



Parliamentary Joint Committee on Human Rights

Human rights scrutiny report

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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

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

Secretariat

Ms Toni Dawes, Committee Secretary
Ms Zoe Hutchinson, Principal Research Officer
Ms Nicola Knackstredt, Principal Research Officer
Ms Jessica Strout, Principal Research Officer
Ms Eloise Menzies, Senior Research Officer
Ms Alice Petrie, Legislative Research Officer

External legal adviser

Dr Aruna Sathanapally

Committee information

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

The committee assesses legislation against the human rights contained in the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR); as well as five other treaties relating to particular groups and subject matter.¹ **Appendix 2** contains brief descriptions of the rights most commonly arising in legislation examined by the committee.

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

Some human rights obligations are absolute under international law. However, in relation to most human rights, prescribed limitations on the enjoyment of a right may be justified under international law if certain requirements are met. Accordingly, a focus of the committee's reports is to determine whether any limitation of a human right identified in proposed legislation is justifiable. A measure that limits a right must be **prescribed by law**; be in pursuit of a **legitimate objective**; be **rationaly connected** to its stated objective; and be a **proportionate** way to achieve that objective (the **limitation criteria**). These four criteria provide the analytical framework for the committee.

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

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

More information on the committee's analytical framework and approach to human rights scrutiny of legislation is contained in Guidance Note 1 (see **Appendix 4**).

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

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Chapter 1

New and continuing matters

- 1.1 This chapter provides assessments of the human rights compatibility of:
- bills introduced into the Parliament between 21 and 24 November 2016 (consideration of three bills from this period has been deferred);¹
 - legislative instruments received between 4 and 10 November 2016 (consideration of two legislative instruments from this period has been deferred);² and
 - bills and legislative instruments previously deferred.

Instruments not raising human rights concerns

1.2 The committee has examined the legislative instruments received in the relevant period, as listed in the *Journals of the Senate*.³ Instruments raising human rights concerns are identified in this chapter.

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

1.4 The committee has also concluded its examination of the previously deferred Anti-Money Laundering and Counter-Terrorism Financing Rules Amendment Instrument 2016 (No. 1) [F2016L01444] and Defence Regulation 2016 [F2016L01568] and makes no further comment on the instruments.

1 See Appendix 1 for a list of legislation in respect of which the committee has deferred its consideration. The committee generally takes an exceptions based approach to its substantive examination of legislation.

2 The committee examines legislative instruments received in the relevant period, as listed in the *Journals of the Senate*. 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.

3 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.

Advice only

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

Migration Legislation Amendment (2016 Measures No. 3) Regulation 2016 [F2016L01390]

Purpose	Amends various provisions in the Migration Regulations 1994 and the Australian Citizenship Regulations 2007 including in relation to imposing certain limitations on the approval of sponsors for prospective marriage and partner visas
Portfolio	Immigration and Border Protection
Authorising legislation	<i>Australian Citizenship Act 2007; Migration Act 1958</i>
Last day to disallow	24 November 2016
Rights	Protection of the family; family reunion; privacy; rights of children (see Appendix 2)

Background

1.6 The Migration Legislation Amendment (2016 Measures No. 3) Regulation 2016 (the regulation) contains seven schedules of amendments relating to the Migration Regulations 1994 (Migration Regulations) and the Australian Citizenship Regulations 2007, including in respect of applications for a Prospective Marriage (Temporary) (Class TO) visa, a Partner (Provisional) (Class UF) visa and a Partner (Temporary) (Class UK).

1.7 The *Migration Amendment (Family Violence and Other Measures) Act 2016* amended the *Migration Act 1958* (Migration Act) to require a proposed sponsor for a family visa to be assessed and approved as a sponsor before a visa application can be made.

1.8 In its *Report 7 of 2016*, the committee noted that, to assess the compatibility of the Migration Amendment (Family Violence and Other Measures) Bill 2016 with the right to protection of the family, it would be necessary to assess the criteria for a person to be approved as a family visa sponsor once this was prescribed by regulation.¹ This regulation prescribes the criteria for a person to be approved as a family visa sponsor.

1 Parliamentary Joint Committee on Human Rights, *Report 7 of 2016* (11 October 2016) 93-94.

Approval of persons as family visa sponsors

1.9 Schedule 6 of the regulation amends the Migration Regulations to impose a limitation on the approval for sponsorship in respect of prospective marriage and partner visas.

1.10 New section 1.20KC of the Migration Regulations requires the Minister for Immigration and Border Protection to refuse the sponsorship of each applicant for a visa in circumstances where the sponsor has been convicted of a 'relevant offence or relevant offences',² and the sponsor has a significant criminal record in relation to this offence or offences.³ A 'significant criminal record' is defined at new section 1.20KD(1), and includes where a sponsor has been sentenced to two or more terms of imprisonment where the total is 12 months or more.

1.11 However, the minister has the discretion to approve the sponsorship where the minister considers it is reasonable.⁴ In considering whether it is reasonable to approve sponsorship, the minister is required to have regard to certain information, such as the best interests of any children of the sponsor and/or applicant, or the length of time since the sponsor completed the sentence(s) for the relevant offence(s).⁵

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

1.12 The right to protection of the family includes ensuring that family members are not involuntarily separated from one another.⁶

1.13 The measure engages and limits this right insofar as, under certain circumstances where sponsorship of an applicant is refused by the minister pursuant to section 1.20KC(3), spouses can be separated from each other, and from their

2 'Relevant offence' is defined as involving (a) violence against a person, including (without limitation) murder, assault, sexual assault and the threat of violence; (b) the harassment, molestation, intimidation or stalking of a person; (c) the breach of an apprehended violence order, or a similar order, issued under a law of a state, a territory or a foreign country; (d) firearms or other dangerous weapons; (e) people smuggling; (f) human trafficking, slavery or slavery-like practices (including forced marriage), kidnapping or unlawful confinement; (g) attempting to commit an offence involving any of the matters mentioned in paragraphs (a) to (f), or paragraph (h); (h) aiding, abetting, counselling or procuring the commission of an offence involving any of the matters mentioned in paragraphs (a) to (g): new section 1.20KC(2).

3 Section 1.20KC(3).

4 Section 1.20KC(4).

5 See, section 1.20KC(4).

6 See articles 17 and 23 of the International Covenant on Civil and Political Rights and article 10 of the International Covenant on Economic, Social and Cultural Rights. In respect of children in particular, separation of a child from their parent is prohibited unless this is in the best interests of the child, as determined by competent authorities subject to judicial review; see article 9 of the Convention on the Rights of the Child.

children. That is, an individual may not be granted a visa to join their family member in Australia as that family member has not been approved as a sponsor.

1.14 Under international human rights law, the right to protection of the family may be subject to permissible limitations where the measure pursues a legitimate objective, is rationally connected to that objective and is proportionate to achieve that objective.

1.15 The statement of compatibility states that the amendments to the Migration Regulations provided for by Schedule 6 implements Action Item 11 of the Second Action Plan 2013-2016 of the National Plan to Reduce Violence against Women and their Children 2010-2020 (the Second Action Plan), which states:

...overseas spouses entering Australia will receive strengthened support by requiring additional information disclosure by the Australian husband or fiancé applying for an overseas spouse visa.⁷

1.16 The stated objective of the measure is to 'inform and protect potentially vulnerable people from harm'.⁸ This appears to be a legitimate objective from the perspective of international human rights law as it addresses a pressing and substantial concern.

1.17 The requirement under the regulation to be assessed and approved as a sponsor is limited to a Prospective Marriage (Temporary) (Class TO) visa, a Partner (Provisional) (Class UF) visa and a Partner (Temporary) (Class UK). The statement of compatibility also provides the following explanation as to how the measures are likely to be effective in achieving the stated objective, demonstrating a rational connection to that objective:

These amendments build on the existing ability to request a police check be provided by sponsors of certain Child and Partner visa applicants, where there is a minor child in the application. These existing measures ensure that minor visa applicants seeking to enter or remain in Australia on certain Partner or Child visas are protected from being sponsored by people with convictions for child sex or other serious offences indicating they might pose a significant risk to a child in their care. These amendments recognise that some adult visa applicants can also be vulnerable.⁹

1.18 The statement of compatibility explains how the measure is proportionate to the stated objective:

- the relevant offences in section 1.20KC(2) are limited to certain crimes against the person and crimes relating to intimidation or harassment,¹⁰ and

7 Explanatory statement (ES), statement of compatibility (SOC) 10.

8 ES, SOC 13.

9 ES, SOC 12-13.

10 See footnote 2.

the sponsor is required to have a significant criminal record,¹¹ in respect of these specified crimes;¹²

- safeguards exist alongside the operation of the measure, including access to merits review by the Administrative Appeals Tribunal or judicial review by a court in relation to a final decision to refuse an application;¹³
- there is some flexibility in the application of the measure through the provision of discretion to the minister or delegate to approve sponsorship even where a sponsor has been convicted of an offence;¹⁴ and
- sponsors whose sentences or convictions have been quashed or nullified, or who have been pardoned, will not be detrimentally affected by this measure.¹⁵

1.19 On balance, the above elements of the scheme appear sufficient to ensure that the scheme is a proportionate limit on the right to protection of the family. In particular, the measure appears to be sufficiently circumscribed in relation to the criteria to be applied, safeguards exist in the form of access to administrative and judicial review, and the minister or delegate's discretion may provide a degree of flexibility in relation to the measure.

Committee comment

1.20 **The committee previously indicated that it would be necessary to consider the criteria for a person to be approved as a family visa sponsor, which have now been prescribed by this regulation.**

1.21 **Noting the preceding legal analysis, the committee considers that the process for approval as a family visa sponsor, set out in the regulation, is likely to be compatible with the right to protection of the family.**

Disclosure of information to visa applicants

1.22 Items 4 and 7 of Schedule 6 of the instrument insert sections 300.222(2) and 309.222(2) into Schedule 2 of the Migration Regulations. These new sections provide that the sponsor or prospective spouse consents to disclosure by the Department of Immigration and Border Protection (the department) to the visa applicant(s) of their

11 At subsection 1.20KD(1): in relation to a relevant offence or relevant offences if, for that offence or those offences: (a) the sponsor has been sentenced to death; or (b) the sponsor has been sentenced to imprisonment for life; or (c) the sponsor has been sentenced to a term of imprisonment of 12 months or more; or (d) the sponsor has been sentenced to 2 or more terms of imprisonment, where the total of those terms is 12 months or more.

12 ES, SOC 13.

13 ES, SOC 14.

14 ES, SOC 13.

15 ES, SOC 12.

conviction for a 'relevant offence(s)'.¹⁶ Consent to this disclosure is a criterion of the visa grant.¹⁷

Compatibility of the measure with the right to privacy

1.23 The right to privacy encompasses respect for informational privacy, including the right to respect for private information and private life, particularly the use and sharing of such information.¹⁸

1.24 The measure engages and limits the right to privacy by providing for the disclosure of the personal information of the sponsor or prospective spouse by the department to the visa applicant (a spouse or family member). Under international human rights law, the right to privacy may be subject to permissible limitations where the measure pursues a legitimate objective, is rationally connected to that objective and is a proportionate way to achieve that objective.

1.25 It can be understood that the objective of this measure is, as above, to inform and protect potentially vulnerable people from harm.¹⁹ The statement of compatibility notes that the Second Action Plan specifically states that overseas spouses entering Australia will receive strengthened support owing to the requirement on their partner to disclose certain information when applying for a sponsor visa.²⁰

1.26 The statement of compatibility suggests that the disclosure of the sponsor's personal information by the department to the applicant is 'reasonable, proportionate and necessary', as it 'will ensure that visa applicants are aware of the sponsor's relevant history as it relates to instances of family violence, and any potential risk to their safety and the safety of their children.'²¹

1.27 The disclosure of information to visa applicants pursuant to this regulation is limited to visa applicants for a Prospective Marriage (Temporary) (Class TO) visa, a Partner (Provisional) (Class UF) visa and a Partner (Temporary) (Class UK). It can be accepted that the provision of information to these people regarding the type of offences covered by the measure is rationally connected to the objective of the measure.

1.28 The measure also provides that the conviction of the sponsor or prospective spouse is to be disregarded where the conviction has been quashed or otherwise nullified, or the sponsor or prospective spouse has been pardoned.²² Accordingly, the

16 ES 39. As set out above 'relevant offence' is defined to include a range of violent offences.

17 ES 39.

18 Article 17 of the International Covenant on Civil and Political Rights.

19 ES, SOC 13.

20 ES, SOC 11.

21 ES, SOC 14.

22 Schedule 6, Items 4 and 7, sections 300.222(3) and 309.222(3).

measure circumscribes which kind of information is to be provided (while excluding less relevant information).

1.29 The requirement to disclose a prior conviction appears to be sufficiently targeted to relevant information, while excluding irrelevant information, and therefore, it appears that the measure is likely to be a proportionate limitation on the right to privacy.

Committee comment

1.30 **Noting the preceding legal analysis, the committee considers that the regulation is likely to be compatible with the right to privacy.**

Bills not raising human rights concerns

1.31 Of the bills introduced into the Parliament between 21 and 24 November 2016, the following did not raise human rights concerns (this may be because the bill does not engage or promotes human rights, and/or permissibly limits human rights):

- Corporations Amendment (Crowd-sourced Funding) Bill 2016;
- Corporations Amendment (Professional Standards of Financial Advisers) Bill 2016;
- Fair Work Amendment (Protecting Christmas) Bill 2016;
- Hazardous Waste (Regulation of Exports and Imports) Amendment Bill 2016;
- Hazardous Waste (Regulation of Exports and Imports) Levy Bill 2016;
- High Speed Rail Planning Authority Bill 2016;
- National Health Amendment (Pharmaceutical Benefits) Bill 2016; and
- Renew Australia Bill 2016.

Chapter 2

Concluded matters

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

2.2 Correspondence relating to these matters is included at **Appendix 3**.

Social Services Legislation Amendment (Transition Mobility Allowance to the National Disability Insurance Scheme) Bill 2016

Purpose	Proposes to amend the <i>Social Security Act 1991</i> and the <i>Social Security (Administration) Act 1999</i> to restrict the eligibility criteria for mobility allowance, to provide that the allowance will no longer be payable to individuals who transition to the National Disability Insurance Scheme and to close the mobility allowance program from 1 July 2020
Portfolio	Social Services
Introduced	House of Representatives, 13 October 2016
Right	Equality and non-discrimination (see Appendix 2)
Previous reports	8 of 2016

Background

2.3 The committee first reported on the Social Services Legislation Amendment (Transition Mobility Allowance to the National Disability Insurance Scheme) Bill 2016 (the bill) in its *Report 8 of 2016*, and requested a response from the Minister for Social Services by 18 November 2016.¹

2.4 The minister's response to the committee's inquiries was received on 18 November 2016. The response is discussed below and is reproduced in full at **Appendix 3**.

Discontinuing the mobility allowance program

2.5 Schedule 1 of the bill seeks to amend the *Social Security Act 1991* to replace the current definitions which determine who is qualified to receive mobility allowance. Mobility allowance is a payment designed to assist with transport costs

¹ Parliamentary Joint Committee on Human Rights, *Report 8 of 2016* (9 November 2016) 9-11.

for persons with a disability who participate in work and certain approved activities and who are unable to use public transport without substantial assistance.

2.6 The amendments will provide that the mobility allowance provisions only apply to persons aged between 16 and 65 (the current age requirement is only that the person be over 16). This eligibility criterion would apply to new claimants from 1 January 2017. The bill also provides that the mobility allowance will cease on 1 July 2020 consistent with the transition from the mobility allowance to the National Disability Insurance Scheme (NDIS).

2.7 The initial human rights analysis acknowledged that the transition to the NDIS generally promotes the rights of persons with disabilities and may involve the reallocation of resources. However, limiting access to the mobility allowance so that those aged over 65 would no longer qualify for this additional allowance engages and limits the right to equality and non-discrimination on the basis of age.²

2.8 The initial human rights analysis noted that the statement of compatibility addresses the issue of age discrimination. The statement of compatibility explains that the amendment is intended to provide consistency with the access requirements for the NDIS, which applies to persons under the age of 65, and that the NDIS:

...is part of a broader system of support available in Australia and persons over the age of 65 who are not eligible for assistance through the National Disability Insurance Scheme can access support through the aged care system. This limitation is reasonable and necessary because it supports the broader intent of an integrated system of support operating nationally and providing seamless transition through different phases of life.³

2.9 The statement of compatibility also addresses transitional arrangements for those recipients of the mobility allowance who turn 65 prior to the discontinuation of the mobility allowance program in 2020. These recipients will not be affected by the change, and can continue to be paid the mobility allowance. The statement of compatibility then states:

Once the mobility allowance program is closed, any remaining recipients will either transition to the National Disability Insurance Scheme or be supported under continuity of support arrangements. Funding for continuity of support arrangements includes current recipients aged 65 or

2 Persons aged 65 and older also do not qualify for support under the NDIS. For the committee's previous examination of this issue see the analysis of the National Disability Insurance Scheme Legislation Amendment Bill 2013 and DisabilityCare Australia Fund Bill 2013 and eleven related bills in Parliamentary Joint Committee on Human Rights, *First Report of the 44th Parliament* (10 December 2013) 187-196; *Third Report of the 44th Parliament* (4 March 2014) 91-100; and *Seventh Report of the 44th Parliament* (18 June 2014) 76-81.

3 Explanatory memorandum (EM), statement of compatibility (SOC) 13.

over who will be ineligible to transition to the National Disability Insurance Scheme.⁴

2.10 The initial human rights analysis observed that it was not clear from the statement of compatibility what the 'continuity of support arrangements' for those over 65 years will be once the mobility allowance program is closed. It was also not explained whether those aged 65 and older who are not receiving mobility allowance when the program is closed (but who would qualify for support under the existing law) will be eligible to receive comparable support through the aged care system.

2.11 Accordingly, the committee sought the minister's advice as to whether the continuity of support arrangements for existing recipients of mobility allowance will provide for the same level of support as that existing under the current allowance.

2.12 The committee also sought the minister's advice as to whether there is comparable assistance under the aged care system for persons aged 65 and older who participate in work and other approved activities (given there may be persons who are not currently receiving the allowance and who, if the program were not closed, would otherwise be eligible to receive mobility allowance).

Minister's response

2.13 In relation to continuity of support arrangements for existing recipients of mobility allowance, the minister's response states that continuity of support will provide support for existing Commonwealth disability support program recipients who are assessed as ineligible for the NDIS to achieve similar outcomes, in accordance with the NDIS bilateral agreements, even if the arrangements for doing that change over time. In the short term, continuity of support will be provided through existing programs. However, the minister's response indicates that long term continuity of support arrangements have yet to be finalised.

2.14 In relation to whether there is comparable assistance under the aged care system for persons aged 65 and older to participate in work and other approved activities, the minister's response states that the Australian Government subsidises many different types of aged care services to help people stay as independent as they can, including support for living in their own home and transport services. Under aged care arrangements there are two types of transport services available. A person can be picked up by a transport service or they can receive vouchers or subsidies, such as for taxi services. Given that the purpose of mobility allowance is to assist the recipient with the cost of transportation while they are undertaking approved activities, the minister advises that transport services within the aged care system achieve the same outcomes without the need for ongoing monetary payments. Additionally, affected individuals aged 65 and over will continue to be supported by other services that address mobility issues. Two of these services appear to relate to mobility, being GST exempt purchase of cars for work use, where

4 EM, SOC 13.

the individual has a disability affecting them to the extent they cannot use public transport, and state and territory transport, vehicle modification and parking subsidies.

2.15 As noted in the previous human rights analysis of the bill, the transition to the NDIS generally promotes the rights of persons with disabilities and may involve the reallocation of resources. The information provided by the minister indicates that there are a range of programs in place, including transitional arrangements to support people over 65 years of age in relation to transport and mobility. Such programs will assist to provide ongoing support to people over the age of 65 even after the mobility allowance is discontinued. On the basis of the information provided by the minister and the range of ongoing support for persons over 65 years of age, it appears that discontinuing the mobility allowance program is likely to be compatible with the right to equality and non-discrimination on the basis of age.

Committee response

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

2.17 **Noting the preceding legal analysis and the advice of the minister, the committee considers that the measure is likely to be compatible with the right to equality and non-discrimination on the basis of age.**

Australian Public Service Commissioner's Directions 2016 [F2016L01430]

Purpose	Prescribes standards which Agency Heads and Australian Public Service (APS) employees must comply with to meet their obligations under the <i>Public Service Act 1999</i>
Portfolio	Prime Minister and Cabinet
Authorising legislation	<i>Public Service Act 1999</i>
Last day to disallow	30 November 2016
Right	Privacy (see Appendix 2)
Previous report	8 of 2016

Background

2.18 The committee first reported on the Australian Public Service Commissioner's Directions 2016 (the directions) in its *Report 8 of 2016*, and requested further information from the Australian Public Service Commissioner (the Commissioner).¹

2.19 The Commissioner's response to the committee's inquiries was received on 22 November 2016. The response is discussed below and is reproduced in full at **Appendix 3**.

Publishing termination decision for breach of the Code of Conduct

2.20 Paragraph 34(1)(e) of the directions provides that decisions to terminate the employment of an ongoing APS employee for breach of the Code of Conduct must be published in the Public Service Gazette (the Gazette). The requirement to publish details of an APS employee when their employment has been terminated on the grounds of breach of the Code of Conduct in the Gazette engages and limits the right to privacy.

2.21 The committee reported on previous similar directions in its *Sixth Report of 2013*, *Eighteenth Report of the 44th Parliament* and *Twenty-first Report of the*

1 Parliamentary Joint Committee on Human Rights, *Report 8 of 2016* (9 November 2016) 12-15.

44th Parliament.² This previous analysis raised concerns about the compatibility of measures relating to the notification in the Gazette of certain employment decisions, particularly in relation to the publication of decisions to terminate employment and the grounds for termination, with the right to privacy and the rights under the Convention on the Rights of Persons with Disabilities (CRPD).

2.22 In response to these previous concerns, the Commissioner conducted a review of the Australian Public Service Commissioner's Directions 2013 [F2013L00448] (the 2013 directions). As a result, the 2013 directions were amended by the Australian Public Service Commissioner's Amendment (Notification of Decisions and Other Measures) Direction 2014 [F2014L01426] (the amendment direction) to remove most of the requirements to publish termination decisions. However, the requirement to notify termination on the grounds of the breach of the Code of Conduct in the Gazette was retained.

2.23 In its *Twenty-first Report of the 44th Parliament*,³ the committee acknowledged that the amendment direction addressed the committee's concerns in relation to the compatibility of the 2013 directions with the CRPD, and largely addressed the committee's concerns in relation to their compatibility with the right to privacy. However, the committee considered that the retained measure to publish details of an APS employee when their employment has been terminated on Code of Conduct grounds limited the right to privacy.

2.24 The statement of compatibility to the directions states that the notification of certain employment decisions in the Gazette promotes APS employees' right to privacy insofar as there is an option for agency heads to decide that a name should not be included in the Gazette because of the person's work-related or personal circumstances.

2.25 The initial human rights analysis of the directions clarified that rather than promoting the right to privacy, the requirement arising from paragraph 34(1)(e) of the directions is a limit on the right to privacy, albeit one that may be justified as reasonable and proportionate to a legitimate objective.⁴

2 See, Parliamentary Joint Committee on Human Rights, *Sixth Report of 2013* (15 May 2013) Australian Public Service Commissioner's Directions 2013 [F2013L00448] 133-134; *Eighteenth Report of the 44th Parliament* (10 February 2015) Australian Public Service Commissioner's Amendment (Notification of Decisions and Other Measures) Direction 2014 [F2014L01426] 65-67; and *Twenty-first Report of the 44th Parliament* (24 March 2015) Australian Public Service Commissioner's Amendment (Notification of Decisions and Other Measures) Direction 2014 [F2014L01426] 25-28.

3 Parliamentary Joint Committee on Human Rights, *Twenty-first Report of the 44th Parliament* (24 March 2015) 25-28.

4 Parliamentary Joint Committee on Human Rights, *Report 8 of 2016* (9 November 2016) 12-15.

2.26 As noted with respect to the amendment direction, the committee accepts that maintaining public confidence in the good management and integrity of the APS is likely to be a legitimate objective for the purposes of international human rights law. However, the statement of compatibility provides no assessment of why the requirement arising from paragraph 34(1)(e) of the directions is a reasonable and proportionate limit on the right to privacy in pursuit of this objective.

2.27 The initial human rights analysis noted that neither the statement of compatibility, nor the Commissioner's response to the committee's previous inquiries, provide significant evidence as to how publishing personal information would achieve the apparent objective of showing that the APS deals properly with serious misconduct.

2.28 In relation to whether there are other, less restrictive, ways to achieve the same aim, the initial human rights analysis observed that there are other methods by which an employer could determine whether a person has been dismissed from the APS for breach of the Code of Conduct rather than publishing an employee's personal details in the Gazette. For example, it would be possible for the APS to maintain a centralised, internal record of dismissed employees, or to use references to ensure that a previously dismissed APS employee is not rehired by the APS. These measures may be more likely to be of use in the hiring process than an employer searching past editions of the Gazette. Further, it would be possible to publish information in relation to the termination of employment for breaches of the Code of Conduct without the need to name the affected employee.

2.29 As these matters were not addressed by the statement of compatibility, the committee sought the advice of the Commissioner as to whether the limitation on the right to privacy is a reasonable and proportionate measure for the achievement of the apparent objective of the directions, and in particular, whether there are other less rights restrictive means available.

Australian Public Service Commissioner's response

2.30 The Commissioner's response recognises that the requirement to publish details of an APS employee when their employment has been terminated on the grounds of breach of the Code of Conduct in the Gazette engages and limits the right to privacy, and acknowledges that this limitation was not identified in the statement of compatibility.

2.31 The Commissioner notes that the committee has raised valid questions about whether the limitation is a reasonable or proportionate measure in upholding integrity in the APS, and agrees that further investigation into the requirement is warranted. The Commissioner's response notes that, as the provisions relating to the publication of details of employment termination decisions were last reviewed in 2014, it is timely to consider the continued publication of terminations of employment and whether there may be a less rights restrictive means of achieving the same objective.

2.32 The Commissioner's response states that he will undertake a review into the necessity of publicly notifying information about termination decisions on the grounds of breach of the Code of Conduct, and that this review will include appropriate consultation and examination of evidence regarding the deterrent effects and impact on public confidence in the good management and integrity of the APS. The Commissioner will notify the committee of his findings in this matter by June 2017.

Committee response

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

2.34 The committee notes that the Commissioner will undertake a review into the requirement to publish termination decisions and will notify the committee of his findings by June 2017.

2.35 The committee looks forward to receiving the Commissioner's findings in relation to his review into this matter.

Mr Ian Goodenough MP

Chair

Appendix 1

Deferred legislation

3.1 The committee has deferred its consideration of the following legislation for the reporting period:

- Commonwealth Electoral Amendment (Protect the Eureka Flag) Bill 2016;
- Crimes Legislation Amendment (International Crime Cooperation and Other Measures) Bill 2016;
- Veterans' Affairs Legislation Amendment (Digital Readiness and Other Measures) Bill 2016;
- Federal Financial Relations (National Partnership payments) Determination No. 112 (October 2016) [F2016L01724]; and
- Federal Financial Relations (General purpose financial assistance) Determination No. 91 (October 2016) [F2016L01725].

3.2 The committee continues to defer its consideration of the following legislation:

- Australian Border Force (Secrecy and Disclosure) Amendment (2016 Measures No. 1) Rule 2016 [F2016L01461];¹
- Defence Force Discipline Appeals Regulation 2016 [F2016L01452];²
- Narcotic Drugs Regulation 2016 [F2016L01613];³
- Proceeds of Crime Amendment (Approved Examiners and Other Measures) Regulation 2016 [F2016L01617];⁴
- Parliamentary Service Amendment (Notification of Decisions and Other Measures) Determination 2016 [F2016L01649];⁵
- Transport Security Legislation Amendment (Identity Security) Regulation 2016 [F2016L01656];⁶ and

1 See Parliamentary Joint Committee on Human Rights, *Report 8 of 2016* (9 November 2016) 93.

2 See Parliamentary Joint Committee on Human Rights, *Report 8 of 2016* (9 November 2016) 93.

3 See Parliamentary Joint Committee on Human Rights, *Report 9 of 2016* (22 November 2016) 61.

4 See Parliamentary Joint Committee on Human Rights, *Report 9 of 2016* (22 November 2016) 61.

5 See Parliamentary Joint Committee on Human Rights, *Report 9 of 2016* (22 November 2016) 61.

- Migration Legislation Amendment (2016 Measures No. 4) Regulation 2016 [F2016L01696].⁷

3.3 In addition, the committee continues to defer its consideration of the Racial Discrimination Amendment Bill 2016 and Racial Discrimination Law Amendment (Free Speech) Bill 2016 until it completes its current inquiry into freedom of speech in Australia.⁸

6 See Parliamentary Joint Committee on Human Rights, *Report 9 of 2016* (22 November 2016) 61.

7 See Parliamentary Joint Committee on Human Rights, *Report 9 of 2016* (22 November 2016) 61.

8 See Parliamentary Joint Committee on Human Rights, *Report 7 of 2016* (11 October 2016) 113. For more information on this inquiry, see the inquiry website at: http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights_inquiries/FreedomspeechAustralia.

Appendix 2

Short guide to human rights

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

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

Right to life

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

3.3 The right to life has three core elements:

- it prohibits the state from arbitrarily killing a person;
- it imposes an obligation on the state to protect people from being killed by others or identified risks; and
- it imposes on the state a duty to undertake an effective and proper investigation into all deaths where the state is involved (discussed below, [3.5]).

3.4 Australia is also prohibited from imposing the death penalty.

Duty to investigate

Articles 2 and 6 of the ICCPR

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

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

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

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

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

Prohibition against torture, cruel, inhuman or degrading treatment

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

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

3.7 The prohibition contains a number of elements:

- it prohibits the state from subjecting a person to torture or cruel, inhuman or degrading practices, particularly in places of detention;
- it precludes the use of evidence obtained through torture;
- it prevents the deportation or extradition of a person to a place where there is a substantial risk they will be tortured or treated inhumanely (see also non-refoulement obligations, [3.9] to [3.11]); and
- it requires an effective investigation into any allegations of such treatment and steps to prevent such treatment occurring.

3.8 The aim of the prohibition against torture, cruel, inhuman or degrading treatment is to protect the dignity of the person and relates not only to acts causing physical pain but also acts causing mental suffering. The prohibition is also an aspect of the right to humane treatment in detention (see below, [3.18]).

Non-refoulement obligations

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

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

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

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

Prohibition against slavery and forced labour

Article 8 of the ICCPR

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

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

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

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

Right to liberty and security of the person

Article 9 of the ICCPR

Right to liberty

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

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

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

- the right to compensation for unlawful arrest or detention.

Right to security of the person

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

Right to humane treatment in detention

Article 10 of the ICCPR

3.18 The right to humane treatment in detention provides that all people deprived of their liberty, in any form of state detention, must be treated with humanity and dignity. The right complements the prohibition on torture and cruel, inhuman or degrading treatment or punishment (see above, [3.6] to [3.8]). The obligations on the state include:

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

Freedom of movement

Article 12 of the ICCPR

3.19 The right to freedom of movement provides that:

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

Right to a fair trial and fair hearing

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

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

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

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

Presumption of innocence

Article 14(2) of the ICCPR

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

Minimum guarantees in criminal proceedings

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

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

- the presumption of innocence (see above, [3.22]);
- the right not to incriminate oneself (the ill-treatment of a person to obtain a confession may also breach the prohibition on torture, cruel, inhuman or degrading treatment (see above, [3.6] to [3.8]));
- the right not to be tried or punished twice (double jeopardy);
- the right to appeal a conviction or sentence and the right to compensation for wrongful conviction; and
- other specific guarantees, including the right to be promptly informed of any charge, to have adequate time and facilities to prepare a defence, to be tried in person without undue delay, to examine witnesses, to choose and meet with a lawyer and to have access to effective legal aid.

Prohibition against retrospective criminal laws

Article 15 of the ICCPR

3.24 The prohibition against retrospective criminal laws provides that:

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

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

Right to privacy

Article 17 of the ICCPR

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

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

3.27 The right to privacy contains the following elements:

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

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

Right to protection of the family

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

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

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

3.29 The right also encompasses:

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

Right to freedom of thought and religion

Article 18 of the ICCPR

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

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

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

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

3.33 The right to freedom of thought and religion also includes the right of a person not to be coerced in any way that might impair their ability to have or adopt a

religion or belief of their own choice. The right to freedom of religion prohibits the state from impairing, through legislative or other measures, a person's freedom of religion; and requires it to take steps to prevent others from coercing persons into following a particular religion or changing their religion.

Right to freedom of opinion and expression

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

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

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

Right to freedom of assembly

Article 21 of the ICCPR

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

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

Right to freedom of association

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

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

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

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

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

Right to take part in public affairs

Article 25 of the ICCPR

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

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

Right to equality and non-discrimination

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

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

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

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

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

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

Rights of the child

CRC

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

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

Obligation to consider the best interests of the child

Articles 3 and 10 of the CRC

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

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

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

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

3.47 Australia is required to treat applications by minors for family reunification in a positive, humane and expeditious manner. This obligation is consistent with articles 17 and 23 of the ICCPR, which prohibit interference with the family and require family unity to be protected by society and the state (see above, [3.29]).

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

Article 12 of the CRC

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

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

Right to nationality

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

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

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

Right to self-determination

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

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

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

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

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

Rights to and at work

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

Right to work

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

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

Right to just and favourable conditions of work

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

Right to social security

Article 9 of the ICESCR

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

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

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

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

Right to an adequate standard of living

Article 11 of the ICESCR

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

Right to health

Article 12 of the ICESCR

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

Right to education

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

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

Right to culture

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

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

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

Right to an effective remedy

Article 2 of the ICCPR

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

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

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

Appendix 3

Correspondence



The Hon Christian Porter MP
Minister for Social Services

18 NOV 2016

MC16-010043

Chair
Parliamentary Joint Committee on Human Rights
S1.111
P.O. BOX 6100
CANBERRA ACT 2600

Dear Chair

Thank you for your email of 9 November 2016 regarding Fairer Paid Parental Leave Bill 2016 and the Social Services Legislation Amendment (Transition Mobility Allowance to the National Disability Insurance Scheme) Bill 2016. I appreciate the time you have taken to bring these matters to my attention.

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 on whether certain components included in the Social Services Legislation Amendment (Transition Mobility Allowance to the National Disability Insurance Scheme) Bill 2016 and the Fairer Paid Parental Leave Bill 2016 are compatible with human rights, as defined in the Act.

With regard to the Social Services Legislation Amendment (Transition Mobility Allowance to the National Disability Insurance Scheme) Bill 2016, the Committee has questioned the compatibility of some of the proposed changes with the right to equality and non-discrimination. The enclosed document provides responses to the Committee's request for advice on compatibility of the Bill identified with those rights, and other matters.

I trust this information is of assistance.

Yours sincerely

The Hon Christian Porter MP
Minister for Social Services

Encl.

Social Services Legislation Amendment (Transition Mobility Allowance to the National Disability Insurance Scheme) Bill 2016

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 components included in the Social Services Legislation Amendment (Transition Mobility Allowance to the National Disability Insurance Scheme) Bill 2016 (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. This document provides responses to the Committee's request for advice on compatibility of the Bill identified with those rights, and other matters.

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

1.34 The transition to the NDIS generally promotes the rights of persons with disabilities, the preceding legal analysis raises questions as to the compatibility of the measures with the right to equality and non-discrimination on the basis of age.

Right to equality and non-discrimination on the basis of age

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 Mobility Allowance.

The Bill limits access to Mobility Allowance to persons under the age of 65. This amendment is intended to provide consistency with access requirements for the National Disability Insurance Scheme. Existing Mobility Allowance recipients will not be affected by this change and both new and existing recipients can continue to be paid Mobility Allowance if they turn 65 while receiving the payment. This is to ensure there is no loss of entitlement for current recipients on the basis of age.

Once the Mobility Allowance program is closed, any remaining recipients under 65 years of age will either transition to the National Disability Insurance Scheme or be supported under continuity of support arrangements. Mobility Allowance recipients who are aged 65 and over will be transitioned to continuity of support arrangements. Funding for continuity of support arrangements includes current recipients aged 65 or over who will be ineligible to transition to the National Disability Insurance Scheme.

The National Disability Insurance Scheme is part of a broader system of support available in Australia and persons over the age of 65 who are not eligible for assistance through the National Disability Insurance Scheme can access support through the aged care system. This limitation is reasonable and necessary because it supports the broader intent of an integrated system of support operating nationally and providing seamless transition through different phases of life.

The *Convention on the Rights of Persons with Disabilities* (CRPD) recognises the barriers that persons with disabilities may face in realising their rights. While the rights under all human rights treaties apply to everyone, including persons with disabilities, the CRPD applies human rights specifically to the context of persons with disabilities.

Article 3(b) of the CRPD provides that non-discrimination is a general principle in relation to all rights in the CRPD. As noted by the Human Rights Committee in General Comment No. 18 on equivalent rights in the *International Covenant on Civil and Political Rights* (ICCPR), the rights to equality and non-discrimination in the ICCPR sometimes require nation states 'to take affirmative action in order to diminish or eliminate conditions which cause or help perpetuate discrimination'. In this context, the amendments made by this Bill promote and advance the rights of persons with disabilities in Australia by strengthening support for them to exercise their social, economic and cultural rights through their participation in the National Disability Insurance Scheme.

Non-discrimination ensures that no-one is denied their rights because of factors such as race, colour, sex, language, religion, political or other opinion, national or social origin, property or birth. In addition to those grounds, discrimination on certain other grounds may also be prohibited. These grounds include age, nationality, marital status, disability, place of residence within a country and sexual orientation.

Differential treatment will not constitute discrimination if the differences in treatment are aimed at achieving a legitimate purpose and are reasonable and proportionate to this purpose.

Right to social security

This Bill engages the rights to social security contained in article 9 of the *International Covenant on Economic, Social and Cultural Rights* (ICESCR).

The right to social security requires that a system be established under domestic law, and that public authorities must take responsibility for the effective administration of the system. The social security scheme must provide a minimum essential level of benefits to all individuals and families that will enable them to cover essential living costs.

The amendments in this Bill initially tighten the eligibility criteria for Mobility Allowance and later close the program. These amendments are compatible with the right to social security as Mobility Allowance is not a social security payment intended to meet the regular costs of living; rather, it is a supplementary payment designed to assist with transport costs for people with a disability who are undertaking certain approved activities. Eligibility for social security pensions or benefits will be unaffected by these amendments. The assistance provided by Mobility Allowance is being replaced with individualised supports, including assistance with transportation, which will be provided under the National Disability Insurance Scheme. Therefore tightening eligibility rules, and then closing the program, ensures the more efficient allocation of resources. For people aged 65 and over, alternate transport arrangements may be provided through the Aged Care program.

To the extent that the changes in this Bill may limit the right to social security, those limitations are reasonable and proportionate to the policy objective of ensuring a sustainable and well-targeted payment system.

1.35 The committee seeks the Minister for Social Services advice as to whether the ‘continuity of support’ arrangements for existing recipients of Mobility Allowance provides for the same level of support as that existing under the current allowance

The Commonwealth has committed to providing continuity of support for existing Commonwealth disability support program recipients who are assessed as being not eligible for the NDIS.

This includes existing recipients of Mobility Allowance who will require Continuity of Support.

Continuity of support will provide support for these people to achieve similar outcomes, in accordance with the NDIS bilateral agreements, even if the arrangements for doing that change over time.

In the short term, continuity of support will be provided through existing programs. Commonwealth program recipients will be notified about long term continuity of support arrangements once they have been finalised.

1.36 The committee seeks the Minister for Social Services advice as to whether there is comparable assistance under the aged care system for persons aged 65 and older to participate in work and other approved activities (given there may be persons who are not currently receiving the allowance and who, if the program were not closed, would otherwise be eligible to receive mobility allowance.

The Australian Government subsidises many different types of aged care services. These aged care packages and programmes are there to help people stay as independent as they can, including living in your own home and transport services. Each programme or package has broad eligibility criteria and an assessment process to determine a person’s needs and eligibility. Under Aged Care arrangements there are two types of transport services available. A person can be picked up by a transport service or they can receive vouchers or subsidies, such as for taxi services. Given that the purpose of Mobility Allowance is to assist the recipient with the cost of transportation while they are undertaking approved activities, transport services within the Aged Care achieves the same outcomes without the need for ongoing monetary payments.

In addition to the transport services, affected individuals aged 65 and over will continue to be supported by a range of programmes and other services provided by the Commonwealth and state governments. Some of these assistance programs provide services to address mobility issues faced by individuals. Assistance programs available to these individuals include:

- GST exempt purchase of cars for work use, where the individual has a disability affecting them to the extent they cannot use public transport;
- the Employment Assistance Fund, providing financial assistance for people with disability or their workforce modification equipment or services;
- Employment services, through jobactive, Disability Employment Services and the Community Development Program assisting job seekers (including those with disability) become job ready and find work, including through providing wage subsidies;

- Disabled Australian Apprentice Wage Support Program, providing wage and mentoring support for the employers hiring apprentices and trainees with disability;
- State and territory transport, vehicle modification and parking subsidies.

Once the Mobility Allowance program is closed, any remaining recipients will either transition to the National Disability Insurance Scheme or be supported under continuity of support arrangements. Funding for continuity of support arrangements includes current recipients aged 65 or over who will be ineligible to transition to the National Disability Insurance Scheme.



Australian Government
Australian Public Service Commission

Australian Public Service Commissioner

Chair
Parliamentary Joint Committee on Human Rights
S1.111
Parliament House
CANBERRA ACT 2600

Dear Mr Goodenough

Thank you for your letter of 10 November 2016, in which you sought my advice on the compatibility of the Australian Public Service Commissioner's Directions 2016 (the Directions) with the right to privacy.

Paragraph 34(1)(e) of the Directions requires the public notification of terminations of employment where the grounds is a breach of the Code of Conduct. As highlighted in the Committee's *Report 8 of 2016: Human rights scrutiny report*, this requirement engages and limits the right to privacy. The individual's name is usually included, except where the Agency Head chooses to withhold this information. This limitation was not identified in the accompanying statement of compatibility with Human Rights, as it had been addressed when the relevant change was made via the Australian Public Service Commissioner's Amendment (Notification of Decisions and Other Measures) Direction 2014.

The Committee raises valid questions about whether the limitation is a reasonable or proportionate measure in upholding integrity in the Australian Public Service (APS).

Further investigation is warranted. As these provisions were last reviewed in 2014, it is timely to consider the continued publication of terminations of employment and whether there may be a less rights-restrictive means of achieving the same objective.

Therefore, I shall review the necessity of publicly notifying this information. This will include appropriate consultation and examination of evidence regarding the deterrent effects and impact on public confidence in the good management and integrity of the APS. I will notify you of my findings in this matter by June 2017.

Yours sincerely

John Lloyd PSM
November 2016

Appendix 4

Guidance Note 1 and Guidance Note 2

GUIDANCE NOTE 1: Drafting statements of compatibility

December 2014

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

Background

Australia's human rights obligations

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

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

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

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

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

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

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

Civil and political rights

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

Economic, social and cultural rights

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

Limiting a human right

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

Prescribed by law

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

Legitimate objective

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

Rational connection

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

Proportionality

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

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

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

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

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

Retrogressive measures

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

The committee's approach to human rights scrutiny

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

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

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

The committee's expectations for statements of compatibility

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

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

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

³ The Attorney-General's Department guidance may be found at <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

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.

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.

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 civil penalties may be 'criminal' for the purpose of human rights law. See, for example, *Osiyuk v Belarus* (1311/04); *Sayadi and Vinck v Belgium* (1472/06).

When a civil penalty provision is 'criminal'

In light of the criteria described 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