privacy.

2.225 As to the minister's discretion to make information safeguard rules by legislative instrument under proposed section 214A,[9] the minister advised that as appropriate safeguards already exist in legislation for government bodies, it is only necessary to apply the information safeguard rules to research bodies which may not

9 Schedule 2, item 3.

necessarily be answerable in the same way. The minister advised that the rules would add an additional layer of protection to those already on the face of primary legislation, and the plan is to draft such rules, which will list matters that should be considered by the NCVER or the secretary prior to the disclosure of identified personal information (including the purpose of the request; how data will be used; how privacy will be protected; and a requirement that identified data not be disclosed if de-identified data would achieve the relevant purpose).

2.226 Gathering together student data in order to develop policies which respond to the needs of different people within, and emerging from, the VET system is likely to constitute a legitimate objective for the purposes of international human rights law. If that information can only be derived from data which is identifiable at the point at which it is gathered together, then the need to disclose identifiable student data may be rationally connected to that objective. From a human rights perspective, it is helpful that once data has been linked, it is subject to oversight by the Cross Portfolio Data Integration Board, and can be de-identified for research and analysis (although it is noted that there is no requirement that such data be de-identified). It would appear the information safeguard rules would add an additional layer of protection to help safeguard the right to privacy, however, without having sighted such rules it is difficult to conclude that these will adequately safeguard the right to privacy. However, on the basis of the minister's advice the measure may be a proportionate limit on the right to privacy.

Committee view

2.227 The committee thanks the minister for this response. The committee notes that the bill enables the National Centre for Vocational Education Research (NCVER) to disclose information collected in accordance with the 'Data Provision Requirements' to a number of bodies.

2.228 The committee notes that the legal advice and considers that gathering identifiable student data in order to develop policies which respond to the changing needs of students within, and emerging from, the VET system is an important and legitimate objective, and there are sufficient protections to safeguard the right to privacy.

2.229 The committee considers it may be useful if the statement of compatibility accompanying the bill were amended to include the information provided by the minister.

Native Title Legislation Amendment Bill 2019[1]

Purpose	This bill seeks to amend the *Native Title Act 1993* and the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* to modify the native title claims resolution, agreement-making, Indigenous decision-making and dispute resolution processes
Portfolio	Attorney-General
Introduced	House of Representatives on 17 October 2019
Rights	Culture; self-determination; privacy
Status	Concluded

2.230 The committee requested a response from the Attorney-General in relation to the bill in *Report 1 of 2020*.[2]

Majority default rule in applicant decision-making

2.231 The bill seeks, among other things, to amend the *Native Title Act 1993* (NTA) to allow, as the default position, an applicant to a native title claim to act by majority for all things that the applicant is required or permitted to do under the NTA[3] and to allow a claim group to place conditions on the authority of the applicant.[4]

2.232 The 'applicant' to a native title claim is the person or group of people authorised by a native title claim group[5] to make or manage a native title claim on their behalf.[6] Once a claim has been made and has been accepted for registration by the National Native Title Tribunal, the names of the people who make up the applicant appear on the Register of Native Title Claims (Register). The person or persons whose names appear as the applicant on the Register are then also collectively known as the 'registered native title claimant'. The applicant is also the

1 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Native Title Legislation Amendment Bill 2019, *Report 4 of 2020*; [2020] AUPJCHR 58.

2 Parliamentary Joint Committee on Human Rights, *Report 1 of 2020* (5 February 2020), pp. 47-55.

3 See, particularly, proposed section 62C(2), and proposed Schedule 1 more broadly.

4 Proposed section 251BA.

5 A native title claim group is defined in section 253 of the *Native Title Act 1993* (NTA). See Parliamentary Joint Committee on Human Rights, *Report 2 of 2019* (2 April 2019) p. 68 for further discussion.

6 See explanatory memorandum p. 28; section 61(2) of the NTA. The definition of 'applicant' also covers applications for compensation made by a person or persons authorised to make the application by a compensation claim group: section 61(2)(b).

'native title party' for the purpose of the process through which agreements are made under section 31 of the NTA.[7]

2.233 Currently, the default rule under the NTA is that the applicant is required to act jointly or unanimously when carrying out duties or performing functions under the NTA.[8] In *McGlade v Native Title Registrar & Ors* (*McGlade*),[9] the Full Court of the Federal Court held that all members of the applicant—or the registered native title claimant for the purpose of Indigenous Land Use Agreements (ILUAs)[10]—must be party to an area ILUA[11] before the ILUA can be registered and come into effect.[12]

2.234 The *Native Title Amendment (Indigenous Land Use Agreements) Act 2017* (2017 Act) reversed the effect of *McGlade* by changing the default position for future area ILUAs so that a majority of members of the registered native title claimant may be party to the agreement unless otherwise determined by the group.[13] That Act also retrospectively validated area ILUAs that were invalidated by *McGlade*.[14]

---

7 See explanatory memorandum, p. 27 and section 253 of the NTA. Section 31 of the NTA provides an agreement-making mechanism in the form of a right to negotiate in good faith with a view to obtaining the agreement with native title parties relating to the grant of mining and exploration rights over land which may be subject to native title. These agreements are not publicly registered.

8 Explanatory memorandum, p. 32.

9 [2017] FCAFC 10 (*McGlade*).

10 ILUAs are voluntary agreements in relation to the use of land and waters which may cover a number of matters including how native title rights coexist with the rights of other people, who may have access to an area, native title holders agreeing to a future development or future acts, extinguishment of native title, compensation for any past or future act, employment and economic opportunities for native title groups, issues of cultural heritage, and mining: see NTA section 24CB.

11 'Area ILUAs' are made in relation to land or waters for which no registered native title body corporate exists.

12 This included deceased members of the applicant.

13 Explanatory memorandum, p. 32.

14 The committee previously considered the Native Title Amendment (Indigenous Land Use Agreements) Bill 2017 and considered the measures were likely to promote the right to self-determination and represented a proportionate limitation the right to culture for any minority members of a native title claimant: Parliamentary Joint Committee on Human Rights, *Report 2 of 2017* (21 March 2017) pp. 18-25; Parliamentary Joint Committee on Human Rights, *Report 4 of 2017* (9 May 2017) pp. 112-124.

2.235 Schedule 1 of the bill seeks to expand the effect of the 2017 Act so that the applicant may act by majority as the default position for all things that the applicant is required or permitted to do under the NTA.[15]

2.236 Schedule 9 of the bill also seeks to confirm the validity of section 31 agreements that may potentially be affected by *McGlade*. The effect of this is that agreements made under section 31, which relate to the grant of mining and exploration rights over land that may be subject to native title, are retrospectively validated, where at least one member of the registered native title claimant was party to the agreement.

2.237 The bill provides that the default rule may be displaced by conditions imposed on the authority of the applicant under proposed section 251BA,[16] such that where there is a process of decision-making that must be complied with under the traditional laws and customs of the persons who authorise the applicant,[17] it must be in accordance with that process.[18] Where there is no such decision-making process, the persons can agree to and adopt a process of decision-making.[19] A similar safeguard applies in relation to section 31 agreements.[20]

2.238 The bill also provides that the applicant's power to deal with all matters to do with an application is subject to conditions on the authority of the applicant under proposed section 251BA,[21] and further that the Registrar must be satisfied not only that the applicant is authorised by the claim group but also that any conditions on the authority of the applicant have been satisfied when registering a claim on the Register.[22]

15 This includes making ILUAs, making applications for native title determinations or compensation applications, and section 31 agreements. See the general rule in proposed section 62C(2). The bill also includes a number of specific amendments to give effect to this general rule as it applies to specific types of agreement-making by the applicant. In so doing, it repeals and replaces aspects of the NTA as amended by the 2017 Act: see EM pp. 37-38.

16 See Schedule 1, item 23.

17 Section 251A of the NTA sets out the authorisation process for the making of indigenous land use agreements, and section 251B sets out the process for authorising the making of applications for a native title determination or compensation application.

18 Schedule 1, item 23, proposed paragraph 251BA(2)(a).

19 Schedule 1, item 23, proposed paragraph 251BA(2)(b).

20 Schedule 1, item 43, proposed section 31(1C), explanatory memorandum, p. 35.

21 Schedule 1, item 1, proposed subsection 62A(2).

22 Schedule 1, item 16, proposed subsection 190C(4AA).

Summary of initial assessment

Preliminary international human rights legal advice

Rights to culture and self-determination

2.239 The statement of compatibility acknowledges that by introducing a majority default rule for applicant decision-making, and by retrospectively validating section 31 agreements, the bill engages and may limit the right to culture.[23] This is because there may be a conflict between an individual's or a sub-group's right to culture, and the interests of the majority or of the group as a whole.

2.240 All individuals have a right to culture under article 15 of the International Covenant on Economic, Social and Cultural Rights (ICESCR); article 27 of the International Covenant on Civil and Political Rights (ICCPR) and related provisions provide individuals belonging to minority groups, including Indigenous peoples, with additional protections to enjoy their own culture, religion and language.

2.241 The rights conferred under article 27 of the ICCPR have both an individual and a group dimension: while the right is conferred on individuals, it must be exercised within the group. In the context of indigenous peoples, the right to culture includes the right for indigenous people to use land resources, including through traditional activities such as hunting and fishing, and to live on their traditional lands.[24]

2.242 Where there is a conflict between the wishes of individual members of the group and the group as a whole, international jurisprudence indicates that 'a restriction on the right of an individual member of a minority must be shown to have a reasonable and objective justification and to be necessary for the continued viability and welfare of the minority as a whole'.[25] In other words, a limitation on the right to culture will be permissible where it pursues a legitimate objective, including that it is necessary for the continued viability and welfare of the minority as a whole, is rationally connected to this objective and is a proportionate means of achieving this objective.

2.243 Relevant international jurisprudence also indicates that individual rights to culture can generally be restricted when to do so is in the interests of the minority group as a whole. Requiring unanimity for all applicant decision-making may undermine the process of agreement-making under the NTA and to that extent may impact on the enjoyment of the right to culture for the majority of the group.[26] In

---

23 Statement of compatibility, pp. 9 and 14.

24 See, UN Human Rights Committee, *General Comment No. 23: The rights of minorities* (1994).

25 *Kitok v Sweden,* UN Human Rights Committee Communication No.197/1985 (1988) [9.8].

26 See Parliamentary Joint Committee on Human Rights, *Report 4 of 2017* (9 May 2017) pp. 120-121.

this respect, the measures may be a proportionate limitation on the right to culture.[27]

2.244 However, processes such as native title claims, ILUAs and section 31 agreements may cover a range of serious matters. For example, matters that may be covered by ILUAs include the extinguishment of native title rights and interests. Accordingly, where the terms of an agreement are a matter of dispute within the claim group, majority decision-making may profoundly affect the interests of certain individuals or sub-groups in relation to the right to culture. It is relevant here that the law allows for decision-making in accordance with traditional laws and customs or (where there is no such process) in accordance with a process agreed to and adopted by the group,[28] which would appear to allow scope to be afforded to minority views. However, in cases where there is no established traditional or customary decision-making process, it remains unclear how an alternative decision-making process will be established by minority members in circumstances where the majority prefers a majority decision-making process. As such, ongoing monitoring and evaluation, including ongoing consultation with affected groups, may be an appropriate safeguard to ensure that these measures do not unduly limit the right to culture.

2.245 The right to self-determination is protected by articles 1 of both the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the International Covenant on Civil and Political Rights (ICCPR). The right to self-determination, which is a right of 'peoples' rather than individuals, includes the right of peoples to freely determine their political status and to freely pursue their economic, social and cultural development.[29] The proposed amendments also appear to engage and seem likely to promote the collective right to self-determination, as a minority of members would not be able to prevent decisions being made unless the authorisation process allowed for this.

2.246 It would also appear that validation of agreements already entered into may promote the right to self-determination insofar as it respects a group's decision to collectively pursue aspects of their native title rights and their economic, social and cultural development. It also ensures that those parties to section 31 agreements are able to access benefits flowing from the agreement.

2.247 As part of its obligations in relation to respecting the right to self-determination, Australia has an obligation under customary international law to

27 *Apirana Mahuika v New Zealand,* UN Human Rights Committee Communication No. 547/1993 (2000); *Kitok v Sweden,* UN Human Rights Committee Communication No. 197/1985 (1988) [9.8].

28 See *Native Title Act 1993*, section 251B.

29 See, UN Committee on the Elimination of Racial Discrimination, *General Recommendation 21 on the right to self-determination* (1996).

consult with Indigenous peoples in relation to actions which may affect them.[30] The UN Human Rights Council has recently provided guidance on the right to be consulted, stating that the right to be consulted should be understood as a right of Indigenous peoples to 'influence the outcome of decision-making processes affecting them, not a mere right to be involved in such processes or merely to have their views heard'.[31]

2.248 The statement of compatibility identifies safeguards in the bill that were introduced in response to consultation and concerns being raised around the risk 'that allowing majority decision-making promotes outcomes at the expense of collective decision-making.'[32] These safeguards, in particular the safeguard requiring decision-making to accord with traditional laws and customs (where such a process exists), or for members of the applicant to determine an authorisation process that differs from the majority-default position, are important and assist the proportionality of the measures (although it should be noted that they cannot apply to the retrospective validation of section 31 agreements).

2.249 The concept of 'free, prior and informed consent' also includes the principle that Indigenous peoples should have the freedom to be represented as traditionally required under their own laws, customs and protocols.[33] In this regard, the safeguards in the bill that allow for traditional decision-making processes to prevail over the default position are important.

2.250 The initial analysis stated that it would assist with compatibility of the bill if the bill required an evaluation to be conducted within an appropriate timeframe to assess the impact of these measures on the rights to culture and self-determination (for example, whether the safeguards are operating effectively to protect the capacity of sub-groups to influence decisions made by the majority of the native title claim group).

2.251 The full initial human rights analysis is set out at *Report 1 of 2020*.

Committee's initial view

2.252 The committee noted the legal advice that allowing native title applicants to act by majority as the default rule, and retrospectively validating section 31 agreements, may engage and limit the right to culture.

30 See Parliamentary Joint Committee on Human Rights, *Report 4 of 2017* (9 May 2017) pp.122-123.

31 UN Human Rights Council, *Free, prior and informed consent: a human rights-based approach - Study of the Expert Mechanism on the Rights of Indigenous Peoples,* A/HRC/39/62 (2018) [15]-[16].

32 Statement of compatibility, pp. 9-10.

33 UN Human Rights Council, *Free, prior and informed consent: a human rights-based approach. Study of the Expert Mechanism on the Rights of Indigenous Peoples,* A/HRC/39/62 (2018) [20].

2.253 However, the committee noted that the effect of the measures on certain individuals' enjoyment of their right to culture must be balanced against the fact that such measures also promote the right to culture for the group as a whole. In light of this, and that members of the applicant group may determine an authorisation process that differs from the majority-default position, the committee noted the advice that these measures may be a proportionate limit on the right to culture, depending on how these safeguards are implemented in practice.

2.254 The committee also noted the advice that the measures may promote the right to self-determination. However, while the statement of compatibility acknowledges that the right to self-determination is engaged by this amendment, it does not provide an analysis as to how this right is promoted.

2.255 Noting the importance of the obligation to consult with Indigenous peoples in relation to actions which may affect them, and the principles outlined in the United Nations Declaration on the Rights of Indigenous Peoples, the committee considered that ultimately much will depend on how the proposed amendments operate in practice.

2.256 As such, the committee sought the Attorney-General's advice as to whether it would be appropriate for the bill to be amended to require an evaluation to be conducted within an appropriate timeframe to assess the impact of these measures on the rights to culture and self-determination (for example, whether the safeguards are operating effectively to protect the capacity of sub-groups to influence decisions made by the majority of the native title claim group).

Attorney-General's response[34]

2.257 The Attorney-General advised:

> The Committee has sought my advice as to whether it would be appropriate to amend the Bill to require an evaluation to be conducted within an appropriate timeframe to assess the impact of the Bill on Indigenous peoples' rights to culture and self-determination. While I recognise the importance of ongoing engagement with stakeholders in order to understand and assess the practical impact of the Bill if passed, I do not consider the Bill requires amendment to include a formal evaluation mechanism as proposed.
>
> The Bill follows an extensive period of consultation with a wide range of native title sector stakeholders, including public consultation on an options paper for native title reform from November 2017 to February 2018, and consultation on an exposure draft bill from October to December 2018.

34 The Attorney-General's response to the committee's inquiries was received on 20 February 2020. The response is available in full on the committee's website at: https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Scrutiny_reports .

> During these periods of consultation there was a specific focus on engagement with Indigenous people and their representatives, including through targeted meetings with native title and peak Indigenous representative groups. A technical working group was also convened by the Australian Government to assist with developing the Bill, and included representatives from the National Native Title Council (the peak body for native title representative bodies).
>
> I and my department, together with the Minister for Indigenous Australians and his agency, remain committed to ongoing engagement with stakeholders, and in particular Indigenous peoples and their representatives, on native title issues. I am confident that existing formal and informal consultation mechanisms will provide ample opportunity for feedback to be received on the operation of the provisions of the Bill, once enacted. If such consultations indicate legitimate issues with the operation of measures in the Bill, further amendments will be considered.
>
> I also acknowledge the Committee's observations with respect to the right to self-determination. I remain of the view that the Bill's measures with respect to the role of the applicant (contained in Schedule 1) are necessary and proportionate and, when taken in their totality, will facilitate native title groups' ability to collectively pursue the determination of their native title rights and their economic, social and cultural development. The right to self-determination in particular will be promoted by the ability of the native title claim group to exercise greater control and flexibility in defining the scope of the authority of the applicant.

Concluding comments

International human rights legal advice

2.258 Allowing native title applicants to act by majority as the default rule, and retrospectively validating section 31 agreements, engages and may limit the right to culture. However, the effect of the measures on certain individuals' enjoyment of their right to culture must be balanced against the fact that such measures also promote the right to culture for the group as a whole. In light of this, and the fact that members of the applicant group may determine an authorisation process that differs from the majority-default position, the measure may be a proportionate limit on the right to culture, depending on how these safeguards are implemented in practice.

2.259 The Attorney-General has advised that the bill will facilitate native title groups' ability to collectively pursue the determination of their native title rights and their economic, social and cultural development, given the ability of the native title claim group to exercise greater control and flexibility in defining the scope of the authority of the applicant. These amendments appear likely to promote the right to self-determination, as a minority of members would not be able to prevent decisions being made unless the authorisation process allowed for this.

2.260 Noting the importance of the obligation to consult with indigenous peoples in relation to actions which may affect them, and the principles outlined in the United Nations Declaration on the Rights of Indigenous Peoples, ultimately much will depend on how the proposed amendments operate in practice. It would therefore assist with compatibility of the bill if the bill required an evaluation to be conducted within an appropriate timeframe to assess the impact of these measures on these rights (for example, whether the safeguards are operating effectively to protect the capacity of sub-groups to influence decisions made by the majority of the native title claim group).

2.261 The Attorney-General has advised that he does not consider it necessary to amend the bill to include a formal evaluation mechanism, as the bill followed an extensive period of consultation, with a specific focus of engagement with Indigenous people, and the government remains committed to ongoing engagement. The Attorney-General has advised that existing formal and informal consultation mechanisms will provide ample opportunity for feedback to be received on the operation of the provisions of the bill once enacted and if, following this consultation, legitimate issues with the operation of the bill are identified, further amendments will be considered.

2.262 From the perspective of international human rights law, it would be preferable for an evaluation of the impact of these measures on the rights to culture and self-determination to be required as a matter of law, by including such a requirement in the bill itself. However, the Attorney-General’s commitment to conduct further consultation and to amend the legislation if there is evidence of a negative impact on the rights to culture and self-determination goes some way to assist with the human rights compatibility of the bill.

Committee view

2.263 The committee thanks the Attorney-General for this response. The committee notes that this bill seeks to modify the native title claims resolution, agreement-making, Indigenous decision-making and dispute resolution processes.

2.264 The committee welcomes the Attorney-General's commitment to ongoing engagement with stakeholders, in particular Indigenous people and their representatives, on native title issues, and that if consultation indicates legitimate issues with the operation of the bill, further amendments will be considered.

2.265 The committee notes the legal advice and considers that while the bill may limit individual enjoyment of the right to culture, this must be balanced against the fact that the measures also promote the right to culture for the group as a whole, and noting additional safeguards in the bill, these measures may be a proportionate limit on the right to culture. The committee also considers the measures may promote the right to self-determination.

2.266 However, noting the importance of the obligation to consult with Indigenous people in relation to action that may affect them, and the principles

outlined in the United Nations Declaration on the Rights of Indigenous Peoples, the committee considers that ultimately much will depend on how the proposed amendments and safeguards operate in practice.

2.267 The committee commends the Attorney-General's commitment to ongoing consultation and to amend the legislation if there is any evidence of a negative impact on the rights to culture and self-determination.

Tertiary Education Quality and Standards Agency Amendment (Prohibiting Academic Cheating Services) Bill 2019[1]

Purpose	This bill seeks to amend the *Tertiary Education Quality and Standards Agency Act 2011* to criminalise the provision and advertisement of commercial academic cheating services; and establish civil penalties regarding academic cheating services provided on a non-commercial basis and/or advertised on a non-commercial basis
Portfolio	Education
Introduced	House of Representatives, 4 December 2019
Rights	Fair trial; freedom of expression; equality and non-discrimination
Status	Concluded

2.268 The committee requested a response from the minister in relation to the bill in *Report 1 of 2020*.[2]

Prohibition of academic cheating services

2.269 This bill seeks to make it an offence for a person, for a commercial purpose, to provide, offer to provide, or arrange for a third person to provide an 'academic cheating service' to a student undertaking higher education.[3] This offence would be punishable by imprisonment for two years, or 500 penalty units (currently $105,000),[4] or both. Pursuant to subsection 114A(3), the same conduct carried out other than for a commercial purpose would be prohibited, and be subject to a civil penalty of 500 penalty units (also $105,000).

2.270 'Academic cheating service' is defined to mean the 'provision of work to or the undertaking of work for students' in circumstances where that work either:

1 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Tertiary Education Quality and Standards Agency Amendment (Prohibiting Academic Cheating Services) Bill 2019, *Report 4 of 2020*; [2020] AUPJCHR 59.

2 Parliamentary Joint Committee on Human Rights, *Report 1 of 2020* (5 February 2020), pp. 56-63.

3 Schedule 1, item 10, proposed subsection 114A(1).

4 *Crimes Act 1914*, subsection 4AA(1).

- is, or forms a substantial part of, an assessment task that students are required to personally undertake; or
- could reasonably be regarded as being, or forming a substantial part of, an assessment task that students are required to personally undertake.[5]

2.271 The bill would also make it an offence for a person to advertise, publish or broadcast an advertisement for an academic cheating service to students undertaking higher education, where either that academic cheating service is provided on a commercial basis, or the provision of the advertisement itself is conducted for a commercial purpose.[6] This offence would also be punishable by imprisonment for two years, or 500 penalty units (currently $105,000),[7] or both. The same conduct, carried out other than for a commercial purpose, or relating to an academic cheating service which is not carried out for a commercial purpose, would be subject to a civil penalty of 500 penalty units (also $105,000).[8]

2.272 Additionally, the bill would give the Tertiary Education Quality and Standards Agency (TEQSA) the power to apply to the Federal Court of Australia for an injunction requiring a carriage provider to take reasonable steps to disable access to an online location that contravenes, or facilitates a contravention of these new provisions.[9]

Summary of initial assessment

Preliminary international human rights legal advice

Right to equality and non-discrimination

2.273 Sections 114A and 114B seek to make it an offence, or subject to a civil penalty, to provide or advertise academic cheating services other than for a commercial purpose. Section 114C outlines the constitutional heads of power on which these two sections would be based. These include the power to legislate with regards to aliens pursuant to paragraph 51(xix) of the Constitution.[10] The alternatively cited constitutional heads of power are the trade and commerce, corporations and communications power,[11] none of which appear to be relevant in the case of an academic cheating service which is provided on a non-commercial basis conducted in person (rather than via a website). The practical effect of this may

---

5 Schedule 1, item 3.

6 Schedule 1, item 10, proposed subsection 114B(1).

7 *Crimes Act 1914*, subsection 4AA(1).

8 Schedule 1, item 10, proposed subsection 114B(2).

9 Schedule 1, item 26, proposed section 127A.

10 Schedule 1, item 10, proposed subsections 114C(4) and (8).

11 Trade and commerce: paragraph 51(i); corporations: paragraph 51(xx); communications: paragraph 51(v).

be that the civil penalties for the provision of, or advertising of, non-commercial academic cheating services that operate in person (for example, a person on a university campus offering services to students) can only operate in relation to 'aliens'.[12] For example, it may be that in many instances the federal government only has the power to apply a civil penalty for the provision of a non-commercial academic cheating service (a service which is itself defined very broadly), where the student in question is an alien and/or the person providing the service is themselves an alien. This appears to be made evident in subsections 114A(4)-(5), which states that it is generally not necessary to prove that cheating services were offered to a 'particular student', but this does not apply where the student in question is an alien. This appears to anticipate that the aliens head of power may be the only applicable head of power in some instances. Additionally, the prohibition on advertising academic cheating services is confined, in some instances, to persons who are aliens.[13]

2.274 Consequently, the prohibition of the non-commercial provision of, or advertisement of, academic cheating services may disproportionately impact on non-citizens. If this were the case, these measures would appear to engage and limit the right to equality and non-discrimination.[14] This right provides that everyone is entitled to enjoy their rights without discrimination of any kind, which encompasses both 'direct' discrimination (where measures have a discriminatory *intent*) and 'indirect' discrimination (where measures have a discriminatory *effect* on the enjoyment of rights).[15] Indirect discrimination occurs where 'a rule or measure that is neutral at face value or without intent to discriminate', exclusively or disproportionately affects people with a particular protected attribute.[16]

2.275 Differential treatment will not constitute unlawful discrimination if the differential treatment is based on reasonable and objective criteria such that it

---

12 The term 'alien' has been interpreted to include individuals who have an allegiance to a foreign country, include via possession of foreign citizenship, and may include people who were born in Australia. See, *Koroitamana v Commonwealth* (2006) 227 CLR 31.

13 Schedule 1, item 10, proposed subsection 114C(8).

14 International Covenant on Civil and Political Rights, articles 2 and 26.

15 UN Human Rights Committee, *General Comment 18: Non-discrimination* (1989).

16 *Althammer v Austria*, UN Human Rights Committee Communication no. 998/01 (2003) [10.2]. The prohibited grounds of discrimination are race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Under 'other status' the following have been held to qualify as prohibited grounds: age, nationality, marital status, disability, place of residence within a country and sexual orientation. The prohibited grounds of discrimination are often described as 'personal attributes'.

serves a legitimate objective, is rationally connected to that objective and is a proportionate means of achieving that objective.[17]

Right to a fair trial

2.276 As noted above, subsections 114A(3) and 114B(2) seek to prohibit conduct related to the provision of academic cheating services in a non-commercial context. The proposed penalty for this conduct is 500 civil penalty units, which currently equates to a pecuniary penalty of $105,000.[18] Under Australian law, civil penalty provisions are dealt with in accordance with the rules and procedures that apply in relation to civil matters (for example, the burden of proof is on the balance of probabilities). However, if the proposed civil penalty provisions are regarded as 'criminal' for the purposes of international human rights law, they will engage the criminal process rights under articles 14 and 15 of the International Covenant on Civil and Political Rights (ICCPR).

2.277 In assessing whether a civil penalty may be considered criminal, it is necessary to consider:

- the domestic classification of the penalty;
- the nature and purpose of the penalty: a civil penalty is more likely to be considered 'criminal' in nature if it applies to the public in general rather than a specific regulatory or disciplinary context, and where there is an intention to punish or deter, irrespective of the severity of the penalty; and
- third, the severity of the penalty.[19]

2.278 Noting that the penalty applies to the public at large, rather than in a particular regulatory context, and is a significant penalty to apply to an individual, it may be that the civil penalty provisions would be regarded as 'criminal' for the purposes of international human rights law. As a result, further information is required as to how the civil penalties are compatible with the relevant criminal process rights, including whether any limitations on these rights are permissible.

Freedom of expression

2.279 By permitting TEQSA to seek an injunction requiring a carriage service provider to block access to certain online locations,[20] and prohibiting the advertisement of services which are deemed to constitute 'academic cheating

17 UN Human Rights Committee, *General Comment 18: Non-discrimination* (1989) [13]; see also *Althammer v Austria*, UN Human Rights Committee Communication No. 998/01 (2003) [10.2].

18 *Crimes Act 1914*, subsection 4AA(1).

19 For further detail, see Parliamentary Joint Committee on Human Rights, Guidance Note 2.

20 Schedule 1, item 26, proposed section 127A.

services', the measures in this bill engage and may limit the right to freedom of expression.

2.280 The right to freedom of expression includes the freedom to seek, receive and impart information and ideas of all kinds, either orally, in writing or print, in the form of art, or through any other media of an individual's choice.[21] The right may be subject to limitations that are necessary to protect the rights or reputations of others,[22] national security, public order, or public health or morals.[23] Additionally, such limitations must be prescribed by law, be rationally connected to the objective of the measures and be proportionate.[24]

2.281 The initial analysis stated that further information was required in order to conduct a full assessment of the potential limitations on each of these rights, in particular:

- whether any of the proposed criminal offences, or civil penalty provisions (or any part of the criminal offences or civil penalty provisions) will vary in operation depending on whether a person is an Australian citizen;
- if the proposed criminal offences or civil penalty provisions would treat Australian citizens and non-citizens (or 'aliens') differently, whether that differential treatment is based on reasonable and objective criteria such that it serves a legitimate objective, is rationally connected to that objective and is a proportionate means of achieving that objective;
- how the civil penalties in the bill are compatible with criminal process rights, including whether any limitations on these rights are permissible; and
- whether and how the proposed offence or civil penalty for advertising an academic cheating service and the injunction power are necessary to protect the rights or reputations of others, national security, public order, or public health or morals.

2.282 The full initial human rights analysis is set out at *Report 1 of 2020*.

---

21 International Covenant on Civil and Political Rights, article 19(2).

22 Restrictions on this ground must be constructed with care. For example, while it may be permissible to protect voters from forms of expression that constitute intimidation or coercion, such restrictions must not impede political debate. See UN Human Rights Committee, *General Comment No. 34: Article 19: Freedoms of Opinion and Expression* (2011) [28].

23 The concept of 'morals' here derives from myriad social, philosophical and religious traditions. This means that limitations for the purpose of protecting morals must be based on principles not deriving exclusively from a single tradition. See UN Human Rights Committee, *General Comment No. 34: Article 19: Freedoms of Opinion and Expression* (2011) [32]

24 See, UN Human Rights Committee, *General Comment No.34: Article 19: Freedoms of Opinion and Expression* (2011) [21]-[36].

Committee's initial view

2.283 The committee noted the legal advice and sought the minister's advice as to the matters set out at paragraph [2.281].

Minister's response[25]

2.284 The minister advised:

- *Whether any of the proposed criminal offences, or civil penalty provisions (or any part of the criminal offences or civil penalty provisions) will vary in operation depending on whether a person is an Australian citizen*

Response

For the vast majority of cases, there will be no difference in the application of the proposed criminal offence or civil penalty provisions to Australian citizens or non-Australian citizens. This is dependent on the circumstances of each individual case and the applicability of the various constitutional bases supporting the provisions.

Section 114A of the Bill provides that, if an academic cheating service provides cheating services to students at a registered Australian higher education provider, that conduct will be prohibited by the Bill. This provision draws on the 'corporations' and 'territories' heads of power set out in section 8 of the TEQSA Act. Generally, if the academic cheating service is provided to a student (regardless of whether the student is an Australian citizen) at a registered Australian higher education provider, that conduct will be prohibited by section 114A.

Section 114C of the Bill provides alternative constitutional bases, including the 'aliens' power, for the operation of sections 114A and 114B where the main authority is not able to be drawn on. This might be necessary if it is not possible to identify a specific higher education provider that is impacted by the cheating service for the purposes of section 114A. In limited circumstances, the 'aliens' power may be relied upon to capture cheating services providing services to non-Australian citizens. As poor English language skills are the biggest single risk factor for cheating behaviours, international students have been a key target for the promotion of cheating services. Ensuring all such services are at risk of detection and prosecution will be a key deterrent factor in the legislation's operation.

25 The minister's response to the committee's inquiries was received on 20 February 2020. The response is available in full on the committee's website at: https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Scrutiny_reports .

Section 114B of the Bill prohibits advertising, publishing or broadcasting advertisements for academic cheating services. It is anticipated that the vast majority of these advertisements will use some form of communication service (for example, telephone, social media or email). In practice, this similarly makes it very unlikely that section 114B will vary in its operation depending on whether a person is an Australian citizen. In summary, it is anticipated that the 'aliens' power listed in section 114C of the Bill would only be drawn upon in very limited circumstances, where the other constitutional bases do not apply.

In practice, therefore, while it is very unlikely that sections 114A and 114B will vary in operation depending on whether a person is an Australian citizen, the possibility of prosecution that drawing on the 'aliens' power provides is an important element of the Bill's potential to deter the offering and provision of cheating services to a key target market.

- *If the proposed criminal offences or civil penalty provisions would treat Australian citizens and (or 'aliens') differently, whether that differential treatment is based on reasonable and objective criteria such that it serves a legitimate objective, is rationally connected to that objective and is a proportionate means of achieving that objective*

<u>Response</u>

As outlined in the previous response, there are very limited circumstances in which it is anticipated that activation of the criminal offence or civil penalty provisions in the bill would require drawing on the Commonwealth's power to make laws with respect to 'aliens'. The penalties faced by an Australian citizen or an alien who commits an offence under the legislation will be exactly the same. I consider that the very small number of situations where drawing on the aliens' head of power might be necessary to give effect to the new law are reasonable and proportionate; but important to achieving the overall objectives of the Bill. It is a legitimate objective for the Bill to deter the provision of cheating services to non-Australian citizens who are Australian higher education students. It is also appropriate to deter any non-Australian citizens from offering, providing or facilitating academic cheating services, where other constitutional powers may not be able to be called on.

- *How the civil penalties in the bill are compatible with criminal process rights, including whether any limitations on these rights are permissible*

<u>Response</u>

The civil penalties contained in the Bill are compatible with the processes used in criminal law. This includes the right to the presumption of innocence, and the right to a fair trial. I note the Committee's point that the significant civil financial penalty could be interpreted as 'criminal' for

the purposes of international human rights law. Whilst I acknowledge that the pecuniary penalty is intended to be deterrent in nature, the penalty provision is, properly characterised, a civil penalty provision for the purposes of human rights law. The amount of the pecuniary penalty that may be imposed under the Bill is not punitive having regard to the nature of the industry sought to be regulated (namely, commercial providers and advertisers of higher education academic cheating services) and having regard to the relative size of the civil pecuniary penalties that may be imposed in comparable corporate settings. The civil penalty provision is also strictly confined to a specific regulatory or disciplinary context, namely providers of cheating services within the higher education sector, and does not apply to the public in general.

Given the need for a strong deterrent to academic cheating service provision and advertising, I believe that the level of the penalty is justified. The penalty is also in line with other similar offences, such as dealing in fraudulent identity information, or knowingly providing false or misleading information, or providing a false or misleading document to a Commonwealth entity. I acknowledge the Committee's request that the statement of compatibility with human rights for the Bill explain how the civil penalties are compatible with criminal process rights.

I will give consideration to having this document updated.

- *Whether and how the proposed offence or civil penalty for advertising an academic cheating service and the injunction power are necessary to protect the rights or reputations of others, national security, public order, or public health or morals*

Response

The proposed offence and civil penalty provisions for advertising an academic cheating service are an essential part of the deterrent effect that this Bill is intended to have, and are necessary to protect vulnerable students, in particular students for whom English is not their first language.

Promotion of cheating services to students takes a number of forms, and the use of social media for promotion of cheating services has become prevalent. Students have reported being inundated with unsolicited emails for such services, as well as advertisements and personal messages received through social media platforms. There have even been reports of cheating services setting up 'information booths' on university campuses during orientation week to trick students into believing these services are a legitimate part of the university's operations. Some cheating services have been reported as recruiting current students as 'agents' to gain access to university web chat rooms to promote their services directly to other students via ostensibly legitimate channels.

These various advertising and promotion channels target vulnerable students who might be struggling to meet academic requirements, by highlighting ease of access, low cost and low risk of detection, all the while playing down the ethical dishonesty involved. Many cheating services promote their services as altruistic enterprises, looking to help students under academic stress. Stressed students who might reach out to friends and family for support through social media can subsequently be targeted by cheating service providers. Students can be especially vulnerable if they are experiencing ill health, or are struggling with the academic demands of certain subjects. The consequences of failing, such as putting their student visa and family honour at risk can be emphasised by those targeting particular students. Academic cheating services exploit these students and may convince them that what they are doing is acceptable under the circumstances.

Having significant penalties in place for advertising academic cheating services will create a strong deterrent, and protect those at risk of being preyed upon by opportunistic cheating service providers.

The injunctions power is another significant mechanism to help reduce the ease of access to cheating services, lower their visibility and minimise the negative impact they might have on the reputation of Australia's higher education sector. Web-based cheating services are the prevalent model of paid academic cheating service operation. A large number of cheating service providers operate across international borders and are located across multiple countries, which will create challenges for Australian authorities wishing to prosecute the activity directly. Research from 2019 looking at the provision of cheating services on a freelance basis, found over 5,000 contractors were offering academic writing services on one 'auction' style website alone; and noted that a high proportion of these contractors were from one overseas country.

The ability to seek injunctions to block cheating websites from appearing in web searches or being available through Australian internet service providers will reduce the visibility of, and ease of access to, overseas websites that provide or advertise cheating services, and will reduce their availability and impact. At the very least, users searching for these websites would need to take deliberate action to circumvent such blocks in order to access a blocked online location. Some universities have already implemented a localised version of this approach, by blocking cheating websites from appearing in internet searches by students using university computer networks.

The ability to block websites will also provide another layer of protection for students from mistakenly thinking they are accessing a legitimate student support or tutoring service.

Concluding comments

International human rights legal advice

Right to equality and non-discrimination

2.285 Sections 114A and 114B of the bill seek to make it an offence, or subject to a civil penalty, to provide or advertise, academic cheating services other than for a commercial purpose. Section 114C outlines the constitutional heads of power on which these two sections would be based: powers relating to higher education providers and the trade and commerce, corporations, communications, and aliens powers.[26]

2.286 The minister has advised that section 114C includes the alien head of power for the operation of sections 114A and 114B, 'where the main authority is not able to drawn on', including in cases where it is not possible to identify a specific higher education provider that is impacted by the cheating service. The minister has explained that the effect of this is that, in limited circumstances, the aliens head of power may be relied on to address cheating services provided to non-Australian students, noting that poor English language skills are 'the biggest single risk factor for cheating behaviours', and the fact that international students have been a key target for the promotion of cheating services.

2.287 Based on this information, it would appear that in limited circumstances the proposed offence and civil penalties may only apply where the student in question is an alien and/or the person providing the service is an alien: that is, in general, a non-citizen. As such, this would constitute direct discrimination on the basis of nationality, which engages and limits the right to equality and non-discrimination.[27]

2.288 Differential treatment will not constitute unlawful discrimination if it is based on reasonable and objective criteria such that it serves a legitimate objective, is rationally connected to that objective and is a proportionate means of achieving that objective.[28] In circumstances where the aliens head of power is the only applicable head of power on which to rely, it would appear that the only reason for the differential treatment of non-citizens would be the absence of an alternative constitutional head of power. Addressing this gap in constitutional legislative power would be very unlikely to constitute reasonable and objective criteria on which to base the resulting differential treatment under international human rights law.

26 Constitution, paragraphs 51(i), (v), (xix) and (xx).

27 International Covenant on Civil and Political Rights, articles 2 and 26. The prohibited grounds of discrimination include race, colour, language, or national or social origin.

28 UN Human Rights Committee, *General Comment 18: Non-discrimination* (1989) para. [13]; see also *Althammer v Austria*, UN Human Rights Committee Communication No. 998/01 (2003) para. [10.2].

Although combatting the provision of academic cheating services to higher education students in Australia generally may constitute a legitimate objective for the purposes of international human rights, and penalising the provision of such services would appear to be rationally connected to that aim, it does not appear that the differential treatment of non-citizens because of a lack of constitutional power would constitute a permissible limitation on the right to equality and non-discrimination.

Right to a fair trial

2.289 In relation to the two proposed civil penalties of $105,000, the minister has advised that this is not punitive, having regard to the industry being regulated (commercial providers and advertisers of academic cheating services) and to the relative size of civil penalties which may be imposed in comparable corporate settings. The minister also states that this penalty is confined to a specific regulatory and disciplinary context (the providers of cheating services within the higher education sector), and does not apply to the public in general.

2.290 However, as drafted, the prohibition on the provision of non-commercial academic cheating services would appear to apply more broadly to the public in general, where any person has provided work to a higher education student which formed 'a substantial part' of an assessment task.[29] The explanatory memorandum states that 'a large proportion of third party cheating occurs on a non-commercial basis, for example by friends, family or community members'.[30] In addition, the explanatory memorandum gives the example of 'Joy', who runs a not-for-profit tutoring service for people in her neighbourhood, who, in order to give her students the best chance of succeeding completes substantial parts of assessment tasks without asking for anything in return. If 'Eleanor', who runs a not-for-profit community newsletter and knows that Joy has been completing substantial parts of students' assessments, advertises Joy's tutoring service in her newsletter, she could be liable to a civil penalty of up to $105,000.[31] As such, it would appear that this would apply more broadly to the general public and not in a specific regulatory or disciplinary context.

2.291 Consequently, while the proposed civil penalties may be of an amount similar to penalties in corporate settings, as the minister notes, the fact that the penalties imposed under this bill may apply to individuals in a non-corporate or not-for-profit settings is an important difference which makes the amount of the penalties more punitive and more likely to constitute a criminal penalty under international human rights law. Similarly, while the minister compares the provision

29 See, proposed definition of 'academic cheating service', Schedule 1, item 3, proposed section 5.

30 Explanatory memorandum, p. 18.

31 Explanatory memorandum, p. 18.

of academic cheating services to offences, including dealing in fraudulent identity information, knowingly providing false or misleading information, or providing a false or misleading document to a Commonwealth entity, those offences do not appear to be directly comparable with the civil penalty provisions in this bill, having regard to the breadth of conduct which would be captured by this bill.

2.292 As these two civil penalty provision could apply to the general public, and considering the significant size of the penalties, it appears these provisions may be regarded as 'criminal' for the purposes of international human rights law. Consequently, they must be shown to be consistent with the criminal process guarantees set out in articles 14 and 15 of the International Covenant on Civil and Political Rights, including the right to be presumed innocent until proven guilty according to law and the right not to be tried twice for the same offence.

2.293 The compatibility of the measure with these rights in articles 14 and 15 was not addressed in the minister's response. However, as the burden of proof to establish a civil penalty is on the civil standard of 'the balance of probabilities' (rather than the criminal standard of 'beyond reasonable doubt')[32] the measure may not accord with the right to be presumed innocent.

2.294 In addition, as there are criminal offence provisions proposed for the same conduct as the civil penalty, this raises concerns that a person could be tried and punished twice for the same conduct, unless there are specific safeguards to prevent this from occurring.

2.295 The *Tertiary Education Quality and Standards Agency Act 2011* (which this bill seeks to amend) provides that criminal proceedings may be started against a person for conduct that is substantially the same as conduct contravening a civil penalty, 'regardless of whether a civil penalty order has been made against the person'.[33] As such, it would appear that if these civil penalty provisions were to be considered 'criminal' for the purposes of international human rights law (which appears likely), there is a risk that these provisions are not compatible with the criminal process rights in article 14 of the International Covenant on Civil and Political Rights. This risk, in relation to the prohibition on double jeopardy, would be alleviated if the bill were amended to provide that section 123 of the *Tertiary Education Quality and Standards Agency Act 2011* did not apply to proceedings for a civil penalty order under proposed subsections 114A(3) and 114B(2).

32 UN Human Rights Committee, *General Comment 32: Article 14: Right to equality before courts and tribunals and to a fair trial* (2007) para. [30];

33 Section 123 of the *Tertiary Education Quality and Standards Agency Act 2011*.

Right to freedom of expression

2.296 The minister has advised that the prohibition of advertising an academic cheating service is 'necessary to protect vulnerable students, in particular students for whom English is not their first language', noting that the advertisement of such services can take place via unsolicited emails, personal messages on social media, and fake 'information booths' at university campuses. As to the necessity of the proposed injunction power, the minister has advised that this will help to address the challenges of authorities wishing to prosecute academic cheating activity directly, noting that many services operate across international borders. The minister notes that the injunction power will help to reduce the availability and impact of overseas websites by reducing their visibility.

2.297 Noting the minister's advice as to the need to protect vulnerable students from being exploited by academic cheating services, it may be that protecting the rights of these students constitutes a legitimate objective for the purposes of international human rights law. Noting the role of the court in determining the breach of the offence or civil penalty provision, the requirement that it must be proven that a person knew they were advertising an academic cheating service, and the safeguards that apply to the use of the injunctions power,[34] it may be that any limitation on the right to freedom of expression may be considered to be permissible under international human rights law.

Committee view

2.298 The committee thanks the minister for this response. The committee notes that the bill would make it an offence to advertise or provide academic cheating services on a commercial basis, and would impose a pecuniary penalty on the advertisement or provision of such services on a non-commercial basis.

2.299 The committee notes the minister's advice that for the vast majority of cases, there will be no difference in the application of the proposed criminal offence or civil penalty provisions to Australian citizens or non-Australian citizens. The committee considers that deterring the provision of academic cheating services is a laudable and legitimate objective. However, the committee considers that in those limited circumstances where, for constitutional reasons, the bill applies differently depending on a person's nationality, this may impermissibly limit the right to equality and non-discrimination.

2.300 The committee also notes the legal advice that the proposed civil penalties in this bill may be regarded as 'criminal' for the purposes of international human rights law, and considers there is a risk that such provisions may not comply with the criminal process rights under the International Covenant on Civil and Political

34 As set out in the statement of compatibility, p. 8.

Rights. The committee considers this risk may be alleviated if the bill were amended to provide that section 123 of the *Tertiary Education Quality and Standards Agency Act 2011* did not apply to proceedings for a civil penalty order under proposed subsections 114A(3) and 114B(2). The committee welcomes the minister's advice that he will consider updating the statement of compatibility accompanying this bill in order to reflect the engagement of criminal process rights.

2.301 Finally, the committee considers that the prohibition on advertising an academic cheating service and the power of the court to block access to online locations, engages and limits the right to freedom of expression, but that this is a permissible limitation under international human rights law. The committee considers that it would be useful if the statement of compatibility were updated to include an assessment of the application of the right to freedom of expression in relation to the prohibition on advertising an academic cheating service and, in relation to the injunctions power, the limitation on a person's right to receive information.

Treasury Laws Amendment (Registries Modernisation and Other Measures) Bill 2019 and related bills[1]

Purpose	These bills seek to establish a new Commonwealth business registry regime, by modernising Commonwealth registers and establishing a framework for director identification numbers
Portfolio	Treasury
Introduced	House of Representatives, 4 December 2019
Right	Privacy
Status	Concluded

2.302 The committee requested a response from the Assistant Treasurer in relation to the bills in *Report 1 of 2020*.[2]

Collection and disclosure of personal information

2.303 These five bills constitute a legislative package designed to establish a new business registry regime.[3] The package seeks to consolidate the business registers administered by the Australian Securities and Investments Commission (ASIC) and Australian Business Registry, and provides for the appointment and functions of a registrar who would be responsible for administering the new registers regime.[4]

2.304 The bills would establish a legal framework by which all directors of bodies corporate registered under the *Corporations Act 2001* (Corporations Act) or *Corporations (Aboriginal and Torres Strait Islander) Act 2006* would be required to apply for, and hold, a permanent unique director identification number (DIN). The new registrar would be required to issue a director with a DIN, where they are satisfied the director's identity has been established, and keep a record of the DINs

---

1 Commonwealth Registers Bill 2019; Business Names Registration (Fees) Amendment (Registries Modernisation) Bill 2019; Corporations (Fees) Amendment (Registries Modernisation) Bill 2019; and National Consumer Credit Protection (Fees) Amendment (Registries Modernisation) Bill 2019. The committee commented on these bills as they were previously introduced into the Parliament in *Report 2 of 2019*, seeking further information. This entry can be cited as: Parliamentary Joint Committee on Human Rights, Treasury Laws Amendment (Registries Modernisation and Other Measures) Bill 2019 and related bills, *Report 4 of 2020*; [2020] AUPJCHR 60.

2 Parliamentary Joint Committee on Human Rights, *Report 1 of 2020* (5 February 2020), pp. 64-70.

3 Statement of compatibility, p. 63.

4 Explanatory memorandum, p. 6.

issued to directors.[5] This process would involve the disclosure of personal information to the registrar.

2.305 The bills would enable the registrar to make, by legislative instrument, data standards on matters relating to the performance of their functions and exercise of their powers.[6] These may address a range of issues relating to the collection and disclosure of information, including:

- the type of information which may be collected by the registrar to perform their functions and exercise their powers;
- how such information may be collected;
- the manner and form in which such information is given to the registrar;
- what information is given to the registrar;
- how information held by the registrar is to be stored; and
- the integration or linking of information held by the registrar.[7]

2.306 The Commonwealth Registers Bill would regulate the disclosure of 'protected information' by the registrar,[8] which could include personal information. 'Protected information' is defined broadly to mean information which is obtained by a person in the course of the person's official employment; and disclosed to the person or another person, or obtained by the person or another person under, or in relation to, this bill, or under another law of the Commonwealth in connection with particular functions or powers of the registrar.[9]

2.307 The Commonwealth Registers Bill would empower the registrar to make a disclosure framework relating to disclosing protected information.[10] The framework may set out the circumstances in which: protected information must not be disclosed without the consent of the person to whom the information relates; de-identified personal information may be disclosed; protected information may be disclosed to

5 See *Corporations (Aboriginal and Torres Strait Islander) Act 2006*, proposed section 308-5; *Corporations Act 2001* (Corporations Act), proposed section 1272.

6 Commonwealth Registers Bill, proposed subsection 13(1).

7 The Treasury Laws Amendment (Registries Modernisation and Other Measures) Bill 2019 inserts equivalent provisions into the *National Consumer Credit Protection Act 2009* (NCCP Act) (proposed section 212H), the *Business Names Registration Act 2011* (Business Names Registration Act) (proposed section 62H), and the Corporations Act (proposed section 1270G).

8 Commonwealth Registers Bill, Part 4.

9 Commonwealth Registers Bill, section 5. The Treasury Laws Amendment (Registries Modernisation and Other Measures) Bill 2019 seeks to insert the same definition of 'protected information' into the Corporations Act, section 9; Business Names Registration Act, section 3; and the NCCP Act, section 5(1).

10 Proposed section 16.

the general public; and confidentiality agreements are required for disclosure of protected information.[11] The framework may also impose conditions on the disclosure of protected information.[12] The framework must not permit the disclosure of protected information unless the registrar is satisfied that the benefits of disclosure outweigh the risks of disclosure, taking into account any mitigation of those risks in accordance with the disclosure framework.[13]

2.308 The Commonwealth Registers Bill would create an offence for a person who is, or has been, in official employment to make a record of information or disclose information to another person, where they obtained that information in the course of their official employment.[14]

Summary of initial assessment

Preliminary international human rights legal advice

Right to privacy

2.309 As these bills seek to confer a range of powers and functions on the new registrar, including the collection and disclosure of personal information, the measures engage and may limit the right to privacy. This is acknowledged in the statement of compatibility accompanying the suite of bills.[15] The right to privacy encompasses respect for informational privacy, including the right to respect for private and confidential information, particularly the storing, use and sharing of such information; and the right to control the dissemination of information.[16] 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

11 Commonwealth Registers Bill, proposed subsection 16(2).

12 Commonwealth Registers Bill, proposed subsection 16(2).

13 Commonwealth Registers Bill, proposed subsection 16(5).

14 Commonwealth Registers Bill, proposed section 17. Subsection 17(2) would create an exemption to this offence where the disclosed information is authorised by subsection 17(3), namely where: the recording or disclosure is for the purposes of the Act; the recording or disclosure happens in the course of the performance of the duties of the person's official employment; the disclosure is to another person to use in the course of their official employment and performance or exercise of the functions or powers of a government entity; each person to whom the information relates consents to the disclosure; or the disclosure is in accordance with the disclosure framework.

15 Statement of compatibility, pp. 69-72.

16 International Covenant on Civil and Political Rights, article 17.

legitimate objective and be rationally connected and proportionate to achieving that objective.[17]

2.310 The initial analysis considered further information was required to assess the implications of these measures with regards to the right to privacy, in particular:

- what is meant by the term 'public benefit' in relation to the disclosure of information by the registrar in accordance with the disclosure framework, and whether it would constitute a legitimate objective for the purposes of international human rights law;
- the nature and scope of the personal information which is likely to be collected and disclosed under the new regime;
- whether the disclosure framework set out in section 16 of the Commonwealth Registers Bill 2019 is sufficiently circumscribed and accompanied by adequate safeguards (having regard to, but not limited to, the matters set out at subsection 16(2));
- whether there exists a detailed outline of the proposed disclosure framework insofar as it relates to the right to privacy; and
- any other matters relevant to the adequacy of safeguards in relation to the collection, use, disclosure and detention of personal information pursuant to this suite of bills.

2.311 The full initial human rights analysis is set out at *Report 1 of 2020*.

Committee's initial view

2.312 The committee noted the legal advice and in order to assess whether these measures constitute a proportionate limitation on the right to privacy, the committee sought the Assistant Treasurer's advice as to the matters set out at paragraph [2.310].

---

17 See, for example, *Leyla Sahin v Turkey,* European Court of Human Rights (Grand Chamber) Application No. 44774/98 (2005); *Al-Adsani v United Kingdom*, European Court of Human Rights (Grand Chamber) Application No. 35763/97 (2001) [53] - [55]; *Manoussakis and Others v Greece*, European Court of Human Rights, Application No. 18748/91 (1996) [36] - [53]. See also the reasoning applied by the High Court of Australia with respect to the proportionality test in *Lange v Australian Broadcasting Corporation* [1997] HCA 25.

Assistant Treasurer's response[18]

2.313 The Assistant Treasurer advised:

I note the Committee's concerns relating to the disclosure framework. I consider that the disclosure framework is sufficiently circumscribed and accompanied by adequate safeguards.

As the Committee notes, under clause [16] of the Commonwealth Registers Bill 2019 (and the equivalent provisions in the associated bills), the registrar may only authorise the disclosure of registry information under the disclosure framework where it is satisfied that the benefits of disclosure outweigh the risks, after those risks have been mitigated. Those risks include privacy risks.

The information to be collected by the new regime comprises that currently related to 34 existing business registers currently kept by Australian Securities and Investments Commission and the Australian Business Registrar. A significant proportion of the information to be collected by the new Commonwealth registries regime is information that is collected by Commonwealth bodies and is already made publicly searchable.

By way of example of where such a public benefit may exist, in relation to disclosure within Government is registry information that is required for the administration of other Australian laws. This disclosure supports a report-once, use-often approach by Government, reducing red tape and compliance costs for business.

Additionally, the framework could allow a trusted user (for instance a university whose IT systems, processes and staff have been vetted) to access information that may not be appropriate for wider dissemination where a social benefit exists and appropriate undertakings are made.

This approach to disclosure aligns with the Productivity Commission's 2017 recommendation in their report on Data Availability and Use to take a more principled approach to the release of Government data. In particular, the Commission recommended that Government data be able to be released publically where the benefits of the release outweigh the risks involved (including privacy risks) after those risks have been mitigated to the extent practicable. The reforms are consistent with the Government's broader reforms to data sharing and release.

I also note that to the extent that information collected is personal information there are additional safeguards contained in the bill to protect an individual's right to privacy.

---

18 The Assistant Treasurer's response to the committee's inquiries was received on 20 February 2020. The response is available in full on the committee's website at: https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Scrutiny_reports .

> Firstly, the disclosure framework will be subject to a privacy impact assessment under the *Privacy Act 1988*.
>
> Secondly, the Bill allows a person to apply to the registrar to prevent an inappropriate disclosure of registry information that relates to them.
>
> Thirdly, in making the disclosure framework, the Registrar is appropriately empowered to place limits and controls on the disclosure of information. This includes the circumstances in which information must not be disclosed without consent of the person to whom it relates, and circumstances in which enforceable confidentiality agreements are required for the disclosure of information. To support the effectiveness of the disclosure framework in relation to circumstances in which confidentiality agreements are required for the disclosure of registry information, penalties can apply to a person who contravenes such an agreement.
>
> Finally, the disclosure framework will be developed by the Commonwealth body that is appointed Registrar should the Bill become law. The disclosure framework will be a disallowable instrument and will therefore be subject to proper Parliamentary oversight. In addition to Parliamentary oversight, the disclosure framework is subject to the consultation requirements contained in the *Legislation Act 2003*.

Concluding comments

International human rights legal advice

2.314 In terms of whether disclosure of personal information in accordance with the disclosure framework seeks to pursue a legitimate objective, the Assistant Treasurer has explained that giving the registrar flexibility regarding the release of registry information provides a 'public benefit'. He has advised that this could include disclosures within government for the administration of other Australian laws; and would support a 'report-once, use-often' approach to data use, which would reduce red tape and compliance costs for businesses. However, in order to constitute a legitimate objective for the purposes of international human rights law, any limitation on a right must be shown to be aimed at achieving an objective that addresses a pressing or substantial concern, and not simply seek an outcome regarded as desirable or convenient.[19] While ensuring the effective operation of the proposed registry regime and facilitating the administration of other laws may be laudable aims, on the basis of this advice, it remains unclear whether the measures pursue a pressing or substantial concern such that this would be capable of constituting a legitimate objective for the purposes of international human rights law.

19 See, Parliamentary Joint Committee on Human Rights, *Guidance Note 1 – Drafting Statements of Compatibility.*

2.315 As to the proportionality of these proposed measures, the Assistant Treasurer has advised that the type of information which would be subject to the framework relates to 34 existing business registers currently being maintained by the Australian Securities and Investments Commission and the Australian Business Registrar, a 'significant portion' of which is already publicly available. However, this does not address the questions of the nature and scope of the personal information which would be likely to be collected and disclosed under the proposed framework.

2.316 The Assistant Treasurer has also outlined several limitations on access to, and disclosure of, information under the proposed framework. In making the framework the registrar would be able to set limits on the disclosure of information, and could only authorise the disclosure of that information where they are satisfied that the benefits of the disclosure outweigh the risks, which the Assistant Treasurer has advised would include privacy risks. The Assistant Treasurer notes that this approach aligns with a recommendation of the Productivity Commission. While the requirement that the registrar consider privacy risks prior to disclosure would serve as an important safeguard, the legislative provisions themselves do not specifically require that the registrar have regard to privacy risks in order to be satisfied that the benefits of disclosure outweigh the risks of disclosure.[20] As such, the value of this limitation on permissible disclosure of information as a safeguard may be limited. Further, the Assistant Treasurer explains that the framework could allow for a trusted user, such as a university, to access information where a 'social benefit' exists and appropriate undertakings have been made. However, no further information is provided as to what a social benefit may include in this context, and so it remains unclear as to whether access to information on this basis would be sufficiently circumscribed.

2.317 The Assistant Treasurer also notes that the bill would permit a person to apply to the registrar to prevent an 'inappropriate' disclosure of registry information that relates to them. However, it is unclear how a person would be made aware that protected information relating to them is proposed to be disclosed, and it is not clear what factors the registrar would take into account in determining whether it 'is not appropriate to disclose that information'.[21] The Assistant Treasurer also states that in making the disclosure framework, the registrar is empowered to place limits and controls on the disclosure of information. However, much of the detail of how this framework would operate appears to be left to the disclosure framework, which is intended to be set out in a legislative instrument, rather than in the bill.

20 See, subclause 16(5) of the Commonwealth Registers Bill 2019; and Schedule 1, item 18, proposed subsection 212L(5) of the Treasury Laws Amendment (Registries Modernisation and Other Measures) Bill 2019.

21 See, clause 19 of the Commonwealth Registers Bill 2019; and Schedule 1, item 18, proposed subsection 212P of the Treasury Laws Amendment (Registries Modernisation and Other Measures) Bill 2019.

2.318 Consequently, questions remain as to whether the measures associated with the proposed disclosure framework would constitute a proportionate limitation on the right to privacy, noting in particular questions as to the nature and scope of personal information which may be collected and disclosed under the scheme, and the adequacy of potential safeguards, noting that these are not included in the bill before Parliament.

Committee view

2.319 The committee thanks the Assistant Treasurer for this response. The committee notes that the package of bills would establish a new Commonwealth business registry regime and sets out when personal information relating to the registry regime may be collected and disclosed.

2.320 The committee notes that the legal advice and considers that as the detail of the disclosure framework will be set out in delegated legislation, including relevant safeguards to protect the right to privacy, it is unclear whether there are sufficient safeguards in place to protect the right to privacy. However, the committee also notes that should the bill be passed the proposed disclosure framework would be contained in a disallowable instrument, and would therefore be subject to parliamentary scrutiny. The committee will consider the human rights implications of any such legislative instrument should it be made.

Senator the Hon Sarah Henderson

Chair

Dissenting Report by Labor and Greens members[1]

1.1 Australian Labor Party and Australian Greens members (dissenting members) of the Parliamentary Joint Committee on Human Rights (the committee) seek to issue dissenting remarks in relation to the Fair Work (Registered Organisations) Amendment (Ensuring Integrity No. 2) Bill 2019, on which the committee has concluded.

1.2 The dissenting members consider it regrettable that it has again become necessary to prepare yet another dissenting report for this previously non-partisan committee.

Fair Work (Registered Organisations) Amendment (Ensuring Integrity No. 2) Bill 2019

1.3 This bill seeks to amend the *Fair Work (Registered Organisations) Act 2009* to expand the grounds on which: a person can be disqualified from holding office in a union; the registration of unions may be cancelled; and a union may be placed into administration, and also sets out a public interest test for amalgamations of unions.

Disqualification of individuals from holding office in a union

1.4 The bill seeks to expand the grounds on which a person can be disqualified from office in a union. In doing so, the bill engages and limits the right to freedom of association and, in particular, the right of unions to elect their own leadership freely. Conduct that could result in disqualification includes contraventions of industrial relations law, including taking unprotected industrial action. The dissenting members note that Australia's existing restrictions on taking unprotected industrial action have been found by international bodies to constrain the right to strike. In adding another sanction or disincentive for taking unprotected industrial action this measure further limits the right to strike. It therefore remains unclear how the breadth and impact of this measure is effective to achieve the stated objective of protecting the interests of members, where members may be of the view that taking particular forms of industrial action is in their best interests. Given the breadth of the proposed powers for disqualification, the measure does not appear to be the least rights restrictive way of achieving the stated objective.

1.5 As a matter of international human rights law, a generally broad scope should be afforded to unions to choose their leadership freely. Expanding the grounds on which a person can be disqualified from office in a union, including when they have taken unprotected industrial strike action, creates an additional sanction or disincentive for taking such action. As such, the dissenting members

1 This section can be cited as Parliamentary Joint Committee on Human Rights, Dissenting Report by Labor and Greens members, *Report 4 of 2020;* [2020] AUPJCHR 61.

consider the measure is likely to be incompatible with the right to freedom of association, in particular the right of unions to elect their own leadership freely.

Cancellation of registration of registered organisations

1.6 By expanding the grounds on which unions can be de-registered or suspended, the measure engages and limits the right to freedom of association. The dissenting members consider that it has not been demonstrated that further sanctioning non-compliance with particular laws meets the stated objectives of protecting the interests of members or guaranteeing the democratic functioning of organisations. The dissenting members are also concerned that the role of the court may not be sufficient to ensure that the limitation is the least rights restrictive way to achieve the stated objective. This is particularly so given the breadth of the grounds on which union registration may be cancelled, which could include two or more relatively minor breaches of industrial law.

1.7 The dissenting members note that the bill seeks to expand the grounds for the cancellation of the registration of unions. Noting the importance under international human rights law of registration as an essential facet of the rights to organise, the dissenting members consider there is a significant risk that this measure may result in the cancellation of a union's registration in circumstances that may be incompatible with the right to freedom of association.

Placing unions into administration

1.8 The bill seeks to expand the grounds on which organisations may be placed under administration. The dissenting members consider that some of the grounds on which a declaration may be made to place a union into administration do not necessarily capture conduct that would always run contrary to the interests of members. As such, the dissenting members consider it has not been established in relation to all of the grounds on which a declaration may be made, that the measure is rationally connected to the stated objective of protecting the interests of members. In addition, the breadth of the grounds on which a declaration may be made raises questions as to whether the measure is the least rights restrictive means of achieving the stated objective.

1.9 Noting the broad grounds on which a declaration may be made to place a union into administration, the dissenting members consider there is a significant risk that the measure may result in a registered organisation being placed into administration in circumstances which may be incompatible with the right to freedom of association.

1.10 In order to improve the human rights compatibility of this measure, the dissenting members consider it would be appropriate for the bill to be amended to provide that prior to placing a registered organisation into administration the court must be satisfied that it is in the best interests of its members to do so.

Introduction of a public interest test for amalgamations of unions

1.11 By inserting a public interest test before unions can amalgamate, the measure engages and limits the rights to freedom of association, in particular the right to form associations of one's own choosing. The dissenting members consider that it has not been demonstrated that each aspect of the 'public interest test' is rationally connected to the stated objectives, noting that the Commissioner is required to consider issues such as the impact of the union amalgamation on employers. In addition, the measure does not appear to be the least rights restrictive approach to protecting the interests of members. While members may still be able to be represented by their existing union, the measure limits choices as to the form of representation, including by joining together with another union. The effect of this on members' rights is exacerbated by the fact that, while the likely benefit to members of amalgamation is to be taken into account, other factors including the 'impact on employers' are also to be taken into account. This may run contrary to the interests of members, given it may be in the interests of members, but not necessarily for employers, for unions to amalgamate to ensure greater campaigning capacity.

1.12 The dissenting members note that the bill seeks to insert a public interest test before organisations can amalgamate. The scope of the measures would potentially operate to prevent unions amalgamating on the basis of concerns that they could have too much bargaining or campaigning power against employers. As the public interest test includes a broad range of considerations, as a matter of international human rights law, the dissenting members consider the measure is likely to be incompatible with the right to freedom of association.

1.13 The dissenting members draw the above human rights concerns to the attention of the minister and the Parliament.

Graham Perrett MP
Deputy Chair
Member for Moreton

Steve Georganas MP
Member for Adelaide

Senator Nita Green
Senator for Queensland

Senator Pat Dodson
Senator for Western Australia

Senator Nick McKim
Senator for Tasmania