Parliamentary Joint Committee on Human Rights

Human rights scrutiny report

Twenty-eighth report of the 44th Parliament

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PO Box 6100
Parliament House
Canberra ACT 2600

Phone: 02 6277 3823
Fax: 02 6277 5767

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

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Membership of the committee

Members

The Hon Philip Ruddock MP, Chair	Berowra, New South Wales, LP
Mr Laurie Ferguson MP, Deputy Chair	Werriwa, New South Wales, ALP
Senator Carol Brown	Tasmania, ALP
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Secretariat

Mr Ivan Powell, Acting Committee Secretary
Mr Matthew Corrigan, Principal Research Officer
Ms Anita Coles, Principal Research Officer
Ms Jessica Strout, Senior Research Officer
Ms Alice Petrie, Legislative Research Officer

External legal adviser

Professor Simon Rice OAM

Functions of the committee

The committee has the following functions under the *Human Rights (Parliamentary Scrutiny) Act 2011*:

- to examine bills for Acts, and legislative instruments, that come before either House of the Parliament for compatibility with human rights, and to report to both Houses of the Parliament on that issue;
- to examine Acts for compatibility with human rights, and to report to both Houses of the Parliament on that issue; and
- to inquire into any matter relating to human rights which is referred to it by the Attorney-General, and to report to both Houses of the Parliament on that matter.

Human rights are defined in the *Human Rights (Parliamentary Scrutiny) Act 2011* as those contained in following seven human rights treaties to which Australia is a party:

- International Covenant on Civil and Political Rights (ICCPR);
- International Covenant on Economic, Social and Cultural Rights (ICESCR);
- International Convention on the Elimination of All Forms of Racial Discrimination (ICERD);
- Convention on the Elimination of Discrimination against Women (CEDAW);
- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT);
- Convention on the Rights of the Child (CRC); and
- Convention on the Rights of Persons with Disabilities (CRPD).

The establishment of the committee builds on the Parliament's established traditions of legislative scrutiny. Accordingly, the committee undertakes its scrutiny function as a technical inquiry relating to Australia's international human rights obligations. The committee does not consider the broader policy merits of legislation.

The committee's purpose is to enhance understanding of and respect for human rights in Australia and to ensure appropriate recognition of human rights issues in legislative and policy development.

The committee's engagement with proponents of legislation emphasises the importance of maintaining an effective dialogue that contributes to this broader respect for and recognition of human rights in Australia.

Committee's analytical framework

Australia has voluntarily accepted obligations under the seven core United Nations (UN) human rights treaties. It is a general principle of international human rights law that the rights protected by the human rights treaties are to be interpreted generously and limitations narrowly. Accordingly, the primary focus of the committee's reports is determining whether any identified limitation of a human right is justifiable.

International human rights law recognises that reasonable limits may be placed on most rights and freedoms—there are very few absolute rights which can never be legitimately limited.[1] All other rights may be limited as long as the limitation meets certain standards. In general, any measure that limits a human right must comply with the following criteria (the limitation criteria):

- be prescribed by law;
- be in pursuit of a legitimate objective;
- be rationally connected to its stated objective; and
- be a proportionate way to achieve that objective.

Where a bill or instrument limits a human right, the committee requires that the statement of compatibility provide a detailed and evidence-based assessment of the measures against these limitation criteria.

More information on the limitation criteria and the committee's approach to its scrutiny of legislation task is set out in Guidance Note 1, which is included in this report at Appendix 2.

1 Absolute rights are: the right not to be subjected to torture, cruel, inhuman or degrading treatment; the right not to be subjected to slavery; the right not to be imprisoned for inability to fulfil a contract; the right not to be subject to retrospective criminal laws; the right to recognition as a person before the law.

Table of contents

Chapter 1

New and continuing matters

1.1 This report provides the Parliamentary Joint Committee on Human Rights' view on the compatibility with human rights of bills introduced into the Parliament from 7 to 10 September, legislative instruments received from 14 to 27 August 2015, and legislation previously deferred by the committee.

1.2 The report also includes the committee's consideration of responses arising from previous reports.

1.3 The committee generally takes an exceptions based approach to its examination of legislation. The committee therefore comments on legislation where it considers the legislation raises human rights concerns, having regard to the information provided by the legislation proponent in the explanatory memorandum (EM) and statement of compatibility.

1.4 In such cases, the committee usually seeks further information from the proponent of the legislation. In other cases, the committee may draw matters to the attention of the relevant legislation proponent on an advice-only basis. Such matters do not generally require a formal response from the legislation proponent.

1.5 This chapter includes the committee's examination of new legislation, and continuing matters in relation to which the committee has received a response to matters raised in previous reports.

Bills not raising human rights concerns

1.6 The committee has examined the following bill and concluded that it does not raise human rights concerns. The committee considers that it does not require additional comment as it either does not engage human rights or engages rights (but does not promote or limit rights):

- Maritime Legislation Amendment Bill 2015.

Instruments not raising human rights concerns

1.7 The committee has examined the legislative instruments received in the relevant period, as listed in the *Journals of the Senate*.[1] Instruments raising human rights concerns are identified in this chapter.

1.8 The committee has concluded that the remaining instruments do not raise human rights concerns, either because they do not engage human rights, they

1 See Parliament of Australia website, 'Journals of the Senate', http://www.aph.gov.au/Parliamentary_Business/Chamber_documents/Senate_chamber_documents/Journals_of_the_Senate.

contain only justifiable (or marginal) limitations on human rights or because they promote human rights and do not require additional comment.

Deferred bills and instruments

1.9 The committee has deferred its consideration of the following bills:

- Australian Immunisation Register (Consequential and Transitional Provisions) Bill 2015;
- Australian Immunisation Register Bill 2015;
- Social Security Legislation Amendment (Further Strengthening Job Seeker Compliance) Bill 2015; and
- Social Services Legislation Amendment (More Generous Means Testing for Youth Payments) Bill 2015.

1.10 The committee continues to defer its consideration of the Marriage Legislation Amendment Bill 2015 (deferred 8 September 2015) and the Migration Amendment (Protection and Other Measures) Regulation 2015 [F2015L00542] (deferred 23 June 2015).

1.11 As previously noted, the committee continues to defer one bill and a number of instruments in connection with the committee's current review of the *Stronger Futures in the Northern Territory Act 2012* and related legislation.[2]

2 See Parliamentary Joint Committee on Human Rights, *Twenty-first Report of the 44th Parliament* (24 March 2015); and Parliamentary Joint Committee on Human Rights, *Twenty-third Report of the 44th Parliament* (18 June 2015).

Response required

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

Family Assistance (Public Interest Certificate Guidelines) Determination 2015 [F2015L01269]

Paid Parental Leave Amendment Rules 2015 [F2015L01266]

Social Security (Public Interest Certificate Guidelines) (DSS) Determination 2015 [F2015L01267]

Student Assistance (Public Interest Certificate Guidelines) Determination 2015 [F2015L01268]

Portfolio: Social Services
Authorising legislation: A New Tax System (Family Assistance) (Administration) Act 1999; *Paid Parental Leave Act 2010*; *Social Security (Administration) Act 1999*; *and Student Assistance Act 1973*
Last day to disallow: 15 October 2015 (House and Senate)

Purpose

1.13 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 (the determinations) either amend or remake existing instruments relating to the issuing of public interest certificates.

1.14 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.[1]

1.15 However, the Secretary (or delegate) of the Department of Social Services or the Department of Human Services may certify that it is necessary in the public interest to disclose such information in a particular case or class of case. In doing so,

1 See sections 164 and 167 of the *A New Tax System (Family Assistance) (Administration) Act 1999*; sections 204 and 207 of the *Social Security (Administration) Act 1999*; sections 353 and 354 of the *Student Assistance Act 1973*; and sections 129 to 132 of the *Paid Parental Leave Act 2010.*

the secretary must act in accordance with guidelines made under the relevant Act.[2] These determinations set out the guidelines for the exercise of this power.

1.16 Measures raising human rights concerns or issues are set out below.

Disclosure of personal information

1.17 As set out above, the determinations prescribe particular circumstances when a public interest certificate may be issued. They provide that the secretary may issue the certificate if:

- the information cannot reasonably be obtained from a source other than a department;
- the person to whom the information will be disclosed has a sufficient interest in the information (being a genuine and legitimate interest); and
- the secretary is satisfied that the disclosure is for at least one of a number of specified purposes.[3]

1.18 The purposes for which personal protected information can be disclosed include:

- for the enforcement of laws;
- if necessary for the making of (or supporting or enforcing) a proceeds of crime order;
- to brief a minister;
- to assist with locating a missing person or in relation to a deceased person;
- for research, statistical analysis and policy development;
- to facilitate the progress or resolution of matters of relevance within departmental portfolio responsibilities;
- to a department or other authority of a state or territory, or an agent or contracted service provider of a department or authority, if the information is about a public housing tenant (or applicant), or is necessary to facilitate income management measures; and
- to ensure a child is enrolled in or attending school, or to meet or monitor infrastructures and resource needs in a school.[4]

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2 Section 168 of the *A New Tax System (Family Assistance) (Administration) Act 1999*; section 208 of the *Social Security (Administration) Act 1999*; section 355 of the *Student Assistance Act 1973* and section 128 of the *Paid Parental Leave Act 2010.*

3 See section 7 of the Family Assistance (Public Interest Certificate Guidelines) Determination 2015; section 7 of the Social Security (Public Interest Certificate Guidelines) (DSS) Determination 2015; section 7 of the Student Assistance (Public Interest Certificate Guidelines) Determination 2015; and section 4 of the Paid Parental Leave Rules 2010.

1.19 The issuing of public interest certificates to allow for the disclosure of personal protected information engages and limits the right to privacy.

Right to privacy

1.20 Article 17 of the International Covenant on Civil and Political Rights (ICCPR) prohibits arbitrary or unlawful interferences with an individual's privacy, family, correspondence or home. 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;
- the right to control the dissemination of information about one's private life.

1.21 However, this right 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 seek to achieve a legitimate objective and be reasonable, necessary and proportionate to achieving that objective.

Compatibility of the measure with the right to privacy

1.22 The statements of compatibility for the determinations acknowledge that the instruments engage and limit the right to privacy.

1.23 However, the statements of compatibility provide assessments of only three of the numerous purposes for which personal protected information can be disclosed.

1.24 This is despite the fact that three of the four Determinations[5] are remaking the guidelines, including all the specified purposes for which a public interest certificate can be made. The committee's usual expectation is that each limitation on human rights is assessed on the basis of a reasoned and evidence-based explanation of how the measure supports a legitimate objective for the purposes of international human rights law. To be capable of justifying a proposed limitation of human rights, a legitimate objective must address a pressing or substantial concern and not simply seek an outcome regarded as desirable or convenient. Additionally, a limitation must be rationally connected to, and a proportionate way to achieve, its legitimate objective in order to be justifiable in international human rights law.

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4 Note, there are more purposes in the individual Determinations, and not all purposes are included in each Determination. See Part 2 of the Family Assistance (Public Interest Certificate Guidelines) Determination 2015; Part 2 of the Social Security (Public Interest Certificate Guidelines) (DSS) Determination 2015; Part 2 of the Student Assistance (Public Interest Certificate Guidelines) Determination 2015; and Division 4.1.2 of Part 4-1 of the Paid Parental Leave Rules 2010 as amended by the Paid Parental Leave Amendment Rules 2015.

5 The Family Assistance (Public Interest Certificate Guidelines) Determination 2015, the Social Security (Public Interest Certificate Guidelines) (DSS) Determination 2015 and the Student Assistance (Public Interest Certificate Guidelines) Determination 2015, but not the Paid Parental Leave Amendment Rules 2015.

1.25 The committee notes that the stated objective of the three purposes that are assessed—to allow information to be disclosed for proceeds of crimes orders; research, analysis and policy development; the administration of the National Law; and public housing administration—appear to be legitimate objectives for the purposes of international human rights law. The disclosure of such information also appears to be rationally connected to the stated objectives.

1.26 However, it is unclear whether the disclosure of personal protected information in the circumstances set out in the determinations is proportionate to the stated objectives.

1.27 First, while the statements of compatibility state that the *Privacy Act 1988* (the Privacy Act) will continue to apply to the management of disclosed information, it is not clear that all recipients of the information would be subject to the provisions of that Act. In particular, the determinations allow personal protected information to be shared with the 'agent or contracted service provider' of a state or territory department or authority and with universities. However, no information is given as to who such agents or contractors might be and whether they would be bound by the provisions of the Privacy Act (which does not apply to most state or territory government agencies, to small business operators or to most universities).

1.28 Second, the manner in which the information can be disclosed may not, in all instances, be the least rights restrictive approach. In particular, it is unclear why it is necessary to enable the disclosure of protected personal information in a form that identifies individuals when the information is being disclosed for purposes such as research, statistical analysis, policy development, briefing the minister and meeting or monitoring infrastructure and resource needs. In such cases it would appear that the information could be disclosed in a de-identified form, thus avoiding any privacy concerns.

1.29 Third, the determinations provide that in appropriate circumstances the disclosure of information may be accompanied by additional measures to protect the information—for example, deeds of confidentiality or memoranda of understanding may be required for recipients of the information. It is not clear why the requirement to further protect the information in such cases is not set out in the determinations themselves.

1.30 **The committee's assessment against article 17 of the International Covenant on Civil and Political Rights (right to privacy) of the power to disclose personal information raises questions as to whether the limitation on these rights is proportionate to the objective sought to be achieved.**

1.31 **As set out above, the disclosure of personal information engages and limits the right to privacy. The statement of compatibility does not sufficiently justify that limitation for the purposes of international human rights law. The committee therefore seeks the advice of the Minister for Social Services as to:**

- **whether each of the proposed purposes for which information can be shared are aimed at achieving a legitimate objective;**
- **whether there is a rational connection between the limitation and each objective; and**
- **whether the limitation is a reasonable and proportionate measure for the achievement of each objective, particularly whether there are adequate safeguards in place to protect personal information and that the sharing of protected personal information takes the least rights restrictive approach.**

Disclosure of personal information relating to homeless children

1.32 Three of the determinations provide for the disclosure of information relating to a child who is homeless.[6] These provide that a public interest certificate can be provided in a number of circumstances if the information cannot reasonably be obtained otherwise, the secretary is satisfied that the disclosure will not result in harm to the young person and the disclosure is for purposes set out in the guidelines, or will be made to a welfare authority where the child is in their care and is under 15 years old.

1.33 The circumstances when the information can be disclosed include:

- if the information is about the child's family member and the secretary is satisfied that the child, or the child's family member, has been subjected to abuse or violence;
- if the disclosure is necessary to verify qualifications for payments;
- if the disclosure will facilitate reconciliation between the child and his or her parents; and
- if necessary to inform the parents of the child as to whether the child has been in contact with the respective department.

1.34 These measures engage and limit the child's right to privacy and may limit the obligation to consider the best interests of the child in all decision-making.

Rights of the child (including obligation to consider the best interests of the child)

1.35 Children have special rights under human rights law taking into account their particular vulnerabilities. Children's rights are protected under a number of treaties, particularly the Convention on the Rights of the Child (CRC). All children under the age of 18 years are guaranteed these rights. The rights of children include the right to

6 The Family Assistance (Public Interest Certificate Guidelines) Determination 2015, the Social Security (Public Interest Certificate Guidelines) (DSS) Determination 2015 and the Student Assistance (Public Interest Certificate Guidelines) Determination 2015, but not the Paid Parental Leave Amendment Rules 2015.

privacy, which includes the same contents as the general right to privacy set out above at paragraphs [1.20] to [1.21].[7]

1.36 In addition, under the CRC, state parties are required to ensure that, in all actions concerning children, the best interests of the child is a primary consideration.[8]

1.37 This principle requires active measures to protect children's rights and promote their survival, growth and wellbeing, as well as measures to support and assist parents and others who have day-to-day responsibility for ensuring recognition of children's rights. It requires legislative, administrative and judicial bodies and institutions to systematically consider how children's rights and interests are or will be affected directly or indirectly by their decisions and actions.

Compatibility of the measure with the rights of the child

1.38 The statements of compatibility for each of the three relevant determinations do not consider whether the measures engage and limit the rights of the child.[9]

1.39 The committee's usual expectation where a measure may limit a human right is that the accompanying statement of compatibility provide a reasoned and evidence-based explanation of how the measure supports a legitimate objective for the purposes of international human rights law. This conforms with the committee's Guidance Note 1,[10] and the Attorney-General's Department's guidance on the preparation of statements of compatibility, which states that the 'existence of a legitimate objective must be identified clearly with supporting reasons and, generally, empirical data to demonstrate that [it is] important'.[11] To be capable of justifying a proposed limitation of human rights, a legitimate objective must address a pressing or substantial concern and not simply seek an outcome regarded as desirable or convenient. Additionally, a limitation must be rationally connected to, and a proportionate way to achieve, its legitimate objective in order to be justifiable in international human rights law.

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7 Article 16 of the CRC.

8 Article 3(1).

9 The Family Assistance (Public Interest Certificate Guidelines) Determination 2015, the Social Security (Public Interest Certificate Guidelines) (DSS) Determination 2015 and the Student Assistance (Public Interest Certificate Guidelines) Determination 2015.

10 Appendix 2; See Parliamentary Joint Committee on Human Rights, *Guidance Note 1 - Drafting Statements of Compatibility* (December 2014) http://www.aph.gov.au/~/media/Committees/Senate/committee/humanrights_ctte/guidance_notes/guidance_note_1/guidance_note_1.pdf.

11 See Attorney-General's Department, Template 2: Statement of compatibility for a bill or legislative instrument that raises human rights issues at http://www.ag.gov.au/RightsAndProtections/HumanRights/PublicSector/Pages/Statementofcompatibilitytemplates.aspx.

1.40 In respect of this obligation the committee notes that the determinations provide that the secretary can issue public interest certificates only if satisfied that the disclosure 'will not result in harm to the homeless young person'.[12]

1.41 However, while considerations of harm to the child are relevant to the question of what is in the best interests of the child, this question is a broader one under international law. In particular, the child's best interests must be assessed from the child's perspective rather than that of their parents or the state, and include the enjoyment of the rights set out in the CRC, including the right to privacy.

1.42 On this basis, a less rights restrictive approach to the sharing of this personal information in such cases would be to require the decision-maker to be satisfied that the disclosure would be in the best interests of the child, rather than that the disclosure will not result in harm to the child.

1.43 **The committee's assessment of the power to disclose information relating to homeless children against the Convention on the Rights of the Child (particularly the right to privacy and the obligation to consider the best interests of the child) raises questions as to whether the limitation on these rights is justifiable.**

1.44 **As set out above, the power to disclose information relating to homeless children engages and limits the rights of the child. The statement of compatibility does not justify that limitation for the purposes of international human rights law. The committee therefore seeks the advice of the Minister for Social Services as to:**

- **whether the proposed changes are aimed at achieving a legitimate objective;**
- **whether there is a rational connection between the limitation and that objective; and**
- **whether the limitation is a reasonable and proportionate measure for the achievement of that objective.**

12 See paragraphs 18(1)(b) and (2)(d) of the Family Assistance (Public Interest Certificate Guidelines) Determination 2015; paragraphs 20(1)(b) and 20(2)(d) of the Social Security (Public Interest Certificate Guidelines) (DSS) Determination 2015 and paragraphs 21(1)(b) and 21(2)(d) of the Student Assistance (Public Interest Certificate Guidelines) Determination 2015.

Federal Financial Relations (National Specific Purpose Payments) Determination 2013-14 No. 1 [F2015L00877]

Federal Financial Relations (National Specific Purpose Payments) Determination 2013-14 No. 2 [F2015L00878]

Federal Financial Relations (National Partnership payments) Determination No. 87 (December 2014) [F2015L01093]

Federal Financial Relations (National Partnership payments) Determination No. 88 (January 2015) [F2015L01094]

Federal Financial Relations (National Partnership payments) Determination No. 89 (February 2015) [F2015L01095]

Federal Financial Relations (National Partnership payments) Determination No. 90 (March 2015) [F2015L01096]

Federal Financial Relations (National Partnership payments) Determination No. 91 (April 2015) [F2015L01097]

Federal Financial Relations (National Partnership payments) Determination No. 92 (May 2015) [F2015L01098]

Federal Financial Relations (National Partnership payments) Determination No. 93 (June 2015) [F2015L01099]

Portfolio: Treasury
Authorising legislation: Federal Financial Relations Act 2009
Last day to disallow: 16 September 2015 (Senate) (but only in relation to Federal Financial Relations (National Specific Purpose Payments) Determination 2013-14 No. 1 [F2015L00877] and Federal Financial Relations (National Specific Purpose Payments) Determination 2013-14 No. 2 [F2015L00878]

Purpose

1.45 The Federal Financial Relations (National Specific Purpose Payments) Determination 2013-14 No. 1 (Determination 1) specifies the amounts payable for the schools, skills and workforce development, and housing National Specific Purpose Payments (National SPPs) for 2013-14. The Federal Financial Relations (National Specific Purpose Payments) Determination 2013-14 No. 2 (Determination 2) specifies the amount payable for the Disability National SPP for 2013-14.

1.46 The remaining instruments[1] specify the amounts to be paid to the states and territories to support the delivery of specified outputs or projects, facilitate reforms by the states or reward the states for nationally significant reforms. Schedule 1 to these instruments sets out the amounts of payments by reference to certain outcomes, including healthcare, education, community services and affordable housing.

1.47 Together these instruments are referred to as 'the Determinations'.

1.48 Measures raising human rights concerns or issues are set out below.

Payments to the states and territories for the provision of health, education, employment, housing and disability services

1.49 Under the Intergovernmental Agreement on Federal Financial Relations (the IGA), the Commonwealth provides National SPPs to the states and territories as a financial contribution to support state and territory service delivery in the areas of schools, skills and workforce development, disability and housing.

1.50 The *Federal Financial Relations Act 2009* provides for the minister, by legislative instrument, to determine the total amounts payable in respect of each National SPP, the manner in which these total amounts are indexed, and the manner in which these amounts are divided between the states and territories. The Determinations have been made in accordance with these provisions.

1.51 Payments under the Determinations assist in the delivery of services by the states and territories in the areas of health, education, employment, disability and housing. Accordingly, the Determinations engage a number of human rights. Whether those rights are promoted or limited will be determined by the amounts of the payments in absolute terms and in terms of whether the amounts represent an increase or decrease on previous years.

1.52 The committee has previously noted, in its assessment of appropriations bills, that proposed government expenditure to give effect to particular policies may engage and limit and/or promote a range of human rights. This includes rights under

1 Federal Financial Relations (National Partnership payments) Determination No. 87 (December 2014); Federal Financial Relations (National Partnership payments) Determination No. 88 (January 2015); Federal Financial Relations (National Partnership payments) Determination No. 89 (February 2015); Federal Financial Relations (National Partnership payments) Determination No. 90 (March 2015); Federal Financial Relations (National Partnership payments) Determination No. 91 (April 2015); Federal Financial Relations (National Partnership payments) Determination No. 92 (May 2015); Federal Financial Relations (National Partnership payments) Determination No. 93 (June 2015).

the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR).[2]

Multiple rights

1.53 The Determinations engage and may promote or limit the following human rights:

- right to equality and non-discrimination (particularly in relation to persons with disabilities);[3]
- rights of children;[4]
- right to work;[5]
- right to social security;[6]
- right to an adequate standard of living;[7]
- right to health;[8] and
- right to education.[9]

Compatibility of the Determinations with multiple rights

1.54 The statement of compatibility for the Federal Financial Relations (National Specific Purpose Payments) Determination 2013-14 No. 1 and the Federal Financial Relations (National Specific Purpose Payments) Determination 2013-14 No. 2 each simply states that:

> This Legislative Instrument does not engage any of the applicable rights or freedoms.[10]

1.55 However, in making payments to the states and territories to fund a range of services, the Determinations have the capacity to both promote rights and, in some cases, limit rights.

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2 See Parliamentary Joint Committee on Human Rights, *Third Report of 2013* (13 March 2013); Parliamentary Joint Committee on Human Rights, *Seventh Report of 2013* (5 June 2013); Parliamentary Joint Committee on Human Rights, *Third Report of the 44th Parliament* (4 March 2014); and Parliamentary Joint Committee on Human Rights, *Eighth Report of the 44th Parliament* (24 June 2014).

3 Article 26 of the ICCPR and the Convention on the Rights of Persons with Disabilities.

4 Convention on the Rights of the Child (CRC).

5 Articles 6, 7 and 8 of the ICESCR.

6 Article 9 of the ICESCR.

7 Article 11 of the ICESCR.

8 Article 12 of the ICESCR.

9 Article 13 and 14 of the ICESCR and article 28 of the CRC.

10 Determination 1, EM 2 and Determination 2, EM 2.

1.56 The remaining instruments are not accompanied by statements of compatibility as the instruments are not specifically required to have such statements under section 9 of the *Human Rights (Parliamentary Scrutiny) Act 2011*. However, the committee's role under section 7 of that Act is to examine all instruments for compatibility with human rights (including instruments that are not required to have statements of compatibility).

1.57 Australia has obligations to progressively realise economic, social and cultural rights using the maximum of resources available and this is reliant on government allocation of budget expenditure. The states and territories have limited revenue capacity and rely heavily on payments and cash transfers from the Commonwealth. The National SPPs provide funds to the states and territories which enable the provision of a range of government services which facilitate and support the implementation of multiple human rights. The obligations under international human rights law are on Australia as a nation state - it is therefore incumbent on the Commonwealth to ensure that sufficient funding is provided to the states and territories to ensure that Australia's international human rights obligations are met.

1.58 Where the Commonwealth seeks to reduce the amount of funding pursuant to National SPPs, such reductions in expenditure may amount to retrogression or limitations on rights.

1.59 Accordingly the National SPPs facilitate the taking of actions which may both effect the progressive realisation of, and the failure to fulfil, Australia's obligations under the treaties listed in the *Human Rights (Parliamentary Scrutiny) Act 2011*.

1.60 Accordingly, the committee considers that there is a sufficiently close connection between the National SPPs provided for under the Determinations and the implementation of new legislation, policy or programs, or the discontinuation or reduction in support of a particular policy or program that may engage human rights. As a result, the statement of compatibility for these Determinations should provide an assessment of any limitations of human rights that may arise from that engagement. This would include information that provides a detailed comparison for the amounts provided in the Determinations with the amounts provided in previous years.

1.61 **The committee's assessment of the Determinations against the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights raises questions as to whether the Determinations promote or limit multiple human rights.**

1.62 **As the Determinations set out the final amount payable by the Commonwealth to the states and territories under National SPPs for education, employment, disability and housing they may engage and potentially limit or promote a range of human rights that fall under the committee's mandate. As set out above, the statement of compatibility for the bills provides no assessment of their human rights compatibility. The committee therefore seeks the advice of the**

Treasurer as to whether the Determinations are compatible with Australia's human rights obligations, and particularly:

- **whether the Determinations are compatible with Australia's obligations of progressive realisation with respect to economic, social and cultural rights;**
- **whether a failure to adopt these Determinations would have a regressive impact on other economic, social and cultural rights;**
- **whether any reduction in the allocation of funding (if applicable) is compatible with Australia's obligations not to unjustifiably take backward steps (a retrogressive measure) in the realisation of economic, social and cultural rights; and**
- **whether the allocations are compatible with the rights of vulnerable groups (such as children; women; Aboriginal and Torres Strait Islander Peoples; persons with disabilities; and ethnic minorities).**

Further response required

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

Instruments made under the *Autonomous Sanctions Act 2011* and the *Charter of the United Nations Act 1945*

Portfolio: Foreign Affairs
Authorising legislation: Autonomous Sanctions Act 2011 and the Charter of the United Nations Act 1945

Purpose

1.64 A number of instruments have been made under the *Autonomous Sanctions Act 2011* and the *Charter of the United Nations Act 1945* to which this report relates, namely:

- Autonomous Sanctions (Designated Persons and Entities and Declared Persons – Zimbabwe) Amendment List 2013 [F2013L00477];
- Charter of the United Nations Legislation Amendment Regulation 2013 (No. 1) [F2013L00791];
- Charter of the United Nations (UN Sanction Enforcement Law) Amendment Declaration 2013 (No. 1) [F2013L00789];
- Charter of the United Nations (Sanctions – the Taliban) Regulation 2013 [F2013L00787];
- Autonomous Sanctions (Designated Persons and Entities and Declared Persons – Zimbabwe) Amendment List 2013 (No. 2) [F2013L00857];
- Autonomous Sanctions (Designated Persons and Entities and Declared Persons – Syria) Amendment List 2013 [F2013L00884];
- Autonomous Sanctions (Designated Persons and Entities and Declared Persons – Iran) Amendment List 2013 (No. 1) [F2013L01312];
- Autonomous Sanctions Amendment Regulation 2013 (No. 1) [F2013L01447];
- Charter of the United Nations (Sanctions – Democratic People's Republic of Korea) Amendment Regulation 2013 (No. 1) [F2013L01384];
- Autonomous Sanctions (Designated Persons and Entities and Declared Persons – Democratic People's Republic of Korea) Amendment List 2013 [F2013L02049];
- Autonomous Sanctions (Designated and Declared Persons – Former Federal Republic of Yugoslavia) Amendment List 2014 (No.2) [F2014L00970];

- Autonomous Sanctions (Designated Persons and Entities and Declared Persons – Ukraine) Amendment List 2014 [F2014L01184];
- Autonomous Sanctions (Designated Persons and Entities and Declared Persons – Zimbabwe 2014 [F2014L00411];
- Autonomous Sanctions (Designated and Declared Persons Former Federal Republic of Yugoslavia) Amendment List 2014 [F2014L00694];
- Autonomous Sanctions Amendment (Ukraine) Regulation 2014 [F2014L00720];
- Autonomous Sanctions (Designated Persons and Entities and Declared Persons – Ukraine) List 2014 [F2014L00745];
- Charter of the United Nations Legislation Amendment (Central African Republic and Yemen) Regulation 2014 [F2014L00539];
- Charter of the United Nations (Sanctions – Yemen) Regulation 2014 [F2014L00551];
- Charter of the United Nations (UN Sanction Enforcement Law) Amendment Declaration 2014 (No. 2) [F2014L00568];
- Charter of the United Nations Legislation Amendment (Sanctions 2014 Measures No. 1) Regulations 2014 [F2014L01131];
- Charter of the United Nations Legislation Amendment (Sanctions 2014 – Measures No. 2) Regulation 2014 [F2014L01701];
- Autonomous Sanctions (Designated Persons and Entities and Declared Persons – Democratic People's Republic of Korea) Amendment List 2015 [F2015L00061];
- Autonomous Sanctions (Designated and Declared Persons – Former Federal Republic of Yugoslavia) Amendment List 2015 (No. 1) [F2015L00224];
- Autonomous Sanctions (Designated Persons and Entities – Democratic People's Republic of Korea) Amendment List 2015 (No. 2) [F2015L00216];
- Autonomous Sanctions (Designated Persons and Entities and Declared Persons – Iran) Amendment List 2015 (No. 1) [F2015L00227];
- Autonomous Sanctions (Designated Persons and Entities and Declared Persons – Libya) Amendment List 2015 (No. 1) [F2015L00215];
- Autonomous Sanctions (Designated Persons and Entities and Declared Persons – Syria) Amendment List 2015 (No. 1) [F2015L00217];
- Autonomous Sanctions (Designated Persons and Entities and Declared Persons – Zimbabwe) Amendment List 2015 (No. 1) [F2015L00218];
- Charter of the United Nations (Sanctions – South Sudan) Regulation 2015 [F2015L01299]; and

- Charter of the United Nations (Dealing with Assets) Amendment (South Sudan) Regulation 2015 [F2015L01300].

1.65 These instruments either:

- designate and declare individuals subject to the autonomous sanctions regime under the *Autonomous Sanctions Act 2011* and the Autonomous Sanctions Regulations 2011;
- designate individuals subject to the powers under the *Charter of the United Nations Act 1945* by reference to a UN Security Council resolution or decision;
- expand the basis on which the Minister for Foreign Affairs can designate an individual under the Autonomous Sanctions Regulations 2011;
- amend the basis on which a person is prohibited from making assets available to designated persons or expand the basis on which a person will commit an offence if they make an asset available to a designated person; or
- expand the definition of 'controlled asset' to enable the assets of a person acting on behalf of a designated person to be frozen.

1.66 In order to understand the effect of the instruments under review it is necessary to understand how the designation and declaration powers work under the *Autonomous Sanctions Act 2011* and the *Charter of the United Nations Act 1945*.

1.67 Firstly, the *Autonomous Sanctions Act 2011* (in conjunction with the Autonomous Sanctions Regulations 2011 and various instruments made under those regulations) provides the power for the government to impose broad sanctions to facilitate the conduct of Australia's external affairs (the autonomous sanctions regime).

1.68 Sanctions can be imposed under the autonomous sanctions regime if the Minister for Foreign Affairs is satisfied that doing so will facilitate the conduct of Australia's relations with other countries or with entities or persons outside Australia, or will otherwise deal with matters, things or relationships outside Australia.[1] The Autonomous Sanctions Regulations 2011 sets out the countries and activities for which a person or entity can be designated.[2]

1.69 Secondly, the *Charter of the United Nations Act 1945* (in conjunction with various instruments made under that Act)[3] gives the Australian government the

1 See subsection 10(2) of the *Autonomous Sanctions Act 2011*.

2 As at 2 September 2015, the countries listed were the Democratic People's Republic of Korea; the former Federal Republic of Yugoslavia; Iran; Libya; Myanmar; Syria; Zimbabwe; and Ukraine (see section 6 of the Autonomous Sanctions Regulations 2011).

3 See in particular the Charter of the United Nations (Dealing with Assets) Regulations 2008 [F2014C00689].

power to apply sanctions to give effect to decisions of the United Nations Security Council by Australia (the UN Charter sanctions regime).

1.70 Sanctions can be imposed under the UN Charter sanctions regime if the UN Security Council has made a decision under Chapter VII of the *Charter of the United Nations 1945* (UN Charter), not involving the use of armed force, that there exists 'any threat to the peace, breach of the peace or act of aggression' and Australia is obliged under the UN Charter to carry out that decision as a matter of international law.[4] The Charter of the United Nations (Dealing with Assets) Regulations 2008 and a number of other instruments made under the UN Charter sanctions regime sets out the criteria for designating a person.[5]

1.71 Sanctions under both the autonomous sanctions regime and the UN Charter sanctions regime (together referred to as the sanctions regimes) can:

- designate or list persons or entities for a particular country with the effect that the assets of the designated person or entity are frozen, and declare that a person is prevented from travelling to, entering or remaining in Australia; and
- restrict or prevent the supply, sale or transfer or procurement of goods or services.

1.72 As at 2 September 2015, 1110 individuals and 854 entities were subject to targeted financial sanctions or travel bans under both sanctions regimes (449 individuals under the autonomous sanctions regime and 661 under the UN Charter regime). The Consolidated List of all persons and entities subject to targeted financial sanctions or travel bans under both sanctions regimes includes the listed individual's name (and any aliases), date of birth, place of birth and date of listing. In some cases their address, citizenship details, passport number and licence number, as well as information about their activities and physical description, is also included.

1.73 The Consolidated List currently includes the names of three Australian citizens.[6]

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4 See section 6 of the *Charter of the United Nations Act 1945*.

5 These criteria rely on a designation being made by the UN Security Council. As at 2 September 2015, the list of countries from which people have been designated by the UN Security Council are the Central African Republic; Côte d'Ivoire; Democratic People's Republic of Korea; Democratic Republic of the Congo; Eritrea; Iran; Iraq; Lebanon; Liberia; Somalia; South Sudan; Sudan; and Yemen. Also listed are individuals said to be involved with Al-Qaida; the Taliban; and Libyan Arab Jamahiriya, as well as anyone the UN Security Council lists under Resolution 1373. As such these instruments implement Australia's international obligations under the UN Charter with respect to decisions by the UN Security Council.

6 See Department of Foreign Affairs and Trade, 'Consolidated List', accessed 2 September 2015, available at: http://dfat.gov.au/international-relations/security/sanctions/pages/consolidated-list.aspx.

Background

1.74 As set out below, a number of instruments dealing with the sanctions regimes have previously been examined by the committee, while the committee has deferred its examination of a number of other instruments (see paragraph [1.64] above). To date, the statements of compatibility accompanying these instruments have generally failed to identify any human rights as being engaged and, therefore, have provided no further human rights assessment.

1.75 The instruments under consideration expand or apply the operation of the sanctions regime by designating or declaring that a person is subject to the sanctions regime, or by amending the regime itself. To assess whether these instruments are compatible with human rights, it is necessary to assess whether the sanctions regime itself is compatible with human rights.

1.76 The committee's previous examination of some of these instruments is set out in its *Sixth Report of 2013*, *Seventh Report of 2013* and *Tenth Report of 2013*.[7] The committee previously sought information from the Minister for Foreign Affairs as to whether the instruments were compatible with a number of human rights. The committee noted that this was a complex area that required careful consideration of human rights and various competing interests and ultimately asked if the minister could comprehensively review the sanctions regime with respect to Australia's international human rights obligations.

1.77 The former minister responded stating that he had instructed the Department of Foreign Affairs and Trade to carefully consider the committee's recommendation that it conduct a review. On 10 December 2013 the committee wrote to the current Minister for Foreign Affairs to draw her attention to the committee's consideration of these matters and to reiterate its request for a review in relation to both sanctions regimes.

1.78 The committee subsequently deferred its consideration of a number of instruments relating to both sanctions regimes pending receipt and consideration of the minister's response. All of the instruments listed above at paragraph [1.64] are now considered as part of the following analysis.

1.79 On 16 February 2015 the minister provided her response, as set out below.

Minister's response

> As you are aware, sanctions regimes are imposed only in situations of international concern, including the grave repression of human rights, the proliferation of weapons of mass destruction or their means of delivery, or armed conflict. Modern sanctions regimes impose highly targeted measures designed to limit the adverse consequences of the situation, to

7 See Parliamentary Joint Committee on Human Rights, *Sixth Report of 2013* (15 May 2013); *Seventh Report of 2013* (5 June 2013) and *Tenth Report of 2013* (26 June 2013).

> seek to influence those responsible for it to modify their behaviour, and to penalise those responsible.
>
> As the former Committee noted, the implementation of sanctions is a complex issue that requires careful consideration of the various competing interests involved, including human rights. Sanctions measures that are targeted against designated or declared persons necessarily involve the balancing of the human rights of those persons, with the necessity of preventing broader, and often egregious, human rights abuses arising from a situation of international concern. As the process of considering the various competing interests is undertaken in the process of implementation, I see no need for a further review by the Department.[8]

Compatibility of the sanctions regimes with human rights

1.80 The committee notes that aspects of both of the sanctions regimes may operate variously to both limit and promote human rights. For example, sanctions prohibiting the proliferation of weapons of mass destruction will promote the right to life. However, the committee's current and previous examination of Australia's sanctions regimes has been, and is, focused solely on measures that impose restrictions on individuals.

1.81 The committee notes that the focus of the analysis below is in relation to the human rights obligations owed to individuals located in Australia. However, the committee is unaware whether any of the designations or declarations made under the sanctions regime has affected individuals living in Australia (although three current designations apply to Australian citizens).

1.82 In this regard, it is important to note that the committee's mandate is to examine Acts and legislative instruments for compatibility with human rights, and that the application of the committee's analytical framework provides an assessment of whether legislation could be applied in a way that would breach human rights.

1.83 The analysis below therefore provides an assessment of whether both sanctions regimes could breach the human rights of persons to whom Australia owes such obligations, irrespective of whether there have already been instances of individuals living in Australia affected by these measures.

Multiple rights

1.84 The committee considers that the autonomous sanctions regime and the UN Charter regime engage and may limit multiple human rights, including:

- right to privacy;[9]
- right to a fair hearing;[10]

8 See Appendix 1, Letter from the Hon Julie Bishop MP, Minister for Foreign Affairs, to Senator Dean Smith (dated 16 February 2015) 1.

9 Article 17 of the International Covenant on Civil and Political Rights (ICCPR).

- right to protection of the family;[11]
- right to equality and non-discrimination;[12]
- right to an adequate standard of living;[13]
- right to freedom of movement (in relation to the cancellation of a visa of a person declared under the autonomous sanctions regime);[14] and
- prohibition against non-refoulement (in relation to the cancellation of a visa of a person declared under the autonomous sanctions regime).[15]

1.85 The committee's analysis of the compatibility of the sanctions regimes with a number of these rights is set out below.[16]

1.86 The committee acknowledges that sanctions regimes operate as mechanisms for applying pressure to regimes and individuals with a view to ending the repression of human rights internationally.[17] The committee notes the importance of Australia acting in concert with the international community to prevent egregious human rights abuses arising from situations of international concern. The committee considers that laws to facilitate this effort pursue a legitimate objective for the purposes of international human rights law.

1.87 However, in respect of the minister's advice that the sanctions regimes seek 'to penalise those responsible' for the repression of human rights, the committee regards it as important to recognise that the sanctions regimes operate independently of the criminal justice system, and are used regardless of whether a designated person has been charged with or convicted of a criminal offence. While the punishing of those responsible for human rights abuses is a legitimate objective in cases where there has been a judicial determination of guilt, it may not be regarded as such in cases where punishment is imposed on an individual by the executive without any right to judicial review.

1.88 Further, the committee notes that the evidence as to whether sanctions regimes are effective in achieving the aims set out by the minister appears to be

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10 Article 14 of the ICCPR.

11 Article 17 and 23 of the ICCPR and article 10 of the International Covenant on Economic, Social and Cultural Rights (ICESCR).

12 Article 26 of the ICCPR.

13 Article 11 of the ICESCR.

14 Article 12 of the ICCPR.

15 Article 6 and 7 of the ICCPR, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and the Refugee Convention.

16 There may be issues relating to the compatibility of the sanctions regimes with the human rights listed at paragraph [1.84] which have not been examined in the analysis that follows.

17 See Parliamentary Joint Committee on Human Rights, *Tenth Report of 2013* (26 June 2013) 15.

inconclusive;[18] and there are concerns that unilaterally imposed sanctions may in practice impact adversely on the human rights of civilian populations in countries targeted by sanctions.[19] The committee also notes the difficulty in establishing a rational connection between each designation or declaration of an individual and the objective of ending the repression of human rights internationally. Such concerns raise significant questions as to whether sanctions regimes are rationally connected to the objectives which they seek. However, as such questions may ultimately turn on the particular degree and mix of political strategies aimed at ending international human rights abuses, for the purpose of the analysis below, the committee accepts that the sanctions regimes are rationally connected to their objective. The committee therefore has focused on the question of whether any identifiable limitations of human rights arising from the sanctions regimes are proportionate to their stated objective.

1.89 Noting that the minister has declined to undertake a broader review of the sanctions regimes, the analysis below sets out a number of specific human rights concerns in relation to which the minister's advice is sought.

'Freezing' of designated person's assets

1.90 Under both sanctions regimes, the effect of a designation is that it is an offence for a person to make an asset directly or indirectly available to, or for the benefit of, a designated person.[20] A person's assets are therefore effectively 'frozen' as a result of being designated. For example, a financial institution is prohibited from allowing a designated person to access their bank account. The sanctions regimes can apply to persons living in Australia or could apply to persons outside Australia.

1.91 The scheme provides that the minister may grant a permit authorising the making available of certain assets to a designated person.[21] An application for a permit can only be made for basic expenses, to satisfy a legal judgment or where a payment is contractually required.[22] A basic expense includes foodstuffs; rent or

18 A number of academic studies and the European Parliament have said that it is difficult to gauge whether sanctions are effective. See, for example, European Parliament, *Resolution of 4 September 2008 on the Evaluation of EU Sanctions as Part of the EU's Actions and Policies in the Area of Human Rights* (2008/2031(INI)) and Stefan Lehne, *The Role of Sanctions in EU Foreign Policy*, December 2012 available at http://carnegieendowment.org/2012/12/14/role-of-sanctions-in-eu-foreign-policy/etnv.

19 See UN Human Rights Council, 28th session, agenda items 3 and 5, *Research-based progress report of the Human Rights Advisory Committee containing recommendations on mechanisms to assess the negative impact of unilateral coercive measures on the enjoyment of human rights and to promote accountability*, 10 February 2015.

20 Section 14 of the Autonomous Sanctions Regulations 2011 and section 21 of the *Charter of the United Nations Act 1945*.

21 See section 18 of the Autonomous Sanctions Regulations 2011 and section 22 of the *Charter of the United Nations Act 1945*.

22 See section 20 of the Autonomous Sanctions Regulations 2011.

mortgage; medicines or medical treatment; public utility charges; insurance; taxes; legal fees and reasonable professional fees.[23]

1.92 The committee considers that the designation of a person under the sanctions regimes therefore limits a person's right to privacy, and particularly the aspect of the right relating to personal autonomy in one's private life.

1.93 The committee notes that its discussion in relation to the right to privacy applies to the autonomous sanctions regime and to the designation of a person by the minister under the UN Charter sanctions regime. It does not apply in relation to the automatic designation of a person by the UN Security Council, noting that under international law, Australia is bound by the UN Charter to implement UN Security Council decisions.[24] Accordingly, obligations under the UN Charter override Australia's obligations under international human rights law.[25] For further discussion in relation to the automatic designation process under the UN Charter sanctions regime see paragraphs [1.131] to [1.132] below.

Right to privacy

1.94 Article 17 of the International Covenant on Civil and Political Rights (ICCPR) prohibits arbitrary or unlawful interferences with an individual's privacy, family, correspondence or home.

1.95 Privacy is linked to notions of personal autonomy and human dignity: it includes the idea that individuals should have an area of autonomous development; a 'private sphere' free from government intervention and excessive unsolicited intervention by others. The right to privacy requires that the state does not arbitrarily interfere with a person's private and home life.

1.96 However, this right 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 seek to achieve a legitimate objective and be reasonable, necessary and proportionate to achieving that objective.

Compatibility with the right to privacy

1.97 As noted above, the freezing of a person's assets and the requirement for a designated person to seek the permission of the minister to access their funds for basic expenses imposes a limit on that person's right to a private life, free from interference by the state.

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23 See paragraph 20(3)(b) of the Autonomous Sanctions Regulations 2011.

24 See article 2(2) and article 41 of the *Charter of the United Nations 1945*.

25 See section 103 of the UN Charter which provides: 'In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail'.

1.98 The committee notes that, for example, in relation to a similar regime in the United Kingdom, the House of Lords held that the regime 'strike[s] at the very heart of the individual's basic right to live his own life as he chooses'.[26] Lord Brown concluded:

> The draconian nature of the regime imposed under these asset-freezing Orders can hardly be over-stated. Construe and apply them how one will…they are scarcely less restrictive of the day to day life of those designated (and in some cases their families) than are control orders. In certain respects, indeed, they could be thought even more paralysing. Undoubtedly, therefore, these Orders provide for a regime which considerably interferes with the [right to privacy]…[27]

1.99 The need to get permission from the minister to access money for basic expenses could, in practice, impact greatly on a person's private and family life. For example, it could, mean that a person whose assets are frozen would need to apply to the minister whenever they require funds to purchase medicines, travel or meet other basic expenses. The permit may also include a number of conditions. These conditions are not specified in the legislation and accordingly, there is wide discretion available to the minister when imposing conditions on the granting of a permit. In the UK, under the permit system conditions imposed include requiring a designated person to provide receipts for every item of expenditure, and, if receipts are not available (for example, for purchases bought from a market stall), details must be provided of the amount spent, where the money was spent and a description of what was purchased.

1.100 The committee notes that this limitation is not identified as being engaged or otherwise considered in any of the statements of compatibility accompanying the instruments examined by the committee to date. The statements of compatibility therefore provide no justification for limiting this right. Notwithstanding this, the committee notes that the former Minister for Foreign Affairs briefly addressed this in correspondence to the committee in 2013, stating:

> To the extent that such measures limit these individuals' right to privacy, it is the Government's view that this is an acceptable restriction given their involvement in [activities that seriously undermine democracy, respect for human rights and the rule of law in Zimbabwe] and the need to protect those suffering from such abuses.[28]

1.101 The committee's usual expectation where a measure may limit a human right is that the accompanying statement of compatibility provide a reasoned and

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26 *HM Treasury v Ahmed* [2010] UKSC2 at [60] (*Ahmed*).

27 *Ahmed* at [192] per Lord Brown.

28 Letter from Senator the Hon Bob Carr, Minister for Foreign Affairs to Mr Harry Jenkins MP, Chair, Parliamentary Joint Committee on Human Rights (dated 5 June 2013), published in the Parliamentary Joint Committee on Human Rights, *Tenth Report of 2013* (26 June 2013) 18.

evidence-based explanation of how the measure supports a legitimate objective, is rationally connected to and proportionate to that objective for the purposes of international human rights law. This conforms with the committee's Guidance Note 1,[29] and the Attorney-General's Department's guidance on the preparation of statements of compatibility.[30]

1.102 As noted above at [1.86], for the purposes of this analysis the committee accepts that the use of international sanctions regimes to apply pressure to regimes and individuals in order to end the repression of human rights may be regarded as a legitimate objective for the purposes of international human rights law. The committee also has accepted, for the purposes of this analysis, that the measures are rationally connected to the legitimate objective. However, the committee considers that the sanctions regimes may not be regarded as proportionate to the stated objective. In particular, the committee is concerned that there may not be effective safeguards or controls over the sanctions regimes, including that:

- the designation or declaration under the autonomous sanctions regime can be based solely on the basis that the minister is 'satisfied' of a number of broadly defined matters;[31]
- the minister can make the designation or declaration without hearing from the affected person before the decision is made;
- there is no requirement that reasons be made available to the affected person as to why they have been designated or declared;
- no guidance is available under the Act or regulations or any other publicly available document setting out the basis on which the minister decides to designate or declare a person;
- there is no report to Parliament setting out the basis on which persons have been declared or designated and what assets, or the amount of assets that have been frozen;
- once the decision is made to designate or declare a person, the designation or declaration remains in force for three years and may be continued after that time. There is no requirement that if circumstances change or new

29 Appendix 2; See Parliamentary Joint Committee on Human Rights, Guidance Note 1 - Drafting Statements of Compatibility (December 2014) http://www.aph.gov.au/~/media/Committees/Senate/committee/humanrights_ctte/guidance_notes/guidance_note_1/guidance_note_1.pdf.

30 See Attorney-General's Department, Template 2: Statement of compatibility for a bill or legislative instrument that raises human rights issues at http://www.ag.gov.au/RightsAndProtections/HumanRights/PublicSector/Pages/Statementofcompatibilitytemplates.aspx.

31 See examples below at paragraph [1.114] and s 6 of the Autonomous Sanctions Regulations 2011.

evidence comes to light that the designation or declaration will be reviewed before the three year period ends;

- a designated or declared person will only have their application for revocation considered once a year—if an application for review has been made within the year, the minister is not required to consider it;
- there is no provision for merits review before a court or tribunal of the minister's decision;
- there is no requirement to consider whether applying the ordinary criminal law to a person would be more appropriate than freezing the person's assets on the decision of the minister;
- the minister has unrestricted power to impose conditions on a permit to allowing access to funds to meet basic expenses; and
- there is no requirement that in making a designation or declaration the minister needs to take into account whether in doing so, it would be proportionate to the anticipated effect on an individual's private and family life.

1.103 The committee notes that a number of other countries have legislated to implement UN Security Council resolutions to freeze the assets of individuals. The committee notes that the process of designation by the UN Security Council has been subject to criticism internationally.[32] The United Kingdom has terrorist asset freezing powers which are similar to Australia's UN Charter sanctions regime in that it allows the executive to freeze the assets of individuals.[33] The committee considers it useful to look to comparative jurisdictions to see how such jurisdictions implement their UN obligations. This is valuable in determining whether there are less rights restrictive methods of achieving the same objective. The committee notes that the United Kingdom has implemented its obligations in a manner that incorporates a number of safeguards not present in the Australian sanctions regimes, including:

- challenges to designations made by the executive can be made by way of full merits appeal rather than solely by way of judicial review;[34]
- the prohibition on making funds available does not apply to social security benefits paid to family members of a designated person (even if the payment is made in respect of a designated person);[35]

32 See, for example, *Kadi v Council of the European Union* (Joined Cases C-402/05P and C-415/05P) and *Abdelrazik v The Minister of Foreign Affairs* [2009] FC 582, [51] (Canada).

33 It has broader asset freezing powers not restricted to terrorism but these cannot be applied to UK residents, see Part II of the *Anti-terrorism, Crime and Security Act 2001* (UK).

34 See s 26 of TAFA 2010.

35 See subs 16(3) of TAFA 2010.

- quarterly reports must be made by the executive on the operation of the regime;[36]
- an Independent Reviewer of Terrorism Legislation reviews each designation and has unrestricted access to relevant documents, government personnel, the police and intelligence agencies;[37]
- the executive provides a 'Designation Policy Statement' to Parliament setting out the factors used when deciding whether to designate a person;
- an Asset-Freezing Review sub-group annually reviews all existing designations, or earlier if new evidence comes to light or there is a significant change in circumstances, and the executive invites each designated person to respond to whether they should remain designated;[38] and
- when the executive is considering designating a person, operational partners are consulted, including the police, to determine whether there are options available other than designation, for example, prosecution or forfeiture of assets (that is, to assist to ensure that there is not a less rights restrictive alternative to achieve the objective).[39]

1.104 These kinds of safeguards in the United Kingdom asset-freezing regime indicate that there may be less rights restrictive methods of achieving the stated objective of the Australian sanctions regimes. The committee notes that measures which limit human rights must be the least rights restrictive alternative to achieve their legitimate objective in order to be considered a proportionate limitation on human rights. The United Kingdom Independent Reviewer of Terrorism Legislation (IRTL) has said in relation to the United Kingdom asset-freezing powers, that '[e]xceptional powers require exceptional safeguards'.[40] The IRTL has comprehensively reviewed the United Kingdom's asset-freezing regime, and

36 See s 30 of TAFA 2010.

37 See *Third Report on the Operation of the Terrorist Asset-Freezing etc. Act 2010 (Review Period: Year to 16 September 2013)*, David Anderson QC, Independent Reviewer of Terrorism Legislation, December 2013 para 1.3.

38 See s 4 of TAFA 2010; *First Report on the Operation of the Terrorist Asset-Freezing etc. Act 2010 (Review Period: December 2010 to September 2011)*, David Anderson QC, Independent Reviewer of Terrorism Legislation, December 2011, para 6.5; and *Third Report on the Operation of the Terrorist Asset-Freezing etc. Act 2010 (Review Period: Year to 16 September 2013)*, David Anderson QC, Independent Reviewer of Terrorism Legislation, December 2013 para 3.4.

39 *Third Report on the Operation of the Terrorist Asset-Freezing etc. Act 2010 (Review Period: Year to 16 September 2013)*, David Anderson QC, Independent Reviewer of Terrorism Legislation, December 2013 para 3.2.

40 *First Report on the Operation of the Terrorist Asset-Freezing etc. Act 2010 (Review Period: December 2010 to September 2011)*, David Anderson QC, Independent Reviewer of Terrorism Legislation, December 2011 para 1.2.

individually considered all designations made under the relevant Act. Following the IRTL's first report the United Kingdom government adopted his recommendations to incorporate further safeguards when designating a person.[41] No such comprehensive review has been conducted in Australia.

1.105 The committee notes that Australia's Independent National Security Legislation Monitor (INSLM) has the power to review the operation, effectiveness and implications of designations under the UN Charter sanctions regime relating to terrorism and dealings with assets.[42] The INSLM's reports have made clear that the INSLM's ability to adequately review designations of individuals is extremely hampered by the fact that effective record keeping in relation to the designation process and the assets frozen under the sanction regime is limited.[43]

1.106 **The committee therefore considers that the freezing of a designated person's assets limits a person's right to a private life. As set out above, while the committee accepts that the sanctions regimes pursue a legitimate objective, sufficient information has not been provided to establish that the limitation is proportionate to achieve that objective. The committee therefore seeks the advice of the Minister for Foreign Affairs as to how the designation of a person under the autonomous sanctions regime and the ministerial designation process under the UN Charter sanctions regime is a proportionate limitation on the right to privacy, having regard to the matters set out at paragraph [1.102] and whether there are adequate safeguards to protect the right to a private life.**

1.107 In addition, the committee is of the view that the designation process under the sanctions regimes limits the right to privacy of close family members of a designated person. Once a person is designated under either sanctions regime, the effect of designation is that it is an offence for a person to directly or indirectly make any asset available to, or for the benefit of, a designated person (unless it is

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41 See *Third Report on the Operation of the Terrorist Asset-Freezing etc. Act 2010 (Review Period: Year to 16 September 2013)*, David Anderson QC, Independent Reviewer of Terrorism Legislation, December 2013 paras 3.2-3.7.

42 See section 6 and the definition of 'counter-terrorism and national security legislation' in section 4 of the *Independent National Security Legislation Monitor Act 2010*. The INSLM briefly considered the UN Charter sanctions regime in its *First Annual Report* (Independent National Security Legislation Monitor, *Annual Report* (16 December 2011) 37-41) and considered it, together with the autonomous sanctions regime, in his *Third Annual Report* (Independent National Security Legislation Monitor, *Annual Report* (7 November 2013) 15-57). The INSLM's report mainly focused on the inadequacies of the listing process by the UN Security Council, and the disparity between the UN Charter sanctions regime and terrorism financing offences, and made recommendations in relation to this. None of the recommendations made by the INSLM have been responded to by the government (see Independent National Security Legislation Monitor, *Annual Report* (28 March 2014) 2).

43 See Independent National Security Legislation Monitor, *Annual Report* (7 November 2013) 30-31 and Independent National Security Legislation Monitor, *Annual Report* (7 November 2013) 52.

authorised under a permit to do so). This could mean that close family members who live with a designated person will not be able to access their own funds without needing to account for all expenditure, on the basis that any of their funds may indirectly benefit a designated person (for example, if a wife's funds are used to buy food for the household that the designated person lives in).

1.108 This issue was considered by the House of Lords in relation to the UK's terrorist asset freezing powers, which stated:

> …the way the system is administered affects not just those who have been designated. It affects third parties too, including the spouses and other family members of those who have been designated. For them too it is intrusive to a high degree.[44]

1.109 Similarly, the UK courts have described the effect of the asset freezing regime on the spouses of those designated as 'disproportionate' and 'oppressive', and the invasion of the privacy of non-designated persons as 'extraordinary'.[45]

1.110 However, the statements of compatibility accompanying the relevant instruments do not consider the effect of designation on a designated person's family members.

1.111 The committee's usual expectation where a measure may limit a human right is that the accompanying statement of compatibility provide a reasoned and evidence-based explanation of how the measure supports a legitimate objective, is rationally connected to and proportionate to that objective for the purposes of international human rights law. This conforms with the committee's Guidance Note 1,[46] and the Attorney-General's Department's guidance on the preparation of statements of compatibility.[47]

1.112 As noted above at [1.86], the committee accepts that the objective of the sanctions regimes, which is to apply pressure on regimes and individuals to help end the repression of human rights internationally, may be regarded as a legitimate objective for the purposes of international human rights law. The committee also has accepted, for the purposes of this analysis that the measures are rationally

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44 *Ahmed* at [4].

45 *R v HM Treasury, ex p M* [2008] UKHL 26 at [15].

46 Appendix 2; See Parliamentary Joint Committee on Human Rights, Guidance Note 1 - Drafting Statements of Compatibility (December 2014) http://www.aph.gov.au/~/media/Committees/Senate/committee/humanrights_ctte/guidance_notes/guidance_note_1/guidance_note_1.pdf

47 See Attorney-General's Department, Template 2: Statement of compatibility for a bill or legislative instrument that raises human rights issues at http://www.ag.gov.au/RightsAndProtections/HumanRights/PublicSector/Pages/Statementofcompatibilitytemplates.aspx

connected to the legitimate objective. However, the committee considers that the sanctions regimes may not be regarded as proportionate to its stated objective.

1.113 **The committee therefore considers that the freezing of a designated person's assets limits the right to privacy for close family members of designated persons. As set out above, while the committee accepts that the sanctions regimes pursue a legitimate objective, sufficient information has not been provided to establish that the limitation is proportionate to achieve that objective. The committee therefore seeks the advice of the Minister for Foreign Affairs as to how the designation of a person under the autonomous sanctions regime and the ministerial designation process under the UN Charter sanctions regime is a proportionate limitation on the right to privacy, in particular having regard to the matters set out at paragraph [1.102] and whether there are adequate safeguards to protect the rights of close family members to a private life.**

Lack of effective access to an independent and impartial court or tribunal (autonomous sanctions regime)

1.114 Under the autonomous sanctions regime a person can be designated or declared by the minister on a number of grounds relating to whether the minister is satisfied the person is or has been involved in certain activities. These include, for example, that a person:

- is a supporter of the former regime of Slobodan Milosevic;
- is a close associate of the former Qadhafi regime in Libya (or an immediate family member);
- is providing support to the Syrian regime;
- is responsible for human rights abuses in Syria;
- has engaged in activities that seriously undermine democracy, respect for human rights and the rule of law in Zimbabwe; or
- is responsible for, or complicit in, the threat to the sovereignty and territorial integrity of Ukraine.

1.115 The committee considers that the process for the making of designations limits the right to a fair hearing.

Right to a fair hearing

1.116 The right to a fair hearing is protected by article 14 of the ICCPR. The right applies to both criminal and civil proceedings, to cases before both courts and tribunals and to military disciplinary hearings.

1.117 The right is concerned with procedural fairness, and encompasses notions of equality in proceedings, the right to a public hearing and the requirement that hearings are conducted by an independent and impartial body.

1.118 The right of access to the courts in civil proceedings may be limited if it can be shown to seek to achieve a legitimate objective and the limitation is rationally connected to, and a proportionate way to achieve, its legitimate objective. The limitation as applied must also not restrict or reduce access to the court or tribunal in such a way or to such an extent that the very essence of the right is impaired.

Compatibility with the right to a fair hearing

1.119 As noted above at [1.86], for the purposes of this analysis the committee accepts that the objective of the autonomous sanctions regime, which is to apply pressure on regimes and individuals to help end the repression of human rights internationally, may be regarded as a legitimate objective for the purposes of international human rights law. The committee also has accepted, for the purposes of this analysis, that the measures are rationally connected to the legitimate objective.

1.120 However, the committee considers that the scheme may not be regarded as a proportionate means of achieving that objective. In particular, the right to a fair hearing requires that a person whose rights and obligations are to be determined is entitled to a fair and public hearing before an independent and impartial court or tribunal established by law.

1.121 In particular, the autonomous sanctions regime enables a person to be designated or declared by the minister on the basis of the minister's subjective belief of a number of broadly-defined matters (examples set out above at paragraph [1.114]). No further guidance is given in the *Autonomous Sanctions Act 2011* or the Autonomous Sanctions Regulations 2011 as to how the minister is to make that decision. A designation or declaration may be revoked on the minister's own initiative or on an application by the affected person.[48] A designated or declared person will only have their application for revocation considered once a year – if an application for review has been made within the year, the minister is not required to consider it.[49] There is nothing in the *Autonomous Sanctions Act 2011* or Autonomous Sanctions Regulations 2011 that sets out what the minister is required to consider on an application for revocation.

1.122 The committee notes that there is no provision for merits review of a decision to designate or declare a person by the minister or of a decision not to revoke a designation or declaration. While judicial review of such a decision is available, judicial review is generally limited to the review of the legality of a decision and not to its substantive merits and, as such, may not be sufficient to satisfy the right to a fair hearing where issues of fact are being disputed.

1.123 The effectiveness of judicial review of designations or declarations in this case is reduced because there is no requirement that the minister must be

48 See section 10 of the Autonomous Sanctions Regulations 2011.

49 See section 11 of the Autonomous Sanctions Regulations 2011.

'reasonably' satisfied of sufficiently precise matters on which the designation is based. Rather, the minister must only be 'satisfied' of a number of imprecise matters (for example, that the person is a 'supporter' or 'close associate' of particular regimes).[50] In addition, the absence of a requirement for the minister to provide reasons as to why a designation or declaration has been made (or will not be revoked in the case of an application) means that it is unlikely that judicial review of the minister's decision would succeed, because it could not scrutinise the factual basis for the decision. In light of these factors, the committee considers that designation decisions may in practice be effectively unreviewable.

1.124 **The committee therefore considers that the designation and declaration process under the autonomous sanctions regime, in not providing effective access to an independent and impartial court or tribunal, limits the right to a fair hearing. As set out above, while the committee accepts that the autonomous sanctions regime pursues a legitimate objective, sufficient information has not been provided to establish that the limitation is proportionate to achieve that objective. The committee therefore seeks the advice of the Minister for Foreign Affairs as to how the designation and declaration of a person under the autonomous sanctions regime is a proportionate limitation on the right to a fair hearing, in particular how, in the absence of merits review, there are adequate safeguards to protect the right to a fair hearing.**

Lack of effective access to an independent and impartial court or tribunal (automatic designations under the UN Charter sanctions regime)

1.125 Under the UN Charter sanctions regime, as established under Australian law, there are two methods by which a person can be designated:

- automatic designation by the UN Security Council Committee; and
- listing by the minister if he or she is satisfied on reasonable grounds that the person is a person mentioned in UN Security Council resolution 1373.

1.126 In relation to automatic designation, the committee notes that there is no process under Australian law for review of such a designation. However, a person designated by the UN Security Council, other than those listed under the Al Qaida sanctions regime, may submit a request for de-listing to the UN Focal Point for Delisting. The Focal Point must facilitate consultations between the governments of various states, which may lead to the person being delisted. A person listed under the Al Qaida sanctions regime may submit a request for delisting to the UN Ombudsperson, who can make a recommendation to the UN Security Council on whether the person should be de-listed (although the Council can, by consensus,

50 See also examples set out above at paragraph [1.114].

decide to continue listing of a person in spite of the Ombudsperson's recommendations).[51]

1.127 The committee considers that the automatic designation process by the UN Security Council and consequently under the UN Charter sanctions regime limits the right to a fair hearing.

Right to a fair hearing

1.128 The content of the right to a fair hearing is described above at paragraphs [1.116] to [1.118].

Compatibility of the measure with the right to a fair hearing

1.129 As previously stated,[52] the committee considers that the automatic designation procedures by the UN Security Council and consequentially under the UN Charter sanctions regime may limit the right to a fair hearing because they do not satisfy the requirement for a full hearing before an independent and impartial court or tribunal.

1.130 In particular, the committee notes that the Special Rapporteur on human rights and counter-terrorism has stated that the UN procedures 'do not meet international human rights standards concerning due process or fair trial'.[53] In a 2010 House of Lords decision relating to the UK asset freezing regime, it was observed that:

> The Security Council is a political, not a judicial, body…And it may be that the Committee's procedures are the best that can be devised if it is to be effective in combating terrorism. But, again, the harsh reality is that mistakes in designating will inevitably occur and, when they do, the individuals who are wrongly designated will find their funds and assets frozen and their lives disrupted, without their having any realistic prospect of putting matters right.[54]

1.131 The committee notes that there is no further process for review under Australian law once a person has been designated by the UN Security Council. As noted above at [1.86], for the purposes of this analysis the committee accepts that the use of international sanctions regimes to apply pressure to regimes and individuals in order to end the repression of human rights may be regarded as a

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51 For further details see letter from Senator the Hon Bob Carr, Minister for Foreign Affairs to Mr Harry Jenkins MP, Chair, Parliamentary Joint Committee on Human Rights (dated 19 June 2013), published in the Parliamentary Joint Committee on Human Rights, *Tenth Report of 2013* (26 June 2013) 23.

52 Parliamentary Joint Committee on Human Rights, *Tenth Report of 2013* (26 June 2013) 21-22.

53 *Counter terrorism: the new UN listing regimes for the Taliban and Al-Qaida - Statement by the Special Rapporteur on human rights and counter terrorism, Martin Scheinin*, 29 June 2011 at http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=11191&LangID=E.

54 *Ahmed v HM Treasury* [2010] UKSC 2 (Ahmed) at [182].

legitimate objective for the purposes of international human rights law. The committee also appreciates that, under international law, Australia is bound by the UN Charter to implement UN Security Council decisions;[55] and that obligations under the UN Charter override Australia's obligations under international human rights law.[56]

1.132 **Therefore, the committee considers that the automatic designation of a person in the event that the UN Security Council Committee has designated that person, limits the right to a fair hearing as there is no provision for a fair and public hearing before an independent and impartial court or tribunal. As set out above, the committee considers that the review processes available under the UN system may not contain sufficient human rights safeguards. Nevertheless, the committee considers that Australia, in automatically designating a person once a UN Security Council Committee designates that person, is acting in accordance with its obligations under international law.**

Lack of effective access to an independent and impartial court or tribunal (ministerial designations under the UN Charter sanctions regime)

1.133 As noted above, the second method for the designation of persons under the UN Charter sanctions regime is listing by the minister if he or she is satisfied on reasonable grounds that the person is a person mentioned in UN Security Council resolution 1373. UN Security Council resolution 1373 does not list individuals, rather, it requires states to freeze the funds or assets of anyone who commits, or attempts to commit, terrorist acts or participates in or facilitates the commission of terrorist acts, or anyone who acts on behalf of, or at the direction of, such a person.[57]

1.134 The committee considers that the ministerial listing procedures limit the right to a fair hearing because they do not provide for merits review or contain sufficient safeguards or procedural fairness to satisfy the requirement for a full hearing before an independent and impartial court or tribunal.

1.135 A listing decision by the minister is not subject to merits review. While such a decision is subject to judicial review, as set out above, judicial review of a decision is generally limited to reviewing the legality rather than the substantive merits of a decision and, as such, may not be sufficient to satisfy the right to a fair hearing under article 14(1) if there are issues of fact being disputed. In particular, there is no

55 See article 2(2) and article 41 of the *Charter of the United Nations 1945*.

56 See section 103 of the UN Charter which provides: 'In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail'.

57 See section 15 of the *Charter of the United Nations Act 1945*, s 20 of the Charter of the United Nations (Dealing with Assets) Regulations 2008 [F2014C00689] and resolution 1373 of the UN Security Council.

requirement that an affected person be given reasons for why a decision to designate a person has been made. In this respect the committee notes that the Independent National Security Legislation Monitor (INSLM),[58] in his review of the UN Charter sanctions regime, found that in relation to the only file available to it for review, the minister had refused to provide the applicant with the reasons for the decision not to delist the person.[59] The committee is concerned that failing to provide the applicant with any information at all as to why a designation decision was made provides the affected person with no opportunity to challenge the making of that decision.

1.136 **The committee therefore considers that the designation process by the minister under the UN Charter sanctions regime, in not providing effective access to an independent and impartial court or tribunal, limits the right to a fair hearing. As set out above, while the committee accepts that the UN Charter sanctions regime pursues a legitimate objective, sufficient information has not been provided to establish that the limitation is proportionate to achieve that objective. The committee therefore seeks the advice of the Minister for Foreign Affairs as to how the process of ministerial designation under the UN Charter sanctions regime is a proportionate limitation on the right to a fair hearing, in particular how, in the absence of merits review, there are adequate safeguards to protect the right to a fair hearing.**

Declarations under the autonomous sanctions regime—effect on families

1.137 The autonomous sanctions regime includes a power to declare a person for the purpose of preventing that person from travelling to, entering or remaining in Australia.[60] Under the Migration Regulations 1994, a person declared in this way under the autonomous sanctions regime will have their visa cancelled or will not be granted a visa.[61]

1.138 The committee considers that the declaration process under the autonomous sanctions regime engages and limits the right to protection of the family.

Right to protection of the family

1.139 The right to respect for the family is protected by articles 17 and 23 of the ICCPR and article 10 of the International Covenant on Economic, Social and Cultural Rights (ICESCR). Under these articles, the family is recognised as the natural and fundamental group unit of society and, as such, is entitled to protection.

58 See section 6 and the definition of 'counter‑terrorism and national security legislation' in section 4 of the *Independent National Security Legislation Monitor Act 2010*.

59 Independent National Security Legislation Monitor, *Annual Report* (7 November 2013) 30-32.

60 See section 6 of the Autonomous Sanctions Regulations 2011.

61 See Migration Regulations 1994, section 2.43(1)(aa) and Public Interest Criterion 4003(c).

1.140 An important element of protection of the family, arising from the prohibition under article 17 of the ICCPR against unlawful or arbitrary interference with family, is to ensure family members are not involuntarily separated from one another. Laws and measures which prevent family members from being together, impose long periods of separation or forcibly remove children from their parents, will therefore engage this right.

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

1.141 The committee notes that the declaration of a person living in Australia under the autonomous sanctions regime would mean that that person may have their visa cancelled, requiring them to leave Australia. This could result in family members of a declared person also being required to leave Australia (if their visas are dependent or linked to the declared person's visa), or result in the separation of the family. In addition, immediate family members of certain types of people may themselves be subject to designation or declaration, even if there is no suspicion that the family members themselves have been involved in any of the listed activities.[62]

1.142 The committee notes that section 19 of the Autonomous Sanctions Regulations 2011 provides the minister with a discretion to waive the operation of a declaration to the extent that it would have the effect of preventing a person from travelling to, entering or remaining in Australia under a visa, on the grounds that it would be in the national interest to do so or on humanitarian grounds (what constitutes 'humanitarian grounds' is not defined). The committee reiterates its longstanding view that, where a measure limits human rights, discretionary or administrative safeguards alone are unlikely to be sufficient to protect human rights.

1.143 The committee notes that none of the statements of compatibility accompanying any of the instruments under consideration assess the effect of a declaration on the right to protection of the family or the human rights of family members of declared persons.

1.144 As noted above at [1.86], for the purposes of this analysis the committee accepts that the objective of the autonomous sanctions regime, which is to apply pressure on regimes and individuals to help end the repression of human rights internationally, may be regarded as a legitimate objective for the purposes of international human rights law. The committee also has accepted, for the purposes of this analysis, that the measures are rationally connected to the legitimate objective. However, the committee is concerned that, in relation to the right to protection of the family of designated persons, the autonomous sanctions regime may not be regarded as proportionate to its stated objective.

1.145 **The committee therefore considers that the declaration by the minister under the autonomous sanctions regime limits the right to protection of the family.**

62 See section 6 of the Autonomous Sanctions Regulations 2011 in relation to Libya and Myanmar.

As set out above, while the committee accepts that the autonomous sanctions regime pursues a legitimate objective, sufficient information has not been provided to establish that the limitation is proportionate to achieve that objective. The committee therefore seeks the advice of the Minister for Foreign Affairs as to how the declaration process is a proportionate limitation on the right to protection of the family, and in particular, whether there are adequate safeguards in place to protect this right.

Designations or declarations in relation to specified countries

1.146 The autonomous sanctions regime allows the minister to make a designation or declaration in relation to persons involved in some way with currently eight specified countries. The automatic designation under the UN Charter sanctions regime currently lists 13 countries from which people have been designated. Two of the countries listed overlap between both sanctions regimes.

1.147 As at 2 September 2015, there were 19 countries for which association with aspects of the governments of those countries could lead to a person being designated or declared under the sanctions regimes.

1.148 The committee considers that the designation of persons in relation to specified countries limits the right to equality and non-discrimination.

Right to equality and non-discrimination

1.149 The rights to equality and non-discrimination are protected by articles 2 and 26 of the ICCPR. These are fundamental human rights that are essential to the protection and respect of all human rights. They provide that everyone is entitled to enjoy their rights without discrimination of any kind, and that all people are equal before the law and entitled without discrimination to the equal and non-discriminatory protection of the law.

1.150 The ICCPR defines 'discrimination' as a distinction based on a personal attribute (for example, race, sex or religion),[63] which has either the purpose (called 'direct' discrimination), or the effect (called 'indirect' discrimination), of adversely affecting human rights. Indirect discrimination is a rule or measure that is neutral on its face or without intent to discriminate, which exclusively or disproportionately affects people with a particular personal attribute.

Compatibility with the right to equality and non-discrimination

1.151 The committee notes that the designation or declaration of a person linked to regimes in any of the 19 specified countries does not require the person to be a national of any of those countries. Therefore, the committee does not consider that

63 The prohibited grounds 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 sanctions regimes directly discriminate against a person on the basis of their nationality.

1.152 However, the committee notes that it appears likely that nationals of the 19 listed countries are more likely to be considered to be 'associated with' or work for a specified government or regime than those from other nationalities. Where a measure impacts on particular groups disproportionately it establishes *prima facie* that there may be indirect discrimination. However, such a disproportionate effect may be justifiable.

1.153 The statement of compatibility for one of the instruments considered in this report acknowledges that the right to equality and non-discrimination is engaged, but concludes the differential treatment is justifiable:

> In terms of non-discrimination, persons who are declared by the Minister will be treated differently to persons who are not. This differentiation in treatment does not constitute unlawful discrimination as it is a reasonable and proportionate response aimed at punishing persons closely associated with regimes which are involved in grave human rights breaches and unlawful armed conflict.[64]

1.154 The committee accepts, as set out above at [1.86], that the overall objective of the sanctions regimes is a legitimate objective for the purposes of international human rights law. The committee also has accepted, for the purposes of this analysis, that the measures are rationally connected to the legitimate objective. However, the committee considers that the process to designate or declare a person may not be proportionate to the objective sought to be achieved. As set out in the analysis above, the process by which a person is made subject to a designation or declaration does not appear to contain effective safeguards, including access to review the decision. The committee notes that the one statement of compatibility that addressed this issue stated what the legitimate objective of the measure was, without providing any analysis as to how the measure is proportionate to achieving the stated objective.

1.155 **The committee therefore considers that the designation and declaration by the Minister for Foreign Affairs under the sanctions regimes limits the right to equality and non-discrimination. As set out above, while the committee accepts that the sanctions regime pursues a legitimate objective, sufficient information has not been provided to establish that the limitation is proportionate to achieve that objective. The committee therefore seeks the advice of the Minister for Foreign Affairs as to how the designation or declaration of a person under the autonomous sanctions regime is a proportionate limitation on the right to equality and non-discrimination, and in particular, whether there are adequate safeguards in place to protect this right.**

64 See the explanatory statement to the Autonomous Sanctions Amendment (Ukraine) Regulation 2014 [F2014L00720].

Chapter 2

Concluded matters

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

2.2 Correspondence relating to these matters is included at Appendix 1.

Criminal Code Amendment (Animal Protection) Bill 2015

Sponsor: Senator Chris Back
Introduced: Senate, 11 February 2015

Purpose

2.3 The Criminal Code Amendment (Animal Protection) Bill 2015 (the bill) proposes to amend the *Criminal Code Act 1995* to insert new offences in relation to failure to report a visual recording of malicious cruelty to domestic animals, and interference with the conduct of lawful animal enterprises.

2.4 Measures raising human rights concerns or issues are set out below.

Background

2.5 The committee previously considered the bill in its *Twenty-fourth Report of the 44th Parliament* (previous report) and requested further information from the legislation proponent as to whether a number of measures in the bill were compatible with human rights.[1]

Requirement to report malicious cruelty to animals

2.6 The bill would introduce an offence provision to provide that a person recording what they believe to be malicious cruelty to an animal or animals commits an offence if they fail to report the event to the relevant authorities within one business day of the event occurring, and to provide all recorded material within five business days.

2.7 The committee previously considered that the bill engages and limits the right not to incriminate oneself.

Right to a fair trial and fair hearing rights

2.8 The right to a fair trial and fair hearing is protected by article 14 of the International Covenant on Civil and Political Rights (ICCPR). The right applies to both criminal and civil proceedings, to cases before both courts and tribunals. The right is concerned with procedural fairness, and encompasses notions of equality in proceedings, the right to a public hearing and the requirement that hearings are conducted by an independent and impartial body.

2.9 Specific guarantees of the right to a fair trial in the determination of a criminal charge guaranteed by article 14(1) are set out in article 14(2) to (7). These include the presumption of innocence (article 14(2)) and minimum guarantees in criminal proceedings, such as the right to not incriminate oneself (article 14(3)(g)) and a guarantee against retrospective criminal laws (article 15(1)).

1 Parliamentary Joint Committee on Human Rights, *Twenty-fourth Report of the 44th Parliament* (23 June 2015) 3-6.

Compatibility of the measures with the right to a fair trial and fair hearing rights

2.10 The committee considered that the bill engages and limits the right not to incriminate oneself as providing a recording of cruelty to animals to the relevant authorities may provide evidence of the individual undertaking the recording committing an offence, such as criminal trespass.

2.11 However, the statement of compatibility does not identify the measure as limiting the right to protection from self-incrimination in this way, and therefore provides no justification for the limitation.

2.12 The committee's usual expectation where a measure may limit a human right is that the accompanying statement of compatibility provide a reasoned and evidence-based explanation of how the measure supports a legitimate objective for the purposes of international human rights law.

2.13 The committee therefore sought the advice of the legislation proponent as to whether the limitation on the right to freedom from self-incrimination is compatible with the right to a fair trial, and particularly whether the proposed changes are aimed at achieving a legitimate objective, whether there is a rational connection between the limitation and that objective, and whether the limitation is a reasonable and proportionate measure for the achievement of that objective.

Legislation proponent's response

Self-incrimination

1.23 and 1.24 of the Report state:

"The committee's assessment of the requirement to report malicious cruelty to animals against article 14 of the International Covenant on Civil and Political Rights (right not to incriminate oneself) raises questions as to whether the requirement to potentially incriminate oneself is justifiable.

As set out above, the requirement to report malicious cruelty to animals engages and limits the right not to incriminate oneself. The statement of compatibility does not provide an assessment as to the compatibility of the measure with this right. The committee therefore seeks the advice of the legislation proponent as to whether the limitation on the right to freedom from self-incrimination is compatible with the right to a fair trial, and particularly:

- *whether the proposed changes are aimed at achieving a legitimate objective;*
- *whether there is a rational connection between the limitation and that objective; and*
- *whether the limitation is a reasonable and proportionate measure for the achievement of that objective."*

Response:

Firstly, it is clear and self-evident that the proposals are aimed at achieving a legitimate objective, namely to require the timely reporting of malicious cruelty to animals to allow immediate preventative action to be taken.

Secondly, there is indisputably a rational connection between the possible limitation and the twin objectives of preventing cruelty to animals and preventing illegal interference in the lawful operation of animal enterprises.

Whether a limitation regarding self-incrimination actually exists at all is an arguable point, however if it does exist then the magnitude of the limitation is certainly very minimal in comparison to the seriousness of illegal and malicious cruelty against animals.

Thirdly, the limitation is a reasonable and proportionate measure for the achievement of the objective of addressing malicious cruelty because it requires a person with records of illegal activities to soon present them to the appropriate enforcement agencies for immediate action. The legitimate purpose of this legislation is to make responsible enforcement authorities aware of what may or may not be illegal activity.

The handing over of a visual recording does not in itself necessarily imply any association or potential culpability, nor does it impact on an individual's subsequent right for a fair trial.

Importantly the requirement to disclose materials detailing animal cruelty to authorities in a timely manner is wholly consistent with norms of responsible citizenry and delivers the opportunity for the acts of cruelty to be swiftly interrupted.

By way of a simple comparison, under State legislation it is an offence to fail to report a traffic accident to enforcement agencies as soon as possible. This absolute reporting requirement exists even if no other person is present at the scene of the accident and whether or not there are liability considerations for the person making the report. This requirement does not limit the right to not incriminate oneself, and there is no impact whatsoever on procedural fairness nor upon the presumption of innocence.

Another notable comparison relates to the issue of child abuse where Parliaments in all Australian states and territories have enacted mandatory reporting laws of some description (for professionals). While not wishing to link or associate the subject matter in any way, the legal principle provides an example of a requirement to report egregious activities of cruelty.

The key point is that it is immaterial as to whether or not the person disclosing the information to authorities has themselves potentially participated in any illegal activities, the primary requirement to report is simple and absolute.

> Of course one could envisage certain circumstances where the person who is required to hand over the material might themselves be complicit with the illegal activities or may have already withheld the information in contravention of the reporting requirements. However similar situations can exist in the provided examples of mandatory reporting of child abuse and traffic accidents. However the reporting is a discrete requirement in its own right and does not in itself constitute any limitation on the right to freedom from self-incrimination nor the right to a fair trial.
>
> To reaffirm this point, the Bill requires a person who has acquired significant information regarding illegal animal cruelty to immediately provide this to enforcement agencies regardless of whether the person has participated in the activities or has potentially committed an ancillary offence.[2]

Committee response

2.14 **The committee thanks the Senator for his response.** The response states that 'it is clear and self-evident' that the bill seeks to achieve a legitimate objective, 'namely to require the timely reporting of malicious cruelty to animals to allow immediate preventative action to be taken.' Under international human rights law, a legitimate objective must address a pressing or substantial concern and not simply seek an outcome regarded as desirable or convenient. There must be evidence and reasoning to support a claim that illegal and malicious cruelty against animals is a pressing or substantial concern that requires a limitation on fair hearing rights. Without that evidence, there is a question as to whether the bill pursues a legitimate objective for the purposes of international human rights law.

2.15 The response also states that 'there is indisputably a rational connection' between the measure and the objective being achieved, namely the twin objectives of preventing cruelty to animals and preventing illegal interference in the lawful operation of animal enterprises. However, no evidence is provided to support this claim, and it is possible that the measure would have the opposite effect; it could be, for example, that individuals may be discouraged from filming, and therefore reporting on, animal cruelty as a result of the bill for fear of being liable for criminal trespass. As a result, less instances of animal cruelty could come to light, making the problem of animal cruelty worse. In the absence of evidence or information to establish the likely efficacy of the measure there is a question as to whether there is a rational connection between the measure and the objective being achieved.

2.16 To show the proportionality of the bill, the bill could have included, for example, a requirement that any evidence of animal cruelty provided by an individual may not be used against that individual if they themselves were not involved in the cruelty (known as a 'use immunity' and a 'derivative use immunity');

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2 See Appendix 2, Letter from Senator Chris Back to the Hon Philip Ruddock MP (dated 17 July 2015) 2-3.

this would have protected against self-incrimination. Because the bill does not include a safeguard such as this the limitation on fair hearing rights and on the specific protection against self-incrimination is not proportionate.

2.17 **The committee considers that the measure engages and limits the right not to incriminate oneself. In order to avoid being incompatible with this right the committee recommends that the offence provision include a 'use' and 'derivative use' immunity so that an individual who provides footage of animal cruelty to the police may not have that footage or evidence obtained as a result of that footage used against them in a criminal trial (provided that the individual is not involved in the animal cruelty).**

Offence provision for conduct that destroys or damages property

2.18 The bill provides that a person commits an offence if they engage in conduct that destroys or damages property used in carrying on an animal enterprise, or belonging to a person who carries on, or is associated with, a person who carries on an animal enterprise. A person who causes economic damage exceeding $10 000 is liable to a maximum five year prison term.

2.19 The committee considered that this offence provision engages and may limit the prohibition against arbitrary detention.

Right to liberty (prohibition against arbitrary detention)

2.20 Article 9 of the ICCPR protects the right to liberty, understood as the procedural guarantee not to be arbitrarily and unlawfully deprived of liberty. The prohibition against arbitrary detention requires that the state should not deprive a person of their liberty except in accordance with law. The notion of 'arbitrariness' includes elements of inappropriateness, injustice and lack of predictability.

2.21 Accordingly, any detention must not only be lawful, it must also be reasonable, necessary and proportionate in all the circumstances. Detention that may initially be necessary and reasonable may become arbitrary over time if the circumstances no longer require the detention. In this respect, regular review must be available to scrutinise whether the continued detention is lawful and non-arbitrary.

Compatibility of the measures with the right to liberty

2.22 The committee previously noted that the *Guide to Framing Commonwealth Offences* states that 'a penalty should be consistent with penalties for existing offences of a similar kind or of a similar seriousness'.[3] As it not clear that a prison term of five years for economic damage in excess of $10 000 is comparable to similar types of offences, the committee considered that the penalty may be so excessive as to be unjust (and therefore could amount to arbitrary detention under article 9 of the ICCPR).

2.23 However, the statement of compatibility does not identify the measure as limiting the right to liberty, and therefore provides no justification for the limitation.

2.24 The committee further noted that, as other legislation already includes provisions that make property damage a criminal offence, it is important that the human rights assessment of the bill address the question of whether the proposed offence provisions may be regarded as necessary in pursuit of a legitimate objective for the purposes of international human rights law.

2.25 The committee therefore sought the advice of the legislation proponent as to whether the proposed changes are aimed at achieving a legitimate objective, whether there is a rational connection between the limitation and that objective, and whether the limitation is a reasonable and proportionate measure for the achievement of that objective.

Legislation proponent's response

Arbitrary detention

1.34 of the Report states:

"The committee's assessment of the offence provision against article 9 of the International Covenant on Civil and Political Rights (right not to be arbitrarily detained) raises questions as to whether the offence may be excessive or disproportionate having regard to the breadth of the provision."

Response:

The Bill does not propose arbitrary detention.

Arbitrary detention involves the arrest or detainment of an individual in a case in which there is no likelihood or evidence that they committed a crime against a legal statute, or in which there has been no proper due process of law.

The drafting of the proposed Bill is consistent with the existing Criminal Code provisions and alleged offenders will be fully subject to normal legal due process. While there are maximum penalties for serious offences which may involve imprisonment, these could only be implemented following the normal judicial process. The maximum penalties are certainly not mandatory.

By way of background explanation, the words "maximum penalty" used to appear in Commonwealth legislation, but this expression is no longer used in new Acts. Additionally the older references in statutes are gradually being amended to the new standard. To be clear, the current reference to "penalty" in this Bill is still intended to be a maximum penalty, and it is a matter for the court, in the exercise of judicial discretion, to determine what level of penalty to impose.

A court always has a range of penalty options at its disposal which it will readily choose to utilise according to the circumstances of the offence or the character of the offenders.

It is envisaged that in ordinary circumstances, many of the indictable offences can be summarily dealt with before a Magistrate in the Local Court where the maximum penalty which can be imposed for an offence is generally two years imprisonment. This is regardless of the stated maximum penalty for the offence.

The Local Court hearing might apply to less significant breaches such as simple trespass or minor damage. However, there are some indictable offences which rightfully may be considered too serious to be dealt with in the Local Court. The hearings for these offences may well start off in the Local Court but be then referred to the District or Supreme Court for trial or sentencing. However if the alleged offences are clearly of a strictly indictable nature which requires arraignment, then the Local Court would be avoided altogether.

If found guilty, the accused would then face a penalty which is appropriate to both the level of offence seriousness and the specific case circumstances. The decision of the Court regarding a penalty would presumably also be influenced by many other factors which might include the testimony of character witnesses, existing criminal history, degree of repentance and the guidance of pre-sentence or psychiatric reports.

As such the accused may possibly face a strong penalty in a superior Court for serious offences conducted with wilful intent, or for lesser offences may just receive a fine, community service or a suspended sentence.

The key point is that the normal array of checks and balances will always apply in the Court and there is certainly nothing arbitrary or mandatory proposed in this Bill with regard to detention, sentencing or maximum penalties.

Once more, to be clear with regard to the concerns raised in 1.34, the penalties are reasonable and certainly not excessive or disproportionate. Further discussion and evidence to demonstrate this is provided in following section.

Degree and consistency of penalty

While a clarification has not been specifically sought by the Committee, I feel bound to respond to two concerns contained in point 1.30, notably:

"a penalty should be consistent with penalties for existing offences of a similar kind or of a similar seriousness"; and

"As it not clear that a prison term of five years for economic damage in excess of $10,000 is comparable to similar types of offences, the committee considers that the penalty may be so excessive as to be unjust".

I wish to state that the proposed penalties in this Bill are fully consistent with normal practice and neither excessive nor unjust. The high-end of

contemplated offences are serious activities with direct consequences for human and animal life and as such they beckon a firm deterrent.

The proposed maximum penalties are in most cases less than comparable State and Territory legislation for malicious property damage.

As a test of relativity, in NSW under *s195* of the *Crimes Act 1900*, a person who intentionally or recklessly destroys or damages property is liable for imprisonment for up to five years; or if the damage is caused by fire or explosion, for up to ten years. However if the offences are carried out in the company of another, the maximum terms are longer.

Under *s29* of the Commonwealth *Crimes Act 1914*, destroying or damaging Commonwealth property by fire has a maximum penalty of 10 years imprisonment.

Under the Australian Capital Territory *Crimes Act 1900*, offenders can be imprisoned for 15 years plus 1500 penalty units, or up to 20 years if they acted dishonestly with a view to gain. Indeed, even threatening to damage property by fire has a maximum of 7 years jail plus 700 penalty units.

In Tasmania, under the *Criminal Code Act 1924*, a person placing combustible material with the intent to injure property faces a maximum jail term of 21 years plus a discretionary fine. In my home state of Western Australia, under *s144* of the *Criminal Code* the maximum penalty for wilful damage to property by fire is 14 years.

It is clear that the proposed penalties in the Criminal Code Amendment (Animal Protection) Bill 2015 are moderate by comparison.

Necessary nature

While a clarification has not been specifically sought by the Committee, I would like to respond to a statement contained in point 1.33, notably:

"as other legislation already includes provisions that make property damage a criminal offence ..... whether the proposed offence provisions may be regarded as necessary in pursuit of a legitimate objective for the purposes of international human rights law".

As exemplified earlier in this document, the various levels of penalties within Commonwealth, State and Territory Criminal Codes are quite inconsistent. This Bill will provide some consistency by way of federal legislation.

While some elements of the possible suite of offences might be provided for in existing legislation (such as trespass or arson) there are other costly nuisance activities which may impact upon a primary producer attempting to lawfully conduct their business (such as biosecurity breaches, releasing animals from captivity, preventing the transportation of stock and interfering with husbandry practices) which are not.

Whatever the reason, it is abundantly apparent that incidences of the types of unruly activities contemplated in this Bill are currently not being

prosecuted through normal channels. Therefore there is ample justification for legislation which defines and captures the central nature of the problem relating to animals and primary producers so that the enforcement action which is currently not being taken will be taken in the future.

I also wish to comment on the question as to whether or not the intent of this Bill is a legitimate objective for the purposes of international human rights law. The answer is yes.

I bring the Committee's attention to the right of a farmer, primary producer or animal enterprise manager to support their family and lawfully conduct their business or operations without illegal interruption from those who simply do not respect this right. Just the same as all other citizens in the community, they hold the right to protection under the law when their fundamental rights to maintain the safety of their property and person are threatened, as supported by Article 3 of the Universal Declaration of Human Rights which states:

"Everyone has the right to life, liberty and security of person."

Furthermore, Article 8 states: *"Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law."*

Importantly, Article 7 states: *"All are equal before the law and are entitled without any discrimination to equal protection of the law."*

With regard to those who choose to offend their universal civic obligations as set out in Article 1 to: *"act towards one another in a spirit of brotherhood,"* they will rightly face appropriate sanctions when undertaking illegal activities against primary producers.

In this regard Article 10 states: *"Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him."*

As such I would contend that human rights considerations are implicitly central to both the purpose and utility of this Bill. The legislation as proposed provides a degree of protection for law-abiding citizens in the pursuit of activities such as primary production, while also providing offenders the right to fairly defend their actions in a court of law.

From a human rights perspective this supports the universal recognition that basic rights and fundamental freedoms are inalienable and equally applicable to all human beings.[4]

4 See Appendix 2, Letter from Senator Chris Back to the Hon Philip Ruddock MP (dated 17 July 2015) 3-7.

Committee response

2.26 **The committee thanks the Senator for his detailed response.** The Senator states that arbitrary detention only arises where the detention is unlawful and that the bill would only result in individuals being detained as a result of a criminal conviction in accordance with Australian domestic law. However, arbitrary detention under international human rights law is much broader than unlawful detention. The UN Human Rights Committee has explained:

> …arrests or detentions may be in violation of the applicable law but not arbitrary, or legally permitted but arbitrary, or both arbitrary and unlawful.[5]

2.27 Accordingly, detention that is lawful under Australian law may nevertheless be arbitrary and thus in breach of Australia's obligations under article 9 of the ICCPR. The UN Human Rights Committee has further explained:

> The notion of "arbitrariness" is not to be equated with "against the law", but must be interpreted more broadly to include elements of inappropriateness, injustice, lack of predictability, and due process of law.[6]

2.28 The legislation proponent's response was that the offences in the bill are modest by comparison with a number of Commonwealth offences and offences under state and territory law.

2.29 However, the offences cited are not directly comparable to the offences in the bill. For example, under section 195 of the *Crimes Act 1900* (NSW), a person who destroys or damages property is liable for imprisonment for up to five years. Whereas under the bill, a person who recklessly destroys or damages property could be liable to a penalty of up to 20 years imprisonment should their actions lead to economic damage of a specified amount. The accused person would not be able to ascertain in advance the quantum of economic damage that might be caused by their actions and so the penalty may go up significantly depending on the nature of the business involved.

2.30 Further, the terms 'economic damage' and 'animal enterprise' are defined so broadly that it would not necessarily be evident when the provision applies to a situation and when it does not as well as the nature of the penalty that may apply to conduct. Individuals who do the same act may be treated differently and subject to a different penalty depending on the economic consequences of their action even though there may be no intention to cause economic damage and the likely amount of economic damage was completely unforeseen. These outcomes are also

5 United Nations Human Rights Committee, *General Comment No. 35: Article 9 (Liberty and Security of persons),* UN Doc CCPR/C/GC/35 (16 December 2014) 3.

6 United Nations Human Rights Committee, *General Comment No. 35: Article 9 (Liberty and Security of persons),* UN Doc CCPR/C/GC/35 (16 December 2014) 3.

inconsistent with the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers.*

2.31 Because of the breadth of the offence provision as drafted, the uncertainty in its application and the size of the penalty, it may result in a term of imprisonment being imposed that could amount to arbitrary detention.

2.32 The legislation proponent also states that the offence provision is necessary on the basis that 'incidences of the types of unruly activities contemplated in this Bill are currently not being prosecuted through normal channels'. No information is provided to support the claim that there is a gap in the existing criminal law rather than a failure of police to properly prosecute offenders using existing offences. Moreover, no statistics are provided to support the claim that there is an endemic or significant problem with the 'types of unruly activities contemplated in the bill.'

2.33 **The committee considers that the offence provision for conduct that destroys or damages property causing 'economic damage' engages and limits the right not to be arbitrarily detained. In order to be compatible with this right the committee recommends that the legislation proponent seek the advice of the Attorney-General to ensure that the offence provision is drafted consistently with the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*.**

Social Services Legislation Amendment (Youth Employment and Other Measures) Bill 2015

Portfolio: Social Services
Introduced: House of Representatives, 28 May 2015

Purpose

2.34 The Social Services Legislation Amendment (Youth Employment and Other Measures) Bill 2015 (the bill) seeks to amend the *Social Security Act 1991* and the *Social Security (Administration) Act 1999* to:

- extend the ordinary waiting period for all working age payments from 1 July 2015;
- remove access to Newstart Allowance and Sickness Allowance to 22 to 24 year olds and replace these benefits with access to Youth Allowance (Other) from 1 July 2016;
- provide for a four-week waiting period for certain persons aged under 25 years applying for Youth Allowance (Other) or Special Benefit from 1 July 2016;
- pause indexation on certain income free and income test free areas and thresholds for three years; and
- cease the low income supplement from 1 July 2017.

2.35 Measures raising human rights concerns or issues are set out below.

Background

2.36 The bill reintroduces a number of measures previously included in the Social Services and Other Legislation Amendment (2014 Budget Measures No. 4) Bill 2014 (the No. 4 bill). The No. 4 bill reintroduced some measures previously included in the Social Services and Other Legislation Amendment (2014 Budget Measures No. 1) Bill 2014 (the No. 1 bill) and the Social Services and Other Legislation Amendment (2014 Budget Measures No. 2) Bill 2014 (the No. 2 bill).

2.37 The committee reported on the No. 1 bill and No. 2 bill in its *Ninth Report of the 44th Parliament*,[7] and concluded its examination of the No. 2 bill in its *Twelfth Report of the 44th Parliament*.[8] In that report, the committee requested further

7 Parliamentary Joint Committee on Human Rights, *Ninth Report of the 44th Parliament* (15 July 2014) 83.

8 Parliamentary Joint Committee on Human Rights, *Twelfth Report of the 44th Parliament* (24 September 2014) 67.

information from the Minister for Social Services regarding measures contained within the No. 1 bill.[9]

2.38 The committee then considered the No. 4 bill in its *Fourteenth Report of the 44th Parliament*, and in the *Seventeenth Report of the 44th Parliament* concluded its consideration of the No. 1 bill and No. 4 bill.[10]

2.39 The committee considered the bill in its *Twenty-fourth Report of the 44th Parliament*, and requested further information from the Minister for Social Services as to whether the bill was compatible with Australia's international human rights obligations.[11]

2.40 The bill was negatived in the Senate on 9 September 2015.

Schedule 2 – Age requirements for various Commonwealth payments

2.41 Schedule 2 of the bill would provide that 22-24 year olds are no longer eligible for Newstart Allowance (or Sickness Allowance), and are instead eligible for Youth Allowance. Existing recipients of Newstart Allowance (or Sickness Allowance) would continue to receive those payments until such time as they are no longer eligible.

2.42 The committee considered in its previous analysis that increasing the age of eligibility for various Commonwealth payments engages and limits the right to equality and non-discrimination.

Right to equality and non-discrimination

2.43 The right to equality and non-discrimination is protected by articles 2 and 26 of the International Covenant on Civil and Political Rights (ICCPR).

2.44 This is a fundamental human right that is essential to the protection and respect of all human rights. It provides that everyone is entitled to enjoy their rights without discrimination of any kind, and that all people are equal before the law and entitled without discrimination to the equal and non-discriminatory protection of the law.

2.45 The ICCPR defines 'discrimination' as a distinction based on a personal attribute (for example, race, sex or religion),[12] which has either the purpose (called

9 Parliamentary Joint Committee on Human Rights, *Twelfth Report of the 44th Parliament* (24 September 2014) 55-64.

10 Parliamentary Joint Committee on Human Rights, *Fourteenth Report of the 44th Parliament* (28 October 2014) 94-95, and Parliamentary Joint Committee on Human Rights, *Seventeenth Report of the 44th Parliament* (2 December 2014) 11-13.

11 Parliamentary Joint Committee on Human Rights, *Twenty-fourth Report of the 44th Parliament* (24 June 2015) 12-19.

12 The prohibited grounds 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.

'direct' discrimination), or the effect (called 'indirect' discrimination), of adversely affecting human rights.[13] The UN Human Rights Committee has explained indirect discrimination as 'a rule or measure that is neutral on its face or without intent to discriminate', which exclusively or disproportionately affects people with a particular personal attribute.[14]

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

2.46 The changes to the threshold for Newstart eligibility in Schedule 2 of the bill reintroduce measures previously contained within Schedule 8 of the No. 2 bill and Schedule 6 of the No. 4 bill, which the committee has previously considered.

2.47 The statement of compatibility for the bill does not identify the measures as engaging and potentially limiting the right to equality and non-discrimination.

2.48 However, as the committee noted in its *Ninth Report of the 44th Parliament*, a measure that establishes criteria for access to social security based on age is likely, on its face, to limit the right to equality and non-discrimination. That is, by reducing access to the amount of social security entitlements for persons of a particular age, the measure appears to directly discriminate against persons of this age group.

2.49 A measure which appears directly discriminatory in this way may nevertheless be justifiable under international human right law. The human rights assessment of the measure therefore must establish that the proposed age cut offs are necessary, reasonable and proportionate in pursuit of a legitimate objective.

2.50 As the statement of compatibility for the bill does not identify the measure as engaging and potentially limiting the right to equality and non-discrimination, it therefore provides no assessment as to the compatibility of the measure with reference to the committee's previous examination of the measures.

2.51 The committee noted its usual expectation that where a measure that it has previously considered is reintroduced, previous responses to the committee's requests for further information be used to inform the statement of compatibility for the reintroduced measure.

2.52 The committee therefore sought the advice of the Minister for Social Services as to whether the proposed changes are aimed at achieving a legitimate objective, whether there is a rational connection between the limitation and that objective, and whether the limitation is a reasonable and proportionate measure for the achievement of that objective.

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

14 *Althammer v Austria* HRC 998/01, [10.2].

Minister's response

The measure in schedule 2 to extend the Youth Allowance (other) eligibility age is aimed at achieving consistency across payments, as well as encouraging young people to undertake or participate in education or training to better ensure that they are able to achieve long term sustainable employment outcomes.

Since 1998, there have been two different maximum ages for Youth Allowance - one for full-time students on Youth Allowance (student) and one for young unemployed people on Youth Allowance (other). Once a young person passes the maximum age for youth allowance as a job seeker (currently 21) they transition to Newstart Allowance, which is paid at a higher rate of payment.

For full-time students, however, the transition from Youth Allowance (student) to the adult student payment, Austudy, occurs at the age of 25 years.

Evidence suggests that education and training can play a significant role in improving a person's chances of finding and maintaining employment, particularly for young people. However, the higher rates of Newstart Allowance and Sickness Allowance (currently paid to around 73,000 unemployed youth aged 22 to 24 years) can act as an incentive for young people to stay on Newstart Allowance or Sickness Allowance instead of pursuing full-time study or employment, or to give up study in order to receive these payments. This measure achieves the dual objective of removing this perverse incentive and achieving consistent eligibility criteria, by placing all under 25 year olds on the same payment level, whether they are unemployed or studying full-time.

Australia's social security system is designed to be highly targeted and to provide for different payments, rates and other settings that reflect the needs and circumstances of different cohorts. For this reason, age-based eligibility criteria are already part of a number of social security payments, including Youth Allowance as outlined above. To the extent that this measure may limit the right to non-discrimination by affecting only a particular age group, this is reasonable and proportionate to the objective of ensuring that payment rates are aligned for young people aged under 25 with similar needs and circumstances, irrespective of whether they are studying or looking for work.

Affected young people will continue to be supported by a range of programmes and other services provided by the Commonwealth and state governments. Grandfathering arrangements will apply to young people aged 22 years or over who are in receipt of Newstart Allowance or

Sickness Allowance as at 1 July 2016 to ensure that no existing recipients will have their payment rate reduced.[15]

Committee response

2.53 **The committee thanks the Minister for Social Services for his response.** The committee notes the minister's advice that the measure is aimed at achieving consistency across payments for young people as well as to encourage young people to undertake or participate in education or training to help achieve long term sustainable employment outcomes. The committee also notes that currently there are higher rates of payments to young people on Newstart and Sickness Allowances than to those on Youth Allowance, which may act as a disincentive to pursue full-time study.

2.54 **Accordingly, the committee considers that the measure may be compatible with the right to equality and non-discrimination and has concluded its examination of this matter.**

Schedule 3 – Income support waiting periods

2.55 Schedule 3 of the bill would introduce a requirement from 1 July 2016 that individuals under the age of 25 be subject to a four-week waiting period, as well as any other waiting periods that may apply, before social security benefits become payable.

2.56 The measure would apply to applicants seeking Youth Allowance (Other) and Special Benefit. The four-week waiting period may be reduced if a person has previously been employed, and there are a range of exemptions for parents and individuals with a disability.

2.57 The committee considered previously that the income support waiting periods engage and limit the rights to social security and an adequate standard of living.

Right to social security

2.58 The right to social security is protected by article 9 of the International Covenant on Economic, Social and Cultural Rights (ICESCR). This right 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 and the right to health.

2.59 Access to social security is required when a person has no other income and has insufficient means to support themselves and their dependents. Enjoyment of the right requires that sustainable social support schemes are:

- available to people in need;

15 See Appendix 2, Letter from the Hon Scott Morrison MP, Minister for Social Services, to the Hon Philip Ruddock MP (dated 31 July 2015) 1-2.

- adequate to support an adequate standard of living and health care; and
- accessible (providing universal coverage without discrimination and qualifying and withdrawal conditions that are lawful, reasonable, proportionate and transparent; and
- affordable (where contributions are required).

2.60 Under article 2(1) of ICESCR, Australia has certain obligations in relation to the right to social security. These include:

- the immediate obligation to satisfy certain minimum aspects of the right;
- the obligation not to unjustifiably take any backwards steps that might affect the right;
- the obligation to ensure the right is made available in a non-discriminatory way; and
- the obligation to take reasonable measures within its available resources to progressively secure broader enjoyment of the right.

2.61 Specific situations which are recognised as engaging a person's right to social security, include health care and sickness; old age; unemployment and workplace injury; family and child support; paid maternity leave; and disability support.

Right to an adequate standard of living

2.62 The right to an adequate standard is guaranteed by article 11(1) of the ICESCR, and requires state parties to take steps to ensure the availability, adequacy and accessibility of food, clothing, water and housing for all people in Australia.

2.63 In respect of the right to an adequate standard of living, article 2(1) of the ICESCR also imposes on Australia the obligations listed above in relation to the right to social security.

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

2.64 The introduction of the four-week waiting period in Schedule 3 of the bill re-introduces, with some amendments (particularly to the timeframe), the proposal for a 26-week waiting period previously contained in Schedule 9 of the No. 2 bill and Schedule 7 of the No. 4 bill.

2.65 The committee previously concluded, in its *Twelfth Report of the 44th Parliament*, that the measure was incompatible with the right to social security and an adequate standard of living.[16]

2.66 In comparison to the previous measure, the bill would reduce the waiting period to four weeks rather than 26 weeks; and introduce an additional $8.1 million

16 See Parliamentary Joint Committee on Human Rights, *Twelfth Report of the 44th Parliament* (24 September 2014) 73, para 2.12.

in funding that will be allocated to Emergency Relief providers to provide assistance for those that have been disproportionately impacted by the measure.

2.67 The statement of compatibility for the bill acknowledges that the measure engages the rights to social security and an adequate standard of living, and states that the objective of the measure is to 'encourage greater participation in work through establishing firm expectations for young job seekers'.[17]

2.68 The committee considered that this may be regarded as a legitimate objective, and that the measure is rationally connected to that objective, for the purposes of international human rights law.

2.69 However, the committee considered that the statement of compatibility has not demonstrated that the measure is proportionate to its stated objective, that is, that it is the least rights restrictive means of achieving that objective.

2.70 In particular, the statement of compatibility has not addressed how young people are to sustain themselves and provide for an adequate standard of living during the four-week period without social security.

2.71 Further, while the committee welcomes additional funding for Emergency Relief providers, the bill provides no explicit guarantee that individuals subject to the measure will be able to access support from the charitable organisations allocated the funding. In addition, the statement of compatibility provides no justification as to how this additional funding supports the compatibility of the measure with the right to social security (which is broader than the receipt of charity) and the right to an adequate standard of living.

2.72 The committee therefore sought the advice of the Minister for Social Services as to whether the measure is a proportionate means of achieving the stated objective.

Minister's response

Right to social security

Unemployment rates for young people have increased significantly since the global financial crisis. As at June 2015, the youth unemployment rate was 13.4 per cent, compared with an average total unemployment rate of six per cent. The proportion of young Australians not in employment, education or training is also high, with young people in this category at particular risk of social exclusion. The 2014 report by National Centre for Vocational Education Research, *How young people are faring in the transition from school to work*, indicates that in 2012 more than a quarter of 21 year olds (27.4 per cent) were either not engaged or not fully engaged in employment, education or training. The report also notes that not all young people in this category are 'vulnerable' and that some may be in this category voluntarily. This measure seeks to address youth

17 Explanatory Memorandum (EM), Statement of Compatibility (SoC) 9.

unemployment by establishing firm expectations for young people to accept jobs or move into education and training, rather than relying on income support in the first instance at the risk of becoming disengaged, both socially and economically.

The risk this measure could be considered to limit the right to social security by restricting immediate access to income support is mitigated by the specific targeting of the measure to those young people who are job ready (in Stream A of jobactive) and able to support themselves through paid work.

Job seekers who have been assessed as having significant barriers to work will be exempt from the measure. This will include job seekers in Stream B and C of jobactive, parents with 35 per cent or more care of a child, young people in or leaving state care and those with a temporary activity test exemption of more than two weeks, such as pregnant women in the six weeks before they are expected to give birth, or people testing their eligibility for Disability Support Pension. The Bill before Parliament also allows the Minister to make further exemptions via a legislative instrument. These exemptions ensure that young people who face more complex and/or multiple barriers to finding work and are less able to fully support themselves will continue to receive income support.

In recognition of the importance of education and training in preventing future unemployment, young people who return to school or full-time vocational education or university study will be able to access student payments, such as Youth Allowance (student), and therefore will not subject to a four week waiting period.

Evidence also suggests that this measure will be most effective if it is supported by an appropriate level of employment services, targeted at job seeker deficits[18]. Job seekers subject to a four week waiting period will continue to be supported by the full range of programmes and assistance currently available under jobactive to enable them to find employment. Job seekers will also be required to participate in rapid activation activities designed to enhance their chances of moving into work as quickly as possible.

To the extent that this measure may limit the right social security, this limitation is reasonable and proportionate to the objective of encouraging young people to be either working or studying as targeted cohort are those who are job ready and capable of finding and maintaining a job.

18 Analysis commissioned by the New Zealand Government (*Actuarial valuation of the Benefit System for Working-Age Adults as at 30 June 2013: Greenfield/Miller/McGuire*), which would be broadly applicable to the Australian system, shows that if young unemployed people are not provided with the right mix of programmes and support, there is a high chance that they will end up trapped on welfare for much of their lives.

Right to an adequate standard of living

Income support data (as at June 2015) shows that a majority of young job seekers are receiving support from their parents, with 54 per cent of Youth Allowance (other) recipients considered to be dependent on their parents for the purposes of calculating their rate of payment. This indicates that a large proportion of affected recipients will have access to external support in order to maintain an adequate standard of living.

From 1 July 2016, pending the implementation of the measure, around $8.1 million over three years in additional funding will be available to Emergency Relief providers to provide basic material aid to young people during the four week waiting period. This assistance is not intended to provide assistance to all young people affected by this measure. It is also not meant to meet affected individuals' living costs during the waiting period. Assistance will vary according to the needs and circumstances of the person.

This additional Emergency Relief funding will become available only following the implementation of the measure. The Department will undertake an analysis of payments data and consult with the Emergency Relief sector to inform the targeting and distribution of available funds to those most affected by the measure.

The limitation of the availability of income support is reasonable and proportionate as the measure is targeted at those who are job ready and able to be self-supporting through work and a large proportion of the targeted cohort will have access to parental support and additional Emergency Relief funding will be available for those in need.[19]

Committee response

2.73 **The committee thanks the Minister for Social Services for his response.** The committee notes that it had previously accepted that the measure pursues a legitimate objective and that the measure is rationally connected to that objective. Accordingly, the committee sought further information from the minister in relation to the proportionality of the measure. Of particular concern to the committee was whether the measure was the least rights restrictive approach.

2.74 The committee notes the minister's advice that the measure specifically targets those young people who are job ready and that there are important protections for parents and those assessed as unable to work who will be exempt from the measure. However, the measure will apply to all individuals assessed as job ready (in Stream A of jobactive) and there will be no individual assessment of each job seeker's engagement with seeking work, nor an individual assessment of their ability to find jobs. Currently, there is a youth unemployment rate of 13.4 per cent which suggests there are more job seekers than jobs available. Evidence is not

19 See Appendix 2, Letter from the Hon Scott Morrison MP, Minister for Social Services, to the Hon Philip Ruddock MP (dated 31 July 2015) 3-4.

provided to confirm that all jobseekers will be eligible and able to immediately engage with education and immediately gain income support.

2.75 The measure does not also allow for an individual assessment of the individual's capacity to live without social security support for four weeks and there is no discretion that would enable Centrelink to waive the waiting period if the individual does not meet the set exemptions. In the absence of these protections, the measure cannot be said to be the least rights restrictive means of achieving a legitimate objective and therefore does not impose a proportionate limitation on the right to social security.

2.76 In relation to an adequate standard of living, the response suggests that 46% of young people do not live at home and are thus not fully supported by their parents. The majority of these would appear to be in private rental accommodation of some sort. It is not clear from the response how those young people will meet the costs of housing during the waiting period and meet other basic living costs to provide an adequate standard of living.

2.77 While the response states that the department will analyse payment data and consult with the Emergency Relief sector to inform the targeting and distribution of available funds to those most affected by the measure, the response does not suggest that Emergency Relief will ensure that all individuals affected by the measure will be able to provide an adequate standard of living.

2.78 The measure does not appear to be proportionate as it does not include an individual assessment for each person affected by the measure nor does it provide safeguards to ensure that no individual is left unable to meet their basic needs during the waiting period.

2.79 **The committee's assessment of the proposed income support waiting period for young people aged under 25 against articles 9 and 11 of the International Covenant on Economic, Social and Cultural Rights (right to social security and an adequate standard of living) raises questions as to whether the changes are justifiable under international human rights law.**

2.80 **However, as the bill has been negatived in the Senate, the committee draws the preceding analysis to the attention of the minister and has concluded its examination of the bill.**

Right to equality and non-discrimination

2.81 The right to equality and non-discrimination is protected by articles 2 and 26 of the ICCPR. More information is provided above at paragraphs [2.43] to [2.45].

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

2.82 The committee previously concluded that the measure in the No. 2 bill was incompatible with the right to equality and non-discrimination on the basis of age (direct discrimination).[20]

2.83 In comparison to the previous measure, the bill provides that the waiting period will apply to persons under the age of 25, rather than those under the age of 30.

2.84 The statement of compatibility for the bill acknowledges that the measure engages the right to equality and non-discrimination on the basis of age, but concludes that 'those subjected to a waiting period are young enough to reasonably draw on family support to assist them during the waiting period'.[21]

2.85 However, a measure that impacts differentially on or excludes individuals based on their age is likely, on its face, to be incompatible with the right to equality and non-discrimination. In this respect, by imposing a four-week waiting period based on a person's age, the measure appears to directly discriminate against persons under 25 years of age.

2.86 As noted above, a measure which appears directly discriminatory in this way may nevertheless be justifiable under international human right law. The human rights assessment of the measure must establish that the proposed age cut offs are necessary, reasonable and proportionate in pursuit of a legitimate objective.

2.87 However, the committee considered previously that the statement of compatibility had not established how persons under the age of 25, who will be impacted by the measure, will be able to 'reasonably draw on family support' any more than those over the age of 25.

2.88 In addition, no information was given as to how persons affected by the measure, who do not have the ability to draw on family support, could maintain housing and an adequate standard of living during the waiting period.

2.89 The committee therefore sought the advice of the Minister for Social Services as to whether the measure is a proportionate means of achieving the stated objective.

Minister's response

> Young unemployed people under 25 years have a significantly higher rate of unemployment compared to the general population, with a large number in the cohort also facing increased risk of social exclusion due to disengagement from work and education. The targeting of this measure to those under 25 is specifically aimed at addressing the risks for this

20 See Parliamentary Joint Committee on Human Rights, *Twelfth Report of the 44th Parliament* (24 September 2014) 79, para 2.25.

21 EM, SoC 12.

particular cohort by providing incentives for these young job seekers to pursue work or further education or training, which evidence suggests will reduce their chances of becoming long-term unemployed.

Additionally, around 43 per cent of the young people on unemployment payments aged under 25 years are still living in the parental home, compared to only seven per cent for those aged over 25. This shows that the cohort targeted by this measure is more likely to be drawing on family support and have secure housing than their older counterparts and therefore may be less likely to face hardship while serving a waiting period.

To the extent that this measure may limit the right to equality and non-discrimination by affecting only a particular age group, this is reasonable and proportionate in the context of factors particular to this group such as higher youth unemployment rates, high rates of youth disengagement from employment, education and training, and increased access to parental support.[22]

Committee response

2.90 **The committee thanks the Minister for Social Services for his response.** The committee notes that it had previously accepted that the measure pursues a legitimate objective and that the measure is rationally connected to that objective. Accordingly, the committee sought further information from the minister in relation to the proportionality of the measure.

2.91 In terms of proportionality, the statement of compatibility concludes that 'those subjected to a waiting period are young enough to reasonably draw on family support to assist them during the waiting period'.[23] The minister's response states that 43 per cent of young people receiving unemployment benefits are living at home with their parents, compared with 7 per cent of those aged over 25. This shows there is some evidence that the measure is targeted at young people taking into account their ability to seek support from their parents. However, the response does show that the majority of young people on unemployment payments are not living at home (and are thus likely to have private rental costs) and are less likely to be able to rely on their parents for support during the waiting period. These figures also do not show whether a person living at home with their parents are doing so on a rent-free basis or whether such persons might be financially supporting their family members.

2.92 A human rights assessment of the measure must establish that the proposed age cut offs are necessary, reasonable and proportionate in pursuit of a legitimate objective. The response does not demonstrate that nearly all, or even a majority, of

22 See Appendix 2, Letter from the Hon Scott Morrison MP, Minister for Social Services, to the Hon Philip Ruddock MP (dated 31 July 2015) 4.

23 EM, SoC 12.

individuals aged 25 or under will be able to rely on their parents for economic support and, as such, the measure does not appear sufficiently targeted to impose a proportionate limitation on the right to equality and non-discrimination based on age.

2.93 **The committee's assessment of the proposed income support waiting periods for young people aged under 25 against articles 2, 16 and 26 of the International Covenant on Civil and Political Rights (right to equality and non-discrimination) raises questions as to whether the changes are justifiable under international human rights law.**

2.94 **However, as the bill has been negatived in the Senate, the committee draws the preceding analysis to the attention of the minister and has concluded its examination of the bill.**

The Hon Philip Ruddock MP

Chair

Appendix 1

Correspondence

THE HON JULIE BISHOP MP

Minister for Foreign Affairs

Senator Dean Smith
Chair
Parliamentary Joint Committee on Human Rights
Parliament House
CANBERRA ACT 2600

Dear Senator Smith /Dean

Thank you for your letter seeking a response to the former Committee's request for a review of the human rights compatibility of sanctions regimes implemented under Australian sanction laws.

As you are aware, sanctions regimes are imposed only in situations of international concern, including the grave repression of human rights, the proliferation of weapons of mass destruction or their means of delivery, or armed conflict. Modern sanctions regimes impose highly targeted measures designed to limit the adverse consequences of the situation, to seek to influence those responsible for it to modify their behaviour, and to penalise those responsible.

As the former Committee noted, the implementation of sanctions is a complex issue that requires careful consideration of the various competing interests involved, including human rights. Sanctions measures that are targeted against designated or declared persons necessarily involve the balancing of the human rights of those persons, with the necessity of preventing broader, and often egregious, human rights abuses arising from a situation of international concern. As the process of considering the various competing interests is undertaken in the process of implementation, I see no need for a further review by the Department.

Yours sincerely Best wishes

Julie Bishop

16 FEB 2015

Telephone (02) 6277 7500 Parliament House, Canberra ACT 2600, Australia Facsimile (02) 6273 4112

DR CHRISTOPHER BACK
Liberal Senator for Western Australia

PERTH
Unit E5, 817 Beeliar Drive
Cockburn Central WA 6164

PO Box 3468
SUCCESS WA 6964

Telephone: (08) 9414 7288
Facsimile: (08) 9414 8819
Freecall: 1300 301 846
Email: senator.back@aph.gov.au

CANBERRA
Parliament House
Canberra ACT 2600
Telephone: (02) 6277 3733
Facsimile: (02) 6277 5877

17 July 2015

The Hon Phillip Ruddock MP
Chair
Parliamentary Joint Committee on Human Rights
S1.111
Parliament House
CANBERRA ACT 2600

Dear Chair

Criminal Code Amendment (Animal Protection) Bill 2015

With regard to the proposed Criminal Code Amendment (Animal Protection) Bill 2015 ("the Bill"), thank you for your letter of 23 June 2015 detailing the request for a response to the twenty-fourth report ("the Report") of the Parliamentary Joint Committee on Human Rights ("the Committee").

Self-incrimination

1.23 and 1.24 of the Report state:

"The committee's assessment of the requirement to report malicious cruelty to animals against article 14 of the International Covenant on Civil and Political Rights (right not to incriminate oneself) raises questions as to whether the requirement to potentially incriminate oneself is justifiable.

As set out above, the requirement to report malicious cruelty to animals engages and limits the right not to incriminate oneself. The statement of compatibility does not provide an assessment as to the compatibility of the measure with this right. The committee therefore seeks the advice of the
legislation proponent as to whether the limitation on the right to freedom from self-incrimination is compatible with the right to a fair trial, and particularly:

- *whether the proposed changes are aimed at achieving a legitimate objective;*
- *whether there is a rational connection between the limitation and that objective; and*
- *whether the limitation is a reasonable and proportionate measure for the achievement of that objective."*

Response:

Firstly, it is clear and self-evident that the proposals are aimed at achieving a legitimate objective, namely to require the timely reporting of malicious cruelty to animals to allow immediate preventative action to be taken.

Secondly, there is indisputably a rational connection between the possible limitation and the twin objectives of preventing cruelty to animals and preventing illegal interference in the lawful operation of animal enterprises.

Whether a limitation regarding self-incrimination actually exists at all is an arguable point, however if it does exist then the magnitude of the limitation is certainly very minimal in comparison to the seriousness of illegal and malicious cruelty against animals.

Thirdly, the limitation is a reasonable and proportionate measure for the achievement of the objective of addressing malicious cruelty because it requires a person with records of illegal activities to soon present them to the appropriate enforcement agencies for immediate action. The legitimate purpose of this legislation is to make responsible enforcement authorities aware of what may or may not be illegal activity.

The handing over of a visual recording does not in itself necessarily imply any association or potential culpability, nor does it impact on an individual's subsequent right for a fair trial.

Importantly the requirement to disclose materials detailing animal cruelty to authorities in a timely manner is wholly consistent with norms of responsible citizenry and delivers the opportunity for the acts of cruelty to be swiftly interrupted.

By way of a simple comparison, under State legislation it is an offence to fail to report a traffic accident to enforcement agencies as soon as possible. This absolute reporting requirement exists even if no other person is present at the scene of the accident and whether or not there are liability considerations for the person making the report. This requirement does not limit the right to not incriminate oneself, and there is no impact whatsoever on procedural fairness nor upon the presumption of innocence.

Another notable comparison relates to the issue of child abuse where Parliaments in all Australian states and territories have enacted mandatory reporting laws of some description (for professionals). While not wishing to link or associate the subject matter in any way, the legal principle provides an example of a requirement to report egregious activities of cruelty.

The key point is that it is immaterial as to whether or not the person disclosing the information to authorities has themselves potentially participated in any illegal activities, the primary requirement to report is simple and absolute.

Of course one could envisage certain circumstances where the person who is required to hand over the material might themselves be complicit with the illegal activities or may have already withheld the information in contravention of the reporting requirements. However similar situations can exist in the provided examples of mandatory reporting of child abuse and traffic accidents. However the reporting is a discrete requirement in its own right and does not in itself constitute any limitation on the right to freedom from self-incrimination nor the right to a fair trial.

To reaffirm this point, the Bill requires a person who has acquired significant information regarding illegal animal cruelty to immediately provide this to enforcement agencies regardless of whether the person has participated in the activities or has potentially committed an ancillary offence.

Arbitrary detention

1.34 of the Report states:

"The committee's assessment of the offence provision against article 9 of the International Covenant on Civil and Political Rights (right not to be arbitrarily detained) raises questions as to whether the offence may be excessive or disproportionate having regard to the breadth of the provision."

Response:

The Bill does not propose arbitrary detention.

Arbitrary detention involves the arrest or detainment of an individual in a case in which there is no likelihood or evidence that they committed a crime against a legal statute, or in which there has been no proper due process of law.

The drafting of the proposed Bill is consistent with the existing Criminal Code provisions and alleged offenders will be fully subject to normal legal due process. While there are maximum penalties for serious offences which may involve imprisonment, these could only be implemented following the normal judicial process. The maximum penalties are certainly not mandatory.

By way of background explanation, the words "maximum penalty" used to appear in Commonwealth legislation, but this expression is no longer used in new Acts. Additionally the older references in statutes are gradually being amended to the new standard. To be clear, the current reference to "penalty" in this Bill is still intended to be a maximum penalty, and it is a matter for the court, in the exercise of judicial discretion, to determine what level of penalty to impose.

A court always has a range of penalty options at its disposal which it will readily choose to utilise according to the circumstances of the offence or the character of the offenders.

It is envisaged that in ordinary circumstances, many of the indictable offences can be summarily dealt with before a Magistrate in the Local Court where the maximum penalty which can be imposed for an offence is generally two years imprisonment. This is regardless of the stated maximum penalty for the offence.

The Local Court hearing might apply to less significant breaches such as simple trespass or minor damage. However, there are some indictable offences which rightfully may be considered too serious to be dealt with in the Local Court. The hearings for these offences may well start off in the Local Court but be then referred to the District or Supreme Court for trial or sentencing. However if the alleged offences are clearly of a strictly indictable nature which requires arraignment, then the Local Court would be avoided altogether.

If found guilty, the accused would then face a penalty which is appropriate to both the level of offence seriousness and the specific case circumstances. The decision of the Court regarding a penalty would presumably also be influenced by many other factors which might include the testimony of character witnesses, existing criminal history, degree of repentance and the guidance of pre-sentence or psychiatric reports.

As such the accused may possibly face a strong penalty in a superior Court for serious offences conducted with wilful intent, or for lesser offences may just receive a fine, community service or a suspended sentence.

The key point is that the normal array of checks and balances will always apply in the Court and there is certainly nothing arbitrary or mandatory proposed in this Bill with regard to detention, sentencing or maximum penalties.

Once more, to be clear with regard to the concerns raised in 1.34, the penalties are reasonable and certainly not excessive or disproportionate. Further discussion and evidence to demonstrate this is provided in following section.

Degree and consistency of penalty

While a clarification has not been specifically sought by the Committee, I feel bound to respond to two concerns contained in point 1.30, notably:

"a penalty should be consistent with penalties for existing offences of a similar kind or of a similar seriousness"; and

"As it not clear that a prison term of five years for economic damage in excess of $10,000 is comparable to similar types of offences, the committee considers that the penalty may be so excessive as to be unjust".

I wish to state that the proposed penalties in this Bill are fully consistent with normal practice and neither excessive nor unjust. The high-end of contemplated offences are serious activities with direct consequences for human and animal life and as such they beckon a firm deterrent.

The proposed maximum penalties are in most cases less than comparable State and Territory legislation for malicious property damage.

As a test of relativity, in NSW under *s195* of the *Crimes Act 1900*, a person who intentionally or recklessly destroys or damages property is liable for imprisonment for up to five years; or if the damage is caused by fire or explosion, for up to ten years. However if the offences are carried out in the company of another, the maximum terms are longer.

Under *s29* of the Commonwealth *Crimes Act 1914*, destroying or damaging Commonwealth property by fire has a maximum penalty of 10 years imprisonment.

Under the Australian Capital Territory *Crimes Act 1900*, offenders can be imprisoned for 15 years plus 1500 penalty units, or up to 20 years if they acted dishonestly with a view to gain. Indeed, even threatening to damage property by fire has a maximum of 7 years jail plus 700 penalty units.

In Tasmania, under the *Criminal Code Act 1924*, a person placing combustible material with the intent to injure property faces a maximum jail term of 21 years plus a discretionary fine. In my home state of Western Australia, under *s144* of the *Criminal Code* the maximum penalty for wilful damage to property by fire is 14 years.

It is clear that the proposed penalties in the Criminal Code Amendment (Animal Protection) Bill 2015 are moderate by comparison.

Necessary nature

While a clarification has not been specifically sought by the Committee, I would like to respond to a statement contained in point 1.33, notably:

"as other legislation already includes provisions that make property damage a criminal offence.....whether the proposed offence provisions may be regarded as necessary in pursuit of a legitimate objective for the purposes of international human rights law".

As exemplified earlier in this document, the various levels of penalties within Commonwealth, State and Territory Criminal Codes are quite inconsistent. This Bill will provide some consistency by way of federal legislation.

While some elements of the possible suite of offences might be provided for in existing legislation (such as trespass or arson) there are other costly nuisance activities which may impact upon a primary producer attempting to lawfully conduct their business (such as biosecurity breaches, releasing animals from captivity, preventing the transportation of stock and interfering with husbandry practices) which are not.

Whatever the reason, it is abundantly apparent that incidences of the types of unruly activities contemplated in this Bill are currently not being prosecuted through normal channels. Therefore there is ample justification for legislation which defines and captures the central nature of the problem relating to animals and primary producers so that the enforcement action which is currently not being taken will be taken in the future.

I also wish to comment on the question as to whether or not the intent of this Bill is a legitimate objective for the purposes of international human rights law. The answer is yes.

I bring the Committee's attention to the right of a farmer, primary producer or animal enterprise manager to support their family and lawfully conduct their business or operations without illegal interruption from those who simply do not respect this right. Just the same as all other citizens in the community, they hold the right to protection under the law when their fundamental rights to maintain the safety of their property and person are threatened, as supported by Article 3 of the Universal Declaration of Human Rights which states:

"Everyone has the right to life, liberty and security of person."

Furthermore, Article 8 states: *"Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law."*

Importantly, Article 7 states: *"All are equal before the law and are entitled without any discrimination to equal protection of the law."*

With regard to those who choose to offend their universal civic obligations as set out in Article 1 to: *"act towards one another in a spirit of brotherhood,"* they will rightly face appropriate sanctions when undertaking illegal activities against primary producers.

In this regard Article 10 states: *"Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him."*

As such I would contend that human rights considerations are implicitly central to both the purpose and utility of this Bill. The legislation as proposed provides

a degree of protection for law-abiding citizens in the pursuit of activities such as primary production, while also providing offenders the right to fairly defend their actions in a court of law.

From a human rights perspective this supports the universal recognition that basic rights and fundamental freedoms are inalienable and equally applicable to all human beings.

Summary

In conclusion, unfortunately it is not uncommon for people to record activities of animal cruelty and then consciously withhold the recordings for extended periods of time, thereby allowing the violent treatment of animals to endure. As such, I strongly contend that the requirement to immediately hand over visual recordings when they come to hand is justifiable, reasonable and proportionate and does not impact upon the common law rights of citizens. Also, the activities undertaken to damage the property or thwart and inhibit the ability of primary producers to conduct their lawful operations need to be firmly attended to.

This Bill is an important step forward as it ensures that malicious cruelty against animals can be more firmly reported in a responsible and lawful manner.

Yours sincerely

Dr Chris Back
Senator for Western Australia

Cc: Secretariat via email: human.rights@aph.gov.au

The Hon Scott Morrison MP
Minister for Social Services

MC15-008928

The Hon Philip Ruddock MP
Chair
Parliamentary Joint Committee on Human Rights
S1.111
Parliament House
CANBERRA ACT 2600

Dear Mr Ruddock

Thank you for your letter of 23 June 2015 about the Social Services Legislation Amendment (Youth Employment and Other Measures) Bill 2015.

I have noted the comments in the Committee's *Twenty-fourth Report of the 44th Parliament* and have provided my response to these comments in the enclosed document.

Thank you again for writing.

Yours sincerely

The Hon Scott Morrison MP
Minister for Social Services
31 / 7 /2015

Encl.

Social Services Legislation Amendment (Youth Employment and Other Measures) Bill 2015

The Parliamentary Joint Committee on Human Rights, in its 'Examination of legislation in accordance with the *Human Rights (Parliamentary Scrutiny) Act 2011*' report, has sought advice from the Minister of Social Services on whether certain measures included in the Social Services Legislation Amendment (Youth Employment and Other Measures) Bill 2015 (the Bill) are compatible with human rights, as defined in the Act.

Specifically the Committee has questioned the compatibility of some of the proposed changes with the right to equality and non-discrimination, the right to social security, and the right to an adequate standard of living. This document provides responses to the Committee's request for advice on compatibility of the measures identified with those rights.

Age requirements for various Commonwealth payments

Schedule 2

- **Remove access to Newstart Allowance and Sickness Allowance to 22 to 24 year olds and replace these benefits with access to Youth Allowance (other) from 1 July 2016**

1.92 The age requirements for various Commonwealth payments engage and limit the right to equality and non-discrimination. The statement of compatibility does not sufficiently justify that limitation for the purposes of international human rights law. The committee therefore seeks the advice of the Minister for Social Services as to:

- whether the proposed changes are aimed at achieving a legitimate objective;
- whether there is a rational connection between the limitation and that objective; and
- whether the limitation is a reasonable and proportionate measure for the achievement of that objective.

The amendments proposed at Schedule 2 of the Bill were previously included in the Social Services and Other Legislation Amendment (2014 Budget Measures No. 2) Bill 2014 (the No. 2 Bill), and subsequently the Social Services and Other Legislation Amendment (2014 Budget Measures No. 4) Bill 2014 (the No. 4 Bill). The substance of Schedule 2 is the same as in previous Bills although the commencement date has been revised to 1 July 2016. The Committee concluded its examination of the measure in Bill No. 2 in its *Twelfth Report of the 44th Parliament*, following the provision of additional information on the human rights impact of the measure in relation to the right to social security and the right to an adequate standard of living. Based on this information, the Committee concluded that this measure was compatible with human rights. The Committee has now requested additional information in relation to the right to equality and non-discrimination.

Right to equality and non-discrimination

The measure in schedule 2 to extend the Youth Allowance (other) eligibility age is aimed at achieving consistency across payments, as well as encouraging young people to undertake or participate in education or training to better ensure that they are able to achieve long term sustainable employment outcomes.

Since 1998, there have been two different maximum ages for Youth Allowance – one for full-time students on Youth Allowance (student) and one for young unemployed people on Youth Allowance (other). Once a young person passes the maximum age for youth allowance as a job seeker (currently 21) they transition to Newstart Allowance, which is paid at a higher rate of payment.

For full-time students, however, the transition from Youth Allowance (student) to the adult student payment, Austudy, occurs at the age of 25 years.

Evidence suggests that education and training can play a significant role in improving a person's chances of finding and maintaining employment, particularly for young people. However, the higher rates of Newstart Allowance and Sickness Allowance (currently paid to around 73,000 unemployed youth aged 22 to 24 years) can act as an incentive for young people to stay on Newstart Allowance or Sickness Allowance instead of pursuing full-time study or employment, or to give up study in order to receive these payments. This measure achieves the dual objective of removing this perverse incentive and achieving consistent eligibility criteria, by placing all under 25 year olds on the same payment level, whether they are unemployed or studying full-time.

Australia's social security system is designed to be highly targeted and to provide for different payments, rates and other settings that reflect the needs and circumstances of different cohorts. For this reason, age-based eligibility criteria are already part of a number of social security payments, including Youth Allowance as outlined above. To the extent that this measure may limit the right to non-discrimination by affecting only a particular age group, this is reasonable and proportionate to the objective of ensuring that payment rates are aligned for young people aged under 25 with similar needs and circumstances, irrespective of whether they are studying or looking for work.

Affected young people will continue to be supported by a range of programmes and other services provided by the Commonwealth and state governments. Grandfathering arrangements will apply to young people aged 22 years or over who are in receipt of Newstart Allowance or Sickness Allowance as at 1 July 2016 to ensure that no existing recipients will have their payment rate reduced.

Income support waiting periods

Schedule 3

- **Provide for a four-week waiting period for certain persons aged under 25 years applying for Youth Allowance (other) or Special Benefit from 1 July 2016**

1.111 The income support waiting periods engage and limit the rights to social security and an adequate standard of living. The statement of compatibility does not sufficiently justify that limitation for the purposes of international human rights law. The committee therefore seeks the advice of the Minister for Social Services as to whether the measure is a proportionate means of achieving the stated objective.

1.123 The income support waiting periods engage and limit the right to equality and non-discrimination on the basis of age. The statement of compatibility does not sufficiently justify that limitation for the purposes of international human rights law. The committee therefore seeks the advice of the Minister for Social Services as to whether the measure is a proportionate means of achieving the stated objective.

The amendments at Schedule 3 of the Bill introduce a new four week waiting period for new job seekers applying for Youth Allowance (other) or Special Benefit, aged under 25 and placed in Stream A with a jobactive provider. This measure is aimed at increasing the level of young job ready people achieving gainful employment outcomes. This measure replaces the six month waiting period for young people under 30 previously included in the No. 2 Bill and subsequently the No. 4 Bill.

Right to social security

Unemployment rates for young people have increased significantly since the global financial crisis. As at June 2015, the youth unemployment rate was 13.4 per cent, compared with an average total unemployment rate of six per cent. The proportion of young Australians not in employment, education or training is also high, with young people in this category at particular risk of social exclusion. The 2014 report by National Centre for Vocational Education Research, *How young people are faring in the transition from school to work*, indicates that in 2012 more than a quarter of 21 year olds (27.4 per cent) were either not engaged or not fully engaged in employment, education or training. The report also notes that not all young people in this category are 'vulnerable' and that some may be in this category voluntarily. This measure seeks to address youth unemployment by establishing firm expectations for young people to accept jobs or move into education and training, rather than relying on income support in the first instance at the risk of becoming disengaged, both socially and economically.

The risk this measure could be considered to limit the right to social security by restricting immediate access to income support is mitigated by the specific targeting of the measure to those young people who are job ready (in Stream A of jobactive) and able to support themselves through paid work.

Job seekers who have been assessed as having significant barriers to work will be exempt from the measure. This will include job seekers in Stream B and C of jobactive, parents with 35 per cent or more care of a child, young people in or leaving state care and those with a temporary activity test exemption of more than two weeks, such as pregnant women in the six weeks before they are expected to give birth, or people testing their eligibility for Disability Support Pension. The Bill before Parliament also allows the Minister to make further exemptions via a legislative instrument. These exemptions ensure that young people who face more complex and/or multiple barriers to finding work and are less able to fully support themselves will continue to receive income support.

In recognition of the importance of education and training in preventing future unemployment, young people who return to school or full-time vocational education or university study will be able to access student payments, such as Youth Allowance (student), and therefore will not subject to a four week waiting period.

Evidence also suggests that this measure will be most effective if it is supported by an appropriate level of employment services, targeted at job seeker deficits[1]. Job seekers subject to a four week waiting period will continue to be supported by the full range of programmes and assistance currently available under jobactive to enable them to find employment. Job seekers will also be required to participate in rapid activation activities designed to enhance their chances of moving into work as quickly as possible.

To the extent that this measure may limit the right social security, this limitation is reasonable and proportionate to the objective of encouraging young people to be either working or studying as targeted cohort are those who are job ready and capable of finding and maintaining a job.

Right to an adequate standard of living

Income support data (as at June 2015) shows that a majority of young job seekers are receiving support from their parents, with 54 per cent of Youth Allowance (other) recipients considered to be dependent on

[1] Analysis commissioned by the New Zealand Government (*Actuarial valuation of the Benefit System for Working-Age Adults as at 30 June 2013: Greenfield/Miller/McGuire*), which would be broadly applicable to the Australian system, shows that if young unemployed people are not provided with the right mix of programmes and support, there is a high chance that they will end up trapped on welfare for much of their lives.

their parents for the purposes of calculating their rate of payment. This indicates that a large proportion of affected recipients will have access to external support in order to maintain an adequate standard of living.

From 1 July 2016, pending the implementation of the measure, around $8.1 million over three years in additional funding will be available to Emergency Relief providers to provide basic material aid to young people during the four week waiting period. This assistance is not intended to provide assistance to all young people affected by this measure. It is also not meant to meet affected individuals' living costs during the waiting period. Assistance will vary according to the needs and circumstances of the person.

This additional Emergency Relief funding will become available only following the implementation of the measure. The Department will undertake an analysis of payments data and consult with the Emergency Relief sector to inform the targeting and distribution of available funds to those most affected by the measure.

The limitation of the availability of income support is reasonable and proportionate as the measure is targeted at those who are job ready and able to be self-supporting through work and a large proportion of the targeted cohort will have access to parental support and additional Emergency Relief funding will be available for those in need.

Right to equality and non-discrimination

Young unemployed people under 25 years have a significantly higher rate of unemployment compared to the general population, with a large number in the cohort also facing increased risk of social exclusion due to disengagement from work and education. The targeting of this measure to those under 25 is specifically aimed at addressing the risks for this particular cohort by providing incentives for these young job seekers to pursue work or further education or training, which evidence suggests will reduce their chances of becoming long-term unemployed.

Additionally, around 43 per cent of the young people on unemployment payments aged under 25 years are still living in the parental home, compared to only seven per cent for those aged over 25. This shows that the cohort targeted by this measure is more likely to be drawing on family support and have secure housing than their older counterparts and therefore may be less likely to face hardship while serving a waiting period.

To the extent that this measure may limit the right to equality and non-discrimination by affecting only a particular age group, this is reasonable and proportionate in the context of factors particular to this group such as higher youth unemployment rates, high rates of youth disengagement from employment, education and training, and increased access to parental support.

Appendix 2

Guidance Note 1 and Guidance Note 2

PARLIAMENTARY JOINT COMMITTEE ON HUMAN RIGHTS

GUIDANCE NOTE 1: Drafting statements of compatibility

December 2014

This note sets out the committee's approach to human rights assessments and its requirements for statements of compatibility. It is designed to assist legislation proponents in the preparation of statements of compatibility.

Background

Australia's human rights obligations

Human rights are defined in *the Human Rights (Parliamentary Scrutiny) Act 2011* as the rights and freedoms contained in the seven core human rights treaties to which Australia is a party. These treaties are:

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

Australia has voluntarily accepted obligations under these seven core UN human rights treaties. Under international law it is the state that has an obligation to ensure that all persons enjoy human rights. Australia's obligations under international human rights law are threefold:

- **to respect** – requiring government not to interfere with or limit human rights;
- **to protect** – requiring government to take measures to prevent others (for example individuals or corporations) from interfering with human rights;
- **to fulfil** – requiring government to take positive measures to fully realise human rights.

Where a person's rights have been breached, there is an obligation to ensure accessible and effective remedies are available to that person.

Australia's human rights obligations apply to all people subject to Australia's jurisdiction, regardless of whether they are Australian citizens. This means Australia owes human rights obligations to everyone in Australia, as well as to persons outside Australia where Australia is exercising effective control over them, or they are otherwise under Australia's jurisdiction.

The treaties confer rights on individuals and groups of individuals and not companies or other incorporated bodies.

Civil and political rights

Australia is under an obligation to respect, protect and fulfil its obligations in relation to all civil and political rights. It is generally accepted that most civil and political rights are capable of immediate realisation.

Economic, social and cultural rights

Australia is also under an obligation to respect, protect and fulfil economic, social and cultural rights. However, there is some flexibility allowed in the implementation of these rights. This is the obligation of progressive realisation, which recognises that the full realisation of economic, social and cultural rights may be achieved progressively. Nevertheless, there are some obligations in relation to economic, social and cultural rights which have immediate effect. These include the obligation to ensure that people enjoy economic, social and cultural rights without discrimination.

Limiting a human right

It is a general principle of international human rights law that the rights protected by the human rights treaties are to be interpreted generously and limitations narrowly. Nevertheless, international human rights law recognises that reasonable limits may be placed on most rights and freedoms – there are very few absolute rights which can never be legitimately limited.[1] For all other rights, rights may be limited as long as the limitation meets certain standards. In general, any measure that limits a human right has to comply with the following criteria (*The limitation criteria*) in order for the limitation to be considered justifiable.

Prescribed by law

Any limitation on a right must have a clear legal basis. This requires not only that the measure limiting the right be set out in legislation (or be permitted under an established rule of the common law); it must also be accessible and precise enough so that people know the legal consequences of their actions or the circumstances under which authorities may restrict the exercise of their rights.

Legitimate objective

Any limitation on a right must be shown to be necessary in pursuit of a legitimate objective. To demonstrate that a limitation is permissible, proponents of legislation must provide reasoned and evidence-based explanations of the legitimate objective being pursued. To be capable of justifying a proposed limitation on human rights, a legitimate objective must address a pressing or substantial concern, and not simply seek an outcome regarded as desirable or convenient. In addition, there are a number of rights that may only be limited for a number of prescribed purposes.[2]

Rational connection

It must also be demonstrated that any limitation on a right has a rational connection to the objective to be achieved. To demonstrate that a limitation is permissible, proponents of legislation must provide reasoned and evidence-based explanations as to how the measures are likely to be effective in achieving the objective being sought.

Proportionality

To demonstrate that a limitation is permissible, the limitation must be proportionate to the objective being sought. In considering whether a limitation on a right might be proportionate, key factors include:

- whether there are other less restrictive ways to achieve the same aim;
- whether there are effective safeguards or controls over the measures, including the possibility of monitoring and access to review;

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[1] Absolute rights are: the right not to be subjected to torture, cruel, inhuman or degrading treatment; the right not to be subjected to slavery; the right not to be imprisoned for inability to fulfil a contract; the right not to be subject to retrospective criminal laws; the right to recognition as a person before the law.

[2] For example, the right to association. For more detailed information on individual rights see Parliamentary Joint Committee on Human Rights, Guide to Human Rights (March 2014), available at http://www.aph.gov.au/~/media/Committees/Joint/PJCHR/Guide%20to%20Human%20Rights.pdf

- the extent of any interference with human rights – the greater the interference the less likely it is to be considered proportionate;
- whether affected groups are particularly vulnerable; and
- whether the measure provides sufficient flexibility to treat different cases differently or whether it imposes a blanket policy without regard to the merits of an individual case.

Retrogressive measures

In respect of economic, social and cultural rights, as there is a duty to realise rights progressively there is also a corresponding duty to refrain from taking retrogressive measures. This means that the state cannot unjustifiably take deliberate steps backwards which negatively affect the enjoyment of economic, social and cultural rights. In assessing whether a retrogressive measure is justified the limitation criteria are a useful starting point.

The committee's approach to human rights scrutiny

The committee's mandate to examine all existing and proposed Commonwealth legislation for compatibility with Australia's human rights obligations, seeks to ensure that human rights are taken into account in the legislative process.

The committee views its human rights scrutiny tasks as primarily preventive in nature and directed at minimising risks of new legislation giving rise to breaches of human rights in practice. The committee also considers it has an educative role, which includes raising awareness of legislation that promotes human rights.

The committee considers that, where relevant and appropriate, the views of human rights treaty bodies and international and comparative human rights jurisprudence can be useful sources for understanding the nature and scope of the human rights referred to in the Human Rights (Parliamentary Scrutiny) Act 2011. Similarly, there are a number of other treaties and instruments to which Australia is a party, such as the International Labour Organization (ILO) Conventions and the Refugee Convention which, although not listed in the *Human Rights (Parliamentary Scrutiny) Act 2011,* may nonetheless be relevant to the interpretation of the human rights protected by the seven core human rights treaties. The committee has also referred to other non-treaty instruments, such as the United Nations Declaration on the Rights of Indigenous Peoples, where it considers that these are relevant to the interpretation of the human rights in the seven treaties that fall within its mandate. When the committee relies on regional or comparative jurisprudence to support its analysis of the rights in the treaties, it will acknowledge this where necessary.

The committee's expectations for statements of compatibility

The committee considers statements of compatibility as essential to the examination of human rights in the legislative process. The committee expects statements to read as stand-alone documents. The committee relies on the statement as the primary document that sets out the legislation proponent's analysis of the compatibility of the bill or instrument with Australia's international human rights obligations.

While there is no prescribed form for statements under the *Human Rights (Parliamentary Scrutiny) Act 2011*, the committee strongly recommends legislation proponents use the current templates provided by the Attorney-General's Department. [3]

The statement of compatibility should identify the rights engaged by the legislation. Not every possible right engaged needs to be identified in the statement of compatibility, only those that are substantially engaged. The committee does not expect analysis of rights consequentially or tangentially engaged in a minor way.

[3] The Attorney-General's Department guidance may be found at http://www.ag.gov.au/RightsAndProtections/HumanRights/PublicSector/Pages/Parliamentaryscrutiny.aspx#role

Consistent with the approach set out in the guidance materials developed by the Attorney-General's department, where a bill or instrument limits a human right, the committee requires that the statement of compatibility provide a detailed and evidence-based assessment of the measures against the limitation criteria set out in this note. Statements of compatibility should provide analysis of the impact of the bill or instrument on vulnerable groups.

Where the committee's analysis suggests that a bill limits a right and the statement of compatibility does not include a reasoned and evidence-based assessment, the committee may seek additional/further information from the proponent of the legislation. Where further information is not provided and/or is inadequate, the committee will conclude its assessment based on its original analysis. This may include a conclusion that the bill or instrument (or specific measures within a bill or instrument) are incompatible with Australia's international human rights obligations.

This approach is consistent with international human rights law which requires that any limitation on human right be justified as reasonable, necessary and proportionate in pursuit of a legitimate objective.

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

Phone: 02 6277 3823
Fax: 02 6277 5767

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

PARLIAMENTARY JOINT COMMITTEE ON HUMAN RIGHTS

GUIDANCE NOTE 2: Offence provisions, civil penalties and human rights

December 2014

This guidance note sets out some of the key human rights compatibility issues in relation to provisions that create offences and civil penalties. It is not intended to be exhaustive but to provide guidance to on the committee's approach and expectations in relation to assessing the human rights compatibility of such provisions.

Introduction

The right to a fair trial and fair hearing are protected by article 14(1) of the International Covenant on Civil and Political Rights (ICCPR). The right to a fair trial and fair hearing applies to both criminal and civil proceedings.

A range of protections are afforded to persons accused and convicted of criminal offences under article 14. These include the presumption of innocence (article 14(2)), the right to not incriminate oneself (article 14(3)(g)), the right to have a sentence reviewed by a higher tribunal (article 14(5)), the right not to be tried or punished twice for the same offence (article 14(7)), a guarantee against retrospective criminal laws (article 15(1)) and the right not to be arbitrarily detained (article 9(1)).[1]

Offence provisions need to be considered and assessed in the context of these standards. Where a criminal offence provision is introduced or amended, the statement of compatibility for the legislation will usually need to provide an assessment of whether human rights are engaged and limited.[2]

The *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* provides a range of guidance in relation to the framing of offence provisions.[3] However, legislation proponents should note that this government guide is neither binding nor conclusive of issues of human rights compatibility. The discussion below is intended to assist legislation proponents to identify matters that are likely to be relevant to the framing of offence provisions and the assessment of their human rights compatibility.

Reverse burden offences

Article 14(2) of the ICCPR protects the right to be presumed innocent until proven guilty according to law. Generally, consistency with the presumption of innocence requires the prosecution to prove each element of a criminal offence beyond reasonable doubt.

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1 For a more comprehensive description of these rights see Parliamentary Joint Committee on Human Rights, *Guide to Human Rights* (March 2014), available at http://www.aph.gov.au/~/media/Committees/Joint/PJCHR/Guide%20to%20Human%20Rights.pdf.

2 The requirements for assessing limitations on human rights are set out in *Guidance Note 1: Drafting statements of compatibility* (December 2014).

3 See *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (September 2011), available at http://www.ag.gov.au/Publications/Documents/GuidetoFramingCommonwealthOffencesInfringementNoticesandEnforcementPowers/A%20Guide%20to%20Framing%20Cth%20Offences.pdf

An offence provision which requires the defendant to carry an evidential or legal burden of proof, commonly referred to as 'a reverse burden', with regard to the existence of some fact engages and limits the presumption of innocence. This is because a defendant's failure to discharge the burden of proof may permit their conviction despite reasonable doubt as to their guilt. Where a statutory exception, defence or excuse to an offence is provided in proposed legislation, these defences or exceptions must be considered as part of a contextual and substantive assessment of potential limitations on the right to be presumed innocent in the context of an offence provision.

Reverse burden offences will be likely to be compatible with the presumption of innocence where they are shown by legislation proponents to be reasonable, necessary and proportionate in pursuit of a legitimate objective. Claims of greater convenience or ease for the prosecution in proving a case will be insufficient, in and of themselves, to justify a limitation on the defendant's right to be presumed innocent.

It is the committee's usual expectation that, where a reverse burden offence is introduced, legislation proponents provide a human rights assessment in the statement of compatibility, in accordance with Guidance Note 1.

Strict liability and absolute liability offences

Strict liability and absolute liability offences engage and limit the presumption of innocence. This is because they allow for the imposition of criminal liability without the need to prove fault.

The effect of applying strict liability to an element or elements of an offence therefore means that the prosecution does not need to prove fault. However, the defence of mistake of fact is available to the defendant. Similarly, the effect of applying absolute liability to an element or elements of an offence means that no fault element needs to be proved, but the defence of mistake of fact is not available.

Strict liability and absolute liability offences will not necessarily be inconsistent with the presumption of innocence where they are reasonable, necessary and proportionate in pursuit of a legitimate objective.

The committee notes that strict liability and absolute liability may apply to whole offences or to elements of offences. It is the committee's usual expectation that, where strict liability and absolute liability criminal offences or elements are introduced, legislation proponents should provide a human rights assessment of their compatibility with the presumption of innocence, in accordance with Guidance Note 1.

Mandatory minimum sentencing

Article 9 of the ICCPR protects the right to security of the person and freedom from arbitrary detention. An offence provision which requires mandatory minimum sentencing will engage and limit the right to be free from arbitrary detention. The notion of 'arbitrariness' under international human rights law includes elements of inappropriateness, injustice and lack of predictability. Detention may be considered arbitrary where it is disproportionate to the crime that has been committed (for example, as a result of a blanket policy).[4] Mandatory sentencing may lead to disproportionate or unduly harsh outcomes as it removes judicial discretion to take into account all of the relevant circumstances of a particular case in sentencing.

Mandatory sentencing is also likely to engage and limit article 14(5) of the ICCPR, which protects the right to have a sentence reviewed by a higher tribunal. This is because mandatory sentencing prevents judicial review of the severity or correctness of a minimum sentence.

The committee considers that mandatory minimum sentencing will be difficult to justify as compatible with human rights, given the substantial limitations it places on the right to freedom

[4] See, for example, *A v Australia* (2000) UN doc A/55/40, [522]; *Concluding Observations on Australia in 2000 (2000) UN doc A/55/40,* [522] (in relation to mandatory sentencing in the Northern Territory and Western Australia).

from arbitrary detention and the right to have a sentence reviewed by a higher tribunal (due to the blanket nature of the measure). Where mandatory minimum sentencing does not require a minimum non-parole period, this will generally be insufficient, in and of itself, to preserve the requisite judicial discretion under international human rights law to take into account the particular circumstances of the offence and the offender.[5]

Civil penalty provisions

Many bills and existing statutes contain civil penalty provisions. These are generally prohibitions on particular forms of conduct that give rise to liability for a 'civil penalty' enforceable by a court. As these penalties are pecuniary and do not include the possibility of imprisonment, they are said to be 'civil' in nature and do not constitute criminal offences under Australian law.

Given their 'civil' character, applications for a civil penalty order are dealt with in accordance with the rules and procedures that apply in relation to civil matters. These rules and procedures often form part of a regulatory regime which provides for a graduated series of sanctions, including infringement notices, injunctions, enforceable undertakings, civil penalties and criminal offences.

However, civil penalty provisions may engage the criminal process rights under articles 14 and 15 of the ICCPR where the penalty may be regarded as 'criminal' for the purpose of international human rights law. The term 'criminal' has an 'autonomous' meaning in human rights law. In other words, a penalty or other sanction may be 'criminal' for the purposes of the ICCPR even though it is considered to be 'civil' under Australian domestic law.

There is a range of international and comparative jurisprudence on whether a 'civil' penalty is likely to be 'criminal' for the purpose of human rights law.[6] This criteria for assessing whether a penalty is 'criminal' for the purposes of human rights law is set out in further detail on page 4. The following steps (one to three) may assist legislation proponents in understanding whether a provision may be characterised as 'criminal' under international human rights law.

- **Step one:** *Is the penalty classified as criminal under Australian Law?*

  If so, the penalty will be considered 'criminal' for the purpose of human rights law. If not, proceed to step two.

- **Step two:** *What is the nature and purpose of the penalty?*

  The penalty is likely to be considered criminal for the purposes of human rights law if:

  a) the purpose of the penalty is to punish or deter; **and**

  b) the penalty applies to the public in general (rather than being restricted to people in a specific regulatory or disciplinary context).

  If the penalty does not satisfy this test, proceed to step three.

- **Step three:** *What is the severity of the penalty?*

  The penalty is likely to be considered criminal for the purposes of human rights law if the penalty carries a penalty of imprisonment or a substantial pecuniary sanction.

Note: even if a penalty is not considered 'criminal' separately under steps two or three, it may still be considered 'criminal' where the nature and severity of the penalty are cumulatively considered.

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5 This is because the mandatory minimum sentence may be seen by courts as a 'sentencing guidepost' which specifies the appropriate penalty for the least serious case. Judges may feel constrained to impose, for example, what is considered the usual proportion for a non-parole period (approximately two-thirds of the head sentence).

6 The UN Human Rights Committee, while not providing further guidance, has determined that civi; penalties may be 'criminal' for the purpose of human rights law. See, for example, *Osiyuk v Belarus* (1311/04); *Sayadi and Vinck v Belgium* (1472/06).

When a civil penalty provision is 'criminal'

In light of the criteria described above, the committee will have regard to the following matters when assessing whether a particular civil penalty provision is 'criminal' for the purposes of human rights law.

a) Classification of the penalty under domestic law

The committee considers that in accordance with international human rights law, the classification of the penalty as 'civil' under domestic law will not be determinative. However, if the penalty is 'criminal' under domestic law it will also be 'criminal' under international law.

b) The nature of the penalty

The committee considers that a civil penalty provision is more likely to be considered 'criminal' in nature if it contains the following features:

- the penalty is intended to be punitive or deterrent in nature, irrespective of its severity;
- the proceedings are instituted by a public authority with statutory powers of enforcement;
- a finding of culpability precedes the imposition of a penalty; and
- the penalty applies to the public in general instead of being directed at people in a specific regulatory or disciplinary context (the latter being more likely to be viewed as 'disciplinary' or regulatory rather than as 'criminal').

c) The severity of the penalty

In assessing whether a pecuniary penalty is sufficiently severe to amount to a 'criminal' penalty, the committee will have regard to:

- the amount of the pecuniary penalty that may be imposed under the relevant legislation with reference to the regulatory context;
- the nature of the industry or sector being regulated and relative size of the pecuniary penalties and the fines that may be imposed (for example, large penalties may be less likely to be criminal in the corporate context);
- the maximum amount of the pecuniary penalty that may be imposed under the civil penalty provision relative to the penalty that may be imposed for a corresponding criminal offence; and
- whether the pecuniary penalty imposed by the civil penalty provision carries a sanction of imprisonment for non-payment, or other very serious implications for the individual in question.

The consequences of a conclusion that a civil penalty is 'criminal'

If a civil penalty is assessed to be 'criminal' for the purposes of human rights law, this does not mean that it must be turned into a criminal offence in domestic law. Human rights law does not stand in the way of decriminalisation. Instead, it simply means that the civil penalty provision in question must be shown to be consistent with the criminal process guarantees set out in articles 14 and 15 of the ICCPR.

By contrast, if a civil penalty is characterised as not being 'criminal', the specific criminal process guarantees in articles 14 and 15 will not apply. However, such provisions must still comply with the right to a fair hearing before a competent, independent and impartial tribunal contained in article 14(1) of the ICCPR. The Senate Standing Committee for the Scrutiny of Bills may also comment on whether such provisions comply with accountability standards.

As set out in Guidance Note 1, sufficiently detailed statements of compatibility are essential for the effective consideration of the human rights compatibility of bills and legislative instruments. Where

a civil penalty provision could potentially be considered 'criminal' the statement of compatibility should:

- explain whether the civil penalty provisions should be considered to be 'criminal' for the purposes of human rights law, taking into account the criteria set out above; and
- if so, explain whether the provisions are consistent with the criminal process rights in articles 14 and 15 of the ICCPR, including providing justifications for any limitations of these rights.

It will not be necessary to provide such an assessment in the statement of compatibility on every occasion where proposed legislation includes civil penalty provisions or draws on existing civil penalty regimes. For example, it will generally not be necessary to provide such an assessment where the civil penalty provision is in a corporate or consumer protection context and the penalties are small.

Criminal process rights and civil penalty provisions

The key criminal process rights that have arisen in the committee's scrutiny of civil penalty provisions include the right to be presumed innocent (article 14(2)) and the right not to be tried twice for the same offence (article 14 (7)). For example:

- article 14(2) of the International Covenant on Civil and Political Rights (ICCPR) protects the right to be presumed innocent until proven guilty according to law. This requires that the case against the person be demonstrated on the criminal standard of proof, that is, it must be proven beyond reasonable doubt. The standard of proof applicable in civil penalty proceedings is the civil standard of proof, requiring proof on the balance of probabilities. In cases where a civil penalty is considered 'criminal', the statement of compatibility should explain how the application of the civil standard of proof for such proceedings is compatible with article 14(2) of the ICCPR.
- article 14(7) of the ICCPR provides that no-one is to be liable to be tried or punished again for an offence of which she or he has already been finally convicted or acquitted. If a civil penalty provision is considered to be 'criminal' and the related legislative scheme permits criminal proceedings to be brought against the person for substantially the same conduct, the statement of compatibility should explain how this is consistent with article 14(7) of the ICCPR.

Other criminal process guarantees in articles 14 and 15 may also be relevant to civil penalties that are viewed as 'criminal', and should be addressed in the statement of compatibility where appropriate.

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

Phone: 02 6277 3823
Fax: 02 6277 5767

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