



Parliamentary Joint Committee on Human Rights

Examination of legislation in accordance with the
Human Rights (Parliamentary Scrutiny) Act 2011

Bills introduced 20 – 30 October 2014

Legislative Instruments received

20 September – 10 October 2014

Fifteenth Report of the 44th Parliament

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Membership of the committee

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Senator Carol Brown	Tasmania, ALP
Senator Matthew Canavan	Queensland, NAT
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Senator Claire Moore	Queensland, ALP
Ms Michelle Rowland MP	Greenway, New South Wales, ALP
Senator Penny Wright	South Australia, AG
Mr Ken Wyatt AM MP	Hasluck, Western Australia, LP

Functions of the committee

The Committee has the following functions:

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

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Abbreviations

Abbreviation	Definition
CAT	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CEDAW	Convention on the Elimination of Discrimination against Women
CRC	Convention on the Rights of the Child
CRPD	Convention on the Rights of Persons with Disabilities
EM	Explanatory Memorandum
FRLI	Federal Register of Legislative Instruments
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
PJCHR	Parliamentary Joint Committee on Human Rights

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Executive summary

This report provides the Parliamentary Joint Committee on Human Rights' view on the compatibility with human rights as defined in the *Human Rights (Parliamentary Scrutiny) Act 2011* of bills introduced into the Parliament during the period 20 to 30 September 2014 and legislative instruments received during the period 20 September to 10 October 2014. The committee has also considered responses to the committee's comments made in previous reports.

Bills introduced 20 to 30 September 2014

The committee considered 25 bills, all of which were introduced with a statement of compatibility. Of these 25 bills, 10 do not require further scrutiny as they do not appear to give rise to human rights concerns. The committee has decided to defer its consideration of 14 bills.

The committee has identified one bill that it considers requires further examination and for which it will seek further information.

Legislative instruments received between 20 September and 10 October 2014

The committee considered 86 legislative instruments received between 20 September and 10 October 2014. All instruments tabled in this period are listed in the Journals of the Senate.¹

Of these 86 instruments, none appear to raise any human rights concerns and all are accompanied by statements of compatibility that are adequate.

Responses

The committee has considered one response relating to matters raised in relation to bills and legislative instruments in previous reports. There are no concluded matters in this report.

Senator Dean Smith
Chair

¹ Journals of the Senate, available at:
http://www.aph.gov.au/Parliamentary_Business/Chamber_documents/Senate_chamber_documents/Journals_of_the_Senate

Chapter 1 – New and continuing matters

This chapter lists new matters identified by the committee at its meeting on 14 November 2014, and continuing matters in relation to which the committee has received recent correspondence. The committee will write to the relevant proponent of the bill or instrument maker in relation to substantive matters seeking further information.

Matters which the committee draws to the attention of the proponent of the bill or instrument maker are raised on an advice-only basis and do not require a response.

This chapter includes the committee's consideration of 11 bills introduced between 20 and 30 October 2014.

Amending Acts 1970 to 1979 Repeal Bill 2014

Portfolio: Attorney-General

Introduced: House of Representatives, 22 October 2014

Purpose

1.1 The Amending Acts 1970 to 1979 Repeal Bill 2014 (the bill) seeks to repeal amending and repeal Acts on the basis that they are no longer required.

Committee view on compatibility

1.2 **The committee considers that the bill is compatible with human rights and has concluded its examination of the bill.**

Australian War Memorial Amendment Bill 2014

Portfolio: Veterans' Affairs

Introduced: House of Representatives, 30 October 2014

Purpose

1.3 The Australian War Memorial Amendment Bill 2014 (the bill) seeks to amend the *Australian War Memorial Act 1980* to prohibit the levying of entry or parking fees at the Australian War Memorial premises in Campbell in the Australian Capital Territory.

Committee view on compatibility

1.4 **The committee considers that the bill is compatible with human rights and has concluded its examination of the bill.**

Building Energy Efficiency Disclosure Amendment Bill 2014

Portfolio: Industry

Introduced: House of Representatives, 22 October 2014

Purpose

1.5 The Building Energy Efficiency Disclosure Amendment Bill 2014 (the bill) seeks to amend the *Building Energy Efficiency Disclosure Act 2010* (the BEED Act) to:

- provide exemptions from disclosing energy efficiency information when commercial office space of 2000 square metres or more is offered for sale or lease to building owners who receive unsolicited offers for the sale or lease of their office space;
- allowing transactions between wholly-owned subsidiaries to be excluded from disclosure obligations;
- amend elements of the BEED Act in relation to the status of assessments undertaken by assessors accredited under the National Australian Built Environment Rating System (NABERS) Program but not accredited under the CBD Program;
- introduce the ability to determine a commencement date for a Building Energy Efficiency Certificate (BEEC) which is later than the date of issue; and
- remove the need for new owners and lessors to reapply or pay the application fee for new exemptions if there is an existing one in place for a building.

Committee view on compatibility

1.6 **The committee considers that the bill is compatible with human rights and has concluded its examination of the bill.**

Corporations Amendment (Publish What You Pay) Bill 2014

Sponsor: Senator Christine Milne

Introduced: Senate, 28 October 2014

Purpose

1.7 The Corporations Amendment (Publish What You Pay) Bill 2014 (the bill) seeks to amend the *Corporations Act 2001* to establish mandatory reporting of payments made by Australian-based extractive companies to foreign governments. The bill would require companies to disclose these payments on a country-by-country and project-by-project basis, and would apply to all Australian companies involved in extractive industries.

Committee view on compatibility

1.8 **The committee considers that the bill is compatible with human rights and has concluded its examination of the bill.**

Corporations Legislation Amendment (Deregulatory and Other Measures) Bill 2014

Portfolio: Treasury

Introduced: House of Representatives, 22 October 2014

Purpose

1.9 The Corporations Legislation Amendment (Deregulatory and Other Measures) Bill 2014 (the bill) seeks to amend the *Corporations Act 2001* (Corporations Act) and the *Australian Securities and Investments Commission Act 2001* (ASIC Act) to:

- change the requirements for the calling of extra-ordinary meetings of shareholders;
- reduce remuneration reporting requirements;
- clarify the circumstances in which a financial year may be less than 12 months;
- exempt certain companies limited by guarantee from the need to appoint or retain an auditor; and
- extend the Remuneration Tribunal's remuneration setting responsibility to include certain Corporations Act bodies.

Committee view on compatibility

1.10 **The committee considers that the bill is compatible with human rights and has concluded its examination of the bill.**

Customs Amendment (Japan-Australia Economic Partnership Agreement Implementation) Bill 2014

Portfolio: Immigration and Border Protection

Introduced: House of Representatives, 29 October 2014

Purpose

1.11 The Customs Amendment (Japan-Australia Economic Partnership Agreement Implementation) Bill 2014 (the bill) seeks to amend the *Customs Act 1901* (the Customs Act) to introduce new rules of origin for goods that are imported into Australia from Japan to give effect to the Japan-Australia Economic Partnership Agreement. These proposed amendments will enable goods that satisfy the rules of origin to enter Australia at preferential rates of customs duty.

Committee view on compatibility

1.12 **The committee considers that the bill is compatible with human rights and has concluded its examination of the bill.**

Customs Tariff Amendment (Japan-Australia Economic Partnership Agreement Implementation) Bill 2014

Portfolio: Immigration and Border Protection

Introduced: House of Representatives, 29 October 2014

Purpose

1.13 The Customs Tariff Amendment (Japan-Australia Economic Partnership Agreement Implementation) Bill 2014 (the bill) seeks to amend the *Customs Tariff Act 1995* (the Customs Tariff) to implement the Japan-Australia Economic Partnership Agreement (the Agreement) by:

- providing free rates of customs duty for certain goods that are Japanese originating goods;
- amending Schedule 4 to the Customs Tariff to maintain customs duty rates for certain Japanese originating goods in accordance with the applicable concessional item; and
- phasing the preferential rates of customs duty for certain goods to Free by 2021.

Committee view on compatibility

1.14 **The committee considers that the bill is compatible with human rights and has concluded its examination of the bill.**

Export Finance and Insurance Corporation Amendment (Direct Lending and Other Measures) Bill 2014

Portfolio: Trade and Investment

Introduced: House of Representatives, 22 October 2014

Purpose

1.15 The Export Finance and Insurance Corporation Amendment (Direct Lending and Other Measures) Bill 2014 (the bill) seeks to amend the *Export Finance and Insurance Corporation Act 1991* to expand the Export Finance and Insurance Corporation (EFIC)'s powers to allow direct lending for export transactions involving all goods, and provides for competitive neutrality principles to apply to EFIC's operations.

Committee view on compatibility

1.16 **The committee considers that the bill is compatible with human rights and has concluded its examination of the bill.**

Tax and Superannuation Laws Amendment (2014 Measures No. 6) Bill 2014

Portfolio: Treasury

Introduced: House of Representatives, 30 October 2014

Purpose

1.17 The Tax and Superannuation Laws Amendment (2014 Measures No. 6) Bill 2014 (the bill) seeks to amend the *Income Tax Assessment Act 1997* to:

- amend existing business restructure roll-overs concessions;
- provide that foreign pension funds can access the managed investment trust (MIT) withholding tax regime and the associated lower rate of withholding tax on income from certain Australian investments; and
- provide an exemption from Australian tax on income derived by certain entities engaged by the Government of the United States of America (US) in connection with Force Posture Initiatives in Australia.

1.18 The bill would also amend the *Fuel Tax Act 2006* and the *Energy Grants (Cleaner Fuels) Scheme Regulations 2004* to ensure that changes to the amount of excise and excise-equivalent customs duty payable by taxpayers as a result of any tariff proposals tabled in the House of Representatives are taken into account in calculating fuel tax credits and the cleaner fuels grant for biodiesel and renewable diesel.

Committee view on compatibility

1.19 **The committee considers that the bill is compatible with human rights and has concluded its examination of the bill.**

Telecommunications (Interception and Access) Amendment (Data Retention) Bill 2014

Portfolio: Attorney-General

Introduced: House of Representatives, 30 October 2014

Purpose

1.20 The Telecommunications (Interception and Access) Amendment (Data Retention) Bill 2014 (the bill) would amend the *Telecommunications (Interception and Access) Act 1979* (the TIA Act) to introduce a mandatory data retention scheme. This scheme would require service providers to retain types of telecommunications data under the TIA Act for two years. The bill will also provide that:

- mandatory data retention would only apply to telecommunications data (not content);
- mandatory data retention would be reviewed by the Parliamentary Joint Committee on Intelligence and Security (PJCIS) three years after its commencement;
- the Commonwealth Ombudsman would have oversight of the mandatory data retention scheme and, more broadly, the exercise by law enforcement agencies of powers under chapters 3 and 4 of the TIA Act; and
- the number of agencies which would be able to access the data would be confined.

Background

1.21 The TIA Act has not previously been subject to an assessment of human rights compatibility as it was introduced prior to the inception of the committee. However, the aims of the proposed amendments to the TIA Act should be understood in terms of the key objective of the TIA Act, which is:

- to protect the privacy of telecommunications by criminalising the interception or accessing of communications; and
- to provide a framework to enable law enforcement and national security agencies to apply for warrants to intercept communications when investigating serious crimes and threats to national security in prescribed circumstances.¹

1 Australian Attorney-General's Department, *Submission 26*, Inquiry into the comprehensive revision of the *Telecommunications (Interception and Access) Act 1979*, Senate Legal and Constitutional Affairs References Committee, 4
http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Comprehensive_revision_of_TIA_Act/Submissions (accessed 10 November 2014).

1.22 Under the TIA Act, access to communications (content) requires a warrant while access to telecommunications data (metadata) does not. However, technology has significantly developed since the TIA Act was enacted with the development of new forms of communications technologies and, consequently, new forms of metadata. In this respect, the committee notes that the assessment of this bill brings into sharper focus potential inadequacies of the TIA Act in terms of specific safeguards around access to telecommunications data and content.

Committee view on compatibility

1.23 The committee notes that the Attorney-General's Department has provided a very informative and detailed statement of compatibility. The analysis and evidence provided in this statement has been of great assistance to the committee. It is an example of the type of analysis that the committee considers is necessary and appropriate for a statement of compatibility for the kinds of measures proposed in the bill.

Right to privacy

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

1.25 However, this right may be subject to permissible limitations which are provided by law and are not arbitrary. In order for limitations not to be arbitrary, they must seek to achieve a legitimate objective and be reasonable, necessary and proportionate to achieving that objective.

Mandatory data retention scheme –scope of data set to be retained

1.26 As noted at 1.20 above, Schedule 1 would require providers of telecommunications services to retain data in relation to all communications for a period of two years. Proposed section 187A(2) sets out the categories of data (the prescribed data set) to be collected and retained, including information relating to:

- the subscriber, accounts, telecommunications devices and other relevant services of a relevant service, (proposed section 187A(2)(a));
- the source of a communication (proposed section 187A(2)(b));
- the destination of a communication (proposed section 187A(2)(c));
- the date, time and duration of a communication (proposed section 187A(2)(d));
- the type of communication (proposed section 187A(2)(e)); and
- the location of the line, equipment or telecommunications device (proposed section 187A(2)(f)).

1.27 Proposed section 187A(4) limits the scope of mandatory data retention by specifying that service providers cannot be required to collect and retain the 'content' of a communication.

1.28 The statement of compatibility acknowledges that the scheme requiring mandatory retention of data engages and limits the right to privacy, and identifies the legitimate objective of the legislation as being:

...[the] protection of national security, public safety, addressing crime, and protecting the rights and freedoms of by [sic] requiring the retention of a basic set of communications data required to support relevant investigations.²

1.29 The statement of compatibility argues that the scheme's limitation of the right to privacy is justified due to the 'pressing social need' for enforcement agencies to effectively prosecute crime:

Access to historical data and analysis of inter-linkages with other data sources is vital to both reactive investigations into serious crime and the development of proactive intelligence on organised criminal activity and matters affecting national security. In 2012 the Queensland Crime and Misconduct Commission (now the Crime and Corruption Commission) stated that more than one-fifth of all of their investigations were being undermined by telecommunications data not being kept. In 2014 the Australian Federal Police (AFP) revealed that it could not identify more than one-third of all suspects in a current, major child exploitation investigation, because the telecommunications data is not available.³

1.30 The statement of compatibility separately assesses why each category of data is necessary in pursuit of the scheme's stated objective;⁴ and the committee considers that the statement of compatibility has generally established why particular categories of data are considered necessary for law enforcement agencies.

1.31 The committee notes that the proposed scheme would require private service providers to collect and retain data on each and every customer. A requirement to collect and retain data on every customer just in case that data is needed for law enforcement purposes is very intrusive of privacy,⁵ and raises an

2 Explanatory memorandum (EM) 10.

3 EM 6.

4 EM 13-16.

5 See, UN General Assembly Resolution, Right to privacy in the digital age http://www.un.org/ga/search/view_doc.asp?symbol=A/RES/68/167; See also, Office of the United Nations High Commissioner for Human Rights, The right to privacy in the digital age, A/HRC/27/37 (30 June 2014) http://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session27/Documents/A.HRC.27.37_en.pdf (accessed 5 November 2014).

issue of proportionality. Communications data can reveal quite personal information about an individual, even without the content of the data being made available, revealing who a person is in contact with, how often and where. This in turn may reveal the person's political opinions, sexual habits, religion or medical concerns. As the European Court of Justice has stated in its recent ruling that held that blanket retention of metadata was disproportionate, such data 'taken as a whole, may allow very precise conclusions to be drawn concerning the private lives of the persons whose data has been retained such as the habits of everyday life, permanent or temporary places of residence, daily or other movements, the activities carried out, the social relationships of those persons and the social environments frequented by them.'⁶ As such, the proposed scheme clearly limits the right to privacy. The committee therefore considers that the scheme must be sufficiently circumscribed to ensure that limitations on the right to privacy are proportionate (that is, are only as extensive as is strictly necessary).

1.32 In relation to the scope of the data set to be retained, the statement of compatibility states that the scheme is less restrictive of the right to privacy than covert investigative methods which involve the acquisition of the content or substance of communications.⁷ This is may be so but it is not analogous, as covert investigative methods collect data on specified individuals not, as the scheme would do, on all users.

1.33 The statement of compatibility notes that the categories of data to be collected and retained by service providers are not specified in the bill, but will be set out in regulations at a later date to ensure 'necessary technical detail [is available]...to telecommunications service providers about their data retention obligations while remaining sufficiently flexible to adapt to rapid and significant future changes in communications technology'.⁸ The statement of compatibility advises that the types of content may include:

- identification information of account holders such as name, date of birth and address;
- network identifies such as Internet Protocol (IP) addresses in relation to an account;
- download volumes;
- location and destination of a communication;
- information about when a communication commenced or concluded;

6 See *Digital Rights Ireland Ltd (C-293/12) and Kärntner Landesregierung ors (C-594/12), v Minister for Communications, Marine and Natural Resources and ors* (8 April 2014),[27].

7 EM 5.

8 EM 7.

- type of communication such as internet access, email or a telephone call; and
- location of the equipment used in the communication.⁹

1.34 These categories of data may provide significant identifying details about an individual, and therefore may significantly limit an individual's right to privacy. For example, the time of a communication and the location of communications equipment alone would provide significant details about an individual's life.

1.35 Given such potential use of metadata, the committee is concerned that the types of data to be collected remain unspecified until such time as the relevant regulation is made.

1.36 The committee recommends that, to avoid the arbitrary interference with the right to privacy that would result from reliance on regulations, the bill be amended to define the types of data that are to be retained.

1.37 If the bill is not amended, the committee recommends that the government release for consultation a exposure draft of the regulation specifying the types of data to be retained for the purposes of the scheme.

1.38 The concern about the undefined types of data to be collected is compounded by the fact that what constitutes the 'content' of a communication (and would therefore be excluded from collection) is undefined in the bill, which could see data retained that does include aspects of content. For instance, meta-tags are used by website developers to provide search engines with information about their sites, and may contain significant information about a website including aspects of its content. However, it is unclear whether it is intended that meta-tags will be prescribed in the regulations as data to be retained for the purposes of the scheme.

1.39 The committee therefore recommends that, to avoid the arbitrary interference with the right to privacy that would result from not defining the content that is excluded from required retention, the bill be amended to include an exclusive definition of 'content' for the purposes of the scheme.

Mandatory data retention scheme—two year retention period

1.40 As noted at 1.20 above, Schedule 1 would require data retention for a period of two years. The statement of compatibility justifies the period of retention on the basis that law enforcement and national security agencies 'advise that a data retention period of two years is appropriate to support critical investigative capabilities'.¹⁰ The statement of compatibility notes that, under other data retention regimes, data accessed by agencies was 'frequently ... less than six months old',

9 EM 37-42.

10 EM 19.

however, '[e]xperience ... was that ... there was a higher requirement for data up to two years old for national security and complex criminal offences'.¹¹

1.41 A data retention period of two years raises the question of whether the period is disproportionate, and may go beyond the period necessary to achieve the scheme's legitimate objective. This question is resolved by reference to the purposes for which the data is accessed.

1.42 For example, despite the acknowledged low frequency of use of data that is more than six months old, and the stated requirement for older data for national security and complex criminal offences, the scheme does not limit access to data which is older than six months to the investigation of national security and complex criminal offences.

1.43 The committee therefore requests the further advice of the Attorney-General as to whether the two year retention period is necessary and proportionate in pursuit of a legitimate objective.

Mandatory data retention scheme—access to information

1.44 Currently under the TIA Act a broad number of agencies may access telecommunications data (metadata).¹² These agencies do not require a warrant to access this data. Chapter 4 of the TIA Act permits an 'authorised officer' of an 'enforcement agency' to authorise a service provider to disclose existing¹³ telecommunications data where it is 'reasonably necessary' for the enforcement of, 'a law imposing a pecuniary penalty or the protection of the public revenue'.¹⁴ The disclosure of prospective data may be authorised when it is considered 'reasonably necessary' for the investigation of an offence with a maximum prison term of at least three years.¹⁵ The TIA Act also allows senior ASIO officers to authorise access to existing telecommunications data and prospective data in performance of its functions.¹⁶

1.45 Schedule 2 of the bill would amend the definition of 'enforcement agency' under the TIA Act to confine the number of agencies that are able to access such data.¹⁷ The listed agencies would include the Australian Federal Police, a police force

11 EM 19.

12 TIA Act section 5.

13 TIA Act section 178. Existing data is information which existed before an authorisation for disclosure was received. It does not include information which comes into existence after the authorisation was received.

14 ITA Act section 179.

15 TIA Act section 180. Prospective data is data that comes into existence during the period the authorisation is in force.

16 TIA Act sections 175 and 176.

17 EM 19.

of a state and the Australian Commission for Law Enforcement Integrity. The minister would have the power under proposed section 110A to declare further authorities or bodies to be a 'criminal law enforcement agency' according to criteria specified in the bill.

1.46 The committee notes that the provisions in relation to ASIO's access to telecommunications data remain unchanged under the proposed scheme, and that confining the number of agencies that may access retained metadata is relevant to ensuring the proportionality of the scheme's limitation on the right to privacy.

1.47 The term 'data' is undefined in the TIA Act. Because of the significant developments in technology since the TIA Act was passed, the types of data that can now be accessed without a warrant is considerably broader than was the case when the access provisions under the TIA Act were enacted. The proposed requirement that private service providers retain undefined telecommunications data therefore further broadens, in practice, the types of data that may be accessed without a warrant. Notwithstanding this, the statement of compatibility argues that the threshold for enforcement agencies being able to access data remains appropriate:

Enforcement agencies may only issue authorisations enabling access to data where it is 'reasonably necessary' for a legitimate investigation and must consider the privacy impact of accessing telecommunications data. 'Reasonably necessary' is not a low threshold. It will not be 'reasonably necessary' to access data if it is merely helpful or expedient.¹⁸

1.48 There appear to be no significant limits on the type of investigation to which a valid disclosure authorisation for existing data may apply. For example, there is no requirement that the disclosure of telecommunications data be related to a serious crime, and the scheme may allow a disclosure authorisation where it is 'reasonably necessary' for the enforcement of minor offences. The lack of a threshold, relating to the nature and seriousness of the offence, for access to retained data appears to be a disproportionate limitation on the right to privacy. The committee considers that to ensure a proportionate limitation on the right to privacy, an appropriate threshold should be established to restrict access to retained data to investigations of specified threatened or actual crimes that are serious, or to categories of serious crimes such as major indictable offences (as is the current threshold for requiring the option of trial by jury). The committee is additionally concerned that the threshold of 'reasonably necessary' for the enforcement of offences may lack the requisite degree of precision.

1.49 **The committee therefore recommends that the bill, so as to avoid the disproportionate limitation on the right to privacy that would result from disclosing telecommunications data for the investigation of any offence, be amended to limit**

disclosure authorisation for existing data to where it is 'necessary' for the investigation of specified serious crimes, or categories of serious crimes.

1.50 While there are some safeguards in the TIA Act against misuse of data, the scheme may allow data that is disclosed for an authorised purpose to be used for unrelated purposes. For example, under information sharing provisions in the TIA Act and the *Australian Security Intelligence Organisation Act 1979*,¹⁹ the Australian Secret Intelligence Service (ASIS) may receive information obtained by ASIO under the TIA Act if it is relevant to ASIS's functions. The potential for data to be used by parties other than the requesting agency, and for purposes other than that for which the data was originally requested, appears to be a disproportionate limitation on the right to privacy.

1.51 The committee therefore recommends that, to avoid the disproportionate limitation on the right to privacy that would result from data that is disclosed for an authorised purpose being used for an unrelated purpose, the bill be amended to restrict access to retained data on defined objective grounds, including:

- **where it is 'necessary' for investigations of specific serious crimes such as major indictable offences or specific serious threats; and**
- **used only by the requesting agency for the purpose for which the request was made and for a defined period of time.**

1.52 There are also currently no exceptions for the retention and accessing of data on persons whose communications are subject to obligations of professional secrecy, such as lawyers. Under the proposed scheme, it would be possible for the data from a legal practitioner to be accessed, which raises questions as to whether this could impact on legal professional privilege. If it were to impact on legal professional privilege this would raise concerns as to whether this is proportionate with the right to privacy.

1.53 The committee is concerned that the communications data of persons subject to an obligation of professional secrecy may be accessed and that accessing this data could impact on legal professional privilege.

1.54 The committee therefore requests the advice of the Attorney General as to whether such data could, in any circumstances, impact on legal professional privilege, and if so, how this is proportionate with the right to privacy.

Mandatory data retention scheme –oversight and accountability

1.55 As noted above at 1.20, the Commonwealth Ombudsman would have oversight of the mandatory data retention scheme and the exercise of law enforcement agencies' powers under chapters 3 and 4 of the TIA Act. Additionally, the Parliamentary Joint Committee on Intelligence and Security (PJCIS) would be

19 Australian Security Intelligence Organisation Act (ASIO) section 18.

tasked with reviewing the scheme three years after its commencement. The committee considers that these are important oversight mechanisms taking into account the very intrusive nature of the proposed scheme.

1.56 The statement of compatibility usefully refers to a recent judgement of the Court of Justice of the European Union (ECJ) which examined the European Union (EU) mandatory metadata retention regime.²⁰ That regime contained some aspects similar to the proposed scheme under the bill. As noted in the statement of compatibility, the ECJ found the EU mandatory data retention law to be invalid on the basis that the interference with the right to privacy was not precisely circumscribed by provisions to ensure that it was actually limited to what was strictly necessary.²¹ One of the relevant factors in reaching this conclusion was the absence of a requirement that access to data be subject to prior review by a court or independent administrative body.

1.57 In light of this, the committee notes that the proposed oversight mechanisms in the bill are directed at reviewing access powers after they have been exercised. However, the statement of compatibility does not address the question of why access to metadata under the scheme should not be subject to prior review through a warrant system, as is the case for access to other forms of information under the TIA Act.

1.58 The committee considers that requirements for prior review would more effectively ensure that the grant of access to metadata under the scheme would be consistent with the right to privacy.

1.59 The committee therefore recommends that, so as to avoid the unnecessary limitation on the right to privacy that would result from a failure to provide for prior review, the bill be amended to provide that access to retained data be granted only on the basis of a warrant approved by a court or independent administrative tribunal, taking into account the necessity of access for the purpose of preventing or detecting serious crime and defined objective grounds as set out above at 1.51.²²

1.60 In relation to the proposed oversight of the scheme by the Commonwealth Ombudsman and the PJCS, the committee considers that these important subsequent review mechanisms should be complemented by close prior oversight of the recommended warrant process for access to retained metadata. Such an approach would be equivalent to, for example, the prior oversight provided by the

20 *Digital Rights Ireland Ltd (C-293/12) and Kärntner Landesregierung ors (C-594/12), v Minister for Communications, Marine and Natural Resources and ors* (8 April 2014).

21 EM 16-17.

22 In the case of emergencies application for warrants could occur by telephone as is currently the case under the TIA Act.

Independent National Security Legislation Monitor. Such a mechanism could assist to ensure impartial assessment of the content and sufficiency of a warrant application. The committee is of the view that this may be an important safeguard where warrant applications occur *ex parte* (that is, without the individual whose data is to be accessed being present).

1.61 The committee therefore recommends the establishment of a mechanism to provide close prior oversight of the recommended warrant process for access to retained metadata under the scheme.

Right to freedom of opinion and expression

1.62 The right to freedom of opinion and expression is protected by article 19 of the International Covenant on Civil and Political Rights (ICCPR). The right to freedom of opinion is the right to hold opinions without interference and cannot be subject to any exception or restriction. The right to freedom of expression extends to the communication of information or ideas through any medium, including written and oral communications, the media, public protest, broadcasting, artistic works and commercial advertising.

1.63 Under article 19(3), freedom of expression may be subject to limitations that are necessary to protect the rights or reputations of others, national security, public order (*ordre public*),²³ or public health or morals. Limitations must be prescribed by law, pursue a legitimate objective, be rationally connected to the achievement of that objective and a proportionate means of doing so.²⁴

Right to an effective remedy

1.64 Article 2 of the International Covenant on Civil and Political Rights (ICCPR) requires Australia to ensure access to an effective remedy for violations of human rights. States parties are required to establish appropriate judicial and administrative mechanisms for addressing claims of human rights violations under domestic law.

1.65 Australia is 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.

23 'The expression 'public order (*ordre public*)'...may be defined as the sum of rules which ensure the functioning of society or the set of fundamental principles on which society is founded. Respect for human rights is part of public order (*ordre public*): Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights U.N. Doc. E/CN.4/1985/4, Annex (1985), clause 22.

24 See, generally, Human Rights Committee, *General comment No 34 (Article 19: Freedoms of opinion and expression)*, CCPR/C/GC/34, paras 21-36 (2011).

1.66 Effective remedies should be appropriately adapted to take account of the special vulnerability of certain categories of person including, and particularly, children.

Mandatory data retention scheme

1.67 As noted at 1.20 above, Schedule 1 would require providers of telecommunications services to retain telecommunications data in relation to a communication for a period of two years.

1.68 The statement of compatibility identifies this aspect of the scheme as engaging and potentially limiting the right to freedom of expression and notes:

...requiring providers of telecommunications services to retain telecommunications data about the communications of its subscribers or users as part of a mandatory dataset may indirectly limit the right to freedom of expression, as some persons may be more reluctant to use telecommunications services to seek, receive and impart information if they know that data about their communications will be stored and may be subject to lawful access.²⁵

1.69 The statement of compatibility argues that any limitation is 'designed for the legitimate objective of protecting public order',²⁶ which includes 'preventing crime'.²⁷ While the committee acknowledges that the prevention and detention of crime may be regarded as a legitimate objective for human rights purposes, the committee is of the view that, as discussed above, the proposed limitation is not proportionate to the stated aims of the proposed scheme.

1.70 In particular, with respect to the right to freedom of opinion and expression, the proposed scheme may have an inhibiting or 'chilling' effect on people's freedom and willingness to communicate via telecommunications services. The committee notes that the proposed provisions may have a particular inhibiting or 'chilling' effect on journalists who may be concerned about the protection of their sources.

1.71 Under the proposed scheme, data would be retained and could subsequently be used without the user or individual ever being informed. The potential for such undisclosed retention and use of metadata could lead people to 'self-censor' the views expressed via telecommunications services, or to restrict their own use of such services.²⁸

25 EM 28.

26 EM 29.

27 EM 28.

28 See, for example, *Digital Rights Ireland Ltd (C-293/12) and Kärntner Landesregierung ors (C-594/12), v Minister for Communications, Marine and Natural Resources and ors* (8 April 2014).

1.72 As discussed above, in order for the proposed data retention measure to be proportionate to the stated aim it will need to be carefully circumscribed with access to data appropriately limited.

1.73 An example of other possible safeguards would be, subject to clearly stated and defined criteria, if the scheme included a requirement for a delayed notification to an individual that their data had been subject to an application for an authorisation for access.²⁹ The committee is of the view that delayed notification may also improve the proportionality of the measure in other respects. For example, it would increase the transparency of the scheme and allow for further public scrutiny and oversight. The committee notes that the European Court of Human Rights has similarly indicated on a number of occasions that delayed user notification is an important safeguard.³⁰ Notification requirements may support mechanisms for challenging access to such data in advance, in appropriate circumstances, where it would not jeopardise the purpose for which the information is sought.

1.74 The committee therefore recommends that, to ensure a proportional limitation on the right to freedom of opinion and expression, consideration be given to amending the proposed scheme to provide a mechanism to guarantee that access to data is sufficiently circumscribed; for example:

- **individuals being notified when their telecommunications data is subject to an application for authorisation for access or once it has been accessed (noting that there may be circumstances where delayed notification would be appropriate, such as in the context of investigating a serious crime); and**
- **a process to allow individuals to challenge such access (noting that exemptions may need to be available for continuing investigations of, for example, a serious crime).**

1.75 The right to an effective remedy would be supported by a notification requirement. This is because, for example, it would be impossible for an individual to seek redress for breach of their right to privacy if they did not know that data pertaining to them had been subject to an access authorisation.

1.76 However, the committee notes that this limitation of the right to an effective remedy was not addressed in the statement of compatibility.

29 See, for example, United Nations High Commissioner for Human Rights, The right to privacy in the digital age, A/HRC/27/37 (30 June 2014) http://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session27/Documents/A.HRC.27.37_en.pdf (accessed 5 November 2014).

30 See, for example, *Association for European Integration and Human Rights and Ekimdzhiiev v Bulgaria*, 62540/00, ECHR 28 June 2007 [90]; *Weber and Savaria v Germany*, 10 January 2000, 54934/00, [135].

1.77 The committee therefore requests the advice of the Attorney-General as to whether the proposed scheme is compatible with the right to an effective remedy, and particularly:

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

Telecommunications Amendment (Giving the Community Rights on Phone Towers) Bill 2014

Sponsor: Mr Andrew Wilkie MP

Introduced: House of Representatives, 27 October 2014

Purpose

1.78 The Telecommunications Amendment (Giving the Community Rights on Phone Towers) Bill 2014 (the bill) seeks to amend the *Telecommunications Act 1997* to increase the requirements on telecommunications companies to consult with residents and land owners who would be affected by the erection of new phone towers, or by the extension of existing infrastructure.

Committee view on compatibility

1.79 **The committee considers that the bill is compatible with human rights and has concluded its examination of the bill.**

Crimes Legislation Amendment (Psychoactive Substances and Other Measures) Bill 2014

Portfolio: Justice

Introduced: House of Representatives, 17 July 2014

Purpose

1.80 The Crimes Legislation Amendment (Psychoactive Substances and Other Measures) Bill 2014 (the bill) contains a number of amendments to the *Commonwealth Places (Application of Laws) Act 1970*, *Criminal Code Act 1995*, *Customs Act 1901*, *Financial Transaction Reports Act 1988*, *International Transfer of Prisoners Act 1997* and the *Surveillance Devices Act 2004*. These include:

- introducing an offence of importing all substances that have a psychoactive effect;
- introducing an offence of importing a substance which is represented to be a serious drug alternative;
- granting Australian Customs and Border Protection officers powers with respect to these new offences;
- introducing new international firearms and firearm parts trafficking offences and mandatory minimum sentences;
- extending existing cross-border disposal or acquisition firearms offences;
- introducing procedures in relation to the international transfer of prisoners regime within Australia;
- clarifying that certain slavery offences have universal jurisdiction;
- validating access by the Australian Federal Police to certain investigatory powers in designated State airports from 19 March until 17 May 2014; and
- correcting an error in the definition of a minimum marketable quantity in respect of a drug analogue of one or more listed border controlled drugs.

Background

1.81 The committee reported on the bill in its *Tenth Report of the 44th Parliament*.

Committee view on compatibility

Schedule 1 - Import ban on psychoactive substances

Right to a fair trial and fair hearing rights

New offence of importing 'psychoactive substance'

1.82 The committee sought the advice of the Minister for Justice as to whether the reverse burden offence in proposed section 320.2 is compatible with the right to be presumed innocent, and particularly:

- whether there is a rational connection between the limitation and the legitimate objective; and
- whether the limitation is a reasonable and proportionate measure for the achievement of that objective.

Minister's response

Proposed section 320.2 is compatible with the right to be presumed innocent.

For a person to be found guilty of an offence of importing a psychoactive substance under proposed section 320.2, the prosecution bears the onus of proving beyond reasonable doubt that the person has imported the substance, and that the substance is a psychoactive substance.

Proposed subsection 320.2(2) sets out a range of substances which are not caught by the offence, even if they may be psychoactive. These are legitimate use exemptions. It is only if the defendant wishes to rely on one of these exemptions to avoid liability under the offence, that he or she is subject to a 'reverse burden'. In these circumstances, the burden operates to require the defendant to adduce or point to evidence to suggest a reasonable possibility that the substance is captured by one of the listed exceptions.

It is reasonable and proportionate to require an importer who wishes to claim a legitimate use exemption to point to evidence which substantiates his or her claim that the goods are captured by that exemption. Without this burden, it would be possible for a defendant to assert that a psychoactive substance was a legitimate import, captured by one of the many existing legislative schemes that control which goods come into the country, without being required to point to anything to substantiate that claim. Prosecutors would be required to conclusively prove that the substance did not fall within each of enumerated exemptions before an offence could be made out. This would be a difficult, costly and inefficient exercise, ill-suited to identifying and resolving the real issues in the prosecution.

Further, placing the evidential burden on the defendant to demonstrate that a substance falls within one of the exemptions enumerated in subsection 320.2(2) is consistent with the operation of the current border

environment. There are a range of regulatory schemes operating at the border to ensure that dangerous goods are not imported into Australia, at least not without appropriate permissions and safeguards. An importer who wishes to rely on an exemption to avoid criminal liability is already required to comply with the regulatory scheme to which the exemption relates, by obtaining all relevant authorisations and permissions for the importation of the goods, and to be aware of the purpose for which they are importing the goods. It is reasonable to expect that a legitimate importer will have readily available from their personal or business records sufficient evidence to suggest a reasonable possibility that the substance is captured by the relevant exemption.

This burden must also be assessed against the serious ramifications of importing new psychoactive substances (NPS) for human consumption. NPS are dangerous and unpredictable, their potential for harming individuals is well documented and there is a legitimate impetus to protect public health. There is a rational connection between requiring importers to show evidence that the goods are captured by one of the existing regulatory schemes, and protecting public health by ensuring that the importer is not bringing potentially harmful substances into the country. Requiring importers to demonstrate that their import falls within one of the legitimate use exemptions ultimately prevents unknown, unassessed and potentially dangerous substances from entering Australia. This is particularly important considering that importers are in a unique position of power to make substances available to the public. Consequently, it is incumbent on them to be aware of the regulatory schemes that govern the importation of their goods, and to ensure that they are not bringing in substances that may be dangerous to public health.¹

Committee's response

1.83 The committee thanks the Minister for Justice for his response. The committee considers that proposed section 320.2 is compatible with the right to be presumed innocent and has concluded its examination of this aspect of the bill.

New offence of importing substances represented to be serious drug alternatives

1.84 The committee sought the advice of the Minister for Justice as to whether the reverse burden offence in proposed section 320.3 is compatible with the right to be presumed innocent, and particularly:

- whether there is a rational connection between the limitation and the legitimate objective; and
- whether the limitation is a reasonable and proportionate measure for the achievement of that objective.

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See Appendix 1, Letter from the Hon Michael Keenan MP, Minister for Justice, to Senator Dean Smith (dated 30 September 2014) 1-2.

Minister's response

Proposed section 320.3 is compatible with the right to be presumed innocent.

For a person to be found guilty of an offence of importing a substance represented to be a serious drug alternative under proposed section 320.3, the prosecution bears the onus of proving beyond reasonable doubt that the person has intentionally imported a substance, that the presentation of the substance included an express or implied representation that the substance was a serious drug alternative, and that the defendant knew or was reckless as to whether the presentation of the substance contained or made such a representation.

Proposed subsection 320.3(3) sets out a range of substances which are not caught by the offence. It is only if the defendant wishes to rely on one of these exceptions to avoid liability under the offence that he or she is subject to a 'reverse burden'. In these circumstances, the burden operates to require the defendant to adduce or point to evidence to suggest a reasonable possibility that the substance is captured by one of the listed exceptions.

As set out above, it is reasonable and proportionate to require an importer who wishes to claim a legitimate use exemption to point to evidence which substantiates his or her claim that the goods are captured by that exemption. Without this burden, it would be possible for a defendant to assert that a substance represented to be a serious drug alternative was a legitimate import, captured by one of the many existing legislative schemes that control which goods come into the country, without being required to point to anything to substantiate or justify the claim. Prosecutors would be required to conclusively prove that the substance did not fall within each of enumerated exemptions before an offence could be made out. This would be a difficult, costly and inefficient exercise, ill-suited to identifying and resolving the real issues in the prosecution.

Further, and as set out above, placing the evidentiary burden on the defendant to demonstrate that a substance falls within one of the exemptions enumerated in subsection 320.3(3) is consistent with the operation of the current border environment. There are a range of regulatory schemes operating at the border to ensure that dangerous goods are not imported into Australia, at least not without appropriate permissions and safeguards, including with respect to their presentation and labelling.

The burden must also be assessed against the serious ramifications of importing a substance presented as a serious drug alternative. As set out in the Explanatory Memorandum, NPS are frequently sold or marketed with the representation that they are 'legal' alternatives to illicit drugs. This may encourage individuals, and particularly young people, to use these substances on the assumption that they have been tested and

assessed as safe. This is incorrect. NPS are dangerous and unpredictable and their potential for harming individuals is well documented. There is a legitimate impetus to protect public health from goods presented as 'legal' and containing a misleading representation that they are safe.

There is a rational connection between requiring importers to show evidence that the goods are captured by one of the existing regulatory schemes, and protecting public health by ensuring that the importer is not bringing potentially harmful substances into the country. Requiring importers to demonstrate that their import falls within one of the legitimate use exemptions ultimately prevents unknown, unassessed and potentially dangerous substances from entering Australia. This is particularly important considering that importers are in a unique position of power to make substances available to the public. Consequently, it is incumbent on them to be aware of the regulatory schemes that govern the importation of their goods, and to ensure that they are not bringing in substances that may be dangerous to public health.²

Committee's response

1.85 The committee thanks the Minister for Justice for his response. The committee considers that proposed section 320.3 is compatible with the right to be presumed innocent and has concluded its examination of this aspect of the bill.

Prohibition against retrospective criminal laws – quality of law

New offence of importing 'psychoactive substance'

1.86 The committee requested the advice of the Minister for Justice as to whether the measure, as currently drafted, meets the standards of the quality of law test for human rights purposes and whether the prohibition on retrospective laws (article 15 of the ICCPR) is engaged.

Minister's response

The measure, as currently drafted, meets the quality of law test for human rights purposes and does not engage article 15 of the ICCPR. The measure clearly sets out what conduct is permitted and what conduct is prohibited under the new offences.

The term 'psychoactive substance' is defined in section 320.1 of the measure as a substance which has the capacity to induce a psychoactive effect when consumed by a person. A psychoactive effect is also defined in section 320.1. There are two alternate limbs to this definition. The first deals with the physiological effects of a person consuming a drug, the second deals with the addictive effects of those drugs. A substance will have a psychoactive effect if it satisfies either of those limbs. I

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See Appendix 1, Letter from the Hon Michael Keenan MP, Minister for Justice, to Senator Dean Smith (dated 30 September 2014) 2-3.

acknowledge that the term is broad. Seeking to ban these substances on the basis of effect was a deliberate move by Government to prevent criminals from evading existing controls on illicit drugs that operate by banning substances based on their chemical structure. Experience has shown that criminals have deliberately sought to evade traditional controls that target substances based on their specific chemical structure.

However, the list of exemptions to what is a 'psychoactive substance' is also very broad. As such, the measure operates to ban only very small portion of what is captured by the definition: those substances which do not otherwise have a legitimate use. The explanatory memorandum sets out in significant detail the kinds of substances which are and are not banned by the measure. Moreover, the list of exceptions contained in the legislation will provide importers with certainty, as it sets out precisely what is permitted to be imported, often through references to existing legislation which explains what can and cannot be imported. As set out above, this measure does not occur in a vacuum. It must be considered in light of the existing regulatory schemes at the border that govern the importation of goods. If a person is importing goods in a manner consistent with those schemes, they will not be affected by this measure.

The definitions in the Bill, and the details provided in the explanatory memorandum, are sufficiently certain and accessible that people will be able to understand the legal effect of their actions in advance.³

Committee's response

1.87 The committee thanks the Minister for Justice for his response.

1.88 The committee notes that under proposed section 320.1 'Psychoactive substance' is defined as 'any substance that, when a person consumes it, has the capacity to induce a psychoactive effect'. 'Psychoactive effect' is defined in the alternative as either '(a) stimulation or depression of the person's central nervous system, resulting in hallucinations or in a significant disturbance in, or significant change to, motor function, thinking, behaviour, perception, awareness or mood' or '(b) causing a state of dependence, including physical or psychological addiction.'

1.89 While noting that the term 'psychoactive substance' is intended to be broad, the committee remains concerned, based on the information provided, that the measure nevertheless risks being insufficiently certain as required for human rights purposes. The committee notes in particular that there are a number of aspects of the definition as currently drafted that would seem to potentially be overly broad or to lack clarity, meaning that the measure fails to meet the standards of the quality of law test for human rights purposes.

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See Appendix 1, Letter from the Hon Michael Keenan MP, Minister for Justice, to Senator Dean Smith (dated 30 September 2014) 3-4.

1.90 The committee therefore requests the further advice from the Minister for Justice as to:

- whether the term 'psychoactive substance' could be more specifically defined;
- whether more precise terms than 'significant disturbance' could be used in the definition of what constitutes a 'psychoactive effect', and
- whether non-exhaustive terms such as 'including' be could be omitted from the definition of what constitutes a 'psychoactive effect'.

Schedule 2 – Firearm Trafficking Offences

Right to security of the person and freedom from arbitrary detention, and right to a fair trial and fair hearing rights

Mandatory minimum sentences for international firearms and firearm parts trafficking offences

1.91 The committee sought the advice of the Minister for Justice as to whether the mandatory sentencing is compatible with the right to freedom from arbitrary detention and the right to a fair trial, and particularly:

- whether there is a rational connection between the limitation and the legitimate objective; and
- whether the limitation is a reasonable and proportionate measure for the achievement of that objective.

Minister's response

The mandatory minimum sentence of five years' imprisonment being introduced for offences against Divisions 360 and 361 of the Criminal Code Act 1995 (the Code) is compatible with the right to freedom from arbitrary detention. Detention is not arbitrary where it is reasonable, necessary and proportionate to the end that is sought. In this case, the end being sought is to limit the number of firearms and firearm-related articles entering the illicit market which can later be used in the commission of serious and violent crimes. There are clear and serious social and systemic harms associated with firearms trafficking, and the entry of even a small number of illegal firearms into the Australian community can have a significant impact on the size of the illicit market. Failure to enforce harsh penalties on trafficking offenders could lead to increasing numbers of illegal firearms coming into the possession of individuals and organised crime groups.

The penalties associated with the new and amended offences will act as a rational and legitimate deterrent for people seeking to illegally import and export firearms and firearm parts into and out of Australia. They will also support current efforts to prevent the diversion of firearms into overseas illicit markets, and demonstrate Australia's commitment to our international obligations regarding the illegal trade of firearms.

The provisions include safeguards against arbitrary detention, including that they do not impose minimum non-parole periods and do not apply mandatory minimum penalties to children (those under the age of 18). These factors preserve a level of judicial discretion and ensure that custodial sentences imposed by courts take into account the particular circumstances of the offence and the offender. In appropriate cases, this may mean that there is a significant difference between the non-parole period and the head sentence. The Government believes the lack of a mandatory non-parole period will allow courts the discretion to take into account factors such as cognitive impairment and the public interest when setting the period offenders spend in custody. This level of judicial discretion is an appropriate protection against arbitrary detention. The Government believes that the mandatory minimum head sentence with no minimum non-parole period strikes an appropriate balance between putting in place a strong deterrent message and preserving judicial discretion. Given the serious nature of firearms trafficking and the consequences of supplying firearms and firearm parts to the illicit market, it is appropriate to adopt this approach to ensure the Government's response to gun-related crime is as effective as possible.

The mandatory minimum sentence is also compatible with the right to a fair trial, including the right to review by a higher tribunal as set out in article 14(5) of the ICCPR. The minimum term of imprisonment will only apply if a person is convicted of an offence as a result of a fair trial in accordance with such procedures as are established by law. The penalty does not prevent appeal of a conviction or of any sentence above the mandatory minimum.⁴

Committee's response

1.92 The committee thanks the Minister for Justice for his response.

1.93 However, the committee notes that the offence provisions contained in Schedule 2 which impose mandatory minimum sentences engage and limit the right to be free from arbitrary detention. This is because detention may be considered arbitrary where it is disproportionate to the crime that has been committed.⁵

1.94 The committee notes that the minister's response provides some information to justify this limitation on human rights as reasonable, necessary and proportionate in pursuit of a legitimate objective. The response states that mandatory sentences will act as a 'rational and legitimate deterrent' against the importation of illicit firearms. However, it does not provide any evidence to show that the imposition of mandatory sentencing would in fact act as a greater deterrent

⁴ See Appendix 1, Letter from the Hon Michael Keenan MP, Minister for Justice, to Senator Dean Smith (dated 30 September 2014) 4-5.

⁵ See, for example, *A v Australia* (2000) UN doc A/55/40, [522].

than preserving judicial discretion to take into account the particular circumstances of the offence and the offender. In other words, the committee is of the view that the response has not shown that mandatory sentencing is necessary in pursuit of the stated objective, and that less restrictive measures would not achieve the same result.

1.95 The committee further notes that in order for detention not to be arbitrary in international law it must be reasonable, necessary and proportionate in the individual case (rather than as a result of a blanket policy). The notion of 'arbitrariness' under international human rights law includes elements of inappropriateness, injustice and lack of predictability. This is why it is generally important for human rights purposes to allow courts the discretion to ensure that punishment is proportionate to the seriousness of the offence and individual circumstances.

1.96 The committee notes that the response points to a number of safeguards that are said to guard against arbitrary detention. Namely, that mandatory minimum sentencing will not apply to children and that 'a level' of judicial discretion will be preserved in relation to the minimum non-parole period. However, the committee is concerned that the mandatory minimum sentence may be seen by courts as a 'sentencing guidepost', which is to say the appropriate sentence for the least serious case. Additionally, courts may feel constrained to impose a non-parole period that is in the usual proportion to the head sentence. This is generally two-thirds of the head sentence (or maximum period of the sentence to be served).

1.97 The committee notes that the response asserts that mandatory minimum sentencing is compatible with article 14(5) of the ICCPR, which provides that everyone convicted of a crime has the right to have their conviction and sentence reviewed by a higher tribunal. The response states that that the provision 'does not prevent appeal of a conviction or of any sentence above the mandatory minimum'. However, the imposition of mandatory minimum sentencing does seriously affect the review of sentences at the mandatory minimum. The committee notes that, when a trial judge imposes the prescribed mandatory minimum sentence, the appellate court is likely to form the view that there is nothing in the sentencing processes to review. This is because the judge has imposed the required sentence.

1.98 The committee therefore considers that the mandatory minimum sentencing provisions are likely to be incompatible with the right not to be arbitrarily detained and the right to a fair trial.

1.99 In the event that the mandatory minimum sentencing provisions are retained, the committee recommends the provision be amended to clarify to the courts that the mandatory minimum sentence is not intended to be used as a 'sentencing guidepost' and that there may be a significant difference between the non-parole period and the head sentence.

Absolute liability and strict liability - new international firearms and firearm parts trafficking offences

1.100 The committee sought the advice of the Minister for Justice as to whether the strict liability and absolute liability elements of the proposed firearm offences are compatible with the right to be presumed innocent, and particularly:

- whether there is a rational connection between the limitation and the legitimate objective; and
- whether the limitation is a reasonable and proportionate measure for the achievement of that objective.

Minister's response

The strict and absolute liability elements of the proposed firearm offences are compatible with the right to be presumed innocent.

Absolute liability applies to the element of the offence that the firearm or part was a prohibited import or export unless certain requirements had been met. This means that the prosecution will not have to prove that the defendant knew or was reckless as to whether the firearm or part was a prohibited import or export. Strict liability applies to the element of the offence that the person had not met all of the import or export requirements. This means that the prosecution will not have to prove that the defendant knew or was reckless as to whether they had met all of the import or export requirements. The absolute liability provision has been carefully drafted to ensure that a firearms trafficker could not rely on the defence of honest or reasonable mistake of fact, while the strict liability provision does make this defence available to the defendant.

In the case of absolute liability, there is a rational connection between the limitation of the right to be presumed innocent and the legitimate objective of prosecuting firearms traffickers. If absolute liability were not imposed, a defendant could attempt to avoid criminal liability for the offence by claiming they were unaware that there were import and export requirements which had to be met.

It is incumbent on those who are engaged in the import and export of articles into and out of Australia to make enquiries as to how to legitimately go about that process. This is the case for all manner of items, be they food, medical supplies or parts for manufacturing. The expectation that importers and exporters will seek information on the requirements they need to meet is a legitimate one, and is not unique to firearms and other prohibited goods. Additionally and with respect to firearms, given their highly controlled nature and history of regulation in Australia it is reasonable to expect that members of the community, particularly those involved in the movement of firearms, know that there are controls on importing and exporting firearms and firearm parts, or at least know enough to make enquiries.

In the case of the strict liability provisions, the connection between the limitation of the right and the objective is similar however differs slightly. Again, it is a legitimate expectation that those engaging in the movement of firearms and firearm parts into and out of Australia would be aware that regulations exist to control that trade. Given then that the defendant would be aware whether or not they had met the requirements for import or export, requiring the prosecution to prove beyond reasonable doubt that a person knew approval had not been obtained, or was reckless as to whether or not the requirements had been met, would be overly onerous. The limitation of the right to be presumed innocent is legitimate in that without it, the objective to deter people from firearms trafficking could be undermined if suspects could avoid conviction by arguing that they were unaware of import or export requirements. The limitation is also proportionate, as the defence of mistake of fact is available for the elements to which strict liability applies. Appropriately, this defence could be used if a person mistakenly believed that he or she had met the requirements for import or export of a firearm or firearm part.

Furthermore, and in both cases, the effectiveness of the new offences would be weakened if the prosecution were required to prove the elements to which strict and absolute liability have been applied, as it would be very difficult to obtain evidence showing the defendant's state of mind. To undermine the effectiveness of the offence would be to undermine the deterrent effect it seeks to achieve. In 2012, firearms were identified as being the type of weapon used in 25% of homicides in Australia. The entry of even a small number of illegal firearms into the Australian community can contribute to the risk of these and other gun-related crimes becoming more prevalent. Therefore, any limitation on the right to be presumed innocent by the application of strict and absolute liability is justified through the legitimate objective to reduce the number of illicit firearms and firearm parts imported and exported into and out of Australia.⁶

Committee's response

1.101 The committee thanks the Minister for Justice for his response. The committee considers that the measure is compatible with the right to be presumed innocent and has concluded its examination of this aspect of the bill.

⁶ See Appendix 1, Letter from the Hon Michael Keenan MP, Minister for Justice, to Senator Dean Smith (dated 30 September 2014) 5-6.

Schedule 3 – International Transfer of Prisoners

Right to a fair trial and fair hearing rights

Removal of the Attorney-General's decision in 'unviable' applications

1.102 The committee sought the advice of the Minister for Justice as to whether the removal of the requirement for the Attorney-General to make a decision in 'unviable' applications is compatible with the right to a fair hearing, and particularly:

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

Minister's response

The objective of the proposed amendment in relation to unviable applications is to address undue delay by facilitating more efficient processing of applications to provide a prisoner with a speedier response to their application. The current requirement that the Attorney-General make a decision on 'unviable' applications extends the delay in notifying the prisoner (or prisoner's representative) of the outcome of their application, and in progressing applications from other prisoners that are viable.

'Unviable' applications are applications that cannot proceed because one or more of the requirements set out in section 10 of the International Transfer of Prisoners Act 1997 cannot be met. The requirements are:

- all relevant parties consent to the transfer
- the prisoner is not subject to an extradition request
- the prisoner is an Australian citizen (in the case of an application for transfer to Australia) or a national of the country to which he or she wishes to be transferred (in the case of an application for transfer from Australia)
- the time left to serve being no less than 6 months
- neither the sentence of imprisonment nor the conviction is subject to appeal, and
- the offence for which the prisoner is serving their sentence constitutes an offence in the country to which he or she wishes to transfer.

Currently, where a prisoner does not meet one or more of the requirements in section 10, the Attorney-General may still be required to determine whether or not he or she consents to the transfer. However, in these cases, the only option open to the Attorney-General is to refuse

consent due to one of the requirements not being met. Removing the requirement for the Attorney-General to make a decision in relation to an unviable application does not impact on a person's rights under the Act because there is no alternative decision that could be made, as such applications for transfer already cannot proceed.

The Committee sought further information as to how an assessment will be made as to whether a case would fall within proposed subsection 1 OA. The central authority for the international transfer of prisoners in the Attorney-General's Department is responsible for determining whether all of the requirements outlined above are met for each application. These are questions of fact - i.e. is the prisoner an Australian citizen, has the other country consented, is there an extradition request in relation to the person, etc. When one or more requirement is not met, the central authority will close the application as the application cannot proceed, and write to the prisoner notifying them of the closure. There is no scope to exercise discretion at this stage of the process as the outcome is dictated by the answer to the factual requirements outlined above. It does not involve a consideration of whether transfer is appropriate in the circumstances, which is a matter for the Attorney-General to consider in determining whether or not to consent.

Once an unviable application has been closed, the prisoner will be promptly notified and provided with the reasons for the closure. This will enable the prisoner to respond, if desired. While merits review is not available in relation to the closure of unviable applications, any decision taken under the Act is reviewable, including any decisions on the requirements set out above.

In summary, the proposed change is aimed at achieving a legitimate objective of facilitating a speedier resolution of applications that cannot proceed. This may be more beneficial to prisoners with unviable applications, as the proposed amendment would enable a prisoner to be informed of the outcome of their application in a more timely fashion. The potential limitation is very small as the measure would not alter the outcome of the applications. The measure is reasonable and proportionate for the purpose of achieving the objective outlined above.⁷

Committee's response

1.103 The committee thanks the Minister for Justice for his response. The committee considers that the measure is compatible with human rights and has concluded its examination of this aspect of the bill.

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See Appendix 1, Letter from the Hon Michael Keenan MP, Minister for Justice, to Senator Dean Smith (dated 30 September 2014) 7-8.

Clarifying that Attorney-General's power to seek a variation of terms from a transfer country is discretionary

1.104 The committee sought the advice of the Minister for Justice as to whether the potential limitation of administrative reviews through the clarification of the discretion is compatible with the right to a fair hearing, and particularly:

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

Minister's response

Currently, if the Attorney-General would not consent to a transfer based on the transfer terms proposed by a transfer country, subsection 20(3) of the Act allows the Attorney-General to propose a variation to the terms if he or she would consent to transfer on a variation of the proposed terms.

In the time in which the ITP Scheme has been in place, it has become clear that many transfer countries are unable to accommodate a variation to terms. Many transfer countries have advised that their proposed terms of sentence enforcement are governed by domestic legislation and are not discretionary. This amendment would ensure that in these cases, the Attorney-General is not obliged to exercise his or her discretion to seek a variation of terms given doing so would prolong the period in which an application is open with no change in the outcome. The proposed amendment would assist in providing certainty to the prisoner and a speedier conclusion to their application in cases where it is clear that the transfer country would not agree to a variation to the terms (based on that country's domestic legislation and processes).

This amendment does not diminish the existing rights of a prisoner under the Act to seek review. In the event that the Attorney-General denies consent to the transfer and exercises his or her discretion to not seek a variation of the terms, it remains open to the prisoner to seek a review of this decision.⁸

Committee's response

1.105 The committee thanks the Minister for Justice for his response. The committee considers that the measure is compatible with human rights and has concluded its examination of this aspect of the bill.

⁸ See Appendix 1, Letter from the Hon Michael Keenan MP, Minister for Justice, to Senator Dean Smith (dated 30 September 2014) 8.

Imposing a discretionary one year limit on reapplications

1.106 The committee sought the advice of the Minister for Justice as to whether the proposed limit on reapplications is compatible with the right to a fair hearing, and particularly:

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

Minister's response

The purpose of this amendment is to address situations where, as is often the case, reapplications are received despite no changes in circumstances or new information being available to give weight to the need for reconsideration, and within months of prisoners being informed that their earlier application had been refused. Currently, these reapplications must be reconsidered in full. The processing of these reapplications diverts resources that could otherwise be directed towards progressing viable and new applications.

While this amendment engages the right to a fair hearing, the amendment is aimed at achieving the legitimate objective of not requiring the Attorney-General to consider, and the Department to use resources processing, repeat applications where it is clear that the outcome would remain the same because there have been no significant changes in the circumstances of that prisoner's case.

The proposed amendment is reasonable and proportionate to achieving the stated objective because by not limiting reapplications, the processing of all other applications is subject to a slower processing due to the need to continue progressing repeat applications. By reducing the number of reapplications that are considered, the proposed section aims to increase processing efficiency and render a benefit to more applicants overall.

The approach is proportionate to this objective because the language of the proposed subsection 1 OA(2) is permissive, thus allowing the Attorney-General to consider reapplications within the one year limit where, for example, there has been a change of circumstances.

To assist prisoners and to facilitate consideration of reapplications where new circumstances or information does become available within the one year limit, application forms for the transfer of prisoners will be amended to enable prisoners to provide information outlining why an application should be considered within the one year timeframe. This will provide a basis for the prisoner to demonstrate a change in circumstances that would justify the reconsideration of their application.

It will still remain open to all prisoners to reapply after 12 months has passed if they would like their application to be reconsidered for any reason.⁹

Committee's response

1.107 The committee thanks the Minister for Justice for his response. The committee considers that the measure is compatible with human rights and has concluded its examination of this aspect of the bill.

Schedule 5 – Validating airport investigations

Multiple Rights

Validation of conduct by the Australian Federal Police (AFP) in airport investigations

1.108 The committee sought the advice of the Minister for Justice as to whether the retrospective validation of conduct by AFP and special members is compatible with the right to security of the person and freedom from arbitrary detention, the prohibition against retrospective criminal laws, the right to an effective remedy and the right to a fair trial and fair hearing rights, and particularly:

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

Minister's response

Right to security of the person and freedom from arbitrary detention

The Committee has asked for further advice on whether the retrospective validation of conduct by the Australian Federal Police (AFP) and special members is compatible with the right to security of the person and freedom from arbitrary detention under Article 9 of the International Covenant on Civil and Political Rights (ICCPR). In particular, the Committee has asked whether the proposed changes are aimed at achieving a legitimate objective, whether there is a rational connection between the limitation and that objective, and whether the limitation is a reasonable and proportionate measure for the achievement of that objective.

The main aim of Schedule 5 to the Bill is to ensure continuity in policing services at Australia's major airports, required as a result of an administrative error that led to certain investigatory powers not being available to AFP and special members in those airports for a short period of time.

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See Appendix 1, Letter from the Hon Michael Keenan MP, Minister for Justice, to Senator Dean Smith (dated 30 September 2014) 8-9.

The Commonwealth Places (Application of Laws) Act 1970 and the Commonwealth Places (Application of Laws) Regulations 1998 (1998 regulations) provided AFP officers with the ability to use investigatory powers under Part IAA and Part ID of the Commonwealth Crimes Act 1914 (relevant Crimes Act powers) to investigate state offences that occur at Commonwealth places which are designated state airports. This arrangement has been in place since 2011, following enactment of the Aviation Crimes and Policing Legislation Amendment Act 2011 which supported the 'all-in policing and security model', under which the AFP took responsibility for the policing and security of Australia's eleven major airports.

On 18 March 2014, the 1998 regulations which listed the 'designated state airports' were inadvertently repealed due to an administrative error as part of work on a recent omnibus repeal regulation, the Spent and Redundant Instruments Repeal Regulation 2014. The repeal of the 1998 regulations took effect on 19 March 2014 at which time the Crimes Act powers were no longer available to the AFP. Although alternative powers were available during the relevant time, including applied state police powers arising under section 9 of the *Australian Federal Police Act 1979*, the AFP was unaware of the need to confine itself to these powers for a portion of the repeal period. Upon realising the mistake, action was taken to re-instate this access through the making of the Commonwealth Places (Application of Laws) Regulation 2014 which came into force on 17 May 2014 and restored the prior definition of designated state airport.

Schedule 5 of the Bill is necessary to correct the anomaly that arose between 19 March 2014 and 16 May 2014, when the Crimes Act powers were inadvertently not available. These powers were available to the AFP for an extended period of time (approximately three years) prior to 19 March 2014, were intended to operate between 19 March 2014 and 16 May 2014 and have again been in force since 17 May 2014.

Retrospective validation of conduct to cover this limited time period is a reasonable and proportionate measure to ensure consistent application of appropriate security and policing at Commonwealth airports. The relevant Crimes Act powers would not be unknown to individuals or the Australian public. The measure would avoid the potential for inequitable outcomes within the criminal justice system, based on whether action taken by the APP in a relevant airport occurred within the eight week period when the investigative powers used by the AFP were not in force.¹⁰

Prohibition against retrospective criminal laws

The Committee has asked for further advice concerning the retrospective validation of AFP and special members conduct and whether it is

¹⁰ See Appendix 1, Letter from the Hon Michael Keenan MP, Minister for Justice, to Senator Dean Smith (dated 30 September 2014) 9-10.

compatible with the prohibition against retrospective criminal laws in accordance with Article 15 of the ICCPR. Schedule 5 of the Bill does not alter the content or operation of any State offences in respect of which a person may have been arrested, charged and subsequently prosecuted. As outlined in the Explanatory Memorandum, it will not interfere with the penalties which may be available to, and set by, a court. The provisions are necessary to address the anomaly that arises between 19 March 2014 and 16 May 2014, when relevant Crimes Act investigative powers were inadvertently not available. Notwithstanding alternative powers were available during the relevant time, (including applied state police powers arising under section 9 of the *Australian Federal Police Act 1979*), the AFP was unaware of the need to confine itself to these powers for a portion of the repeal period.¹¹

Right to life and the prohibition against torture, cruel, inhuman or degrading treatment

The Committee has also asked for further advice on whether the retrospective validation of conduct by APP and special members is compatible with the right to life and prohibition on torture and cruel, inhuman or degrading treatment or punishment in accordance with Articles 6 and 7 of the ICCPR.

As outlined, retrospective validation under the Bill is necessary to address the anomaly that arises between 19 March 2014 and 16 May 2014, when relevant Crimes Act powers were inadvertently not available. Alternative powers were available during the relevant time, including applied state police powers arising under section 9 of the *Australian Federal Police Act 1979*.

In addition to protections on the use of force outlined in the Explanatory Memorandum, the APP has robust administrative procedures in place to ensure this right is protected. Commissioner's Order 3, is a direction issued by the AFP Commissioner concerning the use of reasonable force. Commissioner's Order 3 must be complied with by all AFP members in all operations and activities, in addition to any legislative restrictions on the exercise of police powers. Failure to comply with Commissioner's Order 3 may constitute a breach of AFP professional standards and, depending on the seriousness of the breach, can result in loss of employment and/or criminal charges. These safeguards operate independently of the *Commonwealth Places (Application of Laws) Act 1970* and its regulations, and ensure that, in addition to relevant legislative protections, there are

¹¹ See Appendix 1, Letter from the Hon Michael Keenan MP, Minister for Justice, to Senator Dean Smith (dated 30 September 2014) 10.

operational processes utilised by the APP to prevent inappropriate use of force.¹²

Right to a fair trial and fair hearing rights and right to an effective remedy

The Committee has asked for advice concerning whether the retrospective validation of conduct by the AFP and special members is compatible with the right to an effective remedy under Article 2 of the ICCPR. The Committee has also asked for advice as to whether retrospective validation is compatible with Article 14 of the ICCPR which provides the right to a fair trial and fair hearing rights.

While Schedule 5, item 2 of the Bill may technically limit these rights in some limited circumstances, alternative powers were available during the relevant time, including applied state police powers arising under section 9 of the *Australian Federal Police Act 1979*.

To the extent that the Bill limits these rights, those limitations are reasonable, necessary and proportionate for the achievement of a legitimate objective. As outlined above, retrospective validation of conduct to cover this limited time period is a reasonable and proportionate measure to ensure consistent application of appropriate security and policing at Commonwealth airports. The relevant Crimes Act powers would not be unknown to individuals or the Australian public. The measure would avoid the potential for inequitable outcomes, based on whether action taken by the AFP in a relevant airport occurred within the eight week period when the investigative powers used by the AFP were not in force.

The Bill does not alter existing criminal processes which apply in relation to a person charged with an offence, nor does it alter civil claim processes. Schedule 5, Item 2 is specified to apply to a thing done to the extent that the doing of the thing would, apart from the item, be invalid or ineffective because the Commonwealth place was not a designated State airport. This does not remove a person's ability to question whether *Crimes Act 1914* powers were used correctly in their circumstances in the course of any future prosecution or claim.

Accordingly, Schedule 5 of the Bill is compatible with human rights because to the extent that it may limit human rights, those limitations are reasonable, necessary and proportionate.¹³

Committee's response

1.109 The committee thanks the Minister for Justice for his response.

¹² See Appendix 1, Letter from the Hon Michael Keenan MP, Minister for Justice, to Senator Dean Smith (dated 30 September 2014) 11.

¹³ See Appendix 1, Letter from the Hon Michael Keenan MP, Minister for Justice, to Senator Dean Smith (dated 30 September 2014) 11-12.

1.110 However, the committee remains concerned, based on the information provided, that the retrospective validation of conduct may not be necessary or proportionate. The committee notes that in order to for a measure to constitute a permissible limitation on human rights it must be reasonable, necessary and proportionate to a legitimate objective. The committee notes that retrospective validation of conduct raises fundamental rule of law issues.

1.111 The committee therefore requests the further advice of the Minister for Justice as to:

- **whether unauthorised powers were exercised (such that there is a need to retrospectively validate such powers);**
- **if so, what powers were exercised (to see whether that the general nature of the validation is proportionate); and**
- **what specific other powers existed at the time under which the conduct was or could have been carried out (to see if there is a need to retrospectively validate such power and if such validation is proportionate).**

Deferred bills and instruments

The committee has deferred its consideration of the following bills and instruments:

Acts and Instruments (Framework Reform) Bill 2014

Australian Citizenship and Other Legislation Amendment Bill 2014

Broadcasting and Other Legislation Amendment (Deregulation) Bill 2014

Civil Law and Justice Legislation Amendment Bill 2014

Counter-Terrorism Legislation Amendment Bill (No. 1) 2014

Freedom of Information Amendment (New Arrangements) Bill 2014

Migration Amendment (Character and General Visa Cancellation) Bill 2014

Omnibus Repeal Day (Spring 2014) Bill 2014

Racial Discrimination Amendment Bill 2014

Social Security Legislation Amendment (Strengthening the Job Seeker Compliance Framework) Bill 2014

Statute Law Revision Bill (No. 2) 2014

Telecommunications (Industry Levy) Amendment Bill 2014

Telecommunications Legislation Amendment (Deregulation) Bill 2014

Treasury Legislation Amendment (Repeal Day) Bill 2014

Autonomous Sanctions (Designated and Declared Persons - Former Federal Republic of Yugoslavia) Amendment List 2014 (No. 2) [F2014L00970]

Autonomous Sanctions (Designated Persons and Entities and Declared Persons - Ukraine) Amendment List 2014 [F2014L01184]

Criminal Code (Terrorist Organisation—Islamic State) Regulation 2014 [F2014L00979]

Chapter 2 - Concluded matters

There are no concluded matters in this report.

Appendix 1

Correspondence



THE HON MICHAEL KEENAN MP
Minister for Justice



MC14/18405

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

30 SEP 2014

Dear Chair

Thank you for your letter regarding the Parliamentary Joint Committee on Human Rights' report on the Crimes Legislation Amendment (Psychoactive Substances and Other Measures) Bill 2014.

The Committee raised a number of concerns about measures contained in the Bill. My advice in relation to these concerns is set out below.

Schedule 1 – New Psychoactive Substances

1.47 The committee seeks the advice of the Minister for Justice as to whether the reverse burden offence in proposed section 320.2 is compatible with the right to be presumed innocent, and particularly:

- whether there is a rational connection between the limitation and the legitimate objective; and*
- whether the limitation is a reasonable and proportionate measure for the achievement of that objective.*

Proposed section 320.2 is compatible with the right to be presumed innocent.

For a person to be found guilty of an offence of importing a psychoactive substance under proposed section 320.2, the prosecution bears the onus of proving beyond reasonable doubt that the person has imported the substance, and that the substance is a psychoactive substance.

Proposed subsection 320.2(2) sets out a range of substances which are not caught by the offence, even if they may be psychoactive. These are legitimate use exemptions. It is only if the defendant wishes to rely on one of these exemptions to avoid liability under the offence, that he or she is subject to a 'reverse burden'. In these circumstances, the burden operates to require the defendant to adduce or point to evidence to suggest a reasonable possibility that the substance is captured by one of the listed exceptions.

It is reasonable and proportionate to require an importer who wishes to claim a legitimate use exemption to point to evidence which substantiates his or her claim that the goods are captured by that exemption. Without this burden, it would be possible for a defendant to assert that a psychoactive substance was a legitimate import, captured by one of the many existing legislative schemes that control which goods come into the country, without being required to point to anything to substantiate that claim. Prosecutors would be required to conclusively prove that the substance did not fall within each of enumerated exemptions before an offence could be made out. This would be a difficult, costly and inefficient exercise, ill-suited to identifying and resolving the real issues in the prosecution.

Further, placing the evidential burden on the defendant to demonstrate that a substance falls within one of the exemptions enumerated in subsection 320.2(2) is consistent with the operation of the current border environment. There are a range of regulatory schemes operating at the border to ensure that dangerous goods are not imported into Australia, at least not without appropriate permissions and safeguards. An importer who wishes to rely on an exemption to avoid criminal liability is already required to comply with the regulatory scheme to which the exemption relates, by obtaining all relevant authorisations and permissions for the importation of the goods, and to be aware of the purpose for which they are importing the goods. It is reasonable to expect that a legitimate importer will have readily available from their personal or business records sufficient evidence to suggest a reasonable possibility that the substance is captured by the relevant exemption.

This burden must also be assessed against the serious ramifications of importing new psychoactive substances (NPS) for human consumption. NPS are dangerous and unpredictable, their potential for harming individuals is well documented and there is a legitimate impetus to protect public health. There is a rational connection between requiring importers to show evidence that the goods are captured by one of the existing regulatory schemes, and protecting public health by ensuring that the importer is not bringing potentially harmful substances into the country. Requiring importers to demonstrate that their import falls within one of the legitimate use exemptions ultimately prevents unknown, unassessed and potentially dangerous substances from entering Australia. This is particularly important considering that importers are in a unique position of power to make substances available to the public. Consequently, it is incumbent on them to be aware of the regulatory schemes that govern the importation of their goods, and to ensure that they are not bringing in substances that may be dangerous to public health.

1.51 The committee seeks the advice of the Minister for Justice as to whether the reverse burden offence in proposed section 320.3 is compatible with the right to be presumed innocent, and particularly:

- *whether there is a rational connection between the limitation and the legitimate objective; and*
- *whether the limitation is a reasonable and proportionate measure for the achievement of that objective.*

Proposed section 320.3 is compatible with the right to be presumed innocent.

For a person to be found guilty of an offence of importing a substance represented to be a serious drug alternative under proposed section 320.3, the prosecution bears the onus of proving beyond reasonable doubt that the person has intentionally imported a substance, that the presentation of the substance included an express or implied representation that the substance was a serious drug alternative, and that the defendant knew or was reckless as to whether the presentation of the substance contained or made such a representation.

Proposed subsection 320.3(3) sets out a range of substances which are not caught by the offence. It is only if the defendant wishes to rely on one of these exceptions to avoid liability under the offence that he or she is subject to a 'reverse burden'. In these circumstances, the burden operates to require the defendant to adduce or point to evidence to suggest a reasonable possibility that the substance is captured by one of the listed exceptions.

As set out above, it is reasonable and proportionate to require an importer who wishes to claim a legitimate use exemption to point to evidence which substantiates his or her claim that the goods are captured by that exemption. Without this burden, it would be possible for a defendant to assert that a substance represented to be a serious drug alternative was a legitimate import, captured by one of the many existing legislative schemes that control which goods come into the country, without being required to point to anything to substantiate or justify the claim. Prosecutors would be required to conclusively prove that the substance did not fall within each of enumerated exemptions before an offence could be made out. This would be a difficult, costly and inefficient exercise, ill-suited to identifying and resolving the real issues in the prosecution.

Further, and as set out above, placing the evidentiary burden on the defendant to demonstrate that a substance falls within one of the exemptions enumerated in subsection 320.3(3) is consistent with the operation of the current border environment. There are a range of regulatory schemes operating at the border to ensure that dangerous goods are not imported into Australia, at least not without appropriate permissions and safeguards, including with respect to their presentation and labelling.

The burden must also be assessed against the serious ramifications of importing a substance presented as a serious drug alternative. As set out in the Explanatory Memorandum, NPS are frequently sold or marketed with the representation that they are 'legal' alternatives to illicit drugs. This may encourage individuals, and particularly young people, to use these substances on the assumption that they have been tested and assessed as safe. This is incorrect. NPS are dangerous and unpredictable and their potential for harming individuals is well documented. There is a legitimate impetus to protect public health from goods presented as 'legal' and containing a misleading representation that they are safe.

There is a rational connection between requiring importers to show evidence that the goods are captured by one of the existing regulatory schemes, and protecting public health by ensuring that the importer is not bringing potentially harmful substances into the country. Requiring importers to demonstrate that their import falls within one of the legitimate use exemptions ultimately prevents unknown, unassessed and potentially dangerous substances from entering Australia. This is particularly important considering that importers are in a unique position of power to make substances available to the public. Consequently, it is incumbent on them to be aware of the regulatory schemes that govern the importation of their goods, and to ensure that they are not bringing in substances that may be dangerous to public health.

1.58 The committee requests the advice of the Minister for Justice on whether the measure, as currently drafted, meets the standards of the quality of law test for human rights purposes and whether article 15 of the ICCPR is engaged.

The measure, as currently drafted, meets the quality of law test for human rights purposes and does not engage article 15 of the ICCPR. The measure clearly sets out what conduct is permitted and what conduct is prohibited under the new offences.

The term ‘psychoactive substance’ is defined in section 320.1 of the measure as a substance which has the capacity to induce a psychoactive effect when consumed by a person. A psychoactive effect is also defined in section 320.1. There are two alternate limbs to this definition. The first deals with the physiological effects of a person consuming a drug, the second deals with the addictive effects of those drugs. A substance will have a psychoactive effect if it satisfies either of those limbs. I acknowledge that the term is broad. Seeking to ban these substances on the basis of effect was a deliberate move by Government to prevent criminals from evading existing controls on illicit drugs that operate by banning substances based on their chemical structure. Experience has shown that criminals have deliberately sought to evade traditional controls that target substances based on their specific chemical structure.

However, the list of exemptions to what is a ‘psychoactive substance’ is also very broad. As such, the measure operates to ban only very small portion of what is captured by the definition: those substances which do not otherwise have a legitimate use. The explanatory memorandum sets out in significant detail the kinds of substances which are and are not banned by the measure. Moreover, the list of exceptions contained in the legislation will provide importers with certainty, as it sets out precisely what is permitted to be imported, often through references to existing legislation which explains what can and cannot be imported. As set out above, this measure does not occur in a vacuum. It must be considered in light of the existing regulatory schemes at the border that govern the importation of goods. If a person is importing goods in a manner consistent with those schemes, they will not be affected by this measure.

The definitions in the Bill, and the details provided in the explanatory memorandum, are sufficiently certain and accessible that people will be able to understand the legal effect of their actions in advance.

Schedule 2 – Firearm Trafficking Offences

1.69 – The committee seeks the advice of the Minister for Justice as to whether the mandatory sentencing is compatible with the right to freedom from arbitrary detention and the right to a fair trial, and particularly:

- *Whether there is a rational connection between the limitation and the legitimate objective, and*
- *Whether the limitation is a reasonable and proportionate measure for the achievement of that objective*

The mandatory minimum sentence of five years’ imprisonment being introduced for offences against Divisions 360 and 361 of the Criminal Code Act 1995 (the Code) is compatible with the right to freedom from arbitrary detention. Detention is not arbitrary where it is reasonable, necessary and proportionate to the end that is sought. In this case, the end being sought is to limit the number of firearms and firearm-related articles entering the illicit market which can later be used in the commission of serious and violent crimes. There are clear and serious social and systemic harms associated with firearms trafficking, and the entry of even a small number of illegal firearms into the Australian community can have a significant impact on the size of the illicit market. Failure to enforce harsh penalties on trafficking offenders could lead to increasing numbers of illegal firearms coming into the possession of individuals and organised crime groups.

The penalties associated with the new and amended offences will act as a rational and legitimate deterrent for people seeking to illegally import and export firearms and firearm parts into and out of Australia. They will also support current efforts to prevent the diversion of firearms into overseas illicit markets, and demonstrate Australia's commitment to our international obligations regarding the illegal trade of firearms.

The provisions include safeguards against arbitrary detention, including that they do not impose minimum non-parole periods and do not apply mandatory minimum penalties to children (those under the age of 18). These factors preserve a level of judicial discretion and ensure that custodial sentences imposed by courts take into account the particular circumstances of the offence and the offender. In appropriate cases, this may mean that there is a significant difference between the non-parole period and the head sentence. The Government believes the lack of a mandatory non-parole period will allow courts the discretion to take into account factors such as cognitive impairment and the public interest when setting the period offenders spend in custody. This level of judicial discretion is an appropriate protection against arbitrary detention. The Government believes that the mandatory minimum head sentence with no minimum non-parole period strikes an appropriate balance between putting in place a strong deterrent message and preserving judicial discretion. Given the serious nature of firearms trafficking and the consequences of supplying firearms and firearm parts to the illicit market, it is appropriate to adopt this approach to ensure the Government's response to gun-related crime is as effective as possible.

The mandatory minimum sentence is also compatible with the right to a fair trial, including the right to review by a higher tribunal as set out in article 14(5) of the ICCPR. The minimum term of imprisonment will only apply if a person is convicted of an offence as a result of a fair trial in accordance with such procedures as are established by law. The penalty does not prevent appeal of a conviction or of any sentence above the mandatory minimum.

1.79 – The committee seeks the advice of the Minister for Justice as to whether the strict liability and absolute liability elements of the proposed firearm offences are compatible with the right to be presumed innocent, and particularly:

- *Whether there is a rational connection between the limitation and the legitimate objective,*
- *Whether there is a reasonable and proportionate measure for the achievement of that objective*

The strict and absolute liability elements of the proposed firearm offences are compatible with the right to be presumed innocent.

Absolute liability applies to the element of the offence that the firearm or part was a prohibited import or export unless certain requirements had been met. This means that the prosecution will not have to prove that the defendant knew or was reckless as to whether the firearm or part was a prohibited import or export. Strict liability applies to the element of the offence that the person had not met all of the import or export requirements. This means that the prosecution will not have to prove that the defendant knew or was reckless as to whether they had met all of the import or export requirements. The absolute liability provision has been carefully drafted to ensure that a firearms trafficker could not rely on the defence of honest or reasonable mistake of fact, while the strict liability provision does make this defence available to the defendant.

In the case of absolute liability, there is a rational connection between the limitation of the right to be presumed innocent and the legitimate objective of prosecuting firearms traffickers. If absolute liability were not imposed, a defendant could attempt to avoid criminal liability for the offence by claiming they were unaware that there were import and export requirements which had to be met.

It is incumbent on those who are engaged in the import and export of articles into and out of Australia to make enquiries as to how to legitimately go about that process. This is the case for all manner of items, be they food, medical supplies or parts for manufacturing. The expectation that importers and exporters will seek information on the requirements they need to meet is a legitimate one, and is not unique to firearms and other prohibited goods. Additionally and with respect to firearms, given their highly controlled nature and history of regulation in Australia it is reasonable to expect that members of the community, particularly those involved in the movement of firearms, know that there are controls on importing and exporting firearms and firearm parts, or at least know enough to make enquiries.

In the case of the strict liability provisions, the connection between the limitation of the right and the objective is similar however differs slightly. Again, it is a legitimate expectation that those engaging in the movement of firearms and firearm parts into and out of Australia would be aware that regulations exist to control that trade. Given then that the defendant would be aware whether or not they had met the requirements for import or export, requiring the prosecution to prove beyond reasonable doubt that a person knew approval had not been obtained, or was reckless as to whether or not the requirements had been met, would be overly onerous. The limitation of the right to be presumed innocent is legitimate in that without it, the objective to deter people from firearms trafficking could be undermined if suspects could avoid conviction by arguing that they were unaware of import or export requirements. The limitation is also proportionate, as the defence of mistake of fact is available for the elements to which strict liability applies. Appropriately, this defence could be used if a person mistakenly believed that he or she had met the requirements for import or export of a firearm or firearm part.

Furthermore, and in both cases, the effectiveness of the new offences would be weakened if the prosecution were required to prove the elements to which strict and absolute liability have been applied, as it would be very difficult to obtain evidence showing the defendant's state of mind. To undermine the effectiveness of the offence would be to undermine the deterrent effect it seeks to achieve. In 2012, firearms were identified as being the type of weapon used in 25% of homicides in Australia. The entry of even a small number of illegal firearms into the Australian community can contribute to the risk of these and other gun-related crimes becoming more prevalent. Therefore, any limitation on the right to be presumed innocent by the application of strict and absolute liability is justified through the legitimate objective to reduce the number of illicit firearms and firearm parts imported and exported into and out of Australia.

Schedule 3 – International Transfer of Prisoners

1.87 The committee seeks the advice of the Minister for Justice as to whether the removal of the requirement for the Attorney-General to make a decision in 'unviable' applications is compatible with the right to a fair hearing, and particularly:

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

The objective of the proposed amendment in relation to unviable applications is to address undue delay by facilitating more efficient processing of applications to provide a prisoner with a speedier response to their application. The current requirement that the Attorney-General make a decision on ‘unviable’ applications extends the delay in notifying the prisoner (or prisoner’s representative) of the outcome of their application, and in progressing applications from other prisoners that are viable.

‘Unviable’ applications are applications that cannot proceed because one or more of the requirements set out in section 10 of the International Transfer of Prisoners Act 1997 cannot be met. The requirements are:

- all relevant parties consent to the transfer
- the prisoner is not subject to an extradition request
- the prisoner is an Australian citizen (in the case of an application for transfer to Australia) or a national of the country to which he or she wishes to be transferred (in the case of an application for transfer from Australia)
- the time left to serve being no less than 6 months
- neither the sentence of imprisonment nor the conviction is subject to appeal, and
- the offence for which the prisoner is serving their sentence constitutes an offence in the country to which he or she wishes to transfer.

Currently, where a prisoner does not meet one or more of the requirements in section 10, the Attorney-General may still be required to determine whether or not he or she consents to the transfer. However, in these cases, the only option open to the Attorney-General is to refuse consent due to one of the requirements not being met. Removing the requirement for the Attorney-General to make a decision in relation to an unviable application does not impact on a person’s rights under the Act because there is no alternative decision that could be made, as such applications for transfer already cannot proceed.

The Committee sought further information as to how an assessment will be made as to whether a case would fall within proposed subsection 10A. The central authority for the international transfer of prisoners in the Attorney-General’s Department is responsible for determining whether all of the requirements outlined above are met for each application. These are questions of fact – i.e. is the prisoner an Australian citizen, has the other country consented, is there an extradition request in relation to the person, etc. When one or more requirement is not met, the central authority will close the application as the application cannot proceed, and write to the prisoner notifying them of the closure. There is no scope to exercise discretion at this stage of the process as the outcome is dictated by the answer to the factual requirements outlined above. It does not involve a consideration of whether transfer is appropriate in the circumstances, which is a matter for the Attorney-General to consider in determining whether or not to consent.

Once an unviable application has been closed, the prisoner will be promptly notified and provided with the reasons for the closure. This will enable the prisoner to respond, if desired. While merits review is not available in relation to the closure of unviable applications, any decision taken under the Act is reviewable, including any decisions on the requirements set out above.

In summary, the proposed change is aimed at achieving a legitimate objective of facilitating a speedier resolution of applications that cannot proceed. This may be more beneficial to prisoners with unviable applications, as the proposed amendment would enable a prisoner to be informed of the outcome of their application in a more timely fashion. The potential limitation is very small as the measure would not alter the outcome of the applications. The measure is reasonable and proportionate for the purpose of achieving the objective outlined above.

1.91 The committee seeks the advice of the Minister for Justice as to whether the proposed limitation of administrative reviews is compatible with the right to a fair hearing, and particularly:

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

Currently, if the Attorney-General would not consent to a transfer based on the transfer terms proposed by a transfer country, subsection 20(3) of the Act allows the Attorney-General to propose a variation to the terms if he or she would consent to transfer on a variation of the proposed terms.

In the time in which the ITP Scheme has been in place, it has become clear that many transfer countries are unable to accommodate a variation to terms. Many transfer countries have advised that their proposed terms of sentence enforcement are governed by domestic legislation and are not discretionary. This amendment would ensure that in these cases, the Attorney-General is not obliged to exercise his or her discretion to seek a variation of terms given doing so would prolong the period in which an application is open with no change in the outcome. The proposed amendment would assist in providing certainty to the prisoner and a speedier conclusion to their application in cases where it is clear that the transfer country would not agree to a variation to the terms (based on that country's domestic legislation and processes).

This amendment does not diminish the existing rights of a prisoner under the Act to seek review. In the event that the Attorney-General denies consent to the transfer and exercises his or her discretion to not seek a variation of the terms, it remains open to the prisoner to seek a review of this decision.

1.96 The committee seeks the advice of the Minister for Justice as to whether the proposed limit on reapplications is compatible with the right to a fair hearing, and particularly:

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

The purpose of this amendment is to address situations where, as is often the case, reapplications are received despite no changes in circumstances or new information being available to give weight to the need for reconsideration, and within months of prisoners being informed that their earlier application had been refused. Currently, these reapplications must be reconsidered in full. The processing of these reapplications diverts resources that could otherwise be directed towards progressing viable and new applications.

While this amendment engages the right to a fair hearing, the amendment is aimed at achieving the legitimate objective of not requiring the Attorney-General to consider, and the Department to use resources processing, repeat applications where it is clear that the outcome would remain the same because there have been no significant changes in the circumstances of that prisoner's case.

The proposed amendment is reasonable and proportionate to achieving the stated objective because by not limiting reapplications, the processing of all other applications is subject to a slower processing due to the need to continue progressing repeat applications. By reducing the number of reapplications that are considered, the proposed section aims to increase processing efficiency and render a benefit to more applicants overall.

The approach is proportionate to this objective because the language of the proposed subsection 10A(2) is permissive, thus allowing the Attorney-General to consider reapplications within the one year limit where, for example, there has been a change of circumstances.

To assist prisoners and to facilitate consideration of reapplications where new circumstances or information does become available within the one year limit, application forms for the transfer of prisoners will be amended to enable prisoners to provide information outlining why an application should be considered within the one year timeframe. This will provide a basis for the prisoner to demonstrate a change in circumstances that would justify the reconsideration of their application.

It will still remain open to all prisoners to reapply after 12 months has passed if they would like their application to be reconsidered for any reason.

Schedule 5 – Validating airport investigations

1.114 The committee seeks the advice of the Minister for Justice as to whether the retrospective validation of conduct by AFP and special members is compatible with the right to security of the person and freedom from arbitrary detention, and particularly:

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

The Committee has asked for further advice on whether the retrospective validation of conduct by the Australian Federal Police (AFP) and special members is compatible with the right to security of the person and freedom from arbitrary detention under Article 9 of the International Covenant on Civil and Political Rights (ICCPR). In particular, the Committee has asked whether the proposed changes are aimed at achieving a legitimate objective, whether there is a rational connection between the limitation and that objective, and whether the limitation is a reasonable and proportionate measure for the achievement of that objective.

The main aim of Schedule 5 to the Bill is to ensure continuity in policing services at Australia's major airports, required as a result of an administrative error that led to certain investigatory powers not being available to AFP and special members in those airports for a short period of time.

The Commonwealth Places (Application of Laws) Act 1970 and the Commonwealth Places (Application of Laws) Regulations 1998 (1998 regulations) provided AFP officers with the ability to use investigatory powers under Part 1AA and Part 1D of the Commonwealth Crimes Act 1914 (relevant Crimes Act powers) to investigate state offences that occur at Commonwealth places which are designated state airports. This arrangement has been in place since 2011, following enactment of the Aviation Crimes and Policing Legislation Amendment Act 2011 which supported the ‘all-in policing and security model’, under which the AFP took responsibility for the policing and security of Australia’s eleven major airports.

On 18 March 2014, the 1998 regulations which listed the ‘designated state airports’ were inadvertently repealed due to an administrative error as part of work on a recent omnibus repeal regulation, the Spent and Redundant Instruments Repeal Regulation 2014. The repeal of the 1998 regulations took effect on 19 March 2014 at which time the Crimes Act powers were no longer available to the AFP. Although alternative powers were available during the relevant time, including applied state police powers arising under section 9 of the *Australian Federal Police Act 1979*, the AFP was unaware of the need to confine itself to these powers for a portion of the repeal period. Upon realising the mistake, action was taken to re-instate this access through the making of the Commonwealth Places (Application of Laws) Regulation 2014 which came into force on 17 May 2014 and restored the prior definition of designated state airport.

Schedule 5 of the Bill is necessary to correct the anomaly that arose between 19 March 2014 and 16 May 2014, when the Crimes Act powers were inadvertently not available. These powers were available to the AFP for an extended period of time (approximately three years) prior to 19 March 2014, were intended to operate between 19 March 2014 and 16 May 2014 and have again been in force since 17 May 2014.

Retrospective validation of conduct to cover this limited time period is a reasonable and proportionate measure to ensure consistent application of appropriate security and policing at Commonwealth airports. The relevant Crimes Act powers would not be unknown to individuals or the Australian public. The measure would avoid the potential for inequitable outcomes within the criminal justice system, based on whether action taken by the AFP in a relevant airport occurred within the eight week period when the investigative powers used by the AFP were not in force.

1.121 The committee seeks the advice of the Minister for Justice as to whether the retrospective validation of conduct by AFP and special members is compatible with the prohibition against retrospective criminal laws.

The Committee has asked for further advice concerning the retrospective validation of AFP and special members conduct and whether it is compatible with the prohibition against retrospective criminal laws in accordance with Article 15 of the ICCPR.

Schedule 5 of the Bill does not alter the content or operation of any State offences in respect of which a person may have been arrested, charged and subsequently prosecuted. As outlined in the Explanatory Memorandum, it will not interfere with the penalties which may be available to, and set by, a court. The provisions are necessary to address the anomaly that arises between 19 March 2014 and 16 May 2014, when relevant Crimes Act investigative powers were inadvertently not available. Notwithstanding alternative powers were available during the relevant time, (including applied state police powers arising under section 9 of the *Australian Federal Police Act 1979*), the AFP was unaware of the need to confine itself to these powers for a portion of the repeal period.

1.131 The committee therefore seeks the advice of the Minister for Justice as to whether the retrospective validation of conduct by AFP and special members is compatible with the right to life and the prohibition on torture, cruel, inhuman and degrading treatment or punishment.

The Committee has also asked for further advice on whether the retrospective validation of conduct by AFP and special members is compatible with the right to life and prohibition on torture and cruel, inhuman or degrading treatment or punishment in accordance with Articles 6 and 7 of the ICCPR.

As outlined, retrospective validation under the Bill is necessary to address the anomaly that arises between 19 March 2014 and 16 May 2014, when relevant Crimes Act powers were inadvertently not available. Alternative powers were available during the relevant time, including applied state police powers arising under section 9 of the *Australian Federal Police Act 1979*.

In addition to protections on the use of force outlined in the Explanatory Memorandum, the AFP has robust administrative procedures in place to ensure this right is protected. Commissioner's Order 3, is a direction issued by the AFP Commissioner concerning the use of reasonable force. Commissioner's Order 3 must be complied with by all AFP members in all operations and activities, in addition to any legislative restrictions on the exercise of police powers. Failure to comply with Commissioner's Order 3 may constitute a breach of AFP professional standards and, depending on the seriousness of the breach, can result in loss of employment and/or criminal charges. These safeguards operate independently of the *Commonwealth Places (Application of Laws) Act 1970* and its regulations, and ensure that, in addition to relevant legislative protections, there are operational processes utilised by the AFP to prevent inappropriate use of force.

1.136 The committee therefore seeks the advice of the Minister for Justice as to whether the retrospective validation of conduct by AFP and special members is compatible with the right to an effective remedy.

The Committee has asked for advice concerning whether the retrospective validation of conduct by the AFP and special members is compatible with the right to an effective remedy under Article 2 of the ICCPR. The Committee has also asked for advice as to whether retrospective validation is compatible with Article 14 of the ICCPR which provides the right to a fair trial and fair hearing rights.

While Schedule 5, item 2 of the Bill may technically limit these rights in some limited circumstances, alternative powers were available during the relevant time, including applied state police powers arising under section 9 of the *Australian Federal Police Act 1979*.

To the extent that the Bill limits these rights, those limitations are reasonable, necessary and proportionate for the achievement of a legitimate objective. As outlined above, retrospective validation of conduct to cover this limited time period is a reasonable and proportionate measure to ensure consistent application of appropriate security and policing at Commonwealth airports. The relevant Crimes Act powers would not be unknown to individuals or the Australian public. The measure would avoid the potential for inequitable outcomes, based on whether action taken by the AFP in a relevant airport occurred within the eight week period when the investigative powers used by the AFP were not in force.

The Bill does not alter existing criminal processes which apply in relation to a person charged with an offence, nor does it alter civil claim processes. Schedule 5, Item 2 is specified to apply to a thing done to the extent that the doing of the thing would, apart from the item, be invalid or ineffective because the Commonwealth place was not a designated State airport. This does not remove a person's ability to question whether *Crimes Act 1914* powers were used correctly in their circumstances in the course of any future prosecution or claim.

Accordingly, Schedule 5 of the Bill is compatible with human rights because to the extent that it may limit human rights, those limitations are reasonable, necessary and proportionate.

I trust this information will assist the Committee in its inquiries.

Yours sincerely

Michael Keenan

Appendix 2

**Practice Note 1 and
Practice Note 2 (interim)**

PARLIAMENTARY JOINT COMMITTEE ON HUMAN RIGHTS

PRACTICE NOTE 1

Introduction

This practice note:

- (i) sets out the underlying principles that the committee applies to the task of scrutinising bills and legislative instruments for human rights compatibility in accordance with the *Human Rights (Parliamentary Scrutiny) Act 2011*; and
- (ii) gives guidance on the committee's expectations with regard to information that should be provided in statements of compatibility.

The committee's approach to human rights scrutiny

- 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.
- Consistent with the approaches adopted by other human rights committees in other jurisdictions, the committee will test legislation for its potential to be incompatible with human rights, rather than considering whether particular legislative provisions could be open to a human rights compatible interpretation. In other words, the starting point for the committee is whether the legislation could be applied in ways which would breach human rights and not whether

a consistent meaning may be found through the application of statutory interpretation principles.

- The committee considers that the inclusion of adequate human rights safeguards in the legislation will often be essential to the development of human rights compatible legislation and practice. The inclusion of safeguards is to ensure a proper guarantee of human rights in practice. The committee observes that human rights case-law has also established that the existence of adequate safeguards will often go directly to the issue of whether the legislation in question is compatible. Safeguards are therefore neither ancillary to compatibility and nor are they merely 'best practice' add-ons.
- 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 defined in the *Human Rights (Parliamentary Scrutiny) Act 2011*.
- The committee notes that previously settled drafting conventions and guides are not determinative of human rights compatibility and may now need to be re-assessed for the purposes of developing human rights compatible legislation and practice.

The committee's expectations for statements of compatibility

- The committee views statements of compatibility as essential to the consideration

of human rights in the legislative process. It is also the starting point of the committee's consideration of a bill or legislative instrument.

- The committee expects statements to read as stand-alone documents. The committee relies on the statement to provide sufficient information about the purpose and effect of the proposed legislation, the operation of its individual provisions and how these may impact on human rights. While there is no prescribed form for statements under the *Human Rights (Parliamentary Scrutiny) Act 2011*, the committee has found the templates¹ provided by the Attorney-General's Department to be useful models to follow.
- The committee expects statements to contain an assessment of whether the proposed legislation is compatible with human rights. The committee expects statements to set out the necessary information in a way that allows it to undertake its scrutiny tasks efficiently. Without this information, it is often difficult to identify provisions which

may raise human rights concerns in the time available.

- In line with the steps set out in the assessment tool flowchart² (and related guidance) developed by the Attorney-General's Department, the committee would prefer for statements to provide information that addresses the following three criteria where a bill or legislative instrument limits human rights:
 1. whether and how the limitation is aimed at achieving a legitimate objective;
 2. whether and how there is a rational connection between the limitation and the objective; and
 3. whether and how the limitation is proportionate to that objective.
- If no rights are engaged, the committee expects that reasons should be given, where possible, to support that conclusion. This is particularly important where such a conclusion may not be self-evident from the description of the objective provided in the statement of compatibility.

SEPTEMBER 2012

1 <http://www.ag.gov.au/Humanrightsandantidiscrimination/Pages/Statements-of-Compatibility-templates.aspx>

2 <http://www.ag.gov.au/Humanrightsandantidiscrimination/Pages/Tool-for-assessing-human-rights-compatibility.aspx>

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PARLIAMENTARY JOINT COMMITTEE ON HUMAN RIGHTS

PRACTICE NOTE 2 (INTERIM)

CIVIL PENALTIES

Introduction

1.1 This interim practice note:

- sets out the human rights compatibility issues to which the committee considers the use of civil penalty provisions gives rise; and
- provides guidance on the committee's expectations regarding the type of information that should be provided in statements of compatibility.

1.2 The committee acknowledges that civil penalty provisions raise complex human rights issues and that the implications for existing practice are potentially significant. The committee has therefore decided to provide its initial views on these matters in the form of an interim practice note and looks forward to working constructively with Ministers and departments to further refine its guidance on these issues.

Civil penalty provisions

1.3 The committee notes that 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.¹ These penalties are pecuniary, and do not include the possibility of imprisonment. They are stated to be 'civil' in nature and do not constitute criminal offences under Australian law. Therefore, applications for a civil penalty order are dealt with in accordance with the rules and procedures that apply in relation to civil matters.

1.4 These provisions 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. The committee appreciates that these schemes are intended to provide regulators with the flexibility to use sanctions that are appropriate to and likely to be most effective in the circumstances of individual cases.

Human rights implications

1.5 Civil penalty provisions may engage the criminal process rights under articles 14 and 15 of the International Covenant on Civil and Political Rights (ICCPR).² These articles set out specific guarantees that apply to proceedings involving the determination of 'criminal charges' and to persons who have been convicted of a 'criminal offence', and provide protection against the imposition of retrospective criminal liability.³

1.6 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 if it is considered to be 'civil' under Australian domestic law. Accordingly, when a provision imposes a civil penalty, an assessment is required of whether it amounts to a 'criminal' penalty for the purposes of the ICCPR.⁴

The definition of 'criminal' in human rights law

1.7 There are three criteria for assessing whether a penalty is 'criminal' for the purposes of human rights law:

- a) *The classification of the penalty in domestic law*: If a penalty is labelled as 'criminal' in domestic law, this classification is considered

determinative for the purposes of human rights law, irrespective of its nature or severity. However, if a penalty is classified as ‘non-criminal’ in domestic law, this is never determinative and requires its nature and severity to be also assessed.

- b) *The nature of the penalty*: A criminal penalty is deterrent or punitive in nature. Non-criminal sanctions are generally aimed at objectives that are protective, preventive, compensatory, reparatory, disciplinary or regulatory in nature.
- c) *The severity of the penalty*: The severity of the penalty involves looking at the maximum penalty provided for by the relevant legislation. The actual penalty imposed may also be relevant but does not detract from the importance of what was initially at stake. Deprivation of liberty is a typical criminal penalty; however, fines and pecuniary penalties may also be deemed ‘criminal’ if they involve sufficiently significant amounts but the decisive element is likely to be their purpose, ie, criterion (b), rather than the amount per se.

1.8 Where a penalty is designated as ‘civil’ under domestic law, it may nonetheless be classified as ‘criminal’ under human rights law if either the nature of the penalty or the severity of the penalty is such as to make it criminal. In cases where neither the nature of the civil penalty nor its severity are separately such as to make the penalty ‘criminal’, their cumulative effect may be sufficient to allow classification of the penalty as ‘criminal’.

When is a civil penalty provision ‘criminal’?

1.9 Many civil penalty provisions have common features. However, as each provision or set of provisions is embedded in a different

statutory scheme, an individual assessment of each provision in its own legislative context is necessary.

1.10 In light of the criteria described in paragraph 1.9 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*

1.11 As noted in paragraph 1.9(a) above, the classification of a civil penalty as ‘civil’ under Australian domestic law will be of minimal importance in deciding whether it is criminal for the purposes of human rights law. Accordingly, the committee will in general place little weight on the fact that a penalty is described as civil, is made explicitly subject to the rules of evidence and procedure applicable to civil matters, and has none of the consequences such as conviction that are associated with conviction for a criminal offence under Australian law.

b) *The nature of the penalty*

1.12 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 punitive or deterrent in nature, irrespective of its severity;
- the proceedings are instituted by a public authority with statutory powers of enforcement;⁵
- a finding of culpability precedes the imposition of a penalty; and
- the penalty applies to the public in general instead of being directed at regulating members of a specific group (the latter being more likely to be viewed as ‘disciplinary’ rather than as ‘criminal’).

c) The severity of the penalty

1.13 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;
- the nature of the industry or sector being regulated and relative size of the pecuniary penalties and the fines that may be imposed;
- whether the maximum amount of the pecuniary penalty that may be imposed under the civil penalty provision is higher than 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.

The consequences of a conclusion that a civil penalty is ‘criminal’

1.14 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 decriminalization. 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 article 14 and article 15 of the ICCPR.

1.15 If a civil penalty is characterised as not being ‘criminal’, the 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 committee’s expectations for statements of compatibility

1.16 As set out in its *Practice Note 1*, the committee views sufficiently detailed

statements of compatibility as essential for the effective consideration of the human rights compatibility of bills and legislative instruments. The committee expects statements for proposed legislation which includes civil penalty provisions, or which draws on existing legislative civil penalty regimes, to address the issues set out in this interim practice note.

1.17 In particular, 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 article 14 and article 15 of the ICCPR, including providing justifications for any limitations of these rights.⁶

1.18 The key criminal process rights that have arisen in the committee’s scrutiny of civil penalty provisions are set out briefly below. The committee, however, notes that the 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.

Right to be presumed innocent

1.19 Article 14(2) of the ICCPR provides that a person is entitled to be presumed innocent until proved 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.**

Right not to incriminate oneself

1.20 Article 14(3)(g) of the ICCPR provides that a person has the right ‘not to be compelled to testify against himself or to confess guilt’ in criminal proceedings. **Civil penalty provisions that are considered ‘criminal’ and which compel a person to provide incriminating information that may be used against them in the civil penalty proceedings should be appropriately justified in the statement of compatibility.⁷ If use and/or derivative use immunities are not made available, the statement of compatibility should explain why they have not been included.**

Right not to be tried or punished twice for the same offence

1.21 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.**

- 1 This approach is reflected in the Regulatory Powers (Standard Provisions) Bill 2012, which is intended to provide a standard set of regulatory powers which may be drawn on by other statutes.
- 2 The text of these articles is reproduced at the end of this interim practice note. See also UN Human Rights Committee, General Comment No 32 (2007) on article 14 of the ICCPR.
- 3 Article 14(1) of the ICCPR also guarantees the right to a fair hearing in civil proceedings.
- 4 This practice note is focused on civil penalty provisions that impose a pecuniary penalty only. But the question of whether a sanction or penalty amounts to a ‘criminal’ penalty is a more general one and other ‘civil’ sanctions imposed under legislation may raise this issue as well.
- 5 In most, if not all, cases, proceedings in relation to the civil penalty provisions under discussion will be brought by public authorities.
- 6 That is, any limitations of rights must be for a legitimate objective and be reasonable, necessary and proportionate to that objective – for further information see *Practice Note 1*.
- 7 The committee notes that a separate question also arises as to whether testimony obtained under compulsion that has already been used in civil penalty proceedings (whether or not considered ‘criminal’) is consistent with right not to incriminate oneself in article 14(3)(g) of the ICCPR if it is used in subsequent criminal proceedings.

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Articles 14 and 15 of the International Covenant on Civil and Political Rights

1. Article 14

1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may

be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal

case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.

2. Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.

3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:

- a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;
- b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;
- c) To be tried without undue delay;
- d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;
- e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
- f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court;
- g) Not to be compelled to testify against himself or to confess guilt.

4. In the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation.

5. Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.

6. When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.

7. No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.

Article 15

1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby.

2. Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.