Parliamentary Joint Committee on Human Rights

Human rights scrutiny report

Report 1 of 2026

4 February 2026

ISSN 2204-6356 (Print)

ISSN 2204-6364 (Online)

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This report can be cited as: Parliamentary Joint Committee on Human Rights, *Report 1 of 2026*; [2026] AUPJCHR 1

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

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Contents

Committee information

Under the *Human Rights (Parliamentary Scrutiny) Act 2011* (the Act), the committee's functions are to examine bills, Acts and legislative instruments for compatibility with human rights, and report 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 for compatibility with the human rights set out in seven international treaties to which Australia is a party.[1] The committee's *Guide to Human Rights* provides a short and accessible overview of the key rights contained in these treaties which the committee commonly applies when assessing legislation.[2]

The establishment of the committee builds on Parliament's tradition of legislative scrutiny. The committee's scrutiny of legislation seeks 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, most rights may be limited as long as it meets certain standards. Accordingly, a focus of the committee's reports is to determine whether any limitation on rights is permissible. In general, any measure that limits a human right must comply with the following limitation criteria: be prescribed by law; be in pursuit of a legitimate objective; be rationally connected to (that is, effective to achieve) its stated objective; and be a proportionate way of achieving that objective.

Chapter 1 of the reports include new and continuing matters. Where the committee considers it requires further information to complete its human rights assessment it will seek a response from the relevant minister, or otherwise draw any human rights concerns to the attention of the relevant minister and the Parliament. Chapter 2 of the committee's reports examine responses received in relation to the committee's requests for information, on the basis of which the committee has concluded its examination of the legislation.

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1 International Covenant on Civil and Political Rights; International Covenant on Economic, Social and Cultural Rights; International Convention on the Elimination of All Forms of Racial Discrimination; Convention on the Elimination of Discrimination against Women; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; Convention on the Rights of the Child; and Convention on the Rights of Persons with Disabilities.

2 See the committee's *Guide to Human Rights*. See also the committee's guidance notes, in particular *Guidance Note 1 – Drafting Statements of Compatibility*.

Report snapshot[1]

In this report the committee has examined the following bills and legislative instruments for compatibility with human rights. The committee's full consideration of legislation commented on in the report is set out in Chapters 1 and 2.

Bills

Chapter 1: New and continuing matters	
Bills introduced 24 November to 20 January 2026	22
Bills commented on in report[2]	3
Private members or senators' bills that may engage and limit human rights	4
Chapter 2: Concluded	
Bills committee has concluded its examination of following receipt of ministerial response	2

A New Tax System (Family Assistance) Amendment (No Jab No Pay Repeal) Bill 2025

The committee notes that this non-government bill appears to engage and may limit human rights. Should this bill 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.

Coal Mining Industry (Long Service Leave) Legislation Amendment Bill 2025

No comment

Combatting Antisemitism, Hate and Extremism (Criminal and Migration Laws) Bill 2026

The committee has deferred consideration of this bill.

Combatting Antisemitism, Hate and Extremism (Firearms and Customs Laws) Bill 2026

1 This section can be cited as Parliamentary Joint Committee on Human Rights, Report snapshot, *Report 1 of 2026*; [2026] AUPJCHR 2.

2 The committee makes no comment on the remaining bills on the basis that they do not engage, or only marginally engage, human rights; promote human rights; and/permissibly limit human rights. This 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.

The committee has deferred consideration of this bill.

Corporations Amendment (Digital Assets Framework) Bill 2025

No comment

Defence Amendment (Sexual Assault Prevention, Intervention and Response Commission) Bill 2025

The committee notes that this non-government bill appears to engage and may limit human rights. Should this bill 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.

Defence and Veterans' Service Commissioner (Consequential and Transitional Provisions) Bill 2025

Defence and Veterans' Service Commissioner Bill 2025

Advice to Parliament

Information-sharing and disclosure

Right to privacy

These bills seek to facilitate the transition of the Defence and Veterans' Service Commission from Part VIIIE of the *Defence Act 1903* to its own standalone Act. The Defence and Veterans' Service Commission monitors, enquires into and reports on matters relating to suicide prevention and wellbeing outcomes for veterans. The committee notes that several measures in these bills provide for the collection, use and disclosure of personal information and this engages and limits the right to privacy.

The committee considers that these measures pursue legitimate objectives, including to fulfill the Commissioner's functions of improving veterans' wellbeing and reducing the suicide risk to veterans and supporting effective collaboration between different government bodies. The committee considers that in general terms the measures may be rationally connected to these objectives; however, some questions remain as to whether each measure would be effective to achieve the stated objectives in practice.

Regarding proportionality, the committee notes that the circumstances in which the right to privacy may be limited are generally specified in the Defence and Veterans' Service Commissioner Bill 2025 (the bill) and the measures are accompanied by some important safeguards. However, the committee also notes that the potential extent of interference with the right to privacy may be significant, especially considering the sensitive information that may be used and disclosed, and some key safeguards are not contained in the bill. The committee considers that less rights restrictive alternatives may be available, such as requiring disclosure of information in a de-identified form where possible. As such, the committee considers that there may be circumstances in which a

limitation on the right to privacy may not be proportionate and has recommended amendments to the bill to assist with proportionality.

Offences relating to special inquiries, providing information and unauthorised publication, use or disclosure

Criminal process rights

The bill would provide that a person is not excused from giving evidence, information or a statement, or producing a document or thing when summonsed to attend a hearing or by a notice given by the Commissioner for the purposes of a special inquiry on the ground that it might tend to incriminate that person or expose them to penalty. The committee notes that insofar as this measure abrogates the privilege against self-incrimination, it engages and limits the right not to incriminate oneself.

The committee notes that ensuring the Commissioner can conduct full and genuine inquiries with access to all relevant information is likely a legitimate objective and the measure is likely to be rationally connected to the stated objective. The committee considers that the absence of a derivative use immunity significantly increases the potential extent of the interference with the right not to incriminate oneself and as such, the committee has recommended that the bill be amended to provide for a derivate use immunity.

Contempt offences

Freedom of assembly and expression

The bill would provide that a person commits an offence if they engage in conduct that would obstruct or hinder the Commissioner in the performance of the Commissioner's functions or exercise of the Commissioner's powers or, if the Commissioner were a court of record, would constitute a contempt of that court. The offences would be punishable by imprisonment for three months. The committee considers that this measure engages and limits the rights to freedom of assembly and expression.

The committee notes that the purpose of the measure is to promote the effective operation of the Commission. While the committee considers this to be an important objective, it is not clear that this objective is necessary and addresses an issue of public or social concern that is pressing and substantial enough to warrant limiting rights.

The committee considers there to be a risk that the offences are framed so broadly that they may criminalise legitimate conduct that would otherwise be protected under international human rights law, such as peaceful protest and legitimate criticism of the Commission. The committee further considers that the measure is not drafted in the least rights restrictive way to achieve the stated objective.

The committee notes that it has previously reached similar conclusions with respect to contempt offences in other legislation and has recommended amending the relevant provision to remove

the offence for obstructing or hindering the Commissioner in performing their functions as the contempt of court offence captures much of the conduct targeted in the obstruct or hinder offence. The committee has reiterated this recommendation and recommended that the statement of compatibility be updated to provide an assessment of the compatibility of the measure with the rights to freedom of assembly and freedom of expression.

Freedom of Information Amendment Bill 2025

Advice to Parliament

Restricting access to information

Freedom of expression

This bill seeks to amend the *Freedom of Information Act 1982* (FOI Act) to reform the operation of the Freedom of Information framework (FOI framework). The FOI framework provides for processes for requesting information held by government agencies and for review of decisions to refuse access to information. The committee notes that by limiting disclosure of information through FOI requests and thereby restricting individuals' access to information held by government, many of the measures in the bill engage and limit the right to access information, a component of the right to freedom of expression. The committee further considers that, to the extent that the measures limit the right to access information, these measures also engage and limit multiple other human rights which include access to information as a core part of fulfilling the right, including the right to health, privacy, the right to take part in public affairs and the right to education. The committee sought further information from the minister in relation to the compatibility of these measures with the right to freedom of expression in *Report 7 of 2025*.

The committee notes the Attorney-General's advice that the current cost and time taken to process FOI requests is likely delaying access to information and resulting in public resources being allocated to individual FOI requests. However, the committee considers that based on the information provided by the Attorney-General, it remains unclear whether the increasing volume of FOI requests (and consequent time and cost spent) correlates with the decline in timeliness of processing FOI requests. The committee further notes that no information regarding the public services which are not being delivered because of the increased time and cost spent on processing FOI requests has been provided. The committee therefore considers that it is not possible to conclude that the measures pursue a legitimate objective for the purposes of international human rights law.

The committee notes the Attorney-General's advice that it is not anticipated that the measures will result in greater requests for review but nevertheless considers that there remains a risk that the

measures could result in greater review requests which may undermine the key objective of efficiency gains.

Regarding proportionality, while the committee notes that there are some safeguards that assist with proportionality, concerns remain that many of the measures are not sufficiently circumscribed, accompanied by adequate safeguards and the least rights restrictive approach. Further, the committee notes that the cumulative impact of the multiple measures in the bill may have a chilling effect on applicants seeking access to information and may amount to a disproportionate limit on the right to freedom of expression. The committee therefore considers that when considering all the measures together, the operation of the bill as a whole may not be a proportionate limit on the right to freedom of expression.

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

Health Legislation Amendment (Prescribing of Pharmaceutical Benefits) Bill 2025

No comment

Higher Education Support Amendment (Reverse Job-Ready Graduates Fee Hikes and End 50k Arts Degrees) Bill 2025

No comment

Interactive Gambling Amendment (Ending Online Wagering on Greyhound Racing) Bill 2025

No comment

National Disability Insurance Scheme Amendment (Integrity and Safeguarding) Bill 2025

This bill seeks to amend the *National Disability Insurance Scheme Act 2013* (the Act) to give the National Disability Insurance Scheme Quality and Safeguards Commission more powers to deter and respond to contraventions of the Act by providers, and to make minor changes to the National Disability Insurance Agency. In particular, the bill seeks to expand accessible communication options for participants wishing to exit the National Disability Insurance Scheme (NDIS), as well as providing an electronic system for provider claims. Insofar as these measures ensure participants and providers can access information and systems in formats and technologies more appropriate to them, the bill promotes the rights of people with disability.

The bill also seeks to provide the Commissioner with the power to make a banning order that prohibits or restricts specified activities and expand the categories of persons against whom a banning order can be imposed. Insofar as these provisions may prevent individuals from working in the disability support sector, this measure engages and may limit the right to work. The right to work provides that everyone must be able to freely accept or choose their work, and includes a right not to be unfairly deprived of work. It may also engage and limit the right to privacy to the extent that conditions imposed by a banning order interfere with a person's private and work life.

In addition, the bill provides for the publication of banning orders on the NDIS Provider Register, which may also limit the right to privacy, particularly the right to control the dissemination of information about one's private life.

The committee has previously commented on measures relating to NDIS banning orders, most recently in relation to the National Disability Insurance Scheme Amendment (Getting the NDIS Back on Track No. 1) Bill 2024 (now Act) in *Report 4 of 2024*. The committee considered that while banning orders likely pursue a legitimate objective, there may be questions regarding their proportionality, particularly if banning orders are made in circumstances where individuals do not pose a direct risk to the safety of people with disability. The committee has also raised concerns that the publication of banning orders on the NDIS Provider Register limits the right to privacy (see for example *Report 9 of 2021* in relation to the National Disability Insurance Scheme Amendment (Improving Supports for At Risk Participants) Bill 2021).

The committee considers that expanding the categories of persons against whom a banning order can be imposed may engage and limit the rights to work and privacy. The committee reiterates, and draws the minister and the Parliament's attention to, its previous concerns in relation to similar measures.

Online Safety and Other Legislation Amendment (My Face, My Rights) Bill 2025

The committee notes that this non-government bill appears to engage and may limit human rights. Should this bill 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.

Social Media Minimum Age Repeal Bill 2025

The committee notes that this non-government bill appears to engage and may limit human rights. Should this bill 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.

Social Security and Other Legislation Amendment (Technical Changes No. 2) Bill 2025

Advice to Parliament

Benefit restriction notices

Criminal process rights; rights to effective remedy; social security

A government amendment to the bill amended the *Social Security Act 1991* to introduce a broader power to cancel a person's social security payments or concession cards if persons are the subject of an arrest warrant in respect of a serious violent or sexual offence or may prejudice the security of Australia or a foreign country.

As this measure results in social security payments not being payable to a person wanted for a serious offence, it engages and limits the right to social security. Insofar as the operation of a benefit restriction notice may limit the right to social security, effective remedies should be available to individuals. If the cancellation of social security payments were to be considered a criminal punishment, criminal process rights should be afforded. The committee urgently sought further information from the minister in order to assess the compatibility of this measure with these rights in *Report 7 of 2025*.

The committee considers that the stated objective may not promote the general welfare of the community as a whole and as such the measure may not pursue a legitimate objective. The committee notes that the minister did not provide further information that the measure would be effective in preventing or making it more difficult for a person who is wanted for a serious offence to evade police arrest or in encouraging a person to present for arrest. As such, the committee considers that questions remain as to how cancelling a person's social security benefits would facilitate their arrest.

The committee notes that the measure contains some important safeguards and the minister advised that protocols and guides are being prepared which will include a requirement for the minister to regularly review the appropriateness of a notice. The committee considers that overall the safeguards accompanying the measure are unlikely to be adequate, particularly noting the unavailability of merits review. The committee notes that the extent of the interference with the right to social security is broad and considers that there remains a risk that cancelling a person's social security benefits entirely would deprive them of their minimum essential needs. There also remains a real risk the minimum core obligations of the right to social security will not be fulfilled.

In relation to the right to an effective remedy, the committee retains concerns that there do not appear to be effective remedies available for individuals whose right to social security has been violated. In relation to criminal process rights, the committee notes that the minister did not provide any information about whether the measure may constitute a criminal punishment and if so, whether it is compatible with criminal process rights, including in regard to the presumption of innocence and the prohibition on double jeopardy. In relation to the right to equality and non-discrimination, the committee notes that the minister did not address whether the measure would have a disproportionate impact on certain vulnerable groups, including Aboriginal and Torres Strait Islander people.

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

Telecommunications Legislation Amendment (Universal Outdoor Mobile Obligation) Bill 2025

No comment

Translating and Interpreting Services Bill 2025

No comment

Treasury Laws Amendment (Genetic Testing Protections in Life Insurance and Other Measures) Bill 2025

No comment

Treasury Laws Amendment (Supporting Choice in Superannuation and Other Measures) Bill 2025

No comment

Universities Accord (Australian Tertiary Education Commission) (Consequential and Transitional Provisions) Bill 2025

No comment

Universities Accord (Australian Tertiary Education Commission) Bill 2025

No comment

Unlocking Supply of Family Homes Bill 2025

No comment

Veterans' Affairs Legislation Amendment (Miscellaneous Measures No. 2) Bill 2025

No comment

Legislative instruments

Chapter 1: New and continuing matters	
Legislative instruments registered on the Federal Register of Legislation between 30 September to 25 November 2025[3]	208
Legislative instruments commented on in report[4]	6
Chapter 2: Concluded	
Legislative instruments committee has concluded its examination of following receipt of ministerial response	10

Aged Care (Consequential and Transitional Provisions) Rules 2025

Aged Care Legislation Consequential Amendments Regulations 2025

These instruments make transitional and consequential provisions to support the transition from the old aged care framework to the new aged care framework. In general, by facilitating the transition to the new aged care system, including by ensuring continuity of care for care recipients under the old law and that transitional arrangements are in place to deal with applications during the transition period, such as needs assessments and financial hardship arrangements, this instrument likely promotes a number of human rights, including the rights to an adequate standard of living and health and the rights of people with disability.

However, a number of provisions provide for the transfer and continued use of personal information under the new aged care framework. The statement of compatibility provides that information-sharing is necessary to ensure continuity of care. The committee has previously raised concerns in relation to privacy regarding information sharing and disclosure provisions in the new aged care legislative framework. The committee has noted that information sharing to broadly facilitate the provision of safe and high-quality supports and services to individuals accessing funded aged care services, including to promote accountability, transparency and enable proper scrutiny of registered provider's operation to protect individuals from exploitation, violence and abuse, is

[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, use the advanced search function on the Federal Register of Legislation, and select 'Collections' to be 'legislative instruments'; 'type' to be 'as made'; and date to be 'registered' and 'between' the date range listed above.

[4] Unless otherwise indicated, the committee makes no comment on the remaining legislative instruments on the basis that they do not engage, or only marginally engage, human rights; promote human rights; and/permissibly limit human rights. This is based on an assessment of the instrument and relevant information provided in the statement of compatibility (where applicable). The committee may have determined not to comment on an instrument notwithstanding that the statement of compatibility accompanying the instrument may be inadequate.

an important objective. The committee has consistently stated that, while these measures would pursue a legitimate objective, and that the sharing of personal information would be effective to achieve that objective, it is not clear that they would be sufficiently circumscribed, accompanied by sufficient safeguards, and subject to independent oversight and review. The committee reiterates its recommendation that an independent review of the privacy implications of the information-sharing scheme be undertaken after a specified period of operation of the new aged care system.

The committee has also consistently stated that ensuring the financial sustainability of the aged care system by using means testing is an important policy aim. However, if the practical effect of these transitional measures is to increase the cost of accessing aged care services for certain individuals, questions may arise as to whether the measures may be retrogressive with respect to the rights to an adequate standard of living and health.

Lastly, the Aged Care (Consequential and Transitional Provisions) Rules 2025 provide transitional arrangements for restrictive practices nominees under the old aged care system to continue to be nominees under the new aged care system. While this instrument does not authorise new restrictive practices nominees, the committee has consistently stated that prescribing substitute decision-makers for the use of restrictive practices, irrespective of the will and preferences of the individual to whom the practices would apply, raises serious human rights concerns. As such, the committee reiterates its previous recommendation that additional safeguards recommended by the Royal Commission into Aged Care Quality and Safety should be included in the new aged care system, including that restrictive practices be prohibited unless recommended by an accredited independent expert or when necessary in an emergency to avert the risk of immediate physical harm, with any further use subject to recommendation by an independent expert.

Biosecurity (Entry Requirements) Determination 2025

Advice to Parliament

Entry requirements

Multiple rights

This instrument revokes and remakes the Biosecurity (Entry Requirements) Determination 2016 to set requirements for individuals entering Australian territory. In particular, the instrument sets requirements relating to individuals entering Australia who have been in yellow fever risk regions, and entry requirements for individuals who may be, or may have been, infested with a listed human disease.

The committee had previously concluded its consideration of the human rights compatibility of this instrument in *Report 6 of 2025* and recommended that the instrument be amended to provide that screening of an incoming traveller must not involve physical examination. The committee considered that there is a risk that the safeguards in the *Biosecurity Act 2015* may not be adequate in all circumstances so as to ensure that any limitations on the right to privacy and the rights of children and people with disability are proportionate. The committee further recommended that a statement of compatibility be prepared in relation to this instrument.

The committee welcomes the minister's explanation of the difference between invasive and non-invasive examination techniques, and the minister's advice that an invasive physical examination would only be utilised in a situation of the gravest threat

to the public health of Australia. The committee also welcomes the minister's indication that further consideration will be given to the development of guidelines to ensure due weight is given to the views of the child and to the rights of persons with disabilities to give free and informed consent when seeking consent to any biosecurity measures.

Customs (Places of Detention) Directions 2025

Advice to Parliament

Humane treatment in detention

Children's rights; rights to freedom of movement; humane treatment in detention; liberty; privacy; rights of persons with disability

This instrument identifies places of detention that a person can be held in under Division 1BA of Part XII of the *Customs Act 1901*, including a room that meets the standards specified in the instrument or otherwise an Australian Border Force (ABF) vehicle. The instrument further provides that if a customs officer conducts a search of the person, the officer must afford the person as much personal privacy as the circumstances of the search allow.

The committee notes that by providing for some conditions of detention for an individual and requiring detainees to be afforded privacy when being searched, the measures may promote the right to humane treatment in detention and the right to privacy.

However, the committee considers that these rights may also be limited where a person is detained in a place that does not meet standards of humane treatment or where they are subject to a search of their person. Additionally, by designating places in which a person can be detained, the measures also engage the rights to freedom of movement and liberty and, to the extent that children and people with disability may be detained in the places identified, the rights of the child and persons with disability.

The committee considers that the measures likely pursue a legitimate objective and appear to be rationally connected to that objective. The committee considers that while the measures are accompanied by some important safeguards, many of these safeguards are discretionary and do not provide sufficient protections for vulnerable groups, such as children and people with disability. The committee considers that it has not been demonstrated that the measures represent a proportionate limitation on the rights to privacy, humane treatment in detention, liberty and freedom of movement, as well as the rights of children and persons with disability to the extent the measures apply to these groups, and draws these human rights concerns to the minister and the Parliament.

Public Interest Certificate instruments

Advice to Parliament

Information sharing powers

Rights to equality and non-discrimination; privacy; rights of people with disability

These legislative instruments either amend or remake guidelines relating to the issuing of public interest certificates and provide for additional purposes for which personal protected information can be disclosed, including where it is reasonably necessary to assist a Commonwealth, state or territory agency to manage a potential or actual work health and safety (WHS) risk to that agency at premises where Services Australia is present.

The committee considered that the measures in these instruments engage and may limit the right to equality and non-discrimination and privacy, and the rights of people with disability. The committee sought further information from the minister in *Report 8 of 2025* in order to assess the compatibility of this measure with these rights.

The committee considers that internal policies and processes may act as an important safeguard to mitigate the risk that persons with disabilities (particularly individuals with cognitive impairments or other hidden disabilities), Aboriginal and Torres Strait Islander people and culturally and linguistically diverse people may be disproportionately considered to be an aggressive customer or pose a generalised threat, and therefore may be more likely to have their personal information shared. However, much will depend on the quality of the training and guidance provided to staff in practice.

The committee has recommended the statement of compatibility be updated and otherwise draws its human rights concerns to the attention of the minister and the Parliament.

International Organisations (Privileges and Immunities—Nauru Trust Fund No. 2) Regulations 2025

This instrument declares the Intergenerational Trust Fund No. 2 for the People of the Republic of Nauru (fund) as an international organisation to which the *International Organisations (Privileges and Immunities) Act 1963* applies, conferring exemptions from currency and exchange restrictions and exemptions from income tax on the fund.

The committee notes that the purpose of this fund is to provide Nauru with an ongoing source of revenue to fund its participation in third country reception arrangements entered into with Australia. The committee considers that, while extending limited privileges and immunities to the fund does not, in and of itself, directly limit human rights, the broader legislative context in which this fund operates does raise serious human rights concerns.

The committee has consistently stated that, with respect to the removal of a person to a foreign country under a third country reception arrangement, given the breadth of authority for the Commonwealth to take actions under a third country reception arrangement and the financial control the Commonwealth has and will maintain over the arrangement with Nauru, Australia would exercise effective control under international law over persons removed to Nauru (see *Report 1 of 2025* and *Report 5 of 2025*). Therefore, the removal from Australia of non-citizens under

this arrangement, subsequent treatment in Nauru, and any risk of return to a country where they had faced persecution, would engage Australia's human rights obligations.

The committee notes that third country reception arrangements engage and limit the right to freedom of movement, which includes the right to enter one's own country. Where it results in separation of the person from their family in Australia, this may engage the right to protection of the family, which requires the state not to arbitrarily or unlawfully interfere in family life and to adopt measures to protect the family. This right may be engaged where a person is expelled from a country without due process and is thereby separated from their family. Where a person is exposed to a risk of poor treatment in the foreign country, this may engage the absolute prohibition against torture and other cruel, inhuman and degrading treatment or punishment. If there were a risk that the person's removal to the foreign country led to that person being refouled to a country from which they had sought protection from persecution ('chain refoulement'), this may engage the right to non-refoulement. Further, as the *Migration Act 1958* establishes wide-ranging immunities for the Commonwealth from civil liability and disapplies natural justice in relation to the exercise of certain powers that facilitate the removal of non-citizens from Australia, this engages the right to an effective remedy and the prohibition on the expulsion of aliens without due process.

The committee reiterates its concerns in relation to the legislative framework in which this instrument operates.

Migration (Disclosure of Information to Prescribed Bodies) Instrument 2025

Migration (Disclosure of Information to Prescribed International Organisations) Instrument 2025

Seeking Information

Disclosure of identifying information

Rights to life; non-refoulement; privacy; prohibition on torture and cruel, inhuman or degrading treatment or punishment

These legislative instruments prescribe the bodies and international organisations to which specified officers may disclose identifying information about individuals, including biometric data and any other information that could be used to discover a person's identity or to get information about them. The prescribed bodies include 107 state and territory police forces and agencies, federal intelligence agencies, federal agencies, foreign police forces (including police forces in Hong Kong, Indonesia, Korea, New Zealand, Canada, United Kingdom, Malaysia and Sri Lanka), and foreign intelligence agencies (including in the United States of America). The prescribed international organisations include the International Committee of the Red Cross, International Monetary Fund, Interpol, International Residual Mechanism for Criminal Tribunals, International Organisation for Migration and the United Nations.

The committee notes that prescribing the bodies and international organisations to which identifying information may be disclosed for specified purposes engages and limits the right to privacy and may engage and limit further rights. The committee considers that further information is required to assess the compatibility of this measure

with these rights, and as such, seeks the minister's advice in relation to these matters.

National Higher Education Code to Prevent and Respond to Gender-based Violence 2025

This instrument creates the National Higher Education Code to Prevent and Respond to Gender-Based Violence (code). The committee commented on the Universities Accord (National Higher Education Code to Prevent and Respond to Gender-based Violence) Bill 2025 (now Act) in *Report 2 of 2025*, which provided for the establishment of this code. In its comment, the committee considered that, to the extent that any future code may impose requirements on higher education providers to collect and disclose information which may include personal information, and provide the Secretary with information, collection, use and disclosure powers, it would engage and may limit the right to privacy.

The committee was particularly concerned that higher education providers would be required under this code to collect information relating to highly sensitive allegations or disclosures of violent conduct which relate to staff or students, including conduct which may constitute criminal offences. As such, the committee considered that it was not clear that the scheme which the bill sought to establish would be sufficiently circumscribed, accompanied by sufficient safeguards, or subject to review and oversight, such that it would constitute a proportionate limit on the right to privacy.

The committee considered that the proportionality of these measures would be assisted were the bill amended to require that information be provided to the Secretary in a de-identified and/or aggregated manner unless there were specified exceptional circumstances, or only provided with the consent of a person whose records were being shared, and provide that information may only be disclosed where the person or body who holds the information is satisfied that the information will be appropriately protected after the disclosure.

In this regard, the committee welcomes the requirements in this code that higher education providers must ensure that information is collected and disclosed in a safe, trauma-informed and person-centred manner, be held and handled securely; and must be de-identified, and otherwise take into account applicable commonwealth, state and territory privacy laws, or where no other privacy laws apply with reference to the Australian Privacy Principles.

However, the committee notes that under the code a provider must provide to the Secretary, and may be required to publish, de-identified demographic data which includes a student's mode of attendance at university, year of study, whether the student is an Australian citizen or international student, their accommodation status, and whether the discloser's relationship to the respondent is known and if so, in what capacity. Depending on how this information is shared and published, the committee is concerned that there may be a risk that an individual could be identifiable. The committee also notes that, while the information collected, used and disclosed under this code is de-identified, it remains unclear whether that information is being used with the consent of the person whose record is being shared. As such, the committee remains concerned that this code will engage and may limit an individual's right to privacy. The committee draws these concerns to the attention of the minister and the Parliament.

Social Security (Remote Australia Employment Services) instruments

Advice to Parliament

Compliance with participation payment obligations

Rights to an adequate standard of living; children's rights; equality and non-discrimination; social security

The Social Security (Administration) (Penalty Amount) Determination 2025 determines the method for working out penalty amounts for no show no pay failures, reconnection failures, and non-attendance failures for certain participation payments. The Social Security (Administration) (Persistent Non-compliance) Determination 2025 determines the matters that the secretary must consider in considering whether they are satisfied that a person has been persistently non-compliant with their obligations in relation to a participation payment. The compliance framework established by these instruments will apply to participants in the Remote Australia Employment Service (RAES) program who are 'declared program participants' under the Social Security (Declared Program Participant) Determination 2025. The Social Security (Streamlined Participation Requirements) Instrument 2022 Amendment (Approved Programs of Work) 2025 provides that 'Work Skills and Projects' is an approved program of work available to RAES participants entitling these income support recipients to the approved program of work supplement.

By imposing penalties on social security recipients and suspending social security payments, the measures engage and limit the right to the right to social security and the right to an adequate standard of living. Further, as participants under the RAES program are subject to a different compliance framework and eligible for a different approved program of work than job seekers in non-remote areas, the measures may have a disproportionate impact on Aboriginal and Torres Strait Islander people living in remote areas and so engage the right to equality and non-discrimination on the basis of race and place of residence. The committee sought further information from the minister in order to assess the compatibility of this measure with these human rights in *Report 8 of 2025*.

The committee considers that the stated objective of encouraging persons receiving social security payments to participate in activities or programs designed to improve their employment prospects is likely to be a legitimate objective for the purposes of international human rights law. However, the committee notes that based on the information provided by the minister, the measures may not be rationally connected to the stated objective as it remains unclear whether the compliance framework is effective in encouraging persons receiving social security payments to participate in certain activities.

The committee considers that the safeguards accompanying the measure may not be adequate, noting that the guidance to be provided to RAES providers is not a statutory safeguard and the statutory safeguards available may not operate to ensure that a person is able to meet their basic necessities. The committee further considers that there may be a less rights restrictive alternative, namely continuing the pause currently in place for the Job Seeker Compliance Framework.

In relation to the right to equality and non-discrimination and the expectation of genuine consultation, the committee notes the minister's advice that there was no specific consultation in regard to these instruments and as such, the differential treatment that may arise as a result of a different compliance framework applying to declared program participants in remote Australia may not be based on reasonable and objective criteria.

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

Instruments imposing sanctions on individuals[5]

A number of legislative instruments impose sanctions on individuals. The committee has considered the human rights compatibility of similar instruments on a number of occasions, and retains scrutiny concerns about the compatibility of the sanctions regime with human rights.[6] However, as these legislative instruments do not appear to designate or declare any individuals who are currently within Australia's jurisdiction, the committee makes no comment in relation to these instruments at this stage.

5 See Autonomous Sanctions (Designated Persons and Entities and Declared Persons – Democratic People's Republic of Korea) Amendment (No. 1) Instrument 2025 [F2025L01362]; Autonomous Sanctions (Designated Persons and Entities and Declared Persons – Thematic Sanctions) Amendment (No. 3) Instrument 2025 [F2025L01407].

6 See, most recently, Parliamentary Joint Committee on Human Rights *Report 2 of 2024* (20 March 2024) pp. 14–20 and *Report 15 of 2021* (8 December 2021) pp. 2–11.

Chapter 1
New and ongoing matters

1.1 The committee comments on the following bill and legislative instruments, and in some instances, seeks a response or further information from the relevant minister.

Bills

Defence and Veterans' Service Commissioner Bill 2025

Defence and Veterans' Service Commissioner (Consequential and Transitional Provisions) Bill 2025[9]

Purpose	These bills seek to facilitate the transition of the Defence and Veterans' Service Commission from Part VIIIE of the *Defence Act 1903* to its own standalone Act. The Defence and Veterans' Service Commission monitors, enquires into and reports on matters relating to suicide prevention and wellbeing outcomes for veterans.
Portfolio	Prime Minister and Cabinet
Introduced	House of Representatives, 27 November 2025
Rights	Criminal process rights; freedom of assembly; freedom of association; freedom of expression; privacy

Information-sharing and disclosure

1.2 Several provisions in these bills provide for the collection, use and disclosure of information, including personal information, to and by the Commissioner. For example, the Commissioner may require a person to give information or to produce a document or thing to the Commissioner if the Commissioner has reasonable grounds to suspect that a person has information, a document or thing relevant to a special inquiry.[10] Failure to give the information or to produce the documents or thing is an offence with a maximum penalty of 2 years imprisonment.[11] The Defence and Veterans' Service Commissioner Bill 2025 (the bill) would also enable an authorised officer (being the Commissioner or someone the Commissioner has authorised) to enter and remain on premises occupied by a government entity or Commonwealth

9 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Defence and Veterans' Service Commissioner Bill 2025, *Report 1 of 2026*; [2026] AUPJCHR 3.

10 Defence and Veterans' Service Commissioner Bill 2025, clause 33.

11 Defence and Veterans' Service Commissioner Bill 2025, clause 57.

contractor for the purposes of a special inquiry and the authorised officer is entitled to full and free access at all reasonable times to any documents or other property; may examine, make copies of or take extracts from any document; and may remove the document from the premises.[12] The bill would also enable an authorised officer to access documents or other records held in electronic form by a government entity or a Commonwealth contractor by remote means.[13] The term 'remote means' is not defined but is intended to include access by any means that does not require being physically present at the premises of the relevant person or body. This may include, for example, access by means of a user account and password or by a device, such as a laptop, provided to the authorised person for the purpose of accessing systems other than while physically on premises.[14] The bill would also enable the Commissioner or an authorised member to apply to an eligible judge for a search warrant in relation to a special inquiry if there are reasonable grounds to believe that the thing connected with the special inquiry may be concealed, lost, mutilated or destroyed if a notice to produce the thing is given.[15]

1.3 In regard to authorisations to disclose information, a Commonwealth company, Commonwealth entity, state or territory body, an individual who holds an office or appointment under a law of the Commonwealth or a law of a state or territory, or the coroner or a coroners' court may disclose information (including personal information) to the Commissioner for the purpose of assisting in the performance of the Commissioner's functions or exercise of the Commissioner's powers.[16] The bill would also authorise the Commissioner to disclose information obtained in accordance with the bill, including in some circumstances intelligence and personal information, to certain Commonwealth, state and territory entities if they are satisfied that the information will assist the entity to perform any of its functions or exercise any of its powers.[17]

1.4 The bill would also authorise the Commissioner to disclose information to the public, or make a public statement about the Commissioner's functions and powers or an inquiry, if the Commissioner is of the opinion that doing so would be in the public interest.[18] In this circumstance, the Commissioner must have regard to whether the information relates to a deceased person, or a veteran's lived experience with a suicide risk, or is personal and private and, if the information is critical of a Commonwealth entity, the Commissioner must give the entity concerned a reasonable opportunity to

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12 Defence and Veterans' Service Commissioner Bill 2025, clause 34.

13 Defence and Veterans' Service Commissioner Bill 2025, clause 35.

14 Explanatory memorandum, p. 45.

15 Defence and Veterans' Service Commissioner Bill 2025, clause 36.

16 Defence and Veterans' Service Commissioner Bill 2025, subclauses 44(1) and 45(1).

17 Defence and Veterans' Service Commissioner Bill 2025, clauses 48 and 49.

18 Defence and Veterans' Service Commissioner Bill 2025, clause 50.

respond to the information.[19] The bill would also authorise an entrusted person to disclose protected information (which includes personal information) if the Commissioner is satisfied that it is necessary in the public interest to disclose the information.[20] An entrusted person is defined broadly and includes staff of the Commission, a contractor or consultant engaged by the Commission and a person assisting the Commission.[21]

International human rights legal advice

Right to privacy

1.5 Insofar as measures in the bill authorise the collection, use and disclosure of personal information in certain circumstances, the right to privacy is engaged and limited. 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.[22] It also includes the right to control the dissemination of information about one's private life.

1.6 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, they must pursue a legitimate objective and be rationally connected to (that is, effective to achieve) and proportionate to achieving that objective.

1.7 The statement of compatibility states that the measures supporting information-sharing are directed to fulfilling the Commissioner's functions of driving improvement in the wellbeing of veterans and reducing the suicide risk to veterans.[23] It notes that the measures that support the disclosure of information between the Commission and other entities seek to ensure that bodies do not work in silos and that the Commission is able to meet the Royal Commissioner's expectation of effective communication and collaboration with other agencies in order to coordinate effort and work priorities.[24] To the extent that the measures support the work of the Commission to reduce suicide risk and promote the health and wellbeing of veterans, they would likely pursue a legitimate objective for the purposes of international human rights law and may be rationally connected to this objective. However, questions remain as to whether some of the measures would, in practice, be effective to improve veteran wellbeing and reduce suicide risk. For example, it is unclear whether enabling the Commissioner to make public statements that may include personal information and providing for disclosure of protected information in the

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19 Defence and Veterans' Service Commissioner Bill 2025, subclauses 50(2) and (4).

20 Defence and Veterans' Service Commissioner Bill 2025, subclause 51(2).

21 Defence and Veterans' Service Commissioner Bill 2025, clause 7.

22 International Covenant on Civil and Political Rights, article 17.

23 Statement of compatibility, p. 130.

24 Statement of compatibility, p. 130.

public interest would be effective to achieve the stated objectives. The explanatory materials provide minimal information in this regard.

1.8 In order to be proportionate, a limitation on the right to privacy should be sufficiently circumscribed, be only as extensive as is strictly necessary to achieve its legitimate objective, must be accompanied by appropriate safeguards and should be the least rights restrictive means of achieving the stated objective. The UN Human Rights Committee has stated that legislation must specify in detail the precise circumstances in which interferences with privacy may be permitted.[25]

1.9 The breadth of the measure is relevant in this regard, including the persons or entities to whom information may be shared, the purposes for which information may be shared, and the scope of personal information that may be used and disclosed. Information sharing is authorised between the Commissioner and a range of entities, including law enforcement, Royal Commissions and other Commonwealth, state and territory entities or bodies. The Commissioner is authorised to use information disclosed to it for the purpose of performing or exercising any of the Commissioner's functions or powers. The Commissioner's functions are drafted broadly, encompassing a wide-ranging spectrum of duties, for example, monitoring 'the state of the defence and veteran ecosystem, as it relates to the prevention of suicide and suicidality among veterans'.[26] Entities to whom the Commissioner discloses information may use that information to perform their functions or exercise their powers if that function or power is connected with suicide among veterans, suicide prevention and wellbeing outcomes for veterans. Further, the measure enabling disclosure in the public interest creates a broad authorisation for an entrusted person to disclose protected information if it is in the public interest to do so, which may differ from case to case and change over time. An entrusted person would include a range of individuals, including the Commissioner, staff of the Commission, contractors and consultants.[27]

1.10 As to the type of personal information that may be collected, used and disclosed, the statement of compatibility states that the information would be personal information of veterans. Noting the purposes for which the information may be collected, used and disclosed and the Commission's functions, this information is likely to be highly sensitive personal information. Additionally, in certain

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25 *NK v Netherlands*, UN Human Rights Committee Communication No. 2326/2013 (2018) [9.5].

26 Defence and Veterans' Service Commissioner Bill 2025, paragraph 10(1)(iii).

27 Defence and Veterans' Service Commissioner Bill 2025, clause 7.

circumstances, the Commissioner may also disclose intelligence information.[28] While the purposes for which information may be collected, used and disclosed and the entities and individuals to whom information may be disclosed are specified in the bill, the scope of personal information that is likely to be captured by the measures and the circumstances in which this information may be used and disclosed remain broad.

1.11 Regarding safeguards, the statement of compatibility identifies several safeguards that may operate to protect personal information. For example, the bill contains offence provisions for the unauthorised use or disclosure of protected information, the Commissioner may hold a hearing in private and the Commissioner may issue a non-publication direction in relation to a range of information disclosed to them.[29] These are important safeguards and, importantly, are included in the bill itself. However, the bill does not contain some key safeguards in regard to the right to privacy, such as providing notice and seeking consent prior to disclosure or publication of personal information and enabling a person to correct any information that may be incorrect.

1.12 The statement of compatibility also states that the *Privacy Act 1988* (Privacy Act) and the Protective Security Policy Framework would operate to protect any information once obtained by the Commissioner. However, compliance with the Privacy Act is not a complete answer to concerns about interference with the right to privacy for the purposes of international human rights law. This is because the Australian Privacy Principles (APPs), which government entities are obligated to comply with, contain a number of exceptions to the prohibition on use or disclosure of personal information for a secondary purpose, including where its use or disclosure is authorised under an Australian Law,[30] which may be a broader exception than permitted in international human rights law. There is also a general exemption in the APPs for the disclosure of personal information for a secondary purpose where it is reasonably necessary for one or more enforcement related activities conducted by, or on behalf of, an enforcement body.[31] Therefore, it is not clear whether the operation of the specific safeguards in the Privacy Act provide effective safeguards of the right to privacy in these circumstances.

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28 Defence and Veterans' Service Commissioner Bill 2025, clause 7. Intelligence information is defined to mean information: that was acquired or prepared by or on behalf of an Australian intelligence entity in connection with the performance of the entity's functions (for example, information provided to an Australian intelligence entity by a foreign government or an agency of a foreign government); or that relates to the performance by an Australian intelligence entity of its functions; or that identifies a person as being, or having been, a staff member or agent of the Australian Secret Intelligence Service or the Australian Security Intelligence Organisation.

29 Statement of compatibility, p. 130.

30 APP 9; APP 6.2(b).

31 APP; 6.2(e).

1.13 There may also be less rights restrictive alternatives available to achieve the stated objectives. For example, requiring authorised persons to only disclose personal information to the extent that is strictly necessary to achieve the purpose for which the information is disclosed, and where possible, disclose information in a de-identified or anonymous form. For certain functions, such as monitoring, inquiring into and reporting on data and trends regarding suicide and suicidality among veterans, it may be effective to use de-identified and aggregated data.

1.14 In conclusion, the measures generally pursue legitimate objectives and may be rationally connected to these objectives, although some questions remain as to whether each of the measures would be effective to achieve the stated objectives in practice. Regarding proportionality, the circumstances in which the right to privacy may be limited are generally specified in the bill and the measures are accompanied by some important safeguards. However, noting the breadth of personal information that may be used and disclosed, and the potential availability of less right restrictive alternatives, there may be circumstances in which a limitation on the right to privacy may not be proportionate.

Committee view

1.15 The committee notes that several measures in the bill provide for the collection, use and disclosure of personal information and this engages and limits the right to privacy.

1.16 The committee considers that these measures pursue legitimate objectives, including to fulfill the Commissioner's functions of improving veterans' wellbeing and reducing the suicide risk to veterans; ensuring that different government bodies do not work in silos; and supporting the Commission to meet the Royal Commissioner's expectation of effective communication and collaboration with other agencies. The committee considers that the measures may be rationally connected to these objectives, although some questions remain as to whether each of the measures would be effective to achieve the stated objectives in practice.

1.17 In regard to proportionality, the committee notes that the circumstances in which the right to privacy may be limited are generally specified in the bill and the measures are accompanied by some important safeguards, including offence provisions for unauthorised disclosure of information and the Commissioner's power to hold a hearing in private and issue a non-publication direction in relation to information disclosed to them. However, the committee also notes that the potential extent of interference with the right to privacy resulting from these measures may be significant, especially considering the sensitive information that may be used and disclosed. The committee further notes that some key safeguards in regard to the right to privacy are not contained in the bill, such as notifying and seeking consent of persons affected by disclosure of certain information prior to disclosure and enabling them to correct information as necessary. The committee also considers that less rights restrictive alternatives may be available, such as requiring disclosure of

information in a de-identified form where possible. In light of this, the committee considers that there may be circumstances in which a limitation on the right to privacy may not be proportionate.

Suggested action

1.18 The committee considers the proportionality of this measure may be assisted were the bill amended to:

(a) provide that a person that may be affected by the disclosure or publication of certain information is notified, gives consent where possible and is afforded the opportunity to correct information prior to its disclosure or publication; and

(b) require that the extent of personal information disclosed is limited to that which is strictly necessary to achieve the purpose for which the information is disclosed, and where possible, information is disclosed in a de-identified or anonymous form.

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

Offences relating to special inquiries, providing information and unauthorised publication, use or disclosure

1.20 The bill would provide that a person is not excused from giving evidence, information or a statement, or producing a document or thing when summonsed to attend a hearing or by a notice given by the Commissioner for the purposes of a special inquiry on the ground that it might tend to incriminate that person or expose them to penalty.[32]

International human rights legal advice

Criminal process rights

1.21 Insofar as the measure abrogates the privilege against self-incrimination, the right to a fair trial is engaged and limited. The right to a fair trial includes the right not to be compelled to testify against oneself or confess guilt.[33] While the measure provides for a use immunity, there does not appear to be a derivative use immunity. The absence of a derivative use immunity could have significant and broad-reaching implications for a person's right not to be compelled to testify against themselves. An individual summonsed to give evidence or produce documents may be required to

[32] Defence and Veterans' Service Commissioner Bill 2025, clause 62.

[33] International Covenant on Civil and Political Rights, article 14(3)(g).

answer questions about a specific matter[34] and while that answer itself cannot be used in evidence against the person, the information could be used to find other evidence against the person which could be used against them in a prosecution.[35] This may have the practical effect that the subject had been compelled to testify against and incriminate themselves with respect to related criminal proceedings.

1.22 The statement of compatibility states that the partial abrogation of the privilege against self-incrimination is necessary to ensure the Commissioner can conduct full and genuine inquiries, with access to all relevant information, and emphasises the public benefit of the Commissioner having the appropriate powers of inquiry.[36] This objective is likely necessary to address a pressing or substantial area of public concern, being the improvement of suicide prevention and wellbeing outcomes for veterans, and as such is likely to be considered a legitimate objective. The measure is also rationally connected to the stated objective as compelling individuals to provide information is likely to assist the Commissioner to gather relevant information and fulfil their functions.

1.23 Regarding proportionality, it is necessary to consider the extent of any interference with the right, any relevant safeguards and whether less rights restrictive alternatives are available. The extent of the interference with the privilege against self-incrimination is potentially significant. The measure contains a use immunity, except in relation to specific offences, including in relation to the provision of false or misleading information. This limits an individual's ability to rely on the use immunity in certain circumstances. Further, the bill does not include a derivative use immunity to prevent the use of information provided in accordance with this bill in other evidence brought against that person. This is particularly important in the context of the Commission's work in inquiry about defence personnel and veteran's conduct, as the absence of a derivative use immunity could lead to the information being relied on in the context of prosecuting a range of other serious offences.

1.24 The statement of compatibility identifies that the partial abrogation of the privilege against self-incrimination also operates alongside the protection that a natural person appearing as a witness or giving or producing evidence has the same protection as a witness in the High Court, which will enable relevant persons to claim the defence of absolute privilege in respect of information disclosed when appearing as a witness or in response to a compulsory notice, for example, in separate criminal

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34 Defence and Veterans' Service Commissioner Bill 2025, clause 31.

35 Failure to attend a hearing, give information or produce evidence is a serious offence with a penalty of imprisonment for two years (Defence and Veterans' Service Commissioner Bill 2025, clause 57). The UN Human Rights Committee has relevantly directed that in considering any abrogation of the privilege against self-incrimination, regard should be had to any form of compulsion used to compel a person to testify against themselves. See, UN Human Rights Committee, *General Comment No. 13: Article 14 (Administration of justice)* (1984) [14].

36 Statement of compatibility, p. 126.

or civil proceedings.[37] The statement of compatibility also states that the bill contains powers of the Commissioner to issue a non-publication direction to limit the publication of evidence which may be self-incriminating.[38] These provisions in the bill may operate as important safeguards and assist with proportionality, however, they do not ameliorate the lack of a derivative use immunity.

Committee view

1.25 The committee notes that insofar as the measure abrogates the privilege against self-incrimination, it engages and limits the right not to incriminate oneself. The committee notes that ensuring the Commissioner can conduct full and genuine inquiries with access to all relevant information, and acknowledging the broader public benefit of the Commissioner having the appropriate powers of inquiry, is likely to be a legitimate objective. The committee notes that compelling individuals to provide information is likely to assist the Commissioner to gather relevant information and fulfil their functions and as such the measure is likely to be rationally connected to the stated objective. The committee considers that the absence of a derivative use immunity significantly increases the potential extent of the interference with the right not to incriminate oneself and as such, the measure may not be proportionate.

Suggested action

1.26 The committee considers the proportionality of this measure may be assisted were the bill amended to provide for a derivative use immunity.

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

Contempt offences

1.28 The bill would provide that a person commits an offence if they engage in conduct that would obstruct or hinder the Commissioner in the performance of the Commissioner's functions or exercise of the Commissioner's powers[39] or, if the Commissioner were a court of record, would constitute a contempt of that court.[40] The offences would be punishable by imprisonment for three months.

37 Statement of compatibility, p. 126.

38 Statement of compatibility, p. 126.

39 Defence and Veterans' Service Commissioner Bill 2025, subclause 66(1).

40 Defence and Veterans' Service Commissioner Bill 2025, subclause 66(2).

International human rights legal advice

Freedom of assembly and expression

1.29 Prohibiting a person from obstructing or hindering the proceedings of the Commission engages and may limit the right to freedom of assembly and the right to freedom of expression.

1.30 The right to freedom of assembly provides that all people have the right to peaceful assembly.[41] It protects the right of individuals and groups to meet and engage in peaceful protest and other forms of collective activity in public.[42] The right to peaceful assembly is closely linked to the right to freedom of expression, as it is a means for people to collectively express their views. 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.[43] The right to freedom of expression extends to the communication of information or ideas through any medium, including written and oral communications, the media, public protest, broadcasting, artistic works and commercial advertising.[44] The UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression has stated that 'the right to freedom of expression includes expression of views and opinions that offend, shock or disturb'.[45]

1.31 These rights may be limited for certain prescribed purposes. That is, that the limitation is necessary to respect the rights of others, to protect national security, public safety, public order, public health or morals. Additionally, such limitations must be prescribed by law, be rationally connected (that is, effective to achieve) and proportionate to achieving the prescribed purpose.

1.32 The statement of compatibility does not acknowledge that these measures engage these human rights and so provides no assessment as to the human rights compatibility of these measures. The explanatory memorandum states that the contempt offences are modelled on section 120 of the *Administrative Review Tribunal Act 2024*. It states that these measures are intended to protect the effective operation and integrity of the Commissioner's work by allowing the Commissioner to deal with conduct that interferes with their functions and powers.[46]

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41 International Covenant on Civil and Political Rights, article 21

42 UN Human Rights Committee, *General Comment No. 25: Article 25 (Participation in public affairs and the right to vote)* (1996) [8]. The Committee notes that citizens take part in the conduct of public affairs, including through the capacity to organise themselves.

43 International Covenant on Civil and Political Rights, article 19(2).

44 International Covenant on Civil and Political Rights, article 19.

45 UN Human Rights Council, *Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue*, A/HRC/17/27 (2011) [37].

46 Explanatory memorandum, p. 90.

1.33 While promoting the effective operation of the Commission, which in general terms has rights promoting functions, is capable of constituting a legitimate objective, it must also be demonstrated that this objective is necessary and addresses an issue of public or social concern that is pressing and substantial enough to warrant limiting rights. In this regard, it is not clear that hindering the Commissioner, for example by insulting the Commissioner or disrupting a hearing, would necessarily prevent the Commission from exercising its powers or undertaking its functions such that the Commission was unable to effectively operate. Noting the important status of the right to freedom of expression under international human rights law and the specific protection of insulting expression,[47] it is not clear that hindering the Commissioner would necessarily prevent the Commission undertaking its functions in such a way that creates a pressing and substantial need to deter these activities.

1.34 In assessing proportionality, a relevant consideration is the breadth of the measure. The proposed offences capture a broad scope of conduct, including conduct that obstructs or hinders the Commissioner. The explanatory memorandum states that examples of conduct that may amount to a contempt include, but are not limited to, where a person insults, disturbs or uses insulting language towards the Commissioner during a hearing or otherwise disrupts a hearing, or physically assaults or threatens a person present at a hearing.[48] A broad range of conduct could therefore amount to contempt. By framing the offences so broadly, there appears to be a risk that the provisions may criminalise legitimate criticism of, or objection to, the Commission and its proceedings, and legitimate protests unrelated to the operation of the Commission that do not necessarily prevent the Commission from carrying out its functions. It is also not clear why it is necessary to make it an offence to obstruct or hinder the Commissioner in the performance of their functions in light of the specific contempt offence in the bill, which makes it an offence to engage in conduct that would constitute a contempt of a court of record. A contempt of court includes conduct that interferes with or undermines the authority, performance or dignity of the courts, including abusing and swearing at a magistrate, refusing to leave the court when directed and disobeying court orders.[49] As such, there appears to be overlap between the offence and it is therefore not clear why the specific contempt of court offence alone is not sufficient to address conduct that may disrupt or interfere with the effective operation of the Commission. As drafted, the proposed offence does not appear to be sufficiently circumscribed and does not appear to be the least rights restrictive way to achieve the stated objective. As such, these provisions risk disproportionately limiting the rights to freedom of expression and assembly.

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47 UN Human Rights Committee, General comment No. 34: Article 19: Freedoms of opinion and expression (2011) [2]–[3].

48 Explanatory memorandum, p. 90.

49 Judicial Commission of New South Wales, Local Court Bench Book (November 2019) [48-020].

Committee view

1.35 The committee notes that the bill would make it an offence, punishable by three months imprisonment, to obstruct or hinder the Commissioner in the performance of the Commissioner's functions or exercise of their powers. The committee considers that this engages and limits the rights to freedom of assembly and expression.

1.36 The committee notes that the statement of compatibility does not acknowledge that this measure limits these rights and so provides no assessment as to whether the limitations are permissible. The committee notes that the purpose of the measure is to promote the effective operation of the Commission. While the committee considers this to be an important objective, particularly in light of the important role the Commission plays in improving suicide prevention and wellbeing outcomes of serving and ex-serving Australian Defence Force members, it is not clear that this objective is necessary in the context of this measure and addresses an issue of public or social concern that is pressing and substantial enough to warrant limiting rights.

1.37 The committee considers there to be a risk that the offences are framed so broadly that they may criminalise legitimate conduct that would otherwise be protected under international human rights law, such as peaceful protest (including protests not related to the Commission) and legitimate criticism of the Commission. The committee further considers that the measure is not drafted in the least rights restrictive way to achieve the stated objective, noting that there appears to be overlap between the offences. The committee therefore considers that the measure risks disproportionately limiting the rights to freedom of expression and assembly.

1.38 The committee notes that it has previously reached similar conclusions with respect to contempt offences in other legislation.[50] Most recently, in considering contempt offences in the Veterans' Entitlements, Treatment and Support

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50 The committee has historically raised repeated concerns regarding the compatibility of similar contempt provisions relating to Royal Commissions (and other bodies invested with the powers of Royal Commissions) and has recommended their amendment. See, for example, Parliamentary Joint Committee on Human Rights, Royal Commissions Amendment Regulation 2016 (No. 1) [F2016L00113], *Thirty-Eighth Report of the 44th Parliament* (3 May 2016) pp. 21–26; Prime Minister and Cabinet Legislation Amendment (2017 Measures No. 1) Bill 2017, *Report 6 of 2017* (20 June 2017) pp. 35–49; Banking and Financial Services Commission of Inquiry Bill 2017, *Report 4 of 2017* (9 May 2017) pp. 42–45; Commission of Inquiry (Coal Seam Gas) Bill 2017, *Report 11 of 2017* (17 October 2017) pp. 51–52; Murray-Darling Basin Commission of Inquiry Bill 2019, *Report 2 of 2019* (12 February 2019) pp. 131–135; National Integrity Commission Bill 2018, National Integrity Commission Bill 2018 (No. 2) and National Integrity (Parliamentary Standards) Bill 2018, *Report 2 of 2019* (12 February 2019) pp. 136–145; National Integrity Commission Bill 2018 (No. 2) and National Integrity Commission Bill 2019, *Report 6 of 2019* (5 December 2019) pp. 99–116; and National Anti-Corruption Commission Bill 2022, *Report 5 of 2022* (20 October 2022) pp. 17–20.

(Simplification and Harmonisation) Bill 2024 (now Act), the committee recommended amending the relevant provision to remove the paragraphs that made it a contempt to use insulting language or create a disturbance near a Commission hearing (given that it was also a contempt to disrupt a hearing or obstruct or hinder a Commission staff member in performing their functions).[51] While the offence provision in this bill are framed more narrowly, the committee considers that a similar approach can be adopted with respect to this bill without frustrating its legislative purposes as the contempt of court offence captures much of the conduct targeted in the obstruct or hinder offence.

Suggested action

1.39 The committee considers the proportionality of this measure may be assisted were the bill amended to remove subclause 66(1) (which would retain only the contempt of the Commission offence) and provide that the conduct that the offence seeks to criminalise must reach such a level that the Commission is effectively unable to operate.

1.40 The committee recommends that the statement of compatibility be updated to provide an assessment of the compatibility of the measure with the rights to freedom of assembly and freedom of expression.

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

[51] Parliamentary Joint Committee on Human Rights, *Report 6 of 2024* (24 July 2024) pp. 14–15.

Legislative instruments

Migration (Disclosure of Information to Prescribed Bodies) Instrument 2025

Migration (Disclosure of Information to Prescribed International Organisations) Instrument 2025[52]

FRL No.	F2025L01218 and F2025L01234
Purpose	These legislative instruments prescribe the bodies and international organisations to which specified officers may disclose identifying information.
Portfolio	Home Affairs
Authorising legislation	*Migration Regulations 1994*
Disallowance	Exempt
Rights	Life; non-refoulement; privacy; prohibition on torture and cruel, inhuman or degrading treatment or punishment

Disclosure of identifying information

1.42 Under the *Migration Act 1958* (Migration Act), a specified officer may disclose identifying information to prescribed bodies of a foreign country, of the Commonwealth, of a state or territory, or to a prescribed international organisation.[53] These instruments prescribe the bodies and international organisations to which specified officers may disclose identifying information.[54]

1.43 The prescribed bodies include 107 state and territory police forces and agencies, federal intelligence agencies, federal agencies, foreign police forces (including police forces in Hong Kong, Indonesia, Korea, New Zealand, Canada, United Kingdom, Malaysia and Sri Lanka) and foreign intelligence agencies (including in the United States of America).[55] The prescribed international organisations include the International Committee of the Red Cross, International Monetary Fund, Interpol,

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52 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Migration (Disclosure of Information to Prescribed Bodies) Instrument 2025, *Report 1 of 2026*; [2026] AUPJCHR 4.

53 *Migration Act 1958,* paragraphs 336F(1)(d) and 336F(1)(e).

54 Migration Regulations 1994, sections 5.34D and 5.34E.

55 Migration (Disclosure of Information to Prescribed Bodies) Instrument 2025, Schedule 1.

International Residual Mechanism for Criminal Tribunals, International Organisation for Migration and the United Nations.[56]

1.44 The identifying information which may be shared with these prescribed bodies and international organisations includes any personal identifier, such as a person's fingerprints, height and weight, iris scan, audio or video recordings and signature;[57] any other identifier prescribed by the regulations;[58] and any other information that could be used to discover a particular person's identity or to get information about them.[59]

1.45 The identifying information may be disclosed for a number of specified purposes, including:

- to improve the integrity of entry programs;
- to improve the procedures for determining claims from people seeking protection as refugees;
- to assist in determining whether a person is an unlawful non-citizen or a lawful non-citizen;
- to enhance the Department's ability to identify non-citizens who have a criminal history or who are of character concern;
- to assist in identifying persons who may be a security concern to Australia or a foreign country;
- to ascertain whether an applicant for a protection visa, an unauthorised maritime arrival making a claim for protection as a refugee or on the basis that they will suffer significant harm had sufficient opportunity to avail themselves of protection before arriving in Australia;
- to inform the government of foreign countries of the identity of non-citizens who are, or are able to be, removed or deported from Australia;
- to detect forum shopping by applicants for visas; and
- to combat document and identity fraud in immigration matters.[60]

1.46 Subject to exceptions, identifying information which relates to a person applying for a protection visa, or to an unauthorised maritime arrival making a claim for protection as a refugee, or to an unauthorised maritime arrival making a claim for protection on the basis that they will suffer significant harm, cannot be disclosed to a

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56 Migration (Disclosure of Information to Prescribed International Organisations) Instrument 2025, section 6.

57 *Migration Act 1958,* subsection 5A(1).

58 *Migration Act 1958,* paragraph 5A(1)(g).

59 *Migration Act 1958,* section 336A.

60 *Migration Act 1958,* subsections 336F(2) and 5A(3).

foreign country in respect of which the application or claim is made, or to a body of that country. Nor can such information be disclosed if the country or body to whom the disclosure is made may then disclose that identifying information to a foreign country in respect of which the person's application or claim is made.[61]

Preliminary international human rights legal advice

Right to privacy

1.47 By prescribing international organisations and bodies in Australia and in foreign countries to which specified officers may disclose identifying information for a range of purposes, this measure 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.[62] 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 which are provided by law and are not arbitrary. In order for limitations to not be arbitrary, the measure must pursue a legitimate objective, and be rationally connected to (that is, effective to achieve) and proportionate to achieving that objective.

1.48 In the context of biometric data, such as fingerprints taken using digital live scanning technologies, iris scans, images of a person's face, signatures and audio recordings, the UN High Commissioner for Human Rights has observed that:

> biometric data is particularly sensitive, as it is by definition inseparably linked to a particular person and that person's life, and has the potential to be gravely abused. For example, identity theft on the basis of biometrics is extremely difficult to remedy and may seriously affect an individual's rights. Moreover, biometric data may be used for different purposes from those for which it was collected, including the unlawful tracking and monitoring of individuals. Given those risks, particular attention should be paid to questions of necessity and proportionality in the collection of biometric data.[63]

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61 *Migration Act 1958,* subsections 336F(3) and (4).

62 International Covenant on Civil and Political Rights, article 17.

63 UN High Commissioner for Human Rights, *The right to privacy in the digital age*, A/HRC/39/29 (2018) [14]. The UN High Commissioner for Human Rights raised similar concerns in its 2021 report, with a particular emphasis on remote biometric recognition. It stated, '[r]emote biometric recognition is linked to deep interference with the right to privacy. A person's biometric information constitutes one of the key attributes of her or his personality as it reveals unique characteristics distinguishing her or him from other persons. Moreover, remote biometric recognition dramatically increases the ability of State authorities to systematically identify and track individuals in public spaces, undermining the ability of people to go about their lives unobserved and resulting in a direct negative effect on the exercise of the rights to freedom of expression, of peaceful assembly and of association, as well as freedom of movement': *The right to privacy in the digital age*, A/HRC/48/31 (2021) [27].

1.49 Migration regulations prescribed under the Legislation (Exemptions and Other Matters) Regulations 2015 are legislative instruments that are exempt from disallowance and as such no statements of compatibility have been provided.[64] This removes an important safeguard in the ability of the Parliament to effectively scrutinise the legislation, including for permissible limitations on human rights, and to disallow the instrument if necessary. Further, no information is provided in the explanatory statements to identify the objective sought to be achieved by these measures, or to demonstrate that there is a pressing and substantial need to disclose identifying information to the bodies and international organisations prescribed by the instruments.

1.50 Given the limited information provided in the explanatory statements, it is difficult to assess whether the measure is pursuing a legitimate objective for the purposes of international human rights law. In light of the specified purposes for which disclosure may be authorised (see above),[65] it appears that the broad objective of the measure is to ensure the integrity of Australia's border and migration system by disclosing identifying information to prescribed bodies and international organisations.

1.51 Maintaining the integrity of Australia's borders and migration system may be regarded as a legitimate objective for the purposes of international human rights law. However, to constitute a legitimate objective for the purposes of international human rights law, it must be necessary and address an issue of public or social concern that is pressing and substantial enough to warrant limiting the right. In this regard, the explanatory materials do not explain how the disclosure of identifying information, which includes biometric information, to each of the bodies and international organisations prescribed in the instruments is necessary to achieve this objective. Without further information in relation to the necessity of sharing identifying information with these specific bodies and international organisations, it is difficult to assess whether the measure pursues a legitimate objective that is both necessary and addresses a substantial public or social concern.

1.52 Under international human rights law, it must also be demonstrated that any limitation on a right has a rational connection to the objective sought to be achieved. The key question is whether the relevant measures are likely to be effective in achieving the objective being sought.

1.53 Disclosing identifying information to some Australian bodies and international organisations for the specified purposes may be effective to achieve the objective of maintaining the integrity of Australia's border and migration system. However, it is not clear how sharing identifying information to all of the prescribed bodies and

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64 *Legislation Act 2003,* section 42 and Legislation (Exemptions and Other Matters) Regulation 2015, section 10, sub-item 20(b).

65 See *Migration Act 1958,* subsection 5A(3).

international organisations would be effective to achieve this objective. For example, it is not clear how disclosing identifying information to state and territory agencies including the Western Australian Department of Planning, Lands and Heritage, VicRoads, the Tasmanian Department of State Growth, the Victorian Department of Families, Fairness and Housing, New South Wales Fair Trading, the South Australian Department of Primary Industries and Regions, Infrastructure Tasmania or to Commonwealth agencies like the Australian Fisheries Management Authority and the Fair Work Ombudsman would be an effective means of maintaining the integrity of Australia's border and migration system.

1.54 A key aspect of whether a limitation on a right can be justified is whether the limitation is proportionate to the objective being sought. In this respect, it is necessary to consider a number of factors, including whether a proposed limitation is sufficiently circumscribed; whether the measure is accompanied by sufficient safeguards; whether there is the possibility of oversight; whether any less rights restrictive alternatives could achieve the same objective; and the extent of any interference with human rights. 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.

1.55 In general, specifying in legislation the circumstances in which information may be disclosed may assist with proportionality, depending on the scope of the authorisation. However, in this instance, the authorisation is very broad and allows the disclosure of identifying information, including biometric data, to a wide range of bodies including Commonwealth, state and territory agencies and enforcement bodies, foreign agencies, foreign police forces and law enforcement bodies, for a range of purposes. This suggests the measure may not be sufficiently circumscribed.

1.56 Another consideration with respect to proportionality is the extent of any interference with human rights. The greater the interference, the less likely the measure is to be considered proportionate. The scope of the information and to whom it may be disclosed is relevant in this regard. There appear to be limited restrictions on the scope of identifying information that may be disclosed, so long as it is disclosed for specified purposes, which, as noted above, are quite broad. Further, the type of information that may be disclosed is particularly sensitive. As a result, the interference with the right to privacy could be significant.

1.57 As to the existence of safeguards, there is a prohibition on the disclosure of identifying information relating to an applicant for a protection visa, or an unauthorised maritime arrival who makes a claim for protection as a refugee or on the basis that they will suffer significant harm, to a foreign country or a body of that country in respect of which the application or claim is made,[66] or where the officer making the disclosure is not reasonably satisfied that the country or body will not

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66 *Migration Act 1958,* subsection 336F(3).

disclose the identifying information to a foreign country in respect of which the application or claim is made (that is, onwards disclosure).[67] These safeguards may operate, in practice, to help protect against arbitrary interference with the right to privacy for a limited number of particularly vulnerable individuals and may act as an important safeguard for the protection of other human rights, for example, the prohibition against torture and cruel, inhuman or degrading treatment or punishment.

1.58 However, it is noted that a person's identifying information may still be disclosed in certain circumstances, including:

- if the person to whom the identifying information relates has agreed or requested to return to the foreign country in respect of which the application or claim is made;[68]
- if the person's application for a protection visa has been refused and finally determined or they are an unauthorised maritime arrival who makes a claim for protection as a refugee and are found not to be a person in respect of whom Australia has protection obligations or an unauthorised maritime arrival who makes a claim on the basis that they will suffer significant harm and they are not found to be a person for whom there is a real risk of suffering significant harm;[69]
- if the person is an unauthorised maritime arrival who makes a claim for protection on the basis that they will suffer significant harm and following assessment of their claim, are found to be a person to whom there are serious reasons for considering they have committed a crime against peace, a war crime, a crime against humanity or a serious non-political crime before entering Australia, or are guilty of acts contrary to the purposes or principles of the United Nations; and[70]
- if the person is an unauthorised maritime arrival who makes a claim for protection on the basis that they will suffer significant harm and following assessment of their claim, are found to be a person in respect of whom there are reasonable grounds for considering they will be a danger to Australia's security or, having been convicted of a particularly serious crime, is a danger to the Australian community.[71]

Right to life and prohibition against torture and non-refoulement

1.59 There could be a risk that the measure may (depending on the circumstances) engage and limit further rights, such as the right to life (if the disclosure of identifying

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67 *Migration Act 1958,* subsection 336F(4).

68 *Migration Act 1958,* paragraph 336F(5)(a).

69 *Migration Act 1958,* paragraphs 336F(5)(b), (c) and (ca).

70 *Migration Act 1958,* paragraph 336F(5)(cb).

71 *Migration Act 1958,* paragraph 336F(5)(cc).

information exposed a person to the risk of the death penalty in a foreign country to which they were removed), the prohibition on torture and cruel, inhuman or degrading treatment or punishment (if the disclosure exposed them to the risk of such treatment in a foreign country to which they were removed), or non-refoulement (if the disclosure contributed to their return to a country in which they faced persecution, for example, because it caused a foreign country to which they had been removed from Australia to refoul them to a third country in which they faced persecution). The right to life imposes an obligation on Australia to protect people from being killed by others or from identified risks. As Australia has prohibited the death penalty, this prohibits Australia from deporting or extraditing a person to a country where that person may face the death penalty.[72]

1.60 These concerns arise having regard to the kinds of identifying information that are authorised to be shared with foreign countries and international organisations pursuant to this measure, and the purposes for which such information may be shared. Disclosing identifying information could expose an individual to a risk of harm in a foreign country if it resulted in the individual being prosecuted for a crime subject to the death penalty, being held in conditions contrary to the prohibition on torture, inhuman or degrading treatment or punishment, or being expelled to a third country where the individual would face a risk of persecution. The extent of such a risk would depend on the foreign country to which the information is disclosed (and its relevant domestic laws, practices or policies, for example whether the death penalty applies, including for drug related offences) and the extent of any safeguards put in place by Australia to alleviate such a risk, for example, whether Australia sought assurances that the death penalty would not be imposed. It is noted that identifying information may be disclosed to the Indonesian National Police, Royal Malaysia Police, United States' Drug Enforcement Administration, Department of Homeland Security and Federal Bureau of Investigation, enforcement bodies of foreign countries which apply the death penalty for certain offences. On the face on the instrument, it is unclear what requirements (if any) Australia would impose on these countries before sharing information or removing individuals to these countries, in order to protect against such risks of harm. There appear to be limited safeguards to ensure that identifying information is not shared with a foreign government in circumstances that would or may expose a person to the death penalty or lead to a person being tortured or subjected to cruel, inhuman or degrading treatment or punishment, or subject to chain-refoulement.

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72 *Judge v Canada*, UN Human Rights Committee Communication No. 929/1998 (2003) [10.4]; *Kwok v Australia*, UN Human Rights Committee Communication No. 1442/05 (2009) [9.4]–[9.7].

Committee view

1.61 The committee notes that prescribing the bodies and international organisations to which identifying information may be disclosed for specified purposes engages and limits the right to privacy, and may engage and limit further human rights.

1.62 The committee notes that these instruments are exempt from disallowance and so are not subject to parliamentary control. The committee therefore considers that it is particularly important that this committee closely scrutinise the human rights concerns in this instrument.[73]

1.63 The committee considers that further information is required to assess the compatibility of this measure with these rights, and as such, seeks the minister's advice in relation to:

(a) what is the objective that the measure is pursuing;

(b) why it is necessary to disclose identifying information to each of the bodies and international organisations prescribed in these instruments and what is the pressing or substantial concern this seeks to address;

(c) how the disclosure of identifying information to each of the prescribed bodies and international organisations is effective to achieve the objective being sought;

(d) what other identifying information may be prescribed by the regulations (and therefore able to be disclosed);

(e) why it is necessary to disclose biometric data to each of these prescribed bodies and international organisations;

(f) whether individuals are informed of how their identifying information may be disclosed and to whom it may be disclosed;

(g) what other safeguards, if any, accompany the measure to ensure that any limitation on the right to privacy is proportionate, such as restrictions on the onwards disclosure of information by prescribed bodies and international organisations;

(h) what safeguards exist to ensure that personal information is not shared with a foreign government in circumstances that would or may expose a person to the death penalty or lead to a person being tortured, or subjected to cruel, inhuman or degrading treatment or punishment, or subject to chain-refoulement; and

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73 The committee has previously recommended that the *Human Rights (Parliamentary Scrutiny) Act 2011* be amended to require the rule-maker in relation to all legislative instruments (not only disallowable legislative instruments) to cause a statement of compatibility to be prepared in respect of that instrument. See Parliamentary Joint Committee on Human Rights, *Inquiry into Australia's Human Rights Framework* (May 2024) Recommendation 14, p. xxvi.

(i) whether other less rights restrictive measures have been considered.

Chapter 2
Concluded matters

2.1 The committee considers a response to matters raised previously by the committee.

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

Bills

Freedom of Information Amendment Bill 2025[2]

Purpose	This bill seeks to amend the *Freedom of Information Act 1982* to change the operation of the Freedom of Information framework and make consequential amendments to the *Australian Information Commissioner Act 2010* and the *Public Interest Disclosure Act 2013*.
Portfolio	Attorney-General
Introduced	House of Representatives, 3 September 2025
Rights	Freedom of expression

2.3 The committee requested a response from the minister in relation to the Freedom of Information Amendment Bill in *Report 7 of 2025*.[3]

Restricting access to information

2.4 The bill seeks to amend the *Freedom of Information Act 1982* (FOI Act) to reform the operation of the Freedom of Information framework (FOI framework). The FOI framework provides for processes for requesting information held by government agencies and for review of decisions to refuse access. Some of the main changes sought to be introduced in the bill include:

- an amendment to the object clause to more expressly reflect the balance between promoting transparent government and providing safeguards to

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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, Freedom of Information Amendment Bill 2025, *Report 1 of 2026*; [2026] AUPJCHR 5.

3 Parliamentary Joint Committee on Human Rights, *Report 7 of 2025* (26 November 2025) pp. 18–38.

protect essential private interests and the proper and effective operation of government in the FOI framework;[4]

- an agency or minister may refuse to deal with repeat or vexatious requests or requests that are an abuse of process,[5] and the definition of 'abuse of the process for an access action' is expanded to include an action that is harassing, intimidating, insulting or abusing an individual or employee of an agency;[6]
- an FOI request cannot be made anonymously or under a pseudonym;[7]
- an agency or minister may refuse to process a request as a 'practical refusal reason'[8] if it would take more than a prescribed amount of time to process, with a default minimum of 40 hours;[9]
- application fees can be specified in the regulations for FOI requests, internal reviews and Information Commissioner (IC) reviews,[10] but not for requests for an individual's own personal information;[11]
- an agency or minister can refuse requests to give access to a document on the terms of the request, without having identified the document, if it is apparent it is or would be an exempt document;[12]
- a document is exempt if it has been prepared by a minister, on a minister's behalf or by an agency, and a substantial purpose for its preparation was

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4 Schedule 1, part 1, item 3, subsection 3(2).

5 Schedule 2, part 4, item 41, section 15AD.

6 Schedule 2, part 4, item 50, subsection 89L(4). Abuse of the process for an access action also includes, but is not limited to, unreasonably interfering with the operations of an agency, and seeking to use the FOI Act for the purpose of circumventing restrictions on access to a document(s) imposed by a court.

7 Schedule 2, part 5, item 53, paragraphs 15(2)(ba) and (bb).

8 *Freedom of Information Act 1982*, sections 24 and 24AA: a 'practical refusal reason' exists in relation to a request for a document if the work involved in processing the request would substantially and unreasonably divert the resources of the agency from its other operations or the performance of the minister's functions, or the request does not provide such information concerning the document as is reasonably necessary to enable a responsible officer of the agency, or the minister, to identify it. If an agency or minister is satisfied that a practical refusal reason exists in relation to the request, they must undertake a request consultation process which provides an opportunity for the applicant to seek assistance from the agency or minister to revise the request, and if the practical refusal reason still exists, they may refuse to give access to the document.

9 Schedule 3, part 2, item 10, paragraph 24AA(1)(c).

10 Schedule 6, items 2, 4, 5 and 6, paragraph 15(2)(f), subsection 54B(1A), paragraph 54N(1)(c) and section 93C.

11 Schedule 6, item 6, subsection 93C(3).

12 Schedule 7, part 1, item 1, section 23A.

submission for consideration by the cabinet or to brief a minister in relation to issues to be considered by the cabinet;[13]

- an amendment to the public interest exemptions as it relates to the deliberative process of government[14] to include factors against giving access;[15] and
- an outgoing minister may transfer requests seeking access to information to another minister or the responsible agency,[16] and otherwise, active FOI requests are automatically forwarded to a relevant agency,[17] and applications to annotate or correct personal records made to a responsible minister will be taken to have lapsed on the minister ceasing office.[18]

Summary of initial assessment

Preliminary international human rights legal advice

Right to freedom of expression

2.5 Insofar as the various measures that seek to amend the FOI framework have the practical effect of restricting or impeding individuals' access to information held by government, including by broadening the grounds on which an FOI request may be refused, introducing application fees and removing anonymous and pseudonymous requests, these measures engage and limit the right to access information, a component of the right to freedom of expression.

2.6 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.[19] The right to freedom of expression also includes 'a right of access to information held by public bodies'.[20] The United Nations (UN) Human Rights Committee has stated:

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13 Schedule 7, part 2, items 3 and 4, paragraphs 34(1)(a) and (c).

14 *Freedom of Information Act 1982*, section 47C provides that a document is conditionally exempt if its disclosure under the FOI Act would disclose matter (*deliberative matter*) in the nature of, or relating to, opinion, advice or recommendation obtained, prepared or recorded, or consultation or deliberation which has taken place, in the course of, or for the purposes of, the deliberative processes involved in the functions of an agency, or a minister or government of the Commonwealth.

15 Schedule 7, part 3, item 14, subsection 11B(3A).

16 Schedule 8, part 1, item 2, subsection 16B(1).

17 Schedule 8, part 1, item 2, subsection 16B(2).

18 Schedule 8, part 1, item 3, section 51CA.

19 International Covenant on Civil and Political Rights, article 19(2).

20 UN Human Rights Committee, *General Comment No. 34, Article 19: Freedom of opinions and expression* (12 September 2011) [18].

> To give effect to the right of access to information, States parties should proactively put in the public domain Government information of public interest. States parties should make every effort to ensure easy, prompt, effective and practical access to such information. States parties should also enact the necessary procedures, whereby one may gain access to information, such as by means of freedom of information legislation. The procedures should provide for the timely processing of requests for information according to clear rules that are compatible with the Covenant. Fees for requests for information should not be such as to constitute an unreasonable impediment to access to information. Authorities should provide reasons for any refusal to provide access to information. Arrangements should be put in place for appeals from refusals to provide access to information as well as in cases of failure to respond to requests.[21]

2.7 The UN Special Rapporteur on the right to freedom of opinion and expression has also endorsed a set of general principles to give effect to the right to freedom of information:

(a) Freedom of information legislation should be guided by the principle of maximum disclosure.

(b) Public bodies should be under an obligation to publish key information.

(c) Public bodies must actively promote open government.

(d) Exceptions should be clearly and narrowly drawn and subject to strict 'harm' and 'public interest' tests.

(e) Requests for information should be processed rapidly and fairly and an independent review of any refusals should be available.

(f) Individuals should not be deterred from making requests for information by excessive costs.

(g) Meetings of public bodies should be open to the public.

(h) Laws which are inconsistent with the principle of maximum disclosure should be amended or repealed.

(i) Individuals who release information on wrongdoing - whistle-blowers - must be protected.[22]

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[21] UN Human Rights Committee, *General Comment No. 34, Article 19: Freedom of opinions and expression* (12 September 2011) [19].

[22] Article 19, *The Public's Right to Know: Principles on Freedom of Information Legislation* (June 1999). These are endorsed by the UN Economic and Social Council, *Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression*, E/CN.4/2000/63 (2000) [43] and the UN Commission on Human Rights, *The right to freedom of opinion and expression*, Res 2000/38 (2000) [11].

2.8 The right to freedom of expression may be subject to limitations that are necessary to protect the rights or reputations of others,[23] national security,[24] public order, or public health or morals.[25] Additionally, such limitations must be prescribed by law, be rationally connected to the objective of the measures and be proportionate.[26]

Multiple rights

2.9 To the extent that the measures limit the right to access information, these measures also engage and limit multiple other human rights which include access to information as a core part of fulfilling the right, including the right to health, privacy, the right to take part in public affairs and the right to education. The UN General Assembly has resolved that freedom of information is a fundamental human right 'and the touchstone for all freedoms to which the United Nations is consecrated'.[27] The UN Special Rapporteur on Education has further stated:

> Access to information is essential to enable people to exercise their human rights. Without relevant, timely and accurate information, rights holders cannot know which services they are entitled to, what the associated costs are (if any) or which complaint mechanisms they can use to seek redress when their right …is violated.[28]

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23 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].

24 Extreme care must be taken by State parties to ensure that treason laws and similar provisions relating to national security are crafted and applied in a manner that conforms to the strict requirements of paragraph 12(3) of the International Covenant on Civil and Political Rights. It is not compatible with paragraph 3, for instance, to invoke such laws to suppress or withhold from the public information of legitimate public interest that does not harm national security or to prosecute journalists, researchers, environmental activists, human rights defenders, or others, for having disseminated such information. See UN Human Rights Committee, *General Comment No. 34: Article 19: Freedoms of Opinion and Expression* (2011) [30].

25 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].

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

27 United Nations General Assembly, *Resolution 59(1)*, 65th Plenary Meeting, 14 December 1946.

28 UN Human Rights Council, *Report of the Special Rapporteur on Education*, A/HRC/38/32 (2018) [45].

2.10 The right to health is the right to enjoy the highest attainable standard of physical and mental health.[29] It includes the right to information accessibility, which includes the right to seek, receive and impart information and ideas concerning health issues.[30] The UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression stated:

> The default position must be that public authorities do not wait for a request for information; they must have an affirmative policy of releasing all relevant information in ways that are understandable to a non-technical public and that advance public health priorities.
>
> …
>
> A Government that deprives the public of reliable information puts individuals at risk and can justify such deprivation only on the narrowest grounds and with the greatest degree of necessity to protect a legitimate interest.[31]

2.11 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.[32] In order for the right to be effective, every person has the right to find out what personal data is stored in relation to them, for what purpose and who has access to their information.

2.12 The right to take part in public affairs is the right of all citizens, without discrimination or unreasonable restriction, to take part in the conduct of public affairs, directly or through freely chosen representatives; to stand for public office; to vote in elections; and to have access to positions in public service.[33] This is engaged insofar as the measures relate to the imparting and receipt by citizens of information and ideas about public and political issues.

2.13 The right to education provides that education should be accessible to all.[34] It includes access to information that covers all aspects of education governance,

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

30 UN Economic, Social and Cultural Rights Committee, *General Comment No. 14: the right to the Highest Attainable Standard of Health* (2000) [11]–[12].

31 UN Human Rights Council, *Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression on Disease pandemics and the freedom of opinion and expression*, A/HRC/44/49 (2020) [18] and [20].

32 International Covenant on Civil and Political Rights, article 17.

33 International Covenant on Civil and Political Rights, article 25. See UN Human Rights Council, *General Comment No. 25: Article 25, Right to participate in public affairs, voting rights and the right of equal access to public service* (1996) [1], [5]–[6].

34 International Covenant on Economic, Social and Cultural Rights, article 13.

including decision-making procedures for school admissions, teacher selection and other areas of concern for education-related stakeholders.[35]

2.14 Access to information is essential to respect, protect and fulfil multiple other human rights. As the bill seeks to amend the FOI Act, which covers most government agencies, any limitation on the right to access information impacts access to a broad range of information held by public bodies in hugely diverse areas of public policy and private life, and would therefore engage and limit multiple other human rights.

Committee's initial view

2.15 The committee noted that the bill seeks to amend the *Freedom of Information Act 1982* (FOI Act) to reform the operation of the Freedom of Information framework (FOI framework). The FOI framework provides for processes for requesting information held by government agencies and for review of decisions to refuse access.

2.16 The committee noted that by limiting disclosure of information through FOI requests and thereby restricting individuals' access to information held by government, many of these measures engage and limit the right to access information, a component of the right to freedom of expression. The committee further noted that the measures also engage and limit multiple other human rights which include access to information as a core part of fulfilling the right.

2.17 The committee considered that based on the explanatory information accompanying the bill, it was unclear whether the stated objective is a legitimate objective or how the measures are rationally connected to the legitimate objective. The committee also considered multiple measures in the bill may not be a proportionate limit on the right to freedom of expression. The committee considered that further information was required to assess the compatibility of the measure with human rights and therefore sought the minister's advice.

2.18 The full initial analysis is set out in *Report 7 of 2025*.[36]

Minister's response[37]

2.19 The minister advised:

> **(a) whether the current volume of FOI requests and subsequent time and cost spent processing these requests results in delays in providing individuals with access to information or results in delays more broadly in the delivery of public services**

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35 UN Human Rights Council, *Report of the Special Rapporteur on Education*, A/HRC/38/32 (2018) [46].

36 Parliamentary Joint Committee on Human Rights, *Report 7 of 2025* (26 November 2025), pp. 18–38.

37 The minister's response to the committee's inquiries was received on 16 December 2025. This is an extract of the response. The response is available in full on the committee's webpage.

An effective freedom of information (FOI) system is critical in fostering public trust in government decision-making through transparency and access to information. The Freedom of Information Amendment Bill 2025 (the FOI Bill) would amend the *Freedom of Information Act 1982* (the FOI Act) to modernise the FOI framework, reduce system inefficiencies, and address abuses of process that can consume a disproportionate amount of agency resources and impact on the right of genuine applicants to access information.

The cost of processing FOI applications is significant and has increased overtime. In 2024-25 the FOI system conservatively cost $97.99 million, a 14% increase on 2023-24 of $86.24 million, which itself was a 23% increase on 2022-23 of $70.33 million. These are significant increases compared with $36.32 million in 2010-11. The number of FOI requests received in 2024-25 was 43,456, an increase of 25% compared with 2023-24. The time required to process requests has also increased to almost 1.2 million hours in 2024-25, up from 1.1 million hours in 2023-24.

The significant increase in electronic records held by government, which continues to increase annually, contributes to the time required to process FOI requests. Agencies have also identified requests as being complex. Complex and voluminous requests impact not just on the timely provision of information to the applicant, but on all other applicants, when resources are dedicated to addressing large individual requests. The Office of the Australian Information Commissioner (the OAIC) noted in their 2024-25 annual report that the timeliness of decision-making has declined since 2017-18.

Accessing government information is an important right and the increasing costs of an FOI system need to be met, however there are not indefinite government resources available to process large and complex requests, or requests that are abusive to people and abuse government processes. Therefore, it rationally follows that increased costs for FOI comes at either an opportunity cost of not being able to provide other government services, or increased costs to the taxpayer. The FOI Bill aims to deliver efficiencies through modernising processes and reducing abuses of the system, as discussed further below.

(b) how the measures are rationally connected to (that is, effective to achieve) the legitimate objective of the bill, including whether the measures in the bill that have the effect of encouraging non-disclosure of documents may lead to greater requests for review, and whether this may undermine the timely processing of requests

To support the government to provide timely access to information the FOI Bill provides legislative reform to modernise processes, achieve efficiencies in both the FOI request processing and Information Commissioner review (IC review) process, including to address issues that have arisen in the digital age, and address abuse of process.

Further information as to how the measures are rationally connected to the legitimate objective of the FOI Bill is set out below, noting this is in addition to the information provided in the explanatory materials, which reference where measures implement or respond to recommendations of past reviews.

Modernising and efficiency measures

Amendments in Schedules 2 to 5 would promote more efficient receipt and processing of FOI applications by agencies and Ministers and more efficient conduct of IC reviews and complaints. This would translate into more efficient use of time and government resources and more efficient outcomes for applicants. These include:

- modernising the electronic submission requirements for FOI requests, applications for amendment or annotation of records, IC review applications and complaints, while allowing other forms of requests (schedule 2, part 1). This amendment was requested by the OAIC and agencies on the basis that will allow for more efficient processing of applications, reviews and complaints.
- providing a power for agencies and Ministers to refuse individual requests where the request is vexatious, frivolous, harassing or an abuse of process (schedule 2, part 4). This will allow agencies and Ministers to focus on processing genuine requests for information, and not divert resources to process requests that abuse people or government processes or cause harm.
- requiring applicants to provide a name and identifying information up front when making a request, particularly when seeking personal, commercial, financial or business information about a person (schedule 2, part 5). The OAIC in their submission to the Senate Standing Committee on Legal and Constitutional Affairs Freedom of Information Amendment Bill 2025 (**Senate Committee**) recognised that the identity of the individual is important in determining requests for personal information, and that the systems to validate the authority of a representative are also important to the credibility of the FOI system and decision-making.[38] The Department of Home Affairs advised the committee that the measure would result in efficiencies and better protect personal information from persons who should not have access to it.[39]
- being able to transfer requests to another more appropriate agency or Minister without conducting a search for a document if it is

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38 Office of the Australian Information Commissioner - submission to the Senate Standing Committee on Legal and Constitutional Affairs Inquiry into the Freedom of Information Amendment Bill 2025, paragraph 58.

39 The Department of Home Affairs - submission to the Senate Standing Committee on Legal and Constitutional Affairs Inquiry into the Freedom of Information Amendment Bill 2025, p 3.

apparent from the request that it would not be in their possession. This will allow the request to be directed to the correct agency or Minister sooner, promoting efficient handling and improving timely decision making (schedule 2, part 6).

- introducing the option for an agency to use the discretionary 40-hour cap for processing requests (schedule 3, Part 2). This cap, as recommended by Dr Allan Hawke's 2013 *Review of the FOI Act and the Australian Information Commissioner Act 2010* (the **2013 Hawke Review**) and the 2012 *Review of changes under the Freedom of Information Act 1982* (the **2012 Charges Review**), and the OAIC's submission to the Hawke Review 2013, would provide a clear and consistent standard for when a request needs to be narrowed or amended because of its unmanageability, reducing disputes and encouraging applicants to make reasonably scoped requests, which will free up agency resources to deal with other requests and result in timelier outcomes for applicants.
- streamlining the review of FOI decisions by preventing duplicative concurrent internal agency and IC review (schedule 4, part 1). This measure was put forward by the OAIC as a measure that would result in system efficiencies, freeing up resources to deal with other matters.
- streamlining extension of time arrangements agreed with an applicant (schedule 4, part 2). This ensures agencies and Ministers are provided sufficient time to make quality decisions on time and to engage constructively with applicants to extend timeframes, without additional administrative steps of engaging with OAIC, noting that in 2024-25, 79% of all IC review applications involved deemed access refusal decisions
- providing processing times for agencies in working days to reflect the actual time available to process a request, and enabling time for an agency to consult relevant agencies (schedule 4, part 4). Allowing sufficient time for agencies and Ministers to make quality decisions on time will reduce the need for an applicant to seek review or make a complaint, and should reduce the IC review caseload, noting that as referenced above, in 2024-25, 79% of all IC review applications involved deemed access refusal decisions. This will facilitate timelier IC review of those matters where the actual, rather than deemed decision is in dispute.
- creating a new power for the Information Commissioner to remit IC review applications with directions to original decision-makers for further consideration, to enable timelier decision-making and outcomes for applicants in certain circumstances (schedule 5, part 1).

- providing for the resolution of IC review applications by agreement, without requiring a formal written IC review decision (schedule 5, part 2). This measure was put forward by the OAIC as a measure that would result in efficiencies for the OAIC, freeing up resources to deal with other matters.
- streamlining the IC review process by providing that only the applicant and respondent, not third parties, are automatically a party to an IC review, without limiting their ability to be joined as a party (schedule 5, part 3). This measure was put forward by the OAIC as a measure that would result in administrative efficiencies, freeing up resources to deal with other matters.
- supporting more efficient handling of FOI complaints by the OAIC (schedule 5, part 4), freeing up more OAIC resources to manage other work. These measures were put forward by the OAIC as measures that would result in administrative efficiencies.
- being able to refuse requests for documents that would otherwise be exempt on their terms in accordance with existing exemptions under the FOI Act. This measure will reduce the cost of FOI processing by not requiring agencies or Ministers to undertake searches for documents that are clearly exempt (schedule 7, part 1).

Potential for greater requests for review

The committee seeks further information as to whether the measures in the FOI Bill that provide for circumstances in which information may be withheld from access may lead to greater requests for review, and whether this may undermine the timely processing of requests. The committee specifically references the measures to introduce a processing cap, and power for an agency to refuse access on the terms of a request in this regard.

Part 2 of Schedule 3 of the FOI Bill provides an agency or Minister with discretion to refuse to process a request as a practical refusal reason, if it would take more than a prescribed amount of time to process (described as a 'processing cap'). Agencies and Ministers are already empowered, under the FOI Act, to practically refuse a request where the work involved in processing the request would substantially and unreasonably divert the resources of the agency from its other operations. In order to rely on these provisions an agency must consult with the applicant to provide an opportunity to revise the request. An agency or Minister must also take reasonable steps to assist an applicant to revise the request so that the practical refusal reason no longer exists (section 24AB(3)). The proposed amendment to include a processing cap would provide a clear standard for when a request needs to be narrowed or amended because of its unmanageability. The amendment implements a recommendation of the OAIC in its submission to the Hawke Review 2013, which was adopted by that review. In making its submission the OAIC noted that a processing cap

would 'represent a predictable measure in the FOI process, striking a balance between an individual's right to access and an agency's interest in managing the processing resource burden'.[40] For this reason, it is not expected that the amendment would give rise to greater requests for review. Rather, it will be clearer for applicants why a broadly scoped or voluminous application cannot be processed.

The measure provided in Part 1 of Schedule 7 will allow an agency to refuse a request on its terms. This amendment is reliant on the existing exemptions in the FOI Act, for example national security or law enforcement exemption, and these exemptions have always been subject to IC review. Therefore, it is not anticipated that this measure will significantly increase requests for IC reviews over and above any IC reviews that may be sought by decision-makers relying on existing exemptions.

Part 4 of Schedule 2 provides for amendments that empower agencies and Ministers to decline to handle repeat or vexatious requests or requests that are an abuse of process. Further rationale for this measure is set out below. A safeguard around the use of this provision is that the decision would be subject to IC review. However, as an applicant is not prevented from making a new request and having that request processed where it is not vexatious, frivolous or abusive, this may be the approach adopted by some applicants rather than seeking IC review. Without the proposed amendments agencies and Ministers are obligated to continue to engage with vexatious and abusive applicants and process such requests, reducing their capacity to engage on genuine requests and presenting work, health and safety issues for FOI processing officers. As explained in Services Australia's response to the Senate Committee's questions on notice, the usual systems the agency applies to deal with customer aggression and counterproductive behaviour are unavailable under the FOI Act, which means the agency is unable to restrict or refuse to progress an FOI request from aggressive customers.[41]

Other measures

The amendments to the Cabinet exemption (schedule 7, part 2) and to the public interest considerations as they apply to the deliberative processes exemption (schedule 7, part 3) update and clarify the operation of these existing exemptions in the FOI Act.

Whilst there may be some initial increase in reviews and appeals as these amendments are interpreted and applied by review and appeal bodies, as these are amendments to existing exemptions, it is not anticipated that

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40 Office of the Australian Information Commissioner - submission to Dr Allan Hawke's 2013 Review of the FOI Act and the Australian Information Commissioner Act 2010 (the 2013 Hawke Review), p 77.

41 Services Australia - response to questions on notice from the Senate Legal and Constitutional Affairs Legislation Committee, Inquiry into the Freedom of Information Amendment Bill 2025 - IQ25-000018.

there will be an ongoing increase in reviews and appeals arising from these reforms which are designed to improve the clarity and operation of the provisions.

For the above reasons, the Government does not consider that the proposed amendments will lead to greater requests for review in a way that would undermine the timely processing of requests or detract from the efficiency benefits the FOI Bill is intended to achieve.

(c) whether the measure to refuse requests that are considered vexatious or frivolous is sufficiently circumscribed

The Government considers the amendments in Part 4 of Schedule 2 that would provide agencies and Ministers with the power to refuse individual requests where the request is vexatious, frivolous, harassing or an abuse of process, are sufficiently circumscribed. The circumstances for refusal outlined in proposed section 15AD of this schedule are appropriate and a proportionate limitation of the right to access information.

Managing vexatious and abusive requests has been a longstanding issue for agencies, raised in the context of both the 2013 Hawke Review and the 2023 Senate Standing Committee on Legal and Constitutional Affairs Inquiry into the operation of Commonwealth Freedom of Information (FOI) laws (2023 Senate Inquiry). The OAIC, in its submission to the 2013 Hawke Review, recommended that the FOI Act be amended to permit agencies to decline to handle a repeat or vexatious request or requests that are an abuse of process, without impacting the applicant's ability to make other requests or remake the request that was not accepted. The OAIC noted that this would allow agencies to promptly and efficiently manage requests of this nature. As identified in the Australian Public Service Commission's submission to the FOI Bill inquiry, 'the current inability for agencies to refuse vexatious requests unreasonably interferes with the operations of an agency, impacts an agency's resources to deal with other FOI requests and causes a risk of psychological harm in the workplace, including stress, burnout and turnover of staff.'[42]

To the extent the amendments limit an applicant's right to freedom of expression, this is considered necessary to protect the liberty and security of agency staff, as enshrined by Article 9 of the International Covenant on Civil and Political Rights (ICCPR). During the development of the FOI Bill and in subsequent testimony to the Senate Committee as part of this inquiry, agencies provided many examples of applicants engaging in abuse of staff responsible for processing FOI requests. The harms reported are broad ranging, such as staff being subject to verbal abuse, threats, experiencing psychosocial stress and feeling physically unsafe. Representatives from

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42 Australian Public Service Commission - submission to the Senate Legal and Constitutional Affairs Legislation Committee Inquiry into the Freedom of Information Amendment Bill 2025, October 2025, p 2.

Services Australia gave evidence to the FOI Bill inquiry of harms of this nature, noting that even where such matters are referred to the police, the agency is required to process the FOI application.[43] It is not reasonable to expect staff in agencies to tolerate requests for information that are made in abusive, threatening or excessive ways, and the amendments will assist to better protect staff from the fear of physical injury and intentional infliction of mental injury.

Proposed section 15AD of the FOI Bill was intentionally drafted to reflect terms that have legal precedent. It mirrors, in a narrower form, those powers already available under the FOI Act to the Information Commissioner (see paragraph 54W(a)(i) of the FOI Act). The provision also draws from the *Family Law Act 1975* (Part XIB divisions 1 and 1A) and Federal Circuit and Family Court of Australia Act 2021 (section 7).

The Explanatory Memorandum that introduced this definition into the federal courts (Access to Justice (Federal Jurisdiction) Amendment Bill 2011) outlined that the definition was based on model law for dealing with vexatious proceedings that was endorsed by the Standing Council of Attorneys-General in 2003, and was intended to provide consistency and uniformity. The provision also draws from examples in other Australian jurisdictions and internationally which allow for individual requests to be refused as vexatious.[44]

Proposed section 15AD has been drafted to focus on the outcomes or impacts of a request and focus particularly on harm and abuse of process. The Government does not accept the example put forward by the committee at paragraph 1.19 that the vexatious application power could enable an agency to refuse requests from campaigners seeking environmental decision-making information. Such requests would be consistent with the objects of the FOI Act and therefore would not be considered an abuse of process. The vexatious application power, as explained in the explanatory memorandum, concern those applications where they are designed to disrupt an agency, or cause harm, and not genuinely seek information.

Importantly, the FOI Bill includes appropriate restrictions on the power of agencies and Ministers to refuse to deal with vexatious requests. The ability to refuse to deal with a vexatious request is limited to a single request, and the amendments would not prevent an applicant from making new

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43 See Official Committee Hansard, Senate Legal and Constitutional Affairs Legislation Committee, Freedom of Information Amendment Bill 2025, public hearing Friday 17 October 2025, page 11; Services Australia Answer to Question on Notice: 1Q25-000019.

44 Section 14(1), Freedom of Information Act 2000 (UK); section 43, Freedom of Information Act 2016 (ACT); section 20, Right to Information Act 2009 (Tas). South Australia also provides for the refusal of vexatious applications where the application is part of a pattern of conduct that amounts to an abuse of the right of access or is made for a purpose other than to obtain access to information, see section 18(2a) Freedom of Information Act 1991 (SA).

requests. The amendments do not impact a person's right to access information beyond the individual request that was refused. A decision of an agency or Minister to refuse to deal with a request on the basis that it [is] vexatious is reviewable by the Information Commissioner, and the power to declare an applicant to be vexatious would remain solely with the Information Commissioner. Further, the FOI Guidelines issued by the Information Commissioner under section 93A of the FOI Act can provide guidance for the application of such provisions, and such guidance must be considered by agencies and Ministers.

(d) why expanding the grounds upon which the Information Commissioner can declare an individual to be vexatious is considered necessary, and whether the measure is sufficiently circumscribed

The Government does not consider that the Bill is expanding the grounds upon which the Information Commissioner can declare a person to be vexatious, but is clarifying them. The amendment responds to evidence raised in the 2023 Senate Inquiry that decision-making agencies may face difficulties using provisions in the legislation that are designed to protect the Commonwealth from vexatious applicants.

Division 1 of Part VIII of the FOI Act allows the Information Commissioner to declare a person to be a vexatious applicant if they are satisfied the grounds in section 89L of the FOI Act exist. Subsection 89L(4) is an inclusive definition, and therefore an applicant may be declared vexatious for a range of behaviours. The FOI Bill provides further specificity for how such a declaration can be used by adding unambiguous terms of 'insulting' and 'abusing' and is therefore sufficiently circumscribed.

(e) why it is considered appropriate that individuals seeking access to documents that do not relate to their personal information must provide their name and may need to provide proof of identification

The amendments in Part 5 of Schedule 2 require any person seeking access to non-personal information under the FOI Act to provide their full name and, in some circumstances, provide proof of their identity. The amendments seek to achieve a range of legitimate objectives.

The amendments seek to ensure the effective operation of the provisions in the FOI Act that provide for the Information Commissioner to make a vexatious applicant declaration. To ensure the effective use of Commonwealth resources it is necessary for decision-making agencies to have fair and efficient processes for obtaining vexatious applicant declarations, and for these to effectively operate. The existing vexatious applicant declaration provisions are currently of limited effectiveness in the context where a request can be made anonymously or under a pseudonym, which makes it difficult to prove one person is making the request.

The amendments are also intended to protect the safety and wellbeing of agency officers by discouraging applicants from engaging in inappropriate

and abusive communication when making a request. It is considered that such behaviour is less likely when the applicant can be identified and the FOI Act provides for effective consequences (for example, the making of a vexatious applicant declaration that can be meaningfully enforced).

The amendments are also intended to ensure agencies and Ministers can appropriately assess exemptions. The Government notes that the requirements in Part 5 of Schedule 2 to provide personal information as part of a request should not impact the right of a person to access information. Section 11 of the FOI Act forbids an agency from taking into account the applicant's reasons for making a request (or the agency's belief as to those reasons). However, the identity of the applicant can be relevant to understanding the likely consequences of disclosure, which is a legitimate consideration under the FOI Act.

As the committee has acknowledged in its report, Australian Privacy Principle (APP) 2 of the *Privacy Act 1988* the (Privacy Act) provides that an individual must have the option when dealing with an entity regulated by the Privacy Act of not identifying themselves, or of using a pseudonym. However, the Privacy Act is principles-based law which can be overridden where it is reasonable, necessary and proportionate to the policy objective. The Government considers that requiring applicants to include personal information as part of request will assist in improving the operation of the FOI Act as set out above, and is reasonable, necessary and proportionate to achieve this purpose. The FOI Bill's requirement to provide personal information when lodging a request triggers the exception at APP 2.2(a) that the entity is required or authorised by or under law to deal with individuals who have identified themselves.

The Government notes that the amendments also provide that proof of identity is not required for another person whom the applicant is acting on behalf of, where the request does not concern that person's personal, business, commercial or financial information. This reflects that there may be situations where an applicant may wish to obtain non-personal information anonymously through another applicant, including whistleblowers seeking to reveal wrongdoing. The revised Explanatory Memorandum to FOI Bill provides the example of a community group lodging a request on behalf of an individual.[45] However, it would also be possible for an individual to lodge a request on behalf of another individual without providing details of the person who the request is made on behalf of.

(f) why it is considered that 40 hours represents a reasonable period to allocate to a request, and whether any less rights restrictive alternatives

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45 Freedom of Information Amendment Bill 2025, Supplementary Explanatory Memorandum, available at: www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result>bId=r7371

(than rejecting requests which would involve 40 hours of work or more) could achieve the same objective

Part 2 of Schedule 3 of the FOI Bill provides an agency or Minister with discretion to refuse to process a request as a practical refusal reason, if it would take more than a prescribed amount of time to process (described as a 'processing cap'). The introduction of a discretionary processing cap reflects the need for appropriate balance between an applicant's access rights and the impact on agency resources in deciding access.

As acknowledged in the 2012 Charges Review and the OAIC's submission to the 2013 Hawke Review, 'it is generally accepted that government agencies should not bear an unlimited obligation to provide access under the FOI Act to all non-exempt information.'[46]

As the committee has acknowledged in its report, the default minimum processing cap would be 40 hours, although regulations may prescribe a higher number of hours of work. Use of the processing cap would be discretionary, and it would remain open to agencies or Ministers to respond to requests that would take more than 40 hours (or a greater amount as determined in regulations) to process.

A minimum discretionary processing cap of 40 hours is reasonable and justified as it constitutes just over one week's ordinary hours of work for a full-time employee under Australia's National Employment Standards.[47] It is also above the current average processing time of 3.6 days per FOI request received.[48] As acknowledged in the department's submission to the Senate Committee, a 40-hour processing cap is also comparable to likeminded overseas jurisdictions, such as the United Kingdon (UK) and Scotland (which operates separately to the UK's FOI system for Scottish public authorities). These jurisdictions enable entities to refuse a request if the cost of complying with the request would exceed a set limit, generally £600 across both jurisdictions.[49] This equates to a 'processing cap' of up to 40 hours.[50]

The Government considers there will be sufficient opportunities afforded to applicants to revise or narrow the scope of their request, such that the introduction of a processing cap would not inappropriately restrict applicants from requesting government-held information. In particular, the consultation processes under sections 24 and 24AB of the FOI Act, which

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46 OAIC, *Review of freedom of information legislation, submission to the Hawke Review*, 2012, p. 54

47 Fair Work Ombudsman, Maximum weekly hours – Fair Work Ombudsman, 2025.

48 OAIC Annual report 2024–25 – volume 2 p. viii

49 Section 12, *Freedom of Information Act 2000* (UK) and section 12, *Freedom of Information (Scotland) Act 2002*.

50 Scottish Information Commissioner, What might it cost? I Scottish Information Commissioner; Information Commissioner's Office (United Kingdom), Charging a fee and cost limits I ICO, 2023.

the committee has referenced at paragraph 1.27 of its report, would also apply to the use of the processing cap. Prior to refusing a request under section 24, an agency or Minister must undertake the 'request consultation process' outlined at section 24AB of the FOI Act. This applies with respect to all 'practical refusal reasons' provided at section 24AA, which would include the processing cap (see item 10, Part 1 of Schedule 3). Accordingly, prior to refusing a request due to the processing cap, an agency or Minister would first be required to give an applicant written notice of its intention to refuse the request (section 24AB(2)), with a 14-day consultation period commencing the day after the written notice is provided. During this consultation period, an agency or Minister must take reasonable steps to assist an applicant to revise the request so that the practical refusal reason no longer exists (section 24AB(3)).

In response to additional concerns raised by the committee at paragraph 1.27 of its report, the Government notes there are a range of safeguards on the application of the processing cap. The FOI Bill provides a power for regulations to prescribe the matters (if any) an agency or Minister must have regard to in determining if the processing cap is likely to be exceeded (see item 14, Part 2 of Schedule 3). Agencies and Ministers would also be required to have regard to any guidelines issued by the Information Commissioner under section 93A of the FOI Act, where relevant. There is also a substantive body of decisions made by the Information Commissioner and the Administrative Review Tribunal (ART) (formerly the Administrative Appeals Tribunal), which provide comment on the approaches used by agencies or Ministers to determine the hours required to process a request. Moreover, applicants are able to seek internal and IC review of practical refusal decisions, which would include a decision to refuse a request due to the processing cap.

(g) what fee structure and circumstances for exemptions are proposed to be included in the regulations

As identified by the committee, the FOI Bill will create a power in the FOI Act to enable an application fee to be specified in the regulations for access requests, internal reviews and Information Commissioner reviews. The introduction of any regulations imposing fees is subject to the passage of the FOI Bill. Any regulations imposing fees will be informed by further consultation, analysis and costings.

New section 93C(4), as inserted in the FOI Act by item 6 in Schedule 6 of the FOI Bill, requires that any fee regulations also provide for waiver or remission of fees in circumstances of financial hardship. Further circumstances in which fees should be refunded or an applicant exempt from paying the fee would be provided in the regulations, which are a disallowable instrument.

(h) what safeguards are in place to ensure that any application fees would not amount to an unreasonable impediment to access information

As a legislative instrument, the regulations would be subject to appropriate scrutiny and parliamentary oversight, including assessment by the Senate Standing Committee for the Scrutiny of Delegated Legislation. The regulations would also be subject to disallowance. As the committee acknowledges at paragraph 1.29 of its report, fees will not apply to requests for an individual's own personal information, either made by that individual or an authorised representative on their behalf. This is an important caveat, noting that a majority of FOI requests are for personal information. For example, in the 2024-25 financial year 74% (32,109) of requests sought access to personal information. Requests for other government information comprised 26% of total requests.

The new regulation making power contained in the FOI Bill does require any fee regulations to provide for waiver or remission of fees in circumstances of financial hardship. The regulations can also provide for broader circumstances in which fees should be refunded or an applicant exempt from paying the fee. Enabling such safeguards to be provided in the regulations will provide greater flexibility in implementing the application fee framework. This will enable the government to modify the operation of any application fees to reflect relevant considerations over time.

(i) why it is considered proportionate to refuse access on the terms of a request rather than considering the documents themselves

This measure would achieve efficiencies and will allow agencies and Ministers to more quickly resolve requests of this kind. It recognises that conducting searches and fully processing requests for documents that are clearly exempt and therefore a decision refusing access is anticipated, is not an efficient use of public resources. Conducting searches for relevant documents is a significant part of processing an FOI request, due to the significant volume of documents in the possession of each agency and Minister (e.g. in the Attorney-General's Department alone, between April 2024 - April 2025, over 1.1 million electronic documents were created on its content manager system), and the high standard that is required of searches (the FOI Guidelines at paragraph 3.143 provide that 'a thorough and systematic search must be undertaken and documented'). Preparing document packages to provide the applicant with access to the documents, and identifying each relevant document in the accompanying statement of reasons, is also a significant part of the processing time. This measure would reduce the burden on agencies and Ministers in respect of the above.

This measure has a specific narrow application, which supports the principle noted by the committee at paragraph 1.32, that 'any exceptions to disclosure of government information should be clearly and narrowly drawn and subject to strict harm and public interest tests.'

Agencies and Ministers can only exercise this power where they have had regard to the nature of the document as described in the request and the application of exemptions in Part IV of the FOI Act to that document. The

new provision would also effectively only apply where an agency or Minister can assess from the terms of a request that the document would be exempt in full, or where the applicant has made clear they would not wish to receive an edited copy, because granting partial access to a document would necessarily require locating and assessing the document itself. Further, as the committee notes at paragraph 1.33, the measure is subject to safeguards. Applicants are required to be advised that this provision was relied upon and will be able to seek review of the decision to rely on this provision, or be able to lodge another request in different terms. The committee raises a concern that this provision may lead to more applications for review and may delay access to documents if the decision is overturned. However, the reasons for exemption remain the same as presently available to decision-makers and a decision to apply an existing exemption is already able to be the subject of an IC review.

(j) why it is considered appropriate to include and expand Cabinet documents as a class exemption, and whether any less rights restrictive alternatives could achieve the same objective (for example, to consider the documents individually and include exemptions based on harm associated with disclosure and a public interest test)

The amendments to the Cabinet exemption in Part 2 of Schedule 7 of the FOI Bill are intended to ensure it appropriately protects Cabinet confidentiality and the principle of collective ministerial responsibility, which is central to the Cabinet system of government. The Cabinet exemption has existed in the FOI Act since its enactment in 1982, as an absolute exemption. In relation to Cabinet documents, the second reading speech stated: "It is of the essence of Cabinet government that the deliberations of Cabinet and of the Executive Council should be protected from mandatory disclosure". The Government continues to consider it appropriate that the Cabinet exemption remain an absolute exemption in Part IV, Division 1 of the FOI Act. The amendments in the FOI Bill are intended to ensure the Cabinet exemption strikes an appropriate balance between protecting Cabinet confidentiality and providing appropriate limits on the exemption by making clearer the intended scope of the provisions and better reflecting how the Cabinet process operates in practice.

The FOI Bill would replace existing paragraph 34(1)(a) to refer to a document prepared by a Minister, on a Minister's behalf or by an agency; and where a substantial purpose for its preparation was submission for the Cabinet's consideration. The change to reference who the document has been prepared by is intended to reflect how Cabinet documents are developed in practice, which may involve, for example, agencies or ministerial offices preparing or commissioning documents for the Cabinet's consideration before a Minister has formally proposed that the related matter be considered by the Cabinet.

The FOI Bill would also replace existing paragraph 34(1)(c), which exempts a document brought into existence for the dominant purpose of briefing a

Minister on a document to which paragraph (a) applies, with a provision that exempts a document where a substantial purpose for its preparation was to brief a Minister in relation to issues to be considered by the Cabinet. The change is intended to amend the operation of the provision by focusing on the nature of a relevant document as one that briefs a Minister about the Cabinet's considerations, rather than just being limited to briefing a Minister on a document submitted to the Cabinet for its consideration. This would capture cases, for example, where a matter is presented to the Cabinet orally and without papers.

The amendments outlined above involve replacing the current 'dominant purpose' test with a 'substantial' purpose test. Prior to the reforms to the FOI Act in 2010, the Cabinet exemption referred only to documents created for the 'purpose' of submission for Cabinet consideration, without any qualifier. Since 2010, the 'dominant' purpose test has been interpreted as 'the ruling, prevailing, paramount or most influential purpose'.

The Bill's 'substantial' purpose test is intended to recognise that documents may be created for multiple purposes and may disclose, in substance, a matter for consideration by the Cabinet, even if they were not created for the 'dominant' purpose of the Cabinet's consideration, or briefing a Minister on a document to be submitted for the Cabinet's consideration. As noted in the explanatory memorandum, the Cabinet purpose must still be of substance, real and not insignificant, trivial or nominal, even if it is not the dominant purpose.

In considering the approach to amending the Cabinet exemption, including the 'purpose' threshold, the approaches taken in other jurisdictions were considered. All Australian state and territory jurisdictions provide for an exemption of certain Cabinet records or decisions. In Queensland information is exempt for 10 years after the relevant date if 'it has been brought into existence for the consideration of Cabinet' (paragraph (1)(b), item 2 of Schedule 3, *Right to Information Act 2009* (Qld)). Guidelines issued by the Queensland Office of the Information Commissioner state that 'purpose' does not mean 'dominant' or 'sole' purpose', and it 'will be sufficient if one of the reasons for bringing it into existence was for the consideration of Cabinet'.

The amendments do not adopt the closing observation of the Royal Commission into the Robodebt Scheme to repeal section 34. As outlined in the Australian Government's response to the report of the Robodebt Royal Commission, the Government believes it is critical that the Cabinet, as the key decision-making body of government, be comprehensively informed in its deliberations. To achieve this, the Cabinet must have the benefit of frank and fearless advice from Ministers and senior public servants. The principle of collective responsibility requires that Ministers should be able to express their views frankly [in] meetings of the Cabinet in the expectation that they can argue freely in private while maintaining a united front in public when decisions have been reached. For these reasons, the Government does not

support repeal of section 34 and has proposed amendments to ensure the exemption more clearly and accurately reflects how the Cabinet process works in practice, and appropriately protects Cabinet information in its different forms. However, the proposed amendment to subsection 34(7) responds to an issue highlighted in the Robodebt Royal Commission report by making it clear that the mere presence or absence of any kind of security marking or other feature is not sufficient to determine whether or not the document is exempt under section 34.

While the current exemption and the amendments interact with the right to freedom of expression in Article 19 of the ICCPR, this is justified on the basis of pursuing the legitimate objective of appropriately protecting confidentiality of the Cabinet and the principle of collective ministerial responsibility. The amendments to the existing Cabinet exemption are necessary to more closely reflect how the Cabinet process works in practice.

(k) how does including factors weighing against disclosure for public interest exemptions as it relates to the deliberative process of government, rather than proactively disclosing information, ensure the effectiveness and integrity of government decision-making

Part 3 of Schedule 7 of the FOI Bill would amend the public interest test at section 11B of the FOI Act to include public interest factors which would weigh against disclosure of a document which is conditionally exempt under the deliberative processes exemption in section 47C. The deliberative processes exemption recognises that governments need to be able to run internal operations effectively and have time to consider advice and options provided by the Australian Public Service (APS) in the course of considering options or making a decision.

The Government considers it is appropriate to give recognition in the FOI Act that it is a relevant consideration in assessing the public interest in disclosure, whether disclosure would inhibit communications between agency officials, and agencies and Ministers that are essential for considered, yet timely, decision-making. Other like-minded jurisdictions such as the United Kingdom and New Zealand recognise such factors as relevant considerations in assessing the public interest in disclosure of information.[51]

A number of reviews have examined the deliberative processes exemption and its impact on the effectiveness of government operations and decision-making, which informed the amendments in the FOI Bill. The 2013 Hawke Review noted that the absence of a clear indication of harm that the exception is designed to protect results in the exemption being subject to differing interpretations and difficult to apply. Further, the 2015 Shergold review *Learning from Failure Report* (the **2015 Shergold Review**) found that

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51 For example, section 9 of the Official Information Act 1982 (New Zealand); section 35, Freedom of Information Act 2000 (UK).

the operation of the FOI Act had the unintended consequence of constraining the content, form and mode of advice presented to ministers, and that 'the provision of frank advice and the benefits of a frank exchange of views as part of the deliberative process of government'.[52] These findings were reiterated in the 2019 Thodey Review *Our Public Service, Our Future: Independent Review of the Australian Public Service* (2019 Thodey review).

Depending on the content and context, disclosure of deliberative material can have an impact on the effective function of government. For example, the disclosure of information generated in the early and formative stages of a policy development process, particularly informal and exploratory thinking or discussions, may inhibit the free and frank exchange of opinions that is necessary for the development of robust policy advice within and to government. Similarly, disclosure of internal and inter-agency consultation on draft policy proposals, may inhibit officials in future processes, from discussing each other's work or positions, or critiquing the views advanced by others in a free and frank way - which is crucial to the quality and robustness of the final policy that is developed. Disclosure of this type of material could also have the effect of a preference for more formal communications, which could mean consultation takes longer, undermining the speed and efficiency of the policy making process. The amendments address these risks and support the integrity of government decision-making processes by clarifying that these are relevant factors when considering the public interest of disclosing a document which is conditionally exempt under the deliberative processes exemption.

Regarding the committee's question about relying on proactively disclosing information to ensure the effectiveness and integrity of government decision-making, the amendments in Part 3 of Schedule 7 in the FOI Bill do not affect the ability of Ministers and agencies to proactively disclose information, including existing requirements for agencies to disclose information under the Information Publication Scheme in Part II of the FOI Act (the IPS). The FOI Bill also contains amendments to the objects provision of the FOI Act to include reference to 'proactively' publishing information, reflecting how agencies should approach the IPS.

(l) whether the factors weighing against disclosure for public interest exemptions as it relates to the deliberative process of government are sufficiently circumscribed

The FOI Bill would amend the public interest test in section 11B of the FOI Act, to add three factors to consider against giving access to a document that is conditionally exempt under section 47C.

Section 47C provides a public interest conditional exemption in relation to deliberative matter obtained, prepared or recorded in the course of, or for the purposes of deliberative processes involved in the functions of an

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52 Peter Shergold, *Learning from Failure Report*, 2015, p. 121.

agency, a Minister or the Commonwealth Government. It includes exceptions in relation to operational information, purely factual material and reports (as specified in subsection 47C(3)). The deliberative processes exemption was applied in 6% of decisions in 2024-25.

The current public interest provisions at section 11B include factors favouring access at subsection 11B(3) and 'irrelevant factors' at subsection 11B(4) which must not be taken into account. As amended, section 11B would also include factors which would weigh against the disclosure of conditionally exempt material under section 47C.

These factors relate to whether disclosure would:

- prejudice the frank or timely discussion of matters or exchange of opinions between participants in a deliberative process of government
- prejudice the frank or timely provision of advice to or by an agency or Minister, or the consideration of that advice after it is provided,
- prejudice the orderly and effective conduct of a government decision-making process.

The committee raises a concern (at paragraph 1.40) at the breadth of the proposed factors and seeks further information as to whether the measure including these factors weighing against disclosure is sufficiently circumscribed and therefore a proportionate limitation on the right to freedom of expression. The Government considers this is the case for the following reasons.

The amendments proposed do not otherwise affect the public interest test in section 11B or alter the first step of determining that a document is conditionally exempt under section 47C.

The exemption remains a conditional exemption, subject to the public interest test. In applying the exemption, a decision-maker would still need to weigh the various public interest considerations for and against disclosure. The factors favouring access in the public interest, and factors which must not be taken into account, would continue to apply. Further, the existing parameters of the section 47C exemption will continue to apply, for example operational information and purely factual material will not attract the deliberative processes exemption and neither will the information covered by subsection 47C(3).

The FOI Act involves a balancing of the public interest in transparency, with other legitimate protected interests which may justify non-disclosure. Ensuring the continued effectiveness and integrity of government decision-making (confidentiality of deliberative processes within or between public bodies during the internal preparation of a matter) is a recognised legitimate protected interest which may justify non-disclosure.

As outlined in the explanatory memorandum to the Bill, the proposed amendments take into account commentary and recommendations of the 2013 Hawke Review, the 2015 Shergold Review and the 2019 Thodey Review, each of which considered the operation of the deliberative processes exemption. The 2013 Hawke Review defined the operation of existing section 47C as allowing 'a decision-maker to consider whether disclosure would be detrimental to the proper workings of government by impairing the policy development process, particularly in relation to the development of sensitive policy matters', further noting that 'the absence of a clear indication of harm that the exemption is designed to protect results in the exemption being subject to differing interpretations and difficult to apply.

The purpose of the amendments is to provide greater statutory clarity around the harm the existing deliberative processes exemption is designed to protect. Without this, there is no clear statutory guidance for what considerations may apply.

The amendments ensure an appropriate balance in weighing the public interest favour of access, such as Australian's being informed of the processes of their government and its agencies on the one hand, against the public interest against access, such as prejudice to the effective working government and its agencies, on the other. The framing of the factors has been informed by review of other Westminster jurisdictions, including the United Kingdom and New Zealand, which recognise similar factors as those proposed to be inserted into the FOI Act as relevant considerations in assessing the public interest in disclosure.

It is the case that the current operation of the FOI Act already allows decision-makers discretion in working out whether access to a conditionally exempt document would, on balance, be contrary to the public interest under subsection 11A(5). The FOI Guidelines issued by the OAIC note that factors weighing against access will depend on the circumstances, and include a non-exhaustive list of public interest factors against access.

For the above reasons, the Government considers that the amendments are appropriately circumscribed.

(m) how the measure to transfer or lapse requests for official documents of a minister is proportionate with the right to access information, including why it is considered appropriate not to provide for review to the Information Commissioner where a minister ceases to hold the relevant office.

The amendments in Schedule 8 of the FOI Bill respond to the decision of the Full Court of the Federal Court of Australia in *Attorney-General v Patrick* [2024] FCAFC 126 which has raised complex issues in respect of requests made to Ministers and the established convention that deliberative documents of a previous government are not provided to an incoming government.

The committee raises a concern that the Bill does not require a Minister to transfer any active requests before they leave office and that applicants are not able to make an application for review with the Information Commissioner in relation to an access refusal decision if the relevant Minister ceases to hold the relevant office.

Schedule 8 of the FOI Bill inserts new section 16B, which provides for the discretionary forwarding of an ongoing FOI request or review if the Minister believes they will cease to hold the relevant office, but also for the automatic forwarding of an active request to the default agency in circumstances where the outgoing Minister has not forwarded the active request under proposed subsection 16B(1).

The definition of active request inserted at subsection 4(1) includes both the period prior to a decision being made on a request and ongoing IC review or ART review proceedings. Where a request is automatically forwarded prior to the outgoing Minister having made a decision, the usual review rights will apply to any decision made by the agency in respect of the request.

In the context of the above, the amendments in Schedule 8 which operate to prevent an application for IC review or ART review to be made after the outgoing Minister ceases to hold the relevant office are considered appropriate. They seek to ensure that new Ministers are not made party to an FOI matter or review process where there are practical limitations on their capacity to engage in the proceedings. They are supported by other amendments in the Schedule which provide for review proceedings to be commenced (in the circumstances where a new Minister or agency has made a decision on a request that has been forwarded under section 16B) or continued (in the circumstances where an ongoing IC review or ART review proceeding has been forwarded under section 16B).

To the extent the amendments limit review rights, the amendments are anticipated to have minimal impact on the amount of government information withheld from the public. Requests to Ministers comprise a very small percentage of total FOI requests made to agencies and Ministers (1.2% in 2024-25) and the amendments will only restrict review rights in limited circumstances associated with cessation of office.

Concluding comments

International human rights legal advice

Legitimate objective

2.20 As set out in the preliminary analysis, the general objective pursued by the bill is to improve efficiencies in the FOI framework. While administrative convenience, in and of itself, is unlikely to be sufficient to constitute a legitimate objective, if the FOI framework is delayed so as to not be able to facilitate the timely processing of requests for information, this in itself may restrict access to information and not be compatible with the right to freedom of expression. In this regard, further information was sought

from the Attorney-General as to whether the current volume of FOI requests and subsequent time and cost spent processing these requests results in delays in providing individuals with access to information or in delays more broadly in delivery of public services.

2.21 The Attorney-General advised that the cost of processing FOI applications is significant and has increased over time. In 2024–25 the FOI system conservatively cost $97.99 million, a 14% increase on 2023–24, which itself was a 23% increase on 2022–23. The Attorney-General also advised that the number of FOI requests received in 2024–25 was 43,456, an increase of 25% compared with 2023–24. The Attorney-General stated that the time required to process requests has also increased to almost 1.2 million hours in 2024–25, up from 1.1 million hours in 2023–24. The Attorney-General further advised that complex and voluminous requests impact on the timely provision of information to the applicant as well as other applicants because resources are dedicated to addressing large individual requests. The Attorney-General referred to the Office of the Australian Information Commissioner's (OAIC) 2024–2025 Annual Report, which reported:

> In 2024–25, 73% of all FOI requests were processed within the applicable statutory timeframe: 67% of all personal information requests and 85% of all other (non-personal) requests. The timeliness of decision making for personal information requests further declined from 69% in 2023–24 to 67% in 2024–25, while the timeliness of decision-making for 'other' requests increased from 84% in 2023–24 to 85% in 2024–25.
>
> Accordingly, there was an overall minor deterioration (1%) of FOI requests processed within the applicable statutory timeframe (73% in 2024–25 compared with 74% in 2023–24).
>
> Generally, timeliness of decision-making has declined since 2017–18, when 85% of all FOI requests were decided within the relevant statutory timeframe (86% of all requests for access to personal information and 85% of all other (non-personal) requests).[53]

2.22 Based on the OAIC's data, there has been a greater decline with respect to timeliness of decision making for personal information requests; whereas timeliness of decision making for other (non-personal) requests has remained steady (both in 2017–18 and 2024-25 85% of all other (non-personal) requests were decided within the statutory timeframe). The OAIC's 2024–25 Annual Report also noted that timeliness of decision making depended on the relevant agency and minister, with four agencies and one minister deciding less than 50% of their FOI requests within the

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53 Office of the Australian Information Commissioner, *2024–2025 Annual Report*, Volume 2, p. 19.

statutory time in 2024–25.[54] In contrast, other agencies responded to all FOI requests within the statutory timeframe.[55] The OAIC's data indicates a general decline in timeliness of decision-making, however the OAIC did not address the reasons for this decline in timeliness. It is therefore not clear the extent to which the increasing volume of FOI requests (and consequent time and cost spent) correlates with the decline in timeliness of processing FOI requests.

2.23 While it is evident that there has been an increase in volume of FOI requests in recent years and the time and cost spent on processing these requests has also increased, it remains unclear whether the consequence of this trend has been significant delays in providing individuals with access to information (noting that there does not appear to be a decline in timeliness with respect to processing other (non-personal) FOI requests from 2017–18 to 2024–25) or in delays more broadly in delivery of public services. The Attorney-General stated that it rationally follows that increased costs for FOI comes at either an opportunity cost of not being able to provide other government services, or increased costs to the taxpayer. However, the Attorney-General did not provide evidence regarding which, if any, public services are not being delivered as a result of the increased time and cost spent on processing FOI requests.

2.24 If the current cost and time taken to process FOI requests is delaying access to information and resulting in public services not being delivered, improving the efficient operation of the FOI framework in this context may constitute a legitimate objective. However, without further evidence to demonstrate the correlation between the time and cost spent on processing FOI requests and the decline in delivery of public services, it is not possible to conclude that the measures pursue a legitimate objective for the purposes of international human rights law.

Rational connection

2.25 Under international human rights law, it must also be demonstrated that any limitation on a right is rationally connected to, or effective to achieve, the objective being sought. The Attorney-General advised that the various amendments to the FOI Act would translate to more efficient use of time and government resources and more efficient outcomes for applicants. For example, the Attorney-General advised that modernising the electronic submission requirements for FOI requests and other applications will allow for more efficient processing of these requests and applications. Further, the Attorney-General advised that providing a power for agencies and ministers to refuse individual requests where the request is vexatious, frivolous, harassing or an abuse of process will allow agencies and ministers to focus on

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54 Office of the Australian Information Commissioner, *2024–2025 Annual Report*, Volume 2, p. 19. The agencies are Home Affairs (37%); Aboriginal Hostels Limited (33%); Workplace Gender Equality Agency (29%); and NDIA (33%). The Minister for Immigration and Citizenship decided only 33% of requests within the statutory timeframe.

55 Office of the Australian Information Commissioner, *2024–2025 Annual Report*, Volume 2, p. 21.

processing genuine requests for information, and not divert resources to process requests that abuse people or government processes or cause harm. The Attorney-General also advised that being able to transfer requests to another more appropriate agency or minister without conducting a search for a document will allow the request to be directed to the correct agency or minister sooner, promoting efficient handling and improving timely decision making. Further, the Attorney-General stated that the discretionary 40-hour cap for processing requests is aimed at encouraging applicants to make reasonably scoped requests which may free up agency resources to deal with other requests and result in timelier outcomes for applicants.

2.26 Further information was also sought from the Attorney-General as to whether measures in the bill that encourage non-disclosure of documents, for example measures to introduce a processing cap[56] and discretion to refuse access on the terms of a request,[57] may lead to greater requests for review, undermining the objective of improving efficiency of the FOI framework. The Attorney-General advised that it is not expected that allowing an agency to refuse a request on its terms would give rise to greater requests for review, rather, it will be clearer for applicants to understand why a broadly scoped or voluminous application cannot be processed. The Attorney-General further advised that this particular measure is reliant on the existing exemptions in the FOI Act for an agency to refuse a request that is subject to review by the Information Commissioner and as such this measure is not anticipated to cause a significant increase in requests for review. The Attorney-General did acknowledge that the measures that seek to amend the exemptions in the FOI Act may give rise to some initial increase in reviews as they are interpreted and applied by review and appeal bodies. However, the Attorney-General did not anticipate that there would be an ongoing increase in review arising from these measures.

2.27 Based on the information provided by the Attorney-General, it appears that some of the measures may be capable of achieving more timely processing of requests for information. However, there appears to remain some risk that the measures could result in greater requests for review, although it is acknowledged that the Attorney-General does not anticipate a significant increase in review requests. If such an increase in review requests were to occur, it may undermine any efficiency gains by the measures.

Proportionality

2.28 Further information was sought from the Attorney-General regarding the proportionality of each of the key measures, which are addressed in turn below.

Vexatious or frivolous requests

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56 Schedule 3, part 2, item 11, subsection 24AA(1A).

57 Schedule 7, part 1, item 1, section 23A.

2.29 The bill seeks to allow an agency or minister to refuse to deal with a request that is vexatious or frivolous, likely has the effect of harassing or intimidating or otherwise causing harm (or a reasonable fear of harm) to another person, or a request that is otherwise an abuse of process.[58] The effect of this amendment would be that an agency or minister may refuse to deal with specific requests without impacting the applicant's ability to make other requests or remake the request that was declined. The separate vexatious applicant declaration process through the Information Commissioner would continue to exist.[59]

2.30 The terms in the measure appear to capture a broad range of circumstances. The terms vexatious, frivolous, harassing and intimidating are taken to have their ordinary meanings.[60] 'Harm' may include, but is not limited to, harm to health (including psychological health and wellbeing), safety and welfare.[61] The broad framing of this provision creates a risk that ambiguous concerns about potential harms to staff could be enough for an application to be refused.

2.31 The Attorney-General advised that the measure was intentionally drafted to reflect terms that have legal precedent and mirrors the powers already available to the Information Commissioner under the FOI Act. Drawing on the explanatory materials that accompanied amendments to the processes for dealing with vexatious litigants in the federal courts, the Attorney-General advised that the definition was based on model law for dealing with vexatious proceedings and was intended to provide consistency and uniformity. The Attorney-General reiterated that the new power for vexatious or frivolous requests concerns those applications that are designed to disrupt an agency, or cause harm and not to genuinely seek information.

2.32 Further, in relation to the grounds on which the Information Commissioner can declare an applicant as vexatious, the bill provides for an expanded definition of 'abuse of the process for an access action' to include an action that is harassing, intimidating, insulting or abusing an individual or employee of an agency.[62] The Attorney-General advised that this measure does not expand the ground on which the Information Commissioner can declare a person to be vexatious, but it seeks to clarify the grounds by providing further specificity through 'unambiguous terms'. However, the Attorney-General did not provide further information as to how 'insulting' and 'abusing' will be interpreted in practice, such as factors the Information Commissioner may consider when relying on these grounds to declare an applicant as vexatious.

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58 Schedule 2, part 4, item 41, section 15AD.

59 *Freedom of Information Act 1982*, part VIII, division 1.

60 Explanatory memorandum, p. 24.

61 Explanatory memorandum, p. 24.

62 Schedule 2, part 4, item 50, subsection 89L(4). Abuse of the process for an access action also includes, but is not limited to, unreasonably interfering with the operations of an agency, and seeking to use the FOI Act for the purpose of circumventing restrictions on access to a document(s) imposed by a court.

Further, the Attorney-General did not provide any information as to why the current terminology is ineffective and why these additional terms or grounds are necessary.

2.33 It therefore remains unclear how the measure will be applied in practice and there is a risk that the expanded ground on which an individual may be declared vexatious may be interpreted broadly. As such, it remains unclear whether the measure is sufficiently circumscribed and a proportionate limitation on the right to access information.

Removing ability to make anonymous and pseudonymous requests

2.34 The bill seeks to provide that where an applicant makes an FOI request on behalf of themselves, the request cannot be made anonymously or under a pseudonym,[63] and they may be required to provide proof of identity.[64] If an applicant makes a request on behalf of a third party for the other person's personal information or information concerning their business, commercial or financial affairs, the applicant must provide proof of the applicant's identity, the other person's identity and that the applicant is authorised to access the document on behalf of the other person.[65] Requests for documents on behalf of a third party can be anonymous, however, where it does not relate to the third party's personal information or information concerning their business, commercial or financial affairs.

2.35 The Attorney-General reiterated the information provided in the statement of compatibility. That is, that the measure aims to achieve the objective of ensuring vexatious applicant declarations are effective and unable to be circumvented via the use of a pseudonym; it enables agencies and ministers to readily determine whether multiple requests should be considered in aggregate; it ensures personal or private information is only disclosed in appropriate circumstances; it ensures agencies or ministers can appropriately determine the national security or personal safety implications of granting access to documents or information; and it protects the safety and wellbeing of agency officers and employees, by discouraging applicants from engaging in inappropriate or threatening behaviour when making a request.[66] The statement of compatibility further states that the *Privacy Act 1988* (Privacy Act) applies.[67]

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63 Schedule 2, part 5, item 53, paragraphs 15(2)(ba) and (bb).

64 Schedule 2, part 5, item 54, paragraph 15(2)(d).

65 Schedule 2, part 5, item 54, paragraphs 15(2)(d) and (e). The bill as introduced provided that all requests on behalf of a third party must include the full name of the other person and may require proof of identity. Government amendments agreed to have limited the scope of this measure such that the full name of the third party only needs to be provided in relation to requests on behalf of a third party for the third party's personal information or information concerning their business, commercial or financial affairs, see Government amendment sheet SV117, items (1) and (2), amended paragraph 15(2)(bb) and substituted subsection 19(1).

66 Statement of compatibility, pp. 7–8.

67 Statement of compatibility, p. 8.

2.36 As noted in the preliminary analysis, it assists with the proportionality of the measure that requests for documents on behalf of a third party can be anonymous if it does not relate to their personal or business information. The Attorney-General advised that this would support, for example, a community group lodging a request on behalf of an individual, and it would also be possible for an individual to lodge a request on behalf of another individual without providing details of the person who the request is made on behalf of. The Attorney-General stated that this may apply to whistleblowers seeking to reveal wrongdoing.

2.37 However, as set out in the preliminary analysis, this exception is not extended to individuals making a request for themselves. While an individual who wants to make an anonymous request for documents may be able to seek the assistance of another person or organisation to make a request on their behalf (and therefore remain anonymous), this option may not be readily available for all individuals. The Attorney-General did not provide any further information regarding this concern. It therefore remains unclear whether in practice this may deter, and provide a chilling effect on, individuals and organisations seeking information in some circumstances, particularly for whistleblowers and individuals working within the agencies that they want to disclose information about.

2.38 Further, in regard to overriding the Australian Privacy Principle (APP) 2 which provides a right to anonymity or pseudonymity when dealing with an APP entity,[68] the Attorney-General advised that requiring applicants to include personal information as part of a request is proportionate to the policy objective of improving the operation of the FOI Act. It remains unclear, however, how this provision aligns with the principles of the Privacy Act and whether requiring that an applicant provide their name is the least rights restrictive approach to achieving the stated objective.

<u>Agency or minister may refuse to process a request that would take more than 40 hours of work</u>

2.39 The bill seeks to allow an agency or minister to refuse to process a request as a 'practical refusal reason'[69] if it would take more than a prescribed amount of time to

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68 Australian Privacy Principle 2.

69 *Freedom of Information Act 1982*, sections 24 and 24AA provide that a 'practical refusal reason' exists in relation to a request for a document if the work involved in processing the request would substantially and unreasonably divert the resources of the agency from its other operations or the performance of the minister's functions, or the request does not provide such information concerning the document as is reasonably necessary to enable a responsible officer of the agency, or the minister, to identify it. If an agency or minister is satisfied that a practical refusal reason exists in relation to the request, they must undertake a request consultation process which provides an opportunity for the applicant to seek assistance from the agency or minister to revise the request, and if the practical refusal reason still exists, they may refuse to give access to the document.

process. The default minimum processing cap would be 40 hours of work and regulations may prescribe a higher number of hours.[70]

2.40 Regarding whether 40 hours represents a reasonable period to allocate to a request and why this would be appropriate in all circumstances, the Attorney-General advised that this amounts to just over one week's ordinary hours of work for a full-time employee and is above the current average processing time of 3.6 days per FOI request received. Further, the Attorney-General advised that this 40-hour processing cap is comparable to likeminded overseas jurisdictions, such as the United Kingdom.

2.41 Regarding less rights restrictive alternatives to improving efficiencies in the FOI system, for example proactively discussing with an applicant the scope of their request and whether what they are seeking is in practice narrower than what they have requested,[71] the Attorney-General advised that there will be sufficient opportunities afforded to applicants to revise or narrow the scope of their request, such that the introduction of a processing cap would not inappropriately restrict applicants from making a request for information. The Attorney-General advised that the consultation processes contained in the FOI Act, which require an agency or minister to take reasonable steps to assist an applicant to review their request, would also apply to refusals based on the processing cap.

2.42 Further, the Attorney-General stated that there are a range of safeguards that apply to the application of the processing cap ground of refusal. For example, the bill provides for a power to make regulations to prescribe matters an agency or minister must have regard to in determining if the processing cap is likely to be exceeded. Agencies and ministers would also be required to have regard to any guidelines issued by the Information Commissioner, and internal review and review by the Information Commissioner of practical refusal decisions would be available.

2.43 These safeguards would assist with proportionality and in some circumstances, the 40-hour processing time may represent a reasonable period to allocate to a request and be a proportionate limitation on the right to access information. However, in circumstances where a request has a large processing time due to difficulties in finding certain documents or information because of errors or inefficiencies in government record keeping, refusal to process a request on the basis that it exceeds the minimum processing cap may not be a proportionate limitation on the right to access information.

Application fees

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70 Schedule 3, part 2, item 11, subsection 24AA(1A).

71 *Freedom of Information Act 1982*, sections 24 and 24AB provide that where a practical refusal reason exists, the agency or minister must undertake a request consultation process. Rather than proactively contacting an applicant about the scope of the request, the applicant is notified of an intention to refuse access and is given the opportunity to contact the agency or minister within 14 days in order to receive assistance.

2.44 The bill allows application fees for FOI requests, internal reviews and Information Commissioner reviews to be specified in the regulations. Requests for an individual's own personal information must not be subject to an application fee, and the regulations must provide for waiver or remission in prescribed circumstances of financial hardship.[72]

2.45 The UN Human Rights Committee has stated that fees for requests for information should not be such as to constitute an unreasonable impediment to access to information.[73] Providing that fees cannot be applied to an individual's request for their own personal information and providing for a waiver or remission in cases of financial hardship assists with the proportionality of the measure. The Attorney-General further advised that future regulations could provide for broader circumstances in which fees should be refunded or an applicant exempt from paying the fee, which may assist with proportionality. However, as the fee structure and circumstances for exemptions are to be included in future regulations, it remains unclear how accessible the waiver or remission process will be in practice or whether the process of applying for a fee waiver in itself may deter applicants.

2.46 Further, as the Attorney-General did not provide information as to the likely amount of the application fees, it remains difficult to assess in practice whether any fees imposed would constitute an 'unreasonable impediment to access to information' and whether fees may be so high as to deter potential applicants.

Refusal to give access on the terms of the request

2.47 The bill would allow an agency or minister to refuse requests to give access to a document on the terms of the request, without having identified the document, if it is apparent it is or would be an exempt document. This measure would still require consideration of whether the obligation to provide an edited copy of the document applies.[74] An exempt document is a document exempt under division 2 of Part IV of

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72 Schedule 6, item 6, subsections 93C(3) and (4).

73 UN Human Rights Committee, *General Comment No. 34, Article 19: Freedom of opinions and expression* (12 September 2011) [19].

74 Schedule 7, part 1, item 1, section 23A.

the FOI Act,[75] or conditionally exempt under division 3 of Part IV of the FOI Act and access would be contrary to the public interest.[76]

2.48 The Attorney-General advised that this measure would achieve efficiencies by allowing agencies and ministers to more quickly resolve requests of this kind. The Attorney-General reiterated the information in the explanatory materials accompanying the bill, namely that this measure recognises that fully processing FOI requests for documents that are clearly exempt based on the terms of the request may not be an efficient use of public resources in cases where an access refusal can be anticipated as the likely outcome of the FOI request from the outset.

2.49 The UN Special Rapporteur on freedom of opinion and expression has endorsed the principle that any exceptions to disclosure of government information should be clearly and narrowly drawn and subject to strict harm and public interest tests.[77] The exemptions and conditional exemptions as drafted in the bill are numerous and broad. The Attorney-General advised that this measure has a specific narrow application as agencies and ministers can only exercise this power where they have had regard to the nature of the document as described in the request and the application of the exemptions to that document, and further that the measure would also effectively only apply where an agency or minister can assess from the terms of a request that the document would be exempt in full, or where the applicant has made clear they would not wish to receive an edited copy, because granting partial access

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75 *Freedom of Information Act 1982*, part IV, division 2: Exempt documents are documents affecting national security, defence or international relations; cabinet documents; documents affecting enforcement of law and protection of public safety; documents to which secrecy provisions of enactments apply; documents subject to legal professional privilege; documents containing material obtained in confidence; Parliamentary Budget Office documents; documents disclosure of which would be contempt of Parliament or contempt of court; documents disclosing trade secrets or commercially valuable information; and electoral rolls and related documents.

76 *Freedom of Information Act 1982*, part IV, division 3: Conditionally exempt documents are documents that would disclose confidential information between the Commonwealth and a state; would disclose matter of the deliberative processes involved in the functions of an agency, minister or Commonwealth government; would have a substantial adverse effect on the financial or property interests of the Commonwealth or of an agency; would prejudice or have a substantial adverse effect on the operations of agencies; would involve the unreasonable disclosure of personal information about any person; would disclose information concerning a person in respect of their business or professional affairs which would unreasonably affect them; contain information relating to research being undertaken and would unreasonably expose the agency or officer to disadvantage; or would have a substantial adverse effect on Australia's economy.

77 Article 19, 'The Public's Right to Know: Principles on Freedom of Information Legislation' (June 1999). These are endorsed by the UN Economic and Social Council, *Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression*, E/CN.4/2000/63 (2000) [43] and the UN Commission on Human Rights, *The right to freedom of opinion and expression*, Res 2000/38 (2000) [11].

to a document would necessarily require locating and assessing the document itself. However, it remains unclear whether the current exemptions and conditional exemptions in the FOI Act are permissible exceptions given their potentially broad application and whether refusing access on the terms of the request without considering the documents themselves may compound concerns that the exemptions are overly broad.

2.50 Further, while refusing requests on their terms may assist efficiency, it also creates a risk that more requests may be refused and that this ground of refusal may be misapplied or misused. In terms of safeguards, the Attorney-General reiterated that internal review and review by the Information Commissioner would exist for decisions made to refuse access on the terms of the request, and applicants are also able to lodge another FOI request in different terms. This may assist with the proportionality of the measure. However, refusal on the terms of a request may lead to many more applications for review of a decision both internally and with the Information Commissioner and, rather than encourage early resolution of requests, may operate to delay access to documents if the decision is overturned on review. In this regard, the Attorney-General advised that the reasons for exemption remain the same as presently available to decision-makers. However, as noted above, the exemptions in the FOI Act are drafted in broad terms and there remains a risk that providing an additional avenue to rely on these exemptions may give rise to more applications for review of a decision to refuse disclosure. It is therefore not clear that this measure represents a proportionate limitation on the right to freedom of expression.

Cabinet exemption

2.51 The bill seeks to exempt a document from disclosure if it has been prepared by a minister, on a minister's behalf or by an agency, and a substantial purpose for its preparation was submission for consideration by the cabinet or to brief a minister in relation to issues to be considered by the cabinet.[78] This replaces the current requirement that the document is exempt if brought into existence for the *dominant purpose* of submission for consideration by the cabinet or briefing a minister on a document which was brought into existence for the dominant purpose of submission for consideration by the cabinet.[79] The Attorney-General reiterated the position set out in the statement of compatibility that the objective of the measure is to protect cabinet confidentiality and the principle of collective ministerial responsibility.

2.52 Exemptions that apply to a class of documents do not appear to align with the principle of maximum disclosure and the principle that exceptions should be clearly and narrowly drawn and subject to strict 'harm' and 'public interest' tests upheld by

78 Schedule 7, part 2, items 3 and 4, paragraphs 34(1)(a) and (c).

79 *Freedom of Information Act 1982*, part IV, subsection 34(1).

international human rights bodies.[80] The Attorney-General advised that the government considers it appropriate that the cabinet exemption remain an absolute exemption and this measure is intended to make clearer the intended scope of the provisions and better reflect how the cabinet process operates in practice. However, the current broad exemption for cabinet documents and the amendments made to it through this measure do not include any consideration of possible harm associated with disclosure or a public interest test. As such, the measure may not be sufficiently circumscribed.

2.53 The Attorney-General advised that it is critical that the cabinet, as the key decision-making body of government, be comprehensively informed in its deliberations and this requires cabinet to have the benefit of frank and fearless advice from ministers and senior public servants. While many documents may disclose sensitive information about cabinet matters, the Attorney-General did not provide any further information or evidence on why disclosure of such documents would, in all cases, be of concern. On the contrary, the disclosure of such information may improve the integrity and effectiveness of government decision-making, which is the very justification for including the class exemption in the first place. Of note, the Robodebt Royal Commission recommended the repeal of the cabinet documents class exemption in order to improve transparency in cabinet decision-making, and recommended that confidentiality should only be maintained over any cabinet documents or parts of cabinet documents where it is reasonably justified for an identifiable public interest reason, depending on the individual circumstances of each case.[81] The Attorney-General advised that the government does not support the Robodebt Royal Commission's recommendation to repeal the exemption.

2.54 The Attorney-General did not provide information on whether less rights restrictive alternatives are available and were considered in the development of the bill. For example, less rights restrictive approaches may be to proactively release non-sensitive information or include exemptions based on harm associated with disclosure and a public interest test. This measure therefore does not appear to be the least rights restrictive approach.

Public interest exemption

2.55 The bill seeks to include an amendment to the public interest exemptions as it relates to the deliberative process of government to include factors against giving

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80 Article 19, *The Public's Right to Know: Principles on Freedom of Information Legislation* (June 1999). These are endorsed by the UN Economic and Social Council, *Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression,* E/CN.4/2000/63 (2000) [43] and the UN Commission on Human Rights, *The right to freedom of opinion and expression*, Res 2000/38 (2000) [11].

81 Commonwealth of Australia, *Royal Commission into the Robodebt Scheme* (Vol. 1, 2023) pp. 656–657.

access. The factors against giving access include whether giving access would, or could reasonably be expected to, have the following effects:

- prejudice the frank or timely discussion of matters or exchange of opinions between participants in deliberative processes of government for the purposes of consultation or deliberation in the course of, or for the purposes of, those processes;
- prejudice the frank or timely provision of advice to or by an agency or minister, or the consideration of that advice after it is provided;
- prejudice the orderly and effective conduct of a government decision-making process.[82]

2.56 These factors do not appear to align with the requirement upheld by international human rights bodies that any exceptions to disclosure of information by government bodies should be clearly and narrowly drawn. The Attorney-General reiterated that the exemption recognises that governments need to be able to run internal operations effectively and have time to consider advice and options provided by the public service in the course of considering options or making a decision. The Attorney-General advised that in assessing the public interest of disclosure, it is appropriate to consider whether disclosure would inhibit communications between agency officials, and agencies and ministers, and that other like-minded jurisdictions such as the United Kingdom and New Zealand recognise such factors as relevant considerations in assessing the public interest in disclosure of information. Further, the Attorney-General advised that the measure is intended to provide greater statutory clarity around the harm the existing deliberative processes exemption is designed to protect, being detriment to the proper working of government and the policy development process. This may prevent differing interpretations and difficulty in applying the exemption. The Attorney-General advised that that disclosure of deliberative material can have an impact on the effective function of government, for example disclosure of information generated in the early and formative stages of policy development may inhibit officials from critiquing views and could prolong consultation if a preference for more formal communications arises. However, the exemption is not limited to deliberative material and as such it remains unclear how restricting access to a broad range of information ensures the effectiveness and integrity of government decision-making. In this regard, it appears that the factors against giving access are so broad that they could in theory justify restricting access to almost any information and arguably many documents may be refused to be disclosed on this basis.

2.57 These factors also do not align with the principle of proactive and maximum disclosure. In this regard, the Attorney-General advised that the measure does not affect the ability of ministers and agencies to proactively disclose information

[82] Schedule 7, part 3, item 14, subsection 11B(3A).

including under the Information Publication Scheme. However, no further information was provided as to how often this proactive disclosure discretion is used in practice and the impact it has on the integrity and effectiveness of government decision-making.

2.58 As such, it is not clear that the measure is sufficiently circumscribed and therefore a proportionate limitation on the right to freedom of expression.

Transferral and lapsing of requests when a minister ceases office

2.59 The bill seeks to provide that an outgoing minister may, where they reasonably believe they will cease to hold the relevant office, elect to transfer requests seeking access to information to another minister or the responsible agency.[83] Otherwise, active FOI requests would be automatically forwarded to a relevant agency.[84] Applications to annotate or correct personal records made to a responsible minister will be taken to have lapsed on the minister ceasing office.[85] In addition to limiting the right to access information, this aspect of the measure also limits the right to informational privacy, which includes the right to control the dissemination of information about one's private life.[86] A minister would cease to hold office when they leave office due to a general election, change portfolios after a reshuffle of the ministry or when they resign office.[87]

2.60 This measure does not require a minister to transfer any active requests and does not require a minister to identify the documents subject to an FOI request before they leave office. Further, applicants are not able to make an application for review with the Information Commissioner in relation to an access refusal decision if the relevant minister ceases to hold the relevant office.[88] The Attorney-General advised that this is considered appropriate to ensure that new ministers are not made party to an FOI matter or review process where there are practical limitations on their capacity to engage in the proceedings. The Attorney-General advised that review would be available in circumstances where a new minister or agency has made a decision on a request that has been forwarded or continued (in circumstances where an ongoing Information Commissioner review or Administrative Review Tribunal review proceeding had been forwarded).

2.61 Regarding the extent of any interference with rights, the Attorney-General advised that this measure is anticipated to have minimal impact on the amount of

83 Schedule 8, part 1, item 2, subsection 16B(1).

84 Schedule 8, part 1, item 2, subsection 16B(2).

85 Schedule 8, part 1, item 3, section 51CA.

86 International Covenant on Civil and Political Rights, article 17.

87 Explanatory memorandum, p. 78.

88 Schedule 8, item 12, proposed subsection 54L(2A).

government information withheld from the public as requests to ministers, as opposed to departments, comprise a very small percentage of total FOI requests.

2.62 Given the frequency with which ministers may change or leave office, it appears that this measure may impede timely access to documents by making it more difficult to find requested documents and may in practice lead to individuals making new requests for information. Further, the limitations on access to review where certain applications would be taken to have lapsed and where a minister ceases to hold the relevant office do not support the proportionality of the measure, although it is noted that review remains available in certain circumstances.

Chilling effect

2.63 An additional factor in considering the proportionality of a measure is the extent of any interference with human rights. The greater the interference, the less likely the measure is to be considered proportionate. In addition to the specific measures addressed above, there are other measures in the bill that may, of themselves, constitute a proportionate or marginal interference with the right to access to information as part of freedom of expression, but taken together may limit the right. For example, measures to transfer requests for documents to another agency or minister;[89] amendments throughout the FOI Act to replace calendar days with working days;[90] and amendments to the deemed refusal process where a decision is not made on a request within time.[91] Taken together, the cumulative impact of the multiple measures in the bill may have a chilling effect on applicants seeking access to information and may amount to a disproportionate limit on the right to freedom of expression.

2.64 Further the bill seeks to amend the object clause of the FOI Act to express that promoting transparent government through providing access to information is balanced against protecting essential private interests and the proper and effective operation of government in the FOI framework.[92] This appears to reflect an intention that the operation of the FOI Act as a whole is to shift to increasing restrictions on access to information and this shift does not align with the principle of maximum disclosure.

2.65 It has not been demonstrated that the measures in the bill pursue an objective that is pressing and substantial enough to warrant limiting the right to access information and would be a proportionate limit on this right in all circumstances. As such, when considering all the measures together, the operation of the bill as a whole may not be a proportionate limit on the right to freedom of expression.

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89 Schedule 2, part 6, item 62, subsection 16(1A).

90 Schedule 4, part 4, items 52 and 53, subsection 15(7A) and paragraph 15(8)(a).

91 Schedule 4, part 3.

92 Schedule 1, part 1, item 3, subsection 3(2).

Committee view

2.66 The committee thanks the Attorney-General for this response.

2.67 The committee considers that the bill introduces multiple measures which broadly go towards improving efficiencies and addressing abuses of process in the FOI framework. The committee considers that by limiting disclosure of information through FOI requests and thereby restricting individuals' access to information held by government, many of these measures engage and limit the right to access information, a component of the right to freedom of expression. The committee further considers that, to the extent that the measures limit the right to access information, these measures also engage and limit multiple other human rights which include access to information as a core part of fulfilling the right, including the right to health, privacy, the right to take part in public affairs and the right to education.

2.68 The committee notes the Attorney-General's advice that the current cost and time taken to process FOI requests is likely delaying access to information and resulting in public resources being allocated to individual FOI requests. The committee notes that the Attorney-General referred to the Office of the Australian Information Commissioner's (OAIC) 2024–2025 Annual Report in their response, which indicates a general decline in timeliness of decision-making. However, the committee notes that the OAIC did not address the reasons for this decline in timeliness and it is therefore not clear whether the increasing volume of FOI requests (and consequent time and cost spent) correlates with the decline in timeliness of processing FOI requests. The committee further notes that the Attorney-General advised that there is an opportunity cost to the provision of government services due to increased FOI costs. However, the Attorney-General did not provide any information regarding the public services which are not being delivered because of the increased time and cost spent on processing FOI requests. The committee therefore considers that it is not possible to conclude that the measures pursue a legitimate objective for the purposes of international human rights law.

2.69 The committee notes the Attorney-General's advice that it is not anticipated that the measures will result in greater requests for review and considers that some of the measures may be capable of achieving more timely processing of requests for information. However, the committee considers that there remains a risk that the measures could result in greater review requests which may undermine the key objective of efficiency gains.

2.70 Regarding proportionality, while the committee notes that there are some safeguards that assist with proportionality, such as access to review of refusal decisions, concerns remain that many of the measures are not sufficiently circumscribed, accompanied by adequate safeguards and the least rights restrictive approach. Further, the committee notes that the cumulative impact of the multiple measures in the bill may have a chilling effect on applicants seeking access to information and may amount to a disproportionate limit on the right to freedom of

expression. The committee therefore considers that when considering all the measures together, the operation of the bill as a whole may not be a proportionate limit on the right to freedom of expression.

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

Social Security and Other Legislation Amendment (Technical Changes No. 2) Bill 2025[93]

Purpose	This bill seeks to amend the *Social Security Act 1991* to provide a legal basis for the method of apportioning employment income that was applied to entitlement periods between 1 July 1991 and 6 December 2020 and clarify methods for apportioning employment income in entitlement periods from 1 July 1991 to 6 December 2020 to determine a debt or rate of payment following the commencement of the bill. This bill also seeks to amend *the Social Security Act 1991*, the *A New Tax System (Family Assistance) (Administration) Act 1999*, the *Student Assistance Act 1973* and the *Paid Parental Leave Act 2010* to expand instances in which the special circumstances waiver may be applied to waive debts incurred under each respective Act and increase the threshold for waiving a small debt. This bill also seeks to establish the Income Apportionment Resolution Scheme.
Portfolio	Social Services
Introduced	House of Representatives, 4 September 2025 *Finally passed both Houses, 26 November 2025*
Rights	Criminal process rights; effective remedy; social security

2.72 The committee requested a response from the minister in relation to Schedule 5 of the bill (now Act) in *Report 7 of 2025*.[94]

Benefit restriction notices

2.73 On 29 October 2025, the government made an amendment to the bill that passed the House of Representatives.[95] The government amendment added new

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93 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Social Security and Other Legislation Amendment (Technical Changes No. 2) Bill 2025, *Report 1 of 2026*; [2026] AUPJCHR 6.

94 Parliamentary Joint Committee on Human Rights, *Report 7 of 2025* (26 November 2025), pp. 122–143. The Committee concluded its consideration of other measures in the bill in *Report 7 of 2025*. While awaiting the minister's response in relation to Schedule 5 of this bill, the Committee also made a minor comment on the bill in *Report 8 of 2025* (11 December 2025) pp. 7–8 to reiterate its concerns regarding the rapid passage of legislation before the committee has completed its scrutiny.

95 Sheet FE107.

Schedule 5 to the bill, which amended the *Social Security Act 1991* (Social Security Act) to introduce a broader power to cancel a person's social security payments or concession cards if persons are the subject of an arrest warrant in respect of a serious violent or sexual offence, or might prejudice the security of Australia or a foreign country.[96] The AFP Minister may give the minister a 'benefit restriction notice' if the person is the subject of an arrest warrant for a serious violent or sexual offence,[97] and the person has not been arrested under the warrant, and a cancellation request for the person has been made.[98] A cancellation request is a request to cancel the person's social security payments or concession card made in writing by a senior police force member to the relevant minister or department.[99]

2.74 Before giving a notice restricting a person's benefit, the AFP Minister must have regard to the extent to which the person is likely to be a threat or danger to the community while the person is not under arrest and the likely effect of the operation of the notice on the person's dependants, if the AFP Minister is aware of those dependants.[100] The secretary of the department administered by the AFP Minister must seek the advice of the Human Services Secretary in relation to the likely effect of the notice on the person's dependants and inform the AFP Minister of that advice.[101]

2.75 The government amendment also amended the *A New Tax System (Family Assistance) Act 1999* and the *Paid Parental Leave Act 2010* in the same way regarding family assistance[102] and parental leave pay.[103]

Summary of initial assessment

Preliminary international human rights legal advice

Right to social security

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96 Sheet FE107, item 5.

97 *Criminal Code Act 1995* (Criminal Code), Division 395 defines 'serious violent or sexual offence' to mean an offence against a law of the Commonwealth, a State or a Territory where: (a) it is an offence punishable by imprisonment for life or for a period, or maximum period, of at least 7 years; and (b) the particular conduct constituting the offence involved, involves or would involve, as the case requires: (i) loss of a person's life or serious risk of loss of a person's life; or (ii) serious personal injury or serious risk of serious personal injury; or (iii) sexual assault; or (iv) sexual assault involving a person under 16; or (v) the production, publication, possession, supply or sale of, or other dealing in, child abuse material (within the meaning of Part 10.6); or (vi) consenting to or procuring the employment of a child, or employing a child, in connection with material referred to in subparagraph (v); or (vii) acts done in preparation for, or to facilitate, the commission of a sexual offence against a person under 16.

98 Sheet FE107, item 10.

99 Sheet FE107, item 10.

100 Sheet FE107, item 10.

101 Sheet FE107, item 10.

102 Sheet FE107, Part 2.

103 Sheet FE107, Part 3.

2.76 To the extent that the measure results in social security payments not being payable to a person wanted for a serious offence, the measure engages and limits the right to social security. The right to social security recognises the importance of adequate social benefits in reducing the effects of poverty. Social security benefits must be adequate in both amount and duration. Public authorities are responsible for ensuring the effective administration or supervision of a social security system. States must also have regard to the principles of human dignity and non-discrimination to avoid any adverse effect on the levels of benefits and the form in which they are provided, and must guarantee the equal enjoyment by all of minimum and adequate protection. The right also includes the right not to be subject to arbitrary and unreasonable restrictions of existing social security coverage.

2.77 Australia has obligations under international human rights law to progressively realise the right to social security (and other social and economic rights) using the maximum of resources available. Australia has a corresponding duty to refrain from taking retrogressive measures, or backwards steps, in relation to the realisation of this right.[104] In this context, the United Nations (UN) Committee on Economic, Social and Cultural Rights has stated that there is a 'strong presumption of impermissibility of any retrogressive measures taken' in relation to economic, social and cultural rights. If deliberate retrogressive measures are taken, the state:

> has the burden of proving that they have been introduced after the most careful consideration of all alternatives and that they are fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the State party's maximum available resources.[105]

2.78 Retrogressive measures, a type of limitation, may be permissible under international human rights law providing that they address a legitimate objective, are rationally connected to that objective and are a proportionate way to achieve that objective. The UN Committee on Economic, Social and Cultural Rights has stated that 'the withdrawal, reduction or suspension of benefits should be circumscribed, based on grounds that are reasonable, subject to due process, and provided for in national law'.[106]

2.79 With respect to a legitimate objective, states may limit economic, social and cultural rights only insofar as this may be compatible with the nature of those rights, and 'solely for the purpose of promoting the general welfare in a democratic society'.[107] This means that the only legitimate objective in the context of economic,

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104 International Covenant on Economic, Social and Cultural Rights, article 2.

105 UN Committee on Economic, Social and Cultural Rights, *General Comment No. 13: the right to education* (1999) [45].

106 UN Committee on Economic, Social and Cultural Rights, *General Comment No. 19: The Right to Social Security* (2008) [24].

107 International Covenant on Economic, Social and Cultural Rights, article 4.

social and cultural rights is a limitation for the 'promotion of general welfare'. In addition, the UN Committee on Economic, Social and Cultural Rights has advised that:

> the benefits of the limitation in promoting the general welfare must outweigh the impacts on the enjoyment of the right being limited. The more serious the impact on the [individual's] Covenant rights, the greater the scrutiny that must be given to the grounds invoked for such a limitation.[108]

2.80 As to when a limitation will be compatible with the nature of economic, social and cultural rights, the UN Committee on Economic, Social and Cultural Rights has stated that there exists 'a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights'.[109] That is, even if a limitation were for the promotion of general welfare, if it was regarded as resulting in failure to fulfil the minimum core obligations associated with economic, social and cultural rights, then it would go against the nature of those rights and would be impermissible.[110]

Right to effective remedy

2.81 Insofar as the operation of a benefit restriction notice limits the right to social security, effective remedies should be available to individuals. The right to an effective remedy requires the availability of a remedy which is effective with respect to violations of rights and freedoms recognised by the International Covenant on Economic, Social and Cultural Rights. The UN Committee on Economic, Social and Cultural Rights provides guidance as to the duty to give effect to the rights contained in the Covenant. It explains that:

> [by] requiring Governments to do so "by all appropriate means", the Covenant adopts a broad and flexible approach which enables the particularities of the legal and administrative systems of each State, as well as other relevant considerations, to be taken into account.[111]

2.82 However, the UN Committee on Economic, Social and Cultural Rights goes on to explain that this flexibility 'coexists with the obligation upon each State party to use all the means at its disposal to give effect to the rights recognized in the Covenant'. As such, the UN Committee on Economic, Social and Cultural Rights advises that 'appropriate means of redress, or remedies, must be available to any aggrieved

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108 *Pardo v Spain*, UN Committee on Economic, Social and Cultural Rights, Communication No. 52/2018, E/C.12/67/D/52/2018 [9.4].

109 UN Committee on Economic, Social and Cultural Rights, *General Comment No. 3: the nature of states parties' obligations* (14 December 1990) E/1991/23(Supp) [10].

110 For further discussion see, Amrei Muller, 'Limitations to and derogations from economic, social and cultural rights', *Human Rights Law Review*, vol. 9, no. 4, 2009, pp. 580–581.

111 UN Committee on Economic, Social and Cultural Rights, *General Comment No. 9: the domestic application of the covenant* (1998) [1].

individual or group, and appropriate means of ensuring governmental accountability must be put in place'.[112]

2.83 The International Covenant on Economic, Social and Cultural Rights does not require the provision of judicial remedies for violations of the right to social security, but it does require effective remedies to be available. Effective remedies will be absent where a primary administrative decision about a person's right to social security is final and no provision is made for review by either a court or a (well-designed and sufficiently fair and independent) administrative tribunal.[113]

Criminal process rights

2.84 A further consideration is whether the measure may be considered a criminal penalty insofar as the cancellation of social security payments could operate to punish certain individuals. If the cancellation of social security payments is regarded as 'criminal' for the purposes of international human rights law, it will engage the criminal process rights under articles 14 and 15 of the International Covenant on Civil and Political Rights, which include the right to be presumed innocent (including the application of the criminal standard of proof) and the right not to be tried and punished twice for an offence for which a person has already been finally convicted or acquitted (sometimes referred to as the principle of double jeopardy).

2.85 In assessing whether a cancellation of social security payments may be considered criminal, it is necessary to consider: the nature and purpose of the measure including whether there is an intention to punish or deter, irrespective of the severity of the measure; and the severity of the measure. The stated purpose of the measure is to strengthen and improve the effectiveness of the regime for ceasing social security payments in certain circumstances, and to prevent individuals charged with a serious offence from benefiting from social security payments.[114] It therefore appears that the measure is, at least in part, aimed at deterring individuals from evading arrest. Further, the consequences of ceasing social security payments altogether may be very significant for some individuals. As a result, it could have a punitive effect in practice, such that it could potentially be considered a criminal penalty for the purposes of

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112 UN Committee on Economic, Social and Cultural Rights, *General Comment No. 9: the domestic application of the covenant* (1998) [2]. The UN Committee further advises at paragraph [3] that: 'a State party seeking to justify its failure to provide any domestic legal remedies for violations of economic, social and cultural rights would need to show either that such remedies are not "appropriate means" within the terms of article 2.1 of the Covenant or that, in view of the other means used, they are unnecessary. It will be difficult to show this and the Committee considers that, in many cases, the other "means" used could be rendered ineffective if they are not reinforced or complemented by judicial remedies'.

113 Ben Saul, David Kinley and Jacqueline Mowbray, *The International Covenant on Economic, Social and Cultural Rights: Commentary, cases and materials*, Oxford University Press, Oxford, 2014, p. 719. See also UN Committee on Economic, Social and Cultural Rights, *General Comment No. 19: The Right to Social Security* (2008) [77].

114 Supplementary statement of compatibility, p. 21.

international human rights law. There is therefore a risk that the measure could have implications for criminal process rights.

2.86 If the cancellation of social security payments is considered a criminal punishment, this raises issue from the perspective of criminal process rights because the punishment is imposed before the charge against the person is proven beyond reasonable doubt. As a result, the measure may not be consistent with the presumption of innocence and the prohibition on double jeopardy.

Committee's initial view

2.87 The committee noted that benefit restriction notices result in social security payments not being payable to a person wanted for a serious offence and this engages and limits the right to social security. As such, the committee noted that effective remedies should be available. The committee also noted that if the cancellation of social security payments were to be considered a criminal punishment, criminal process rights should be afforded.

2.88 The committee considered that further information was required to assess the compatibility of the measure with these rights and therefore sought the advice of the minister.

2.89 The full initial analysis is set out in *Report 7 of 2025*.[115]

Minister's response[116]

2.90 The minister advised:

> Where a person is in custody, including on remand, they are not eligible for social security payments or concession cards under existing legislative provisions. Prior to the passage of this legislation, there were no means by which the Australian Government could stop payments to people evading arrest for the most serious kinds of offences, which would ordinarily result in someone being held on remand and not being eligible for bail. The amendments made under Schedule 5 address this issue.
>
> The types of offences captured in the definition of 'serious violent or sexual offence' in the *Criminal Code Act 1995* are limited to those of a particularly grave nature, such as those involving the loss of a person's life, serious personal injury or sexual assault.
>
> It is appropriate this measure apply only to this category of offending because these offences:

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115 Parliamentary Joint Committee on Human Rights, *Report 7 of 2025* (26 November 2025), pp. 122–143.

116 The minister's response to the committee's inquiries was received on 23 December 2025. This is an extract of the response. The response is available in full on the committee's webpage.

- directly impact the safety and protection of the community, as well as partners and children of the person accused of these offences; and
- are of a kind where the individual would be remanded upon arrest and for which bail is not expected to be granted prior to trial.

It is not appropriate for individuals who are evading police arrest, under a warrant for such grave offences, to continue to be supported by the taxpayer-funded social security system. The system exists to assist Australians in genuine need, not to aid offenders in avoiding apprehension or continuing to be a risk to the safety of the community. It is reasonable and necessary in such circumstances for the government to have the ability to cease a person's payments or concessions to assist in efforts to apprehend the person.

This power has been designed for very limited use and only in the most exceptional circumstances. It can only be exercised personally by the Minister for Home Affairs and is not delegable to officials in the Department of Home Affairs or Services Australia.

Prior to a benefit restriction notice being considered, a request to cancel an individual's payment and/or concession card must be made in writing by a senior member of the Australian Federal Police (or a member of a State or Territory police force with an equivalent rank) to the Minister for Home Affairs (cancellation request).

After a cancellation request is made, the legislation will require the Minister for Home Affairs to consider the:

- extent to which the person is likely to be a threat to community safety while they are not arrested under the relevant warrant; and
- likely effect on any dependants if the person's payments or concessions were cancelled, having regard to advice provided by Services Australia on the subject.

Prior to issuing a benefit restriction notice, advice must be sought from Services Australia to confirm if an individual has any dependants, and the likely impact that cancelling payments would have on those dependants.

Where a person is receiving family assistance payments, such as the Family Tax Benefit, they can be redirected to another person such as another parent or family member to ensure continued support for any impacted dependants. Furthermore, a benefit restriction notice will not apply to the Child Care Subsidy, which is a payment made directly to providers, ensuring a dependent child who is accessing childcare can continue to do so.

Internal merits review will not be available in relation to a decision to issue a benefit restriction notice, or a decision to not revoke a benefit restriction notice. This reflects that decisions are made personally by the Minister for

Home Affairs as part of the Executive Government, and not government officials.

There is also a practical consideration to precluding merits review. There is no hypothetical example where a person who is subject to an arrest warrant and evading arrest would be able to seek a merits review without turning themselves in to law enforcement authorities.

Judicial review of decisions of the Minister for Home Affairs would be available, including under the *Administrative Decisions (Judicial Review) Act 1977*. In these cases, my Department intends to consider any request to assist the individual with the cost of the litigation and ensure they have suitable legal representation.

My Department is preparing protocols and updates to the Social Security Guide to support the intended exercise of the new powers and will work closely with stakeholders on the policy framework and implementation.

The Guide will outline additional factors the Minister for Home Affairs should consider in deciding whether to issue a benefit restriction notice.

The protocols will also require the Minister for Home Affairs to regularly review the appropriateness of a notice and revoke a notice where they became aware the legal basis for issuing the notice is no longer present - for example, where the individual is subject to bail conditions, or if the notice is no longer considered necessary or proportionate for any other reason. This process will be informed by updated information from the relevant policing agency and Services Australia. The Minister for Home Affairs may also revoke a notice, if appropriate, where the individual subject to the notice has requested it be revoked.

I am confident these arrangements have the right checks and balances in place, reflecting the seriousness of the circumstances in which a benefit restriction notice may be used.

In further recognition of the nature of this new provision, I have requested the Commonwealth Ombudsman be involved in monitoring its operation.

Concluding comments

International human rights legal advice

Right to social security

2.91 As set out in the preliminary analysis, the stated objective of the measure is to strengthen and improve the effectiveness of the regime for ceasing social security payments in certain circumstances.[117] More specifically, the measure seeks to ensure that persons who have been charged with serious violent or sexual offences and are subject to an outstanding arrest warrant cannot continue to benefit from social

[117] Supplementary explanatory memorandum, p. 7.

security payments, which might be assisting them in evading the authorities.[118] The minister advised that it is considered appropriate that this measure apply only to this category of offending because these offences directly impact the safety and protection of the community, as well as partners and children of the person accused of these offences; the offences are of a kind where the individual would be remanded upon arrest and for which bail is not expected to be granted prior to trial; and where a person is in custody, including on remand, they are not eligible for social security.

2.92 As outlined above, the only legitimate objective in the context of the right to social security is a limitation for the 'promotion of general welfare'. The term 'general welfare' should not be taken to impliedly include reference to public order, public morality and respect for the rights and freedoms of others.[119]

2.93 The preliminary analysis noted that as the potential interference with an individual's right to social security may be significant, particularly if they are deprived of the minimum essential level of benefits, greater scrutiny is required as to whether the stated objectives are legitimate for the purposes of international human rights law. Further information was sought from the minister in this regard. The minister advised that prior to the passage of this legislation, there were no means by which the Australian Government could stop payments to people evading arrest for the most serious kinds of offences, which would ordinarily result in someone being held on remand and not being eligible for social security payments. However, no information was provided about how the measure promotes the general welfare of the people and community as a whole. While the minister explained why the previous laws were insufficient to achieve the stated purpose of the measure, it has not been demonstrated that the limitation is for the promotion of the general welfare and thus a legitimate objective for the purposes of international human rights law.

2.94 The preliminary analysis noted that the measure may not be rationally connected to (that is, effective in achieving) the stated objective. The minister did not provide any further information or evidence that the measure would, in a significant way, be effective in preventing or making it more difficult for a person who is wanted for a serious offence to evade police arrest or continue to evade arrest, or in encouraging a person to present for arrest. It therefore remains unclear how cancelling a person's social security benefits would facilitate their arrest.

2.95 In assessing proportionality, it is relevant to consider whether the measure provides sufficient flexibility to treat different cases differently; whether there are effective safeguards in place such as access to review; the extent of any interference

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118 Supplementary statement of compatibility, p. 21.

119 Amrei Muller, 'Limitations to and derogations from economic, social and cultural rights', *Human Rights Law Review*, vol. 9, no. 4, 2009, p. 573. See also, Phillip Alston and Gerard Quinn, 'The Nature and Scope of States Parties' Obligations under the International Covenant on Economic, Social and Cultural Rights', *Human Rights Quarterly*, vol. 9 no. 2, 1987, pp. 201–202.

with the right; and the availability of less rights restrictive alternatives. A further consideration in the context of economic, social and cultural rights is whether the measure is compatible with the nature of the right (in this case, the right to social security).

2.96 The power to issue a benefit restriction notice is discretionary and requires consideration of personal circumstances, which may provide some flexibility to treat individual cases differently. Whether the discretionary nature of the power will operate as a safeguard will depend on how often the power is used. The minister advised that the measure has been designed for very limited use and only in the most exceptional circumstances. The power to issue a benefit restriction notice can only be exercised personally by the Minister for Home Affairs and is not delegable to officials in the Department of Home Affairs or Services Australia. If the power is exercised only in the most exceptional circumstances, it may assist with proportionality. However, there is no legislative requirement to exercise the power in the manner suggested by the minister or as a last resort. Discretionary safeguards are less stringent than the protection of statutory processes as there is no requirement to follow them.

2.97 As outlined in the preliminary analysis, the measure is also accompanied by some safeguards. Before issuing a benefit restriction notice, the AFP Minister must have regard to the individual's circumstances, including the extent to which they are a danger to the community and any impact on their dependants.[120] The relevant secretary must also seek to notify the person of the cancellation of their benefits.[121] However, this power is non-reviewable. The minister stated that internal merits review will not be available in relation to a decision to issue a benefit restriction notice, or a decision to not revoke a benefit restriction notice, as decisions are made personally by the Minister for Home Affairs as part of the Executive Government and not government officials, and in practice a person who is subject to an arrest warrant and evading arrest would not be able to seek a merits review without turning themselves in to law enforcement authorities. The safeguard value of the requirement to notify may therefore be weakened if an individual is unable in practice to seek review of the decision to issue a benefit restriction notice once notified.

2.98 The minister also advised that the department is preparing protocols and updates to the Social Security Guide that will outline additional factors the minister should consider in deciding whether to issue a benefit restriction notice. As these protocols have yet to be drafted, the safeguard value of them, if any, is unclear. Further, including these factors in protocols rather than legislation weakens their potential safeguard value as there is no requirement for the minister to follow them.

2.99 The extent of the interference with the right to social security is broad as the measure results in the cancellation of social security payments on an ongoing basis

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120 Sheet FE107, item 10.

121 *Social Security Act 1991*, subsection 38M(6).

until the notice is revoked by the minister. In this regard, the minister advised that the protocols to be developed by the department will require the minister to regularly review the appropriateness of a notice and revoke a notice where they become aware the legal basis for issuing the notice is no longer present (for example, where the individual is subject to bail conditions) or the notice is no longer considered necessary or proportionate for any reason. It is not clear that this non-legislated protocol would assist in curtailing the extent of any interference with the right to social security in practice. If an individual's social security payments were cancelled and they were subsequently granted bail, the individual would need to reapply for social security, which may take a substantial amount of time, leaving them without access to social security for a potentially significant period. The lack of access to review also becomes more pertinent in consideration of the extent of the interference with the right.

2.100 As to the availability of less rights restrictive alternatives, the minister did not provide any further information on whether less rights restrictive alternatives have been considered. It therefore remains unclear why a person's social security benefits need to be cancelled as opposed to suspended, noting that it is likely to be easier to reinstate social security payments in the event that a person presents for arrest and is granted bail or the charges are subsequently dropped, for example. It is also not clear why the AFP Minister is not required to give consideration to whether all other avenues of bringing about arrest are exhausted before issuing a benefit restriction notice, such that the benefit restriction notice is only available as a last resort. There also does not appear to be any mechanism by which a person can seek backpay of their social security benefits or other form of compensation if they are ultimately found not guilty of the serious offence.

2.101 As set out in the preliminary analysis, the state has an obligation under international human rights law to ensure the minimum essential levels of economic, social and cultural rights are fulfilled, and as such any limitation on the right to social security must not go so far as to constitute a non-fulfilment of the minimum core obligations. There remains a risk that cancelling an individual's access to social security in its entirety may go against the nature of the right. If the cancellation of social security payments also results in an individual not being able to access the essential levels of health care, basic shelter and housing, water and sanitation, food and basic education, there remains a real risk the minimum core obligations of the right to social security will not be fulfilled.

2.102 If the measure results in the deprivation of the minimum essential level of benefits, it would constitute an impermissible limit on the right to social security. In this regard, the minister advised that that where a person is receiving family assistance payments, such as the Family Tax Benefit, they can be redirected to another person, such as another parent or family member, to ensure continued support for any impacted dependants. A benefit restriction notice will also not apply to the Child Care Subsidy, which is a payment made directly to providers, ensuring a dependent child who is accessing childcare can continue to do so. These safeguards assist to mitigate

the risk that dependants or children would be deprived of the minimum essential level of benefits, but do not assist the individual subject to the notice. If the minimum core obligations are fulfilled, there nevertheless appears to be a risk that the measure may not constitute a proportionate limit on the right to social security, as an individual would not have access to review of the decision made by the minister to issue a benefit restriction notice and there appear to be less rights restrictive alternatives available.

Right to effective remedy

2.103 As set out in the preliminary analysis, the operation of a benefit restriction notice may limit the right to social security and accordingly effective remedies should be available to individuals. The statement of compatibility did not acknowledge that the benefit restriction notice has implications for the right to effective remedy.

2.104 It is unlikely that effective remedies are available for any limitation on the right to social security resulting from the measure. The minister confirmed that internal merits review will not be available in relation to a decision to issue a benefit restriction notice, or a decision to not revoke a benefit restriction notice. The minister advised that judicial review of decisions of the Minister for Home Affairs would be available, including under the *Administrative Decisions (Judicial Review) Act 1977*. The minister also advised that the operation of the measure will be monitored by the Commonwealth Ombudsman. However, it is unclear how the Ombudsman's involvement will operate in practice and in any case, it is unlikely to provide a remedy to individuals.

2.105 Further, it does not appear that a person subject to a benefit restriction notice who may have the relevant arrest warrant revoked, or may be subsequently found not guilty of the relevant offence, would be entitled to the social security payments that were cancelled as a result of the benefit restriction notice or some other form of compensation or relief. While further information was sought in relation to this matter, the minister did not provide it. As such, there do not appear to be effective remedies available to persons where a benefit restriction notice results in a violation of their right to social security.

Criminal process rights

2.106 The preliminary analysis also raised a further consideration of whether the measure may be considered a criminal penalty, insofar as the cancellation of social security payments could operate to punish certain individuals, and if so may engage the criminal process rights of the right to be presumed innocent (including the application of the criminal standard of proof) and the right not to be tried and punished twice for an offence for which a person has already been finally convicted or acquitted (sometimes referred to as the principle of double jeopardy).

2.107 The minister did not provide any further information regarding whether and how the measure engages criminal process rights. The risk that the measure could have implications for criminal process rights therefore remains. If the cancellation of

social security payments is considered a criminal punishment, the measure may not be consistent with the presumption of innocence and the prohibition on double jeopardy.

Committee view

2.108 The committee thanks the minister for this response. The committee notes that the minister did not provide a response to the committee prior to the passage of the bill and as such, the committee's ability to adequately scrutinise the measure has been limited.

2.109 The committee notes that as the measure results in social security payments not being payable to a person wanted for a serious offence, the measure engages and limits the right to social security. The committee considers that the stated objective may not promote the general welfare of the community as a whole and as such the measure may not pursue a legitimate objective for the purposes of international human rights law. The committee notes that the minister did not provide any further information that the measure would, in a significant way, be effective in preventing or making it more difficult for a person who is wanted for a serious offence to evade police arrest or continue to evade arrest, or in encouraging a person to present for arrest. As such, the committee considers that questions remain as to how cancelling a person's social security benefits would facilitate their arrest.

2.110 The committee notes that the measure contains some important safeguards to ensure that the minister has regard to individual circumstances and notifies the individual before issuing a benefit restriction notice. The committee notes the minister's advice that protocols and guides are being prepared by the department, which will include a requirement for the minister to regularly review the appropriateness of a notice. While these protocols may operate as a safeguard, their value is unclear as they are yet to be drafted and are not contained in legislation. The committee considers that overall, the safeguards accompanying the measure are unlikely to be adequate, particularly noting the unavailability of merits review. The committee notes that the extent of the interference with the right to social security is broad as the measure results in the cancellation of social security payments on an ongoing basis until the notice is revoked by the minister. The committee also notes that the minister did not provide any further information on whether less rights restrictive alternatives have been considered, such as suspending (rather than cancelling) social security payments.

2.111 The committee further considers that there remains a risk that cancelling a person's social security benefits entirely would deprive them of their minimum essential needs, and if the cancellation of social security payments also results in an individual not being able to access the essential levels of health care, basic shelter and housing, water and sanitation, food and basic education, there also remains a real risk the minimum core obligations of the right to social security will not be fulfilled.

2.112 In relation to the right to an effective remedy, the committee considers that in the absence of access to merits review or the ability to seek backpay or compensation, there do not appear to be effective remedies available for individuals whose right to social security has been violated. Further, the committee notes that if the cancellation of social security payments were to be considered a criminal punishment, criminal process rights should be afforded. The committee notes that the minister did not provide any information about whether the measure may constitute a criminal punishment and if so, whether it is compatible with criminal process rights, including in regard to the presumption of innocence and the prohibition on double jeopardy.

2.113 Finally, the committee notes that the minister did not address whether the measure would have a disproportionate impact on certain vulnerable groups, including Aboriginal and Torres Strait Islander people. The committee is therefore unable to provide further analysis with respect to this matter.

2.114 As the bill has now passed, the committee makes no further comment in relation to this bill. The committee draws these human rights concerns to the attention of the minister and the Parliament.

Legislative instruments

Biosecurity (Entry Requirements) Determination 2025[122]

FRL No.	F2025L00820
Purpose	This instrument revokes and remakes the Biosecurity (Entry Requirements) Determination 2016 to set requirements for individuals entering Australian territory.
Portfolio	Health, Disability and Ageing
Authorising legislation	*Biosecurity Act 2015*
Disallowance	Exempt
Rights	Children's rights; equality and non-discrimination; freedom of movement; health; liberty; privacy; rights of persons with disability

2.115 The committee considered this instrument and the minister's response, and made some recommendations to assist with the human rights compatibility of the instrument in *Report 6 of 2025*.[123] The committee did not request further information from the minister, nevertheless the minister provided a further response which has been considered below.

Entry requirements

2.116 This instrument revokes and remakes the Biosecurity (Entry Requirements) Determination 2016 to set requirements for individuals entering Australian territory. Part 2 of the instrument sets out entry requirements relating to yellow fever risk regions, countries or areas.[124] In particular, individuals entering Australia are required to provide information about whether they have been in Africa, South America, Central America or the Caribbean ('yellow fever risk regions') at any time in the six days before entering Australian territory at a landing place or port.[125] This information is to be provided to an official via a completed passenger card or an Automatic Travel Declaration pass.[126] If an individual has been in a yellow fever risk region at any time in the six days before entering the landing place or port, the individual must provide

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122 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Biosecurity (Entry Requirements) Determination 2025, *Report 1 of 2026*; [2026] AUPJCHR 7.

123 Parliamentary Joint Committee on Human Rights, *Report 6 of 2025* (29 October 2025), pp. 94–120.

124 Schedule 1, item 1 specifies 42 yellow fever risk countries and areas.

125 Part 2, subsection 6(2).

126 Part 2, paragraphs 6(2)(a) and (b).

information about whether they stayed overnight or longer in a yellow fever risk country or area (as specified in Schedule 1 of the instrument) at any time in the six days before entering the landing place or port.[127] This information is to be provided by either answering the relevant question about the matter when prompted by the SmartGate or declaring the information to a relevant official.[128] If an individual has stayed overnight or longer in a yellow fever risk country or area during the specified time, a relevant official may require the individual to declare whether they have received yellow fever vaccine at least 10 days before entering the landing place or port and/or provide an international vaccination certificate evidencing this fact.[129] A relevant official may also require the individual to declare their international travel history for the six days before entering the landing place or port.[130]

2.117 If an individual fails to comply with the entry requirement to declare whether they have received yellow fever vaccine and/or provide an international vaccination certificate, an officer[131] has the power to impose a human biosecurity control order on the individual.[132] A human biosecurity control order may be imposed on an individual if the officer is satisfied that: the individual has signs or symptoms of a listed human disease; or the individual has been exposed to the disease or another individual who has signs or symptoms of the disease; or the individual has failed to comply with the entry requirements in relation to the disease (such as the requirement relating to yellow fever vaccine set out in this instrument).[133] An individual may fail to comply with an entry requirement even if they are unable to comply with the requirement.[134] A human biosecurity control order may include various biosecurity measures,[135] which would require an individual, for example, to:

- report their health status to an officer;[136]

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127 Part 2, subsections 7(1) and (2).

128 Part 2, subsections 7(2)–(4).

129 Part 2, subsections 8(2). Subsection 8(3) sets out the requirements of an international vaccination certificate, such as that it must be in the name of the individual; be issued by a designated yellow fever vaccination centre; and state that the vaccine received by the individual is approved by the World Health Organization for the vaccination of persons against yellow fever.

130 Part 2, subsections 8(4) and (5).

131 For the purposes of this provision, an officer is a chief human biosecurity officer, a human biosecurity officer or a biosecurity officer. See *Biosecurity Act 2015,* subsection 60(1).

132 Part 2, Note to subsection 8(2).

133 *Biosecurity Act 2015,* section 60.

134 *Biosecurity Act 2015,* subsection 60(3).

135 The biosecurity measures are set out in Division 3, Subdivision B of the *Biosecurity Act 2015*.

136 *Biosecurity Act 2015,* section 86.

- remain at their place of residence and not visit a specified place or come into close proximity with a specified class of individuals;[137]
- wear specified clothing and equipment;[138]
- undergo, at a specified medical facility, a specified kind of examination to determine the presence of the listed human disease in the individual. This may include providing body samples for diagnosis;[139] and
- receive, at a specified medical facility, a specified vaccination, form of treatment or medication in order to manage the listed human disease.[140]

2.118 If an individual refuses to consent to a biosecurity measure, the Director of Human Biosecurity may give a direction for the individual to comply with the measure. If such a direction is given and the person still fails to comply with the biosecurity measure, the person may commit an offence.[141] Force must not be used against an individual to require the individual to comply with the above biosecurity measures. However, in relation to the biosecurity measures that require an individual to not leave Australian territory (traveller movement measure)[142] and remain isolated at a specified medical facility (isolation measure),[143] force may be used against an individual to require compliance with these measures.[144]

2.119 Part 3 of the instrument sets out entry requirements for individuals who may be, or may have been, infected with a listed human disease. A 'listed human disease' is one that may be communicable and may cause significant harm to human health.[145] A relevant official may require an individual to be screened (including by equipment or by being required to answer questions or provide information in writing) for the purpose of establishing whether they may be, or may have been, infected with a listed human disease.[146] This requirement applies to an individual entering Australian territory if the individual:

- is identified as having signs or symptoms of an illness or infection; or
- has, or has been exposed to, a listed human disease; or

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137 *Biosecurity Act 2015,* section 87.

138 *Biosecurity Act 2015,* section 88.

139 *Biosecurity Act 2015,* sections 90 and 91.

140 *Biosecurity Act 2015,* sections 92 and 93.

141 *Biosecurity Act 2015,* sections 72–74 and 107.

142 *Biosecurity Act 2015,* section 96.

143 *Biosecurity Act 2015,* section 97.

144 *Biosecurity Act 2015,* sections 95, 96, 97, 101 and 104.

145 *Biosecurity Act 2015,* section 42.

146 Part 3, subsection 9(2).

- has been in a country where individuals are known to be, or to have been, infected with a listed human disease.[147]

2.120 Part 4 of the instrument provides that a relevant official may ask an individual who is entering Australian territory on a flight or voyage that commenced outside Australian territory to declare their international travel history for the 14 days before the day the international flight commenced, or international voyage ended.[148] The relevant official may ask an individual to provide this travel history declaration if they reasonably suspect the individual has, or has been exposed to, a listed human disease.[149]

2.121 A civil penalty of 150 penalty units (currently $49,500) applies to an individual who fails to comply with the entry requirements set out in this instrument.[150] Even if an individual is not able to comply with the entry requirements, they may still contravene the civil penalty provision.[151]

2.122 Further, in relation to children or 'incapable persons' who are subject to the entry requirements in this instrument, there are certain 'protections' that apply under the *Biosecurity Act 2015* (Biosecurity Act). A 'child or incapable person' is defined to mean a person who is less than 18 years old, or a person who is at least 18 years old and is considered to be incapable of either: understanding the general nature and effect of, and purposes of carrying out, a biosecurity measure; or indicating whether they consent or do not consent to a biosecurity measure.[152] A child or incapable person who is subject to an entry requirement may be accompanied by an 'accompanying person',[153] who is defined to be a parent, guardian or next of kin, or another person who is authorised to be an accompanying person by a parent, guardian or next of kin.[154] An accompanying person may give consent on behalf of the child or incapable person for the purposes of biosecurity measures under a human biosecurity control order.[155] If the accompanying person gives their consent, then the child or incapable person is taken to have given their consent.[156] Additionally, if an officer gives a direction to an accompanying person for the purpose of ensuring the compliance of the child or incapable person with a requirement in relation to a listed human

147 Part 3, subsection 9(1).

148 Part 4, section 10.

149 Part 4, subsections 10(2) and (4).

150 See the Notes to subsections 6(4), 7(5), 8(6), 9(3) and 10(6); see also *Biosecurity Act 2015,* subsection 46(1).

151 *Biosecurity Act 2015,* subsection 46(4).

152 *Biosecurity Act 2015,* section 9.

153 *Biosecurity Act 2015,* sections 36 and 37.

154 *Biosecurity Act 2015,* sections 9 and 39.

155 *Biosecurity Act 2015,* subsection 40(1).

156 *Biosecurity Act 2015,* subsection 40(2).

disease,[157] the accompanying person must comply with the direction. Failure to do so is a fault-based offence attracting a penalty of imprisonment for five years or 300 penalty units (currently $99,000) or both.[158]

Summary of committee view

2.123 The committee considered that to the extent that the measures in this instrument assist in preventing the spread of a listed human disease in Australian territory, the measures would promote the right to health.

2.124 The committee welcomed the minister's advice that screening of a traveller entering Australia involves an interview rather than medical examination. However, the committee noted that the instrument itself does not preclude the use of more invasive screening and testing equipment and therefore considered that, depending on how the provisions relating to screening of travellers entering Australia are operationalised in the future, the measures in the instrument could amount to an impermissible limitation on an individual's right to privacy. The committee therefore recommended that the instrument be amended to provide that screening of an incoming traveller must not involve physical examination. The committee also considered that, in relation to informational privacy, there is a risk that the safeguards in the Biosecurity Act may not be adequate in all circumstances so as to ensure that any limitation on the right to privacy will be proportionate.

2.125 The committee considered that the Biosecurity Act and the instrument do not appear to contain adequate safeguards to protect the rights of children and people with disability. The committee therefore reiterated its previous recommendation (as made in *Report 12 of 2021*) that guidelines be developed to explain officers' obligations to ensure due weight is given to the views of the child (according to their age and maturity), and to the rights of persons with disabilities to give free and informed consent when seeking consent to any biosecurity measures.

2.126 The committee further recommended that a statement of compatibility be prepared in relation to this instrument.

Minister's response[159]

2.127 The minister advised:

> **2.80 The committee considers the proportionality of this measure may be assisted were the instrument amended to provide that screening of an incoming traveller must not involve physical examination.**

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157 Under Chapter 2 of the *Biosecurity Act 2015*.

158 *Biosecurity Act 2015,* section 38.

159 The minister's response to the committee's inquiries was received on 25 November 2025. This is an extract of the response. The response is available in full on the committee's website.

Australians expect their government to respond quickly and effectively to emerging health threats, particularly those as serious as a potential outbreak of a Listed Human Disease. To meet this expectation, it is essential to retain legislative authority for effective screening measures such as physical examination, even if these measures are not typically applied for routine screening purposes as explained in my letter of 10 September 2025.

It is important that the Committee understand the difference between physical examination and invasive physical examination. Simple physical examinations such as measuring temperature and heart rate, observing a rash, or examining eyes and skin for jaundice, for example, are all non-invasive examination techniques which may have utility for screening for a future, unknown serious disease or an outbreak of a known Listed Human Disease.

It is unlikely that an invasive physical examination would ever be used as a screening method at an Australian border for the reasons set out in my previous letter. Such invasive physical screenings would not be utilised lightly, and only ever in a situation of the gravest threat to the public health of Australia. As the committee notes in section 2.62 of Report 6 of 2025, there are strong checks and balances in the Act, and these are in place to ensure screening requirements are used proportionately.

Finally, a provision specifically ruling out physical examination may have the unintended effect of creating confusion about whether relevant officials are legally prevented from giving first aid to an ill traveller with urgent or life-threatening medical needs. The Act is specific in s35 that the exercise of a power, or the imposition of a biosecurity measure, in relation to an individual must not interfere with any urgent or life-threatening medical needs of the individual. A provision in the Determination preventing physical examination may be perceived by operational personnel as limiting their ability to assist in such circumstances.

2.81 The committee reiterates its previous recommendation (as made in Report 12 of 2021) that guidelines be developed to explain officers' obligations to ensure due weight is given to the views of the child (according to their age and maturity) and to the rights of persons with disabilities to give free and informed consent when seeking consent to any biosecurity measures.

As outlined in my letter of 10 September 2025, I agree that this should be given further consideration. I have asked the Department of Health, Disability and Ageing to review this aspect of the Act in the light of the Committee's report. Recent machinery-of-government changes, which brought the disability portfolio into the department, will support improved alignment on these commitments.

The department will continue to work with its partners at the Department of Agriculture, Fisheries and Forestry and relevant border agencies to ensure officers understand their obligation to give proper weight to the

views of children, and to respect the rights of people with disabilities to provide free and informed consent when seeking consent for biosecurity activities.

2.82 The committee recommends that a statement of compatibility be prepared in relation to this instrument.

I note the Committee's recommendation.

Concluding comments

Committee view

2.128 The committee thanks the minister for this response.

2.129 The committee welcomes the minister's explanation of the difference between invasive and non-invasive examination techniques, and the minister's advice that it is unlikely that an invasive physical examination would ever be used as a screening method at an Australian border and that such an examination would only be utilised in a situation of the gravest threat to the public health of Australia. The committee notes the minister's advice that removing the ability of officers to carry out physical examination may have unintended consequences regarding the ability to assist with urgent or life-threatening medical needs of an individual.

2.130 The committee also welcomes the minister's indication that further consideration will be given to the development of guidelines to ensure due weight is given to the views of the child (according to their age and maturity), and to the rights of persons with disabilities to give free and informed consent when seeking consent to any biosecurity measures.

2.131 The committee makes no further comment and draws its human rights concerns regarding the legislative instrument to the attention of the minister and the Parliament.

Customs (Places of Detention) Directions 2025[160]

FRL No.	F2025L01189
Purpose	This legislative instrument identifies places at which a customs officer is permitted to detain a person under Division 1BA of Part XII of the *Customs Act 1901* and requires privacy to be afforded to detainees during searches.
Portfolio	Home Affairs
Authorising legislation	*Customs Act 1901*
Disallowance	15 sitting days after tabling (tabled in the House of Representatives on 7 October 2025 and in the Senate on 27 October 2025). Notice of motion to disallow must be given by 3 February 2026 in the House and by 2 March 2026 in the Senate.[161]
Rights	Children's rights; freedom of movement; humane treatment in detention; liberty; privacy; rights of persons with disability

2.132 The committee requested a response from the minister in relation to the instrument in *Report 8 of 2025*.[162]

Treatment in detention

2.133 Under the *Customs Act 1901* (Customs Act), a customs officer[163] is permitted to detain a person if the person is in a designated place,[164] including a port, airport or wharf, and:

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160 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Customs (Places of Detention) Directions 2025, *Report 1 of 2026*; [2026] AUPJCHR 8.

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

162 Parliamentary Joint Committee on Human Rights, *Report 8 of 2025* (11 December 2025), pp. 74–83.

163 *Customs Act 1901*, section 4: an officer means an officer of Customs, which means the secretary of the department, the Australian Border Force Commissioner, an APS employee of the department, or a person authorised under certain provisions of the *Customs Act 1901* to exercise the powers and perform the functions of an officer.

164 *Customs Act 1901*, section 4: a designated place includes a port, airport or wharf that is appointed under section 15; a place to which a ship or aircraft has been brought because of stress of weather or other reasonable cause; a boarding station that is appointed under section 15; a place that is the subject of a permission under subsection 58(2) or section 175; or a section 234AA place.

- the customs officer has reasonable grounds to suspect the person has committed, is committing or intends to commit a serious Commonwealth offence or a prescribed state or territory offence;[165] or
- the customs officer has reasonable grounds to suspect that the person intends to leave the designated place and either there is a warrant for the arrest of the person in relation to a Commonwealth offence or a prescribed state or territory offence, or the person is on bail and subject to a bail condition that, if complied with, prevents the person from leaving Australia;[166] or
- the customs officer is satisfied on reasonable grounds that the person is, or is likely to be, involved in an activity that is a threat to national security or the security of a foreign country.[167]

2.134 The instrument identifies places of detention that a person can be held in. It provides that a person must be held in a room where persons inside the room are concealed from the view of persons outside the room; the room is secured against access by any person who is not a customs officer; and the room has reasonably comfortable ventilation and illumination.[168] If a room meeting these standards is not available in the designated place, the person must be detained in a room, if it is convenient and suitable to do so, in another place that meets these standards, or otherwise the person must be detained in an Australian Border Force (ABF) vehicle.[169]

2.135 The instrument further provides that if a customs officer conducts a search of the person before taking them to a permissible place of detention, the customs officer must afford the person as much personal privacy as the circumstances of the search allow.[170]

Summary of initial assessment

Preliminary international human rights legal advice

Rights to freedom of movement; humane treatment in detention; liberty; privacy; rights of persons with disability; rights of the child

2.136 By providing for some conditions of detention for an individual, including reasonably comfortable ventilation and illumination, and requiring detainees to be afforded as much privacy as the circumstances of a search of their person allows, the measures may promote the right to humane treatment in detention and the right to

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165 *Customs Act 1901*, subsection 219ZJB(1).

166 Subsection 219ZJC(1).

167 Subsection 219ZJCA(1).

168 Subsection 6(1).

169 Subsection 6(2).

170 Section 7.

privacy. The statement of compatibility identifies that the measures promote these rights.[171]

2.137 The right to humane treatment in detention is protected by article 10 of the International Covenant on Civil and Political Rights (ICCPR). It provides that all people deprived of their liberty must be treated with humanity and dignity. The United Nations (UN) Human Rights Committee has stated that this right:

> imposes on States parties a positive obligation towards persons who are particularly vulnerable because of their status as persons deprived of liberty, and complements the ban on torture or other cruel, inhuman or degrading treatment or punishment contained in article 7 of the Covenant. Thus, not only may persons deprived of their liberty not be subject to treatment that is contrary to article 7…but neither may they be subjected to any hardship or constraint other than that resulting from the deprivation of liberty; respect for the dignity of such persons must be guaranteed under the same conditions as for that of free persons.[172]

2.138 Inhuman treatment must attain a minimum level of severity to come within the scope of article 10 of the ICCPR.[173] The UN Human Rights Committee has stated that the assessment of this minimum depends on all the circumstances of the case, such as the nature and context of the treatment, its duration, its physical or mental effects, and in some instances, the sex, age, state of health or other status of the victim.[174]

2.139 The right to privacy prohibits arbitrary and unlawful interferences with an individual's privacy, family, correspondence or home.[175] For persons in detention, the degree of restriction on a person's right to privacy must be consistent with the standard of humane treatment of detained persons under Article 10(1) of the International Covenant on Civil and Political Rights.[176] Article 10 provides extra protection for persons in detention who are particularly vulnerable because of their

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171 Statement of compatibility, p. 8.

172 UN Human Rights Committee, *General Comment No. 21: article 10 (Human Treatment of Persons Deprived of Their Liberty)* (1992) [3].

173 The *United Nations Standard Minimum Rules for the Treatment of Prisoners* (Mandela Rules) outline minimum standards for prisoners, including ensuring all prisoners are treated with the respect due to their inherent dignity and value as human beings, provision for personal hygiene, access to food and health care services, and the prisoner must be allowed to inform their family or representative of their imprisonment. These rules have been endorsed by the UN Human Rights Committee, see Sarah Joseph and Melissa Castan, *The International Covenant on Civil and Political Rights: Cases, materials and commentary*, 3rd ed, Oxford University Press, Oxford, 2013, p. 317.

174 *Brough v Australia*, UN Human Rights Committee Communication No. 1184/2003 (2006) [9.2].

175 UN Human Rights Committee, *General Comment No. 16: Article 17* (1988) [3]–[4].

176 *Angel Estrella v Uruguay*, UN Human Rights Committee Communication No. 74/80 (1983) [9.2].

status as persons deprived of their liberty, and imposes a positive duty on States to provide detainees with a minimum of services to satisfy basic needs, including means of communication and privacy.[177] Persons in detention have the right to correspond under necessary supervision with families and reputable friends on a regular basis.[178]

2.140 The right to privacy also includes the right to personal autonomy and physical and psychological integrity. It extends to protecting a person's bodily integrity against compulsory procedures.[179] The UN Human Rights Committee has emphasised 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, and further that persons subject to body searches should only be examined by persons of the same sex.[180]

2.141 The right to humane treatment in detention and the right to privacy may be limited where a person is detained in a place that does not meet standards of humane treatment (for example, an ABF vehicle) or where they are subject to a search of their person. By designating places in which a person can be detained, the measures also engage and may limit the rights to freedom of movement and liberty. To the extent that children and people with disability may be detained in the places identified, the measures also engage the rights of the child,[181] and the rights of persons with disability.[182] The statement of compatibility does not identify that these rights are engaged and limited.

2.142 The right to freedom of movement includes the right to move freely within a country for those who are lawfully within the country, the right to leave any country and the right to enter one's own country.[183] The UN Human Rights Council has stated that placing individuals in temporary custody in stations, ports and airports or any other facilities where they remain under constant surveillance may not only amount

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177 UN Human Rights Committee, *General Comment No. 21: Article 10 (Humane Treatment of Persons Deprived of their Liberty)* (1992).

178 *Angel Estrella v Uruguay*, UN Human Rights Committee Communication No. 74/80 (1983) [9.2].

179 See *MG v Germany*, UN Human Rights Committee Communication No. 1428/06 (2008) [10.1].

180 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].

181 Including the requirement that the best interests of the child be the primary consideration in all actions concerning children; the obligation to provide protection and humanitarian assistance to child refugees and asylum seekers; the requirement that detention is used only as a measure of last resort and for the shortest appropriate period of time; and the obligation to take measures to promote the health, self-respect and dignity of children recovering from torture and trauma: Convention on the Rights of the Child, articles 3(1), 22, 37(b) and 39.

182 Convention on the Rights of Persons with Disabilities.

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

to restrictions on personal freedom of movement, but also constitute a de facto deprivation of liberty.[184]

2.143 The right to liberty prohibits the arbitrary and unlawful deprivation of liberty.[185] The notion of 'arbitrariness' includes elements of inappropriateness, injustice and lack of predictability. The UN Human Rights Committee has stated that several safeguards are necessary for the protection of persons against arbitrary detention:

> Detainees should be held only in facilities officially acknowledged as places of detention. A centralized official register should be kept of the names and places of detention, and times of arrival and departure, as well as of the names of persons responsible for their detention, and made readily available and accessible to those concerned, including relatives. Prompt and regular access should be given to independent medical personnel and lawyers and, under appropriate supervision when the legitimate purpose of the detention so requires, to family members.[186]

2.144 Accordingly, any detention must be lawful, reasonable, necessary and proportionate in all circumstances. Detention that may initially be necessary and reasonable may become arbitrary over time if the circumstances no longer require detention. The UN Human Rights Committee has further stated that the appropriateness of the conditions prevailing in detention to the purpose of detention is sometimes a factor in determining whether detention is arbitrary within the meaning of article 9.[187] In this respect, regular review must be available to scrutinise whether the continued detention is lawful and non-arbitrary. The right to liberty applies to all forms of deprivations of liberty, including immigration detention.

2.145 Children have special rights under international human rights law taking into account their particular vulnerabilities.[188] Both international human rights law and Australian criminal law recognise that children have different levels of emotional, mental and intellectual maturity than adults, and so are less culpable for their actions.[189] The detention of a child, for example, should only be used as a measure of

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184 UN Human Rights Council, *Report of the Working Group on Arbitrary Detention*, A/HRC/22/44 (2012) [59].

185 International Covenant on Civil and Political Rights, article 9.

186 UN Human Rights Committee, *General Comment No. 35: Liberty and security of person,* CCPR/C/GC/35 (2014) [58].

187 UN Human Rights Committee, *General Comment No. 35: Liberty and security of person,* CCPR/C/GC/35 (2014) [59].

188 Convention on the Rights of the Child. See also, UN Human Rights Committee, *General Comment No. 17: Article 24* (1989) [1].

189 UN General Assembly, *United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules)*, UNGA Res. 40/33 (1985).

last resort, and for the shortest appropriate period of time.[190] Further, every child deprived of liberty has the right to maintain contact with their family, and this should only be limited in exceptional circumstances and in a manner which is clearly described in law and is not left to the discretion of authorities.[191] In addition, Australia is required to ensure that, in all actions concerning children, the best interests of the child shall be a primary consideration. That is, a child's best interests are not just one consideration to be taken into account among other considerations.[192]

2.146 The Convention on the Rights of Persons with Disabilities (CRPD) reaffirms that all persons with disabilities are guaranteed all human rights without discrimination, including those rights set out above. The CRPD clarifies and qualifies how all categories of rights apply to persons with disabilities. For example, in relation to the right to liberty, people with disability must not be deprived of their liberty unlawfully or arbitrarily and the existence of a disability must not justify deprivation of liberty.[193] Additionally, states are obligated to provide persons with disability who are deprived of their liberty reasonable accommodation.[194] The UN Committee on the Rights of Persons with Disabilities has emphasised that 'a lack of accessibility and reasonable accommodation places persons with disabilities in substandard conditions of detention that are incompatible with article 17 of the Convention [right to respect for physical and mental integrity] and may constitute a breach of article 15(2) [freedom from torture or cruel, inhuman or degrading treatment or punishment]'.[195]

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190 UN Committee on the Rights of the Child, *General Comment No. 24 on children's rights in the child justice system* (2019) [85].

191 UN Committee on the Rights of the Child, *General Comment No. 24 on children's rights in the child justice system* (2019) [94].

192 UN Committee on the Rights of the Child, *General Comment No. 14 on the right of the child to have his or her best interests taken as a primary consideration* (2013); see also *IAM v Denmark*, UN Committee on the Rights of the Child Communication No. 3/2016 (2018) [11.8].

193 The Committee on the Rights of Persons with Disabilities has described the right not to be deprived of liberty on the basis of disability as an 'absolute prohibition of detention on the basis of impairment'. See United Nations General Assembly, *Report of the Committee on the Rights of Persons with Disabilities*, A/72/55 (2016) p. 16.

194 Convention on the Rights of Persons with Disabilities, article 14.

195 United Nations General Assembly, *Report of the Committee on the Rights of Persons with Disabilities*, A/72/55 (2016) p. 20. In *Brough v Australia*, for example, the UN Human Rights Committee found that the author's extended confinement to an isolated cell without any possibility of communication, combined with his exposure to artificial light for prolonged periods and the removal of his clothes and blanket was not commensurate with his status as a juvenile person in a particularly vulnerable position because of his disability and his status as an Aboriginal, and consequently found a violation of article 10 (the right to humane treatment in detention). See *Brough v Australia*, UN Human Rights Committee Communication No. 1184/2003 (2006) [9.2].

2.147 The above rights may generally be subject to permissible limitations where the limitation pursues a legitimate objective, is rationally connected to (that is, effective to achieve) that objective and is proportionate to achieving that objective.

Committee's initial view

2.148 The committee noted that by providing for some conditions of detention for an individual and requiring detainees to be afforded as much privacy as the circumstances of a search of their person allows, the measures may promote the right to humane treatment in detention and the right to privacy. However, the committee considered that these rights may also be limited where a person is detained in a place that does not meet standards of humane treatment or where they are subject to a search of their person. The committee further considered that by designating places in which a person can be detained, the measures also engage the rights to freedom of movement and liberty and, to the extent that children and people with disability may be detained in the places identified, the measures also engage the rights of the child and the rights of persons with disability.

2.149 The committee considered that the measures pursue a legitimate objective and appear to be rationally connected to that objective. However, the committee considered further information was required to assess the proportionality of the measures with these rights.

2.150 The full initial analysis is set out in *Report 8 of 2025*.

Minister's response[196]

2.151 The minister advised:

> ***(a) what safeguards exist beyond those specified in the instrument to ensure the humane treatment and privacy of individuals detained***
>
> The APS Values and Code of Conduct contained within the *Public Service Act 1999* articulate the expectations placed on departmental (including Australian Border Force (ABF)) officers in terms of standards of behaviour. These include being respectful and maintaining the highest ethical standards at all times. All officers are required to discharge their duties, delegations, authorisations and powers lawfully, proportionately and appropriately, in accordance with legislative requirements and approved policy settings and procedures.
>
> Officers have a duty of care towards detained persons whilst they are in ABF custody and must treat them with dignity and respect during the detention. The health and welfare of detainees is the responsibility of the detaining officer.

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196 The minister's response to the committee's inquiries was received on 13 January 2025. This is an extract of the response. The response is available in full on the committee's website.

Officers undertaking the detention of individuals are required to be trained and certified in the Personal Search, Detention and Search Training Course.

Access to family forms part of the humane treatment for individuals who are detained. Officers must inform the person of their right to have a family member, or another person, notified of their detention if:

- a person has been detained for more than 2 hours for the purposes of sections 219ZJB(5) and 219ZJCA(4) of the Customs Act; or
- a person has been detained for more than 45 minutes subject to a warrant or bail condition (section 219ZJC(4) of the Customs Act).

The Traveller Intervention and Response Policy Statement highlights that officers must ensure that intervention and response activities are commensurate with any suspected or identified risks and are conducted in accordance with the relevant legislated powers.

The Detention and Search (Divisions 1B and 1BA *Customs Act 1901*) Procedural Instruction (Detention and Search PI) is the principal policy document that informs the conduct of officers in line with the legislative requirements and procedures relating to the detention and search of individuals under Divisions 1B and 1BA of Part XII of the Customs Act.

This Detention and Search PI sets out the rights available to the individual, including minors, the allowed conduct when executing the search and the circumstances required to detain and search an individual to be lawful under the Customs Act. This includes:

- that reasonable steps must be taken to ensure the person's health and safety are not at risk during the period of detention
- the use of interpreters if a person is not fluent in English
- circumstances regarding contacting a family member, or another person
- if a person has been in detention for longer than 4 hours, an appropriate form of nourishment and water may be provided.

The Detention and Search PI also provides guidance on use of force in relation to detention. Where an officer exercises powers in relation to a person under Division 1BA they must not use more force, or subject the person to greater indignity, than is reasonable and necessary (subsection 219ZJG(1) of the Customs Act). Where use of force is required, an officer must not do an act likely to cause death or grievous bodily harm to the person, unless the officer believes on reasonable grounds that doing the act is necessary to protect life or prevent serious injury to the officer or any other person (subsection 219ZJG(2) of the Customs Act).

There is no exemption under the Detention Direction from Part 5 of the *Australian Border Force Act 2015* dealing with collection, retention and

disclosure of information, which accords with the *Privacy Act 1988* and ensures individuals' privacy while in detention.

(b) whether a detained individual is able to contact a family member or other person themselves and if so, when

Officers must inform the person of their right to have a family member, or another person, notified of their detention if:

- a person has been detained for more than 2 hours for the purposes of sections 219ZJB(5) and 219ZJCA(4) of the Customs Act; or
- a person has been detained for more than 45 minutes subject to a warrant or bail condition (section 219ZJC(4) of the Customs Act).

If the person wishes to exercise their right to notify someone of their detention, the officer must take all reasonable steps to notify the family member, or another person.

The officer must inform a minor (or a person reasonably believed to be a minor) of their right for a parent or guardian or another person who is capable of representing their interests to be notified of their detention (section 219ZJJ of the Customs Act).

If the person is a minor (or a person reasonably believed to be a minor), upon the request of the person, the officer must take all reasonable steps to notify such person and inform them:

- the minor has been detained
- the place where the minor is being held
- the place where the minor will be transferred to by police, if known at the time of contacting the parent, guardian or person representing the minor's interests.

If officers are subsequently made aware of the place where the minor is being transferred to by the police, then the officer may inform the parent, guardian or person representing the minor's interests of that place.

Any request for notification may be refused if the officer believes on reasonable grounds that notification should not be made in order to safeguard national security, the security of a foreign country or the processes of law enforcement, or protect the life and safety of any person.

(c) whether there is a time limit on the duration for which an individual can be detained under Division 1BA of Part XII of the Customs Act 1901

There is no specific timeframe or maximum duration prescribed in the Customs Act for how long the individual can be detained. Division 1BA of the Customs Act is intended to facilitate the process of safely handing a person over to State or Territory police, or the Australian Federal Police custody under specified circumstances.

An officer must advise a police officer of the person's detention as soon as practicable and ensure the person is made available to the police officer as soon as practicable.

If the officer no longer has reasonable grounds to suspect that the person has committed, or was committing, an offence, the officer must release the person from detention immediately.

(d) how long are individuals typically detained for before being delivered to the police or released

The Department does not have a central source of information that tracks how long individuals are detained before they are delivered to the police or released.

Each detention is recorded individually in the Department of Home Affairs record management system and is therefore not available unless each occurrence of detention is investigated manually.

(e) what safeguards exist to ensure the humane treatment and privacy of individuals detained in an Australian Border Force (ABF) vehicle

The APS Values and Code of Conduct contained within the *Public Service Act 1999* articulate the expectations placed on all officers in terms of standards of behaviour. These include being respectful and maintaining the highest ethical standards at all times. Officers have a duty of care towards a person detained whilst they are in ABF custody and must treat them with dignity and respect during the detention. The health and welfare of detainees is the responsibility of the detaining officer. Officers undertaking this activity are required to be trained and certified in the Personal Search, Detention and Search Training Course. This training covers using the least restrictive intrusion on the individual necessary, such as in relation to the use of restraints.

The Detention and Search PI outlines the responsibilities on the ABF officers undertaking the search and the rights of the individual, to ensure humane treatment is maintained during detention.

The Detention and Search PI states if a vehicle is utilised it must 'afford adequate personal privacy'.

The *Detention of reportable child offenders at the border* Procedural Instruction provides information on the rights available to the individual, including minors, the conduct of the search and the circumstances required to exist for the lawful detention and search of an individual under the Act. This includes:

- that reasonable steps must be taken to ensure the person's health and safety are not at risk during the period of detention
- the use of interpreters if a person is not fluent in English

- if a person has been in detention for longer than 4 hours, an appropriate form of nourishment and water may be provided.

This PI notes that if the officer is using an ABF vehicle, the following WHS standards must be adhered to:

- ensuring that adequate air conditioning is used
- parking in a shaded spot if available
- providing water as required, if conditions are particularly hot.

(f) how many individuals have been detained in an ABF vehicle to date and what is the average length and conditions of detention in an ABF vehicle, including whether there are safeguards to maintain acceptable and humane temperatures at all time, for example are vehicles air conditioned at all times and is there a maximum temperature in which a person cannot be detained in an ABF vehicle

The Australian Border Force (ABF) does not hold aggregate details of how many individuals have been detained in an ABF vehicle and the average length of the detention in an ABF vehicle.

Each detention is recorded individually in the Department of Home Affairs record management system and is therefore not available unless each occurrence of detention is investigated manually.

(g) what specific considerations and safeguards exist for individuals detained who have particular vulnerabilities, including persons with a disability and children

If the person is a minor (or a person reasonably believed to be a minor), the officer must inform the minor of their right for a parent or guardian or another person who is capable of representing their interests to be notified of their detention (section 219ZJJ of the Customs Act).

Upon the request of the person, the officer must take all reasonable steps to notify such person and inform them:

- the minor has been detained
- the place where the minor is being held
- the place where the minor will be transferred to by police, if known at the time of contacting the parent, guardian or person representing the minor's interests.

If officers are subsequently made aware of the place where the minor being transferred to by the police, then the officer may inform the parent, guardian or person representing the minor's interests of that place.

Any request for notification may be refused if the officer believes on reasonable grounds that notification should not be made in order to safeguard national security, the security of a foreign country or the processes of law enforcement or protect the life and safety of any person.

At the time the ABF officer advises a police officer of the minor's detention, the officer must also advise the police officer that the person is a minor.

If the person has a disability or is believed to have a disability, officers are expected to identify individual care needs of any persons with special needs, which include those with a mental or physical disability, the elderly, minors, and torture/trauma victims. If the disability impacts the ability to communicate, s 219ZD requires that officers must take reasonable steps to provide a competent interpreter throughout the process.

Where an ABF officer or police officer detaining a person under this Division has reasonable cause to believe that a person is not fluent in English, the officer must take all reasonable steps to ensure during the person's detention, a person competent to act as an interpreter is used and acts as an interpreter for the purpose of communication (s219ZD and s219ZJI of the Customs Act).

The Detention and Search PI notes to avoid actual or perceived conflicts of interest or integrity concerns, where the detaining officer has determined that reasonable grounds for suspicion exist (or the officer has a reasonable belief), officers must cease to provide interpretation, and a Telephone Interpreter Service must be used.

An interpreter provided by the Telephone Interpreter Service must be used where:

- the person requests an interpreter
- the officer has determined that reasonable grounds for suspicion exist and wishes to conduct a search, but there is reasonable cause to believe that:
    - the person does not speak English
    - is unable, because of inadequate knowledge of the English language or for any other reason, to communicate orally with reasonable fluency in the English language.

(h) what safeguards beyond those specified in the instrument exist to ensure the dignity of a person subject to a search of their person.

The APS Values and Code of Conduct contained within the *Public Service Act 1999* articulate the expectations placed on all officers in terms of standards of behaviour. These include being respectful and maintaining the highest ethical standards at all times.

Officers undertaking this activity are required to be trained and certified in the Personal Search, Detention and Search Training Course.

The Traveller Intervention and Response Policy Statement highlights that ABF officers must ensure that intervention and response activities are commensurate with any suspected or identified risks and are conducted in accordance with the relevant legislated powers.

The Detention and Search PI informs ABF officers of the legislative requirements and procedures relating to the detention and search of individuals under Divisions 1B and 1BA of Part XII the Customs Act.

The Detention and Search PI notes that a search of a person is lawfully permitted for persons detained under Division 1BA of the *Customs Act 1901*, but that search must be conducted in ways outlined in s219ZJD(2).

Importantly, a search under s219ZJD must be conducted:

- as soon as practicable after the person is detained
- by an officer of the same sex as the detained person.
- An officer who conducts a search under this Division may seize any weapon or anything mentioned in section 219ZJD(1)(c).

If a weapon or other thing is seized under Division 1BA, officers must ensure it is delivered, or made available, to a Police officer.

Concluding comments

International human rights legal advice

2.152 The preliminary analysis noted that the measures likely pursue a legitimate objective and appear to be rationally connected to that objective. The key question is whether the limitations on rights are proportionate.

2.153 As outlined in the preliminary analysis, the measures are accompanied by a number of safeguards that assist with proportionality, including that a person must be detained in a room that is concealed from the view of persons outside the room, is secured against access by any person who is not a customs officer, and has reasonably comfortable ventilation and illumination. A person is also required to be afforded as much personal privacy during searches as the circumstances allow. To assess the sufficiency of safeguards, further information was sought regarding other safeguards that exist to ensure the humane treatment and privacy of individuals detained and searched. The minister stated that Australian Border Force (ABF) officers are subject to the APS Values and Code of Conduct, which requires officers to be respectful and maintain the highest ethical standards at all times. The minister stated that officers have a duty of care towards detained persons whilst they are in ABF custody and must treat them with dignity and respect during the detention. The minister noted that the health and welfare of detainees is the responsibility of the detaining officer. The minister further advised that officers are required to be trained and certified in the Personal Search, Detention and Search Training Course. The minister noted that other policies apply, including the Traveller Intervention and Response Policy Statement, which provides that officers must ensure their activities are commensurate with any suspected or identified risks and are conducted lawfully. Additionally, the Detention and Search (Divisions 1B and 1BA *Customs Act 1901*) Procedural Instruction sets out the rights available to detainees and the circumstances in which search and detention is lawful, including:

- that reasonable steps must be taken to ensure the person's health and safety are not at risk during the period of detention
- the use of interpreters if a person is not fluent in English
- circumstances regarding contacting a family member, or another person
- if a person has been in detention for longer than 4 hours, an appropriate form of nourishment and water may be provided.

2.154 The Detention and Search Procedural Instruction also provides guidance on use of force in relation to detention. In particular, officers must not use more force, or subject a person to greater indignity, than is reasonable and necessary and where use of force is required, it must not be an act likely to cause death or grievous bodily harm to the person (unless it is considered necessary to protect life or prevent serious injury to the officer or any other person).

2.155 Regarding contact with family members, the minister advised that detainees must be informed of their right to have a family member or another person notified of their detention if the person has been detained for more than two hours or a person has been detained for more than 45 minutes subject to a warrant or bail condition. The minister advised that if a person wishes to exercise their right to notify family, the officer must take all reasonable steps to notify the family member or another person. If the detainee is (or likely to be) a minor, the officer must inform the minor of their right for a parent, guardian or another person to be notified of their detention. The minister stated that any request for notification may be refused if the officer believes on reasonable grounds that notification should not be made in order to safeguard national security, the security of a foreign country or the processes of law enforcement, or to protect the life and safety of any person.

2.156 The above safeguards assist with proportionality, particularly with respect to the right to privacy and humane treatment in detention. However, many of these safeguards are discretionary and contained in policies rather than legislation. Discretionary safeguards are not as stringent as legislative protections and may not be sufficient for the purposes of international human rights law. Further, there are other aspects of humane treatment that do not appear to be addressed. For example, it is unclear whether a detained individual has access to fresh drinking water and sanitary facilities at any time (noting the policies provide for nourishment and water after a person is detained for four hours); whether they will be provided with necessary medical or other health care; and whether they would be permitted to engage in religious practices in accordance with their religion. While a detainee's family may be notified of their detention, it remains unclear why two hours is considered a reasonable timeframe to inform the detained individual of their right to communicate and why the detained individual cannot themselves communicate with the family member or other person under appropriate supervision at an earlier time, particularly if the detained person is vulnerable, such as a child or person with disability. The

strength of this safeguard is also weakened by the exception to the right to notify family where there are national security concerns.

2.157 With respect to the rights to freedom of movement and liberty, the preliminary analysis noted that the Customs Act provides that a customs officer must advise a police officer of the person's detention, and ensure the person is made available to a police officer, as soon as practicable after detaining the person.[197] However further information was sought regarding the length of detention. The minister advised that there is no specific timeframe or maximum duration prescribed in the Customs Act for how long the individual can be detained. If the grounds on which the person was detained no longer apply, the officer must release the person from detention immediately. Detention that may initially be necessary and reasonable may become arbitrary over time if the circumstances no longer require detention.[198] The only limit on the length of detention is the requirement that an officer advise police of the person's detention and ensure the person is made available to police as soon as practicable after detaining the person. The minister was unable to provide any data or information as to how long individuals are typically detained for before being delivered to police or released. It is therefore difficult to assess the effectiveness of these provisions in mitigating the risk of arbitrary detention.

2.158 Further, as noted in the preliminary analysis, a customs officer who detains a person must inform the person of the reason for their detention in certain circumstances.[199] Informing an individual of the reason for their detention may assist with proportionality, however, this requirement does not extend to all circumstances. In particular, there is no requirement under the Customs Act to inform an individual of the reason for their detention if they are detained because an officer is satisfied on reasonable grounds that the person is or is likely to be involved in an activity that is a threat to national security or the security of a foreign country.

2.159 Further information was also sought in relation to specific safeguards applicable to detention of persons in an ABF vehicle, noting that the above human rights concerns are likely exacerbated in this context. The minister advised that the same safeguards outlined above apply, including the APS Values and Code of Conduct and the various internal policies and guidelines. Of particular relevance, the minister

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197 *Customs Act 1901*, subsections 219ZJB(2) and (3); subsections 219ZJC(2) and (3); and subsection 219ZJCA(2).

198 States parties also need to show that detention does not last longer than absolutely necessary, that the overall length of possible detention is limited and that they fully respect the guarantees provided for by article 9 in all cases. See UN Human Rights Committee, *General Comment No. 35: Liberty and security of person* (2014) [15].

199 Including if the person is detained because of suspicion of committing a serious Commonwealth offence or prescribed state or territory offence; there is a warrant for the arrest of the person in relation to a Commonwealth offence or a prescribed state or territory offence; or the person is on bail and subject to a bail condition that, if complied with, prevents the person from leaving Australia: *Customs Act 1901*, subsection 219ZJF(1).

advised that the Detention of reportable child offenders at the border Procedural Instruction provides that if an officer is using an ABF vehicle, the following WHS standards must be adhered to:

- ensuring that adequate air conditioning is used;
- parking in a shaded spot if available; and
- providing water as required, if conditions are particularly hot.

2.160 The minister was unable to provide data or information regarding how many individuals have been detained in an ABF vehicle to date and the average length and conditions of detention in an ABF vehicle, including whether there are safeguards to maintain acceptable and humane temperatures at all times, for example whether vehicles are air conditioned at all times and whether there is a maximum temperature in which a person cannot be detained in an ABF vehicle.

2.161 The safeguards noted above assist with proportionality, but as noted, many of these safeguards are discretionary and whether they are sufficient will depend on the length and conditions of detention. It remains unclear how long an individual may be detained in a vehicle, and whether the detained individual has access to fresh drinking water and sanitary facilities at any time, access to health care and the ability to engage in religious practices.

2.162 Regarding specific safeguards for persons with particular vulnerabilities, the minister advised that there are notification requirements in relation to minors (as outlined above).[200] However, there is no requirement for the child to be able to communicate with the parent or guardian themselves and there is an exception to this notification requirement (on grounds of national security). Further, there is no requirement that the child be detained for the shortest appropriate period of time or that the best interests of the child be a primary consideration. In relation to people with disability, the minister advised that officers are expected to identify individual care needs of persons with disability and if an impairment impacts the person's ability to communicate, officers must take reasonable steps to provide a competent interpreter throughout the process. The provision of interpreters may serve as a safeguard for people who do not speak English as a first language. However, there do not appear to be adequate safeguards with respect to people with disability, such as the ability to access and be supported by a specified support person. Noting that the above human rights concerns are heightened in relation to the detention of persons with disabilities and children and the obligation on the state to provide additional protections to these groups, it does not appear that the measures are accompanied by sufficient safeguards to ensure that any limitation on the rights of children or people with disability are proportionate in practice.

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200 *Customs Act 1901*, paragraph 219ZJJ(1)(a).

2.163 In conclusion, while the measures pursue a legitimate objective and appear to be rationally connected to that objective, it has not been demonstrated that the measures represent a proportionate limitation on numerous human rights, noting the absence of key safeguards and a legislative limit on the length of detention.

Committee view

2.164 The committee thanks the minister for this response.

2.165 The committee notes that by providing for some conditions of detention for an individual and requiring detainees to be afforded as much privacy as the circumstances of a search of their person allows, the measures may promote the right to humane treatment in detention and the right to privacy. However, the committee considers that these rights may also be limited where a person is detained in a place that does not meet standards of humane treatment or where they are subject to a search of their person. The committee further considers that by designating places in which a person can be detained, the measures also engage the rights to freedom of movement and liberty and, to the extent that children and people with disability may be detained in the places identified, the measures also engage the rights of the child and the rights of persons with disability.

2.166 The committee considers that the measures, by providing for the conditions in which people are detained and searched and therefore providing for consistency and minimum standards, likely aim to achieve a legitimate objective for the purposes of international human rights law and appear to be rationally connected to (that is, effective to achieve) that objective.

2.167 Regarding proportionality, the committee notes that the measures are accompanied by some important safeguards. However, many of these safeguards are discretionary and do not provide sufficient protections for vulnerable groups, such as children and people with disability. The committee also notes that there is no time limit on the length of detention and there is no data or information available as to the typical length of detention. This makes it difficult to assess whether the safeguards are adequate to mitigate the risk of arbitrary detention. The committee therefore considers that it has not been demonstrated that the measures represent a proportionate limitation on the rights to privacy, humane treatment in detention, liberty and freedom of movement, as well as the rights of children and persons with disability to the extent the measures apply to these groups.

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

Public Interest Certificate instruments[201]

FRL No.	F2025L01194; F2025L01195; F2025L01197; and F2025L01198
Purpose	These legislative instruments either amend or remake guidelines relating to the issuing of public interest certificates. The instruments provide for additional purposes for which personal protected information can be disclosed, including where it is reasonably necessary to assist a Commonwealth, state or territory agency to manage a potential or actual work health and safety risk to that agency or premises where Services Australia is present.
Portfolio	Social Services
Authorising legislation	*Paid Parental Leave Act 2010*
Disallowance	15 sitting days after tabling (tabled in the House of Representatives on 7 October 2025 and in the Senate on 27 October 2025). Notice of motion to disallow must be given by 3 February 2026 in the House and by 2 March 2026 in the Senate.[202]
Rights	Equality and non-discrimination; privacy; rights of persons with disability

2.169 The committee requested a response from the minister in relation to the Family Assistance (Public Interest Certificate Guidelines) Determination 2025, Paid Parental Leave Amendment (Public Interest Certificates for Work Health and Safety Purposes) Rules 2025, Social Security (Public Interest Certificate Guidelines) (DSS) Determination 2025, and Student Assistance (Public Interest Certificate Guidelines) Determination 2025 in *Report 8 of 2025*.[203]

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201 Family Assistance (Public Interest Certificate Guidelines) Determination 2025; Paid Parental Leave Amendment (Public Interest Certificates for Work Health and Safety Purposes) Rules 2025; Social Security (Public Interest Certificate Guidelines) (DSS) Determination 2025; and Student Assistance (Public Interest Certificate Guidelines) Determination.

This entry can be cited as: Parliamentary Joint Committee on Human Rights, Paid Parental Leave Amendment (Public Interest Certificates for Work Health and Safety Purposes) Rules 2025, *Report 1 of 2026*; [2026] AUPJCHR 9.

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

203 Parliamentary Joint Committee on Human Rights, *Report 8 of 2025* (11 December 2025), pp. 84–89.

Information sharing powers

2.170 Under legislation relating to payments for family assistance, social security, student assistance and paid parental leave it is an offence to make an unauthorised use of personal information obtained under the legislation; and officers are not required to disclose information or documents to any person, except for the purposes of the relevant law they are administering.[204]

2.171 The Family Assistance (Public Interest Certificate Guidelines) Determination 2015, the Paid Parental Leave Amendment Rules 2015, the Social Security (Public Interest Certificate Guidelines) (DSS) Determination 2015 and the Student Assistance (Public Interest Certificate Guidelines) Determination 2015 (together, the PIC instruments) either amend or remake existing instruments relating to the issuing of public interest certificates.

2.172 The PIC instruments provide for additional purposes for which personal protected information can be disclosed, including where it is reasonably necessary to assist a Commonwealth, state or territory agency to manage a potential or actual work health and safety (WHS) risk to that agency at premises where Services Australia is present.[205] The explanatory statements note that the new WHS purpose will allow Services Australia to share information about aggressive customers to identify and assess the risk of generalised harm posed to workers and others at the premises.[206] Information about aggressive customers can be shared with other agencies (for example, Centrelink, Medicare and Child Support) and to other individuals within the shared office environment.[207]

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204 See *A New Tax System (Family Assistance) (Administration) Act 1999*, sections 164 and 167; *Social Security (Administration) Act 1999*, sections 204 and 207; *Student Assistance Act 1973*, sections 353 and 354; and *Paid Parental Leave Act 2010*, sections 129 to 132.

205 Family Assistance (Public Interest Certificate Guidelines) Determination 2025, section 28; Paid Parental Leave Amendment (Public Interest Certificates for Work Health and Safety Purposes) Rules 2025, Schedule 1, new section 56A; Social Security (Public Interest Certificate Guidelines) (DSS) Determination 2025, section 27; Student Assistance (Public Interest Certificate Guidelines) Determination 2025, section 27.

206 Explanatory statements to the Family Assistance (Public Interest Certificate Guidelines) Determination 2025, pp. 9–10; Paid Parental Leave Amendment (Public Interest Certificates for Work Health and Safety Purposes) Rules 2025, p. 4; Social Security (Public Interest Certificate Guidelines) (DSS) Determination 2025, p. 10; Student Assistance (Public Interest Certificate Guidelines) Determination 2025, p. 10.

207 Explanatory statement to the Family Assistance (Public Interest Certificate Guidelines) Determination 2025, p. 9; Statement of compatibility to the Paid Parental Leave Amendment (Public Interest Certificates for Work Health and Safety Purposes) Rules 2025, p. 5; Explanatory statements to Social Security (Public Interest Certificate Guidelines) (DSS) Determination 2025, p. 9; Student Assistance (Public Interest Certificate Guidelines) Determination 2025, p. 9.

Summary of initial assessment

Preliminary international human rights legal advice

Right to equality and non-discrimination, privacy and rights of persons with disability

2.173 By providing for an additional purpose to share personal protected information, this measure engages 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.[208] It also includes the right to control the dissemination of information about one's private life.

2.174 By providing that the sharing of information may be based on the perception of aggressiveness and generalised harm, this measure may engage the right to equality and non-discrimination, including on the ground of race, and the rights of persons with disability.

2.175 The right to equality and non-discrimination provides that everyone is entitled to enjoy their rights without discrimination of any kind and that all people are equal before the law and entitled without discrimination to equal and non-discriminatory protection of the law.[209] The right to equality encompasses both 'direct' discrimination (where measures have a discriminatory intent) and 'indirect' discrimination (where measures have a discriminatory effect on the enjoyment of rights).[210] 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, for example race or on the basis of disability.[211]

2.176 Differential treatment (including the differential effect of a measure that is neutral on its face) will not constitute unlawful discrimination if the differential treatment is based on reasonable and objective criteria such that it serves a legitimate

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208 International Covenant on Civil and Political Rights, article 17.

209 International Covenant on Civil and Political Rights, articles 2 and 26. Article 2(2) of the International Covenant on Economic, Social and Cultural Rights also prohibits discrimination specifically in relation to the human rights contained in the International Covenant on Economic, Social and Cultural Rights.

210 UN Human Rights Committee, *General Comment No. 18: Non-discrimination* (1989).

211 *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'. See Sarah Joseph and Melissa Castan, *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary*, 3rd edition, Oxford University Press, Oxford, 2013 [23.39].

objective, is rationally connected to that objective and is a proportionate means of achieving that objective.[212]

Committee's initial view

2.177 The committee noted that by providing for an additional purpose to share personal protected information based on an assessment of potential or actual work health and safety risk, this measure engages and limits the right to privacy and equality and non-discrimination. The committee was particularly concerned that this measure may disproportionately impact First Nations people and other people of culturally and linguistically diverse backgrounds, and persons with disabilities.

2.178 The committee therefore sought further information from the Minister for Social Services to assess the compatibility of this measure with these rights.

2.179 The full initial analysis is set out in *Report 8 of 2025*.[213]

Minister's response[214]

2.180 The minister advised:

> The Committee has sought additional information on the new 'work health and safety' ('WHS') disclosure ground in the PIC Guidelines in relation to the safeguards that exist to protect the rights of people who may disproportionately be considered to be an aggressive customer or pose a generalised threat to staff.
>
> The WHS ground has been introduced following recommendations from the 2023 Services Australia Security Risk Management Review (the Ashton Review), which the Australian Government commissioned following the stabbing attack of a staff member at a Services Australia service centre. The ground improves Services Australia's ability to share information where reasonably necessary to manage work health and safety risks, including in relation to customer aggression incidents. It reflects a commitment to protecting the safety and security of its workforce and all people who attend Services Australia's premises.
>
> The power to disclose information pursuant to the WHS ground is subject to a series of statutory and operational safeguards to ensure an appropriate balance is struck between pursuing this legitimate objective and protecting

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212 UN Human Rights Committee, *General Comment No. 18: Non-Discrimination* (1989) [13]; see also *Althammer v Austria*, UN Human Rights Committee Communication No. 998/01 (2003) [10.2].

213 Parliamentary Joint Committee on Human Rights, *Report 8 of 2025* (11 December 2025), pp. 84–89.

214 The minister's response to the committee's inquiries was received on 15 January 2026. This is an extract of the response. The response is available in full on the committee's website.

rights of people, including those from vulnerable cohorts, who engage with Services Australia. These safeguards are detailed below.

Statutory safeguards

Several important preconditions must be met before staff are able to disclose protected information pursuant to the WHS ground. Prior to such a disclosure occurring, the Secretary or a delegate (collectively referred to herein as 'the Secretary') must issue a public interest certificate authorising the disclosure under section 208(1)(a) of the *Social Security (Administration) Act 1999* ('SSA Act') or, where relevant, equivalent provisions under the family assistance law, *Student Assistance Act 1973* and *Paid Parental Leave Act 2010*.

For a public interest certificate to be issued, the Secretary must be satisfied that the disclosure is *necessary in the public interest*. The Secretary is also required to act in accordance with the PIC Guidelines (see section 208(2), SSA Act and equivalents) which require that the Secretary be satisfied that, among other things:

- the disclosure would be *reasonably necessary* to assist with the management of work health and safety risks at Services Australia premises;
- this purpose could not be achieved by disclosing the information in a de-identified form; and
- any recipients of the information would have a *genuine and legitimate interest* in the information.

These cumulative requirements mean the WHS ground can only be enacted to support the disclosure of protected information where the disclosure is genuinely needed to manage work health and safety risks at Services Australia premises. This may include, for example, identifying information (i.e. a person's name and customer reference number) and previous incidents of using violence or threatening to physically harm staff or others when visiting a service centre.

Where such a risk does not genuinely exist, for example, where a customer presents no risk, the statutory conditions for issuing a public interest certificate would not be met, and disclosure would not be authorised by the WHS ground. This helps to ensure the provision cannot be used for any other purpose and protects against disproportionate or discriminatory application or disclosure.

Any unauthorised disclosure of protected information would be subject to personal criminal sanction under section 204 of the SSA Act and equivalents.

The disclosure and management of information about customers is also governed by the *Privacy Act 1988*, which requires agencies including Services Australia to, among other things, take reasonable steps to protect the information from:

- misuse, interference and loss; and
- unauthorised access, modification or disclosure.

These requirements operate alongside program-specific confidentiality provisions and help ensure any disclosure is lawful and proportionate.

Operational safeguards

Services Australia has clear internal frameworks to help ensure WHS risk management does not disproportionately impact vulnerable groups. These safeguards are embedded in the agency's business-as-usual processes through mandatory training, detailed operational guidance, and support from specialist teams.

Agency staff are trained to manage customer interactions safely and respectfully, and to consider customers' circumstances, including any vulnerabilities, while taking any action to prevent or reduce the risk of customer aggression. As part of this process, staff are required to consider referrals to specialist teams to address the needs of the customer, including agency social workers, Indigenous Service Officers and Multicultural Service Officers.

These teams are specially trained and qualified to provide targeted and culturally appropriate support, and to intervene in complex cases, including situations where customer aggression may be linked to underlying vulnerabilities.

Services Australia has provided more information on how it manages customer aggression incidents and mitigates risk as part of its submission to the Senate Legal and Constitutional Affairs Committee's inquiry into the Workplace Protection Orders Bill 2024, which is accessible at this address: www.aph.gov.au/DocumentStore.ashx?id=1555518e-bf80-4d6f-81ba-e670085f7195&subId=776603.

At an organisational level, Services Australia is guided by its Indigenous Servicing Pathway Plan, its Multicultural Servicing Strategy and tailored servicing protocols, which prioritise cultural competency and accessibility to services across the agency's operations.

These statutory and operational arrangements:

- require the WHS ground to only facilitate disclosures of protected information where genuinely needed to protect staff and visitors from harm;
- prevent unnecessary disclosures; and
- help to guard against any disproportionate or discriminatory application.

Concluding comments

International human rights legal advice

2.181 Further information was sought as to what safeguards exist, including internal policies and training, to mitigate the risk that particular vulnerable persons may be disproportionately impacted by the measure, including individuals with cognitive impairments or other hidden disabilities, and people of culturally and linguistically diverse backgrounds, who may be more likely to be considered aggressive or pose a generalised threat.

2.182 The minister advised that the power to disclose information is subject to a series of statutory and operational safeguards to ensure an appropriate balance is struck between pursuing the legitimate objective of protecting the safety and security of Services Australia workers and protecting the rights of people, including those from vulnerable cohorts, who engage with Services Australia.

2.183 In relation to the statutory safeguards, the minister noted that several preconditions contained in the PIC Guidelines must be met before staff are able to disclose protected information. For a public interest certificate to be issued, the Secretary must be satisfied that the disclosure is necessary in the public interest and that, among other things:

- the disclosure would be reasonably necessary to assist with the management of work health and safety risks at Services Australia premises;
- this purpose could not be achieved by disclosing the information in a de-identified form; and
- any recipients of the information would have a genuine and legitimate interest in the information.

2.184 As noted in the preliminary analysis, the requirement that the Secretary must be satisfied that the disclosure is necessary in the public interest and act in accordance with the PIC Guidelines may help to ensure the measure is a proportionate limit on the right to privacy. However, much will depend on how the guidelines are applied in practice and the safeguards applicable to the relevant recipient.

2.185 With respect to the right to equality and non-discrimination, including on the grounds of race and the rights of persons with disability, the minister advised that Services Australia has internal frameworks to help ensure WHS risk management does not disproportionately impact vulnerable groups. The minister noted that these safeguards are embedded in the agency's business-as-usual processes through mandatory training, detailed operational guidance, and support from specialist teams.

2.186 The minister further noted that agency staff are trained to manage customer interactions safely and respectfully, and to consider customers' circumstances, including any vulnerabilities, while taking any action to prevent or reduce the risk of

customer aggression. As part of this process, staff are required to consider referrals to specialist teams to address the needs of the customer, including agency social workers, Indigenous Service Officers and Multicultural Service Officers. The minister stated that these teams are specially trained and qualified to provide targeted and culturally appropriate support, and to intervene in complex cases, including situations where customer aggression may be linked to underlying vulnerabilities.

2.187 These internal policies and processes may assist to mitigate the risk that vulnerable persons may be disproportionately impacted by the measure, including individuals with cognitive impairments or other hidden disabilities, and people of culturally and linguistically diverse backgrounds who may be more likely to be considered aggressive or pose a generalised threat.

2.188 While it appears that there are some important safeguards set out in internal policies and processes to assist staff to identify persons who may pose a genuine risk of harm, much will depend on the quality of the training and guidance provided to staff in practice so that particular vulnerable persons are not disproportionately identified as posing a threat based on their race or disability.

Committee view

2.189 The committee thanks the minister for this response.

2.190 The committee notes that by providing for an additional purpose to share personal protected information based on an assessment of potential or actual work health and safety risk, this measure engages and limits the rights to privacy and equality and non-discrimination.

2.191 The committee notes that it has previously commented on various public interest certificate guidelines and considers that the same concerns apply in relation to this measure.[215] While this measure may be a proportionate limit on the right to privacy, much depends on how the guidelines are applied in practice and the safeguards applicable to the relevant recipient.

2.192 The committee remains concerned that this measure may disproportionately impact First Nations people and other people of culturally and linguistically diverse backgrounds, and persons with disabilities. As an individual identified as an aggressive customer may have their personal information shared with other agencies and individuals who work in the shared office environment, if individuals are disproportionately identified as posing a threat based on their race or disability, there is a greater risk that they will have their personal information shared and their right to privacy disproportionately limited.

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[215] See Parliamentary Joint Committee on Human Rights, *Report 28 of the 44th Parliament* (17 September 2015) pp. 3–9; *Report 30 of the 44th Parliament* (10 November 2015) pp. 140–149; *Report 7 of 2018* (14 August 2018) pp. 2–10; and *Report 13 of 2018* (4 December 2018) pp. 25–37.

2.193 The committee considers that internal policies and processes may act as an important safeguard to mitigate the risk that vulnerable persons are disproportionately identified as posing a threat based on their race or disability. The committee notes, however, that much will depend on the quality of the training and guidance provided to staff in practice to identify persons who may pose a genuine risk of harm.

Suggested action

2.194 The committee recommends that the statements of compatibility be updated to reflect the information provided by the minister and provide an assessment of the compatibility of these measures with the right to equality and non-discrimination, including specifying the safeguards available.

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

Social Security (Remote Australia Employment Service) instruments[216]

FRL No.	F2025L01191; F2025L01190; F2025L01326 and F2025L01327
Purpose	The Social Security (Administration) (Penalty Amount) Determination 2025 [F2025L01191] determines the method for working out penalty amounts for no show no pay failures, reconnection failures, and non-attendance failures. The Social Security (Administration) (Persistent Non-compliance) Determination 2025 [F2025L01190] determines the matters that the secretary must consider in considering whether they are satisfied that a person has been persistently non-compliant with their obligations in relation to a participation payment. The Social Security (Declared Program Participant) Determination 2025 [F2025L01326] provides that participants of the Remote Australia Employment Service are 'declared program participants' for the purposes of the social security law. Declared program participants who are in receipt of a participation payment are subject to the Job Seeker Compliance Framework. The Social Security (Streamlined Participation Requirements) Instrument 2022 Amendment (Approved Programs of Work) 2025 [F2025L01327] amends the Social Security (Streamlined Participation Requirements) Instrument 2022 to provide that 'Work Skills and Projects' is an approved program of work available to participants of the Remote Australia Employment Service. Income support recipients who participate in an approved program of work are entitled to the approved program of work supplement.
Portfolio	Employment and Workplace Relations
Authorising legislation	*Social Security Act 1991; Social Security (Administration) Act 1999*

216 Social Security (Administration) (Penalty Amount) Determination 2025; Social Security (Administration) (Persistent Non-compliance) Determination 2025; Social Security (Declared Program Participant) Determination 2025; and Social Security (Streamlined Participation Requirements) Instrument 2022 Amendment (Approved Programs of Work) 2025.

This entry can be cited as: Parliamentary Joint Committee on Human Rights, Social Security (Administration) (Penalty Amount) Determination 2025; Social Security (Administration) (Persistent Non-compliance) Determination 2025; Social Security (Declared Program Participant) Determination 2025; and Social Security (Streamlined Participation Requirements) Instrument 2022 Amendment (Approved Programs of Work) 2025, *Report 1 of 2026*; [2026] AUPJCHR 10.

Disallowance	15 sitting days after tabling ([F2025L01191] and [F2025L01190] tabled in the House of Representatives on 7 October 2025 and in the Senate on 27 October 2025; [F2025L01326] and [F2025L01327] tabled in the House of Representatives and in the Senate on 3 November 2025). [F2025L01191] and [F2025L01190]: Notice of motion to disallow must be given by 4 February 2026 in the Senate. [F2025L01326] and [F2025L01327]: Notice of motion to disallow must be given by 4 March 2026 in the House and in the Senate.[217]
Rights	Adequate standard of living; children's rights; equality and non-discrimination; social security

2.196 The committee requested a response from the minister in relation to the Social Security (Administration) (Penalty Amount) Determination 2025 and Social Security (Administration) (Persistent Non-compliance) Determination 2025 in *Report 8 of 2025*.[218]

2.197 Subsequently, the Social Security (Declared Program Participant) Determination 2025 and the Social Security (Streamlined Participation Requirements) Instrument 2022 Amendment (Approved Programs of Work) 2025 were considered by the committee. These instruments relate to the Social Security (Administration) (Penalty Amount) Determination 2025 and Social Security (Administration) (Persistent Non-compliance) Determination 2025 and are considered alongside these instruments in this report.

Compliance with participation payment obligations

2.198 By way of background, the *Social Security (Administration) Act 1999* (Administration Act) sets out the compliance framework for persons who are 'declared program participants', being persons who participate in employment services programs specified in a determination made under section 28C of the *Social Security Act 1991*.[219] This is known as the Jobseeker Compliance Framework.[220] The Social Security (Declared Program Participant) Determination 2025 determines a participant

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

218 Parliamentary Joint Committee on Human Rights, *Report 8 of 2025* (11 December 2025), pp. 90–105.

219 *Social Security (Administration) Act 1999*, Part 3, subdivision 3A.

220 Social Security (Administration) (Penalty Amount) Determination 2025, statement of compatibility, p. 1; Social Security (Administration) (Persistent Non-compliance) Determination 2025, statement of compatibility, p. 1.

in the Remote Australia Employment Service (RAES) program is a 'declared program participant' for the purposes of the social security law.[221]

2.199 The RAES program commenced on 1 November 2025 and replaces the Community Development Program (CDP). The RAES program seeks to help job seekers prepare for work, move into a job when available and stay employed with access to mentoring and tailored support.[222] The RAES program seeks to support job seekers where work is not available through engagement in community projects that build job seekers' skills and help them become job ready.[223]

2.200 The Administration Act provides that the secretary may determine that a declared program participant commits certain failures by not complying with their obligations in relation to a participation payment.[224] The participation payments are jobseeker payment and, for some people, youth allowance, parenting payment and special benefit.[225] The obligations in relation to participation payments under the RAES program include attending appointments with a RAES service provider, submitting job searches, attending job interviews when interviews are offered, accepting suitable paid work and not voluntarily leaving suitable paid work without a reasonable excuse.[226]

2.201 The Social Security (Administration) (Penalty Amount) Determination 2025 (Penalty Determination) determines the methods for working out penalty amounts for

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221 Social Security (Administration) (Penalty Amount) Determination 2025, statement of compatibility, p. 1; Social Security (Administration) (Persistent Non-compliance) Determination 2025, statement of compatibility, pp. 1–2.

222 See Employment services | NIAA.

223 See Employment services | NIAA.

224 *Social Security (Administration) Act 1999*, section 42A.

225 *Social Security (Administration) Act 1999*, section 42A.

226 See 3.11.14 Consequences for not meeting mutual obligation requirements - RAES job seeker compliance framework | Social Security Guide; Employment services | NIAA.

reconnection failures,[227] no show no pay failures[228] and non-attendance failures[229] by specifying mathematical formulas to calculate the 'daily penalty rate'.[230] The daily penalty rate is intended to represent a 'working day's payment', whereby a person loses a working day's rate of basic participation payment for each working day they fail to do what is required of them.[231] For a no show no pay failure, such as failing to attend a job interview, the penalty amount is the daily penalty rate for the particular day that the person failed to show and the penalty amount is deducted from the participant's participation payment.[232] For a reconnection failure, such as failing to attend a further appointment with the provider, the penalty amount is the sum of the daily penalty rate for each weekday that falls in the reconnection failure period (which is from and including the day the failure occurred until the day before the day on which they meet their further reconnection requirement)[233] and generally the penalty amount is deducted from the participant's participation payment until the participant complies with the requirement imposed. For a non-attendance failure, such as a failure to attend an appointment, the penalty amount is the sum of the daily penalty rates for each weekday that falls in the non-attendance failure penalty period (which is the period beginning on the day the person is notified of the determination that a participation payment is not payable and ending on the day before the day the person

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227 Social Security (Administration) (Penalty Amount) Determination 2025, section 7. A 'reconnection failure' occurs if the job seeker fails to meet their reconnection requirement, being attendance at a further appointment with their provider, without a reasonable excuse: see 3.11.14.30 Participation payment suspensions, connection failures, non-attendance failures, reconnection failures & penalties | Social Security Guide.

228 Social Security (Administration) (Penalty Amount) Determination 2025, section 8. A 'no show no pay' failure occurs if the job seeker fails to participate in a compulsory activity required by their Job Plan, fails to comply with a serious failure requirement, engages in misconduct while participating in an activity, fails to attend a job interview, or deliberately behaves in a way that results in them not receiving the job offer during a job interview: see 3.11.14.20 No show, no pay failures | Social Security Guide.

229 Social Security (Administration) (Penalty Amount) Determination 2025, section 9. A 'non-attendance failure' occurs if the job seeker fails to attend an appointment with an employment service provider or inappropriate behaviour during the appointment results in the purpose of the appointment not being achieved: see 3.11.14.10 Types of failures & penalties | Social Security Guide.

230 Social Security (Administration) (Penalty Amount) Determination 2025, section 10.

231 Social Security (Administration) (Penalty Amount) Determination 2025, statement of compatibility, p. 11.

232 Social Security (Administration) (Penalty Amount) Determination 2025, section 8; *Social Security (Administration) Act 1999*, sections 42A and 42C.

233 *Social Security (Administration) Act 1999*, subsection 42H(4).

complies)[234] and the penalty amount is deducted from the participant's participation payment.[235]

2.202 The Administration Act also provides that the secretary may determine that a person commits a serious failure if the secretary is satisfied that a person who receives a participation payment has persistently failed to comply with his or her obligations in relation to a participation payment (including by committing no show no pay failures, connection failures or reconnection failures).[236]

2.203 The Social Security (Administration) (Persistent Non-compliance) Determination 2025 (Non-compliance Determination) determines the matters that the secretary must take into account in determining whether they are satisfied that a person has been persistently non-compliant with their obligations in relation to a participation payment. The secretary must consider the findings of the most recent comprehensive compliance assessment of the person, whether the person committed three or more failures in the relevant assessment period and if so, whether or not the failures demonstrate a pattern of non-compliance or should be viewed as a single instance of non-compliance.[237] If the secretary is satisfied that a person has committed persistent non-compliance, under the Administration Act, the secretary must determine whether or not a person has committed a 'serious failure', which can result in a participation payment not being payable to the participant for eight weeks.[238] A serious failure could include refusing or failing to accept suitable work without a reasonable excuse,[239] or unemployment resulting from a voluntary act or misconduct of the person.[240] The secretary has discretion to waive the eight week non-payment period if it would cause 'severe financial hardship'.[241]

2.204 Under the RAES program, job seekers are required to agree to a Job Plan, attend monthly appointments, undertake job search requirements (where appropriate) and accept or not leave suitable paid work.[242] However, during the transition period from 1 October 2025 to 5 January 2026, RAES participants will not be subject to compliance action or payment suspensions for not meeting mutual

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234 *Social Security (Administration) Act 1999*, subsections 42T(3B) and 42SA(2).

235 *Social Security (Administration) Act 1999*, section 42SC.

236 *Social Security (Administration) Act 1999*, section 42M.

237 Social Security (Administration) (Persistent Non-compliance) Determination 2025, section 6.

238 *Social Security (Administration) Act 1999*, section 42P.

239 *Social Security (Administration) Act 1999*, section 42N and subsection 42P(2).

240 *Social Security (Administration) Act 1999*, section 42S.

241 *Social Security (Administration) Act 1999*, section 42NC.

242 See Employment services | NIAA.

obligations.[243] From 9 February 2026, RAES participants will be subject to compliance action, which may result in the application of the above penalty amounts.

2.205 The Social Security (Streamlined Participation Requirements) Instrument Amendment (Approved Program of Work) 2025 provides that 'Work Skills and Projects' is an approved program of work for RAES participants. RAES participants who participate in the Work Skills and Projects program are entitled to the approved program of work supplement. Currently, the supplement is $20.80 per fortnight.

Summary of initial assessment

Preliminary international human rights legal advice

Rights to social security, an adequate standard of living, and equality and non-discrimination

2.206 As the measures operationalise the reduction or suspension of social security payments in certain circumstances, they engage and may limit the right to social security and the right to an adequate standard of living. The right to social security recognises the importance of adequate social benefits in reducing the effects of poverty and plays an important role in realising many other economic, social and cultural rights, particularly the right to an adequate standard of living, the right to health and the rights of the child. The right to an adequate standard of living requires state parties to take steps to ensure the availability, adequacy and accessibility of food, clothing, water and housing.[244]

2.207 Social security benefits must be adequate in amount and duration. States must also have regard to the principles of human dignity and non-discrimination so as to avoid any adverse effect on the levels of benefits and the form in which they are provided. States must guarantee the equal enjoyment by all of minimum and adequate protection, and the right includes the right not to be subject to arbitrary and unreasonable restrictions of existing social security coverage. In addition, public authorities are responsible for ensuring the effective administration or supervision of a social security system.

2.208 States are obliged to monitor the adequacy of benefits to ensure that recipients can afford the goods and services they require to realise their other economic, social and cultural rights.[245] The United Nations (UN) Committee on Economic, Social and Cultural Rights has also highlighted that 'social protection floors' – which call for a set of basic social security guarantees that ensure universal access to essential health services and basic income security – are a core obligation, without

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243 See 3.11.14 Consequences for not meeting mutual obligation requirements - RAES job seeker compliance framework | Social Security Guide.

244 See International Covenant on Economic Social and Cultural Rights, articles 9, 11.

245 UN Committee on Economic, Social and Cultural Rights, *General Comment No. 19: The Right to Social Security* (2008) [22].

which economic and social rights are rendered meaningless.[246] In this regard, it has stated that welfare conditionalities (or in these circumstances, mutual obligation requirements) will only be compatible with the right to social security where they are reasonable, proportionate and transparent, stating: 'the withdrawal, reduction or suspension of benefits should be circumscribed, based on grounds that are reasonable, subject to due process, and provided for in national law'.[247] It has stated that '[u]nder no circumstances should an individual be deprived of a benefit on discriminatory grounds or of the minimum essential level of benefits'.[248]

2.209 Further, any limitation on the rights to social security and an adequate standard of living may have implications for the rights of the child. Under the Convention on the Rights of the Child (CRC), children have the right to benefit from social security and to a standard of living adequate for a child's physical, mental, spiritual, moral and social development.[249] Additionally, Australia has obligations under Articles 17 and 23 of the International Covenant on Civil and Political Rights (ICCPR) and Article 10 of the ICESCR to provide the widest possible protection and assistance to the family.

2.210 Under international human rights law, Australia has obligations to progressively realise the rights to social security and an adequate standard of living using the maximum of resources available. Australia has a corresponding duty to refrain from taking retrogressive measures, or backwards steps, in relation to the realisation of these rights. Retrogressive measures, a type of limitation, may be permissible under international human rights law providing that they address a legitimate objective (one which, where an economic, social and cultural right is in question, is solely for the purpose of promoting the general welfare in a democratic

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246 UN Committee on Economic, Social and Cultural Rights, *Social protection floors: an essential element of the right to social security and of the sustainable development goals* (15 April 2015) E/C.12/2015/1 [7]–[10].

247 UN Committee on Economic, Social and Cultural Rights, *General Comment No. 19: The Right to Social Security* (2008) [24]. The committee has also stated that sanctions in relation to social security benefits should be used proportionately and be subject to prompt and independent dispute resolution mechanisms. See UN Committee on Economic, Social and Cultural Rights, *Concluding observations on the sixth periodic report of the United Kingdom of Great Britain and Northern Ireland* (14 July 2016) E/C.12/GBR/CO/6 [41].

248 UN Committee on Economic, Social and Cultural Rights, *General Comment No. 19: The Right to Social Security* (2008) [78]. This approach has also been echoed in the European context. The European Committee of Social Rights has stated that the European Social Charter requires that 'reducing or suspending social assistance benefits can only be in conformity with the Charter if it does not deprive the person of his/her means of subsistence'. European Committee of Social Rights Conclusions, decision of 6 December 2017, Norway, 2013/def/NOR/13/1/EN.

249 Convention on the Rights of the Child, articles 26 and 27.

society),[250] are rationally connected to that objective and are a proportionate way to achieve that objective.

2.211 Additionally, as the measures will apply to the RAES program, which is delivered in remote communities that have a disproportionately higher proportion of Aboriginal and Torres Strait Islander people, and insofar as participants under the RAES program are subject to a different compliance framework than job seekers in non-remote areas, the measure may have a disproportionate impact on Aboriginal and Torres Strait Islander people and people living in remote areas. As such, the measures engage and may limit the right to equality and non-discrimination on the basis of race and place of residence.[251]

2.212 The discriminatory effect of the measures is also evident when considering the broader legislative framework. As set out above, from 9 February 2026, RAES participants will be subject to the non-payment period of eight weeks for persistent non-compliance.[252] The secretary has discretion to waive this non-payment period if it would cause 'severe financial hardship'.[253] By way of contrast, under the Targeted Compliance Framework, which applies to people other than declared program participants (in effect, non-remote participants), the non-payment period is four weeks.[254] Further, certain compliance decisions under the Targeted Compliance Framework which reduce or cancel a person's social security payments for failing to meet mutual obligation requirements were paused on 5 July 2025 and will remain paused while work is underway to determine whether the decision-making processes under the Targeted Compliance Framework align with the legislative framework.[255] If these compliance decisions remain paused beyond February 2026, RAES participants will be subject to compliance action while other participation payment recipients in non-remote employment services programs will not be subject to compliance action.

2.213 The statements of compatibility state that the measures advance the right to equality and non-discrimination but do not acknowledge the potentially

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250 International Covenant on Economic Social and Cultural Rights, article 4.

251 The RAES program applies in the same, or substantially the same, regions as CDP. It is noted that the CDP was criticised for its discriminatory impact on First Nations people. The former Special Rapporteur on the rights of indigenous peoples has observed that the requirements of the CDP are 'discriminatory, being substantially more onerous than those that apply to predominantly non-indigenous job seekers', namely those not in remote areas: UN Human Rights Council, *Report of the Special Rapporteur on the rights of indigenous peoples on her visit to Australia*, A/HRC/36/46/Add.2 (2017) [58].

252 *Social Security (Administration) Act 1999*, sections 42N, 42P and 42S.

253 *Social Security (Administration) Act 1999*, section 42NC.

254 *Social Security (Administration) Act 1999*, subsection 42AP(5).

255 See 3.11.13 Consequences for not meeting mutual obligation requirements - targeted compliance framework | Social Security Guide and Statement from the Secretary on progress under the Targeted Compliance Framework Integrity Assurance program - Department of Employment and Workplace Relations, Australian Government.

disproportionate impact of the measure on Aboriginal and Torres Strait Islander people.[256]

2.214 The right to equality and non-discrimination provides that everyone is entitled to enjoy their rights without discrimination of any kind and that all people are equal before the law and entitled without discrimination to equal and non-discriminatory protection of the law.[257] The right to equality encompasses both 'direct' discrimination (where measures have a discriminatory intent) and 'indirect' discrimination (where measures have a discriminatory effect on the enjoyment of rights).[258] 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 (including race and place of residence).[259] Differential treatment (including the differential effect of a measure that is neutral on its face) will not constitute unlawful discrimination if the differential treatment is based on reasonable and objective criteria such that it serves a legitimate objective, is rationally connected to that objective and is a proportionate means of achieving that objective.[260]

2.215 The Parliamentary Joint Committee on Human Rights has considered measures similar to the Jobseeker Compliance Framework, in particular the Targeted Compliance Framework, on a number of occasions.[261] The committee considered that

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256 Social Security (Administration) (Penalty Amount) Determination 2025, statement of compatibility, pp. 18–19; Social Security (Administration) (Persistent Non-compliance) Determination 2025, statement of compatibility, p. 16.

257 International Covenant on Civil and Political Rights, articles 2 and 26. Article 2(2) of the International Covenant on Economic, Social and Cultural Rights also prohibits discrimination specifically in relation to the human rights contained in the International Covenant on Economic, Social and Cultural Rights.

258 UN Human Rights Committee, *General Comment No. 18: Non-discrimination* (1989).

259 *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'. See Sarah Joseph and Melissa Castan, *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary*, 3rd edition, Oxford University Press, Oxford, 2013 [23.39].

260 UN Human Rights Committee, *General Comment No. 18: Non-Discrimination* (1989) [13]; see also *Althammer v Austria*, UN Human Rights Committee Communication No. 998/01 (2003) [10.2].

261 Parliamentary Joint Committee on Human Rights, *Report 10 of 2018* (18 September 2018), pp. 4–19; *Report 11 of 2017* (17 October 2017), p. 189; *Report 8 of 2017* (15 August 2017), pp. 69, 71; *Ninth Report of the 44th Parliament* (15 July 2014), pp. 66–70; *Thirty-second Report of the 44th Parliament* (1 December 2015), pp. 92–100; *Thirty-third Report of the 44th Parliament* (2 February 2016), pp. 7–12.

the financial disadvantage resulting from a non-payment penalty (that is, a reduction or suspension of a person's participation payment) is unlikely to be compatible with the right to social security insofar as there may be circumstances where a person is unable to meet basic necessities during the non-payment period. In light of the similarities between the Jobseeker Compliance Framework and the Targeted Compliance Framework, the remaking of the Penalty Determination and Non-compliance Determination raises similar human rights concerns.

Committee's initial view

2.216 The committee noted that the Minister for Indigenous Australians previously advised that the committee's previous findings would be considered in designing a new remote employment service to replace the CDP. As the RAES program is predominantly administered through government grants and has a limited legislative framework, the committee has taken the opportunity to assess the compatibility of these instruments with human rights.

2.217 The committee considered that imposing penalties on social security recipients and suspending social security payments engages and limits the right to social security and the right to an adequate standard of living. The committee also considered that as participants under the RAES program are subject to a different compliance framework than job seekers in non-remote areas, the measure may have a disproportionate impact on Aboriginal and Torres Strait Islander people living in remote areas and as such engage the right to equality and non-discrimination on the basis of race and place of residence.

2.218 The committee considered that the measures are capable of pursuing a legitimate objective, however, it is not clear that the measures are rationally connected to that objective or are proportionate. The committee considered that further information was required to assess the compatibility of the measure with these rights, and as such sought the minister's advice.

2.219 The full initial analysis is set out in *Report 8 of 2025*.[262]

Minister's response[263]

2.220 The minister advised:

> **(a) how the measure is effective to achieve the stated objectives and in particular, noting the mixed findings of the CDP regarding its effectiveness in achieving employment outcomes for participants, how the RAES program differs from the CDP such that it is more likely to achieve the stated objectives.**

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262 Parliamentary Joint Committee on Human Rights, *Report 8 of 2025* (11 December 2025), pp. 90–105.

263 The minister's response to the committee's inquiries was received on 20 January 2026. This is an extract of the response. The response is available in full on the committee's website.

The Australian Government is committed to improving employment outcomes for people living in remote Australia and has replaced the Community Development Program (CDP) with the Remote Australia Employment Service (RAES) and the Remote Jobs and Economic Development (RJED) programs. The design of the RJED and the RAES programs has been informed by three remote job trials and feedback received through consultation with remote communities and First Nations peoples.

The RJED and the RAES programs are complementary programs. The main goal of the RJED program is to assist income support recipients move into paid employment through the creation of 3000 new jobs over three years until 2027 that support community priorities. The RAES program supports job seekers with the skills, mentoring and training they need to take up job opportunities, including those created through the RJED program.

The RAES program differs to the CDP by leading with a strengths-based approach, with job seekers better supported to understand their needs. RAES also requires providers to work collaboratively with remote communities to develop community projects. In this, RAES enhances provider engagement with community by requiring that community projects are codesigned to align with local priorities and aspirations. In practice, this means less of a focus on compliance activities and more focus on engagement with participants on the projects that are designed for their communities.

If a participant is not engaging meaningfully in the program, compliance decisions can be taken under the Job Seeker Compliance Framework (JSCF). The *Social Security (Administration) (Penalty Amount) Determination 2025* and *Social Security (Administration) (Persistent Noncompliance) Determination 2025* support the operation of the JSCF.

The RAES program also changes the way providers are funded, supporting improved service delivery in critical areas, such as employment placement support for up to 52 weeks, to acknowledge providing continued support to participants after they are placed in a job helps them to stay in a job.

The RAES program will also include two pilots across targeted remote communities - one with a focus on improving literacy and numeracy, and the other focused on job seeker assessments.

(b) whether participation in employment activities has increased or decreased (and if so by how much) while compliance action has been paused in relation to the CDP and the RAES program.

Mutual obligation requirements have been paused since 1 October 2025 and are currently scheduled to recommence on Monday 9 February 2026 to support job seekers' transition to the RAES program. Income support payments are not impacted during the period of the mutual obligations pause. Since the RAES program launched on 1 November 2025, providers

have been actively engaging with their caseloads with almost half of all participants having met with their provider and established a Job Plan as at mid December 2025.

(c) what safeguards accompany the measure to ensure that a person is able to meet their basic necessities.

A number of safeguards exist across the RAES program including through tailoring to a participant's needs, providing culturally safe servicing and utilising compliance action as a last resort. Legislative provisions also require providers to ensure requirements are appropriately tailored for job seekers and that job seekers do not have requirements that are unsuitable – see subsection 40D(5) and section 40F of the *Social Security (Administration) Act 1999* (the Administration Act). Additionally, a number of exemptions are available to be used depending on circumstances if a jobseeker cannot meet requirements - see sections 40L through to 40T of the Administration Act.

There are also safeguards along the decision-making process before a penalty for a serious failure is applied. Where a participant is not engaging or meeting their mutual obligation requirements, the provider can determine it is appropriate to submit a report to trigger a compliance investigation for Services Australia.

This compliance investigation also ensures that any compliance action from persistent noncompliance (such as a financial penalty) is only taken when there has been a pattern of noncompliance within a person's control and which occurred intentionally, recklessly, or negligently. This is legislated through the *Social Security (Administration) (Persistent Noncompliance) Determination 2025* and section 42M of the Administration Act.

The persistent non-compliance instrument also requires a Comprehensive Compliance Assessment (CCA) to first be conducted before a determination can be made to apply a serious failure for persistent non-compliance. The CCA, conducted by Services Australia social workers and other CCA specialists, is intended as a safety net to ensure the impacts of any barriers or other circumstances on a person's capacity to comply are fully considered and assessed before a serious failure is applied, and outcomes are reported to providers including recommendations if needed for extra support so that providers can adjust requirements accordingly.

Where it has been assessed that there are currently no barriers or issues impacting the participant's non-compliance, a determination may be made that a serious failure is to be applied. However, in this case, income support payments will continue to be paid if a participant agrees to undertake a serious failure requirement, which is to attend a reengagement appointment with their RAES provider.

The National Indigenous Australians Agency (NIAA) will provide RAES providers with detailed advice to guide them when making decisions if someone does not attend the reengagement appointment. For example,

the materials will advise providers they must first consider the participant's circumstances, previous engagement history and potential barriers to participation prior to making a decision about whether to try to reschedule or report to Services Australia.

The power to make decisions of persistent non-compliance and penalties sits with Services Australia and, as noted in the Report, a core safeguard is the consideration of the financial impacts to a participant. For example, section 42NC of the Administration Act prohibits imposing a serious failure period (which may result in a non-payment period of up to 8 weeks) if the participant does not have the capacity to undertake a serious failure requirement to end the serious failure period, and (if served) the serious failure period would result in severe financial hardship. Similarly, under section 42Q, Services Australia can end the non-payment period early if, during that period, the participant does not have capacity to undertake the requirement, and the period is causing severe financial hardship.

As a result, only a small amount of penalties occur in practice (see further detail in response to next question).

(d) whether there are less rights restrictive options that are reasonably available, including whether and how the persistent non-compliance provisions will take into account the unique conditions of remote Australia.

The purpose of mutual obligations and the JSCF is to encourage unemployment payment recipients to look for work and participate in employment services to help them find work. There is a longstanding community expectation that people receiving income support, who are assessed as capable to work, do their best to find work in return. Settings are designed to support people on the path to employment.

The RAES program has been designed to account for the unique conditions of remote Australia in consultation with remote communities including First Nations peoples. Participants in RAES who have a good reason for not meeting their requirements should not be penalised, and participants who do not meet their mutual obligation requirements should be reconnected with employment services as quickly as possible. Providers do not make decisions to determine persistent non-compliance or penalties under social security law, as this ability rests with Services Australia. Providers are, however, required to take into account a participant's circumstances when engaging with them.

Financial penalties that are connected to these two Determinations are not intended to be punitive or commonplace, but to provide a last resort deterrent to non-compliance after other efforts have not worked and after considering relevant factors relating to a participant's circumstances. As a result, the number of participants affected by these measures are low.

For example, in the 2024–25 financial year 58,820 people participated in the CDP. During this period:

- there were zero decisions to apply a serious failure for persistent non-compliance. This has remained low since the changes to Mutual Obligation Requirements in May 2021.
- The number of CDP participants with a Participation Failure applied was 22.
    - This includes Connection, Reconnection, No Show No Pay Failures, Non-Attendance Failures, and Serious Failures for persistent non-compliance or failing to accept or commence in a suitable job.

(e) whether consideration has been given to continuing voluntary participation in the RAES program (that is, not restarting compliance action).

RAES participants are subject to the Job Seeker Compliance Framework and are not subject to the Targeted Compliance Framework, as noted by the Committee at paragraph 1.214. The pauses under the Job Seeker Compliance Framework for RAES participants, which are not due to be lifted until 9 February 2026, were put in place to support the smooth transition from CDP to RAES.

Regardless of any pauses in place for RAES mutual obligation requirements, these instruments are legally required to be made under sections 42M(4) and 42T(l) of the Administration Act respectively.

Mutual obligation requirements have not changed under the RAES program. Job seekers are still required to agree a job plan, attend monthly appointments, undertake job search requirements (where appropriate), and accept or not leave suitable paid work. Participation in activities (including Community Projects and Participation Options) remains voluntary, and do not form part of a RAES job seeker's mutual obligation requirements.

The pauses under the Targeted Compliance Framework for Workforce Australia and Inclusive Employment Australia participants differ to the pause on mutual obligation requirements for RAES. Some parts of the Targeted Compliance Framework system have been paused because there are examples where the system is not operating in alignment with the law and policies or is not operating with the rigour that is expected. Pauses to the Targeted Compliance Framework will remain in place while the Department of Employment and Workplace Relations works to assure the integrity of the administration of the Targeted Compliance Framework.

(f) whether the disproportionate impact the measure may have on Aboriginal and Torres Strait Islander people and job seekers living in remote Australia constitutes differential treatment based on reasonable and objective criteria.

The RAES program was designed to tailor to the needs the remote regions of Australia and jobseekers in remote communities including First Nations peoples.

NIAA and DEWR are also working together to develop a consistent and coherent approach to mutual obligation requirements across both remote and non-remote regions, aligned to future employment services reforms.

(g) whether communities were consulted about the specific measures in these instruments, as opposed to the broader policy underpinning the RAES program, and if so, what were the outcomes of those consultations.

The RAES program has been designed to account for the unique conditions of remote Australia in consultation with remote communities including First Nations peoples. The design was also underpinned by extensive consultation.

The replacement of CDP has been informed by consultation with remote community members, job seekers, peak bodies, First Nations peoples, CDP providers, CDP participants and other key stakeholders with an interest in remote employment. Consultation will also continue as DEWR and the NIAA work together to consider further reforms for the employment services system.

Over the past few years, the Government has heard from thousands of people in more than 200 remote communities about the best way to replace the CDP. This was to enable the creation of a jobs program that communities want, supported by employment services that help job seekers get ready for work. Community consultation and engagement has been critical for ensuring job creation efforts align with local priorities and cultural practices.

RAES has also been designed to minimise non-compliance which will have the practical effect that the number of decisions made under these instruments will be low. As outlined in this submission, there are a number of safeguards embedded in setting mutual obligation requirements to ensure a participant is capable of meeting those requirements. Further, the legislative framework also ensures prior to decision-making about whether compliance action occurs there is discretion to take into account a participant's personal circumstances.

Due to the extensive consultation when RAES was designed and that compliance actions for participants under the Determinations are low, separate consultation specifically on the Determinations has not occurred.

Concluding comments

International human rights legal advice

2.221 As outlined in the preliminary analysis, by enabling the reduction or suspension of social security payments in certain circumstances, the measures engage and may limit the right to social security and the right to an adequate standard of living. States must monitor the adequacy of benefits to ensure that recipients can

afford the goods and services they require to realise their other economic, social and cultural rights.[264] In this regard, the UN Committee on Economic, Social and Cultural Rights has stated that welfare conditionalities (or in these circumstances, mutual obligation requirements) will only be compatible with the right to social security where they are reasonable, proportionate and transparent[265] and '[u]nder no circumstances should an individual be deprived of a benefit on discriminatory grounds or of the minimum essential level of benefits'.[266] States are obligated to progressively realise the rights to social security and an adequate standard of living using the maximum of resources available. Retrogressive measures, a type of limitation, may be permissible under international human rights law if they address a legitimate objective, are rationally connected to that objective and are a proportionate way to achieve that objective.

2.222 Additionally, insofar as participants under the RAES program, which is delivered in remote communities that have a disproportionately higher proportion of Aboriginal and Torres Strait Islander people, are subject to a different compliance framework than job seekers in non-remote areas, the measures engage and may limit the right to equality and non-discrimination on the basis of race and place of residence.[267] The right to equality and non-discrimination provides that everyone is entitled to enjoy their rights without discrimination of any kind and that all people are

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264 UN Committee on Economic, Social and Cultural Rights, *General Comment No. 19: The Right to Social Security* (2008) [22].

265 UN Committee on Economic, Social and Cultural Rights, *General Comment No. 19: The Right to Social Security* (2008) [24]. The committee has also stated that sanctions in relation to social security benefits should be used proportionately and be subject to prompt and independent dispute resolution mechanisms. See UN Committee on Economic, Social and Cultural Rights, *Concluding observations on the sixth periodic report of the United Kingdom of Great Britain and Northern Ireland* (14 July 2016) E/C.12/GBR/CO/6 [41].

266 UN Committee on Economic, Social and Cultural Rights, *General Comment No. 19: The Right to Social Security* (2008) [78]. This approach has also been echoed in the European context. The European Committee of Social Rights has stated that the European Social Charter requires that 'reducing or suspending social assistance benefits can only be in conformity with the Charter if it does not deprive the person of his/her means of subsistence'. European Committee of Social Rights Conclusions, decision of 6 December 2017, Norway, 2013/def/NOR/13/1/EN.

267 The RAES program applies in the same, or substantially the same, regions as CDP. It is noted that the CDP was criticised for its discriminatory impact on First Nations people. The former Special Rapporteur on the rights of indigenous peoples has observed that the requirements of the CDP are 'discriminatory, being substantially more onerous than those that apply to predominantly non-indigenous job seekers', namely those not in remote areas: UN Human Rights Council, *Report of the Special Rapporteur on the rights of indigenous peoples on her visit to Australia*, A/HRC/36/46/Add.2 (2017) [58].

equal before the law and entitled without discrimination to equal and non-discriminatory protection of the law.[268]

2.223 The stated objective of the measures is to encourage persons receiving social security payments to participate in activities or programs designed to improve their employment prospects.[269] This is likely to be a legitimate objective for the purposes of international human rights law insofar as encouraging participation in employment may assist in promoting the social and economic wellbeing of those persons, as well as of society as a whole (that is, it may promote general welfare).

2.224 However, under international human rights law, it must also be demonstrated that any limitation on a right has a rational connection to the objective sought to be achieved. In this regard, the minister advised that the design of RAES has been informed by three remote job trials and feedback received through consultation with remote communities and First Nations people and differs from the previous CDP program by leading with a strengths-based approach, with job seekers better supported to understand their needs and providers required to work collaboratively with remote communities to develop community projects. The minister advised that the RAES program puts more focus on engagement with participants on community-designed projects than compliance activities and provides funding to providers to provide ongoing employment placement support after participants are placed in a job.

2.225 To the extent that co-designed community projects are more targeted to the needs of community members, the RAES program may encourage participation in activities or programs that are designed to improve employment prospects, particularly in comparison with the CDP program. However, much will depend on the operational detail of these community projects. The minister did not provide any information regarding the requirements for community projects, including any requirements that such projects require a certain skill to be developed or a certain number of people to be employed for the project to be delivered. Further, it remains unclear whether the compliance framework is necessary and effective to achieve the stated objective. The minister did not provide any information regarding whether a pause in compliance action or mutual obligation requirements, both under the CDP since 2021 or in the transition to RAES since October 2025, has led to a change in participation in employment activities. The minister advised that since the RAES program launched on 1 November 2025, providers have been actively engaging with their caseloads with almost half of all participants having met with their provider and

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268 International Covenant on Civil and Political Rights, articles 2 and 26. Article 2(2) of the International Covenant on Economic, Social and Cultural Rights also prohibits discrimination specifically in relation to the human rights contained in the International Covenant on Economic, Social and Cultural Rights.

269 Social Security (Administration) (Penalty Amount) Determination 2025, statement of compatibility, p. 16; Social Security (Administration) (Persistent Non-compliance) Determination 2025, statement of compatibility, p. 14.

established a Job Plan as at mid December 2025. This evidence suggests that compliance action is not necessarily required in order to encourage participation. It therefore remains unclear whether the compliance framework which RAES participants are subject to as a result of these instruments has been, and therefore will continue to be, effective in encouraging persons receiving social security payments to participate in certain activities.

2.226 Further, noting the mixed findings regarding the effectiveness of mutual obligations and compliance actions in achieving employment outcomes for participants under CDP and previous remote employment services,[270] questions remain as to the depth and reliability of the evidence-base used to support the proposition that the continuation of the Jobseeker Compliance Framework would effectively achieve its stated objectives under the RAES Program. The minister advised that while the design of the RAES program has been underpinned by extensive consultation, there was no consultation specifically regarding the remaking of these instruments. In the absence of consultation with respect to these instruments and noting the extensive international evidence that questions the inference that mutual obligations effectively achieve longer-term employment and social benefits and highlights the harms that may be experienced by social welfare recipients as a result of mutual obligations,[271] it has not been demonstrated that the measure is rationally connected to the stated objective of encouraging participation in certain activities.

2.227 In assessing proportionality, it is necessary to consider a number of factors, including whether the measure is accompanied by sufficient safeguards and is the least rights restrictive approach to achieve the stated objective.

2.228 The minister advised that a number of safeguards accompany the measure including requiring providers to ensure that job seekers do not have requirements that are unsuitable and providing a discretion for providers to determine whether to report non-compliance. The minister also advised that providers will be given detailed

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270 See ANAO evaluation of CDP (2017); see also Minister's response in Parliamentary Joint Committee on Human Rights, *Report 5 of 2024* (26 June 2024), p. 45: 'As at 29 February 2024, there has been very limited uptake of the [Remote Engagement Program] Trial, there are currently no trial participants and no participant has become eligible for the [Remote Engagement Program] payment. The [Remote Engagement Program] Trial and availability of the [Remote Engagement Program] payment will not be extended beyond 30 June 2024'.

271 See University of York, *Welfare Conditionality Project 2013–2018*, Final Report, Key Findings, p. 4; Ruud Gerards and Riccardo Welters, 'Liquidity Constraints, Unemployed Job Search and Labour Market Outcomes', *Oxford bulletin of economics and statistics*, vol. 82, 2020, p. 625; Joshua Rowntree Foundation, *Sanctions within conditional benefits systems: a review of evidence*, 2010; John David Jordan, 'Welfare grunters or workfare monsters? An empirical review of the operation of two UK 'work programme' centres', *Journal of Social Policy*, vol. 47, no. 3, 2017, pp. 583–601; Colin Lindsay, Sarah Pearson, Elaine Batty, Anne Marie Cullen and Will Eadson, 'Empowering Lone Parents to Progress towards Employability', *Journal of Social Policy*, 2021, pp. 1–20; and Ann Green and Chris Hasluck, 'Action to reduce worklessness: What works?' *Local Economy*, vol. 24, no. 1, 2009, pp. 28–37.

guidance for making decisions which may trigger a compliance investigation by Services Australia. It is unclear, however, what this guidance will contain and what oversight the government will have over providers to implement this guidance. As the guidance is not part of the legislative framework, its safeguard value is reduced.

2.229 As set out in the preliminary analysis, the Non-compliance Determination sets out matters that the secretary must consider as constituting persistent non-compliance. This may assist to ensure that a non-payment penalty is only applied where it is considered proportionate to do so. The minister also advised that a number of exemptions to meeting mutual obligation requirements are available in the Social Security (Administration) Act, including misuse of alcohol, death of person's partner, domestic violence and caring responsibilities. Before determining if a person has committed a serious failure, the secretary must consider the findings of the most recent comprehensive compliance assessment in respect of the person, which includes the reasons why the person may have committed the failures, whether the person has any barriers to employment and whether the person's participation requirements are appropriate.[272] Before imposing a serious failure period, the secretary must also consider whether this would cause severe financial hardship. The minister also advised that the secretary can end the non-payment period early if, during that period, the participant does not have capacity to undertake the serious failure requirement, and the period is causing severe financial hardship. Finally, the minister advised that compliance action is a last resort and is only taken where there has been a pattern of non-compliance within a person's control which occurred intentionally, recklessly or negligently. The minister did not provide any further information on what constitutes severe financial hardship, including what factors the secretary would consider in determining if a person is or will be in severe financial hardship. A such, it remains unclear whether the secretary must consider whether a person will be able to meet basic necessities if a financial penalty is applied. As the minister has not identified any other safeguards that would apply to ensure that a person can meet their basic necessities, there remains a risk that a person may be deprived of the minimum essential level of benefits and therefore unable to meet their basic necessities, such as basic shelter and housing, food and healthcare.

2.230 Further, it is not clear whether the matters required to be taken into account by the secretary provide a sufficient safeguard in relation to the unique conditions of remote Australia, for example, challenges involved in geographically long distances

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272 Social Security (Administration) (Persistent Non-compliance) Determination 2025, section 6; *Social Security (Administration) Act 1999*, section 42NA.

between job opportunities and limited transport options.[273] While the Non-compliance Determination does not limit the factors that a decision-maker may take into account to determine if a person has a reasonable excuse, discretion in and of itself may not constitute a sufficient safeguard under international law, as it falls short of statutory protection. The minister advised that the RAES program has been designed to account for the unique conditions of remote Australia, however, the minister also advised that consultation specifically on the compliance framework applicable to the RAES program has not been undertaken. As such, and noting that these instruments remain unchanged from the compliance action available under the previous CDP program, it cannot be said that there are sufficient safeguards in place to ensure that a person is able to meet their basic necessities such that the measure constitutes a proportionate limit on the rights to social security and an adequate standard of living.

2.231 In regard to less rights restrictive alternatives, the minister advised that there is a longstanding community expectation that people receiving income support find work in return and the RAES program's settings are designed to support people on the path to employment. However, mutual obligation requirements for RAES participants are currently paused while the program transitions from CDP. This approach appears to acknowledge that not enforcing the Job Seeker Compliance Framework is a less rights restrictive alternative. The minister did not provide any information regarding whether a continued pause has been considered and whether this less rights restrictive approach would continue to be effective to achieve the objectives of the RAES program.

2.232 Regarding the right to equality and non-discrimination, it remains unclear whether the potentially disproportionate impact this measure may have on Aboriginal and Torres Strait Islander people, and job seekers living in remote Australia, is based on reasonable and objective criteria such that any differential treatment could be considered permissible. This is particularly relevant in consideration of the Social Security (Streamlined Participation Requirements) Instrument 2022 Amendment (Approved Programs of Work) 2025 which stipulates a different approved program of work, Work Skills and Projects, for RAES participants. Participating in an approved program of work means a person is eligible for the approved program of work supplement. It is unclear whether participation in Work Skills and Projects would be more onerous or difficult for RAES participants in comparison to non-remote employment service participants, and whether RAES participants may face disproportionate barriers to accessing the supplement. The statement of compatibility

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273 See Senate Standing Committee on Finance and Public Administration References Committee, *Appropriateness and effectiveness of the objectives, design, implementation and evaluation of the Community Development Program (CDP)* (December 2017) [7.8]. The committee recommended that CDP participants have obligations that are no more onerous than those of other income support recipients, taking into account special circumstances such as remote locations and cultural obligations.

to this instrument states that the right to equality and non-discrimination is promoted by the measure. However, it is unclear why the existing Work for the Dole program, which applied to both remote and non-remote employment service programs, is no longer suitable for RAES participants and why a new approved program of work is necessary.

2.233 A relevant factor in assessing proportionality with respect to the right to equality and non-discrimination is consultation. The minister advised that the design of the RAES program was underpinned by extensive consultation with thousands of people in more than 200 remote communities. Co-designing the program with communities that are affected by the measure is an important aim and, 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.[274] However, based on the information provided by the minister, it does not appear that communities have been genuinely consulted about the proposed measures in these instruments, as opposed to the broader policy underpinning the RAES program. The minister advised that separate consultation specifically on these determinations has not occurred and, as there has been no substantial change to the compliance framework set out in these instruments since the previous CDP program, it is not clear that the penalty amounts and matters to be taken into account in determining persistent non-compliance can be said to be adequately co-designed. The obligation to consult under international human rights law includes the 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'.[275] It has therefore not been demonstrated that the consultation undertaken with respect to these measures meets the standard of genuine consultation under international human rights law.

2.234 Consequently, it has not been demonstrated that the measure represents a proportionate limit on the rights to social security, an adequate standard of living and equality and non-discrimination, as well as the rights of the child (to the extent that children are affected by the measure).

Committee view

2.235 The committee thanks the minister for this response.

2.236 The committee considers that insofar as the measure enables the reduction or suspension of social security payments in certain circumstances, the right to social security and the right to an adequate standard of living may be engaged and limited.

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274 See Parliamentary Joint Committee on Human Rights, *Report 4 of 2017* (9 May 2017), pp. 122–123; *Report 15 of 2021* (9 December 2021), pp. 9–26.

275 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].

2.237 Further, the committee considers that to the extent that participants under the RAES program, which is delivered in remote communities that have a disproportionately higher proportion of Aboriginal and Torres Strait Islander people, are subject to a different compliance framework and eligible for a different approved program of work than job seekers in non-remote areas, the measure engages and may limit the right to equality and non-discrimination on the basis of race and place of residence.

2.238 The committee considers that the stated objective of encouraging persons receiving social security payments to participate in activities or programs designed to improve their employment prospects is likely to be a legitimate objective for the purposes of international human rights law, as the measures may assist in promoting the social and economic wellbeing of those persons, as well as of society as a whole (that is, it may promote general welfare).

2.239 However, the committee notes that based on the information provided by the minister, the measures may not be rationally connected to the stated objective. The committee notes the minister's advice that the design of RAES has been informed by remote job trials and feedback received through consultation with remote communities and that First Nations people and providers are required to work collaboratively with remote communities to develop community projects. It remains unclear, however, whether the compliance framework which RAES participants are subject to as a result of these instruments is effective in encouraging persons receiving social security payments to participate in certain activities.

2.240 While the measure is accompanied by some safeguards, the committee considers that these safeguards may not be adequate, noting that the guidance to be provided to RAES providers is not a statutory safeguard and the statutory safeguards available may not operate to ensure that a person is able to meet their basic necessities. The committee further considers that there may be a less rights restrictive alternative, namely continuing the pause currently in place for the Job Seeker Compliance Framework.

2.241 Further, the committee considers that while the discretion afforded to providers and the secretary in determining whether to take compliance action against a RAES participant assists with proportionality, it is not clear whether the matters to be taken into account sufficiently account for the unique challenges of remote Australia. This is also relevant in relation to the right to equality and non-discrimination and the expectation of genuine consultation. The committee notes the minister's advice that there was no specific consultation in regard to these instruments and as such, the differential treatment that may arise as a result of a different compliance framework applying to declared program participants in remote Australia may not be based on reasonable and objective criteria.

2.242 Consequently, the committee considers that it has not been demonstrated that the measure represents a proportionate limit on the rights to social security, an

adequate standard of living and equality and non-discrimination, as well as the rights of the child (to the extent that children are affected by the measure).

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

Ms Zaneta Mascarenhas MP

Chair